

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 DAVID ALLEN SATTAZAHN, :

4 Petitioner :

5 v. : No. 01-7574

6 PENNSYLVANIA :

7 - - - - -X

8 Washington, D. C.

9 Monday, November 4, 2002

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States at
12 11:06 a.m.

13 APPEARANCES:

14 ROBERT B. DUNHAM, ESQ., Assistant Federal Defender,
15 Philadelphia, Pennsylvania; on behalf of the
16 Petitioner.

17 IVA C. DOUGHERTY, ESQ., First Assistant District Attorney,
18 Reading, Pennsylvania; on behalf of the Respondent.

19 SRI SRINIVASAN, ESQ., Assistant to the Solicitor General,
20 Department of Justice, Washington, D. C.; on behalf of
21 the United States, as amicus curiae, supporting the
22 Respondent.

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

2 (11:06 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in Number 01-7574, David Allen Sattazahn versus
5 Pennsylvania.

6 Before we begin the second argument, I would
7 like to welcome a group of French judges from the Cour --
8 French Cour de Cassation, France's highest court -- who
9 are visiting our Court today.

10 Soir le bienvenue, Monsieurs.

11 Mr. Dunham, you may proceed.

12 ORAL ARGUMENT OF ROBERT B. DUNHAM

13 ON BEHALF OF THE PETITIONER

14 MR. DUNHAM: Thank you, Mr. Chief Justice, and
15 may it please the Court:

16 The double jeopardy question presented in this
17 case is whether the statutorily mandated judgment of life
18 that was entered in David Sattazahn's first capital trial
19 is, as a matter of Federal constitutional law, a judgment
20 that precludes the Commonwealth of Pennsylvania from
21 seeking and obtaining the death penalty in a second
22 capital trial. Pennsylvania was afforded one fair
23 opportunity to sentence Mr. Sattazahn to death, and the
24 jury in his case decided, in accordance with the trial
25 court's instructions, in accordance with the verdict slip,

1 in accordance with the law of Pennsylvania, to report to
2 the court the presence of circumstances that it knew would
3 compel the court to impose a life sentence. That judgment
4 of life having been imposed after a full and fair
5 opportunity to try, Pennsylvania could not seek death
6 against Mr. Sattazahn on retrial.

7 QUESTION: But that wasn't the result of the
8 same sort of factual determination by a jury that took
9 place in Bullington, was it?

10 MR. DUNHAM: No, that's correct, Your Honor.
11 The Pennsylvania -- the factual difference between
12 Pennsylvania and Missouri is the following, Your Honor.
13 In Pennsylvania -- actually in both States -- if there's a
14 unanimous jury verdict, that's the verdict that the court
15 imposes, that's the sentence the court imposes. In both
16 States, if the jury does not reach a unanimous verdict,
17 then the court is required as a matter of law to impose a
18 life sentence, so here, when the jury did not -- when the
19 jury sent its note back saying it was 9 to 3 in favor of
20 life, the court was required as a matter of Pennsylvania
21 law to impose a life sentence.

22 QUESTION: But in Bullington the verdict was
23 unanimous, was it not?

24 MR. DUNHAM: That's correct.

25 QUESTION: Well, isn't that quite a significant

1 difference? Here the jury did not come to a conclusion
2 one way or the other. They -- they hung.

3 MR. DUNHAM Well, Your Honor, they did not hang
4 in the traditional sense of a hung jury, and the
5 distinction between this case and a hung jury case is the
6 following. The traditional hung jury case, the lack of --
7 when there's an absence of unanimity what happens is, the
8 trial court discontinues the proceedings and jeopardy
9 never terminates, and the proceedings are sent back to
10 start over.

11 Here, as a matter of Pennsylvania law, the
12 legislature determined in advance, saw the possibility of
13 a nonunanimous jury as one of the foreseeable outcomes of
14 the trial and in so doing it said, well, if that happens,
15 what we're going to do is say, the State only gets one
16 chance. If the State does not meet its burden of proving
17 to all twelve jurors that aggravating circumstances
18 outweigh mitigating circumstances, then, well, that's the
19 only chance they get, and if they don't do that --

20 QUESTION: But you agree --

21 QUESTION: That assumes the point in issue. The
22 State says that's not what we're saying, it's a default
23 mechanism and that is not the only chance the State gets
24 if there's a default. I -- this isn't a State law issue
25 we're arguing. I take it that the case comes to us on the

1 assumption that this is -- that Missouri has done is a
2 correct interpretation of its law. I mean, if the State
3 supreme court says so, so you -- for you to say, oh well,
4 the State says this is the only chance, that's the whole
5 issue of the case.

6 MR. DUNHAM Well, Your Honor, this is like
7 Smalis versus Pennsylvania, another double jeopardy case
8 in Pennsylvania that was a decade before, in which
9 Pennsylvania -- this Court correctly found that
10 Pennsylvania could say what was necessary for the court to
11 enter a judgment --

12 QUESTION: Yes, but --

13 MR. DUNHAM -- but not say what the
14 constitutional --

15 QUESTION: -- that was a question of what was --
16 whether or not there was double jeopardy, whether or not
17 he, in fact, could be subject to a new trial, but you are
18 telling us that the State in this case has said that this
19 is his -- the State's only chance, and that's not the way
20 the State reads this law. That's all I would say.

21 MR. DUNHAM This is what the statute says, Your
22 Honor. What the statute -- the statute is very clear
23 when -- when you look at --

24 QUESTION: The statute doesn't say anything
25 about this is the State's only chance.

1 MR. DUNHAM Your Honor, what the statute
2 says -- that's true, the statute does not expressly say
3 this is your only chance. What the statute says, it
4 delineates the two circumstances, and the only two
5 circumstances in which a death sentence may be imposed,
6 and then it says, the verdict must be a sentence of life
7 imprisonment in all other cases.

8 In so doing, what the Pennsylvania legislature
9 determined was that unless -- unless the prosecution was
10 able to prove its case for death, that is, that
11 aggravating circumstances outweighed mitigating
12 circumstances, and was able to prove its case for death
13 unanimously, then the outcome would be a life sentence.

14 QUESTION: Mr. Dunham, do I understand that
15 essentially what you are arguing is that we have here, to
16 put it in simple terms, claim preclusion but not issue
17 preclusion? You agree that this jury found nothing, so
18 that if the Pennsylvania law had been -- when the jury
19 comes in 9 to 3 or 7 to 2, whatever -- when it comes in
20 that way, that the Pennsylvania law had been new trial on
21 penalty, you would have no double jeopardy claim. So
22 you're relying on the entry of a mandatory judgment for
23 life to effect basically claim preclusion, although you
24 admit there's no issue preclusion. That is, no issue has
25 been found by anyone.

1 MR. DUNHAM There's no issue preclusion with
2 respect to aggravating and circumstance -- aggravating and
3 mitigating circumstances, Your Honor, but what's clear is
4 that this jury had made a legally binding factual
5 determination with respect to the issue of life or death,
6 and --

7 QUESTION: But this jury --

8 QUESTION: But it --

9 QUESTION: -- didn't do anything but say We
10 can't agree.

11 QUESTION: Yes, they just hung.

12 MR. DUNHAM No, Your Honor. This jury did
13 split 9 to 3.

14 QUESTION: And its verdict had to be unanimous
15 in order to have any effect, did it not? .

16 MR. DUNHAM The verdict had to be unanimous for
17 the jury verdict to be imposed, but by operation of
18 Pennsylvania law, when -- the judge is then given the
19 opportunity to make two predicate factual determinations,
20 and if those predicate factual determinations are found --
21 and those are determinations relating to whether or not
22 the State had proven its case -- then the judge must
23 impose a life sentence.

24 QUESTION: Well, could the judge have imposed a
25 death sentence here in view of a 9 to 3 verdict of the

1 jury?

2 MR. DUNHAM No, it could not, Your Honor.

3 QUESTION: Well, then, it seems to me when you
4 say Pennsylvania law says this and says that, as Justice
5 Kennedy just -- that's not what the supreme court of
6 Pennsylvania said. You've obviously got a constitutional
7 argument here, double jeopardy, but I don't think you can
8 shift it over and say, this is what Pennsylvania law says.

9 MR. DUNHAM The Pennsylvania supreme court --
10 yes, Your Honor.

11 The Pennsylvania supreme court can say what the
12 operative effects of the statute are, and what the
13 Pennsylvania supreme court has said the operative effects
14 of the statute are is that when the jury is not unanimous,
15 then the judge must take a particular step, and that is to
16 impose the mandatory life sentence.

17 QUESTION: Yes, I do think you can say that in
18 this case, there was a judgment that could have been final
19 had there been no appeal, and so therefore it's different
20 from a hung jury case in some other instances where
21 there's just no determination at all, because after the
22 jury's failure to agree, the judge did impose a sentence
23 that might have become final, that looked final in many
24 instances, in -- from many perspectives. It turned out
25 that there was an appeal, but it could have been final if

1 there had been no appeal.

2 MR. DUNHAM Well, in fact, Your Honor --

3 QUESTION: I mean, I take it that's part of your
4 case.

5 MR. DUNHAM Well, Justice Kennedy, what
6 Pennsylvania does is, Pennsylvania forecloses any appeal
7 of the sentencing determination. When the defendant
8 receives a life sentence at the close of this trial-like
9 capital sentencing proceeding the State does not have
10 authority to appeal and, of course, the defendant has no
11 reason to appeal because he has -- he's come out with a
12 life sentence.

13 QUESTION: Can I ask you, do you know from the
14 record in this -- does the record tell us in this case
15 whether or not this criminal defendant was advised of the
16 risk of taking an appeal?

17 MR. DUNHAM There is nothing in the record that
18 indicates that he was advised of that risk. In fact, the
19 record -- everything that we can see on the record, from
20 the record there is nothing that says anywhere that David
21 Sattazahn was told that if he took an appeal, he risked
22 his life, and in fact --

23 QUESTION: Well, do Pennsylvania judges
24 ordinarily tell potential appellants what the consequences
25 of an appeal will be?

1 MR. DUNHAM Well, Pennsylvania judges tell them
2 what rights that they are waiving, so --

3 QUESTION: By appealing?

4 MR. DUNHAM Yes, Your Honor. But -- But what
5 was --

6 QUESTION: What sort of a colloquy would that
7 be?

8 MR. DUNHAM I --

9 QUESTION: I mean, you know, I can see where a
10 defendant's being arraigned, or being advised whether or
11 not he should have counsel, there's that sort of a
12 colloquy, but --

13 MR. DUNHAM That's what I was thinking of, Your
14 Honor.

15 QUESTION: Yes. Ordinarily a judge, after a
16 verdict comes in, there's no colloquy between the judge
17 and the defendant, is there?

18 MR. DUNHAM No, Your Honor. There's a colloquy
19 as to you have a certain number of days to file post
20 verdict motions, you have the right to be represented by
21 counsel, and so forth.

22 QUESTION: Could you --

23 QUESTION: One of the things that we worry about
24 in enforcing the Double Jeopardy Clause is the possibility
25 that without its protection, the State, in effect, could

1 fail in its attempts and try again and again and again and
2 again. Is there any risk of that with respect to the
3 penalty determination here?

4 On the face of it, it would seem that there
5 isn't such a risk, because the only circumstance -- or the
6 only obvious circumstance -- in which the State could see
7 the -- seek the death penalty again is the one that we
8 have in this case, in which the defendant takes the appeal
9 on some underlying issue of guilt or innocence, and it's
10 only then, if he is successful, that the State would, on
11 its view and on the Pennsylvania supreme court's view,
12 have another shot at getting the death penalty. Is there
13 any greater risk of the State's being -- bringing
14 repetitive, making repetitive attempts to get the death
15 penalty against a given defendant?

16 MR. DUNHAM Well, Your Honor, if the judgment
17 is not a final judgment sentence, I don't see as a matter
18 of double jeopardy jurisprudence what would prevent the
19 State of Pennsylvania from then saying, for every other
20 defendant who had received a life sentence solely by
21 virtue of a split jury, why that would not be subject to
22 further proceedings.

23 QUESTION: Well, that's a question that
24 ultimately I intended to ask counsel on the other side,
25 but what's your position on it?

1 MR. DUNHAM I think that --

2 QUESTION: If you lose, is that, in your
3 judgment, the consequence?

4 MR. DUNHAM I think that's --

5 QUESTION: That even in a case in which the
6 defendant does not appeal the underlying conviction, the
7 State can say, we'd simply like to try again on penalty?
8 Is that your position?

9 MR. DUNHAM Your Honor, under double jeopardy
10 law, yes, I think that would be the risk --

11 QUESTION: Well, is it a plausible position
12 under Pennsylvania law, because I -- and here I'm really
13 at sea, but we've been told that the State has no appeal
14 from the sentence. The State cannot go to the State
15 supreme court and say something was wrong in the
16 sentencing proceeding and we should have another
17 opportunity, so how would the State get its second choice?

18 Do you think it would be inconsistent under
19 State law for the State simply to go to the trial judge
20 and say We'd like you to vacate that judgment insofar --
21 or the verdict -- insofar as it calls for a life sentence
22 and let us try again? Do you think that is open to the
23 State under State law?

24 MR. DUNHAM I think the suggestion would be --
25 they certainly cannot appeal. That would be the manner in

1 which it would be done if the State -- if the State --

2 QUESTION: No, but is there any reason to
3 believe that they could follow the course that I just
4 suggested, which would give them a repetitive opportunity?

5 MR. DUNHAM: I would say as a matter of double
6 jeopardy, yes, there would be a reason to fear that.

7 QUESTION: No, but I'm just asking a question of
8 State law. Do you think the State law can be read in a
9 way that would allow them to do that?

10 MR. DUNHAM: Yes, Your Honor, I do.

11 QUESTION: But how?

12 QUESTION: I can't believe you would take that
13 position, that as a matter of State law the State can go
14 in afterwards and seek a redetermination of the death
15 penalty under Pennsylvania law. You've already told us
16 the State can't appeal.

17 MR. DUNHAM: I'm -- that's --

18 QUESTION: Under what provision of State law
19 could the State go in and ask for it to be done in some
20 other fashion? I'm startled by your answer, really.

21 MR. DUNHAM: Well, Your Honor, I mean, I think
22 it's unlikely that the State would do that, but I'm saying
23 that --

24 QUESTION: We're just asking, as a matter of
25 State law, how could it?

1 QUESTION: The whole premise of your case is, as
2 I understand it, is as a matter of Pennsylvania law, a
3 split verdict has the same effect as a unanimous verdict
4 for life.

5 MR. DUNHAM: That's right, Your Honor.

6 QUESTION: So, let's -- let's --

7 QUESTION: If that's true, then they certainly
8 can't go in and -- and ask for another trial.

9 QUESTION: Let's go back for a second, can --

10 QUESTION: So, you misspoke on that.

11 MR. DUNHAM: Yes, Your Honor.

12 QUESTION: Could we go back to where we started
13 this whole discussion? I mean, I would like to suggest to
14 you that we're dealing with a kind of analogy, that the
15 law in this entire area is a matter of analogy. We're
16 analogizing the penalty phrase of a death trial as if it
17 were a second trial.

18 MR. DUNHAM: That's correct.

19 QUESTION: So I take it your problem is that
20 working with analogy, there's quite a lot here that
21 suggests a hung jury, and there are some things that
22 don't, so if it's like a hung jury, of course, the Double
23 Jeopardy Clause doesn't bar it. If it's not like a hung
24 jury, then it does, so I'd like to ask you to say as
25 concisely as you can in terms of the purposes of this

1 whole area of law, why is it not like a hung jury?

2 MR. DUNHAM Yes, Your Honor.

3 Justice Breyer, it's not like a hung jury first
4 because in the hung jury cases, the jury fails to reach a
5 decision and, as a result, the trial court then
6 discontinues the proceedings. A hung jury does not result
7 in the entry of a judgment. In a hung jury situation, the
8 case gets sent back and the prosecution then has the
9 opportunity to decide whether it's going to proceed with a
10 retrial.

11 This is not a hung jury. It's not a hung jury
12 because 1) it does not produce a mistrial, it produces as
13 a matter of law an entry of judgment, and that judgment is
14 a -- what we would say is a -- a judgment of acquittal.
15 The reason it's a judgment of acquittal is because this
16 Court has made clear in the context of Bullington, it's
17 made clear in the context of Rumsey, and even in Monje v.
18 California and Casperri that there is something
19 fundamentally different about a capital sentencing
20 proceeding that has all the hallmarks of a trial of guilt
21 or innocence.

22 There's something fundamentally different about
23 those proceedings from any other sentencing proceeding
24 and, because of that, because a capital sentencing
25 proceeding is the functional equivalent of a trial on the

1 issue of life or death, and because the State has
2 additional burdens of proof, additional evidentiary
3 requirements, the sentencing phase is, in effect, the
4 functional equivalent of a greater offense.

5 Because of these factors, when a defendant
6 emerges from a capital sentencing proceeding, tried to
7 completion, submitted to a jury and, after the
8 deliberations are done and the law operates, comes out of
9 this with a sentence of life, that life sentence is an
10 acquittal of the death penalty.

11 Now, because of that --

12 QUESTION: You really are arguing for claim
13 preclusion, because in the two juries -- the jury in a
14 State that says, Okay, we do a retrial on sentence, and
15 Pennsylvania -- the two juries are doing an identical
16 thing. You're giving it a different label because
17 Pennsylvania law precludes the claim, but the two juries
18 have done precisely the same thing, so -- and the
19 difference between this case and Bullington, of course, is
20 that there was a determination, a fact determination by
21 the fact-finder for life rather than death.

22 MR. DUNHAM: Yes, Your Honor.

23 QUESTION: And so you can't equate those two
24 cases, so you have to be relying on claim preclusion
25 because a judgment has been entered.

1 MR. DUNHAM Well, but Your Honor, I think it's
2 important to know what it is that the jury knew at the
3 time that it made its statement to the judge that it was
4 going to -- that it was intractably split 9 to 3 in favor
5 of life.

6 What that jury knew, because it was told in the
7 jury instructions, was that there were certain
8 circumstances in which it could impose a death penalty.
9 There were two limited circumstances -- aggravating
10 circumstances and no mitigation, or aggravation that
11 outweighed mitigation -- and in all other circumstances a
12 life sentence would be returned, so the jury is told that
13 up front.

14 Then the judge instructed the jury to take a
15 look at the verdict slip in the case, and the verdict
16 slip -- which contained language in bold capital letters
17 that were mandated by the Pennsylvania Rules of Criminal
18 Procedure -- the verdict slip also told the story the same
19 things, and told the jury that if it could not reach a
20 unanimous verdict, it was to report that to the court, and
21 if the court found two facts, 1) that they were not
22 unanimous and 2) that they were not going to be unanimous,
23 the court would have the duty to impose a life sentence.

24 QUESTION: And that would go even if it had been
25 1 for life and 11 for death, so you've repeated a few

1 times the 9 to 3 for life, but it wouldn't make any
2 difference if it was lopsided the other way?

3 MR. DUNHAM That's correct. That's correct,
4 Your Honor. But what's clear from this is that this jury
5 knew when it was reporting back that a life sentence would
6 result, and what's also clear is the way the statute is
7 written, the legislature has determined -- the legislature
8 has placed on the State the burden of persuading all 12
9 jurors that death is the appropriate punishment, that
10 aggravation outweighs mitigation. When the jury splits,
11 that is a fact finding that the State has not proven its
12 case to all 12.

13 QUESTION: But it's not a fact finding by the
14 whole jury.

15 MR. DUNHAM Well, it's a fact finding by all of
16 the jurors that the State has not been able to persuade
17 everybody.

18 QUESTION: Yes, that's true, but it's 9 out
19 of 12, or 11 out of 1, whatever the case may be. It's not
20 the whole jury.

21 MR. DUNHAM Yes, Your Honor, but then again,
22 Your Honor, as a matter of double jeopardy -- as a matter
23 of constitutional law -- there's nothing magical about the
24 jury having to be unanimous. In fact --

25 QUESTION: No, but there is something magical

1 about a jury, a unanimous jury making a determination, as
2 was the case in Bullington, where you don't just have a
3 split in the jury, the whole jury comes back and says Yes,
4 it's only life.

5 MR. DUNHAM But here the sentencer came back
6 and said Because the State has failed to prove its case
7 for death, then the answer is life.

8 The Pennsylvania law sets for the circumstances
9 in which the State has either proven or failed to prove
10 its case for death, and --

11 QUESTION: Mr. Dunham, maybe I'm
12 misunderstanding the Pennsylvania law, but I thought that
13 this position, we enter judgment of life, it favors
14 defendants. That is, the State is saying If nothing
15 further happens we're not going to subject this defendant
16 to the chance of getting death on a resentencing hearing.
17 We're going to give him life.

18 On the other hand, if he chooses to appeal from
19 the guilt part on, say, a charge error, as was the case
20 here, then we're no longer going to give him that benefit.
21 We did it on the notion that the thing would be over. He
22 wouldn't be subject to death, but now he's taking, in
23 effect, advantage of something we did to benefit him

24 MR. DUNHAM Essentially, Your Honor, what
25 you're stating is the clean slate doctrine, and what --

1 and I think it's critical, when we're categorizing the
2 cases, to figure out which box this case goes in.

3 The clean slate doctrine applies when the
4 defendant has been convicted, and has been convicted of
5 the relevant charge. If it's true, as this Court has said
6 in Bullington, and as this court has said in Rumsey, and I
7 would suggest, Your Honors, as it said in both Casperri
8 and Monje, that there is this categorical distinction
9 between capital sentencing proceedings and noncapital
10 proceedings, and that what happens in a trial-like capital
11 sentencing proceeding is that you have a separate trial on
12 the issue of the death penalty, then when you are
13 appealing from your guilt stage conviction, you're
14 essentially appealing from a lesser offense, and so, using
15 as the analogy Green versus United States, you would not
16 be appealing -- you would not be placing the sentence at
17 issue. You have won on the issue of sentence, so you're
18 appealing a lesser offense.

19 QUESTION: But apparently Pennsylvania has
20 interpreted its law differently on this point.
21 Pennsylvania would say, I gather, that if the defendant
22 does appeal in these circumstances from his conviction,
23 that it's all open to the State to seek the death penalty
24 again. That's what Pennsylvania would say.

25 MR. DUNHAM: But Pennsylvania can't --

1 QUESTION: But you don't want us to hold that it
2 can say that. You want to say that the Federal rule
3 should come into play and prevent Pennsylvania from saying
4 that.

5 MR. DUNHAM: That's correct, Your Honor.

6 QUESTION: May I ask you a question about --
7 actually, two questions about Bullington? Is it not -- am
8 I correct in recalling that in Bullington, the State had
9 the same -- the jury had the same two options, it either
10 could have found unanimously for the death penalty, or
11 either unanimously or by a split verdict, it could have
12 refused to find the death penalty and the consequence
13 under Missouri law would have been the life sentence?

14 MR. DUNHAM: That's correct.

15 QUESTION: So it's exactly like this case in
16 that respect.

17 MR. DUNHAM: That's correct.

18 QUESTION: And is it also not true that in that
19 case, we can't tell whether the jury verdict was finding
20 no aggravating circumstances, or a finding that no matter
21 what the aggravating circumstances are, we're not going to
22 impose the death penalty?

23 MR. DUNHAM: In Bullington?

24 QUESTION: Yes.

25 MR. DUNHAM: Justice Stevens, in Bullington we

1 can take it one step further. In Bullington, we know that
2 the jury found at least one aggravating circumstance.

3 QUESTION: And they -- so that their -- the
4 double jeopardy did not rest on the fact there was a
5 finding of fact, but rather, there was an ultimate
6 judgment that death is the inappropriate penalty?

7 MR. DUNHAM: That's correct, Your Honor.

8 QUESTION: Yes.

9 MR. DUNHAM: Now, Your Honors, I'd like to make
10 a -- I'd like to just talk very briefly about the second
11 issue and then reserve time for rebuttal. The
12 Commonwealth has agreed that this statute -- the
13 Pennsylvania statute -- has created a liberty interest, a
14 life and liberty interest in the life sentence that was
15 the product of the nonunanimous jury.

16 What we would like to -- the dispute between the
17 parties is whether that life and liberty interest that the
18 State concedes exists survives an appeal, and for all the
19 reasons that we've talked about in the briefs, we would
20 say it does, because there is a special interest in
21 finality.

22 This Court has recognized in Bullington and in
23 Rumsey that capital sentencing proceedings -- and also in
24 the other, the noncapital cases we mentioned -- that one
25 of the hallmark differences between a capital sentencing

1 phase and a noncapital sentencing is precisely the
2 expectation in finality in the capital sentencing, and so
3 the defendant has a legitimate and substantial expectation
4 going in that when he gets this life sentence, it is going
5 to be a sentence that will remain with him

6 We would say that Pennsylvania arbitrarily
7 deprives a defendant of this life and liberty interest if
8 it conditions his appeal -- if it conditions the
9 enforcement of that right -- upon giving up the right to
10 appeal a lesser and distinctly different offense. It's
11 conditioning the enforcement of his life sentence for --
12 in this case -- upon his not appealing the lesser first
13 degree murder charge, and that's where we say it's
14 arbitrary.

15 If the Court has no further questions, I'd like
16 to reserve the remaining time for rebuttal.

17 QUESTION: Very well, Mr. Dunham

18 Ms. Dougherty, we'll hear from you.

19 ORAL ARGUMENT OF IVA C. DOUGHERTY

20 ON BEHALF OF THE RESPONDENT

21 MS. DOUGHERTY: Mr. Chief Justice, and may it
22 please the Court:

23 In Bullington, this Court examined its holding
24 that the Double Jeopardy Clause does not apply to
25 sentencing proceedings, and carved out a limited exception

1 which was based on the findings made by a sentencer in a
2 capital sentencing proceeding. The exception does not
3 arise out of the proceeding itself. It arises out of
4 these findings, which distinguish it from a traditional
5 sentencing procedure. This is the only conclusion which
6 is consistent with existing double jeopardy jurisprudence.
7 The Court has never applied double jeopardy protections to
8 traditional sentencing procedures, because --

9 QUESTION: It does seem a little odd that -- if
10 you have case 1, where there are no errors and the
11 defendant is not in any way prejudiced, and there is a
12 life sentence, that's final. But in this case, there was
13 a flawed trial, the defendant was prejudiced, but at this
14 point he now faces a greater sentence for having -- for
15 having established the -- that prejudice. Now, obviously,
16 if we're going to give him the option, we'd say That's a
17 risk he takes, but it's a little troubling about your --

18 MS. DOUGHERTY: Well, double jeopardy -- the
19 Double Jeopardy Clause doesn't preclude a defendant having
20 to make choices in making a decision, and there's nothing
21 final about the life sentence that's imposed by a default
22 judgment under the Pennsylvania statute. It's no
23 different than any other sentence imposed at the end of a
24 traditional sentencing proceeding.

25 QUESTION: Well, is it final if he does not

1 appeal? I mean, just to clear up that issue upon which we
2 got an answer that surprised us from counsel on the other
3 side, if he does not appeal, under Pennsylvania law, can
4 the State go, in effect, before the judge again and say We
5 would like to have another attempt to get the death
6 penalty?

7 MS. DOUGHERTY: No, Your Honor.

8 QUESTION: Okay.

9 QUESTION: Well, this is like -- it seems like
10 Bullington in one respect, and not like it in another.
11 It's not like it in the sense that there's a hung jury.
12 It's like it, however, in the sense that the person is
13 faced with a terrible choice. If he doesn't appeal, he'll
14 live. If he does appeal, he may die.

15 Now, if that terrible choice is embodied in the
16 reasons for an exception to the ordinary blank slate rule,
17 that exists here, so do you think that terrible choice has
18 nothing to do with the exception whatsoever, or does it
19 have something to do with it?

20 MS. DOUGHERTY: Under double jeopardy analysis,
21 I don't believe it has anything to do with it. The
22 defendant also, upon appeal --

23 QUESTION: Well, if it has nothing to do with
24 it, why did the court create the exception? For, after
25 all, ordinarily, as you pointed out, when a person a

1 person appeals his trial, he makes of his sentence a blank
2 slate. It can be reopened. So why did the court say
3 originally that death sentences are different?

4 MS. DOUGHERTY: Because the proceeding itself
5 requires a finding. It leads to a finding. It leads to
6 an acquittal in a way that other traditional sentencing
7 proceedings do not, and when someone has been acquitted of
8 the death penalty, then the State -- that would be
9 precluded by double jeopardy purposes for going back,
10 because of the finality that attaches to an acquittal, not
11 to the final judgment, not to a sentence that's imposed as
12 the result of -- that terminates a proceeding, certainly,
13 but it doesn't have that same finality that the court has
14 always accorded to an acquittal, and --

15 QUESTION: Well, from the dynamics of what the
16 defendant faces when he's sitting at the table and he
17 hears the verdict come in, he hears the verdict come in,
18 no liability for the death penalty, the judge then
19 sentences him to prison, and I had thought he would
20 breathe a sigh of relief. Under your position, no. In
21 other words, he's faced the ordeal of -- of the trial,
22 et cetera.

23 MS. DOUGHERTY: Exactly, and if he stops and is
24 satisfied with a life sentence instead of trying to get an
25 acquittal, which is the result of possibly seeking another

1 trial, is that he could walk out of the courtroom an
2 innocent man on second trial. And that is a choice, but I
3 believe under Chaffin this Court has not ruled out the
4 defendant having to make choices like that. No matter how
5 serious, how tough the choice is --

6 QUESTION: Can you -- can I interrupt with just
7 one question? Are there any other double jeopardy -- I
8 mean, I don't -- are there any other hung jury situations,
9 other than this very narrow category, in which the
10 prosecutor does not have the option to go ahead and seek a
11 second trial?

12 See, here you -- unless the defendant appeals, a
13 prosecutor can't do anything about it here. Is there any
14 other hung jury situation in which the prosecutor's hands
15 are tied in that way?

16 MS. DOUGHERTY: I believe the answer is no.

17 QUESTION: I think that's --

18 MS. DOUGHERTY: However, I think it's comparable
19 to the guilty plea situation, where the Government could
20 forego seeking death in order to -- for an agreement to
21 life, and the Commonwealth -- the State would not be able
22 to appeal that imposition of the life sentence.

23 However, if the defendant appeals and gets his
24 sentence, gets his guilty plea withdrawn, the State would
25 not be precluded in that case from seeking death at the

1 trial. So I think the situation is along those lines.

2 QUESTION: Well, but a hung jury is not quite
3 like a plea bargain, though. And that's what you're
4 talking about, isn't it? If the agreement is set aside,
5 then of course everybody starts from scratch, but not --
6 but when you've got a hung jury, normally the prosecutor
7 has the choice of whether to go ahead and retry or not.

8 MS. DOUGHERTY: That's correct, Your Honor.

9 However, the situation in this case, and the
10 situation for the exception in Bullington, revolved around
11 the findings by the jury, and it revolved around the idea
12 of an acquittal, not a sentence, and that was pointed out
13 further in Rumsey, where the Court talked about, the
14 sentence was based on findings which entitled the
15 defendant to a life sentence, and again in Poland --

16 QUESTION: Just -- let me ask just one more
17 question, then I'll be through. I did not remember --
18 your opponent said that there was actually a finding of an
19 aggravating circumstance in Bullington. Was he correct on
20 that?

21 MS. DOUGHERTY: I don't believe so, Your Honor.
22 There may have been a finding, but it may have been
23 outweighed. I'm sorry, I don't remember that, but it may
24 have been outweighed by the mitigating --

25 QUESTION: So there would have been eligibility

1 for the death penalty there.

2 MS. DOUGHERTY: But the ultimate finding of the
3 jury was that they were -- that they acquitted the
4 defendant based on their weighing situation.

5 And Poland further limited Bullington and
6 specifically talked about when there is not an acquittal,
7 then Bullington -- the Bullington exception does not
8 apply, and --

9 QUESTION: Suppose we had a State with a system
10 that said, if any -- and I think some do have this
11 system -- if any one juror votes for life, then the
12 sentence shall be life. Suppose we had that system, and
13 the jury comes in and says, we're 11 to 1 for death. The
14 judge enters judgment for life. In that case, if the
15 guilt -- if it's an appeal from the guilt determination,
16 and it's successful, then there wouldn't be -- there would
17 be no possibility of reopening the death-life decision,
18 would there?

19 MS. DOUGHERTY: Well, Justice Ginsburg, I don't
20 know that that would qualify as an acquittal. That may be
21 a decision made by the State legislature, but the fact
22 that one person would hold out for life -- an acquittal
23 is, traditionally has been looked at as a finding of
24 innocence, and a finding -- the court has generally
25 recognized it as finding innocence based on the evidence

1 in the record, and it's based on -- the whole point of the
2 jury system is to reach a collective agreement, a
3 collective judgment by the community, and one person
4 holding out for life does not possibly affect the
5 conscience of the community on that sentence.

6 QUESTION: So, you say it would make no
7 difference if, instead of in this case, where the legal
8 consequence following -- follows a jury disagreement, a
9 State that says we make, in effect, each juror the
10 decisionmaker on the life-death question.

11 MS. DOUGHERTY: I don't think that would still
12 have the finality of an acquittal under this Court's
13 double jeopardy jurisprudence, and of course, the
14 hypothetical doesn't apply in this situation, because
15 that's not what Pennsylvania said, but I don't believe
16 that one juror holding out for life could possibly garner
17 that finality that an acquittal has, and if -- I believe
18 there are certainly -- there might be -- there would be an
19 argument in that case that if the defendant appealed,
20 that --

21 QUESTION: Why not? If the State law sets up
22 that single juror in the same way that it sets up a single
23 judge, if the trial is before the judge -- if the
24 sentencing trial is before the judge?

25 MS. DOUGHERTY: A State could do that. I just

1 don't believe that that legislative decision would have
2 the same finality as -- as an acquittal, because an
3 acquittal is based upon a collective judgment of the
4 community on the ultimate question of --

5 QUESTION: Well, do you think that that case
6 that I gave you, where the State law says one juror for
7 life is enough, and Pennsylvania, do you think there's any
8 significant distinction between those two laws?

9 MS. DOUGHERTY: I -- well, I'm sorry. I'm a
10 little -- I'm not quite sure I understand your question.
11 There's a definite different in that Pennsylvania requires
12 a unanimous jury to reach a verdict, and therefore,
13 Pennsylvania is saying unless the jury -- all of the jury
14 agrees -- then there is no verdict. There's no acquittal.
15 There's no conviction. It's a hung jury.

16 I don't feel that I answered your question, but
17 I'm not sure how to better answer it. I do believe that
18 there --

19 QUESTION: I take it you do believe that there
20 is a difference between those two situations.

21 MS. DOUGHERTY: Well, there's a difference in
22 language. I don't know that there's a difference in
23 effect, in the double jeopardy concept of acquittal, the
24 finality that should be accorded that judgment.

25 The -- Pennsylvania's position, of course, is

1 that without these findings made by a jury, that under
2 Bullington analysis, then double jeopardy would not bar
3 retrial for the maximum sentence. You're right back at
4 the results obtained from the traditional sentencing
5 proceeding. The imposition of a particular sentence, in
6 this case life, is not an acquittal of any more serious
7 sentence that could have been imposed and, as this Court
8 has recognized in DiFrancesco as one example, the
9 pronouncement of sentence simply does not have the
10 qualities of constitutional finality that attend an
11 acquittal.

12 QUESTION: May I ask -- I said I wouldn't ask
13 another question. I would like to ask one more. If the
14 jury in this case had been unanimous and said life rather
15 than death, would the judgment entered by the trial court
16 have been any different than the judgment it actually did
17 enter?

18 MS. DOUGHERTY: Life would have been imposed,
19 but it would have been imposed for a different reason.
20 The jury --

21 QUESTION: Well, no, I'm asking, would the form
22 of the judgment, the language used by the trial judge in
23 entering judgment, would it have been any different from
24 the language it did use in this case?

25 MS. DOUGHERTY: Well, it would have been based

1 on the unanimous verdict of the jury.

2 QUESTION: That's not my question. My question
3 is, the language of the judgment would have been any
4 different within the two cases?

5 MS. DOUGHERTY: It would have been a life
6 sentence in both cases.

7 QUESTION: Yes.

8 QUESTION: But you're saying that the Poland
9 analysis should make the result different.

10 MS. DOUGHERTY: Yes, Your Honor. If there's no
11 acquittal --

12 QUESTION: Yes.

13 MS. DOUGHERTY: -- then Bullington doesn't
14 apply, and that's what would be different in the sentence.
15 There would be no acquittal.

16 QUESTION: What happens, in your view, which --
17 I'll be rather imaginary. I mean, there isn't a real
18 situation like this, but given the rulings of this Court,
19 I think you could have a State -- at least not in my
20 views, but other's views, you could have a State which on
21 sentencing left every question of fact to a jury, so they
22 decide every possible question of fact, but the ultimate
23 decision about what to do after those facts are found
24 would lie in the hands of a judge, and in a system like
25 that, where the judge then said life, would your argument

1 still apply, double jeopardy or not? Could they reopen
2 it, or not?

3 MS. DOUGHERTY: Well, the facts that need to be
4 found in a capital sentencing proceeding --

5 QUESTION: Are very complex, but we have special
6 forms and they go do it all. What I'm trying to say is, I
7 want a State still that turns over to the judge the power
8 of life or death, and what the judge in such a State
9 decides is life, and now there is an appeal on the guilt
10 and innocence phase. On -- in your opinion, can the State
11 reopen that ultimate judgment which it put in the hands of
12 the judge? And you see, of course, why -- what my next
13 question will be is, Why isn't this that State?

14 MS. DOUGHERTY: My problem in answering the
15 question, Justice Breyer, is I'm not sure what facts the
16 jury is --

17 QUESTION: Everything you want. I mean, you
18 know, I'm just trying to avoid that question, so have
19 everything you want, everything the Constitution requires,
20 everything the opinions of this Court requires. What I'm
21 interested in is not that, but I'm interested in the State
22 putting the sentencing decision in the hands of the judge.

23 QUESTION: Well, here the judge who enters the
24 verdict in this particular case does not do so because he
25 concludes that the circumstances -- he simply does it

1 because the jury has come in 9 to 3, doesn't he?

2 MS. DOUGHERTY: He comes in because -- that's
3 right. He has no discretion.

4 QUESTION: He doesn't exercise independent
5 judgment.

6 MS. DOUGHERTY: He has --

7 QUESTION: No, but does that -- that's exactly
8 what I'm trying to get at, exactly the question. I mean,
9 is that what makes the difference? Because the State has
10 told the judge what to enter?

11 MS. DOUGHERTY: Well --

12 QUESTION: Rather than being discretionary, does
13 that make a difference for double jeopardy purposes?

14 MS. DOUGHERTY: Well, I think it -- I think it
15 does, and to go back to your hypothetical, my problem in
16 answering that question, if the jury, in fact, has found
17 as fact that the mitigating circumstances outweigh the
18 aggravating circumstances, then I believe that would be an
19 acquittal. If the jury's findings were made in that way,
20 and the judge was -- the judge had to rely on those
21 findings in order to impose that sentence, then I believe
22 that that would be an acquittal, which would distinguish
23 it from the case we have here.

24 QUESTION: Why is that important? Why is it
25 important for drawing a double jeopardy line that in the

1 Poland situation a jury makes a unanimous determination,
2 or in Justice Breyer's hypothetical, a judge that has the
3 power makes the ultimate determination himself? If the
4 judgment can otherwise be attacked on the underlying
5 conviction, why should it make a difference for double
6 jeopardy on sentence that the judgment of life rests upon
7 these kinds of determinations rather than the operation of
8 law which we have?

9 MS. DOUGHERTY: Because an acquittal has
10 always -- the definition of acquittal has always been
11 based on a finding of innocence, on a finding that the
12 State hasn't proved its case, and if there are no such
13 findings -- and that's why double jeopardy hasn't been
14 applied to traditional sentencing proceedings, and if you
15 don't have those findings, then there's no basis to
16 justify the acquittal, which would bar it under double
17 jeopardy.

18 QUESTION: Were you going to comment in the time
19 remaining on the second argument -- which I call just a
20 due process argument -- that it's just unfair to condition
21 the appeal on the possibility of a death sentence? Surely
22 the second argument --

23 MS. DOUGHERTY: Well --

24 QUESTION: -- made by your --

25 QUESTION: Was this point raised in the supreme

1 court of Pennsylvania?

2 MS. DOUGHERTY: It was raised. It was never --
3 it was raised. It was not specifically addressed in this
4 fashion by the supreme court of Pennsylvania, but it was
5 before the court to address.

6 The argument seems to be that somehow the
7 sentence can be separated from the conviction, and I don't
8 believe that's the case. Due process -- procedural due
9 process requires notice and a meaningful opportunity to be
10 heard. Mr. Sattazahn had that throughout these
11 proceedings. Substantive due process, as this Court
12 stated in *Albright versus Oliver*, it's reluctant to expand
13 this generalized notion of substantive due process, and
14 therefore, if there's a specific amendment that applies to
15 the States that addresses the issue, that's what should --
16 that's how the claim should be reviewed.

17 In this case, double jeopardy definitely applies
18 to the States, and it seems that double jeopardy covers
19 all the concerns that are raised in the defendant's due
20 process and in petitioner's due process argument.
21 Therefore, the only way that the defendant should not face
22 a clean slate on resentencing on retrial is the *Bullington*
23 double jeopardy exception, not any due process claim

24 If the Court has no further questions --

25 QUESTION: Thank you, Ms. Dougherty.

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Mr. Srinivasan.

ORAL ARGUMENT OF SRI SRINIVASAN
ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,
SUPPORTING THE RESPONDENT

MR. SRINIVASAN: Thank you, Mr. Chief Justice,
and may it please the Court:

The question in this case is whether Pennsylvania's imposition of a default sentence of life imprisonment by operation of law when the jury in a capital sentencing proceeding is unable to reach a unanimous verdict constitutes an acquittal within the meaning of the Double Jeopardy Clause. We think the answer to that question lies in the settled rule that a hung jury is not an acquittal for double jeopardy purposes.

Double jeopardy law has always drawn a clear distinction between hung juries, where the jury fails to reach a resolution of the case, and acquittals, where a unanimous jury makes a factual determination that the facts in evidence fail to establish the defendant's guilt, or in this --

QUESTION: May I ask how you would respond to my question about the State that has a system, any one juror who votes for life, if there's any one juror, it's a life sentence, and this case? Is there a distinction between

1 those two for double jeopardy purposes?

2 MR. SRINIVASAN: Justice Ginsburg, we think
3 there is a distinction between those two. In the
4 hypothetical statute that you posit, if the jury's
5 resolution in favor of a life sentence were not considered
6 to have final effect, that would strike at the heart of a
7 value central to the Double Jeopardy Clause in that the
8 State could then continue to re prosecute the defendant
9 repeatedly, so we think that in that hypothetical statute,
10 when the jury comes back for a life sentence, I don't know
11 if it's fair to call it an acquittal because an acquittal
12 has a settled meaning under the Double Jeopardy Clause,
13 but we think that determination would be accorded finality
14 for double jeopardy purposes.

15 But this case is different in a significant
16 respect. Here, Pennsylvania gave the defendant the same
17 opportunity to obtain a final acquittal in his favor that
18 defendants traditionally enjoy on the underlying question
19 of guilt or innocence, and that is that he could have
20 obtained a unanimous verdict in his favor, and we think
21 that distinction is critical for double jeopardy purposes.

22 QUESTION: Why should that distinction be more
23 critical than the so-called judgment distinction? In
24 other words, in your -- I understand you to be arguing, as
25 Pennsylvania argued, that the line traditionally is drawn

1 based on whether there was an acquittal or wasn't an
2 acquittal -- an acquittal versus a hung jury, but that
3 line historically also is drawn, in fact, depending on
4 whether the jury's determination results in a judgment or
5 not. Here, we have a judgment. Why should we draw the
6 line based on acquittal rather than drawing the line based
7 on judgment? There is a tradition for each.

8 MR. SRINIVASAN: Justice Souter, it's true that
9 the sentencing proceeding in this case culminated
10 ultimately in the entry of a judgment, but the fact of a
11 judgment we think is not dispositive for double jeopardy
12 purposes, and that's because the core premise of the clean
13 slate rule is that the entry of a sentencing judgment is
14 not a double jeopardy disposition that bars the State from
15 resentencing in the event of a retrial. It's not the
16 event of a judgment that makes the difference. It's
17 whether that judgment manifests the qualities of an
18 acquittal. That's what Bullington holds.

19 So the question is whether the entry of a life
20 sentence in this case manifests the quality of a factual
21 acquittal, and we think it does not, because a hung jury
22 has never been thought to constitute an acquittal within
23 the meaning of the Double Jeopardy Clause.

24 QUESTION: Well, but it does constitute an
25 acquittal of the death penalty if there's no appeal.

1 MR. SRINIVASAN: I don't think so, Justice
2 Kennedy, because the State can resentence in the event of
3 a retrial. It's true that the State has decided that it
4 won't appeal, but the operation of the clean slate rule
5 works such that when the defendant occasions a retrial by
6 successfully appealing his conviction and sentence, at
7 that point the State is free to conduct a resentencing and
8 impose a harsher sentence.

9 QUESTION: If you win.

10 QUESTION: That assumes the issue.

11 QUESTION: I mean, that's the issue.

12 MR. SRINIVASAN: If -- I'm sorry.

13 QUESTION: I mean, you're right if you win, but
14 you're wrong if you lose.

15 MR. SRINIVASAN: That's correct, but -- of
16 course that's correct, Justice Breyer, but I think the
17 reason we should win is because the judgment that was
18 entered in this case is not a factual acquittal of the
19 nature that was considered --

20 QUESTION: But, counsel, supposing the State law
21 had a provision in it that the votes of the jurors shall
22 remain secret, and the only thing that shall become public
23 is the judgment, what would you do in that case?

24 MR. SRINIVASAN: Well, I think in that case --
25 it would depend on how the jury were instructed.

1 QUESTION: Well, they're instructed just as they
2 were in this case. As a matter of protecting the privacy
3 of the jurors, we're just not going to let the public know
4 how they voted, and that we just have a judgment out
5 there. What do you do in that case?

6 MR. SRINIVASAN: No, I think if the jury is
7 required to make a unanimous verdict in either direction,
8 and the judge imposes a sentence of life imprisonment
9 because the jury has made a unanimous verdict, that would
10 have --

11 QUESTION: No, it doesn't -- the "because"
12 doesn't follow, because you don't know on the record I'm
13 hypothesizing.

14 MR. SRINIVASAN: Well, I think in that situation
15 it would present some of the same difficulties that I was
16 discussing in reference to Justice Ginsburg's hypothetical
17 in that it's unclear whether the defendant would have --

18 QUESTION: Well, I take it the judge probably
19 knows in Justice Stevens' hypothetical what the jury did.

20 MR. SRINIVASAN: Right, and if the judge
21 articulated it in his judgment in a way that distinguished
22 between a judgment of a life sentence based on a unanimous
23 jury verdict and judgment of a life sentence based on --

24 QUESTION: No, in my hypothesis he enters
25 exactly the same judgment he entered here, and he just

1 says I'm -- let's close the files on this case so the
2 public won't know how the jury voted.

3 MR. SRINIVASAN: Well, I think in that situation
4 we'd have the same answer that we would to Justice
5 Ginsburg's hypothetical, which is that because the
6 defendant has not been afforded an opportunity to obtain
7 finality, then the double jeopardy law would treat that
8 judgment as final, and the State would not be permitted in
9 that situation to revisit the sentencing judgment.

10 But this case is different in a significant
11 respect, because here, Pennsylvania law draws a
12 distinction between a unanimous jury verdict and a hung
13 jury that results in the imposition of a life sentence,
14 and petitioner had the opportunity to obtain a unanimous
15 jury verdict, and, in fact, when the jury initially past
16 its note to the judge indicating that it had reached an
17 impasse, petitioner immediately moved for declaration of a
18 mistrial and discharge of the jury. And in that situation
19 it's clear under double jeopardy law that when the
20 defendant invites the declaration of a mistrial and the
21 discharge of a jury, there's no double jeopardy
22 prohibition against the State's conducting a retrial or,
23 in this case, the State's conducting a new sentencing
24 proceeding.

25 QUESTION: But isn't the -- isn't the only

1 distinction in Justice Stevens' hypothetical between that
2 case -- the case that he posits -- and this one, the
3 secrecy. And I don't know why the secrecy should make a
4 difference, and I don't know why you don't answer by
5 saying, Look, what is necessary in order to implicate
6 double jeopardy is the unanimous acquittal by the fact-
7 finder, and if the record does not manifest that unanimous
8 acquittal, then, in fact, there would be no double
9 jeopardy bar to trying him on the sentence again. Why
10 hasn't that got to be your answer?

11 MR. SRINIVASAN: Justice Souter, because it
12 depends on whether State law makes unanimity the deciding
13 criterion. If State law does --

14 QUESTION: Well, but on Justice Stevens'
15 hypothetical, it does not. His hypothetical was, it's
16 just like this case except that there's a secrecy
17 requirement, so we don't know. And -- and all we know is
18 that yes, there ultimately was one or the other condition
19 necessary and sufficient -- sufficient, rather -- to
20 support the judgment of life, but we don't know which one
21 it was, and I would have thought that on your position you
22 would say unless it affirmatively appears that there was
23 an acquittal by the unanimous jury, there would be no
24 double jeopardy bar. Make it just like this case.

25 MR. SRINIVASAN: Our position is that if a State

1 has a unanimity requirement, the Double Jeopardy Clause
2 does not preclude the State from enforcing that unanimity
3 requirement, but if a State draws no distinction between a
4 unanimous jury verdict of acquittal and a one-juror vote
5 for the life sentence, then the Double Jeopardy Clause
6 requires the State to honor the finality of the judgment
7 in favor of a defendant. That's our position in this
8 case.

9 QUESTION: Is it fair to take into account,
10 assuming competing analogies of equal weight, choosing the
11 one that would least discourage appeals? I mean, the real
12 problem here, I think, is the problem of a person having a
13 meritorious appeal, but being afraid to make it. So
14 can -- am I free to take that into account, at least, in
15 trying to choose between the analogies?

16 MR. SRINIVASAN: Justice Breyer, we think the
17 due process question in terms of undue burden was --
18 was --

19 QUESTION: I'm not saying that -- due -- is that
20 not a factor that I can take into account in trying to
21 choose among competing analogies?

22 MR. SRINIVASAN: It's -- I think it's fair to
23 say that it's a factor, but I think it's important to note
24 that there are important reasons why a State would draw
25 the distinction drawn by Pennsylvania in this case. There

1 are three reasons why a State might choose not to conduct
2 a resentencing in the initial round of proceedings, but
3 nonetheless to resentence in the event of a retrial.

4 First, as an interesting closure, the State
5 might determine that after a capital trial and a capital
6 sentencing hearing, at that point, it makes sense to
7 accept what is still a substantial punishment, the
8 imposition of a sentence of life imprisonment, but if the
9 defendant occasions a new trial by successfully appealing
10 his conviction, at that point the balance of
11 considerations changes.

12 And in particular, in terms of the second
13 reason, if a State were to conduct a new sentencing
14 proceeding immediately after a hung jury in the initial
15 round of proceedings, the sentencing jury would come to
16 the new sentencing proceeding without having had the
17 benefit of standing through -- of sitting through the
18 capital trial, and the State might reasonably conclude
19 that at that point, it would have to retry much of the
20 underlying case on guilt or innocence.

21 By contrast, when the defendant occasions a new
22 trial by successfully appealing his conviction, the State
23 will have selected a capital jury to conduct the trial,
24 and the new capital jury will come to the sentencing
25 proceeding entirely familiar with the facts and

1 circumstances of the case.

2 QUESTION: Thank you, Mr. Srinivasan.

3 Mr. Dunham, you have three minutes remaining.

4 REBUTTAL ARGUMENT OF ROBERT B. DUNHAM

5 ON BEHALF OF THE PETITIONER

6 MR. DUNHAM Your Honors, I would just like to
7 make a couple of points in rebuttal.

8 The first issue I'd like to address is the
9 question of the State's interest in closure, and the
10 policies, the way the double jeopardy policies work out in
11 this statute in this case. What Pennsylvania --
12 Pennsylvania's statute as it's written recognizes several
13 different interests. One of the interests it recognizes
14 is the interest in economy, the interests in finality, the
15 interest in giving the State a single opportunity to try
16 and obtain a death penalty.

17 On the other hand, it balances this against what
18 this Court has in the past said is a desirable goal of
19 trying to achieve jury unanimity. So it has a preference
20 for a unanimous jury, and it balances that against the
21 finality of the sentence. And that's why the judge is
22 required, when the jury comes back and says that it is not
23 unanimous, why that judge is then required to see if
24 further deliberations are going to be fruitful.

25 When the judge determines that the jury is not

1 unanimous, and determines that the jury is not going to
2 become unanimous, that represents a decision at that point
3 that the interest in finality, imposing the life sentence
4 now and ending it, outweighs the interest in obtaining a
5 unanimous jury. And that is -- and that triggers, that
6 ties into this Court's long-term double jeopardy
7 jurisprudence that one of the primary interests is against
8 subjecting a defendant to multiple trials, forcing him to
9 run the gamut of a second capital sentencing proceeding
10 after the first has been tried to completion.

11 On another issues, Your Honors, one of the
12 things that I would suggest as a possible structural way
13 of looking at capital sentencing cases to see whether
14 there is a sensible way of determining whether or not what
15 you have is an acquittal is this. In Bullington, this
16 Court talked about the binary choice between life or
17 death, and the significance of that when you have a trial-
18 like proceeding, in distinguishing between whether it's an
19 acquittal or a conviction, so there's a binary choice.

20 What the Pennsylvania statute has done is create
21 a second binary choice, only it's a procedural one. If
22 this were a hung jury like what you see at trial, the jury
23 has three options. They can acquit, they can convict, or
24 there's limbo. The hung jury in the case goes back.

25 The Pennsylvania legislature has determined that

1 there is a second binary choice -- a procedural choice --
2 and that is, unless there is a conviction, a life sentence
3 is entered, and by eliminating that third category, it has
4 made the determination that any failure by the State to
5 prove its case to a unanimous jury constitutes an
6 acquittal, so I would say that the second binary choice,
7 the procedural choice, is a bright line way of saying
8 whether or not there is an acquittal. And a bright line,
9 I think, is what Bullington and Rumsey stand for --

10 CHIEF JUSTICE REHNQUIST: Thank you. Thank you,

11 Mr. Dunham

12 The case is submitted.

13 (Whereupon, at 12:05 p.m., the case in the
14 above-entitled matter was submitted.)

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