OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: PAUL CASPARI,SUPERINTENDENT,

MISSOURI EASTERN CORRECTIONAL CENTER, ET AL., Petitioners

v. CHRISTOPHER BOHLEN

CASE NO: 92-1500

PLACE: Washington, D.C.

DATE: Monday, December 6, 1993

PAGES: 1- 52

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 -X

3 PAUL CASPARI, SUPERINTENDENT, :

4 MISSOURI EASTERN CORRECTIONAL :

5 CENTER, ET AL., :

6 Petitioners :

7 v. : No. 92-1500

8 CHRISTOPHER BOHLEN :

9 -X

10 Washington, D.C.

11 Monday, December 6, 1993

12 The above-entitled matter came on for oral

13 argument before the Supreme Court of the United States at

14 10:54 a.m.

15 APPEARANCES:

16 FRANK A. JUNG, ESQ., Assistant Attorney General of

17 MIssouri, Jefferson City, Missouri; on behalf of the

18 Petitioners.

19 WILLIAM K. KELLEY, ESQ., Assistant to the Solicitor

20 General, Department of Justice, Washington D.C.; as

21 amicus curiae, supporting the Petitioners.

22 RICHARD H. SINDEL, ESQ., Clayton, Missouri; on behalf of

23 the Respondent.

24

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

2 (10:54 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument

4 next in No. 92-1500, Paul Caspari v. Christopher Bohlen.

5 Mr. Jung. Is that how you pronounce it, Jung

6 rather than Jung?

7 MR. JUNG: Jung, Your -- Mr. Chief Justice.

8 CHIEF JUSTICE REHNQUIST: Jung, Mr. Jung.

9 MR. JUNG: Yes, Mr. Chief Justice.

10 ORAL ARGUMENT OF FRANK A. JUNG

11 ON BEHALF OF THE PETITIONERS

12 MR. JUNG: Mr. Chief Justice, and may it please

13 the Court:

14 The case before this Court involves whether the

15 double jeopardy principles of Bullington should be

16 extended to noncapital sentencing proceedings, whether

17 doing so would be Teague-barred, and, indeed, whether

18 Bullington should be overturned.

19 The purpose of sentencing is to assure that the

20 punishment fits the offender, and not merely the offense.

21 Defendant's status, and not his conduct, is the linchpin

22 of sentencing. The rehabilitation of a defendant is a

23 factor that the sentencer should consider. Because

24 sentencing focuses on the proper punishment, the Double

25 Jeopardy Clause has never prevented a sentencer from

1 imposing a higher sentence upon resentencing.

2 In fact, in United States v. DiFrancesco, this

3 Court stated that the task is to determine whether the

4 criminal sentence, once pronounced, is to be accorded

5 constitutional finality and conclusiveness similar to that

6 which attaches to a jury's verdict of acquittal. This

7 Court stated: "We conclude that neither the history of

8 sentencing practices, nor the pertinent rulings of the

9 court, not even consideration of double jeopardy policy,

10 supports an equation."

11 The procedures required for sentencing a

12 defendant as a persistent offender in Missouri include

13 pleading the prior convictions in the indictment, or

14 information, introduction of evidence of the defendant's

15 prior convictions at a hearing conducted outside the

16 presence of the jury and prior to submitting the case to

17 the jury, and a finding by the judge that the defendant is

18 a persistent offender.

19 The statute allows for the use of presentence

20 investigation reports and commitments as proof of a prior

21 conviction. Case law in Missouri has established that

22 introduction -- introducing certified copies of prior

23 convictions and commitment reports is prima facie proof

24 that the defendant is the person named in the prior

25 convictions for the purpose of the habitual offender

1 statute.

2 Once a prima facie proof is made, the burden

3 shifts to the defendant to disprove the prior convictions.

4 If the defendant fails to rebut the prima facie proof, the

5 trial court may rely on that prior -- those prior

6 convictions for invoking the habitual offender statute.

7 QUESTION: But, Mr. Jung, what -- the

8 consequences of habitual offender in Missouri, do I

9 understand right that the only consequence is that the

10 judge -- that the jury will no longer recommend the

11 sentence, but that the range would be identical?

12 MR. JUNG: In this case, Your Honor, it would

13 be. But if it -- in -- not in all cases. In -- if a

14 individual was convicted of a class B felony, the range of

15 punishment then would enhance, as an habitual offender, to

16 a class A felony, the rule within --

17 QUESTION: But in this case the only difference

18 was that the -- the jury would not have an opportunity to

19 set the ceiling --

20 MR. JUNG: Yes.

21 QUESTION: -- For the term of incarceration.

22 MR. JUNG: That's correct, Your Honor. That's

23 correct, Your Honor. And also would affect his

24 eligibility for parole under the guide -- Missouri

25 statutes. As a persistent offender, there are

1 consequences of when you would be eligible for parole

2 consideration also.

3 QUESTION: But it's not like the usual add-on

4 enhancement of a sentence -- Missouri -- is this scheme

5 unusual? That is that habitual offender status doesn't

6 mean you get an increased -- you go up to a higher range.

7 It's the same range.

8 MR. JUNG: In this case, Your Honor, that is

9 correct. It is not a mandatory such as a mandatory life

10 imprisonment if you're an habitual offender. It would

11 just -- since he was already a class A felony, and one of

12 the sentences within the class A felony is life

13 imprisonment, it was still within that range, that's

14 correct, Your Honor.

15 QUESTION: Do you know if this scheme is

16 unusual, or are there other States that have it too where

17 the range is the same?

18 MR. JUNG: I -- my investigation of that, Your

19 Honor, is -- basically found that States are split on that

20 issue. Some States have that an habitual offender is

21 subject to a mandatory life imprisonment. Certain States,

22 such as Illinois, have -- where they are is within a range

23 of punishment that is imposed by the judge, an enhanced

24 range of punishment.

25 QUESTION: Mr. Jung, if you claim that applying

1 Bullington in this case would be wrong, it seems to me, a
2 fortiori, you must claim that applying Bullington in this
3 case would be new?
4 MR. JUNG: That's -- that's correct, Your Honor.
5 QUESTION: And so why isn't all of this
6 Teague-barred?
7 MR. JUNG: That's -- Your Honor. That's correct,
8 Your Honor. We have raised that this issue is
9 Teague-barred. The court below found that it was not
10 Teague-barred, because they said you could stretch
11 Bullington into the application of non -- noncapital
12 sentencing proceedings. And our position is that
13 stretching Bullington alone would be Teague-barred,
14 because it is not dictated by past precedents of this
15 case -- this Court.
16 QUESTION: So it's your view that our choice is
17 essentially between two things; either we hold it
18 Teague-barred or we overrule Bullington, but there's no
19 way to say that this -- to rule on the merits of this
20 question if we incline toward your view?
21 MR. JUNG: I think, Your Honor, the Court could
22 state that double jeopardy doesn't apply to noncapital
23 sentencing proceedings in and or itself, and not have to
24 reach whether it is a new rule. If this Court were to
25 apply that -- that Bullington doesn't apply to noncapital

1 sentencing proceedings, we wouldn't have the issue of
2 whether it's Teague-barred. If it's -- if this Court were
3 to interpret that Bullington does apply to noncapital
4 sentencing proceedings, then we would argue that it is
5 Teague-barred because it would be an application of a new
6 rule on a collateral appeal.
7 QUESTION: And back -- are you saying that we
8 would get to the Teague question only if we are inclined
9 to rule against you?
10 MR. JUNG: I believe so, Your Honor, even though
11 I -- there are cases that say Teague is a threshold issue,
12 so it seems like it could be, in some certain situations.
13 Some cases have said that Teague is a threshold issue,
14 saying that we have to look for -
15 QUESTION: Teague said that, didn't it?
16 MR. JUNG: I believe your -- in Saffle v. Parks,
17 I believe, also stated that also, Your Honor.
18 QUESTION: But, I mean, in Teague itself they
19 didn't reach the merits.
20 MR. JUNG: That's correct, Your Honor. So it
21 would be -- we -- I would concede that if you determine
22 that this could be Teague-barred, and not rule on the
23 merits. That's correct, Your Honor.
24 QUESTION: And it would be new. The distinction
25 would be made because of the heightened degree or the more

1 expansive degree of discretion that is involved in the
2 sentencing proceeding here, as distinct from the degree of
3 discretion in the -- in the Bullington situation.
4 MR. JUNG: That's correct, Your Honor. I think
5 that this Court has always recognized that in noncapital
6 sentencing proceedings, that there is a more greater
7 emphasis to allow the jury to make that finding within the
8 broader range of punishment, and they have a more expanded
9 range of punishment which they can impose, unlike
10 situations where it's either life or death in capital
11 situations, Your Honor.
12 Also under the Missouri statute, Your Honors,
13 the trial court may take judicial notice of testimony
14 regarding the defendant's habitual offenses. So, needless
15 to say, that in Missouri the court could just not have to
16 have a prior offender hearing separate and distinct. He
17 could recognize the testimony at trial and hold, in and
18 off itself, based on that testimony, that the defendant is
19 an habitual offender.
20 The fact that the presentence investigation and
21 commitment reports can be admitted into evidence, along
22 with the fact that a certified copy of the judgement and
23 sentence establishes a prima facie evidence of prior
24 conviction, demonstrates that habitual offender statute is
25 a ministerial act. Because Missouri's habitual offender

1 statute is a ministerial act, the Double Jeopardy Clause
2 does not apply.
3 QUESTION: Is there any indication --
4 QUESTION: Well, it might not be a ministerial
5 act if the defendant wanted to challenge some prior
6 conviction on the ground that he had not been afforded
7 counsel, or something like that.
8 MR. JUNG: That's correct. If the defendant
9 were to challenge it, this burden would shift back to the
10 defendant to prove that it was uncounseled. He could not
11 challenge the conviction, in and of itself, but he could
12 challenge a constitutionality, such as it was an
13 uncounseled guilty plea.
14 QUESTION: Is there any indication why, the
15 first time around, there was nothing in the record to show
16 the prior convictions?
17 MR. JUNG: No, Your Honor, there is nothing in
18 the record. The only thing that is in the record, Your
19 Honor, is at the trial -- the prosecutor on the morning of
20 trial, at a pretrial conference, stated that he was
21 willing to proceed. He had the prior convictions and was
22 ready to proceed and demonstrate the prior offender, the
23 statute. But why it never occurred, we don't know, Your
24 Honor.
25 One of the purposes of double jeopardy is to

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1 prevent a defendant from being retried and convicted,
2 although innocent. However, the possibility of innocence
3 of a sentence cannot occur, because a sentence -- second
4 sentencing decision is as correct as a first jury
5 sentencing decision.
6 Even if the trial court determines that the
7 prosecutor failed to meet the statutory obligation for
8 establishing defendant to be an habitual offender, the
9 prosecutor failure is not an implied acquittal of the
10 prior convictions. Nothing would prohibit the use of
11 those prior convictions in a subsequent proceeding.
12 Prior to Bullington, the protections afforded by
13 the Double Jeopardy Clause had never been extended to
14 sentencing. And since Bullington, this Court has never
15 extended the Double Jeopardy Clause to noncapital
16 sentencing proceedings. In declining to extend the Double
17 Jeopardy Clause to noncapital sentencing proceedings, this
18 Court noted that the noncapital sentencing proceedings
19 allowed for a broader range of punishment, rather than the
20 life and death limitation imposed by a jury in capital
21 sentencing proceedings.
22 QUESTION: Now, what case was that, Mr. Jung?
23 MR. JUNG: That was in United States v.
24 DiFrancesco. The Court noted that the broader range of
25 punishment, Your Honor, Mr. Chief Justice, was that the

1 judge had to impose once he made the finding that the
2 defendant was a dangerous special offender in that -- in
3 that case.
4 QUESTION: But that -- that was decided before
5 Bullington, wasn't it?
6 MR. JUNG: That's correct, Mr. Chief Justice.
7 QUESTION: So you really can't say that that
8 case decided that Bullington didn't extend to noncapital
9 cases, if it came before Bullington.
10 MR. JUNG: That's correct, Mr. Chief Justice. I
11 think that Lockhart v. Nelson, this Court specifically
12 stated that the issue was not before it at that time, and
13 stated that the Court -- because all the parties assumed
14 that it did apply, but they didn't address that issue and
15 specifically left it open.
16 In extending the Double Jeopardy Clause to
17 capital sentencing proceedings, this Court determined that
18 the capital sentencing proceedings are unique because they
19 so resemble a trial, the so-called uniqueness found by
20 this Court in Bullington, including opening statements,
21 testimony, introduction of evidence, jury instructions,
22 final arguments, and jury deliberations. These facts,
23 coupled with the prosecutor's requirement to prove certain
24 statutorily defined facts beyond a reasonable doubt, and
25 the jury's limitation of imposing either life or death,

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1 led this Court to believe the Double Jeopardy Clause
2 applied to capital sentencing proceedings.
3 Unlike capital sentencing proceedings,
4 noncapital sentencing proceedings do not require the
5 same -- do not require the same unique characteristics.
6 Although a separate proceeding is required to establish
7 whether defendant is an habitual offender under Missouri
8 statutes, this proceeding is conducted before a judge and
9 not a jury, and is conducted prior to the jury's
10 determination of guilt or innocence.
11 The purpose of the hearing is to determine if
12 the judge or jury will determine the defendant's sentence.
13 There are no opening statements, closing arguments, nor is
14 there any instructions or jury deliberation. The only
15 common characteristics between capital sentencing
16 proceedings and non --
17 QUESTION: May I ask, just to be sure I
18 understand your position, supposing all those things were
19 true, supposing you decided in Missouri to have the
20 multiple offender statute -- I forget the name of it --
21 apply only after a jury found all the facts that the judge
22 now finds, prior convictions and -- would it make any
23 difference to you?
24 MR. JUNG: I don't think so, Your Honor. I
25 think if you looked at the Bullington decision, there were

1 three basic factors that led this Court to that decision,
2 and one was a trial -- only one of them was a trial-like
3 proceeding. The second one was the proof beyond the
4 reasonable doubt, and the third one was the choice between
5 life and death.
6 QUESTION: What is the standard of proof in this
7 proceeding before us today?
8 MR. JUNG: Beyond a reasonable doubt, Your
9 Honor.
10 QUESTION: So that does apply. Then what's the
11 third thing?
12 MR. JUNG: The limited choice between life and
13 death.
14 QUESTION: You think that's different from a
15 limited choice -- say that -- say the multiple offender
16 had to have a mandatory sentence longer, say it was a
17 little more severe than it is here, would that be a
18 distinguishing feature then?
19 MR. JUNG: I think that could be considered,
20 Your Honor, if you looked at it and you saw all three
21 factors.
22 QUESTION: Yeah.
23 MR. JUNG: Then you could probably say it looked
24 more like Bullington. However, I think that, in this
25 situation, Your Honor, it does not look like Bullington

1 because we don't have the -- such as in the Texas habitual
2 offender statute, which requires a mandatory life
3 imprisonment, if the finding of the habitual offender
4 statutes.

5 QUESTION: Is the main point that this -- that
6 here the judge does the sentencing, and in Bullington it
7 was the jury?

8 MR. JUNG: I -- case law, Your Honor, I believe
9 states that there is no distinction between judge
10 sentencing and jury sentencing, so that wouldn't be that
11 relevant, whether the judge or jury did the sentencing.

12 QUESTION: So as soon as you -- as soon as
13 you've acknowledged that, then the absence of instructions
14 to the jury, of course, is just because it's a judge, not
15 a jury.

16 MR. JUNG: That's correct, Your Honor. But
17 there is no -- the issue is, basically, whether this is a
18 trial-like setting.

19 QUESTION: Right.

20 MR. JUNG: Is this an adversarial proceeding.
21 And, we argue that it's not an adversarial --

22 QUESTION: Even though it requires proof beyond
23 a reasonable doubt, it's not a trial-like setting.

24 MR. JUNG: That's correct, Your Honor. I think
25 that is -- just not that factor, in and of itself, makes

1 it a trial-like setting.

2 Mr. Chief Justice, I'd like to save the rest of

3 my time for rebuttal.

4 QUESTION: Very well.

5 Mr. Kelley, we'll hear from you.

6 And then we'll hear from you next, Mr. Sindel.

7 ORAL ARGUMENT OF WILLIAM K. KELLEY

8 ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE

9 SUPPORTING THE PETITIONERS

10 MR. KELLEY: Thank you, Mr. Chief Justice, and

11 may it please the Court:

12 I want to make two points this morning. The

13 first is that the Court's decision in Bullington v.

14 Missouri is distinguishable from this case and does not

15 control the outcome here, and the second point is that the

16 Court ought not to extend Bullington to cover this case.

17 On the first point, we submit that the

18 persistent offender determination in Missouri is quite

19 unlike the trial-like process that was at issue in

20 Bullington. In the penalty phase of a capital case like

21 Bullington, the procedure is very much trial-like. The

22 Court relied on that factor heavily in Bullington, and in

23 this case, and in persistent offender determinations

24 generally, those features are not fully present.

25 In a capital case like Bullington, because it

1 was like a trial with a verdict, quote, on the question of
2 life or death, the Court thought, and was willing to treat
3 the outcome of that proceeding as though it were analogous
4 to be a conviction or a verdict on the question of guilt
5 or innocence.

6 The persistent offenders determination in
7 Missouri is far different. Unlike the penalty phase of a
8 capital case, that determination is made by the judge at a
9 hearing, not a trial, outside the presence of a jury.
10 prior to the case's submission to the jury.

11 QUESTION: Well, was it Rum -- Arizona against
12 Rumsey where we had a life or death determination
13 determined by the judge, not the jury, and we said
14 Bullington applied?

15 MR. KELLEY: That's correct, Your Honor. My
16 point here, however, is that the hearing in this case is
17 unlike the hearing that was at issue in Bullington, and
18 also in Rumsey, in that it was not trial-like. It was
19 merely a hearing. It was not -- it did not contain the
20 full measure of trial-like aspects that is typically at
21 issue and present in the penalty phase of a capital case.

22 For example, in -- under this statute, the
23 defendant is not entitled to the full panoply of
24 constitutional trial rights, there are no opening and
25 closing arguments. In short, the judge hears evidence and

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1 decides the factual question whether the defendant is or
2 is not a persistent offender, and then the trial resumes.
3 Let me emphasize that the persistent offender
4 determination is merely a sentencing factor. It is not
5 the outcome of the sentencing process, like a verdict or a
6 decision on life or death. It is one factor out of many
7 that lead to the ultimate imposition of sentence.
8 QUESTION: Well, do you take the position that
9 Bullington should just be limited to capital sentencing
10 proceedings?
11 MR. KELLEY: Justice O'Connor, our position is
12 that Bullington's rationale, under current sentencing
13 practices, really only applies in capital sentencing
14 proceedings in this country. It's quite clear that the
15 decision in Bullington did not rest explicitly on the life
16 or death nature of the inquiry. But our point is that in
17 the United States, historically and today, the sentencing
18 process is typically much more freewheeling and much more
19 discretionary and much more unfettered than is true in the
20 capital sentencing process.
21 QUESTION: Now, you take no position on whether
22 this is Teague-barred?
23 MR. KELLEY: Your Honor, we did not address that
24 issue in our brief because the Federal interest in this
25 case, we believe, is on the merits of the Bullington

1 question.

2 QUESTION: Well, the Federal interest might also
3 turn on a Teague determination in some cases, I would
4 think.

5 MR. KELLEY: That is quite true. I don't want
6 to misstate our position. Our position is that Bullington
7 ought not to be extended outside the capital context; i.e.
8 the context where life or death determinations are made
9 after a full trial-like process. We think it's quite
10 clear, and we agree with the State, that this is -- this
11 case should be Teague-barred, that extending Bullington to
12 this case would be a new rule. Our primary concern,
13 frankly, in this case is to preserve the integrity of the
14 Federal sentencing system as enacted by the Sentencing
15 Reform Act.

16 QUESTION: If it's a wrong rule, it's got to be
17 a new rule, doesn't it?

18 MR. KELLEY: We think that's quite clear, Your
19 Honor. In fact, the court of appeals, in discussing the
20 issue and whether it was a short extension of Bullington
21 or an -- indicated itself that it was an extension of
22 Bullington. And in that sense it clearly is a new rule,
23 in our position -- in our view.

24 QUESTION: May I ask if your view -- supposing a
25 State that did not have capital punishment and instead had

1 life imprisonment without possibility of parole as a
2 very -- for very, very serious crimes, decided to impose a
3 sentencing procedure that's analogous to those that are
4 used in the death penalty States, to be -- because it's
5 such a serious crime, and they had all the trial-like
6 procedures there; do you think Bullington would apply or
7 not?

8 MR. KELLEY: Well, Justice Stevens, I think that
9 would be a hard question.

10 QUESTION: Well, I think it's a hard question.

11 MR. KELLEY: The rationale of Bullington would,
12 of course, be applicable in that situation, and you would
13 have to decide whether all of the features that were
14 present in Bullington were present in that system.

15 QUESTION: Suppose all -- see, my hypothesis,
16 all of them are present except it's a different sentence.

17 MR. KELLEY: Well, I have two responses. First,
18 this Court's subsequent decision in Poland v. Arizona
19 emphasized quite heavily the life or death nature of the
20 decision in Bullington and was willing to treat that as an
21 implied acquittal type situation.

22 But more -- more importantly, it seems to me
23 that the States are under no constitutional compulsion, in
24 the case that you described, to provide such procedures.
25 So in such a case, a State would have the argument that it

1 ought not have to pay the price of not being able to
2 correct errors if it provides defendants with more
3 procedures to which -- than they are constitutionally
4 entitled. So there would be an arguable distinction in
5 that case. That, of course, is not a question the Court
6 has to reach in this case.
7 QUESTION: But you would not -- you don't
8 rest -- neither of your grounds, then, rests on the fact
9 that death is different from a noncapital case?
10 MR. KELLEY: No. No, it does not, Your Honor.
11 The decision in Bullington did not rest on that. But let
12 me emphasize again that the rationale of Bullington was
13 that because there was this full trial-like process and
14 because it was a question of life or death, an up-down,
15 yes-no question, then the Court was willing to treat the
16 outcome of that proceeding as though it were a verdict on
17 the question of life of death, i.e. innocent or guilty.
18 That analysis stands alone in this Court's
19 sentencing cases relating to double jeopardy. We submit
20 that it should not be extended any further. In this
21 country there has never been, under traditional sentencing
22 practices, any impediment to the correction of errors on
23 resentencing. This Court, in Poland v. Arizona, declined
24 to extend Bullington outside the context in which it
25 arose, that is where there was a full trial-like procedure

1 with an ultimate determination of life or death.

2 QUESTION: Mr. Kelley, your position is clear

3 that Bullington should not be extended to the

4 circumstances of this case. I wasn't clear on your answer

5 to the Teague question. If we accept your position, is

6 there any way we can decide that question, or does Teague

7 mean that we must say if we're inclined to think it's a

8 wrong rule, then it's surely a new rule, so we have to

9 stop with the new rule.

10 MR. KELLEY: I think it's quite plain, Justice

11 Ginsburg, under the Teague analysis, that the new rule

12 inquiry is a threshold question, so the Court could not

13 reach the merits and rule in favor of the respondent in

14 this case if it thought that would be a new rule.

15 Whether the Court could overrule Bullington in

16 this case, even if extending it would be a new rule, is a

17 different question. We think that there would be a

18 reason -- reasonable ground on which to reach that

19 question. We, of course, have not urged the Court to

20 overrule Bullington in this case simply because we think

21 it does not require the State to lose here.

22 QUESTION: So the end result of your argument,

23 then, is that we should hold this claim Teague-barred?

24 MR. KELLEY: We think, Your Honor, that under

25 Teague --

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1 QUESTION: If Teague is a threshold question.
2 MR. KELLEY: And its progeny, that the claim
3 clearly is Teague-barred. We discuss the merits of the
4 case and participate in the case on the merits both to
5 inform the Court's analysis of whether this would be a new
6 rule; i.e. what are the contours of the Bullington
7 analysis. And secondly, and as I've said more importantly
8 from our perspective, to make sure that whatever the Court
9 says here, it does not cast doubt on the integrity of the
10 Federal sentencing system as enacted.
11 QUESTION: It's interesting. If I remember
12 correctly, you don't even mention Teague in your brief, do
13 you?
14 MR. KELLEY: No, we do not, Justice Stevens. As
15 I said, our -- the Federal interest, really, here was
16 in --
17 QUESTION: You would like us to go ahead and
18 decide the case because you think maybe you can win it.
19 MR. KELLEY: Well, that is not -- that is not at
20 all our position, Justice Stevens. We're agnostic on the
21 Teague question. We think however, of course, that an
22 analysis of Teague would lead to this claim being
23 Teague-barred.
24 Unless the Court has further questions, we'd ask
25 the Court to reverse. Thank you.

1 QUESTION: Very well, Mr. Kelley.

2 And, Mr. Sindel, we'll hear from you.

3 ORAL ARGUMENT OF RICHARD H. SINDEL

4 ON BEHALF OF THE RESPONDENT

5 MR. SINDEL: Mr. Chief Justice, and may it

6 please the Court:

7 In Missouri it is the legislator that is --

8 legislature that is responsible for enacting the laws that

9 govern the procedures utilized in the trial of criminal

10 cases. It is the legislature that establishes what is a

11 criminal act and what punishment the actor deserves. It

12 is up to the courts to interpret and to enforce these

13 procedures. As the Court said in Missouri v. Hunter, it

14 is the legislature, not the courts, that prescribe the

15 scope of punishments.

16 In this case, the legislature set out in clear,

17 unambiguous terms the exact procedure that was to be

18 followed if the State wishes to increase the punishment

19 and the scope of punishment for a prior offender, and

20 deprive that defendant of his valued right to a jury

21 determination of sentence.

22 QUESTION: By increasing the scope of

23 punishment, is just -- but here isn't it just a question

24 of who sets the ceiling? We were told that there is no

25 difference in the sentencing range. There would be a

1 difference in parole eligibility.

2 MR. SINDEL: That is correct, Your Honor. In

3 this particular situation, because of the crime that was

4 changed as a class A felony, and there is no higher

5 punishment other than the range of a class A penalty

6 unless, of course, it's a capital crime.

7 QUESTION: And the range is rather large.

8 MR. SINDEL: The range is 10 years to 30 years

9 or life imprisonment.

10 QUESTION: And so the only consequence, as I

11 understand it, is that this case would have to go back, if

12 you're right, for an entire new trial before a new jury;

13 is that right?

14 MR. SINDEL: That is State law, Your Honor.

15 QUESTION: Because you couldn't have a jury just

16 come in for the penalty, not having heard the evidence.

17 MR. SINDEL: That is correct. There are no

18 separate bifurcated proceedings, except in the capital

19 context, in the State of Missouri.

20 QUESTION: So there would be a whole new trial,

21 but then the jury would be faced with that same 10 to 30

22 year range.

23 MR. SINDEL: The jury would be instructed as to

24 the range of punishment, if they were, in fact, to find

25 him guilty of the offense as charged, robbery, first

1 degree.

2 QUESTION: Right. So you could end up with the

3 identical sentence if -- that would be within the jury's

4 prerogative.

5 MR. SINDEL: You could end up with a larger

6 sentence as well.

7 QUESTION: Right.

8 MR. SINDEL: But in this situation, the most

9 valued right that was lost to this defendant was his right

10 to have that jury determine his sentence.

11 QUESTION: So that -- so that within a

12 Bullington frame of reference, how can one say that the

13 defendant has been acquitted of any portion of this

14 penalty if, as you just said, he could get the very same

15 penalty -- in fact, he could get an even higher penalty?

16 MR. SINDEL: Our position is not at all that he

17 was acquitted of the penalty. Our position is that he was

18 acquitted of the status determination that he is a prior

19 or persistent offender. It is that yes-no, either-or,

20 fact-driven determination.

21 The State must prove, under the legislative

22 enactments, beyond a reasonable doubt that this particular

23 defendant has committed a felony in the past. They must

24 do so by filing with the information or indictment, the

25 convictions, the nature of the charge, the sentence that

1 was imposed. They must bring to the Court evidence beyond
2 a reasonable doubt.
3 I have stood here and heard counsel refer to
4 this as a hearing or as a ministerial act. I do not know
5 of other ministerial acts that must be proven beyond a
6 reasonable doubt. In this particular situation it is true
7 that they could submit to the court certified records of
8 the conviction. They could use, if the defendant had
9 testified, his testimony to try and establish the
10 necessity required by the statute.
11 QUESTION: How did they, in fact, prove the
12 prior convictions the second time around?
13 MR. SINDEL: The second time there were
14 submitted certified copies of the records, and the statute
15 allows for certified copies to be utilized by the Court in
16 making a prima facie determination as to whether or not
17 the State has proved their case.
18 QUESTION: So to that extent, it's quite
19 different from the assessment of life versus death, where
20 you take into account aggravating factors, mitigating
21 factors. Here either you had a conviction or you didn't.
22 A prior conviction existed or it didn't exist.
23 MR. SINDEL: Well, that is true. However, if
24 the conviction exists, they still have the option --
25 necessity of proving it. It is not enough -- for example,

1 the State could not have been in a position where after
2 the trial had been concluded, they then went to the
3 appellate court and determined -- decided, well, we forgot
4 or we failed or we have now recovered the certified
5 documents necessary to prove our case, and we want now to
6 be able to submit those cases to the court and have a
7 determination that this individual is a persistent
8 offender, and enhance the punishment.
9 The State has no right to such an appeal. But,
10 in fact, the ruling by the court of appeals in this case
11 gave them exactly that right. It gave them that second
12 bite of the apple, that second crack that the Double
13 Jeopardy Clause precludes. And, in fact, it violated the
14 very statutes enacted by the legislature, by the State of
15 Missouri, in order to enforce these particular provisions.
16 The State of Missouri, by its statutes, demands
17 that this determination be made prior to submission to the
18 jury simply because that is the only way to make sure that
19 that individual is not deprived of his valued right to a
20 jury determination of sentence. In this particular
21 situation, the court of appeals abrogated that and
22 basically end run around the provisions of the statute,
23 ignored the legislative enactments.
24 QUESTION: Are you referring to the Missouri
25 Court of Appeals or the Eighth Circuit?

1 MR. SINDEL: I'm sorry, the Missouri Court --
2 State court of appeals, correct.
3 QUESTION: May I --
4 MR. SINDEL: It is also our position -- I've
5 heard -- it is referred to as a hearing, but there is the
6 option and opportunity to present evidence, and in other
7 State proceedings evidence is often presented, in the
8 terms of testimony, and the defendant has all the rights
9 that are available to him at the trial.
10 QUESTION: What sort of evidence would you
11 present if you -- the issue is persistent offender,
12 habitual offender, and the State comes in with certified
13 copies?
14 MR. SINDEL: Well, if they -- let's say if I
15 represent the defendant and we could contend, A, the
16 identity of an individual named in the certified copies is
17 not the defendant. We can contend that he was not
18 properly represented by counsel. We could contend that it
19 was not a voluntary plea of guilty. We can contend that
20 the court had no jurisdiction.
21 There are a number of factual issues that may,
22 in fact, develop. And it's also important to remember
23 that in the Bullington case, the only evidence that was
24 presented in the penalty phase at that trial was two
25 copies of the records of conviction. There was no

1 testimony, either in aggravation or mitigation. So that
2 trial was as short and concise and complete as the trial
3 that occurred in this particular case. And it is a trial
4 that occurs in this particular case. All the hallmarks of
5 a trial proceeding are present, as well.
6 QUESTION: The second time around, did you
7 present any evidence challenging the prior convictions?
8 MR. SINDEL: I wasn't the attorney at that
9 particular time.
10 QUESTION: Well did the respondent's attorney?
11 MR. SINDEL: I understand. He presented no
12 evidence, but he did make a long, lengthy, and aggressive
13 argument, a closing argument.
14 QUESTION: Unsuccessful, I gather.
15 MR. SINDEL: Unsuccessful is correct, Your
16 Honor.
17 QUESTION: Mr. Sindel, I guess there are
18 decisions of various courts going both ways on whether
19 Bullington extends to this kind of a noncapital setting.
20 Isn't that so?
21 MR. SINDEL: There are decisions from State
22 courts that hold that it doesn't extend to noncapital
23 settings. The decisions --
24 QUESTION: And they were out there before this
25 decision was handed down? Some of them, certainly.

1 MR. SINDEL: Yes, I believe that's correct. I
2 can't say for myself exactly what State courts had decided
3 or when.
4 QUESTION: And the State courts in Missouri had,
5 in the Lee case, said that this persistent offender
6 proceeding is different from the capital sentencing
7 proceeding within Bullington.
8 MR. SINDEL: State v. -- State v. Lee relied
9 on -- and in fact the court indicated it was constrained
10 by the application of the Supreme Court of Missouri in
11 three or four other State cases, all of which were decided
12 before Bullington. And --
13 QUESTION: But, I guess, it did say that the
14 persistent offender scheme bears no similarity to the
15 capital sentencing scheme in Bullington.
16 MR. SINDEL: And I don't believe that is
17 correct.
18 QUESTION: At least that's what they said.
19 MR. SINDEL: That is what they said.
20 QUESTION: Okay. Now, do you think that under
21 all these circumstances we have a Teague-bar problem here?
22 MR. SINDEL: Well, I believe --
23 QUESTION: Is it a new rule that's been adopted
24 here under our precedents?
25 MR. SINDEL: Your Honor -- excuse me. I do not

1 believe that this is a new rule. It is simply, as the
2 Eighth Circuit Court of Appeals indicated, a logical step
3 from Bullington.
4 There's basically two distinguishing factors
5 from Bullington to this particular case. One is the
6 existence of jury sentencing, and clearly that makes no
7 difference in terms of the application of Bullington, as
8 this Court decided in Arizona v. Rumsey. And that also
9 impacts upon, as Justice Stevens noted, whether or not
10 there are jury instructions or deliberations. All those
11 things may not occur, and they didn't occur in Arizona v.
12 Rumsey other than the deliberation that takes place in the
13 judge's mind.
14 But in terms of the Teague issue, besides the
15 fact that there was jury sentencing, which Arizona v.
16 Rumsey says is not important, the only other distinction
17 is death is different, which this Court -- at the time
18 that Bullington was decided every Justice had at least
19 indicated that in some opinion or another.
20 But the Bullington Court specifically did not
21 rely on the death-is-different argument. In fact, it
22 relied -- it indicated in a footnote that we are not
23 deciding this case based on the Eighth and Fourteenth
24 Amendment positions that were represented by the
25 petitioner at that time, and decided only on the double

1 jeopardy issue that was presented.

2 So we do not believe -- it was not the court of

3 appeals' words that they stretched the holding in

4 Bullington to a -- in an application of this case. They

5 said they did not believe it was stretched.

6 QUESTION: Well, this Court has at least

7 reserved the question of the applicability of Bullington

8 in proceedings --

9 MR. SINDEL: In a footnote --

10 QUESTION: -- like this, and there are

11 lower-court decisions going the other way. It seems to me

12 that you have a real problem under Teague.

13 MR. SINDEL: I don't believe that the existence

14 of lower-court opinions, in and of itself, is enough to

15 preclude an examination of this particular issue under

16 Teague. For example, in Stringer v. Black the same

17 situation occured. This Court had determined the fact

18 that the Fifth Circuit Court of Appeals, in concluding

19 that the Maynard v. Cartwright and Clemons v. Mississippi

20 did not apply to the particular situation, was incorrect.

21 And if -- if, in fact, the distinguishing

22 characteristics that are brought up by the Court when they

23 determine whether or not Bullington is different from

24 these situations -- and those distinguishing

25 characteristics uniformly are, one, that death is

1 different, which is not a Bullington issue; and the fact
2 that it is a judge rather than a jury determination, which
3 is not a Bullington issue; and the fact that this is --
4 there has been a history in this Court of not recognizing
5 that sentencing procedures are covered in the Double
6 Jeopardy Clause.
7 Now, it is important to understand that in terms
8 of making this sentencing decision, what we are talking
9 about is the yes-no answer to the question of the status
10 of the individual involved. It is not the line drawing
11 along a continuous spectrum or gradient of decisions
12 concerning what is the appropriate number of years.
13 It is not our position that there is a correct
14 number of years that the court is required to determine
15 beyond a reasonable doubt. What the court is required to
16 determine beyond a reasonable doubt is whether or not the
17 State has brought before them convincing evidence to prove
18 that this individual is, in fact, a prior or persistent
19 offender under the statutes of the State of Missouri.
20 QUESTION: Well, if that were the only issue in
21 the proceeding, you'd have a comparatively strong
22 argument. But that is not the only issue in the
23 proceeding, and in that respect the -- it is different
24 from the Bullington situation, because the degree of
25 discretion that's left is a broader degree of discretion

1 than was left in Bullington. Is that a fair statement?
2 MR. SINDEL: The -- in terms of deciding the
3 sentence, you're correct. But we are not appealing the
4 sentence that was imposed. We are appealing from the fact
5 that a status determination was made without any evidence
6 to support it, and the State was allowed a second
7 opportunity to return the court after failing
8 completely --
9 QUESTION: How are you not appealing the
10 sentence? Because what you're saying is this case has to
11 go back and be retried on guilt or innocence, and then
12 have a jury determine the sentence, which will fall within
13 the same range, but could be anywhere from 10 years to 30
14 years.
15 MR. SINDEL: Every case which is returned to the
16 court for determination as to whether or not -- or a new
17 trial, is going to have the possibility or prospects of a
18 new or different sentence.
19 QUESTION: So you're appealing from a judgment
20 of conviction and a sentence, and you're seeking to get
21 the sentence set aside. Indeed, the conviction, because
22 you have to have a whole new trial, under your theory.
23 MR. SINDEL: Under State law, that is correct.
24 QUESTION: So it's rather technical to say that
25 you're not appealing from the sentence.

1 MR. SINDEL: Well I -- what I am trying to
2 emphasize to the Court, that it is not -- we are not
3 appealing from the determination that a 15-year sentence
4 is appropriate, as opposed to a 17-year sentence, as
5 opposed to a 30-year sentence, as opposed to a 10-year
6 sentence. All those decisions are clearly within the
7 discretion of the court, or the sentencing body, whoever
8 it may determine -- be.
9 But we are appealing from the fact that not only
10 did the defendant lose his right to a jury determination
11 of the appropriate sentence, a valued right in the State
12 of Missouri, obviously a value right for any particular
13 defendant, but also that that determination was made
14 without the evidence that the legislature demands, if you
15 are to follow the Missouri statutes. And this particular
16 situation, the court abrogated its responsibility to make
17 sure that those statues were followed.
18 QUESTION: Mr. Sindel, did you argue Bullington
19 here?
20 MR. SINDEL: I did, Your Honor.
21 QUESTION: May I ask a question about your
22 statute? I notice the procedure applies to a prior
23 offender, persistent offender, or dangerous offender.
24 What -- does the statute define the term dangerous
25 offender?

1 MR. SINDEL: It does, Your Honor.

2 QUESTION: Does it -- is it defined in terms of

3 prior convictions, or just general behavior?

4 MR. SINDEL: Prior convictions, as well as the

5 elements of the underlying offense of conviction.

6 QUESTION: Are there -- is it conceivable that

7 there will be issues of fact in a -- say the charge was

8 dangerous offender rather than persistent offender, that

9 might involve more conflicts in evidence than just whether

10 or not there was a certified copy of a conviction?

11 MR. SINDEL: That is correct.

12 In terms of the amount of evidence that's

13 necessary, there are -- there could be a number of

14 criminal trials in which a determination of guilt or

15 innocence and a sentence could be imposed where similar

16 evidence was presented.

17 For example, as this Court recognizes, the

18 Double Jeopardy Clause applied in the United States v.

19 Dixon, an individual can be found in contempt of court and

20 be sentenced based on conduct simply by admission and

21 judicial notice of the record that the individual had been

22 served with the decree of the court; and if he had pled

23 guilty to the underlying offense that resulted in the

24 contemptuous behavior, a document indicating that that

25 particular plea of guilty had occurred. And those two

1 documents, in and of themselves, would be sufficient to
2 prove beyond a reasonable doubt.
3 So I don't believe it's the amount of time or
4 the amount of witnesses or the quality or the quantity of
5 the evidence that's presented. It is the burden that the
6 State places upon the prosecution in order to make --
7 reach that determination and the fact that they accord the
8 defendant various constitutional rights that are the
9 equivalent of what he's --
10 QUESTION: May I ask you another question about
11 Missouri procedure? Supposing the defendant pleads guilty
12 to the crime, the underlying crime, does the -- but then
13 he disputes the persistent or dangerous offender status,
14 would there then be a separate hearing on those issues?
15 MR. SINDEL: Yes, Your Honor.
16 QUESTION: I see.
17 MR. SINDEL: Although I would -- I would suggest
18 that that very infrequently happens.
19 QUESTION: No, but I suppose it could happen,
20 if, say, the indictment had failed to allege the prior
21 fact, or something like that.
22 MR. SINDEL: If the indictment had failed to
23 allege or --
24 QUESTION: That'd be the end of the game right
25 there.

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1 MR. SINDEL: That would be the end of the game.
2 Just like in Bullington if the State had failed to give
3 appropriate notice of their intention to, in fact,
4 proceed, and the evidence that they intended to use at the
5 penalty phase, that would be -- that would be enough
6 reason, and of itself, for the trial court to basically
7 preclude the application.
8 QUESTION: But it's not too unusual, is it, to
9 have a guilty plea on the merits and then have a hearing
10 on sentencing, on mitigation and aggravation, even in a
11 noncapital case?
12 MR. SINDEL: The only reason I say it, Your
13 Honor, is that -- I like to think of myself as a trial
14 lawyer, as opposed to an appellate lawyer; I'm a little
15 unfamiliar up here. But in terms of situations like that,
16 oftentimes in -- those are results from negotiations and
17 the negotiations go through that.
18 QUESTION: Well, I understand, but the judge
19 isn't always bound by the negotiations.
20 MR. SINDEL: If the judge in Missouri indicates
21 that he is not going to be bound by the negotiations, then
22 he will probably tell the parties that, and the plea may
23 then go forward, but obviously the defense counsel would
24 probably be well advised to search for a more lenient
25 tribunal.

1 In --

2 QUESTION: Your answer to the Teague question
3 that Justice O'Connor asked is simply that the contrary
4 authority was, as the Eighth Circuit said -- they used
5 some adjective besides mistaken -- seriously mistaken, is
6 that -- that's it?

7 MR. SINDEL: That's the adjective, I believe,
8 that's in the opinion, that's correct, Your Honor.

9 In terms of dealing with the Teague issue, as
10 well there's also the exceptions of Teague. And it's our
11 position that the Double Jeopardy Clause has especial
12 implications as far as the first exception to Teague,
13 which requires that new rules that place an entire
14 category of primary conduct beyond the reach of the
15 criminal law, or that prohibit imposition of a certain
16 time of punishment for a class of defendants because of
17 their status or offense.

18 Which is the application that was used by this
19 Court in Penry v. Lynough and joined by all the Justices
20 in making the determination as to whether or not there is
21 a particular category in which an individual may be
22 insulated from the determination or the application of the
23 Teague principles. And it's our position that the Double
24 Jeopardy Clause, in fact, does this, and does provide this
25 sort of insulating protection to this particular defendant

1 and to other defendants.

2 It's very difficult, in many ways, to apply the

3 double jeopardy principles to the Teague analysis in some

4 ways, and this has been recognized by this Court in

5 Robinson v. Neil when it determined that the double

6 jeopardy applications in Waller v. Florida were to be

7 retroactive. And Benton v. Maryland --

8 QUESTION: But that was long before Teague,

9 though, wasn't it?

10 MR. SINDEL: That is correct, Your Honor. To

11 the best of my knowledge, this situation is the first time

12 that the Court has had to address the double jeopardy

13 implications in a Teague -- in light of Teague. But the

14 difficulty with Teague -- for example, one of the

15 exceptions in Teague talks about the accuracy of the

16 proceedings and the fact-finding proceedings. The

17 difficulty with applying the double jeopardy principles is

18 double jeopardy is not necessarily concerned with

19 accuracy.

20 QUESTION: You mean that it doesn't come under

21 that justification for accepting Teague?

22 MR. SINDEL: It -- there are, obviously, in the

23 cases throughout this Court's opinion, that accuracy is

24 one of the underlying concepts in the application of the

25 Double Jeopardy Clause, for fear that the State use --

1 with use of their resources over and over, will undermine
2 the defendant and eventually be able to obtain a verdict,
3 even though he may be innocent.
4 QUESTION: But you're concerned -- or we are
5 concerned in this case with an entirely different accuracy
6 concern, and that is the concern for adequate evidence
7 before making a determination. So that in point of fact,
8 to apply -- to allow the rehearing on this issue is going
9 to enhance the possibility of accuracy, not undermine it.
10 MR. SINDEL: That -- that is conceivably
11 correct, Your Honor. But in every situation in which the
12 Double Jeopardy Clause, there is the possibility that the
13 actual determination of the -- that the offender is guilty
14 or not guilty may be undermined or undervalued.
15 And, in fact, this Court in Ohio v. Johnson and
16 United v. Scott -- United States v. Scott, the Chief
17 Justice indicated that that is not the determination, as
18 to whether or not he is, in fact, innocent. It's whether
19 or not there's been a proceeding that has occurred in
20 which the State has had that opportunity to present its
21 evidence. And in this particular situation, they had the
22 opportunity.
23 QUESTION: Well, that's good double jeopardy
24 analysis, but I don't think it gets you where you want to
25 go under the second Teague exception.

1 MR. SINDEL: I do not believe that our
2 position -- I'd like to tell the Court that our position
3 under the second Teague analysis is pristine and easily
4 determined. I don't believe it is. And that is because
5 the double jeopardy precludes the trial from taking place
6 so that there is no accuracy determination, there is no
7 fact-finding process.
8 And as this Court recognized in Robinson v.
9 Neil, in a trial, a second trial could be perfectly fair.
10 It could have -- it could be the best trial in the world,
11 but that isn't the situation, and that's why Robinson v.
12 Neil held that double jeopardy application had to be
13 retroactive, and that's why Ashe v. Swenson said that
14 Benton v. Maryland was retroactive, because the procedures
15 there were to stop the second trial from taking place at
16 all.
17 QUESTION: Yes, but it wasn't in the name of
18 accuracy that they did it.
19 MR. SINDEL: In the Robinson case?
20 QUESTION: Well either Robinson or Ashe against
21 Swenson, I don't think.
22 MR. SINDEL: Well, Ashe v. Swenson obviously had
23 some concerns for accuracy because the individual was
24 acquitted the first time around. They said, you know, you
25 basically had your shot.

1 QUESTION: Yeah, but to say you basically had
2 your shot is counter to accuracy, it seems to me. If you
3 say, well, the second time around we've got more evidence
4 and, you know, both sides can marshal their resources
5 better, that's a good argument for accuracy. But the
6 argument of double jeopardy is you shouldn't have a second
7 chance, but that's not an accuracy argument.
8 MR. SINDEL: In Ashe v. Swenson, however, the
9 concern was, that as the State admitted at that -- in that
10 particular proceeding, was that we had used the first
11 trial simply to hone our strategies as a dry run on the
12 subsequent trial. And the Court recognized clearly in
13 that particular situation, that that was an accuracy
14 determination.
15 I think, however, as far as the exceptions under
16 Teague, our stronger argument is under the first exception
17 under Teague. Clearly, this is a situation in which this
18 defendant would be insulated from any persistent offender
19 status by the failure of the State to present adequate
20 evidence at the first hearing.
21 QUESTION: As far as that evidence is
22 concerned -- and I perhaps didn't understand an answer you
23 gave to Justice Stevens' question. As I understand this
24 statute, the prior offenses, it's just the existence of
25 the felony. There's nothing in here that indicates that

1 the circumstances of the felony are relevant. A
2 persistent offender is one who has pleaded guilty to or
3 found -- been found guilty of two or more felonies
4 committed at different times. It doesn't say anything
5 about the character of the felonies.
6 MR. SINDEL: The character of the felony is the
7 felony itself. In other words --
8 QUESTION: The felony of indictment, but not the
9 prior felonies. In other words, to establish that someone
10 is a persistent offender, you wouldn't have to show
11 anything about the character of the prior convictions
12 except that they were convictions for felonies.
13 MR. SINDEL: That is correct. And --
14 QUESTION: Of course, that's not true of the
15 dangerous offender.
16 MR. SINDEL: No, that is not true with the
17 dangerous offender.
18 QUESTION: There is goes to the character.
19 MR. SINDEL: But it is true of the prior and
20 persistent offender.
21 QUESTION: Which is what we're dealing with
22 here, if it's a persistent offender?
23 MR. SINDEL: That is correct. That is the
24 allegations that were made, and that was the proof that
25 was accepted when the State got their second crack.

1 We believe that -- in terms of the Teague
2 analysis, that a persistent offender or someone who has
3 been charged as a persistent offender is a category of
4 defendants that would be insulated, then, from the
5 possibility of prosecution, and the State would be
6 precluded from, you know, relitigating the persistent
7 offender status on that particular crime and that
8 particular case.
9 I think it's important to understand that in
10 terms of the Bullington decision and what had occurred, I
11 had heard it referred to that it did not have the
12 hallmarks of the trial. But I believe that, in
13 particular, this proceeding required all the hallmarks of
14 the trial.
15 The defendant was afforded his Fifth and Sixth
16 Amendment rights, his right to counsel, his right to
17 confront and cross-examine witnesses, and his right to
18 present evidence on his own behalf. The State was
19 required to prove their burden beyond a reasonable doubt,
20 and failing that, the judge was entitled or should have
21 acquitted him.
22 And, in fact, if the judge had made the
23 appropriate determination in this case and had said that,
24 yes, you have failed in any way to bring before me any
25 evidence -- and I stress, as the Eighth Circuit did, they

1 brought no evidence before the court to indicate that
2 there was any prior convictions. In that particular
3 situation, then, the judge would have made the appropriate
4 ruling and the case would have gone to the jury that would
5 have been the end of the situation.
6 For some reason unbeknownst of the parties, the
7 courts and the prosecutors failed to, in any way, indicate
8 on the record what the situation was and why that
9 occurred, even when requested to by the court of appeals,
10 and the case was then sent back.
11 I would like very briefly to address the
12 concerns that have been raised by the Government
13 concerning the application of any decision in this case to
14 the possible sentencing guidelines. I think there are a
15 number of distinctions that can be drawn from the case
16 involving Mr. Bohlen and, in fact, the situation involving
17 the sentencing guidelines.
18 First of all, the standard of proof is
19 significantly different; the preponderance of the evidence
20 that's sufficient for the Government to carry the weight
21 in the sentencing guidelines situations. And also the
22 Court -- this Court recognized in Poland v. Arizona that
23 they're not going to break up that sentencing
24 determination into several groups of minitrials.
25 But this is a situation, in this case, where

1 there is one verdict that was reached, and that is whether
2 or not this individual had been -- should properly be
3 classified as a persistent offender. The State failed in
4 their first opportunity to convince the court that that
5 was appropriate. They should not have been given a second
6 opportunity.
7 Thank you, Your Honor.
8 QUESTION: Thank you, Mr. Sindel.
9 Mr. Jung, you have 5 minutes remaining.
10 REBUTTAL ARGUMENT OF FRANK A. JUNG
11 ON BEHALF OF PETITIONERS
12 MR. JUNG: Thank you, Mr. Chief Justice.
13 QUESTION: Before you start, can I just ask you
14 one question?
15 MR. JUNG: Yes, Your Honor.
16 QUESTION: Your questions presented do not
17 mention the Teague issue. Is that right -- correct?
18 MR. JUNG: I believe it's encompassed -- fairly
19 encompassed in the first question, Your Honor.
20 QUESTION: It doesn't mention Teague. And you
21 just -- at the end of the brief you did. I thought it was
22 sort of like our Izumi case, that it was discussed in the
23 briefs but not in the question.
24 MR. JUNG: No, Your Honor. Well, Your Honor, in
25 the Izumi case this Court stated that the Teague was

1 fairly included in the first question, and we feel that if
2 we're asking should it be extended, that fairly
3 encompasses if it is extended --
4 QUESTION: Well, the first question doesn't say
5 anything about extending. It just says should apply.
6 MR. JUNG: Well, should apply. Well --
7 QUESTION: That, you think, implicitly raises a
8 Teague issue?
9 MR. JUNG: We believe so, Your Honor. In any
10 event, this -- the Court also noted that if it raises --
11 decides an important question, even if it's not raised in
12 the question presented, you can still decide it. So you
13 can still decide it, since it does raise an important
14 question. Plus since it was not objected to --
15 QUESTION: Well, that's part of what Izumi was
16 all about, wasn't it?
17 MR. JUNG: Pardon me, Your Honor, that it wasn't
18 an important question or it wasn't --
19 QUESTION: Well, the circumstances under which
20 we will address things that aren't raised in the Petition
21 for Certiorari.
22 MR. JUNG: That's correct, Your Honor. But it
23 was also raised for the first time in the brief in Izumi.
24 And the Court noted that even if we decided the question,
25 it wouldn't be an important question. It would only

1 address this case and it wouldn't help the general
2 interest because they would have to decide whether the --
3 they had standing, rather than whether the dismissal --
4 the summary judgment dismissal, I believe it was, would --
5 QUESTION: The intervention, whether the Federal
6 circuit erred in refusing to allow Izumi to intervene was
7 not a cosmic question.
8 MR. JUNG: Correct, Your Honor. They said to
9 decide that wouldn't be that important of a question.
10 Plus also in Izumi, we think, is distinguished because in
11 Izumi it was objected to. In the respondent's brief there
12 was no objected. We would assert there'd be a waiver in
13 that situation, to the issue.
14 The issue that I'd like to raise here on
15 rebuttal, Your Honors, are that respondent seems to assert
16 that we're not looking at the double jeopardy applying to
17 sentencing, we're determining to the status. Clearly, if
18 they're asking it to apply to a status, it would be a new
19 rule implication, because this Court has never decided
20 that it applies to the status of an habitual offender.
21 The status is no different from the factual question of
22 sentencing, but it is a distinction that a court has made.
23 The issue of whether double jeopardy applies to
24 noncapital cases is subject to debate, as Justice O'Connor
25 has noted. In a recent case in which -- we informed

1 respondent's counsel, and was decided only a month ago in
2 Illinois. In People v. Levin, the Illinois Supreme Court
3 declined to apply the Bullington to a not -- their
4 habitual offender statute. And it shows that reasonable
5 jurors can disagree.
6 In fact, in the Lee case, the Lee case did
7 discuss the Bullington and distinguished -- it said this
8 is not Bullington. We think that's a good-faith analysis
9 of the existing precedent at that time. As to the
10 exceptions, surely respondent is not stating that an
11 habitual offender is a protected class which should be
12 implied under the first exception under Teague. Are we
13 encouraging habitual offenders, to state that you are a
14 protected class of individuals that obtain a right, that
15 will not be punished because of the new -- because of an
16 enactment of a new rule? I would disagree with that, Your
17 Honors.
18 Lastly, as I think the Court noted, was there is
19 a distinction regarding the accuracy. As Justice Souter
20 pointed out, this gives a more accurate consideration for
21 the jury or for a sentencer to impose, knowing the
22 background of a defendant. Whether it be a judge or jury,
23 they should have all rights of the facts -- history of the
24 defendant. Even in capital cases, this Court has decided
25 that juries should have the broadest spectrum of

1 information of a defendant's background before deciding
2 his fate. That would make it more accurate, the same way
3 as this -- this situation.
4 QUESTION: But would you make the same argument
5 if there were a dangerous offender and the issue was
6 whether or not the particular crime had all the
7 aggravating circumstances attached to it that the State
8 relied on? Could you have a second trial on that kind of
9 issue in the same way?
10 MR. JUNG: I think in that situation, Your
11 Honor, it would be different. I --
12 QUESTION: And this statute does cover that very
13 situation, doesn't it?
14 MR. JUNG: That's correct, Your Honor. But that
15 statute -- that section of statute has not -- is not in
16 the law journal.
17 QUESTION: No, I understand, but your argument
18 applies to it.
19 MR. JUNG: Thank you, Your Honors.
20 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Jung.
21 The case is submitted.
22 (Whereupon, at 11:50 a.m., the case in the
23 above-entitled matter was submitted.)
24
25

CERTIFICATION

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PAUL CASPARI, SUPERINTENDENT MISSOURI EASTERN CORRECTIONAL CENTER, ET AL

CHRISTOPHER BOHLEN
CASE 92-1500

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BY Ann Mari Federico

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