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The Substitution of Words for Analysis and Other Judicial Pitfalls: Why David Sattazahn Should Have Received Double Jeopardy Protection

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THE SUBSTITUTION OF WORDS FOR ANALYSIS AND OTHER JUDICIAL PITFALLS: WHY DAVID SATTAZAHN SHOULD HAVE RECEIVED DOUBLE JEOPARDY PROTECTION

Sattazahn v. Pennsylvania, 537 U.S. 101 (2003)

I. INTRODUCTION

In *Sattazahn v. Pennsylvania*, the Supreme Court held that double jeopardy protection does not extend to a life sentence which is the product of a hung jury at the capital sentencing proceedings.[1] David Sattazahn was convicted of first-degree murder, but during the capital sentencing phase, the trial court determined the jury could not reach a unanimous decision.[2] As a result of the applicable state statutory law in Pennsylvania, the trial judge dismissed the jury and entered a life sentence against the defendant.[3] Sattazahn successfully appealed the conviction;[4] however, at retrial, the jury convicted him again of first-degree murder and unanimously agreed to the sentence of death.[5]

In a five-to-four decision, the Supreme Court ruled the second death sentence was not precluded by the Double Jeopardy Clause.[6] It reasoned that the initial sentence was not an "acquittal" of the death penalty since the life sentence was the product of an operation of law, not a unanimous jury decision based on factual adjudication.[7] Because no "acquittal" had occurred, the defendant was not legally entitled to the original sentence.[8] Furthermore, the majority rejected the dissent's reliance on *United States v.*

[1] 537 U.S. 101 (2003).
[2] *Id.* at 103-04.
[3] *Id.* at 104-05.
[4] *Id.* at 105.
[5] *Id.*
[6] *Id.* at 102.
[7] *Id.* at 109-10.
[8] *Id.* at 109.

Scott[9] for the proposition that double jeopardy protection can extend to situations where no "acquittal" has occurred.[10]

This Note argues that prior Supreme Court cases did not lead to the conclusion that an "acquittal" was necessary for legal entitlement to a life sentence.[11] Rather, the Pennsylvania statute governing capital sentencing proceedings created a legal entitlement to a life sentence in the situation of a hung jury.[12] In addition, this Note examines two situations where double jeopardy protection may apply even without factual adjudication of guilt or innocence: mistrials and termination of a trial in favor of the defendant before such factual adjudication.[13] Both situations occurred conceptually in this case, and the defendant met the threshold requirements for double jeopardy protection in both situations.[14]

II. BACKGROUND

A. THE DOUBLE JEOPARDY CLAUSE

The Double Jeopardy Clause of the Fifth Amendment states: "No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb . . . ."[15] This clause protects the individual from being subjected to trial and possible conviction more than once for a particular crime.[16] The rationale behind such a design is straightforward:

> the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense, and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.[17]

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[9] 437 U.S. 82 (1978).

[10] *Sattazahn*, 537 U.S. at 102.

[11] *See infra* Part VI.A.1.

[12] *See infra* Part VI.A.2.

[13] *See infra* Part VI.B.

[14] *See infra* Part VI.B. As explained *infra* note 268, this Note does not argue that both situations actually did occur, as the end result of a mistrial and the end result of termination of a trial in favor of the defendant are mutually exclusive. Rather, the situation which would ordinarily have led to a mistrial during the trial phase, a hung jury, occurred in this case, *Sattazahn*, 537 U.S. at 104, and the Pennsylvania statute mandated termination in favor of the defendant in such a situation. *See* 42 PA. CONS. STAT. ANN. § 9711(c) (West 2004).

[15] U.S. CONST. amend. V.

[16] Green v. United States, 355 U.S. 184, 187 (1957).

[17] *Id.* at 187-88.

B. THE PENNSYLVANIA STATUTE

The Pennsylvania statute guiding jury instructions in capital sentencing hearings reads:

> (iii) aggravating circumstances[18] must be proved by the Commonwealth beyond a reasonable doubt; mitigating circumstances[19] must be proved by the defendant by a preponderance of the evidence.
>
> (iv) the verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance specified in subsection (d) and no mitigating circumstance or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances. The verdict must be a sentence of life imprisonment in all other cases.
>
> (v) the court may, in its discretion, discharge the jury if it is of the opinion that further deliberation will not result in a unanimous agreement as to the sentence, in which case the court shall sentence the defendant to life imprisonment.[20]

The statute essentially states that in order to sentence a defendant to capital punishment, the jury must unanimously vote for such a sentence. In all other cases, including when the jury is unable to reach a unanimous agreement, a defendant receives a life sentence.

C. CASE LAW ON DOUBLE JEOPARDY PROTECTION AT RETRIAL

The Double Jeopardy Clause of the Fifth Amendment stands for the principle that a person should not be tried or punished twice for the same offense.[21] In order to establish double jeopardy protection, one must first show the initial jeopardy has terminated.[22] This inquiry is particularly pertinent for the question of whether a defendant is eligible for the death penalty at retrial. More specifically, if a defendant is convicted of a crime eligible for capital punishment and receives a life sentence, and then successfully appeals the conviction with the result of a retrial, does double jeopardy prevent the defendant from receiving the death penalty? In other

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[18] An aggravating circumstance is defined as "[a] fact or situation that increases the degree of liability or culpability for a tortious or criminal act." BLACK'S LAW DICTIONARY 236 (7th ed. 1999). Pennsylvania lists eighteen aggravating circumstances in the context of the capital sentencing hearing. *See* 42 PA. CONS. STAT. ANN. § 9711 (d).

[19] A mitigating circumstance is defined as "[a] fact or situation that does not justify or excuse a wrongful act or offense but that reduces the degree of culpability and thus may reduce . . . the punishment (in a criminal case)." BLACK'S LAW DICTIONARY, *supra* note 18, at 236. Pennsylvania lists eight mitigating circumstances in the context of the capital sentencing hearing. *See* 42 PA. CONS. STAT. ANN. § 9711(e).

[20] *Id.* § 9711(c).

[21] Sattazahn v. Pennsylvania, 537 U.S. 101, 106 (2003).

[22] *Id.*

words, did the jeopardy of capital punishment terminate with the entrance of the life sentence, or did that jeopardy remain for the retrial?

1. Double Jeopardy Protection Generally Does Not Preclude the Imposition of a Harsher Sentence at Retrial

The Supreme Court first addressed the issue in *Stroud v. United States*, where it ruled that a defendant who received a life sentence at trial could receive the death penalty at retrial.[23] In this case, the defendant was initially convicted of first-degree murder and sentenced to death.[24] This judgment was overturned and the defendant was retried.[25] At retrial, the jury found the defendant guilty of first-degree murder "without capital punishment."[26] This judgment too was overturned, and at the second retrial, the defendant was convicted of first-degree murder; however, the jury made no recommendation as to whether the conviction was with or without capital punishment.[27] With the lack of direction from the jury, the judge entered a death sentence without making additional factual inquiries.[28] On appeal, the defendant claimed the death sentence in the second retrial violated the Double Jeopardy Clause.[29]

Justice Day dismissed this argument; he reasoned that the "termination of jeopardy" inquiry should be focused on the trial of the offense as opposed to the sentence.[30] Because jeopardy never terminated with respect to the offense of first-degree murder, the Double Jeopardy Clause provided no protection.[31] The resulting sentence was merely the result of the conviction and was not the subject of the inquiry itself.[32]

The Supreme Court reaffirmed *Stroud* when it decided *North Carolina v. Pearce*.[33] The Court held the Double Jeopardy Clause did not prevent a

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[23] 251 U.S. 15, 18 (1919).

[24] *Id.* at 16.

[25] *Id.*

[26] *Id.* at 17. .

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Id.* at 18. "The protection afforded by the Constitution is against a second trial for the same offense." *Id.*

[31] *Id.*

[32] *Id.* "Each conviction was for murder as charged in the indictment, which . . . was murder in the first degree. In the last conviction the jury did not add the words 'without capital punishment' to the verdict . . . . In such case the court could do no less than inflict the death penalty." *Id.* The implication of this statement is that the sentence is ancillary to the conviction itself and is not the focus of the Double Jeopardy Clause.

[33] 395 U.S. 711 (1969).

harsher sentence at retrial.[34] The rationale behind this holding was that "a corollary of the power to retry a defendant is the power, upon the defendant's reconviction, to impose whatever sentence may be legally authorized, whether or not it is greater than the sentence imposed after the first conviction."[35] However, the Court pointed out that in this case, the first conviction was overturned at "the defendant's behest."[36]

2. Green and Bullington: The Court Establishes Protection in Certain Circumstances at Retrial

In *Green v. United States*,[37] the Court held that the conviction of second-degree murder at the first trial, when the jury had the opportunity to convict on first-degree murder, barred the prosecution from seeking first-degree murder at retrial.[38] In this case, the defendant was tried for an arson which resulted in the death of a person.[39] The trial judge gave the jury the instruction that it could find the defendant guilty of first- or second-degree murder.[40] The jury found the defendant guilty of second-degree murder, and the defendant appealed.[41] At retrial, the defendant was found guilty of first-degree murder and sentenced to death.[42] The Supreme Court reversed the conviction of the retrial and reasoned "[The defendant] was in direct peril of being convicted and punished for first degree murder at his first trial. He was forced to run the gauntlet once on that charge and the jury refused to convict him."[43] Because the jury only had two choices in the first trial, to convict on either first-degree or second-degree murder, and chose to convict on the lesser charge, the defendant was now protected from prosecution on the greater charge.

Additionally, the Court, in *Bullington v. Missouri*, declined to extend the holding in *Pearce* to a situation where the sentencing procedures "have

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[34] *Id.* at 723.

[35] *Id.* at 720.

[36] *Id.* at 721. "[T]he rationale for this [rule]. . . rests ultimately on the premise that the original conviction has, at the defendant's behest, been wholly nullified and the slate wiped clean." *Id.* at 720-21.

[37] 355 U.S. 184 (1957). Although the Court in *Green* did not specifically address the issue of double jeopardy protection with respect to different sentences for the same offense, the analysis is relevant.

[38] *Id.* at 191.

[39] *Id.* at 185.

[40] *Id.*

[41] *Id.* at 186.

[42] *Id.*

[43] *Id.* at 190.

the hallmarks of a trial on guilt or innocence."[44] The defendant was tried and found guilty of the crime of capital murder.[45] During the sentencing phase, the jury was to take into consideration the existence of aggravating and mitigating circumstances, and it was also to determine whether the prosecution and defense had met specific standards of proof for these circumstances.[46] State law provided for only two sentences: death, or life in prison without the possibility of parole for fifty years.[47] In order to sentence the defendant to death, the jury was required to unanimously agree.[48] If the jury did not unanimously agree for the death penalty, the defendant would receive life imprisonment.[49] The jury unanimously agreed to a life sentence, and the defendant then entered a motion for a new trial because of a recent Supreme Court decision.[50] The trial court granted this motion.[51] On retrial, the prosecution provided notice that it intended to seek the death penalty again.[52] The trial court initially disallowed the State from seeking this sentence, but the Missouri Supreme Court ultimately affirmed the prosecution's position to seek capital punishment.[53]

The Supreme Court reversed the lower court's decision because it found that the first trial was bifurcated: the first stage consisted of the determination of guilt or innocence, and the second stage consisted of the determination of the sentence.[54] While "[t]he imposition of a particular sentence usually is not regarded as an 'acquittal' of any more severe sentence that could have been imposed,"[55] when that sentence is the product

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[44] 451 U.S. 430, 439 (1981).

[45] *Id.* at 435.

[46] *Id.* at 434. In this particular case,

> the prosecution would present evidence of two aggravating circumstances specified by the statute: that "[t]he offense was committed by a person . . . who has a substantial history of serious assaultive criminal convictions," and that "[t]he offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture, or depravity of mind."

Id. at 435 (quoting MO. REV. STAT. § 565.012.2 (1980)).

[47] *Id.* at 432.

[48] *Id.* at 435.

[49] *Id.*

[50] *Id.* at 436. In *Duren v. Missouri*, the Court "held Missouri's constitutional and statutory provisions allowing women to claim automatic exemption from jury service deprived a defendant of his Sixth and Fourteenth Amendments right to a jury drawn from a fair cross-section of the community." *Id.* (citing Duren v. Missouri, 439 U.S. 357 (1979)). Because of *Duren*, the trial court in *Bullington* awarded the defendant a new trial. *Id.*

[51] *Id.*

[52] *Id.*

[53] *Id.* at 436-37.

[54] *Id.* at 432.

[55] *Id.* at 438.

of a sentencing proceeding, the imposition of the lower sentence is an acquittal.[56] The reason for this distinction is "[i]n the usual sentencing proceeding . . . it is impossible to conclude that a sentence less than the statutory maximum 'constitute[s] a decision to the effect that the government has failed to prove its case,'"[57] whereas, when a capital sentencing procedure resembles a trial, the jury explicitly determines whether the prosecution has proved its case.[58] Because the defendant received a sentence which was the product of a trial-like process, the sentence was protected by the Double Jeopardy Clause.

Even in cases where the capital sentencing proceeding is not conducted by a jury, the Supreme Court has found that as long as the proceedings are trial-like, the fact that a judge makes the factual determinations does not nullify double jeopardy protection.[59] In *Arizona v. Rumsey*, the trial judge conducted the capital sentencing proceeding and the requisite factual inquiries.[60] The court ruled that although the judge—instead of the jury—played the role of the sentencer, this did not "render the sentencing proceeding any less like a trial."[61]

3. Limitations on Bullington

In *Poland v. Arizona*,[62] the Supreme Court held that double jeopardy protection did not apply to a retrial sentence of capital punishment when the sentence of the first trial was also capital punishment, even when the aggravating circumstance used to support the capital sentence at retrial was specifically found to have insufficient support at the first trial.[63] In this case, the defendants were found guilty of first-degree murder after robbing an armored car and killing the two guards by placing them in weighted sacks and throwing them into a lake.[64] The prosecution argued the presence of two statutory aggravating circumstances: "(1) that [defendants] had 'committed the offense as consideration for the receipt, of [something] of pecuniary value';[65] and (2) that [defendants] had 'committed the offense in

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[56] *Id.*

[57] *Id.* at 443 (quoting MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 38 (1973)).

[58] *Id.* at 444.

[59] *See* Arizona v. Rumsey, 467 U.S. 203 (1984).

[60] *Id.* at 205.

[61] *Id.* at 210.

[62] 476 U.S. 147 (1986).

[63] *Id.* at 150.

[64] *Id.* at 148-49.

[65] *Id.* at 149 (quoting ARIZ. REV. STAT. ANN. § 13-454(E)(5) (West 1973)).

an especially heinous, cruel, or depraved manner.'"[66] In the sentencing proceeding, the trial judge found insufficient evidence of the "pecuniary gain" circumstance, but found sufficient evidence of the "depraved manner" circumstance and sentenced the defendants to death.[67] The defendants appealed. The Arizona Supreme Court reversed and ordered a new trial because it found insufficient evidence to support the "depraved manner" circumstance.[68] At retrial, the defendants were again convicted and sentenced to death.[69] The sentence ultimately rested on the "pecuniary advantage" circumstance, which the first trial judge found not to be present.[70]

Affirming the second death sentence, the Supreme Court stated "the relevant inquiry in the cases before us is whether the sentencing judge or the reviewing court has 'decid[ed] that the prosecution has not proved its case' for the death penalty and hence has 'acquitted' petitioners."[71] With the inquiry set, the Supreme Court ruled that the use of an aggravating circumstance to support the second sentence of death, which was not present at the first sentence of death, did not violate double jeopardy because the prosecution proved its case for the death penalty in the first trial.[72] The Court reasoned that "[a]ggravating circumstances are not separate penalties or offenses, but are 'standards to guide the making of [the] choice' between the alternative verdicts of death and life imprisonment."[73] Because the defendants could not be "acquitted" of the "pecuniary gain" circumstance, the prosecution could use this circumstance at retrial.[74]

Further limiting the scope of *Bullington*, the Court also held that *Bullington* did not apply in a noncapital case.[75] In *Monge v. California*,[76] the defendant was convicted of a felony related to the sale of marijuana.[77] In a separate sentencing phase, the prosecution sought to prove that the defendant had been convicted of a prior serious felony.[78] Under California

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[66] *Id.* (quoting ARIZ. REV. STAT. ANN. § 13-454(E)(6) (West 1973)).
[67] *Id.* at 149.
[68] *Id.* at 150.
[69] *Id.*
[70] *Id.* at 151.
[71] *Id.* at 154.
[72] *Id.* at 154.
[73] *Id.* at 156 (quoting Bullington v. Missouri, 451 U.S. 430, 438 (1981)).
[74] *Id.*
[75] *See* Monge v. California, 524 U.S. 721 (1998).
[76] *Id.*
[77] *Id.* at 724-25.
[78] *Id.* at 725.

law, if the prosecution proved this circumstance, the defendant's maximum sentence could be doubled.[79] The trial court did find this circumstance, and sentenced the defendant to double the maximum term for the drug charge.[80] The defendant appealed, and the appellate court found insufficient evidence to support the "prior serious felony" circumstance.[81] The appellate court then disallowed a retrial to prove the circumstance because it believed such a retrial would violate double jeopardy principles.[82] The California Supreme Court reversed this decision and allowed a retrial so that prosecutors could again attempt to prove the "prior serious felony" circumstance.[83]

The Supreme Court affirmed this decision by limiting *Bullington* to capital situations.[84] In its distinction between capital and noncapital sentencing proceedings, the Court noted the unique nature of the punishment of death and the need for greater reliability provided by capital sentencing proceedings.[85] The Court further reasoned that trial-like proceedings in noncapital cases were not constitutionally required, but were merely extra protection provided by the state.[86] Under the Court's holding, a defendant in a noncapital case is not legally entitled to a prior sentence, even if such a sentence was the result of a trial-like proceeding.[87]

III. STATEMENT OF THE FACTS

In April 1987, David Sattazahn and Jeffrey Scott Hammer made preparations to rob a restaurant.[88] Through surveillance, the two learned that the restaurant conducted most of its business on Sundays.[89] They also learned that Richard Boyer, the manager of the restaurant, closed the restaurant each night, and that each night he carried the bank deposit bag with the day's receipts.[90] Sattazahn and Hammer obtained two handguns,

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[79] *Id.* at 724 (citing CAL. PENAL CODE §§ 667(d)(1) and (e)(1)(2) (West 1998)).

[80] *Id.* at 725.

[81] *Id.*

[82] *Id.* at 726.

[83] *Id.*

[84] *Id.* at 734.

[85] *Id.* at 732.

[86] *Id.* at 733.

[87] *Id.* at 734. As Justice Stevens points out, if the prosecution at retrial proves the "prior serious felony" circumstance, the defendant automatically receives an additional five years to his sentence. *Id.* at 735 (Stevens, J., dissenting).

[88] Petitioner's Brief at 3, Sattazahn v. Pennsylvania, 537 U.S. 101 (2003) (No. 01-7574).

[89] Respondent's Brief at 1, *Sattazahn* (No. 01-7574).

[90] *Id.*

ammunition, and other supplies.[91] Their plan was to rob Boyer and then handcuff him.[92]

On Sunday, April 12, 1987, Sattazahn and Hammer waited for Boyer to exit the restaurant after closing in order to rob him of the deposit bag.[93] At approximately 11:00 p.m., Boyer left the restaurant and approached his automobile.[94] Sattazahn and Hammer approached the manager and told him to drop the deposit bag and put up his hands.[95] Boyer put his hands up but flung the deposit bag towards the restaurant.[96] Sattazahn forced Boyer to retrieve the bag, but Boyer attempted to throw the bag onto the roof of the restaurant and then proceeded to flee.[97] Sattazahn fired the first shot, and Hammer fired a warning shot in the air.[98] Sattazahn fired several more shots and Boyer collapsed.[99] Sattazahn and Hammer retrieved the bag and the two fled the scene.[100]

Sattazahn was arrested for the murder of Richard Boyer and related crimes on July 17, 1989.[101] The prosecution sought the death penalty for Sattazahn.[102] Hammer was also charged and plead guilty to third-degree murder, robbery, and related charges.[103]

IV. PROCEDURAL HISTORY

At Sattazahn's trial, Hammer served as a primary witness for the Commonwealth.[104] During the trial, Hammer related the events of the crime, and testified that Sattazahn carried a .22 caliber handgun and that he carried a .41 caliber handgun.[105] The autopsy of Boyer showed that he had been shot five times, and that all wounds were consistent with being inflicted by .22 caliber bullets.[106] On May 9, 1991, the jury convicted

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[91] Petitioner's Brief at 3, *Sattazahn* (No. 01-7574).
[92] *Id.*
[93] *Id.*
[94] Respondent's Brief at 1, *Sattazahn* (No. 01-7574).
[95] *Id.* at 1-2.
[96] *Id.* at 2.
[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] *Id.*
[101] *Id.* at 1.
[102] *Id.*
[103] *Id.* at 1 n.1.
[104] *Id.*
[105] *Id.* at 1-2.
[106] *Id.* at 2.

Sattazahn of first-, second-, and third-degree murder, robbery, and other related crimes, and the case proceeded to a capital sentencing hearing.[107]

During the capital sentencing hearing, the trial court provided instructions on Pennsylvania law relating to when the jury can sentence a defendant to death.[108] In order to institute a capital punishment, the jury must unanimously find at least one aggravating circumstance and no mitigating circumstances, or the jury must unanimously find at least one aggravating circumstance which outweighs any mitigating circumstances.[109] In all other circumstances, the sentence must be life imprisonment.[110] The Commonwealth bore the burden of proving the aggravating circumstance(s) beyond a reasonable doubt, whereas the defendant bore the burden of proving the mitigating circumstances by a preponderance of the evidence.[111] Additionally, under the Pennsylvania statute, the trial court may discharge the jury if it believes that further deliberation will not result in a unanimous verdict.[112] In these situations, the court is statutorily mandated to enter a sentence of life imprisonment.[113] The Commonwealth presented evidence of the aggravating circumstance that the defendant committed the murder in the perpetration of a felony.[114] The defendant presented evidence of two mitigating circumstances: the defendant's lack of a significant criminal history and the defendant's age at the time of the crime.[115]

After three and one-half hours of deliberation, the jury returned with a note stating it was hopelessly deadlocked, nine-to-three, in favor of life imprisonment.[116] Sattazahn moved to discharge the jury and enter the mandated life sentence.[117] The court refused to discharge the jury until it could determine whether further deliberations could possibly result in a unanimous verdict.[118] After its examination, the trial court concluded that further deliberations would not result in a unanimous verdict.[119] It discharged the jury and stated its intention to sentence Sattazahn to life

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[107] *Id.* at 2-3.

[108] Petitioner's Brief at 4-5, *Sattazahn* (No. 01-7574).

[109] *Id.* at 4.

[110] *Id.*

[111] *Id.*

[112] *Id.* at 6.

[113] *Id.* at 5-6.

[114] Respondent's Brief at 2 n.2, *Sattazahn* (No. 01-7574).

[115] *Id.*

[116] Petitioner's Brief at 6, *Sattazahn* (No. 01-7574).

[117] Brief for the United States as Amicus Curiae Supporting Respondent at 4, *Sattazahn* (No. 01-7574).

[118] *Id.*

[119] *Id.*

imprisonment on May 10, 1991.[120] The court formally sentenced Sattazahn to this term on February 14, 1992.[121] Between September 19, 1991 and April 1, 1992, Sattazahn plead guilty to a number of other independent crimes, including third degree murder, robbery, and burglary.[122]

Sattazahn appealed his conviction relating to the murder of Richard Boyer on March 12, 1992.[123] The Pennsylvania Superior Court reversed his convictions on two points: first, the court ruled that the evidence at trial was insufficient to support convictions on some of the related crimes and dismissed those charges.[124] Additionally, the court ruled that the trial judge had erred in instructing the jury on the remaining charges, including the charge of murder.[125] As a result, the court reversed and remanded for a new trial on those charges.[126]

With respect to the retrial, the Commonwealth stated that it was again preparing to seek the death penalty.[127] In addition to the original aggravating circumstance of murder in the commission of a felony, the Commonwealth also sought to prove the additional aggravating circumstance "that the defendant had a significant criminal history of felony convictions involving the use or threat of violence to the person."[128] This additional aggravating circumstance was predicated on the guilty pleas Sattazahn entered into for various crimes after the first trial had ended.[129]

After the Commonwealth filed notice to seek the death penalty, Sattazahn moved to prevent the Commonwealth from seeking the death penalty for the retrial and to prevent the Commonwealth from proving the second aggravating circumstance.[130] The Court of Common Pleas denied the motion, and the Pennsylvania Superior Court affirmed the decision.[131] The Superior Court based its decision on the Pennsylvania Supreme Court decision in *Commonwealth v. Martorano*,[132] which stated that when the jury did not reach a unanimous verdict in a capital sentencing phase, the resulting life sentence was not an acquittal of the death penalty, and so did

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[120] Petitioner's Brief at 6, *Sattazahn* (No. 01-7574).

[121] *Id.*

[122] Respondent's Brief at 3, *Sattazahn* (No. 01-7574).

[123] Petitioner's Brief at 7, *Sattazahn* (No. 01-7574).

[124] Respondent's Brief at 3, *Sattazahn* (No. 01-7574).

[125] *Id.*

[126] *Id.*

[127] *Id.* at 4.

[128] *Id.* at 5 n.6.

[129] *Id.* at 3-4.

[130] *Id.* at 4.

[131] *Id.*

[132] 634 A.2d 1063 (Pa. 1993).

not invoke double jeopardy protection from a subsequent capital sentence.[133] The Pennsylvania Supreme Court declined to review the decision.[134]

On retrial, Sattazahn was convicted of the first-degree murder of Richard Boyer and other related charges.[135] During the capital sentencing phase, the jury unanimously voted for the death penalty.[136] The trial court subsequently imposed the formal sentence of death on February 16, 1999.[137]

Sattazahn appealed his conviction to the Pennsylvania Supreme Court.[138] He argued that his life sentence was the product of a Pennsylvania statute which mandated a life sentence in cases with hung juries; his contention was that this life sentence was an "acquittal" in the same sense that a unanimous verdict for a life sentence is an "acquittal" of capital punishment, so that he was entitled to double jeopardy protection from a capital sentence at retrial.[139]

The Pennsylvania Supreme Court rejected this argument, stating that a hung jury did not result in an acquittal on the merits because the judge had no discretion on the sentence: Pennsylvania law mandated the judge to sentence Sattazahn to life imprisonment.[140] In this situation, the Pennsylvania Supreme Court deemed, because the judgment was not based on factual findings, no legal entitlement to the original sentence existed.[141]

Additionally, Sattazahn argued that the Due Process Clause of the Fifth and Fourteenth Amendments precluded the Commonwealth from seeking the death penalty at retrial because such an ability on the Commonwealth's part would have a chilling effect on the defendant's right to appeal; a defendant would have to make the difficult choice between acceptance of a life sentence and appeal with the possibility of capital punishment.[142] The Pennsylvania Supreme Court rejected this argument as well, noting that the United States Supreme Court had rejected a similar line of argumentation.[143]

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[133] Petitioner's Brief at 8, *Sattazahn* (No. 01-7574).
[134] *Id.*
[135] *Id.*
[136] *Id.*
[137] *Id.* at 8-9.
[138] *Id.* at 9.
[139] *Id.*
[140] *Id.* at 9-10.
[141] *Id.* at 10-11.
[142] Commonwealth v. Sattazahn, 763 A.2d 359, 368 (Pa. 2000).
[143] *Id.* (citing Chaffin v. Stynchcombe, 412 U.S. 17, 30, 35 (1973)).

On December 17, 2001, Sattazahn filed a petition for writ of certiorari, and the United States Supreme Court granted the petition.[144] The Court addressed two issues: (1) whether the Double Jeopardy Clause prevented Pennsylvania from seeking the death penalty at Sattazahn's retrial, and (2) whether the Due Process Clause prevented Pennsylvania from seeking the death penalty at Sattazahn's retrial.[145]

V. SUMMARY OF OPINIONS

A. MAJORITY OPINION

The Supreme Court held, in a five-to-four decision authored by Justice Scalia, that double jeopardy protection did not extend to Sattazahn.[146] Relying on *Bullington*, the Court stated that the primary inquiry into whether the Double Jeopardy Clause barred an imposition of the death penalty on retrial is whether the defendant received an "acquittal" of the death penalty in the previous trial.[147] Armed with this test, the Court held that double jeopardy protection did not extend to Sattazahn because his life sentence was the result of a statutory default rule in the case of a hung jury, a situation which was not an "acquittal."[148] Additionally, the Court held that the Due Process Clause of the Fourteenth Amendment did not give greater protection than that provided by the Double Jeopardy Clause.[149]

The Court made explicit that the proper inquiry is not whether Sattazahn received a life sentence in the first trial; rather, "the touchstone for double-jeopardy protection in capital sentencing proceedings is whether there has been an 'acquittal.'"[150] The Court then applied this standard to the facts in this case, and found that the hung jury in Sattazahn's first capital sentencing proceeding produced a "non-result," not an acquittal, and Sattazahn was accordingly not afforded double jeopardy protection.[151]

Furthermore, the Supreme Court ruled that the entry of a life sentence by the trial judge as a result of Pennsylvania statute was not an acquittal.[152]

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[144] Petitioner's Brief at 11, *Sattazahn* (No. 01-7574).

[145] Sattazahn v. Pennsylvania, 537 U.S. 101, 115 (2003).

[146] *Id.* at 110-11. Chief Justice Rehnquist, and Justices O'Connor, Kennedy, and Thomas joined the opinion with respect to Parts I, II, IV, and V. Chief Justice Rehnquist and Justice Thomas joined the opinion with respect to Part III. *Id.* at 102.

[147] *Id.* at 109.

[148] *Id.*

[149] *Id.* at 116.

[150] *Id.* at 109.

[151] *Id.*

[152] *Id.*

In order for an acquittal to occur, the Court reasoned, the judge must make a judgment based on factual findings.[153] In this case, however, the trial judge made a judgment based on an operation of law, not on factual findings.[154] The Court concluded that a mechanical entry of a life sentence based on statutory compulsion was not the same as an acquittal due to factual findings and did not carry a "legal entitlement" to a life sentence.[155]

However, the Court recognized the Pennsylvania legislature could have intended a legal entitlement to a life sentence in the case of a hung jury.[156] The Court ultimately rejected this argument, however, because the Pennsylvania Supreme Court did not find such an intent in the statute, and the Pennsylvania legislature may have had other intentions in mind.[157] Because of the state's interest in closure, and its interest in conservation of resources, the Court reasoned, the state may be willing to accept a life sentence with a hung jury, but not when the case is to be re-litigated.[158] Whether the Pennsylvania legislature intended to create a legal entitlement to the life sentence for defendants such as Sattazahn was unclear at best, the Court concluded.[159]

Additionally, the Court restated its holding from *Apprendi v New Jersey*[160] by ruling that the proper standard for the jury to find an aggravating circumstance in the first trial was beyond a reasonable doubt.[161] In *Apprendi*, the Court held "if the existence of any fact (other than a prior conviction) increases the maximum punishment that may be imposed on a defendant, that fact—no matter how the State labels it—constitutes an element, and must be found by a jury beyond a reasonable doubt."[162] The

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[153] *Id.* at 109-10.

[154] *Id.*

[155] *Id.* at 110 (quoting Commonwealth v. Sattazahn, 763 A.2d 359, 367 (Pa. 2000), which in turn quotes Commonwealth v. Martorano, 634 A.2d 1063, 1070 (Pa. 1993)).

[156] *Id.*

[157] *Id.*

[158] *Id.*

[159] *Id.*

[160] 530 U.S. 466 (2000). In this case, the defendant fired shots into the home of an African American family who had moved into the previously all-white neighborhood. *Id.* at 469. The defendant later made a statement that he did so because he did not want African Americans living in the neighborhood. *Id.* Although the firearm charge carried a five to ten year sentence, the New Jersey hate crime statute allowed an enhanced sentence if the judge found by a preponderance of the evidence that the crime was committed in an attempt to intimidate a person or group because of race. *Id.* at 470. The Supreme Court ruled the hate crime statute unconstitutional, and held any fact which would increase the maximum punishment must be found beyond a reasonable doubt by a jury. *Id.* at 496-97.

[161] *Sattazahn*, 537 U.S. at 111 (citing *Apprendi*, 530 U.S. at 482-84, 490).

[162] *Id.*

corollary to this holding is that "[i]f a jury unanimously concludes that a State has failed to meet its burden of proving the existence of one or more aggravating circumstances, double-jeopardy protections attach to that 'acquittal.'"[163] However, at Sattazahn's first trial, the jury did not unanimously conclude that Pennsylvania did not meet its burden with respect to the aggravating circumstance; the jury was hung during the capital sentencing phase.[164] As a result, Sattazahn's "'jeopardy' never terminated with respect" to the capital sentencing phase.[165]

Next, the Court rebutted the arguments set forth by the dissent, beginning with the dissent's reliance on *United States v. Scott*.[166] First, the majority rejected the dissent's interpretation of *Scott* that "double jeopardy 'may' attach when the 'trial judge terminates the proceedings favorably to the defendant on a basis not related to factual guilt or innocence'"[167] by noting that the text relied upon is in dictum and that "[i]t would be a thin reed on which to rest a hitherto unknown constitutional prohibition of the entirely rational course of making a hung jury's failure to convict provisionally final, subject to change if the case must be retried anyway."[168]

Second, the Court distinguished *Scott* because the dictum in that case stated double jeopardy protection may apply when the defendant receives a favorable termination not based on a factual determination when he, "at least insisted on having the issue of guilt submitted to the first trier of fact."[169] In this case, Sattazahn did not make such an insistence but instead called for a life sentence based on procedural grounds.[170] Finally, the Court stated that this case fell outside the zone of protection that the Double Jeopardy Clause created, because it "hardly presents the specter of 'an all-powerful state relentlessly pursuing a defendant who had either been found not guilty or who had at least insisted on having the issue of guilt submitted to the first trier of fact.'"[171] The Court concluded that "the case is, except for [the sentencing] issue, at an end,"[172] but the state could later attempt to resolve the open issue of the death penalty.[173]

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[163] *Id.* at 112.

[164] *Id.* at 112-13.

[165] *Id.* at 113.

[166] 437 U.S. 82 (1978).

[167] *Sattazahn*, 537 U.S. at 113 (quoting *Scott*, 437 U.S. at 92).

[168] *Id.* at 113-14.

[169] *Id.* at 113 (internal quotation marks and emphasis omitted) (quoting *Scott*, 437 U.S. at 96).

[170] *Id.* at 114.

[171] *Id.* at 114-15 (quoting *Scott*, 437 U.S. at 96).

[172] *Id.* at 115.

[173] *Id.* (quoting Arizona v. Washington, 434 U.S. 497, 509 (1978)).

Finally, the Court rejected Sattazahn's due process claim by stating "[n]othing indicates that any 'life' or 'liberty' interest that Pennsylvania law may have given petitioner in the life sentence imposed after his first capital-sentencing proceeding was somehow immutable."[174] At the heart of the majority's dismissal was the notion that Sattazahn's due process claim was essentially the same as his double jeopardy claim; it concluded that the Due Process Clause did not give "greater double-jeopardy protection than . . . the Double Jeopardy Clause."[175]

B. CONCURRING OPINION

In a concurring opinion, Justice O'Connor agreed with all of the arguments set forth by the majority except for the argument premised on *Apprendi*.[176] She stated, "[i]t remains my view that '*Apprendi*'s rule that any fact that increases the maximum penalty must be treated as an element of the crime is not required by the Constitution, by history, or by our prior cases.'"[177]

Justice O'Connor reiterated the idea that a hung jury is not an 'acquittal,' and therefore does not implicate double jeopardy protection with respect to a capital sentencing proceeding.[178] She based her argument on the idea that with a hung jury, no decision is actually made because the jury "[does] not make any findings about the existence of the aggravating or mitigating circumstances."[179] As a result, double jeopardy protection did not attach.[180]

C. DISSENTING OPINION

The dissenting opinion, authored by Justice Ginsburg, stated double jeopardy protection should apply to a final judgment that is the product of a statutory mandate.[181] The dissent pointed out that, while the majority argued double jeopardy protection extends only to situations where the defendant has been acquitted, double jeopardy jurisprudence did not warrant such a conclusion.[182] Instead, the dissent asserted, "the question is

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[174] *Id.* at 115-16.

[175] *Id.* at 116.

[176] *Id.* (O'Connor, J., concurring).

[177] *Id.* at 117 (O'Connor, J., concurring) (quoting Ring v. Arizona, 536 U.S. 584, 619 (2002) (O'Connor, J., dissenting)).

[178] *Id.* (O'Connor, J., concurring).

[179] *Id.* (O'Connor, J., concurring).

[180] *Id.* at 118 (O'Connor, J., concurring).

[181] *Id.* (Ginsburg, J., dissenting). Justices Stevens, Souter, and Breyer joined the dissent.

[182] *Id.* at 119 (Ginsburg, J., dissenting).

genuinely debatable" whether a final judgment outside of an acquittal would be protected by the Double Jeopardy Clause.[183] The dissent concluded that the mandatory nature of the life sentence as derived from Pennsylvania law created a legal entitlement to such sentence, and was therefore within the realm of double jeopardy protection.[184]

The dissent began by describing the finality of the life sentence imposed by the first trial: the sentence alone could not be appealed or retried by the prosecution.[185] Because the government may not separately appeal the sentence, the implication was that such a sentence is final.[186]

Turning then to *United States v. Scott*,[187] the dissent asserted that double jeopardy protection may apply even in a case without an acquittal:

> [T]his Court has also developed a body of law guarding the separate but related interest of a defendant in avoiding multiple prosecutions even where no final determination of guilt or innocence has been made. . . . "Such interests," we observed, "may be involved in two different situations: the first, in which the trial judge declares a mistrial; the second, in which the trial judge terminates the proceedings favorably to the defendant on a basis not related to factual guilt or innocence."[188]

In the context of the first situation, when a hung jury causes a mistrial, the defendant can be reprosecuted.[189] With respect to the second situation, the dissent argued that "[w]hen a motion to terminate is granted, . . . the trial court 'obviously contemplates that the proceedings will terminate then and there in favor of the defendant.'"[190] However, the dissent also noted that, even in the second situation, double jeopardy protection may not apply in specific cases.[191] If a defendant makes the motion to terminate before an adjudication on factual innocence or guilt, then the defendant can be re-prosecuted even if her motion is successful.[192] In *Scott*, the defendant was denied double jeopardy protection because he was the person who made the motion to terminate.[193] The implication of this logic, the dissent argued, is that in cases where the court terminated the proceedings, double jeopardy protection would apply.[194] Sattazahn's case was a situation where the court

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[183] *Id.* (Ginsburg, J., dissenting).
[184] *Id.* (Ginsburg, J., dissenting).
[185] *Id.* at 118 (Ginsburg, J., dissenting).
[186] *Id.* (Ginsburg, J., dissenting).
[187] 437 U.S. 82 (1978).
[188] *Sattazahn*, 537 U.S. at 120 (Ginsburg, J., dissenting) (quoting *Scott*, 437 U.S. at 92).
[189] *Id.* at 121 (Ginsburg, J., dissenting).
[190] *Id.* (Ginsburg, J., dissenting) (quoting *Scott*, 437 U.S. at 94).
[191] *Id.* at 122 (Ginsburg, J., dissenting).
[192] *Id.* (Ginsburg, J., dissenting).
[193] *Id.* (Ginsburg, J., dissenting) (citing *Scott*, 437 U.S. at 98-99).
[194] *Id.* at 123 (Ginsburg, J., dissenting).

dismissed the jury and terminated the proceedings, so Sattazahn should be protected by the Double Jeopardy Clause.[195]

The dissent was also concerned with the "continuing state of anxiety and insecurity" Sattazahn endured as a result of the second trial.[196] It reasoned that Pennsylvania already had "one complete opportunity"[197] to prosecute Sattazahn, and that Sattazahn was required to bear the emotional stress of one trial.[198] However, with a retrial, Sattazahn was "forced to run the gantlet" a second time.[199]

Finally, the dissent pointed to two factors which weighed in Sattazahn's favor. First, if double jeopardy protection does not apply in a situation with a hung jury during the capital sentencing phase, then defendants such as Sattazahn will have a "perilous choice" between an appeal but with the risk of the death penalty, or a life sentence.[200] Second, the penalty of death is "unique in both its severity and its finality."[201] Sattazahn had already faced such a penalty, and to subject him to the same stress twice did not comport with the spirit of double jeopardy protection.[202]

VI. ANALYSIS

The Supreme Court incorrectly held that the Double Jeopardy Clause did not protect David Sattazahn from a capital sentence at retrial. The Court should have extended double jeopardy protection to defendants who receive life sentences as a result of statutory mandate. While the jury at the capital sentencing phase of the first trial did not reach a unanimous decision, this fact alone should not deny double jeopardy protection. First, the Court unfairly made a unanimous jury decision for life imprisonment a necessary requirement for a "legal entitlement" to the sentence of life imprisonment, even though the plain language of the Pennsylvania statute directs otherwise. Second, jeopardy can end in the situations of a mistrial and termination in favor of the defendant before factual adjudication. The Court's previous analysis in these two situations leads to the conclusion that

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[195] *Id.* (Ginsburg, J., dissenting).

[196] *Id.* at 124 (Ginsburg, J., dissenting) (internal quotation marks omitted) (quoting Green v. United States, 355 U.S. 184, 187 (1957)).

[197] *Id.* (Ginsburg, J., dissenting) (internal quotation marks omitted) (quoting Arizona v. Washington, 434 U.S. 497, 509 (1978)).

[198] *Id.* (Ginsburg, J., dissenting).

[199] *Id.* at 125 (Ginsburg, J., dissenting) (quoting *Green*, 355 U.S. at 190).

[200] *Id.* at 126 (Ginsburg, J., dissenting).

[201] *Id.* at 127 (Ginsburg, J., dissenting) (internal quotation marks omitted) (quoting Monge v. California, 524 U.S. 721, 732 (1998)).

[202] *Id.* (Ginsburg, J., dissenting).

the Double Jeopardy Clause should have barred the prosecution from seeking the death penalty at Sattazahn's retrial.

A. SUPREME COURT JURISPRUDENCE DOES NOT SUPPORT THE CONTENTION THAT AN ACQUITTAL IS A NECESSARY CONDITION FOR DOUBLE JEOPARDY CLAUSE PROTECTION.

Prior Supreme Court cases do not address whether a defendant can receive legal entitlement to a sentence without an acquittal from a unanimous jury decision.[203] As a result, the Court's decision to require such an acquittal for a legal entitlement to a life sentence in the context of a capital sentencing hearing was unfounded and conclusory in its analysis. Moreover, not only did the Supreme Court create a necessary condition for a legal entitlement from whole cloth, it also largely ignored the legal entitlement explicitly created by the Pennsylvania legislature.

1. An Acquittal by a Unanimous Jury Should Not Be a Necessary Condition for a Legal Entitlement to a Life Sentence in the Capital Sentencing Context

The Supreme Court erred in its reliance on the word "acquittal" to dismiss Sattazahn's claim of double jeopardy protection. While an acquittal may be sufficient to create a legal entitlement, it is not necessary to do so.

The majority opinion makes use of two key phrases: "acquittal" and "legal entitlement." The logical starting point of the analysis, then, is the origin and context of these phrases in the Court's double jeopardy jurisprudence. In *Bullington v. Missouri*,[204] the Court began by addressing what was *not* an acquittal: "The imposition of a particular sentence usually is not regarded as an 'acquittal' of any more severe sentence that could have been imposed."[205] However, when the defendant receives a life sentence by a jury through a trial-like capital sentencing proceeding, such a sentence meant that the jury had acquitted the defendant of the death penalty.[206] Although a sentence in general is not an acquittal of a harsher sentence, when a jury issues a life sentence in a capital sentencing proceeding, the sentence acts as an acquittal of the harsher sentence of the death penalty. It is important to note that in the facts specific to *Bullington*, the jury

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[203] *See supra* Part II.

[204] 451 U.S. 430 (1981).

[205] *Id.* at 438.

[206] *Id.* at 445 (quoting State *ex rel.* Westfall v. Mason, 594 S.W.2d 908, 922 (Mo. 1980) (Bardgett, C.J., dissenting)).

"acquitted" the defendant of the death penalty by unanimously voting for the sentence of life imprisonment.[207]

The phrase "legal entitlement" derives its relevancy from *Arizona v. Rumsey*.[208] In that case, the Court stated:

> The trial court entered findings denying the existence of each of the seven statutory aggravating circumstances, and as required by state law, the court then entered judgment in respondent's favor on the issue of death. That judgment, based on findings sufficient to establish legal entitlement to the life sentence, amounts to an acquittal on the merits. . . .[209]

This dictum suggests that factual findings can be sufficient to establish legal entitlement to a life sentence, but it does not suggest that factual findings are necessary to establish legal entitlement.[210] Additionally, the dictum also suggests that a judgment of life imprisonment based on factual findings amounts to an acquittal of the death penalty.[211]

In addition to the Court's use of these phrases, Black's Law Dictionary defines "acquittal" as "[t]he legal certification, usu. by jury verdict, that an accused person is not guilty of the charged offense."[212] It defines "entitlement" as "[a]n absolute right to a (usu. monetary) benefit, such as social security, granted immediately upon meeting a legal requirement."[213]

The question then becomes how "acquittal" and "legal entitlement" are related in the context of a capital sentencing hearing. From the assumptions and definitions aforementioned, the Court in *Bullington* ruled that an acquittal in the form of a unanimous jury decision to sentence a defendant to life imprisonment was sufficient to create a legal entitlement to that sentence.[214] In a broader ruling, the Court acknowledged in *Rumsey* that a judgment based on factual findings was also sufficient to create a legal entitlement.[215] Essentially, the Court gave two paths to a legal entitlement

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[207] *Id.* at 436. Although the facts described by the Court do not explicitly state the jury was unanimous in its decision to sentence the defendant to life imprisonment, such a circumstance can be inferred by the fact that "the jury returned its additional verdict fixing petitioner's punishment not at death, but at imprisonment for life." *Id.* at 435-36. The Missouri statute did not allow the jury to return a sentence if it could not unanimously agree on a sentence; in those cases, the statute mandated the judge to institute a life sentence, much like the Pennsylvania statute in this case. MO. REV. STAT. § 565.006.2 (1980).

[208] 467 U.S. 203, 211 (1984).

[209] *Id.*

[210] *Id.*

[211] *Id.*

[212] BLACK'S LAW DICTIONARY, *supra* note 18, at 24.

[213] *Id.* at 553.

[214] Bullington v. Missouri, 451 U.S. 430, 445 (1981).

[215] Arizona v. Rumsey, 467 U.S. 203, 211 (1984).

to a life sentence protected by the Double Jeopardy Clause: a favorable unanimous jury verdict and a favorable judgment based on factual findings. However, the Court never stated that these were the only means of creating such an entitlement.

On the other hand, the Court has also clearly expressed what conditions are *not* sufficient to create a legal entitlement in a prior sentence. In *Poland v. Arizona*, the Supreme Court held that defendants who are sentenced to capital punishment at the first trial do not have a legal entitlement to a life sentence at retrial, even though the aggravating circumstance, which was the basis for the capital sentence, was later found to be insufficiently supported by the evidence.[216] Additionally, in *Monge v. California*, the Court held that a trial-like sentencing phase was not sufficient to create a legal entitlement to the sentence at the first trial.[217] The facts in *Monge* described a noncapital case, and the Court held that *Bullington* only extended to capital cases.[218]

In sum, the jurisprudence of the Supreme Court on when a defendant is legally entitled to a prior sentence subject to the protection of the Double Jeopardy Clause can be delineated into a handful of simple rules:

- The case must be a capital case.
- The sentencing phase must have the "hallmarks of [a] trial on guilt or innocence."[219]
- A unanimous jury verdict for life imprisonment is sufficient to create a legal entitlement to that sentence so that the Double Jeopardy Clause prohibits the death penalty at retrial.
- A judgment made on factual findings for a life sentence is sufficient to create a legal entitlement to that sentence so that the Double Jeopardy Clause prohibits the death penalty at retrial.
- A judgment made on factual findings for a capital sentence is insufficient to create a legal entitlement to a life sentence, even when said factual findings are erroneous.

The facts in *Sattazahn* satisfied both threshold requirements: capital punishment was an available sentence, and the sentencing phase was trial-like in its adjudication of aggravating and mitigating factors.[220] Also, Sattazahn did not receive a capital sentence at the first trial, so a legal entitlement to his life sentence was not forever lost.[221] However, the facts

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[216] 476 U.S. 147, 154 (1986).

[217] 524 U.S. 721, 731-32 (1998).

[218] *Id.*

[219] *Bullington*, 451 U.S. at 439.

[220] Sattazahn v. Pennsylvania, 537 U.S. 101, 103-04 (2003).

[221] *Id.* at 105.

in Sattazahn did not satisfy either of the sufficient conditions for a legal entitlement to his life sentence.

At this point, one would expect the Supreme Court to analyze whether a person who receives a life sentence outside of a unanimous jury decision or a judgment based on factual findings is legally entitled to his sentence, and, if so, under what conditions. Instead, the Supreme Court peremptorily rejected Sattazahn's claim on the grounds that his life sentence was the result of a procedural mechanism and not the product of a factual inquiry. The majority stated:

> Under Pennsylvania's sentencing scheme, the judge has no discretion to fashion the sentence once he finds that the jury is deadlocked. The statute directs him to enter a life sentence . . . . The judge makes no findings and resolves no factual matter. Since judgment is not based on findings which resolve some factual matter, it is not sufficient to establish legal entitlement to a life sentence. A default judgment does not trigger a double jeopardy bar to the death penalty upon retrial.[222]

The reasoning of the Court is somewhat troubling. Its ultimate conclusion was that a judgment based on resolution of factual matters is the only way to sufficiently establish a legal entitlement.[223] However, this statement is completely conclusory; in no prior case did the Supreme Court hold that a such a judgment was either necessary or exclusively sufficient to create a legal entitlement to a life sentence with double jeopardy protection, nor does this conclusion follow from any of its prior decisions.[224] In addition, the Court gave no policy reasons why a judgment that is the product of an operation of the law is somehow deficient in comparison to a judgment that is the product of factual matters with respect to double jeopardy protection.

The Supreme Court's leap in logic was especially apparent in its application of *Apprendi v. New Jersey*.[225] The holding of *Apprendi* essentially stated that "if the existence of any fact (other than a prior conviction) increases the maximum punishment that may be imposed on a defendant, that fact—no matter how the State labels it—constitutes an element, and must be found by a jury beyond a reasonable doubt."[226] As applied to Sattazahn's case, this holding directed that if the jury wanted to seek a capital sentence, it must find the aggravating circumstance(s) beyond

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[222] *Id.* at 109-10 (internal quotation marks omitted) (quoting Sattazahn v. Commonwealth, 763 A.2d 359, 367 (Pa. 2000)).

[223] *Id.* at 110.

[224] *See supra* Part II.

[225] 530 U.S. 466 (2000).

[226] *Sattazahn*, 537 U.S. at 111 (citing *Apprendi*, 530 U.S. at 482-84, 490).

a reasonable doubt.[227] Conversely, if the jury did not find the aggravating circumstance(s) beyond a reasonable doubt, then the jury could not sentence Sattazahn to death. These are the only two logical endpoints of *Apprendi*. In no way can the *Apprendi* holding be construed to mean that in order to acquit the defendant from the death penalty, the jury must unanimously decide for life imprisonment.

However, the Court's construction is exactly that: it wrote "if the petitioner's first sentencing jury had unanimously concluded that Pennsylvania failed to prove any aggravating circumstances, that conclusion would operate as an 'acquittal' of the greater offense."[228] While this was true, this statement could be derived entirely from the Court's decision in *Bullington v. Missouri*.[229] This was merely a recapitulation of the idea that a unanimous verdict is sufficient to establish a legal entitlement. The Court never explained how the holding in *Apprendi* led from the reasoning in *Bullington* to the conclusion that "there was no double-jeopardy bar" from Pennsylvania seeking the death penalty.[230] *Apprendi* did not stand for the proposition that in order to have a legal entitlement to a life sentence, a defendant must have received that sentence through a unanimous jury verdict.

If anything, the holding of *Apprendi* cut in favor of Sattazahn. As previously stated, one logical conclusion from *Apprendi* is if the jury did not find the aggravating circumstance(s) beyond a reasonable doubt, then the jury could not sentence the defendant to death. In other words, the defendant in that situation would have a legal entitlement *not to receive a capital sentence*. At the very least, the defendant's situation qualifies under a strict definition of "entitlement": the defendant's right not to receive a capital sentence is "absolute"[231] after the meeting of a "requirement"[232] (here the jury's inability to find the aggravating circumstance(s) beyond a reasonable doubt). The facts in Sattazahn fit exactly this situation: the jury was deadlocked nine-to-three in favor of life imprisonment.[233] The jury explicitly did not find the aggravating circumstance beyond a reasonable

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[227] *See generally* Ring v. Arizona, 536 U.S. 584 (2002).

[228] *Sattazahn*, 537 U.S. at 112.

[229] 451 U.S. 430, 445 (1981).

[230] *Sattazahn*, 537 U.S. at 113.

[231] *See supra* note 213 and accompanying text. Under *Apprendi* and *Ring*, if the jury does not find the aggravating circumstances beyond a reasonable doubt, the jury may never institute the death penalty. *See Ring*, 536 U.S. 584; Apprendi v. New Jersey, 530 U.S. 466 (2000).

[232] *See supra* note 213 and accompanying text.

[233] *Sattazahn*, 537 U.S. at 104.

doubt. As such, the *Apprendi* holding appeared to give Sattazahn legal entitlement not to receive the death penalty.

2. *The Pennsylvania Legislature Created a Clear Legal Entitlement to a Life Sentence in the Situation of a Hung Jury*

Perhaps most perplexing is the Supreme Court's dismissal of Sattazahn's legal entitlement to a life sentence as explicitly established by the Pennsylvania legislature. The statute which guides the sentencing proceedings in capital cases states: "the court may, in its discretion, discharge the jury if it is of the opinion that further deliberation will not result in a unanimous agreement as to the sentence, in which case the court shall sentence the defendant to life imprisonment."[234] As correctly pointed out by the majority, the judge has no choice but to give the defendant life imprisonment if she determines the jury will not reach a unanimous verdict.[235] This lack of "discretion" is the result of a direct legislative command to impose such a sentence if this factual situation occurs.

There can be no doubt that such a command establishes an "absolute right;"[236] in no way does the Pennsylvania legislature qualify its mandate with any form of exception.[237] The plain language of the statute denotes that in every instance where the judge determines the jury to be hung in the capital sentencing proceeding, the judge must give the defendant a sentence of life imprisonment.[238] Additionally, the "legal requirement"[239] in this situation is a judge-made determination that the jury will not reach a unanimous verdict.[240] According to the clear direction of Pennsylvania law, once the defendant meets this threshold requirement, then the defendant absolutely receives the right to a life sentence.[241] The facts in *Sattazahn* met this requirement: the judge determined that the jury would not reach a unanimous verdict, so the governing statute forced the hand of the judge to give Sattazahn a life sentence.[242] The lack of discretion given to the judge is a clear indication that the legislature intended this result in all cases, i.e., the right to this life sentence is "absolute."

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[234] *Id.* (quoting 42 PA. CONS. STAT. ANN. § 9711(c)(iv) (West 2004)).

[235] *Id.* at 109.

[236] *See supra* note 213 and accompanying text.

[237] § 9711(c).

[238] *Id.* § 9711(c)(iv).

[239] *See supra* note 213 and accompanying text.

[240] § 9711(c)(iv).

[241] *Id.* § 9711(c)(iv).

[242] *Sattazahn*, 537 U.S. at 104-05.

The majority addressed the legal entitlement created by the Pennsylvania legislature with arguments couched in terms of legislative intent. Justice Scalia gave two possible, interrelated reasons why the Pennsylvania legislature may have intended to deprive a defendant in Sattazahn's position of legal entitlement to the life sentence. First, Justice Scalia emphasized that the State may want closure, so it is willing to give a default judgment in the case of a hung jury; however, if that closure is going to be disturbed anyway by a retrial, the default judgment should not be considered final.[243] Second, the State may want to conserve resources, so it may give a default judgment in lieu of another proceeding; however, if the State must spend its resources for retrial, the reason for giving the default judgment no longer applies.[244]

These arguments hypothesizing legislative intent have several problems. Even if the legislature intended to create no legal entitlement to a life sentence that is the result of a hung jury, no barrier exists for the legislature to put this language into the statute itself. The legislature could have easily included such a clause, and it would not be subject to excessive financial burdens as a result. However, such a clause is not in the statute. The proof of intent is most clearly manifested in the statute itself; the absence of such language is strong evidence that the legislature did not intend to deprive Sattazahn of a legal entitlement to his life sentence. Additionally, while the Pennsylvania Supreme Court did not find an explicit legislative intent to create a legal entitlement to a default judgment, it also did not find an explicit legislative intent to disallow such an entitlement.[245] Nowhere in its opinion did the Pennsylvania Supreme Court enumerate the legislative intent arguments put forth by the Court.[246]

The simple point is that, on its face, the Pennsylvania statute does not create an exception that a defendant who receives a life sentence because of a hung jury will not be legally entitled to that sentence at retrial.[247] In fact, no Pennsylvania statute makes a distinction between a life sentence which is the product of a hung jury and a life sentence which is the product of a unanimous jury verdict.[248] The plain language of the statute, in addition to

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[243] *Id.* at 110.

[244] *Id.*

[245] *See* Commonwealth v. Sattazahn, 763 A.2d 359 (Pa. 2000).

[246] *Id.*

[247] 42 PA. CONS. STAT. ANN. § 9711(c) (West 2004).

[248] "Pennsylvania makes no statutory distinction between the treatment of life sentences imposed by judicially directed verdicts and those imposed by unanimous juries in the event the defendant successfully appeals his conviction." Petitioner's Brief at 14, *Sattazahn* (No. 01-7574).

the lack of any other "statutory distinction," denotes that Sattazahn should have had a legal entitlement to his original life sentence.[249]

Most importantly, the argument by the majority with respect to possible legislative intent focuses only on a small portion of the State's interest: its interest to prosecute defendants. However, this cannot be the State's only interest in enacting a statute regulating capital sentencing procedures. The State also has an interest of offering the utmost protection to defendants when the defendant could possibly be sentenced to death.[250] Indeed, in enacting such a statute, the State establishes its intention "that in a capital sentencing proceeding, it is the State, not the defendant, that should bear 'almost the entire risk of error.'"[251] Pennsylvania's legislative intent in providing protection to the defendant reveals itself in the language of the statute: while the prosecution must prove aggravating circumstances beyond a reasonable doubt, the defense must prove mitigating circumstances only by a preponderance of the evidence.[252] Additionally, the statute allows the death penalty only in the situation where the jury unanimously votes for such a sentence.[253] In all other cases, including when the jury is hung, the statute mandates life imprisonment.[254] Apparent in the language of the statute is "a presumption of life"[255] for the defendant during the capital sentencing proceedings.

Moreover, there is "eminently good cause"[256] to find a legislative intent to presume that a defendant is entitled to a life sentence. As the dissent points out, "death is indeed a penalty 'different' from all others;"[257] a capital sentence is "unique 'in both its severity and finality . . . .'"[258] The State has an interest to apply such a severe sentence sparingly, and only in situations of clear guilt. The interest of the defendant requires the State to protect her interest in not erroneously receiving the death penalty. In this case, that is exactly what occurred; the jury was deadlocked nine-to-three in favor of life imprisonment.[259] As a result of the operation of Pennsylvania

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[249] *Id.*

[250] *See* Bullington v. Missouri, 451 U.S. 430, 445-46 (1981).

[251] *Id.* at 446 (quoting Addington v. Texas, 441 U.S. 418, 424 (1979)).

[252] 42 PA. CONS. STAT. ANN. § 9711(c).

[253] *Id.*

[254] *Id.*

[255] Commonwealth v. Travaglia, 467 A.2d 288, 300 (Pa. 1983).

[256] Sattazahn v. Pennsylvania, 537 U.S. 101, 110 (2003).

[257] *Id.* at 127 (Ginsburg, J., dissenting) (quoting Gregg v. Georgia, 428 U.S. 153, 188 (1976)).

[258] Monge v. California, 524 U.S. 721, 732 (1998) (quoting Gardner v. Florida, 430 U.S. 349, 358 (1977)).

[259] *Sattazahn*, 537 U.S. at 104.

law, such an outcome meant that Sattazahn was entitled to a life sentence.[260] The Pennsylvania legislature intended that in situations where the jury is not unanimous in its decision between life imprisonment and the death penalty, the defendant would receive a life sentence because of the injustice of imposing a death sentence on such questionable grounds. The Pennsylvania legislature thus intended Sattazahn to be legally entitled not to receive the death penalty, and thus maintain legal entitlement in his life sentence.

One could argue that "legal entitlement" to a life sentence in the context of a capital sentencing proceeding should be governed foremost by prior Supreme Court cases that dealt with double jeopardy protection of prior sentences and only secondarily by state law. For instance, one could argue that *Stroud* and *Pearce* created a type of general "negative legal entitlement." In other words, the Supreme Court's decision created an overarching rule that a defendant is not entitled to a previous sentence at retrial. Then, through its subsequent decisions in *Bullington* and *Rumsey*, the Court "carved out" exceptions to this rule and created legal entitlements only in the specific instances of unanimous jury acquittal and judgment based on factual findings. The Court then disposed of the cases in *Poland* and *Monge* simply because they did not fit into the aforementioned "carved out" exceptions. Likewise, because *Sattazahn* did not fall into either of the delineated niches, it too was a case of no "legal entitlement."

However, there are two flaws in the use of Supreme Court jurisprudence to create paramount legal entitlements. First, it is a well-settled principle that the states are reserved the police power, and included in this power is the ability to sentence criminals in a manner which is bound only by the Constitution.[261] Second, if the Pennsylvania legislature decided to enact legislation which stated that a defendant who receives a life sentence at the initial trial cannot be sentenced to death at retrial, then such legislation appears to pass constitutional muster because it does not violate the Double Jeopardy Clause. Such a state statute-based legal entitlement would be immune to Constitutional attack because it only provides entitlement as opposed to unconstitutionally denying entitlement. In any case, when the plain language of a state statute creates a legal entitlement to a life sentence in the case of a hung jury at the capital sentencing proceeding, no reason exists why this entitlement should be precluded by Supreme Court cases which determine only the outer boundaries of state action.

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[260] *Id.* at 105.

[261] *See generally* United States v. Morrison, 529 U.S. 598 (2000); United States v. Lopez, 514 U.S. 549 (1995).

The Supreme Court incorrectly held that David Sattazahn did not have a legal entitlement to the life sentence issued at his first trial. By ending its inquiry at whether Sattazahn received his sentence either through a unanimous verdict or through a judgment based on factual findings, the Court largely ignored reasons why a judgment based on an operation of law should create a legal entitlement, including the clear mandate and intent of the State to create such an entitlement. The Supreme Court should have held that in a situation where the State created a legal entitlement to a life sentence through an operation of law, such an entitlement precludes a capital sentence at retrial.

B. THE PROCEDURAL METHOD THE TRIAL COURT USED TO INSTITUTE A LIFE SENTENCE AFTER A HUNG JURY SHOWS JEOPARDY HAD TERMINATED WITH RESPECT TO THE CAPITAL SENTENCE.

Jeopardy of the death penalty should have terminated at the occurrence of either one of two events during the capital sentencing hearing: when the jury could not unanimously decide on the punishment, or when the judge discharged the jury and entered the life sentence.[262] Even if the defendant was not acquitted in the traditional sense, he should have been afforded double jeopardy protection because his sentence was the result of a hung jury and an operation of the court.

Traditionally, the Double Jeopardy Clause has stood in part for the protection "against a second prosecution for the same offense after acquittal."[263] The question then becomes whether double jeopardy protection attaches to situations where the defendant is not acquitted, but nonetheless the procedures are terminated with no conviction. The dissent points to two situations where this could occur: mistrials and terminations favorable to the defendant.[264]

Contrary to the majority's belief, the substance of double jeopardy protection outside of a pure acquittal is not "a thin reed;"[265] rather, the Court has repeatedly stated that double jeopardy protection could occur when judgment is not based on factual guilt or innocence. In its 1957 decision of *Green v. United States*,[266] the Supreme Court wrote: "it is not even essential that a verdict of guilt or innocence be returned for a defendant to have once been placed in jeopardy so as to bar a second trial

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[262] *Sattazahn*, 537 U.S. at 104-05.

[263] North Carolina v. Pearce, 395 U.S. 711, 717 (1969).

[264] *Sattazahn*, 537 U.S. at 120 (Ginsburg, J., dissenting) (quoting United States v. Scott, 437 U.S. 82, 92 (1978)).

[265] *Id.* at 113.

[266] 355 U.S. 184 (1957).

on the same charge."[267] This quote embodies the idea that a judgment based on factual guilt or innocence is not necessary for double jeopardy protection. In two other situations, mistrials and terminations by the trial judge, double jeopardy protection can attach to the outcome. In this case, both situations occurred.

1. Because No Manifest Necessity Existed When the Jury Was Hung at the Capital Sentencing Proceeding, Double Jeopardy Protection Should Have Attached to Sattazahn's Life Sentence

The manifest necessity for a mistrial created by a hung jury in the trial context is not created by a hung jury in the context of the capital sentencing procedure at issue. As a result, the "mistrial"[268] which occurred when the jury could not decide on Sattazahn's punishment should have terminated jeopardy of the death penalty.

When specific conditions are met, a declaration of mistrial by the judge can be a situation where double jeopardy protection attaches. "[M]istrials declared on the motion of the prosecution or *sua sponte* by the court terminate jeopardy unless stopping the proceedings is required by 'manifest necessity.'"[269] However, when the judge declares a mistrial because of a hung jury, jeopardy does not terminate because a hung jury creates a "manifest necessity" to end the trial.[270] The Court gave two reasons why a hung jury met the "manifest necessity" standard. First, the prosecution should be given one complete opportunity to try the defendant.[271] Second, and of greater importance, the Court recognized that if a hung jury resulted in a mistrial, and that mistrial afforded double jeopardy protection to the defendant, the trial judge would have an incentive

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[267] *Id.* at 188. The Court gave the example where the prosecution or the judge discharges the jury when it appears that the jury might not convict. *Id.*; *see generally* Burks v. United States, 437 U.S. 1 (1978); United States v. Martin Linen Supply Co., 430 U.S. 564 (1977).

[268] The term "mistrial" is used somewhat loosely in this section; its definition is: "[a] trial that ends inconclusively because the jury cannot agree on a verdict." BLACK'S LAW DICTIONARY, *supra* note 18, at 1018. Obviously, the trial did not end inconclusively because Sattazahn received a life sentence. However, the term can be used as a proxy to describe the situation where a hung jury occurs and, but for the operation of Pennsylvania law, no conclusion would have occurred. In other words, the discharge of the jury and the entrance of a life sentence in the capital sentencing phase are analogous to a mistrial in the trial phase.

[269] *Sattazahn*, 537 U.S. at 121 (Ginsburg, J., dissenting) (citing *Scott*, 437 U.S. at 93-94).

[270] *Id.* at 121 (Ginsburg, J., dissenting) (quoting Arizona v. Washington, 434 U.S. 497, 509 (1978)).

[271] *Washington*, 434 U.S. at 509.

to "employ coercive means" in order to make the jury return a verdict.[272] "Such a rule would frustrate the public interest in just judgments."[273]

However, the Court's analysis necessarily leads to the conclusion that while a hung jury may create a "manifest necessity" of a mistrial in the trial context, it is not so in the context of a capital sentencing proceeding. The first reason the Court gave is the assurance that the prosecution would receive a complete opportunity to convict offenders of the law.[274] In the trial context, when a hung jury occurs and a mistrial is declared, the defendant walks away from the trial without punishment.[275] In this sense, the prosecution should be afforded the opportunity to "complete" prosecution through retrial and determination of guilt or innocence; otherwise, to allow defendants to go unpunished because of a jury's inability to reach a unanimous decision would go "against the public interest in insuring that justice is meted out to offenders."[276]

In contrast, in the context of a capital sentencing proceeding, the defendant does not walk away unpunished; under the Pennsylvania sentencing scheme, the minimum sentence is life imprisonment without the possibility of parole.[277] Essentially, the public interest in punishing offenders of the law has been met. Moreover, the Pennsylvania legislature has already determined that one capital sentencing proceeding is a "complete opportunity" for the prosecution to prove its case: in the situation of a hung jury, the Pennsylvania statute mandates a sentence of life imprisonment.[278] If the Pennsylvania legislature believed the single capital sentencing hearing was not a "complete opportunity," it could have provided for alternatives to judgment after a hung jury.[279] The structure of the statute is such that the legislature gives the prosecution a single chance to convince the jury to unanimously decide on the sentence of death. While this opportunity is limited, it is nonetheless complete.

Furthermore, the risk that a judge would not discharge the jury for the express purpose of extracting a verdict is much lower in the context of a capital sentencing proceeding. At the trial level, if defendants were

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[272] *Id.* at 509-10.

[273] *Id.* at 510.

[274] *Id.* at 509.

[275] By definition, when a mistrial occurs, the defendant goes free. When a trial ends without adjudication of guilt or innocence, the defendant does not receive any form of punishment. *See supra* note 268.

[276] United States v. Scott, 437 U.S. 82, 92 (1978).

[277] 42 PA. CONS. STAT. ANN. § 9711(c) (West 2004).

[278] *Id.*

[279] For example, the legislature could have allowed the prosecution to appeal the sentence.

afforded double jeopardy protection through mistrials as a result of hung juries, the trial judge would have a major choice: not discharge the jury with the hope that time will allow the jury to make a unanimous decision of guilt or innocence; or discharge the jury and allow the defendant to go forever free. If the judge leaned towards the latter, then a probability exists that violators of the law would go forever unpunished, as some persons set free because of the hung jury are in fact guilty. If the judge leaned towards the former, the same probability is lower, as defendants are forced to meet a jury verdict, whether accurate or not. The judge thus has an incentive to not discharge at the trial level.[280]

On the other hand, the judge does not have such an incentive at the capital sentencing phase. The defendant will meet a severe form of punishment, either life imprisonment or death.[281] The judge thus has a very different binary choice: at the trial level, the judge chooses between no punishment and the possibility of punishment, while at the capital sentencing level, the judge chooses between life imprisonment and the possibility of the death penalty. The relatively smaller gap between the two choices at the capital sentencing level means that the judge has much less of an incentive to refuse to discharge a jury so that she can unfairly extract a death sentence. In other words, no significant risk exists that the judge would exert pressure on a hung jury to reach a potentially erroneous verdict.

One could argue that the Pennsylvania legislature's mandate of a life sentence in the situation of a hung jury demonstrates the legislature's belief that such a situation creates a manifest necessity to end the trial. Perhaps the legislature felt that because of the severity of a death sentence, the risk was still too great to allow a judge to exert pressure on the jury in a hung jury context.[282] However, two flaws exist in this argument. First, a legislative decree of manifest necessity is not dispositive nor is it above review. For instance, if the legislature were to enact a statute which stated the trial judge could declare a mistrial when the jury might not convict, predicating such a mistrial on the manifest necessity of convicting criminals, no doubt exists that such purported manifest necessity would not pass muster.[283]

Moreover, the majority's arguments hypothesizing legislative intent would be at odds with such an interpretation of manifest necessity. The majority argued that the discharge of the jury and the entrance of the life sentence (an act at the capital sentencing phase analogous to the act of

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[280] Arizona v. Washington, 434 U.S. 497, 509-10 (1978).

[281] 42 PA. CONS. STAT. ANN. § 9711(c).

[282] *See supra* Part VI.A.2.

[283] *See supra* note 267.

declaration of mistrial at the trial phase) were the result of the "State's simple interest in closure" and "its interest in conservation of resources."[284] If the majority was correct in guessing the legislative intent of the statute, then the "mistrial" in this case was not the result of manifest necessity at all. In the spectrum of manifest necessity, the interests of closure and conservation of resources are quite a distance from the interest of protecting society from erroneous jury decisions. While a great necessity may exist to end a trial before adjudication in the situation where continuing the trial may lead to an erroneous judgment, such a manifest necessity does not exist when the State wants some sort of ending and wants to save money. Such a situation is much more akin to the situation where the judge declares a mistrial because the jury may not convict the defendant.[285]

At the trial level, if the judge could declare a mistrial because the state wanted closure on the issue and the trial costs were burgeoning, no doubt exists that double jeopardy protection would prevent the prosecution from seeking another trial.[286] Assuming the legislative intent conjectured by the majority to be true, no manifest necessity existed to end the capital sentencing proceeding in this case. Because there was no manifest necessity to end the "trial," and because the "trial" did in fact end, Sattazahn was entitled to double jeopardy protection over the end result, his life sentence.

No manifest necessity existed to end the capital sentencing proceeding. The traditional rationales of allowing the prosecution a complete opportunity and the risk of erroneous judgment were not present in this case. Moreover, the legislative intent given by the majority demonstrated that manifest necessity was not the impetus behind the discharge of the jury and the institution of the life sentence. In any case, the "mistrial" that occurred created double jeopardy protection for the life sentence.

2. Jeopardy of the Death Penalty Terminated in This Case Because the Prosecution Received One Full Chance of "Convicting" Satttazahn of the Death Penalty, and the Court on Its Own Volition Discharged the Jury and Entered the Life Sentence

As the dissent pointed out, the Supreme Court's decision in *Scott*[287] leads to the conclusion that when the judge terminates the trial in favor of the defendant, and when this termination occurs after the prosecution is

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[284] Sattazahn v. Pennsylvania, 537 U.S. 101, 110 (2003).

[285] *See* Green v. United States, 355 U.S. 184, 188 (1957).

[286] *Id.*

[287] United States v. Scott, 437 U.S. 82 (1978).

given a complete opportunity to try the defendant, the result of the termination is protected by the Double Jeopardy Clause.[288] In this case, the judge terminated the capital sentencing proceeding after the prosecution had submitted its case to the jury. Accordingly, the result of the termination, the life sentence, should have received double jeopardy protection.

In order to understand the application of *Scott* to this case, one should examine the basic facts and analysis in that case. In *Scott*, the defendant was charged with three counts of narcotics distribution.[289] At trial, the defendant moved for dismissal of two of the counts because of prejudice through preindictment delay.[290] The court granted the motion.[291] The third count was submitted to the jury, and the jury returned a verdict of not guilty.[292]

The prosecution sought to appeal the dismissal of the two counts, and the defendant claimed that the result of the motion was protected by the Double Jeopardy Clause.[293] The Supreme Court disagreed and held that "[w]here the defendant himself seeks to have the trial determined without any submission to either judge or jury as to his guilt or innocence, an appeal by the Government from his successful effort to do so is not barred."[294] The Court's decision rested on two grounds: first, the defendant was the cause of the termination, and the prosecution as a result did not receive a full opportunity to try the defendant;[295] and second, the judge and jury were denied the opportunity to make adjudication on factual grounds.[296] Through examination of these factors, one can see that Sattazahn's life sentence should have received double jeopardy protection.

The trial judge, not the defendant, decided to discharge the jury and enter a life sentence.[297] As a result, the defendant in this case cannot be deemed as one who sought to avoid prosecution. In *Scott*, the Court reasoned that the defendant could not claim double jeopardy protection when his own action caused the premature termination of the trial. However, in this case, the termination was not the result of the defendant's actions.[298] In fact, the legislature mandated the judge to dismiss the hung

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[288] *Sattazahn*, 537 U.S. at 120 (Ginsburg, J., dissenting) (quoting *Scott*, 437 U.S. at 92).
[289] *Scott*, 437 U.S. at 84.
[290] *Id.*
[291] *Id.*
[292] *Id.*
[293] *Id.*
[294] *Id.* at 101.
[295] *Id.* at 100.
[296] *Id.*
[297] Sattazahn v. Pennsylvania, 537 U.S. 101, 104-05 (2003).
[298] *Id.*

jury and enter the life sentence.[299] Sattazahn did not try to avoid the death penalty through a legal claim unrelated to factual guilt or innocence; instead, the trial court was the force that ended the capital sentencing proceedings.[300]

The rationale behind the Court's argument in *Scott* was when a defendant is the cause of the premature termination, the defendant necessarily divests the prosecution of its right to a complete trial.[301] In *Scott*, the prosecution had been deprived of "one complete opportunity to convict those who have violated its laws."[302] The defendant's motion to dismiss in that case disallowed the prosecution from submitting its complete case.[303] However, in the case at hand, no such divestment occurred. The prosecution presented its case in entirety and submitted the case to the jury.[304] As the dissent correctly points out, "[t]his was not an instance in which 'the Government was quite willing to continue with its production of evidence,' but was thwarted by a defense-proffered motion."[305] Quite the contrary, after the prosecution submitted the case to the jury, it could do absolutely nothing else: either the jury reached a unanimous verdict, or it did not and the defendant received a life sentence.[306] In both situations, the prosecution could not make any additional efforts; its opportunity was "complete."

Furthermore, the jury was allowed the opportunity to consider Sattazahn's case, a fact which weighed in favor of double jeopardy protection. In *Scott*, the Court made explicit reference to the importance of allowing the jury to consider the case: "submission to either judge or jury as to [the defendant's] guilt or innocence" was a crucial factor in determining whether double jeopardy protection applied.[307] The rationale behind this factor was that in the case where the defendant purposely sought to preclude a jury-made determination, the government could not be construed as "an all-powerful state relentlessly pursuing a defendant

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[299] *Id.*

[300] *Id.* The majority took issue with the fact that Sattazahn initially moved for dismissal of the hung jury and the entrance of the life sentence. *Id.* at 114. However, the trial court denied the motion because under Pennsylvania law it was required to determine whether further deliberation could result in a unanimous verdict. *Id.* at 104-05. The trial court alone had the power to discharge the jury, and it did so. *Id.*

[301] *Scott*, 437 U.S. at 100.

[302] *Id.* (quoting Arizona v. Washington, 434 U.S. 497, 509 (1978)).

[303] *Id.* at 84.

[304] *Sattazahn*, 537 U.S. at 104.

[305] *Id.* at 124 (Ginsburg, J., dissenting) (quoting *Scott*, 437 U.S. at 96).

[306] *See* 42 PA. CONS. STAT. ANN. § 9711(c) (West 2004).

[307] *Scott*, 437 U.S. at 101.

who . . . had at least insisted on having the issue of guilt submitted to the trier of fact."[308]

In this case, Sattazahn did not try to avoid the jury; in fact, the jury did consider his case, but it was unable to reach a unanimous verdict. This is a clear example where the defendant was "forced to run the gauntlet once . . . and the jury refused to convict him."[309] The case was before the jury and the defendant was in peril of punishment of death, and this peril ended with the entrance of a mandated life sentence.[310] This is not the same situation as *Scott*, where the defendant removed himself from such peril before the jury could decide his case.[311]

Indeed, the government in this case could be characterized as the "all-powerful state" wearing down the defendant.[312] The prosecution's evidence used to convict Sattazahn of the death penalty was found after the first trial;[313] the evidence available to the prosecution during the first trial was not enough to convince the jury beyond a reasonable doubt that Sattazahn deserved the death penalty.[314] This bolsters the fact that the government, with its extensive resources, continued to collect evidence to convict Sattazahn of the death penalty, even after the entrance of the life sentence.

One could argue that *Scott* only stood for the proposition that a defendant who prematurely terminates a trial without adjudication of factual innocence or guilt is not entitled to double jeopardy protection to the resulting dismissal of the charge. In this sense, the Court did not answer whether a defendant who does not prematurely terminate the trial is entitled to protection. However, as the dissent points out, "the reasons we thought double jeopardy protection did not attach in *Scott* are absent here."[315] Because the *Scott* decision did not foreclose the possibility that Sattazahn would receive double jeopardy protection, the Court should have used this case to elucidate double jeopardy protection in the situation where the trial court, not the defendant, ends the "trial." Granted, the fact that Sattazahn's case fell outside the scope of the holding in *Scott* does not necessarily mean that double jeopardy protection attached; rather the fact that this case was outside the holding of *Scott* afforded the Court the opportunity to clarify its double jeopardy jurisprudence, an opportunity which the Court did not take.

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[308] *Id.* at 96.

[309] Green v. United States, 355 U.S. 184, 190 (1957).

[310] *Sattazahn*, 537 U.S. at 104-05.

[311] *Scott*, 437 U.S. at 84.

[312] *Id.* at 96.

[313] Respondent's Brief at 6, *Sattazahn* (No. 01-7574).

[314] *Sattazahn*, 537 U.S. at 104.

[315] *Id.* at 126 (Ginsburg, J., dissenting).

The jeopardy of the death penalty terminated in this case. Sattazahn did not voluntarily decide to end the capital sentencing proceeding; the trial court terminated the proceeding. Moreover, the case was submitted to the jury. Sattazahn did not impede the adjudication process in anyway, and the prosecution was able to present its full case. As a result, double jeopardy protection should have attached to the defendant's original life sentence.

VII. CONCLUSION

In its decision to focus solely on whether Sattazahn was "acquitted" of the death penalty, the Supreme Court lost sight of its prior double jeopardy jurisprudence, the plain command of the Pennsylvania legislature, and its decisions in the situations of mistrials and terminations favorable to the defendant. The Court's focus on the word "acquittal" as the exclusive means of legal entitlement was a classic example of "the substitution of words for analysis."[316] Instead of carefully examining a "genuinely debatable" question,[317] the Court made the conclusory determination that any case outside of an "acquittal" would not receive double jeopardy protection.

Moreover, had the Court examined the arguments on both sides, it would have seen overwhelming case support for the defendant. When a judge terminates a trial in favor of a defendant through a motion of the court, and when the defendant does not seek to avoid adjudication but submits his case to the jury, no reason exists why double jeopardy protection should not apply.

Equally important, when a judge declares a "mistrial" and dismisses the jury, and the "mistrial" is not the product of manifest necessity, the defendant is entitled to double jeopardy protection of the result of the mistrial. Assuming, as the majority does, the Pennsylvania legislature created a life sentence in the case of a hung jury because of closure and monetary interests, the end of David Sattazahn's first trial was not the result of manifest necessity. Because the defendant is entitled to double jeopardy protection when a "mistrial" is declared for reasons other than manifest necessity, Sattazahn should not have been subject to the death penalty at retrial.

David Chu

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[316] United States v. White, 401 U.S. 745, 786 (1971) (Harlan, J., dissenting).

[317] *Sattazahn*, 537 U.S. at 119 (Ginsburg, J., dissenting).