

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-227

TITLE DESPINA SMALIS AND ERNEST SMALIS, Petitioners V.
PENNSYLVANIA

PLACE Washington, D. C.

DATE April 2, 1986

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IN THE SUPREME COURT OF THE UNITED STATES

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DESPINA SMALIS AND ERNEST :
SMALIS, :
Petitioners, :
v. : No. 85-227
PENNSYLVANIA :
- - - - -x

Washington, D.C.

Wednesday, April 2, 1986

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 10:01 o'clock p.m.

APPEARANCES:

NORMA CHASE, ESQ., Pittsburgh, Pennsylvania; on
behalf of Petitioners.

ROBERT L. EBERHARDT, ESQ., Deputy District
Attorney of Pennsylvania; on behalf of
Respondents.

ANDREW L. FREY, ESQ., Deputy Solicitor General,
Department of Justice, Washington, D.C.; for
United States, as amicus curiae in support of
Respondents.

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ROBERT L. EBERHARDT, ESQ.;	14
on behalf of Respondents.	
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1 The issue raised by a demurrer to the evidence
2 is the same as the issue raised by a Rule 29 motion in
3 federal court. If it's true, is it enough.

4 The court found that the evidence, even if
5 true, was insufficient to establish beyond a reasonable
6 doubt that either of the defendants set the fire.

7 QUESTION: When did the court hold that?

8 MS. CHASE: December of 1980.

9 QUESTION: I know, but at what stage of the
10 trial?

11 MS. CHASE: The Commonwealth had rested, and
12 the defendants demurred to the evidence.

13 QUESTION: So, this was mid-trial?

14 MS. CHASE: Yes, but the Commonwealth had
15 rested. The court, however, denied demurrer with
16 respect to involuntary manslaughter and various lesser
17 charges involving a reckless state of mind.

18 The District Attorney's office appealed the
19 order sustaining the demurrer and asked that trial of
20 the remaining charges be stayed depending the outcome of
21 the appeal. The District Attorney's office also asked
22 for reconsideration of the order sustaining the
23 demurrer, and the Commonwealth presently finds it
24 significant, as they indicate at footnote 11 at page 46
25 of their brief, that the defendants at that juncture

1 joined in the Commonwealth's request that the ruling in
2 favor of the defendants be reconsidered.

3 We put our reasons on the record at the time.
4 Defendants wanted so desperately to complete the trial
5 on the involuntary manslaughter and the remaining
6 charges that they were willing to suffer the
7 reinstatement of the murder charges with all the risks
8 that that entailed, so that they could complete the
9 trial rather than have the trial interrupted for an
10 appeal.

11 QUESTION: Ms. Chase, in Pennsylvania do you
12 have to demur to the evidence at the close of the
13 prosecution's case in order to later make a motion for
14 judgment n.o.b. if the jury convicts you?

15 MS. CHASE: My understanding is, you don't.

16 QUESTION: Because I was wondering, if the
17 defendants were so anxious to have the trial completed,
18 they could have foregone the demurrer to the evidence.

19 MS. CHASE: That's true. They had lived in
20 that courtroom for six weeks. They didn't want to be in
21 there another six weeks putting in their defense, and
22 they wanted to know, what charges did we already win on.

23 It was just, basically, a matter of economy at
24 that point.

25 QUESTION: But, you demurred across the board?

1 MS. CHASE: Yes, we were interested in weeding
2 out anything that the --

3 QUESTION: You were also interested in having
4 a ruling on all of them, and you would like --

5 MS. CHASE: Naturally. We wanted to know
6 where we stood with the court on all the charges, so
7 that we should know what charges we should direct our
8 defense to.

9 On reconsideration the court reaffirmed its
10 original order. The remaining charges were stayed over
11 our objection pending the outcome of the appeal.

12 Two and a half years later the Superior Court
13 quashed the appeal on double jeopardy grounds and
14 invalidated the Pennsylvania rule. They reconfirmed
15 that decision on re-argument about a year later. About
16 a year ago the Supreme Court of Pennsylvania reversed
17 and remanded to the Superior Court for consideration of
18 the merits of the Commonwealth appeal, and it was at
19 that juncture that we asked for certiorari.

20 The Commonwealth's position, as I understand
21 it, is that since the trial judge made no decision with
22 respect to credibility in ruling on the sufficiency of
23 the evidence, his decision does not go to the factual
24 elements of the crime. It's unrelated to factual guilt
25 or innocence.

1 Essentially, the Commonwealth looks at Scott,
2 sees the words "factual guilt," and thinks that this
3 Court is saying that there is another, unrelated kind of
4 guilt. I can find no language in either Martin Linen or
5 Scott that suggests that kind of distinction or that in
6 any way suggests there has to be a credibility
7 determination before there can be an acquittal, and I
8 think Burks is clearly to the contrary.

9 QUESTION: What do they mean, a credibility
10 determination?

11 MS. CHASE: What they're saying is, since the
12 judge did not determine whether the evidence presented
13 on behalf of the Commonwealth was true, but assumed it
14 to be true for purposes of deciding on the demurrer, his
15 ruling was not an acquittal. It did not go to the
16 merits of the case.

17 QUESTION: You mean, even accepting all of it
18 as true, a ruling that it wasn't enough was not an
19 acquittal?

20 MS. CHASE: That's the Commonwealth's
21 position. I would submit also that this case presents a
22 stronger case against allowing review than Martin Linen
23 because in Martin Linen the defendant had been looking
24 at retrial before the insufficiency decision was made,
25 because the jury had been discharged without reaching a

1 verdict.

2 Martin Linen, I believe, also discloses a
3 manifest necessity argument. There was clearly no
4 mistrial here.

5 I believe that the Commonwealth's argument
6 that the defendants waived their double jeopardy rights
7 by challenging the sufficiency of the evidence when they
8 did is adequately answered by Sanabria. I would add
9 that this case presents none of the quirks of the
10 Sanabria case. There are no evidentiary rulings at
11 issue here.

12 This was basically a circumstantial case that
13 the trial court found did not measure up to the standard
14 of proof beyond a reasonable doubt.

15 QUESTION: Ms. Chase, you say that you think
16 Burks supports, in your position, that it is not
17 necessary for the trial judge to admit a credibility
18 determination in order for double jeopardy to apply, but
19 didn't Burks amount to a conclusion that there was just
20 not sufficient evidence to support a judgment of guilty?

21 MS. CHASE: Yes. The Burks decision, as I
22 understand it, did not turn on any credibility
23 determination. There was a conclusion in Burks that no
24 matter what evidence the court might believe, it still
25 is not enough. No decision had been made in the Burks

1 case as to credibility of witnesses, but the decision
2 was still an acquittal.

3 I note that there has been some disagreement
4 within this Court as to whether every refinement of
5 double jeopardy law as developed in federal cases
6 applies lock, stock and barrel to the states. I would
7 hope that however that debate ultimately turns out, the
8 states will not be held to be free to avoid the finality
9 of acquittals by calling acquittals something else when
10 they're entered at the close of the Commonwealth's case,
11 a stage well after when the defendant has been placed in
12 jeopardy.

13 I would hope also that the states are not
14 going to be free to hold that a defendant waives his
15 Double Jeopardy rights by asking to be acquitted. The
16 rights involved here may not be quite as fundamental as
17 the right not to be retried after a classic, traditional
18 jury verdict of not guilty, but I would submit that they
19 are certainly not peripheral or incidental to the
20 purposes of the double jeopardy clause.

21 As I indicated this morning --

22 QUESTION: Well, suppose the trial is all over
23 and there had been a conviction, but then there was a
24 motion for n.o.b., or whatever the equivalent is, and the
25 trial judge had then sustained it and said there wasn't

1 enough evidence, "I don't care what the jury held, there
2 just wasn't enough evidence."

3 And, then there's an appeal --

4 MS. CHASE: In that case the verdict --

5 QUESTION: -- and the judge --

6 MS. CHASE: -- may be reinstated without
7 placing the defendant back into jeopardy.

8 QUESTION: That is really the point of this
9 case, that it was a trial and there had to be further
10 proceedings?

11 MS. CHASE: Correct, that's correct. In
12 Wilson, what the defendant gets from the appellate court
13 is, go directly to jail, do not pass go.

14 These defendants would at least have to go
15 back for resumption of the non-jury trial. But here we
16 have a situation, since this trial is non-jury, the
17 judge in holding essentially that a reasonable doubt
18 existed as a matter of law, was necessarily saying that
19 there was such a doubt in his own mind.

20 At least, I've never heard a trial judge say,
21 any reasonable person would have a doubt but this court
22 has none.

23 QUESTION: Well, one might wonder how much in
24 the practical world this sort of situation is going to
25 arise, because it's hard to believe that the state is

1 going to profit much by appealing from the sort of
2 judgment you describe and get it reversed, only to come
3 back and find the judge is the fact finder and he will
4 surely feel, as a fact finder he will feel just as he
5 did about the sufficiency of the evidence.

6 And, in the jury case, the thing just isn't
7 going to arise. You don't disband the jury and bring it
8 back two years later.

9 MS. CHASE: I would certainly hope not. I
10 think the impact on different trial judges are going to
11 be different, but there are situations in which allowing
12 the prosecutor to walk back into court years later with
13 an appellate opinion telling the judge how wrong he was
14 in entertaining that doubt at the close of the
15 prosecution's case, is going to put some pressure on the
16 judge to convict.

17 He can still acquit, but he has to find some
18 other basis, and he's put in the position of having to
19 justify an acquittal at that point.

20 QUESTION: Could the judge at that point
21 acquit on the other charges under Pennsylvania law?

22 MS. CHASE: The other charges?

23 QUESTION: Could he have added to what he
24 said, "And I thereby acquit on these other charges"?

25 MS. CHASE: If he had done that, under

1 Pennsylvania law --

2 QUESTION: But can he? Can he do that under
3 Pennsylvania law?

4 MS. CHASE: It's not proper, although it has
5 been done. There have been cases where the judge has
6 said, "I sustain demurrer and I find the defendant not
7 guilty."

8 QUESTION: Right.

9 MS. CHASE: Appellate courts have said, the
10 judge's decision was improper, but it bars review. If
11 he uses the magic words "acquit" or "not guilty," the
12 decision will not be reviewable.

13 I would point out also that if this trial is
14 resumed as the Commonwealth suggests, although the
15 prosecutor doesn't get to re-do his case in chief, he
16 doesn't become a bystander merely because he's rested.

17 Pennsylvania law gives a party who has rested
18 the right to re-open his case if additional evidence has
19 come to light.

20 QUESTION: At least, rebuttal.

21 MS. CHASE: Yes. He also has the right to put
22 in evidence in rebuttal, and he also has the right to
23 cross examine and impeach defense witnesses, perhaps
24 with the aid of whatever he has learned in the 12-year
25 recess.

1 And, I would submit that it is just not
2 realistic to say that the risks of multiple prosecution
3 are not presented by the resumption of a non-jury
4 trial. It is a second crack, and it is offensive to the
5 letter and the spirit of the Double Jeopardy Clause.

6 Thank you.

7 QUESTION: May I ask, before you -- I'm not
8 clear. What happens if the same judge is not available
9 when you come back after a couple of years?

10 MS. CHASE: That's never really been decided.
11 Some of the older cases, when they sustained a demurrer
12 in a non-jury trial, said, reversed with a proclando,
13 merely said reversed with a proclando. More recently
14 the practice has been simply to remand for a new trial.

15 The Supreme Court of Pennsylvania did not
16 accept the alternative of resuming the non-jury trial,
17 apparently because they wanted to hang onto a rule that
18 let the prosecutor appeal whether the trial was jury or
19 non-jury. So, that's never really been determined.

20 I'm aware of one case in which the non-jury
21 trial was simply resumed on remand. To my knowledge
22 there have been no appellate decisions concerning that
23 procedure.

24 QUESTION: Well, maybe I'm not remembering the
25 facts. If it were a jury trial and you had to send it

1 back and start over again, what would he do? He'd put
2 in the same evidence again, is that what he'd do?

3 MS. CHASE: It would be the same as a mistrial
4 situation procedurally, because trial would just start
5 from scratch.

6 QUESTION: But you can't be sure the witnesses
7 will testify in exactly -- the evidence won't be exactly
8 the same as it was the first time?

9 MS. CHASE: Right, there's no certainty there.

10 QUESTION: In fact, it --

11 QUESTION: Some could be dead.

12 MS. CHASE: Bay parlon?

13 QUESTION: Some could be dead.

14 MS. CHASE: That's true. I mean, obviously
15 there are some risks to the prosecutor as well as the
16 defense with multiple prosecutions.

17 Thank you.

18 CHIEF JUSTICE BURGER: Mr. Eberhardt.

19 ORAL ARGUMENT OF ROBERT L. EBERHARDT

20 ON BEHALF OF THE RESPONDENTS

21 MR. EBERHARDT: Mr. Chief Justice, and may it
22 please the Court:

23 The matter before the Court raises an
24 important question relating to the proper role of the
25 Pennsylvania trial judge in deciding whether a criminal

1 case shall proceed to verdict.

2 In the Commonwealth's view, the trial judge in
3 this case was not asked to sit in judgment, but rather
4 was requested to determine that judgment could not be
5 entered at all in this case. The motion made below by
6 the respondents was reflective of Pennsylvania's desire
7 for specificity and particularity when raising claims of
8 sufficiency of the evidence, in the context of the legal
9 standard to be applied in evaluating the evidence.

10 Clearly, a trial judge has a separate function
11 in determining whether or not there is sufficiency of
12 evidence factually to determine guilt, as opposed to
13 determining whether or not the law requires that the
14 judgment be sought in a particular case.

15 The Commonwealth is very aware of this Court's
16 discussion with regard to the talismanic nature of
17 particular words, and the Commonwealth doesn't want to
18 rely on the word "demurrer" as providing any special
19 significance in and of itself. However, the term
20 "demurrer" is reflective of Pennsylvania's desire that
21 was set forth in the case of Martin Linen Supply, that
22 the federal system did not provide, that is, a
23 restriction on the power of the trial judge to rule in
24 midtrial, requests regarding the sufficiency of the
25 evidence as a matter of law.

1 Now, the question that has arisen with regard
2 to what difference would occur before this trial judge
3 on remand, I suggest to the Court that there is a
4 different mental process that the Court would go through
5 in determining whether, specifically as a matter of law,
6 the Commonwealth prosecutor has established a case
7 within the framework of the definition of the crime as
8 opposed to whether or not the Commonwealth, the
9 prosecutor, has established sufficient evidence to
10 convince a finder of fact beyond a reasonable doubt of
11 the crime, that the crime has been committed.

12 There is a different mental process that I
13 suggest is important to reflect and to be recognized in
14 a system such as Pennsylvania's.

15 QUESTION: Under Pennsylvania law, that stage
16 is the judge sitting as the tryer alone, to decide
17 whether, had there been a jury, he would have said there
18 wasn't enough evidence to go to the jury?

19 MR. EBERHARDT: Right.

20 QUESTION: Is that the decision he makes?

21 MR. EBERHARDT: That's the particular request
22 that's made of the judge at that point in time.

23 QUESTION: Then, is the judge now in effect
24 saying to the state, "If that's all you've got you
25 haven't got anything"?

1 MR. EBERHARDT: Right. The court is saying
2 that, "With my understanding of the law and the legal
3 definition of the crime, the evidence that you have
4 presented does not support sufficiently the elements of
5 the offense established by the legislative definition."

6 So, whether we're talking about a jury trial
7 or non-jury trial with regard to the demurrer, the same
8 standard is being requested of the court. However,
9 Pennsylvania goes on in its rules to recognize that at a
10 later stage after all the evidence has been introduced
11 in the particular matter, that the trial judge is being
12 asked to decide a different question.

13 The judge is being asked in a non-jury
14 situation for the equivalent of a verdict. Now, this
15 Court has recognized that double jeopardy problems arise
16 whenever there is a not guilty verdict entered by a
17 jury. Clearly, that is the classic situation where
18 there is an application of the Double Jeopardy Clause.

19 What the Commonwealth is suggesting is that
20 the Pennsylvania procedure here is not providing, at
21 this stage in the trial, through demurrer, the
22 equivalent of a not guilty verdict by a jury.

23 QUESTION: But there was no disagreement, as I
24 understand it, between the trial judge and the Supreme
25 Court of Pennsylvania on what the elements of the crime

1 were, no legal difference except with respect to the
2 quantum of the evidence.

3 MR. EBERHARDT: Well, we never got to argue
4 the merits of the case below, Your Honor. The
5 particular appeal that was taken in Superior Court, and
6 the delays occasioned in this appellate process, were
7 raised as a result of the appealability question.

8 QUESTION: When you say you had no argument,
9 you had no argument --

10 MR. EBERHARDT: We had no opportunity beyond
11 presenting it in a written brief, what the
12 Commonwealth's argument was with regard to the --

13 QUESTION: At the close of the Government's
14 case, is you mean?

15 MR. EBERHARDT: No, on appeal to the Superior
16 Court of Pennsylvania.

17 QUESTION: What occurred? What was the next
18 step that occurred after the Government rested?

19 MR. EBERHARDT: Well, in this particular case
20 the Commonwealth rested, and demurrers were tendered by
21 defense counsel as to all the charges before the Court.
22 the Court granted certain ones and denied others.

23 QUESTION: The Commonwealth -- that was argued?

24 MR. EBERHARDT: That was argued before the
25 lower court. The Commonwealth found a Motion for

1 Reconsideration which is permitted under Pennsylvania
2 practice, that a trial court can reconsider any ruling
3 within 30 days.

4 The court entertained that Motion for
5 Reconsideration. In fact, defense counsel requested
6 that the court reconsider all its rulings with regard to
7 the remurrer.

8 Following the court's decision, the
9 Commonwealth then filed an appeal to the Superior Court
10 of Pennsylvania. Following that appeal a motion was
11 made to quash the appeal.

12 The motion was reserved for argument on the
13 merits of the appeal. Following arguments on the
14 merits, a panel of the Superior Court of Pennsylvania
15 quashed the appeal. Then the Superior Court of
16 Pennsylvania granted re-argument of that question and we
17 argued again the appealability issue before the Superior
18 Court en banc.

19 At no time has a court beyond the trial court
20 reviewed as yet the question of the sufficiency of the
21 evidence.

22 QUESTION: Your suggestion, Mr. Eberhardt, is
23 that when you're talking about a motion like this, the
24 trial court may have a misunderstanding as to what
25 elements are necessary for the crime, so that it's quite

1 different from a credibility determination?

2 MR. EBERHARDT: It's quite different from a
3 credibility determination. What we're suggesting is,
4 the court in measuring the sufficiency of the evidence
5 as a framework within which it is operating, if that
6 framework is improper or is too extensive in light of
7 the Commonwealth's proffer of evidence, then the court
8 has made an error of law that it uses to resolve the
9 question of sufficiency of the evidence.

10 The court is being asked, classically at
11 common law under a demurrer, and under Pennsylvania
12 practice, to make a legal measurement of the sufficiency
13 of the evidence against a framework. If the
14 Commonwealth cannot argue on appeal that the court used
15 the improper framework in measuring the sufficiency of
16 the evidence, then the Commonwealth would not have the
17 right to appeal in Pennsylvania because Pennsylvania
18 practice limits Commonwealth appeals to pure questions
19 of law, from final orders.

20 QUESTION: Well, counsel, I'm sure I missed
21 something, but is it true that this man is now convicted
22 and sentenced without having an opportunity of
23 defending--

24 MR. EBERHARDT: No, no. There were two
25 separate criminal episodes that were joined for trial,

1 Justice Marshall. The one, arson, resulted in what we
2 viewed as a homicide. That is the subject of this
3 proceeding.

4 A separate charge of arson was joined for
5 trial, and when the demurrers were sustained to the
6 homicide charges, the trial court proceeded in a
7 non-jury fashion to adjudicate the defendant guilty of
8 that separate arson. He has been convicted of that
9 arson and is serving a sentence right now for that
10 crime, that involving arson only.

11 QUESTION: I understood you to say that after
12 the judge ruled, that there was an immediate appeal by
13 the State. I guess I misunderstood.

14 MR. EBERHARDT: There was an appeal as to only
15 those charges that were the subject of a grant of a
16 demurrer under Pennsylvania practice.

17 QUESTION: Then the trial took place and
18 defense --

19 MR. EBERHARDT: Defense presented their
20 evidence. I don't know whether they rested or presented
21 their evidence.

22 QUESTION: The trial didn't go ahead, did it?

23 MR. EBERHARDT: The trial as to the separate
24 arson proceeded, yes.

25 QUESTION: After the appeal?

1 MR. EBERHARDT: After the appeal. There was a
2 severance in effect granted of a separate arson based on
3 a different building in a different part of Allegheny
4 County, Pennsylvania, and that case proceeded separately
5 to verdict.

6 This proceeding, which involves homicide
7 charges and causing catastrophe charges, was stayed by
8 the trial court while the appeal process continued on
9 those specific charges, those criminal informations.

10 QUESTION: What did the Pennsylvania Supreme
11 Court hold?

12 MR. EBERHARDT: The Pennsylvania Supreme
13 Court--

14 QUESTION: You did argue there?

15 MR. EBERHARDT: Yes, we did. They did not
16 decide the merits of the Commonwealth's appeal. The
17 Court remanded that matter, the judgment of the Supreme
18 Court of Pennsylvania was to remand the case to the
19 Superior Court of Pennsylvania to consider the merits of
20 the Commonwealth's appeal regarding the legal
21 sufficiency of the evidence, so we have yet to argue
22 before an appellate court and have a decision with
23 regard to the legal sufficiency of the evidence that was
24 produced in the trial court.

25 What the Supreme Court of Pennsylvania held

1 was that the Superior Court had erred in its review of
2 the demurrer, in viewing it as the same as a Motion for
3 Judgment of Acquittal, and the Supreme Court
4 particularly looked at its totality of practice and its
5 history, which was an extensive history with regard to
6 the demurrer being appealable in Pennsylvania, and it
7 viewed it as a pure question of law unlike -- and
8 compared it to the federal rule, Rule 29 -- unlike the
9 federal rule which to a certain extent may not make the
10 classic distinction that the Pennsylvania rule attempted
11 to make.

12 I might note also that the Pennsylvania rule,
13 Rule 1124(a)-1 was promulgated by the Supreme Court
14 after this Court's decision in Scott, aware of the Scott
15 decision, aware of the Martin Liner decision.

16 The Supreme Court through its rulemaking power,
17 which is very broad, entered a decision that a
18 structured rule should provide specifically for the
19 demurrer as a separate item.

20 The rest of Rule 1124 looks very much like the
21 federal rule.

22 QUESTION: Well, you say that you can only
23 appeal on "legal" grounds in Superior -- or you can only
24 appeal on those grounds. So, what was your case before
25 the Superior Court?

1 MR. EBERHARDT: Our case before the Superior
2 Court, essentially with regard to two of the crimes that
3 were before the trial court, was the court had erred in
4 deciding what degree of recklessness was contemplated to
5 be required to be shown under Pennsylvania's definition
6 of murder as a third degree --

7 QUESTION: So, that's the only thing that was
8 appealed?

9 MR. EBERHARDT: The only thing that was
10 appealed --

11 QUESTION: That's the only thing that is left,
12 and so if -- but if you lose those, under the Supreme
13 Court's ruling, the case will go back for trial?

14 MR. EBERHARDT: The case will go back for
15 trial.

16 QUESTION: Because the Supreme Court said that
17 the trial court's ruling was not a sufficient ruling on
18 the evidence?

19 MR. EBERHARDT: Was not a question of fact but
20 was a pure question of law, a determination of legal
21 sufficiency, the evidence on a stated standard.

22 QUESTION: Which is a different question, a
23 new appeal?

24 MR. EBERHARDT: The question that we appealed
25 to the Superior Court, whether the Court erred as a

1 matter of law in ruling that the sufficiency of the
2 evidence was not established based upon the elements of
3 third degree murder and causing a catastrophe.

4 QUESTION: Well, won't it be exactly that
5 question that is pending before the Superior Court of
6 Pennsylvania, if the judgment of the Supreme Court of
7 Pennsylvania is affirmed here?

8 MR. EBERHARDT: That is exactly the question
9 before the Superior Court, is the legal sufficiency of
10 the evidence.

11 QUESTION: And if the Superior Court decides
12 in the defendant's favor but affirms the Court of Common
13 Pleas, is that then the case is all over. If it
14 reverses and says the trial judge was wrong in his
15 understanding of the law, the case would go back?

16 MR. EBERHARDT: The case will go back, in the
17 Commonwealth's view, either way because the remaining
18 charges on which demurrers were denied are still before
19 the court.

20 QUESTION: It seems to me that --

21 MR. EBERHARDT: Misdemeanor charges.

22 QUESTION: One of your arguments is that the
23 issue of the -- the double jeopardy issue, just isn't
24 right for review here?

25 MR. EBERHARDT: That's been raised by both our

1 response to the certiorari petition by the Solicitor
2 General's amicus brief and --

3 QUESTION: Because if you lose in the Superior
4 Court on remand, where you have argued that the judge
5 misunderstood the legal requirements of the crimes?

6 MR. EBERHARDT: Right.

7 QUESTION: The the question would, even under
8 your view, be right, was the -- is a retrial -- can the
9 trial go back for a continuation because -- In spite of
10 the trial judge's ruling on the sufficiency of the
11 evidence?

12 MR. EBERHARDT: Correct.

13 QUESTION: Because you agree the trial judge
14 ruled on the sufficiency of the evidence?

15 MR. EBERHARDT: I agree that the trial judge
16 determined the legal sufficiency of the evidence. He did
17 not engage in --

18 QUESTION: If he understood the crime
19 correctly, then he did rule on the sufficiency of the
20 evidence?

21 MR. EBERHARDT: Yes, he did. So that, the
22 Superior Court would be presented with the question of
23 whether the court, the trial court, properly ruled on
24 the --

25 QUESTION: Well, would you say that if you

1 lose in the Superior Court, would you argue that the
2 trial may continue despite the fact that then it will be
3 clear that the trial judge, A, understood the elements
4 of the crime and, B, ruled that the evidence was
5 insufficient?

6 MR. EBERHARDT: I would argue that the matter
7 would be remanded to the trial court for continuation of
8 trial with regard to those remaining --

9 QUESTION: You would say it could go forward
10 despite the Double Jeopardy Clause?

11 MR. EBERHARDT: I would say, go forward on
12 those charges which were not disposed of by demurrers,
13 because there were two charges --

14 QUESTION: What about the charges that were
15 not disposed of by demurrer -- that were disposed of by
16 demurrer?

17 MR. EBERHARDT: The Superior Court decision
18 would be a final decision, much like Burks recognized
19 that there would be a final order.

20 QUESTION: So, the State concedes that if a
21 trial judge properly understood the elements of the
22 crime in this case, his ruling was an acquittal to the
23 extent that he sustained the demurrer?

24 MR. EBERHARDT: Correct, but it's a legal
25 question only as to --

1 QUESTION: So, the State -- the double
2 jeopardy clause would forbid the continuation of the
3 trial on those issues?

4 MR. EBERHARDT: I do not believe in this case
5 that the Court need go any further in determining whether
6 an acquittal was actually entered in the case. What we
7 are suggesting is that the determination by the Superior
8 Court on our appeal will be determinative of the legal
9 question which we had a right to appeal, and therefore
10 our right to appeal would have been vindicated in the
11 Superior Court, and if we lose in that matter, then the
12 order of the trial court achieves finality and prevents,
13 under the Double Jeopardy Clause, us from arguing that
14 the court should continue on those charges on which a
15 demurrer has been sustained.

16 QUESTION: So, what you're saying is that the
17 Supreme Court of Pennsylvania just told the Superior
18 Court that it misunderstood what the State's appeal was
19 about?

20 MR. EBERHARDT: In essence, yes, in essence.

21 QUESTION: May I ask one question. You say
22 the misdemeanor charges remain undisposed of, but that
23 the charges on the unrelated arson went forward and the
24 man was convicted.

25 Why would they go forward with some charges

1 and not others that were not covered by the demurrer
2 that was sustained? I don't understand.

3 MR. EBERHARDT: Well, I believe that the trial
4 court was desirous of allowing the Commonwealth its
5 right of appeal on those charges that he had sustained a
6 demurrer to.

7 QUESTION: Right.

8 MR. EBERHARDT: And yet, the other charges
9 which were easily severable because they were a separate
10 criminal episode --

11 QUESTION: Well, even if they -- the
12 misdemeanor charges were not covered by the demurrer
13 either, though, were they?

14 MR. EBERHARDT: No demurrer was sustained as
15 to them. All I can suggest to the Court in that regard
16 is that the trial court and the counsel below were
17 concerned with the potential creation of another Double
18 Jeopardy issue, when and if the trial court would
19 proceed on other offenses which might be viewed as
20 lesser included offenses or offenses for which there
21 might be an additional bar that might be argued.

22 QUESTION: I see, but if they are lesser
23 included offenses, then if your opponent wins on the
24 demurrer, those would as well -- at least arguably would
25 also be barred?

1 MR. EBERHARDT: Possibly. I don't believe
2 they are lesser included offenses. I think that was a
3 misunderstanding in the court below, that they may -- at
4 the time of this proceedings there was some question in
5 Pennsylvania whether involuntary manslaughter was a
6 lesser included offense of murder.

7 Subsequent decisions have established that it
8 clearly is not.

9 QUESTION: But your position, as I understand
10 it, on the charges that were covered by the demurrer, is
11 that, we don't yet know if that was an acquittal. If
12 the trial judge turns out to be right it was an
13 acquittal. If he's wrong it's not an acquittal.

14 MR. EBERHARDT: That's basically our position,
15 Your Honor.

16 QUESTION: I take it your position is that in
17 a trial -- short of a jury, for that matter, you get
18 into -- the prosecution gets into an argument with the
19 judge on what the elements of the crime are, and the
20 trial judge says, "I disagree with you, Mr. Prosecutor.
21 You have to prove A, B and C." And at the close of your
22 case or the whole case he says, "The evidence is
23 insufficient because you didn't prove C," acquittal.

24 Now, you say that the State may appeal that
25 acquittal because the judge misunderstood the law?

1 MR. EBERHARDT: Well, my position is, it's not
2 an acquittal. To the extent that Martin Linen Supply --

3 QUESTION: My example is not an acquittal.

4 MR. EBERHARDT: Well, I would make a
5 distinction, Your Honor, between the motion that's made
6 here, a demurrer, prior to -- at the conclusion of the
7 Commonwealth's presentation of its evidence, and a
8 motion that's made at the conclusion of the presentation
9 of all of the evidence.

10 Now, in a non-jury situation I suggest that it
11 may be difficult to separate at that point the
12 distinction between the Court ruling as a matter of law
13 and ruling as a matter of fact. It's not necessary for
14 the Court in this case to reach that far.

15 I think what we have here is a midtrial ruling
16 before all of the evidence has been completed.

17 Thank you, Mr. Chief Justice.

18 CHIEF JUSTICE BURGER: Mr. Frey.

19 ORAL ARGUMENT OF ANDREW L. FREY, ESQ.

20 FOR UNITED STATES, AS AMICUS CURIAE,

21 IN SUPPORT OF RESPONDENT

22 MR. FREY: Thank you, Mr. Chief Justice, and
23 may it please the Court:

24 First of all, the issue that is before the
25 Court today concerns only the ability of the courts to

1 correct legally erroneous judgments of evidentiary
2 insufficiency by the trial court. If the judgment is
3 not legally wrong, that is, if the trial court was
4 correct in finding the evidence insufficient, the
5 appellate court will affirm, there will be no further
6 trial type proceedings of the kind to which the Double
7 Jeopardy Clause could apply.

8 So, your decision on this case will affect
9 only the class of cases in which the defendant has
10 induced the trial court to make a legally erroneous
11 decision.

12 QUESTION: Well, that's not true, is it? Say,
13 the decision is right but the prosecutor doesn't think
14 it's right, therefore appeals --

15 MR. FREY: We'll take an appeal but there's
16 nothing --

17 QUESTION: -- so that the defendant at least
18 has the burden of resisting an appeal that he would not
19 otherwise have to resist?

20 MR. FREY: That is true, but I think this
21 Court's jurisprudence makes it quite clear that nothing
22 in the Double Jeopardy Clause makes the appeal itself,
23 the burden of the appeal itself, prohibited and Wilson
24 dealt with and disposed of that problem.

25 QUESTION: Mr. Frey, I still don't understand

1 what you mean, "legally insufficient," or "legal
2 sufficiency." What do you mean?

3 MR. FREY: Well, the question is, what --
4 well, I think the trial court in a jury trial, for
5 instance, can rule only on a question of law.

6 QUESTION: Now, he says to himself, could any
7 reasonable set of jurors find this evidence sufficient
8 to find guilt beyond a reasonable doubt? Is that the
9 kind of question you're talking about?

10 MR. FREY: Yes. It's a legal determination.

11 QUESTION: Do you think that his saying that
12 at midtrial doesn't bar an appeal?

13 MR. FREY: That is our position.

14 QUESTION: What happened if at the end of
15 exactly what he said in this case, he said, "And I find
16 him not guilty of any charge"?

17 MR. FREY: Well, exacty -- I think there is a
18 legitimate question in this case as to whether what the
19 judge said was an acquittal or not in the true sense,
20 and I'd like to talk for a minute if I may about what
21 constitutes --

22 QUESTION: When you don't agree, that it just
23 would be extra words? He would have to have said
24 something in front, before that.

25 MR. FREY: I think if the Judge -- I think

1 what we are saying, it's not reviewable as to verdict of
2 acquittal. That is a determination by the finder of
3 fact that the defendant is not in fact guilty of the
4 crime.

5 QUESTION: That's not what I --

6 MR. FREY: Or not reviewable, whether it's
7 right or wrong, okay. Now, the judge, however, performs
8 a different function and in this case he did not purport
9 to act and the Pennsylvania court did not treat him as
10 acting as finder of fact when he granted the demurrer,
11 but acting the same way he would if there had been a
12 jury, and taking the case away from the jury.

13 Now, there is a sense in which it is an
14 acquittal. That is, in Scott we were talking about
15 pre-indictment delay claim, and the majority held that
16 you could distinguish between that kind of claim which
17 does not go at all, does not represent at all a finding
18 of guilt or innocence, and the kind of claim that could
19 represent an acquittal.

20 QUESTION: Mr. Frey, it seems to me that your
21 argument goes beyond that, what the State of
22 Pennsylvania -- it seemed to me the State of
23 Pennsylvania was conceding that if the trial court had
24 applied the correct standard in determining the evidence
25 was insufficient, that that would constitute an

1 acquittal for purposes of Double Jeopardy.

2 And yet, you, I think, are arguing a broader
3 rule, that any finding of insufficient evidence just
4 falls outside Double Jeopardy?

5 MR. FREY: That's why I wanted to talk about
6 the different ways in which there could be findings of
7 insufficient evidence. Justice White referred to one
8 way, but before we get to that way, the judge might have
9 a correct understanding of the elements of the offense,
10 but the judge might decide that you can't convict the
11 defendant on the basis of circumstantial evidence, for
12 instance.

13 Therefore, even though there was overwhelming
14 circumstantial evidence of guilt, as to every element of
15 the offense, the judge might enter an acquittal. That
16 would be one kind of ruling. Now, that doesn't involve
17 a misunderstanding of the offense that is in a sense an
18 acquittal. I think we would argue that it should be
19 reviewable.

20 But, Justice White's example was a different
21 kind. The judge may add to the offense an element which
22 is not in fact or in law a part of that offense.

23 QUESTION: Let's get back just a minute, Mr.
24 Frey, to your example about circumstantial evidence.
25 You say that could be reviewable. Could it be reviewed

1 by the Pennsylvania Superior Court, in this case,
2 because the Pennsylvania rule was that you could convict
3 on circumstantial evidence?

4 Could it be reviewed by the Pennsylvania
5 Superior Court saying, this was enough circumstantial
6 evidence to go to the jury?

7 MR. FREY: I think ultimately we would contend
8 that either one of those conclusions would be
9 reviewable. We think they are conclusions of law.

10 QUESTION: Do you think that's the same thing
11 that the attorney for the State of Pennsylvania is
12 arguing?

13 MR. FREY: I'm not sure it is the same thing
14 as they are arguing, but I think the important question
15 is whether -- I mean, I think there is an initial
16 question that the Court has to grapple with, and that
17 is, if this animal that we have is a determination by
18 the judge that the defendant hasn't committed a crime,
19 then can it ever be appealed and corrected, regardless
20 of what is wrong as a legal matter with that
21 determination.

22 Because, there are suggestions, I think in
23 Martin Linen and some suggestions in Scott that it
24 couldn't be, and we are asking the Court to reconsider
25 that question in terms of the policies of the Double

1 Jeopardy Clause.

2 We think that allowing an appeal in a
3 situation where the defendant has induced the court to
4 commit a legal error, has terminated the trial prior to
5 a verdict by the fact finder to correct that error, has
6 none of the -- involves no semblance of the kind of
7 oppressive practices that the Double Jeopardy Clause --

8 QUESTION: I don't understand Pennsylvania to
9 be asking us to reconsider any of our prior cases. The
10 United States seems to be.

11 MR. FREY: Well, I think our reading of Martin
12 Linen is that you would have to, because in our view --

13 QUESTION: How about Scott?

14 MR. FREY: There's no problem with the holding
15 in Scott, and indeed no problem -- indeed, we suggest
16 that the analysis of Scott, there is some language
17 that's troublesome but the analysis of Scott is in fact
18 quite inconsistent with --

19 QUESTION: Martin Linen is right in your
20 teeth, I think?

21 MR. FREY: That is our feeling, that's right.
22 But, I think that Scott has undermined Martin Linen and
23 I think it's appropriate for the Court to reconsider
24 Martin Linen after Scott, and I'd like to talk about the
25 Double Jeopardy policies that might be considered to

1 justify what seems a quite arbitrary result that denies
2 justice to the prosecution, which is to leave legally
3 erroneous decisions, concededly legally erroneous
4 because those are the only ones we are talking about,
5 beyond review and correction.

6 One policy is the finality of judgment, that
7 is, not allowing the prosecution to improve its case
8 when it has failed to persuade the first fact finder
9 that has heard the case. That would be true where you
10 have a verdict of acquittal. It's not true in this case
11 because there has been no failure to persuade the fact
12 finder in a case where the judge takes the case away
13 from the jury, of guilt.

14 Certainly there is the right to have the trial
15 completed before the first tribunal that is empaneled,
16 and that is the right that was considered and evaluated
17 in Scott, and obviously the point here is that there
18 would be no second trial necessary, no appearance before
19 a second tribunal, if the defendant had not chosen to
20 terminate the trial before verdict.

21 The defendant who wants only one trial can
22 allow the first trial to go to verdict, make his or her
23 motions after verdict, get a judgment of acquittal at
24 that point from the judge. It can then be appealed and
25 either affirmed or reversed without the necessity for a

1 second trial.

2 QUESTION: Can you make a motion for judgment
3 n.o.b under the Federal Rules if you haven't made a Rule
4 29 motion at the close of the evidence of the Government?

5 MR. FREY: I am not sure what the answer --

6 QUESTION: Because otherwise, the statement
7 you just made may not be correct. If you have to make a
8 Rule 29 Motion in order to preserve your rights for
9 Post-Verdict Motion --

10 MR. FREY: That would create a problem.

11 QUESTION: And aren't there some states that
12 have such a rule?

13 MR. FREY: There may be, but I don't
14 understand -- that would be a non-constitutional rule,
15 and it could presumably be corrected and if that were
16 the obstacle, remove the constitutional problem here.
17 It's not a rule that makes a lot of sense to me, but
18 there may be some states that have it.

19 Now, in Justice Brennan's dissent in Scott, he
20 spoke of the burdens of retrial, the emotional strain,
21 the expense, the risk of an erroneous conviction, the
22 wearing down, and all these problems. These are very
23 real problems, but you cannot distinguish this kind of
24 case from a case in which there is a hung jury and a
25 retrial with all those burdens, or a case in which a

1 conviction is reversed and there is a retrial with all
2 those burdens.

3 In fact, if you think about it for a moment,
4 when there is legal error injected by the prosecution or
5 the Court over the objection of the defense that paints
6 a verdict of guilty, the law is clear that that can be
7 reversed and there can be a new trial.

8 QUESTION: Mr. Frey, how do you distinguish a
9 case in which a defendant objects to a whole category of
10 evidence, he urges the court to keep it out and the
11 judge erroneously excludes all the evidence, and then
12 the jury returns a verdict of not guilty. It's based on
13 legal error and it's the defendant's fault for having
14 made what turns out to be an improper motion.

15 MR. FREY: Well, there are two pieces to
16 that. If the jury returns a verdict of not guilty, we
17 are not arguing that that can be further reviewed, no
18 matter what.

19 QUESTION: Why not? What's the difference?
20 Still, why wouldn't the defendant have waived his right
21 by making a motion that caused the Court to --

22 MR. FREY: Well, I think an argument could be
23 made, and we have a footnote --

24 QUESTION: It seems to me it's a logical
25 extension of the argument you are making.

1 MR. FREY: Certainly, Justice Cardozo in *Palco*
2 against Connecticut thought that would be a better
3 system, but at least there we don't know what the jury
4 has done. The prosecution has failed to convince the
5 first fact finder, and the considerations that are
6 identified in *Green* to apply. In this situation, none
7 of those considerations have any application.

8 Now, I should say a word in connection with
9 your question about *Sanabria*, because *Sanabria* is a case
10 where essentially that happened, that is, the evidence
11 was suppressed. What was left was insufficient. The
12 judge granted an acquittal.

13 We have no problem with the correctness of
14 *Sanabria*, because we couldn't appeal the evidentiary
15 suppression rule. Because that was so, when the judge
16 granted an acquittal, there was no evidence.

17 CHIEF JUSTICE BURGER: I think you have
18 responded to the questions, Mr. Frey. Your time is up.

19 Do you have anything further?

20 MS. CHASE: I have nothing further. Thank you.

21 CHIEF JUSTICE BURGER: Thank you, counsel.
22 The case is submitted.

23 (Whereupon, at 10:45 o'clock a.m., the case in
24 the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#85-227 - DESPINA SMALIS AND ERNEST SMALIS, Petitioners V. PENNSYLVANIA

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BY Paul A. Richardson

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