OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: ANGEL JAIME MONGE, Petitioner V CALIFORNIA.

CASE NO: No. 97-6146

PLACE: Washington, D.C.

DATE: Tuesday, April 28, 1998

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IN THE SUPREME COURT OF THE UNITED STATES

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ANGEL JAIME MONGE, :

Petitioner :

v. : No. 97-6146

CALIFORNIA :

- - - - - - - - - - - - - - - - - -X

Washington, D.C.

Tuesday, April 28, 1998

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:59 a.m.

APPEARANCES:

CLIFFORD GARDNER, ESQ., San Francisco, California; on behalf of the Petitioner.

DAVID F. GLASSMAN, ESQ., Deputy Attorney General of California, Los Angeles, California; on behalf of the Respondent.

MATTHEW D. ROBERTS, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting the Respondent.

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P R O C E E D I N G S

(10:59 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in Number 97-6146, Angel Monge v. California.

Spectators are admonished do not talk until you get out of the Courtroom. The Court remains in session.

Mr. Gardner.

ORAL ARGUMENT OF CLIFFORD GARDNER

ON BEHALF OF THE PETITIONER

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

If the judge in this case, or the jury, had found sufficient evidence to sustain the charged allegation, and the State court of appeal had affirmed that finding, that judgment as to my client would have been final. I could not go into State court, empanel a new fact-finder, and try it again.

This case arises, or presents the flip side of the question.

QUESTION: Could you in other States, or is that a peculiarity under California law, or is this just a rule of finality that prevails, you think, in most jurisdictions? You just -- no way to reopen it?

MR. GARDNER: My guess is that it's a rule of finality.

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QUESTION: Newly discovered evidence, can't you --

MR. GARDNER: Well, there could be a collateral attack, certainly, but I could not go in in the absence of some kind of new evidence. The case would be final on direct appeal as to my client.

QUESTION: But any number of collateral attacks might be possible.

MR. GARDNER: Certainly. There's a presence of collateral attacks, new evidence if there was suppressed evidence, but this case presents the flip side of the factual scenario I started with, where there's been a finding of insufficient evidence, and the question is, finding by the appellate court, does that finding have any finality? The question in this case is, does double jeopardy prevent the State from going in and relitigating the case.

QUESTION: Well, does California have -- in your first hypothetical, assuming you lose and you find there was something wrong, there was not really a prior conviction, there's no motion to modify the sentence? After the court has affirmed the conviction, the man has served for a year, and all of a sudden we find out that the three strikes isn't right, he can't go into the superior court in the State of California and ask for --

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to modify the sentence?

MR. GARDNER: He could seek a writ of habeas corpus, or if the trial court still had jurisdiction, perhaps. There are collateral attacks that could be made on that sentence, absolutely.

QUESTION: And of course the State can't collaterally attack the sentence. The State is bound by what happens on direct review.

MR. GARDNER: There is -- under the Double Jeopardy Clause the State has no right to collaterally attack or direct attack the judgment of acquittal.

QUESTION: Well, but the State, there's simply no proceeding available. If, say, the jury acquits your client there's no proceeding available whereby the State could appeal and say, probably because of double jeopardy, that this was a wrong result.

MR. GARDNER: I think that's right, because of the Double Jeopardy Clause there is no right to appeal a jury's finding, or a jury verdict of acquittal. What the question really gets at in this situation is the tension I think that the Court addressed in Burks v. United States, the possible distinction between a judgment of acquittal by an appellate court and a judgment of acquittal by a jury.

QUESTION: Well, of course, it's not just a

judgment -- you're saying that a judgment of acquittal is the same thing as a sentencing determination.

MR. GARDNER: Well, for purposes of the distinction between an appellate court's finding and a jury verdict, the distinction that the Court was referring to in Burks, the question is, should those two be treated differently?

There may be other reasons why a sentence enhancement trial is not subject to double jeopardy and we're certainly going to talk about those, I --

QUESTION: I hope you will, yes.

MR. GARDNER: -- I suspect, but for purposes of the distinction between a trial acquittal and an appellate acquittal, Burk suggests that there's no rational reason why there should be a difference. In both situations the treatment should be the same, otherwise the petitioner or the appellant is arbitrarily deprived of some right simply because the trial level fact-finder made the wrong call.

QUESTION: Well now, historically I guess we have not thought that sentencing aspects are covered by the Double Jeopardy Clause for most crimes, have we?

MR. GARDNER: That's correct.

QUESTION: And if there were a judge imposing a sentence in a case and imposes it and then the defendant who is sentenced appeals on the ground that the judge

imposed a sentence not authorized by law and prevails, then I suppose it would be remanded for resentencing.

MR. GARDNER: Yes, it -- I agree.

QUESTION: You wouldn't be arguing double jeopardy here.

MR. GARDNER: I certainly wouldn't, or certainly not here. That would not be -- under the Court's precedents double jeopardy plainly does not apply to decisions made at traditional sentencing hearings.

QUESTION: Right.

MR. GARDNER: That's not what this case is all about.

QUESTION: But you say that this is different because of the special procedures that California employs in the context of this sentencing.

MR. GARDNER: Yes. In all respects the sentencing in this case is identical to a trial on guilt or innocence -- proof beyond a reasonable doubt, notice, the right to confrontation, the right to a jury verdict --

QUESTION: California was foolish to provide those protections. You're saying California should have simply left it up to the judge to find those aggravating factors by a preponderance of the evidence, and in that case if the judge was reversed you'd be able to send it back and have it found again, right?

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MR. GARDNER: Well, I don't agree with the predicate that California was foolish for doing it. I think there were sound policy reasons that the legislature had for giving these rights.

QUESTION: But your argument is so counterintuitive, that the more protection the State gives to the defendant the worse shape the State is in as far as being able to resentence if it's overturned on appeal.

Why do you want to punish the State for being more concerned about the prisoner's rights, and instead of letting the judge find it by a preponderance, saying, we're going to insist that it be found by a jury beyond a reasonable doubt?

MR. GARDNER: I don't view it as punishing the State. This is the argument that's been made by some of the amicus, the so-called no good deed goes unpunished, which is certainly --

QUESTION: I didn't think of that.

(Laughter.)

MR. GARDNER: Then I'm sorry I suggested it.

(Laughter.)

QUESTION: But are you accepting -- you are accepting that California, unlike the death situation where there has to be a procedure to present the mitigators and the aggravators and -- that for this kind

of sentencing it isn't required to have a trial-type hearing at all?

MR. GARDNER: Yes.

QUESTION: You're conceding that?

MR. GARDNER: Well, certainly perhaps 3 weeks ago I could have made a different argument. In light of Almendarez-Torres I don't think I'm in a position to make that argument, and so I'm not going to make that argument.

What I am saying is that when a State elects to treat this just as a trial on guilt or innocence, then there are some consequences, because when the State is enacting this legislation there really are two models, generally, in criminal law.

We have the traditional guilt-or-innocence model, which has all the rights, all the constitutional rights that typically attach to such proceedings, and we have traditional sentencing, and the legislature in this case did not choose the traditional sentencing model, which we --

QUESTION: But why is the State locked into two models? Why can't a State say, look, we want to give him some kind of hearing, but we don't want it to be -- we don't want to get into the Bullington mode, so are you really saying that as a matter of constitutional law the State is frozen into that stark choice?

MR. GARDNER: No, and I --

QUESTION: Either give him no hearing, or give him the full-dress hearing with the double jeopardy?

MR. GARDNER: I didn't mean to suggest that. If I did, then I misspoke. What I'm suggesting is that as a practical matter, when you look at the statutes that the States have enacted, when you look at 50 statutes as to sentence enhancements, what you see is State legislatures choosing from two models.

Now, I agree they don't have to, but as a practical matter, that's what we see. We see either a selection of a trial model with all the rights, or we see selection of a traditional sentencing model.

QUESTION: But this isn't exactly one or the other, is it, because although you said in a conclusory way a moment ago that this, in fact, is the choice of the trial model, there are at least two respects in which it's different from the usual trial model and different from what was involved in Bullington.

Number 1, although in one respect there is a so-called binary choice here, the binary choice nonetheless operates in the sentencing proceeding in which there is the traditional judicial discretion to set the base sentence upon which the binary -- the multiplier will be applied and number 2, as I understand it in this case the

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State has an appeal which the State does not normally have in the traditional model, so we're somewhere in between, it seems to me, here.

MR. GARDNER: I don think so, and let me, if I can, take them one at a time.

As to the first point, the point that although the jury is making -- the fact-finder is making a binary determination ultimately there's discretion at sentencing to choose from among the various sentencing options --

QUESTION: And in fact I -- perhaps I didn't speak properly on that. The discretion is even greater than that, isn't it? I mean, is it the judge or the jury that can decide for policy reasons that in fact the so-called strike scheme shouldn't apply? One of them can.

MR. GARDNER: Well, with respect to all sentence enhancement allegations in California, whether it's a current conduct enhancement such as firearm use or great bodily injury, or a strikes allegation, there's a right to a jury, and the jury, or the judge if a jury is waived, is the fact-finder for purposes of making the determination as to whether the State has presented in -- sufficient evidence.

QUESTION: But isn't -- even beyond sufficiency of evidence, isn't there also a discretionary element somewhere?

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MR. GARDNER: After the fact-finding stage, where the jury or the judge, if a jury is waived, makes the determination that yes, the firearm use has been proved, or yes, the strike allegation has been proved. The judge has discretion under California law, under section 1385, to dismiss that in the interests of justice. That may be what Your Honor is referring to.

QUESTION: Okay. That's a much broader discretion than we find in any trial.

MR. GARDNER: Well, actually --

QUESTION: Normal trial scheme.

MR. GARDNER: Actually, under California law it isn't, judge -- I'm sorry, Your Honor -- because --

QUESTION: Don't worry, I don't regard it an insult.

(Laughter.)

MR. GARDNER: It isn't because what we see in trials on substantive offenses in California is that very same power under section 1385. That in no way distinguishes a trial on a sentence enhancement allegation from a trial on a substantive offense under California law.

QUESTION: You mean, if someone is charged with armed robbery and the case is proved and so on the judge can say, well, I think in the interest of justice this

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should be dismissed?

MR. GARDNER: The judge, under California law, can dismiss any allegation in the interests of justice.

QUESTION: Really.

MR. GARDNER: So in that sense --

QUESTION: Okay, so we're back to my original two. I put you off your argument. We're back to my original two, the two distinctions from the normal --

MR. GARDNER: Yes. You may be, Your Honor, but I have forgotten.

(Laughter.)

QUESTION: Okay. Fair enough. I said there's discretion in the sentencing function in deciding, sort of the basic sentence to which the multiplier will be applied, and secondly there's a State appeal.

MR. GARDNER: Yes. As to the first of those, there is discretion, when we come to sentencing, for the trial court to choose among the appropriate sentences, and yes, that is not a binary decision. That is the traditional, normative decision that is made at sentencing hearings, and I'm not suggesting for a moment double jeopardy applies to that situation.

What I am suggesting is that in the separate hearing, and often it's combined directly with the trial on guilt or innocence, when the jury has reached a verdict

on a firearm use allegation or on a strike allegation, that binary determination, yes, the defendant had a gun, no, the defendant didn't have a gun, or yes, you've proven the strike, no you didn't, it's that binary determination to which double jeopardy applies.

QUESTION: Okay, so in fact you're --

QUESTION: In -- go ahead.

QUESTION: I was just going to -- you're arguing for something a little different, I guess, from what was involved in Bullington, because I thought -- I thought in Bullington the sentencing proceeding was regarded as one, in effect, unitary proceeding, and you're now saying, well, there are two subparts of the sentencing proceeding. Double jeopardy applies to one but not to the other.

QUESTION: May I --

MR. GARDNER: I think as a -- as a matter of the facts of Bullington, it turned out that they were the same, the jury's sentence, both on -- the factual determination and the sentence was the same, but I think that the critical component, if I had to break them out, would be the binary determination of fact that was made, and that's made here. It's --

QUESTION: May I -- excuse me. I thought you were through with your answer.

May I ask you, if you can do it in just a

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sentence or two, because I don't want to take too much of your time, to state the argument you would have made if we hadn't decided Almendarez the other way a few days ago?

MR. GARDNER: If Almendarez-Torres had been decided differently, or perhaps not been here, I probably would have placed a greater significance on the fact that -- the additional exposure to punishment that a client faces under a three strikes or a firearms allegation is so high that that in itself should --

QUESTION: And it cannot be imposed unless this critical finding is made by the fact-finder.

MR. GARDNER: Yes, that's right, Your Honor.

QUESTION: Mr. Gardner, even though Almendarez-Torres has been decided, isn't it possible -- all that said is that recidiv -- it doesn't say that recidivism laws must be nonelements. It just says that they may be, and isn't it open to us to find that even if the State calls it a sentencing enhancement, if, in fact, it is treating it with a separate jury trial beyond the reasonable doubt finding and what-not, in fact it's not just a sentencing enhancement.

In fact, the State is treating it as an element of the offense, and if it is an element of the offense, then by reason of normal double jeopardy principles and not the invention of some new double jeopardy application

to things that aren't elements of the offense, your client would be entitled not to be tried again.

MR. GARDNER: I agree, and that's precisely the argument I'm trying to make.

QUESTION: Well, I don't think you made the argument -- no, you've never come out and confronted the State and said, even though they say it's an enhancement, it's not an enhancement, it's actually an element.

MR. GARDNER: Then let me state it now, if I haven't before. The label that's attached, whether it's enhancement, or whether they call it trial, is of no moment to the double jeopardy analysis.

What's important in the double jeopardy analysis are three things. Does the fact expose the defendant to additional punishment, does it have the hallmarks of trial, particularly proof beyond a reasonable doubt, and is it a binary determination?

QUESTION: Now, what's your authority for those three propositions?

MR. GARDNER: The hallmarks of trial, of course, stems from Bullington.

QUESTION: Yes.

MR. GARDNER: The exposure to -- the fact that exposes to additional punishment really stems from some of the due process cases this Court has now --

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QUESTION: So you're not relying on any one case, then?

MR. GARDNER: No. I think one of the problems with some of the double jeopardy cases, or the analysis, is that there are a number of different policies on which the Double Jeopardy Clause is implicated, so it isn't always possible to rely on one case to establish or set forth a framework.

I'm trying to pull from the Court's precedents what I see happening, and that is, in the due process cases, Specht, and Chandler, and Chewning, the Court said, this is a new fact that exposes you to additional punishment, so we're not going to treat it like traditional sentencing, and I'm suggesting that take that analysis into the double jeopardy context, because at some level I think it makes sense.

QUESTION: Well, but what do you do with a due process case like North Carolina v. Pearce?

MR. GARDNER: Well, I don't think Pearce -- Pearce --

QUESTION: Pearce says you can get a tougher sentence on resentencing.

MR. GARDNER: Yes. I have no problem with that. The difference between this case and Pearce, of course, is what the State is suggesting here is that despite the fact

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that it had one full bite at the apple and presented insufficient evidence, which is conceded, they get another trial.

QUESTION: Well, that's not the only difference. Pearce also didn't involve a sentence that -- a fact that increased the sentence to which the defendant was exposed. It was all within the range of the original crime.

MR. GARDNER: Well, that, too --

QUESTION: That's crucial, that if you're going to say, even though this looks like an enhancement, it smells like an enhancement, it's not an enhancement. It seems to me not only because we gave it a jury trial, but also because the effect of the fact found is to increase the criminal liability of the individual.

MR. GARDNER: Well, I agree, it is crucial, and that's why the first part --

QUESTION: Wait a minute. I don't understand. Why isn't -- this charming book is the Sentencing Guidelines. Let's imagine that -- Federal -- it has, let's say, 800 or 1,000 different factors. Why, in your view, is it the case that all of these findings that the judges make, of course, are yes or no. I mean, they did it or they didn't.

There's a lot of enhancements in there and, moreover, the judge makes it, and then the person's

exposed to higher punishment. In your view the Double Jeopardy Clause apply to each of those?

MR. GARDNER: No.

QUESTION: Why not?

MR. GARDNER: Because although the Sentencing Guidelines are a way to increase punishment, it increases it within a previously prescribed range. In no way can a Sentencing Guideline finding expose the defendant to punishment in addition --

QUESTION: Oh, so if, in fact, this book had been enacted by Congress rather than delegating the power to the agency, i.e., the commission, then in your view the Double Jeopardy Clause would apply?

MR. GARDNER: No. Actually --

QUESTION: Then I don't understand.

MR. GARDNER: If I expressed that view, then again I misspoke.

QUESTION: I don't think you did. I'm trying to understand why not.

MR. GARDNER: No, I think the difference is this. As I understand the Sentencing Guidelines, what they do is assist the judge in selecting a sentence from among a previously prescribed range of sentences. That's what they do, as opposed to the distinction --

QUESTION: It says in the statute -- it says in

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the statute, say, zero to 20 years, and within that, these are factors, and you're saying it's the zero to 20 years that makes the difference.

MR. GARDNER: That's part of the difference.

QUESTION: Yes.

MR. GARDNER: That's part of the difference.

QUESTION: What else?

MR. GARDNER: That's the first part. The second part is that my understanding of the Sentencing Guidelines is that none of them have the hallmarks of trial in the sense that there's no proof beyond a reasonable doubt.

QUESTION: Well, that has never been decided, I mean, I think in this Court. In this Court it hasn't.

The -- all right, hall -- all right. Now, in California, my understanding is that California did try to adopt a system that they intended to be like the Sentencing Guidelines, but instead of doing it through delegation to a commission, what they did is the set of statutory provisions that we have here.

They give three choices, they -- you know, they have low, medium, and high, they build all the things into the statute, just as -- that's my correct understanding, isn't it?

MR. GARDNER: Yes.

QUESTION: All right. So why, if this is

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constitutional, should the effort to -- without double jeopardy, why should the effort of the State legislature to do roughly the same kind of thing through a set of statutes suddenly expose a person to double jeopardy?

MR. GARDNER: Well, the difference isn't between a statute and a regulation, and I'm not suggesting for a moment that the California system of what we call determinate sentencing level, where the judge chooses from 2, 3, or 4 years, where choice is within that previously prescribed range, are subject to double jeopardy.

What I'm saying is that the very separate factual determination which exposes someone to 25 years to life in addition to that 4 years, that's imposed on top of the 4 years and that could not be imposed in the absence of a finding, that binary determination is subject to the Double Jeopardy Clause.

QUESTION: Can you tell me --

QUESTION: Mr. Gardner, you don't think that this Court would have permitted judges to participate in the drafting and promulgation of the guidelines if they were functionally the same as legislation, do you?

MR. GARDNER: Actually, I'd rather not express an opinion on that.

(Laughter.)

QUESTION: You don't think that's relevant to

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this case, do you?

MR. GARDNER: That's certainly not an issue in this case.

QUESTION: May I ask you this. Going to the discretionary law, the trial judge says, I've weighed all of the factors and I'm giving you a sentence of 5 years, 4 years later, after he has only 1 year left, under a State procedure it comes back before the trial judge, he says, I've changed my mind. I think I was wrong the first time. You really should have 8. There's no finality? There's no double jeopardy?

MR. GARDNER: Well, double jeopardy typically would not apply to sentences. There are some -- it's difficult for me to answer the question in the absence of knowing why it's back there. If, for example, it's back there because defendant's appeal took longer and he got a new trial --

QUESTION: No, no. It's final, but the judge just said, I'm going to retain jurisdiction in this case to think about this a little longer, and he waits 4 years.

MR. GARDNER: You can't do that under California law, Your Honor.

QUESTION: But I'm assuming that you have some State procedure where this happens. I'm trying to ask whether or not there -- double jeopardy doesn't have, in

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your view, some component of finality, so that the defendant is not subject to the anguish, the agony of having to go back before a sentencing judge and think he might get more.

MR. GARDNER: Certainly, I think that there's a component of finality in the Double Jeopardy Clause. I think it's the primary purpose of the Double Jeopardy Clause, but putting together this Court's decisions in Bullington and DiFrancesco, I think what we get is that one of the things the Double Jeopardy Clause protects is the reasonable expectation of the finality of the parties.

On DiFrancesco, the Court looked at the existence of a statute which said, you can -- Government, you have the right to appeal a sentence.

QUESTION: Mr. Gardner, it would help me to put a little flesh on these bones and to tell us exactly what was the proof deficiency here. It's a little fuzzy.

I mean, it was a prior conviction based on a guilty plea, right?

MR. GARDNER: Yes, Your Honor.

QUESTION: To a crime called what, assault with a deadly weapon?

MR. GARDNER: It was a guilty plea to assault and the proof deficiency requires a brief understanding of the particular allegation at issue here, and that is, in

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defendant's current offense he was charged with having committed the prior assault, but that does not expose one, under the California scheme, to additional punishment.

What exposes you under the California scheme as -- what triggers the strike provisions if you have a prior assault is the question of whether you used, personally used a weapon in that prior assault.

QUESTION: Wasn't that charged as part of the indictment in that prior crime?

MR. GARDNER: In the original assault?

QUESTION: Yes.

MR. GARDNER: It was not either charged or established from the records of the prior conviction, and that was the proof deficiency in this case, to just --

QUESTION: What would it have taken to supply the deficiency? It was something about there only being four pages, or -- I forgot exactly what it was, but I was trying to figure out where the prosecutor slipped here. It didn't --

MR. GARDNER: The --

QUESTION: Yes.

MR. GARDNER: The prosecutor slipped here because what the prosecutor introduced was a four-page document that did, indeed, show that the defendant was convicted of assault in 1992. What the prosecutor did not

show is any documentation or any evidence whatsoever that the defendant personally used a weapon.

QUESTION: And where would that document, documentation have come from?

MR. GARDNER: Now, under California law the State has a limited universe of places to provide that information, or to seek that information, called the record of conviction, so the State would have had to look in the record of conviction to see if there was documentation to establish that in the 1992 assault --

QUESTION: What's in the record of conviction, the transcript of the evidence?

MR. GARDNER: Yes. The transcript of a preliminary hearing, if it's a guilty plea situation, if it goes to trial --

QUESTION: Which this was. This was a guilty plea, so I -- there were some pieces of paper that were missing, right, that the prosecutor didn't put in, and if he had put in those pieces of paper there would have been no problem, is that right?

MR. GARDNER: Well, if the pieces of paper that Your Honor is referring to were admissible and if, indeed, they contained the information that was necessary to cure the insufficiency --

QUESTION: Were they records of the very court

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that we were dealing with, or was there some other court?

MR. GARDNER: If the question is, was the 1992 assault conviction from the same superior court in the current case, I don't know the answer.

But the earlier question is, was it just a piece of paper, I mean, I suppose one can say that in any insufficiency situation, is that it could have been easily proven. I don't know the answer as to whether --

QUESTION: Well, it can't be easily proven if there's a presumption of innocence that applies. You presume a man's innocent till there's evidence to the contrary, and there's no evidence to the contrary here.

MR. GARDNER: Ultimately, that's the evidentiary failure in this case.

QUESTION: But you're saying there was proof of a prior assault, that there was proof of that.

MR. GARDNER: The question as to whether defendant committed a 1992 assault was, indeed, established by the State. The only question was whether he personally used a weapon, and the State introduced no evidence to that. Your question --

QUESTION: What about the fact that the lawyer didn't contest it? I mean, the lawyer didn't say, he didn't personally use it. The lawyer said, a stick isn't a deadly weapon, so no one's -- no one's -- there's a

charge, assault with a deadly weapon. It's introduced by the State as a -- the -- you know, to satisfy the requirement, which is what, assault with a deadly weapon that you use personally?

MR. GARDNER: Yes.

QUESTION: And then there is no objection on the ground of personal use. There's objection only on the ground that a stick isn't a deadly weapon, so why -- I never understood why, given that circumstance, the California intermediate court could have held that there wasn't enough evidence.

MR. GARDNER: Okay, for two reasons.

QUESTION: Yes.

MR. GARDNER: First, the fact that there's no objection does not in any way undercut the State's burden to prove the charge beyond a reasonable doubt. That ultimately is the question.

The reason the court of appeal correctly held -- and respondent has never even disputed the insufficiency, Your Honor -- is that an assault finding, even if it's with -- even if it's assault with a deadly weapon doesn't mean personal use, because there's always the factor of aiding and abetting. You're just as --

QUESTION: But it was -- it was a single defendant case. I mean, that much was established, right?

MR. GARDNER: That part was never established, Your Honor, at this trial, absolutely not.

In an informal colloquy before the hearing, the prosecutor said to the judge, well, judge, you know, this was a single defendant, but that was never introduced into evidence.

QUESTION: But what was introduced into evidence, the issue is whether there was an assault with a deadly weapon, is that right?

MR. GARDNER: The issue is whether defendant personally used a weapon during the assault.

QUESTION: Personally used a weapon. Now we have the following. He was convicted of assault with a deadly weapon. That's introduced. Second, the weapon involved was a stick, and now the question is, those two things, do they permit someone to conclude that he personally assaulted a person with a deadly weapon, particularly because nobody denies it.

MR. GARDNER: Well, if we had those two things --

QUESTION: Now, you have those three things --

MR. GARDNER: I will answer that question, but we don't have those things, because at the first hearing the State introduced no evidence that a stick was used.

Remember, what happened at that first hearing

was, the judge said, I'm going to take judicial notice of the conviction, and the conviction was for assault with a deadly weapon.

That, in and of itself under California law in over a decade, does not provide sufficient evidence, because there could be aiding and abetting, someone else could have used the weapon, or there could have been an infliction of great bodily injury.

Then the court said, is there any other evidence? The prosecutor said yes, I have a piece of evidence. I have Exhibit 1. That showed that the defendant had been convicted of assault, but it did not provide any evidence that a stick was used or that defendant was the one who used it.

That was never introduced into evidence at the first hearing, and that's why, under State law, the California court of appeal held there was insufficient evidence, after the Attorney General conceded it on appeal, Your Honor.

QUESTION: But -- so what exactly was presented? It was more than a guilty plea to -- there was more information than simply that the defendant had pled guilty to assault, is that not so?

MR. GARDNER: Yes, that's not so. There was nothing else presented, Your Honor. The four-page prison

package showed nothing but that defendant was convicted or pled guilty --

QUESTION: Does it take four pages to say --

MR. GARDNER: Well, it's a prison package, and it comes from the prison. It's not like the prosecutor crafted it for this case. It's a standard document. It has finger prints, often has finger prints, it has a picture, it has the nature of the conviction, sometimes it has the prison of commitment -- it's a standard package not crafted for this case.

QUESTION: And there would be no description of the crime beyond assault?

MR. GARDNER: Beyond, in this case, Penal Code section 245(a)(1), I believe was the provision, which, of course, is not sufficient in and of itself and that's why we have this finding by the State court of appeal, that was agreed to by the Attorney General and has never been contested, of insufficient evidence.

I did want to briefly talk about one of the other purposes of the Double Jeopardy Clause --

QUESTION: And there was an objection to that evidence being insufficient at the sentencing?

MR. GARDNER: There was no argument on insufficiency of the evidence, but under State law that is not necessary to raise insufficiency of the evidence on

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appeal, which was done, and the court of appeals said, you know, by gosh, you're right, there was insufficient evidence.

So there is no question as to whether defense counsel, under California law, has to raise a sufficiency argument at trial. He or she does not.

I did want to talk briefly about one other of the policies underlying the Double Jeopardy Clause. As this Court noted, I think in Burks, one of the other chief policies is the idea of preventing the State from refining its evidentiary presentation in successive trials, and that policy is directly implicated in this case, because after all, what did the State get from the court of appeal in this case? They got a --

QUESTION: Thank you, Mr. Gardner. Your time has expired.

Mr. Glassman, we'll hear from you.

ORAL ARGUMENT OF DAVID F. GLASSMAN

ON BEHALF OF THE RESPONDENT

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

The respondent asks this Court to confirm that the Double Jeopardy Clause does not apply to noncapital sentencing determinations. The Court has traditionally not applied the clause to noncapital sentencing

determinations, actually not to sentencing at all, and there are good reasons for reserving or limiting, I should say, the sole exception that has been recognized thus far by the Court, and that is --

QUESTION: Would you agree, then, that it would be a limitation, based on the rule as we would understand it, if we go back to Bullington?

MR. GLASSMAN: Your Honor, it's our position that Bullington is self-limiting, that Bullington does not purport to --

QUESTION: Well, I don't see how you can say that in the light of DiFrancesco, because DiFrancesco wasn't a capital, and if it had been the capital versus noncapital character, DiFrancesco would have been distinguished right then and there. On the other hand, that isn't what this Court did. This Court distinguished it on characteristics of the sentencing proceeding, so it seems to me that at least through DiFrancesco that's not the way we were viewing it.

MR. GLASSMAN: Well, Your Honor, I think more recently, specifically in Caspari v. Bohlen, the Court has described Bullington as arising and based largely on the rationale that applies in the death penalty context.

QUESTION: Your position is that it was Bullington that was a departure from the line of cases

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like Stroud.

MR. GLASSMAN: Yes, it is, Your Honor, because it is our position that the ultimate inquiry in the double jeopardy context is whether a criminal offense is being adjudicated. The Fifth Amendment, after all, speaks in terms of a criminal offense.

QUESTION: May I ask one question, Mr. Glassman? This case happens to involve an enhancement because of a prior act of the defendant that was not actually proven. If the enhancement had been based on the use of a gun instead, would your argument be precisely the same?

MR. GLASSMAN: Well, Justice Stevens, the Court has allowed for enhancements that share elements of the -- or aspects, I should say, of the underlying crime, so -- I don't know if that answered the question, but our argument generally --

QUESTION: It seems to me you could answer the argument yes or no, and I'm not quite --

MR. GLASSMAN: Yes.

QUESTION: I want to be sure what your answer is.

MR. GLASSMAN: Our argument is that -- is yes.

QUESTION: That's what I thought.

MR. GLASSMAN: That, for example, use of a weapon is a typical element of a sentence enhancement.

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QUESTION: Now, you don't rely on the fact that it -- this might be characterized as a recidivism case, as distinct -- as -- with any special weight in your argument.

MR. GLASSMAN: Well, it's given weight, in our view, insofar as the Court has generally decided that recidivism statutes do not present a double jeopardy concern.

QUESTION: Right, but if you relied just on that, and we only decided that, then it would leave open the question whether your statute would be valid as applied to use of a firearm, for instance.

MR. GLASSMAN: And that is why, Your Honor, our position ultimately is that the crucial concern is the guilt or innocence determination, but that is the concern -- that is the idea --

QUESTION: Right, and the --

MR. GLASSMAN: -- of the Double Jeopardy Clause that's described by --

QUESTION: And the question that's missing here is he was not proven to be guilty of precisely what needed to enhance, and in another example he might not have been proven guilty of using a firearm, if you call it an element of the offense rather than an enhancement.

MR. GLASSMAN: Well, there is disagreement, I

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think, in terms of the nature of this -- of exactly what happened in this case, and perhaps -- and this relates back to Justice Ginsburg's question, Justice Stevens, but if I could describe my view of how this originated in the first place, although --

QUESTION: Yes, before you get back into the facts -- I would like to hear your view of it, but it seems to me you've overstated what we've held.

We haven't held that recidivism does not raise double jeopardy concerns. We have held that if a recidivist statute is not an -- is not an element of the offense, if it treats recidivism as an enhancement, that is constitutional, but we haven't said that every recidivism statute is automatically an enhancement, nor have we ever said that for purposes of the Federal Constitution, it is an enhancement simply because the State chooses to call it an enhancement.

And what you have here is a situation in which the State calls it an enhancement, but both its effects and the trappings with which the court surrounds it do not look -- it doesn't walk and talk like an enhancement. It's just called that.

MR. GLASSMAN: Well, actually, Your Honor, it's our position that this is a traditional recidivism statute.

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The somewhat unique context of this case is that because California restricts the aggregating prior conviction to be a so-called serious felony, as described in California, there needed to be in this case an inquiry into whether it was a particular type of assault, but all of this arises after and only after the guilt determination is made, and returning to DiFrancesco, it's our view that DiFrancesco recognizes that the ordeal that's described as part of the double jeopardy inquiry is an ordeal that extends until the conclusion of the guilt determination.

QUESTION: But you wouldn't deny, would you, that if, in fact, the existence of the three pre-existing felonies, if the fact that they exist of a certain sort or not, if each of those were an element of the offense, then I take it you would not deny the applicability of the Double Jeopardy Clause.

If the offense were the offense of the underlying ones, plus felony A, plus felony B, plus felony C, that's called superoffense. Under those circumstances, I take it the Double Jeopardy Clause would apply.

QUESTION: That's not a hard question.

QUESTION: I mean, the answer's yes or no.

MR. GLASSMAN: I believe the answer would be yes.

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QUESTION: All right. I think it would be yes, too. Has anyone in this case at any level ever argued that these extra three elements are -- the three felonies are, in fact, elements of the offense?

MR. GLASSMAN: Your Honor, my understanding of the petitioner's argument is that the double jeopardy determination is based solely on whether or not the proceeding which has been labeled a sentencing proceeding and which we, of course, consider a sentencing proceeding, is, in fact, so akin to a trial on guilt or innocence in terms of its structure --

QUESTION: I know he's -- I know what he's arguing, and I asked him if he --

QUESTION: Justice Breyer asked you a question that I think could be answered yes or no.

MR. GLASSMAN: That is not the argument. The argument that you have proposed --

QUESTION: I asked you, has it ever been argued that these three things, the three extra felonies of a certain kind, their existence, that the need to have them is an element of the offense?

MR. GLASSMAN: I cannot recall a case that involves that particular --

QUESTION: I'm asking if in this case --

MR. GLASSMAN: No. The answer is no.

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QUESTION: It was not argued. Thank you.

MR. GLASSMAN: The answer is no.

QUESTION: And now you were going to tell us what this deficiency in the evidence was and how that deficiency could have been supplied.

MR. GLASSMAN: Your Honor, in this case the trial judge was reviewing -- or the sentencing judge, I should say, was reviewing a series of documents, and the judge, in view of the appellate court in California, was not entirely precise as to the basis of the judge's determination of the prior conviction.

There was a charge of a prior assault with a deadly weapon, and there was a guilty plea. The judge only formally announced that he was moving the document reflecting the conviction into evidence. He used other words, such as judicial notice, to refer to his review of other documents, and as soon as he decided that the prior conviction had been established, he added that lest there be any doubt, he was -- he had reviewed the court file.

Now, the court file refers to the documents that had been previously submitted to that court and in this case, in fact, there had been a prior hearing at which the petitioner's guilt -- the petitioner's eligibility under the statute would have been established by proof of his personal use.

QUESTION: The court file that you refer to is something different than what Mr. Gardner referred to as the four-page thing?

MR. GLASSMAN: Yes, Your Honor. It's our interpretation that the court file ostensibly refers to the documents in that proceeding that have been previously adjudicated.

QUESTION: Are you arguing that the evidence was sufficient to sustain the trial judge's sentence?

MR. GLASSMAN: Your Honor, I'm aware that the State courts have found that the evidence is insufficient. I'm not -- but my point --

QUESTION: But you're not asking us to review that, are you?

MR. GLASSMAN: No, but this Court has in effect reevaluated those kinds of determinations in --

QUESTION: By State courts, by -- we second-guess the State court on its application of its own law to the facts in the record here?

MR. GLASSMAN: No, Your Honor, but I think, for example, Lockhart v. Nelson indicates that the Court evaluates the nature of the finding that was made to determine whether it's properly characterized, for example, as insufficient evidence or trial error.

The same is true in Poland v. Arizona, which is

a case in the Bullington context.

But no, we do not dispute that the State courts have determined that there was insufficient evidence in this case. In our view, however, that entire analysis is confined to the sufficiency context, which is concluded when this proceeding begins.

I would also like to describe the nature of this proceeding, because the petitioner's argument is that if it looks sufficiently like a trial on guilt or innocence, it is a trial on guilt or innocence, notwithstanding the fact that guilt has been resolved prior to the hearing in this case, and therefore and argue the Double Jeopardy Clause does not apply.

In California in these proceedings, the record is abbreviated. It is six pages in the excerpts here. The record is static and fixed under State law. The trier of fact is not allowed to look beyond the record in the underlying case. That is, the original record.

The defendant is on notice and aware of all potential evidence. Typically, no defense is offered and none was offered here, as has been pointed out, and it is true that California has elected to provide additional procedural guarantees in these proceedings, but it is our view that because the guilt determination has been completed by the time of this event, as Justice Blackmun's

majority opinion in DiFrancesco describes it, that is behind the defendant at the time of sentencing.

There is no process here that is comparable to the determination of guilt or innocence, and in our view that also distinguishes this case from Bullington v. Missouri, and that is to say that in Bullington, of course, the Court held that the jury's decision to sentence the defendant to life in a capital case constitutes an acquittal of death.

And Justice Souter, I would agree with your observation, or the suggestion in your question, that the inquiry in Bullington ultimately was, is there evidence of the sole issue the jury decides, namely death or life, and I submit that is a fundamentally different issue, because in this case, unlike in the capital context, the jury in the petitioner's case was not the sentencer.

The jury, it is true, decides a fact within the sentencing context, and that fact determines whether the judge can double the sentence, but --

QUESTION: Mr. --

MR. GLASSMAN: I'm sorry, Justice Scalia.

QUESTION: I think Justice Souter wanted to ask you --

QUESTION: I was just going to say yes, but there are points on the other side, too, and the points on

the other side is that it's a fact that must be charged, it's a fact which is historical in nature as to which the jury has to say yes or no, it's a fact that has to be proved beyond a reasonable doubt, and these in fact are very trial-like determinations. They're very element-like determinations.

So it seems to me that it's difficult on your side for that reason to say, we can draw an easy categorical distinction.

MR. GLASSMAN: The distinction that we would draw, though, Justice Souter, is that in Bullington the Court attaches significance to the fact that the only choice in the sentence is the choice made by that trier of fact, and in this case that is -- it is true that is the only choice the jury makes, but that is not the choice that ultimately or definitively decides the sentence.

Once the jury --

QUESTION: Well, do you take the position that in California, for example, Bullington wouldn't apply because the sentencer can always say, well, for reasons of justice I'm not going to apply this?

MR. GLASSMAN: Of course not, Your Honor, but that's because I'm not merely describing a process in California in which the judge as -- decides to accept or reject the verdict, or the decision of the jury. My point

is that it is the judge in California in this noncapital context who arrives at the sentence.

The judge decides to apply either the lower, the middle, or the aggravated term, and the judge decides whether to allow the strike, so it is -- it seems to me it's fundamentally different than in Bullington, in which the jury's decision decides the entire event in the sentencing --

QUESTION: Well, you're certainly right there. Going back to an earlier colloquy, if the argument had been made here that in fact that was an element because -- for the reasons I just ticked off, it seems to have some element characteristics, would you agree that there might be a reason for -- a very good reason for coming out against you, not on the Bullington reason but, in fact, on the reasoning that what is really being charged here is an element, whether it's called that or not, so we might get the Bullington result for a different reason?

MR. GLASSMAN: I think -- I guess that I would disagree, Your Honor, because it seems to me that the trial on the offense concern remains paramount in the double jeopardy context, but with respect to your question --

QUESTION: So there's just -- then you're saying there's just -- there's always a categorical distinction

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between offense and sentence except in the capital area.

MR. GLASSMAN: I believe that's the lesson of Bullington, Your Honor. I believe that the Court's holding in Bullington is that it is unique to the death penalty process to carry over, or that the offense consideration survives, and returning to the Court's opinion in Caspari v. Bohlen, the Court there has suggested that it is that uniqueness. It is the uniqueness that Bullington describes as arising out of Furman v. Georgia.

QUESTION: Mm-hmm.

MR. GLASSMAN: And the sentencing discretion that is required, or certainly more important in the capital phase, is not at issue in this case, and that is why, in our view, when Justice Blackmun's majority opinion in Bullington described a hallmarks penalty trial as unique, he was referring to the uniqueness of the context of that case.

QUESTION: We even -- our terminology even suggests that. We speak of innocence of the death penalty as though that particular penalty were a substantive offense. We never speak of innocence of any other sentencing factor, just innocence of the death penalty.

MR. GLASSMAN: Yes, Your Honor, and the Court does not, and I don't think -- I don't understand

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analytically how one could be acquitted of a sentence and that is, of course, the petitioner's argument, that this is somehow an acquittal, as though, if he is correct, the State would be foreclosed from alleging a future recidivism action, for example, or that in the context of a death penalty case, if the sole aggravator was another criminal offense, the acquittal, or the decision of life, would constitute an acquittal of that future crime.

For these reasons, because this case fits squarely within the recidivism context, or the sentencing context, I believe that the Court's description in Caspari is significant here, and that is, the Court has observed in Caspari, which has been minimalized as a Teague v. Lane case, but in fact I think the Teague analysis is not irrelevant here when the Court in Caspari says that the determination, the prior determination of a sentence is an objectively verifiable fact, based upon readily available evidence.

QUESTION: But Teague doesn't apply to a case coming from a State court, Mr. Glassman.

MR. GLASSMAN: No, no, I'm not suggesting that the Teague analysis controls the case or is determinative, but my point is simply that when the Court said in Teague that, in terms of whether or not double jeopardy applied to noncapital sentencing, Justice O'Connor's majority

opinion clearly says that the Court's prior precedents had gone in exactly the opposite direction.

I think that that observation in Caspari was correct, as was the Court's observation in Caspari, unlike the concerns in the double jeopardy context, that when dealing with noncapital sentencing, and particularly the prior offender, there is an increased accuracy in verifying the record in the prior case.

California has implemented a variety of procedures, all of which are discretionary, to make this a fair proceeding. None of the rights that California has granted are required and in our view those rights do not constitutionalize this event or otherwise graduate it into a double jeopardy context that it would not be in unless these hallmarks are present.

QUESTION: Although they may elevate it to being an element of the crime, in which event they would elevate it to all the other things.

MR. GLASSMAN: Your Honor, I don't --

QUESTION: Although the point's been made that that argument was not presented.

MR. GLASSMAN: And I don't believe that their argument -- in other words, that the presence of these hallmarks is directed at the element issue. In other words, the emphasis that --

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QUESTION: But why can't I answer the question that way? The question presented is, does the Double Jeopardy Clause apply to noncapital sentencing proceedings that have all the hallmarks of a trial on guilt or innocence?

Why can't I answer that and say, yes, when those hallmarks in their context demonstrate that what was at issue was an element of the crime? Isn't that a fair way to answer the question presented?

MR. GLASSMAN: It's a fair way to answer it, perhaps, but again, my reading of cases such as McMillan v. Pennsylvania indicate that it is not the shared elements test that is determinative, and that in our context, in the double jeopardy analysis --

QUESTION: Why is it a fair element if it's not in the case, elements of the offense? Why is it a fair reading if the issue of elements of the offense is not in this case?

MR. GLASSMAN: May I answer the question, Your Honor?

QUESTION: Yes.

MR. GLASSMAN: Double jeopardy in my view speaks to guilt only.

Thank you.

QUESTION: Thank you, Mr. Glassman.

Mr. Roberts, we'll hear from you.

ORAL ARGUMENT OF MATTHEW D. ROBERTS

ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

SUPPORTING THE RESPONDENT

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

We believe the Court should not extend Bullington v. Missouri beyond capital sentencing. It should instead reaffirm the well-established rule that the pronouncement of sentence in noncapital cases is not accorded the same finality as an acquittal of substantive criminal charges.

Bullington turned on two factors, each of which was essential to the outcome. First, the sentencing proceeding at issue had all the hallmarks of a trial on guilt or innocence. Second, the ordeal and anxiety posed by capital sentencing are uniquely severe and invariably as great as those posed by a typical trial on guilt or innocence.

That's not the case with noncapital sentencing, so a bar on resentencing is not warranted. The Court's cases --

QUESTION: Well, it can be. I mean, you say -- what was the last part of it, that the consequences are just as severe as the consequences on guilt or innocence?

MR. ROBERTS: That they're uniquely severe, and invariably as great as --

QUESTION: Invariably. Well, okay. Not invariably, but in some cases the so-called enhancement factor can up the ante on the sentence tenfold.

MR. ROBERTS: It still is not a choice between life and death. The prisoner in all those cases, his life is not at stake, and it wouldn't make sense to look at each particular sentencing, at each particular sentencing procedure to evaluate not only whether it has the hallmarks but also whether the anxiety is so great that it ought to trigger double jeopardy. That would be an administrative nightmare.

The Court's -- besides, the Court's cases make clear that the central purpose of the Double Jeopardy Clause is to protect defendants against being repeatedly subjected to the ordeal and anxiety of a trial on guilt or innocence, and against the risk of erroneous conviction, not to guard against repeated sentencing.

QUESTION: If it did apply -- I'm not certain of the answer to this. I'm having -- suppose that you lost this case. Is the consequence of it -- I can see the consequence of it would be that when a person appealed and lost on appeal on the ground of insufficient evidence, you couldn't -- you're stuck with that. Is there any other

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consequence?

MR. ROBERTS: We would contend not, although there might be an argument that under the collateral estoppel line of double jeopardy that we would -- that the State would be bound in future --

QUESTION: They are anyway, aren't they, under collateral estoppel, or not? I mean, if a State tried to punish a person again, say for a somewhat different crime, but there was a factual issue that was identical, the same issue, aren't they bound by it, or not, to litigate it between the two parties?

MR. ROBERTS: They wouldn't be bound necessarily, because there would be a question of whether this determination in the sentencing context has all the -- you mean not as a constitutional matter?

QUESTION: No, I mean -- you know, I mean, what happens if, in fact, they have another trial, another punishment, another sentencing phase on a different matter, and it turns out that there's a factual issue that's identical, the very same fact?

MR. ROBERTS: That would be a rule of State --

QUESTION: Yes, but don't all the States -- do they, or not? How does it work?

MR. ROBERTS: I think that it's the case with sentencing determinations like this, and recidivist

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determinations, that it's a new -- that the State has a new chance to establish that true finding. It has been traditionally the case that that would bind the State in future cases.

QUESTION: The State loses the first time in the sentencing proceeding, where the issue is what happened on the night of July 5, 1988, at 6:00 in the morning, did he have a gun or not, and then he commits another crime, and in sentencing it becomes relevant again, and the State isn't bound, they can bring it up again, try and get him again?

MR. ROBERTS: My understanding, from what the California supreme court stated to be the rule, is that that's -- that the case with recidivist findings is that the findings may be alleged again in future proceedings.

QUESTION: Do you think there's a Due Process Clause issue there?

MR. ROBERTS: There certainly might be limitations under the Due Process Clause on what would be permissible, but that -- you know, obviously that's not the question here. That hasn't --

QUESTION: Well, DiFrancesco talked about an expectation of finality, and pointed out that there the defendant knew that there was a proceeding where the sentence could be appealed and that there might be more

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hearings, but if you have a procedure in which the sentence is final, the appellate court affirms the sentence, and then there's some proceeding, new proceeding to reopen it, it seems to me that that does maybe indicate that an expectation of finality is being disappointed.

That's not this case, I don't think.

MR. ROBERTS: Correct, it's not this case, Justice Kennedy, and we would submit that the expectation of finality that's created only goes so far as the State law that creates it.

I think it's important to recognize that the rule advanced by petitioner that trial-like hallmarks at sentencing automatically triggers a bar on resentencing places too little value on society's interest in accurate and appropriate punishment, and too great a value on defendant's interest in finality.

And it's been pointed out, it might discourage States from providing procedural protections at sentencing, because they wouldn't be free to do so without also triggering double jeopardy protection.

Finally, just to briefly address the issue that came up on the question of Almendarez-Torres. In addition to the fact that it hasn't been argued here, I think it would be inappropriate -- for the same reason that it would be inappropriate to have a rule that triggered

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double jeopardy by the procedural protections, it would be inappropriate to have a rule that said that the State has to make things an element of the offense when it decides it wants to provide certain procedural protections, because that's forcing it to trade off its interests in accurate and appropriate punishment against its decision to afford defendant certain protections to make the sentencing proceeding more fair.

In essence, the reading of Bullington that's advanced by petitioner here is as unworkable and unwise as it is unwarranted by precedent and principle, and we would ask that the Court should affirm the judgment of the California supreme court.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Roberts.

The case is submitted.

(Whereupon, at 11:57 a.m., the case in the above-entitled matter was submitted.)

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