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# Sattazahn v. Pennsylvania: Double Jeopardy and the Definition of "Acquittal" in Capital-Sentencing Proceedings

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# CASENOTES

## SATTAZAHN V. PENNSYLVANIA: DOUBLE JEOPARDY AND THE DEFINITION OF “ACQUITTAL” IN CAPITAL-SENTENCING PROCEEDINGS

### I. INTRODUCTION

According to the Double Jeopardy Clause of the Fifth Amendment, “[n]o person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb.”<sup>1</sup> The origins of the double jeopardy doctrine can be traced back more than 2000 years,<sup>2</sup> and it has consistently played an important role in American jurisprudence.<sup>3</sup> The Double Jeopardy Clause has been said to include three distinct constitutional protections: (1) the protection against a second prosecution for the same offense after acquittal; (2) the protection against a second prosecution for the same offense after conviction; and (3) the protection against multiple convictions for the same offense.<sup>4</sup> Once a defendant is placed in jeopardy for an offense and jeopardy with respect to that offense terminates, the defendant may not again be tried or punished for that offense.<sup>5</sup>

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1. U.S. CONST. amend. V.

2. George C. Thomas III, *The Prohibition of Successive Prosecutions for the Same Offense: In Search of a Definition*, 71 IOWA L. REV. 323, 325 n.8 (1986).

3. See, e.g., *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969) (“If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offence.”) (quoting *Ex Parte Lange*, 85 U.S. (18 Wall.) 163, 168 (1873)), partially overruled by *Alabama v. Smith*, 490 U.S. 794 (1998); *Green v. United States*, 355 U.S. 184, 187–88 (1957) (discussing the existence of the double jeopardy doctrine at English common law and its influence on the Framers of the Constitution).

4. See *Pearce*, 395 U.S. at 717; *Benton v. Maryland*, 395 U.S. 784, 794 (1969). The Supreme Court has held that the double jeopardy prohibition is applicable to the States through the Fourteenth Amendment. *Id.*

5. See *Pearce*, 395 U.S. at 717.

Recently, in *Sattazahn v. Pennsylvania*,<sup>7</sup> the Supreme Court of the United States examined whether the Double Jeopardy Clause bars the imposition of the death penalty when the defendant is retried after a judge dismisses the jury as hung and imposes a life sentence.<sup>8</sup> Part II of this note examines the Court's most important Double Jeopardy decisions leading up to *Sattazahn*, particularly in the sentencing context. Part III discusses the factual and procedural background of *Sattazahn*. Part IV analyzes the majority and dissenting opinions in *Sattazahn* and the arguments in support of and against those opinions. Finally, Part V presents the potential impact of the Court's decision, including its potential effects on criminal appeals, state legislatures, and state courts.

## II. THE HISTORY OF THE DOUBLE JEOPARDY CLAUSE

Over the past century, the Supreme Court attempted to develop and explain its position on the Double Jeopardy Clause in an effort to clarify the confusion surrounding the doctrine.<sup>9</sup> One of the earliest cases to address the issue of whether a court had the authority to retry a defendant whose first conviction had been set aside was *United States v. Ball*.<sup>10</sup> In *Ball*, three defendants were tried for murder; two were convicted and one was acquitted.<sup>11</sup> The original indictment was dismissed on appeal,<sup>12</sup> the grand jury returned a new indictment against all three defendants, and all three were found guilty of murder at the second trial.<sup>13</sup>

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7. 537 U.S. 101 (2003).

8. *Id.* at 104–05.

9. This discussion focuses almost exclusively on the ability of a court to impose a harsher sentence on a defendant on retrial, particularly in capital-sentencing proceedings. For a discussion of the application of the Double Jeopardy Clause in a variety of other situations, see GEORGE C. THOMAS III, *DOUBLE JEOPARDY: THE HISTORY, THE LAW* (1998); William S. McAninch, *Unfolding the Law of Double Jeopardy*, 44 S.C. L. REV. 411 (1993) (discussing, *inter alia*, re prosecution of defendants after acquittals, convictions, and mistrials). For an in-depth analysis of the cases discussed in Part II of this note, see Jennifer L. Czernecki, *The Double Jeopardy Clause of the Pennsylvania Constitution Does Not Bar the Death Penalty upon Retrial After the Trial Judge Grants a Life Sentence on Behalf of a Hung Jury*: Commonwealth v. Sattazahn, 40 DUQ. L. REV. 127 (2001).

10. 163 U.S. 662 (1896).

11. *Id.* at 663–64.

12. The original indictment was quashed after it was found to be fatally defective for failing to aver either the time or the place of the victim's death. See *id.* at 664–65.

13. *Id.* at 664–66.

The Supreme Court, on appeal, first addressed the lower court's ability to retry the formerly acquitted defendant and held that an acquittal acts as a bar to a second prosecution for the same offense.<sup>14</sup> After discussing the traditional English approach to the issue,<sup>15</sup> the Court stated that "in this country a verdict of acquittal, although not followed by any judgment, is a bar to a subsequent prosecution for the same offence."<sup>16</sup> As for the formerly convicted defendants who had appealed their convictions, the Court held that there was no bar to their retrial.<sup>17</sup> Subsequent decisions would elaborate on these general principles and explain the application of the Double Jeopardy Clause in cases where defendants were retried and subjected to more severe sentences than those received after their first trials.<sup>18</sup>

In *Stroud v. United States*,<sup>19</sup> the defendant was convicted of murder and given a life sentence at his second trial, after having previously been found guilty and sentenced to death.<sup>20</sup> The second judgment was reversed, and at the third trial Stroud was again convicted of murder and sentenced to death.<sup>21</sup> The Court only briefly discussed the Double Jeopardy Clause and held that there was no bar to the imposition of the death penalty on retrial.<sup>22</sup>

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14. *Id.* at 671. The Court stated that "[t]he prohibition is not against being twice punished, but against being twice put in jeopardy; and the accused, whether convicted or acquitted, is equally put in jeopardy at the first trial." *Id.* at 669.

15. "In England, an acquittal upon an indictment so defective that . . . it would not have supported any conviction or sentence, has generally been considered as insufficient to support a plea of former acquittal." *Id.* at 666.

16. *Id.* at 671.

17. *Id.* at 672. An important fact with regard to the Court's decision was that the acquitted defendant did nothing as to the previous judgment, whereas the other defendants were attempting to get their convictions set aside. "[I]t is quite clear that a defendant who procures a judgment against him upon an indictment to be set aside, may be tried anew upon the same indictment, or upon another indictment, for the same offence of which he had been convicted." *Id.*; see also THOMAS, *supra* note 9, at 221-23.

18. See *infra* notes 19-54 and accompanying text.

19. 251 U.S. 15 (1919).

20. *Id.* at 16-17.

21. *Id.* at 17.

22. *Id.* at 18. As in *Ball*, it was important to the *Stroud* Court that the defendant was seeking reversal of his conviction. The Court stated that "the conviction and sentence upon the former trials were reversed upon writs of error sued out by the plaintiff . . . which resulted in a further trial. In such cases he is not placed in second jeopardy within the meaning of the Constitution." *Id.*

The Court reaffirmed the basic holding of *Stroud* fifty years later in *North Carolina v. Pearce*.<sup>23</sup> *Pearce* presented essentially the same factual scenario as *Stroud*: two defendants were convicted and sentenced, had their convictions set aside, and received more severe sentences after their second trials than those received following their first trials.<sup>24</sup> The Court said that beyond the requirement that credit be given for prison time already served, "the guarantee against double jeopardy imposes no restrictions upon the length of a sentence imposed upon reconviction."<sup>25</sup> Citing *Stroud*, the Court explicitly stated that, as a corollary to the power to retry a defendant who has succeeded in having his first conviction set aside, a court has the authority to impose whatever sentence is legally authorized, regardless of whether the second sentence is more severe than the first.<sup>26</sup> The holding in *Pearce* "rests ultimately upon the premise that the original conviction has, at the defendant's behest, been wholly nullified and the slate wiped clean."<sup>27</sup> The holding is known as the "clean slate" rule.

In *Bullington v. Missouri*,<sup>28</sup> however, the Court held that the Double Jeopardy Clause did apply to certain capital-sentencing proceedings.<sup>29</sup> The defendant in *Bullington* was found guilty of capital murder and, following a presentence hearing, was sentenced to life in prison.<sup>30</sup> The defendant was subsequently granted a new trial and argued that double jeopardy should apply

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23. 395 U.S. 711 (1969).

24. *Id.* at 713-15. *Pearce* was convicted of assault with intent to commit rape and sentenced to a term of twelve to fifteen years. *Id.* at 713. Several years later he succeeded in having his conviction reversed. *Id.* He was retried, convicted, and sentenced to a term of eight years. *Id.* When this sentence was added to the time *Pearce* had already served, the parties agreed that it amounted to a longer total sentence than that imposed at the first trial. *Id.* *Pearce* pleaded guilty to four charges of burglary and was sentenced to prison terms totaling approximately ten years. *Id.* at 714. He was also successful in having his judgment set aside. *Id.* He was retried, convicted, and sentenced to prison terms totaling twenty-five years. *Id.*

25. *Id.* at 719-20.

26. *Id.* at 720 (citing *Stroud*, 251 U.S. at 18). One must also remember that the imposition of an increased sentence may be subject to attack as violating due process. *See, e.g., id.* at 723-25; *United States v. Jackson*, 390 U.S. 570, 581-91 (1968). A discussion of due process considerations with respect to increased sentences imposed on retrial is beyond the scope of this note.

27. *Pearce*, 395 U.S. at 721.

28. 451 U.S. 430 (1981).

29. *Id.* at 446.

30. *Id.* at 435-36.

in an effort to prevent the prosecution from seeking the death penalty.<sup>31</sup> The Court distinguished Bullington's situation from previous cases and held that the Double Jeopardy Clause did apply because Missouri's capital-sentencing procedure resembled a trial on the issue of guilt or innocence.<sup>32</sup> Under the Missouri procedure, the jury was explicitly required to determine whether the prosecution proved certain facts beyond a reasonable doubt in order to support a death sentence.<sup>33</sup> In other words, the jury had to "convict" or "acquit" the defendant of whatever was necessary for the death penalty to be imposed. The Court concluded that because the jury had already "acquitted" the defendant of the death penalty, the Double Jeopardy Clause barred Missouri from seeking the death penalty on retrial.<sup>34</sup>

The Court further developed its *Bullington* rationale in *Arizona v. Rumsey*.<sup>35</sup> In *Rumsey*, the jury convicted the defendant of murder and robbery, and, under Arizona's statutory scheme, the trial judge acted as the fact-finder during the sentencing hearing.<sup>36</sup> After the hearing, the judge determined that no aggravating or mitigating circumstances were present and, pursuant to Arizona

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31. *Id.* at 436.

32. *Id.* at 438–39. Although the Double Jeopardy Clause prohibits the retrial of an acquitted defendant, the Court noted its historical unwillingness to extend that principle to sentencing procedures. *Id.* at 437–38. The Court observed that "[t]he imposition of a particular sentence usually is not regarded as an 'acquittal' of any more severe sentence that could have been imposed." *Id.* at 438. Bullington's situation, however, was different because of Missouri's detailed sentencing procedure. *Id.* at 438–39 n.10. The applicable Missouri sentencing statute at that time provided for a trial-like procedure at the sentencing phase. *See id.* (citing MO. REV. STAT. § 565.006 (1978) (repealed 1983)). For a current version of the relevant sentencing statute, see MO. ANN. STAT. § 565.030 (West Supp. 2003).

33. *Bullington*, 451 U.S. at 444–45. For example, the procedure required the jury to hear evidence in mitigation or aggravation of punishment, and any evidence of the presence or absence of prior convictions, guilty pleas, or pleas of nolo contendere. *Id.* at 433 n.4 (citing MO. REV. STAT. § 565.006.2 (1978) (repealed 1983)). The statutory scheme required the jury to consider whether the evidence showed the existence of any aggravating or mitigating circumstances, and, if the jury decided to impose the death penalty, it was required to designate, in writing, the circumstances that it found beyond a reasonable doubt. *Id.* at 434 (citing MO. REV. STAT. § 565.012 (1978) (repealed 1983)).

34. *Id.* at 446.

35. 467 U.S. 203 (1984).

36. *Id.* at 205. Under Arizona's statutory scheme for sentencing at that time, the trial judge was instructed to conduct a separate sentencing hearing to consider the presence or absence of any aggravating or mitigating circumstances, and to then determine whether death was the appropriate sentence. *Id.* at 205–06 (citing ARIZ. REV. STAT. ANN. § 13-703 (West Supp. 1983–1984)). For a current version of the relevant sentencing statute, see ARIZ. REV. STAT. ANN. § 13-703 (West Supp. 2003).

law, sentenced the defendant to life imprisonment.<sup>37</sup> On appeal, the Arizona Supreme Court found that the trial court misinterpreted one of the statute's aggravating circumstances, and on remand the defendant was sentenced to death.<sup>38</sup>

The majority in *Rumsey* held that the Arizona sentencing procedure was no different from the Missouri procedure at issue in *Bullington*.<sup>39</sup> The Court explained that the Arizona judge acted just as the Missouri jury in *Bullington* acted: he followed strict statutory standards, made findings with respect to aggravating and mitigating circumstances, and made a decision that amounted to an acquittal on the issue of death.<sup>40</sup> Thus, the Double Jeopardy Clause protected the defendant from facing the death penalty on retrial.<sup>41</sup>

The final case in this line of decisions is *Poland v. Arizona*.<sup>42</sup> In *Poland*, two defendants were tried for murder, convicted, and sentenced to death by the trial judge.<sup>43</sup> On appeal, the Arizona Supreme Court found insufficient evidence to support the aggravating circumstance relied upon by the trial judge to sentence the defendants to death.<sup>44</sup> The Arizona Supreme Court did find, however, sufficient evidence to support a different aggravating cir-

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37. *Rumsey*, 467 U.S. at 205–06.

38. *Id.* at 207–08.

39. *Id.* at 209–10. “The capital sentencing proceeding in Arizona shares the characteristics of the Missouri proceeding [in *Bullington*] that make it resemble a trial for purposes of the Double Jeopardy Clause.” *Id.* at 209. Like the statute at issue in *Bullington*, the *Rumsey* Court stated that under the Arizona regime “the State must prove the existence of aggravating circumstances beyond a reasonable doubt.” *Id.* at 210.

40. *Id.* at 210–11.

41. *Id.* at 212. The *Rumsey* minority questioned whether the trial court actually did “implied[ly] acquit[]” the defendant because there had been an error of law as to what was sufficient to establish one of the aggravating circumstances listed in the statute. *See id.* at 213–15 (Rehnquist, J., dissenting).

42. 476 U.S. 147 (1986).

43. *Id.* at 148–49.

44. *Id.* at 149–50. The trial judge had found that the defendants “committed the offense in an especially heinous, cruel, or depraved manner.” *Id.* at 149 (quoting ARIZ. REV. STAT. ANN. § 13-454(E)(6) (West Supp. 1973)). Section 13-454 was subsequently renumbered and can now be found at ARIZ. REV. STAT. ANN. § 13-703 (West Supp. 2003–2004). The Arizona Supreme Court held that the evidence presented by the prosecution was insufficient to support a finding of the “especially heinous, cruel, or depraved” aggravating circumstance. *Poland*, 476 U.S. at 150 (quoting *State v. Poland*, 645 P.2d 784, 800 (Ariz. 1982)).

cumstance.<sup>45</sup> After being convicted on retrial,<sup>46</sup> the defendants were again sentenced to death.<sup>47</sup>

The *Poland* Court distinguished *Bullington* and *Rumsey* and held that the Double Jeopardy Clause did not bar the reimposition of the death penalty.<sup>48</sup> The *Bullington* exception to the "clean slate" rule<sup>49</sup> did not apply because there was no decision by the sentencing body that the prosecution did not prove its case.<sup>50</sup> In fact, the prosecution clearly did prove its case, as evidenced by the trial judge's imposition of the death penalty after the first trial.<sup>51</sup> According to the Court, the proper inquiry established by *Bullington* is whether the sentencer decided that the prosecution had failed to prove that the death penalty was appropriate.<sup>52</sup> In *Rumsey*, the sentencer determined that no aggravating circumstances were present to support the death penalty, and thus there had been an acquittal.<sup>53</sup> By contrast, in *Poland*, no such determination was made, and the mere failure to find the existence of one particular aggravating circumstance did not amount to an acquittal of the death penalty for double jeopardy purposes.<sup>54</sup>

The Court's definition of the Double Jeopardy Clause as established by the above case law appears to be straightforward, but its application has consistently been a source of difficulty for

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45. *Poland*, 467 U.S. at 150. The Arizona Supreme Court held that the trial judge had misinterpreted whether the defendants "committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value." *Id.* (citing ARIZ. REV. STAT. ANN. § 13-454(E)(5) (West Supp. 1973)). The court held that this circumstance was not limited to situations where a contract killing was involved (as the trial judge had found) and that the trial court could find the existence of that aggravating circumstance on retrial. *Id.*

46. *Id.* The defendants were retried because of evidence that the jury's verdict was tainted. *See id.* at 149-50.

47. *Id.* at 150.

48. *Id.* at 156-57.

49. *Pearce*, 395 U.S. at 721; *see also* text accompanying note 27.

50. *Poland*, 476 U.S. at 154-55. Writing for the majority, Justice White noted that "[a]t no point during petitioners' first capital sentencing hearing and appeal did either the sentencer or the reviewing court hold that the prosecution had 'failed to prove its case' that petitioners deserved the death penalty." *Id.* at 154.

51. *Id.* at 154-55.

52. *Id.* at 155-56. The court stated that it was "not prepared to extend *Bullington* further and view the capital sentencing hearing as a set of minitrials on the existence of each aggravating circumstance. Such an approach would push the analogy on which *Bullington* is based past the breaking point." *Id.*

53. *See Arizona v. Rumsey*, 467 U.S. 203, 211 (1984).

54. *Poland*, 476 U.S. at 155-56.



judges, scholars, and practitioners.<sup>55</sup> It has proven particularly troublesome in cases where a defendant has been sentenced to death on retrial after appealing a lesser sentence. In *Sattazahn*, the Court again addressed this situation and considered how to apply the Double Jeopardy Clause in the context of a capital-sentencing proceeding.

### III. BACKGROUND OF THE *SATTAZAHN* CASE

On the evening of April 12, 1987, David Allen Sattazahn, along with accomplice Jeffrey Hammer, hid in a wooded area waiting to rob restaurant manager Richard Boyer.<sup>56</sup> At closing, Boyer left the restaurant and was confronted in the parking lot by Sattazahn and Hammer.<sup>57</sup> Sattazahn and Hammer, with their guns drawn, attempted to rob Boyer of the bank deposit bag containing the day's earnings.<sup>58</sup> Boyer attempted to flee, at which time both Sattazahn and Hammer fired shots, several of which struck Boyer and caused him to fall to the ground.<sup>59</sup> Sattazahn and Hammer grabbed the bank deposit bag and fled, leaving Boyer dead in the parking lot.<sup>60</sup>

After a jury trial, Sattazahn was found guilty of numerous charges, including first-degree murder.<sup>61</sup> At sentencing, the jury deliberated for several hours but was unable to unanimously agree on a sentence.<sup>62</sup> The judge dismissed the jury as hung and, in accordance with Pennsylvania's capital-sentencing statute, entered a mandatory sentence of life imprisonment.<sup>63</sup> On appeal, the

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55. See, e.g., *Albernaz v. United States*, 450 U.S. 333, 343 (1981) ("[T]he decisional law in the area [of double jeopardy] is a veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator.")

56. *Commonwealth v. Sattazahn*, 763 A.2d 359, 362 (Pa. 2000).

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* Sattazahn was also found guilty of second and third-degree murder, aggravated assault, conspiracy, possessing an instrument of crime, and carrying a firearm without a license. *Id.*

62. *Id.* The jury made no decision on life or death, and made no findings regarding the presence or absence of aggravating or mitigating circumstances. *Id.*

63. *Id.* The court issued the life imprisonment sentence based on a Pennsylvania statute that states that the court, "if it is of the opinion that further deliberation [by the jury] will not result in a unanimous agreement as to the sentence, . . . shall sentence the defendant to life imprisonment." 42 PA. CONS. STAT. ANN. § 9711(c)(1)(v) (West 1998 & Supp.

Superior Court of Pennsylvania reversed the conviction and remanded for a new trial after determining that the trial judge had given erroneous instructions to the jury.<sup>64</sup>

At the second trial, the trial court allowed the prosecution to again seek the death penalty.<sup>65</sup> The jury reinstated the first-degree murder conviction and sentenced Sattazahn to death.<sup>66</sup> Sattazahn appealed to the Supreme Court of Pennsylvania, which affirmed both the conviction and the sentence.<sup>67</sup> The Supreme Court granted certiorari<sup>68</sup> and held that the Double Jeopardy Clause did not bar Pennsylvania from seeking the death penalty against Sattazahn on retrial.<sup>69</sup>

#### IV. ANALYSIS

##### A. *The Majority Opinion*

Justice Scalia, writing for a five-justice majority, focused on the precise holdings of the Court's prior cases<sup>70</sup> and explained that the important double jeopardy inquiry in capital-sentencing cases is whether there was an acquittal at the trial-like sentencing proceeding.<sup>71</sup> Under *Bullington*, *Rumsey*, and *Poland*, it is not the mere imposition of a life sentence that implicates double jeopardy, but rather "whether a first life sentence was an 'acquittal' based on findings sufficient to establish legal entitlement to the life sentence—*i.e.*, findings that the government failed to prove one or more aggravating circumstances beyond a reasonable doubt."<sup>72</sup> The majority illustrated its interpretation of acquittal by

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2003). Neither the judge nor the jury made any findings regarding aggravating or mitigating factors before the jury was dismissed as hung and the life sentence imposed. *Sattazahn*, 763 A.2d at 362.

64. *Id.*

65. *See id.* at 362–63.

66. *See id.* at 363.

67. *Id.* at 369. For an analysis of the Supreme Court of Pennsylvania's ruling and reasoning, see Czernecki, *supra* note 9, at 142–45.

68. *Sattazahn v. Pennsylvania*, 537 U.S. 101, 105 (2003).

69. *Id.* at 116. In addition, the Court declined to extend the Due Process Clause of the Fourteenth Amendment to provide greater protection against double jeopardy than that provided by the Double Jeopardy Clause. *Id.* at 115–16.

70. *See supra* notes 19–54 and accompanying text.

71. *Sattazahn*, 537 U.S. at 112–13.

72. *Id.* at 108.

comparing *Bullington* and *Stroud*.<sup>73</sup> In *Stroud*, the Court held that the Double Jeopardy Clause did not bar reimposition of the death penalty at a new trial.<sup>74</sup> In *Bullington*, on the other hand, the Court found that the Double Jeopardy Clause did bar reimposition of the death penalty on retrial.<sup>75</sup> The difference, Justice Scalia explained, was that in *Stroud* “there was no separate sentencing proceeding at which the prosecution was required to prove—beyond a reasonable doubt or otherwise—additional facts in order to justify the particular sentence.”<sup>76</sup> In other words, in *Stroud* there had been no acquittal of the defendant at a trial-like sentencing proceeding, whereas in *Bullington* there had been a separate sentencing proceeding within which the jury acquitted the defendant.

The decision in *Sattazahn*, therefore, did not depend on the sentence imposed at the first trial, but rather on whether that sentence amounted to an acquittal of the death penalty. The Court rejected Sattazahn’s argument that double jeopardy protections were triggered when the judge imposed the life sentence and refused to extend the *Bullington* exception to Sattazahn’s situation.<sup>77</sup> Sattazahn did not establish that the jury or the court acquitted him of the death penalty, and thus he was not entitled to a life sentence under the Double Jeopardy Clause.<sup>78</sup>

Justice Scalia explained further that the jury did not make any findings with respect to aggravating or mitigating circumstances.<sup>79</sup> The fact that the jury deadlocked “cannot fairly be called an acquittal ‘based on findings sufficient to establish legal entitlement to the life sentence.’”<sup>80</sup> Furthermore, because the judge simply imposed the life sentence as required by Pennsylvania statute and ““ma[de] no findings and resolve[d] no factual matter,””<sup>81</sup> the judge’s actions did not amount to an acquittal of the death penalty. Therefore, Sattazahn was never acquitted of

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73. *Id.* at 106–07.

74. *Stroud v. United States*, 251 U.S. 15, 17–18 (1919).

75. *Bullington v. Missouri*, 451 U.S. 430, 446 (1981).

76. *Sattazahn*, 537 U.S. at 107 (quoting *Bullington*, 451 U.S. at 439).

77. *See id.* at 109.

78. *See id.*

79. *Id.*

80. *Id.* (quoting *Arizona v. Rumsey*, 467 U.S. 203, 211 (1984)).

81. *Id.* at 109–10 (quoting *Commonwealth v. Sattazahn*, 763 A.2d 359, 367 (Pa. 2000)).

the death penalty, and its imposition on retrial did not violate the Double Jeopardy Clause.<sup>82</sup>

The majority opinion discussed *United States v. Scott*,<sup>83</sup> which suggested that double jeopardy might attach where the defendant “had either been found not guilty or . . . had at least insisted on having the issue of guilt submitted to the first trier of fact.”<sup>84</sup> This statement, according to the majority, was merely dictum and would be shaky ground on which to rest a decision that prohibited Pennsylvania from reimposing the death penalty.<sup>85</sup> Furthermore, Sattazahn asked that the jury be dismissed as hung, as opposed to “insist[ing] on having the issue of guilt submitted” for a merits determination.<sup>86</sup> Thus, the dictum arguably did not even apply to Sattazahn’s case.<sup>87</sup>

The majority also noted that Sattazahn’s case did not involve the “perils against which the Double Jeopardy Clause seeks to protect.”<sup>88</sup> The fact that a defendant is subjected to the stress and anxiety of another trial is not determinative of whether double jeopardy is implicated.<sup>89</sup> This was not a case in which “an all-powerful state [was] 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.”<sup>90</sup> Sattazahn had in fact moved that the jury be discharged and appealed his conviction.<sup>91</sup> For all of these reasons, the Court found that the

82. *See id.* Following this discussion, Justice Scalia, in Part III of the opinion, supported the majority’s position by discussing *Apprendi v. New Jersey*, 530 U.S. 466 (2000), in which the Court clarified what constitutes an element of an offense for jury trial purposes. *Sattazahn*, 537 U.S. at 111–12. This part of the opinion was joined only by Chief Justice Rehnquist and Justice Thomas. *Id.* at 103.

83. 437 U.S. 82 (1978).

84. *Sattazahn*, 537 U.S. at 113 (quoting *Scott*, 437 U.S. at 96) (alteration in original).

85. *Id.* (describing the notion that *Scott* supports as “tentative” at best).

86. *Id.* (quoting *Scott*, 437 U.S. at 96) (emphasis removed).

87. *See id.* at 113–14. Another potential problem with applying *Scott* in this context is that *Scott* dealt with a different type of situation—a dismissal after jeopardy attached. Such a dismissal must be analyzed to determine if it acts as an acquittal, but this analysis is somewhat different than that used to determine if there has been an acquittal of the death penalty at a sentencing proceeding. *See McAninch, supra* note 9, at 435–36.

88. *Sattazahn*, 537 U.S. at 114 (quoting *id.* at 124 (Ginsburg, J., dissenting)).

89. *Id.*

90. *Id.* at 114–15 (quoting *Scott*, 437 U.S. at 96).

91. *Id.* at 104–05.

Double Jeopardy Clause did not bar the prosecution from seeking the death penalty on retrial.<sup>92</sup>

### B. *The Dissenting Opinion*

Justice Ginsburg, focusing on the historical purposes of the Double Jeopardy Clause, wrote for the dissent and argued that the life sentence imposed on Sattazahn should have qualified as a jeopardy-terminating event, barring the prosecution from seeking the death penalty at the second trial.<sup>93</sup> Justice Ginsburg believed that the question of whether jeopardy terminated under the circumstances of the case was a genuinely debatable one,<sup>94</sup> and that under *Scott*, Sattazahn was entitled to double jeopardy protection.<sup>95</sup>

Under the dissent's interpretation of *Scott*, a defendant has an interest, beyond obtaining an acquittal, in avoiding multiple prosecutions even where "no final determination of guilt or innocence has been made."<sup>96</sup> Those interests may be involved in two situations: (1) when "the trial judge declares a mistrial;" or (2) when "the trial judge terminates the proceedings favorably to the defendant on a basis not related to factual guilt or innocence."<sup>97</sup> Justice Ginsburg believed that Sattazahn's case fell within the second *Scott* category<sup>98</sup> and argued that, because Sattazahn had not sought to terminate the proceedings before submitting the case to the jury, his case was distinguishable from those in which second prosecutions were allowed.<sup>99</sup> In other words, a trial-terminating judgment, not prompted by action on the defendant's

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92. *See id.* at 116.

93. *Id.* at 118 (Ginsburg, J., dissenting).

94. *Id.* at 119 (Ginsburg, J., dissenting).

95. *See id.* at 120–27 (Ginsburg, J., dissenting).

96. *Id.* at 120 (Ginsburg, J., dissenting) (quoting *United States v. Scott*, 437 U.S. 82, 92 (1978)).

97. *Id.* (Ginsburg, J., dissenting) (quoting *Scott*, 437 U.S. at 92).

98. *Id.* at 122 (Ginsburg, J., dissenting).

99. *Id.* at 125–26 (Ginsburg, J., dissenting). Justice Ginsburg argued that the judge's decision to discharge the jury was not based on a defensive motion, but merely on the jury's announcement that it could not reach a decision. *Id.* at 125 n.5 (Ginsburg, J., dissenting).

part, should entitle the defendant to protection under the Double Jeopardy Clause.<sup>100</sup>

Justice Ginsburg further argued that Sattazahn's second capital-sentencing proceeding plainly implicated "the perils against which the Double Jeopardy Clause seeks to protect."<sup>101</sup> In *Sattazahn*, the state had an opportunity to fully present its case to the jury and to have the jury rule on Sattazahn's guilt or innocence.<sup>102</sup> Furthermore, Sattazahn did not bring about the termination of his first trial; the decision to discharge the jury resulted not from any action on his part, but from the simple fact that the jury deadlocked.<sup>103</sup> Thus, according to the dissent, several of the reasons why double jeopardy protection did not attach in previous cases were absent in Sattazahn's case.<sup>104</sup>

Justice Ginsburg suggested two additional—and perhaps more important—reasons for protecting Sattazahn under the Double Jeopardy Clause. First, Sattazahn was presented with a "perilous" decision: he could appeal his conviction, but might face the death penalty if convicted on retrial; on the other hand, if he chose to forgo his appeal, his life sentence would stand.<sup>105</sup> "The law . . . should not . . . place [defendants] in such an incredible dilemma."<sup>106</sup> Second, the death penalty is a punishment "unique in both its severity and its finality,"<sup>107</sup> which, according to Justice Ginsburg, exacerbates the anxieties and insecurities of the defendant<sup>108</sup> and makes the defendant's dilemma much more incredible.<sup>109</sup> For these reasons, the dissenters believed that jeopardy terminated in *Sattazahn* after the trial judge imposed the life sentence on the defendant.<sup>110</sup>

100. *Id.* at 123 (Ginsburg, J., dissenting).

101. *Id.* at 124 (Ginsburg, J., dissenting).

102. *Id.* at 124–25 (Ginsburg, J., dissenting).

103. *Id.* at 125 n.5 (Ginsburg, J., dissenting).

104. *Id.* at 125–26 (Ginsburg, J., dissenting).

105. *Id.* at 126 (Ginsburg, J., dissenting).

106. *Id.* at 127 (Ginsburg, J., dissenting) (quoting *Green v. United States*, 355 U.S. 184, 193 (1957)) (second and third alterations in original).

107. *Id.* (Ginsburg, J., dissenting) (quoting *Monge v. California*, 524 U.S. 721, 732 (1998)).

108. *Id.* (Ginsburg, J., dissenting); see also *Green*, 355 U.S. at 187.

109. *Sattazahn*, 537 U.S. at 127 (Ginsburg, J., dissenting).

110. *Id.* at 128 (Ginsburg, J., dissenting).

### C. *The Majority: The Definition of "Acquittal"*

Based on the Court's prior rulings, the majority's decision in *Sattazahn* was correct. Under *Bullington*, *Rumsey*, and *Poland*, an acquittal of the death penalty at the capital-sentencing proceeding is necessary for a double jeopardy bar to arise.<sup>111</sup> A defendant has been acquitted when the sentencing body "decide[s] that the prosecution has not proved its case' *that the death penalty is appropriate.*"<sup>112</sup> In the absence of an acquittal of the death penalty, the general rule recognized in *Pearce*<sup>113</sup> applies, and the Double Jeopardy Clause is not implicated.

In *Sattazahn*, as in *Poland*, the sentencer did not decide that the prosecution had failed to prove its case for the death penalty.<sup>114</sup> In fact, the sentencer made no decision at all as to whether the death penalty was appropriate.<sup>115</sup> Absent any findings regarding aggravating or mitigating circumstances, the fact that a jury deadlocks cannot be characterized as an acquittal of the death penalty for double jeopardy purposes.

### D. *The Dissent's Criticisms and Criticisms of the Dissent*

The majority's opinion is open to criticism because the prospect of facing the death penalty on retrial might place a "chilling effect" on a defendant's right and decision to appeal. As the dissent suggested, a defendant in a factual situation similar to that of *Sattazahn* is placed in a troubling position: he can either appeal his conviction and potentially face the death penalty on retrial, or he can elect not to appeal and be forced to serve his original sentence.<sup>116</sup> Such a dilemma arguably supports double jeopardy applicability and the position that defendants should be protected

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111. See *supra* notes 28–54 and accompanying text.

112. *Poland v. Arizona*, 476 U.S. 147, 155 (1986) (quoting *Bullington v. Missouri*, 451 U.S. 430, 438 (1981)) (emphasis in original).

113. See *supra* notes 23–27 and accompanying text.

114. See *Sattazahn*, 537 U.S. at 117 (O'Connor, J., concurring).

115. This point is emphasized by Justice O'Connor in her concurring opinion. See *id.* (O'Connor, J., concurring). The Supreme Court of Pennsylvania placed similar emphasis on the point. See *Commonwealth v. Sattazahn*, 763 A.2d 359, 367 (Pa. 2000).

116. *Sattazahn*, 537 U.S. at 126 (Ginsburg, J., dissenting); see also text accompanying note 105.

from facing harsher penalties, particularly the death penalty, on retrial.

This criticism does not, however, find support in the Court's prior decisions. In *Chaffin v. Stynchcombe*,<sup>117</sup> the Court considered a claim that harsher sentences imposed on retrial are impermissible because they place a chilling effect on the defendant's right to appeal.<sup>118</sup> The majority rejected that argument and held that the possibility of facing a more severe sentence generally does not place an unjustifiable burden on a defendant's right to appeal.<sup>119</sup>

The *Chaffin* Court noted that the legal system frequently requires people to make difficult choices, and even though "a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose."<sup>120</sup> Despite the incidental chilling effects the *Sattazahn* decision might place on a defendant's right to appeal, the prospect of facing a more severe sentence on retrial does not impermissibly impair that right.<sup>121</sup>

The dissent further argued that *Sattazahn* plainly implicated the perils against which the Double Jeopardy Clause was meant to protect.<sup>122</sup> This argument is also problematic. A primary purpose of the Double Jeopardy Clause is to protect defendants from having to endure second trials.<sup>123</sup> In previous cases, however, the Court suggested that the protections of the Double Jeopardy Clause are different when the defendant himself challenges the conviction or sentence.<sup>124</sup> *Sattazahn* moved to have the jury dismissed as hung, was not acquitted of the death penalty, and subsequently appealed his conviction. Thus, *Sattazahn* was subjected to the "ordeal" of a second trial as a result of his own actions.

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117. 412 U.S. 17 (1973).

118. *See id.* at 29–35.

119. *Id.* at 35.

120. *Id.* at 32 (quoting *Crampton v. Ohio*, 402 U.S. 183, 213 (1971)); *see also* *Brady v. United States*, 397 U.S. 742, 751–53 (1970).

121. *See* *Commonwealth v. Sattazahn*, 763 A.2d 359, 368 (Pa. 2000) (suggesting that the imposition of a harsher penalty on retrial balances a defendant's right to appeal with the state's interest in imposing the appropriate punishment).

122. *See supra* notes 101–04 and accompanying text.

123. *See supra* text accompanying note 4.

124. *See, e.g.,* *North Carolina v. Pearce*, 395 U.S. 711, 720–21 (1969); *Green v. United States*, 355 U.S. 184, 188 (1957).



The argument that the prosecution had one complete opportunity to obtain a conviction before a final judgment was entered is likewise not particularly persuasive. The issue in a case like *Sattazahn's* is whether the defendant has obtained an acquittal at the sentencing proceeding.<sup>125</sup> No such decision was ever made by the sentencing body in *Sattazahn* as to the prosecution's case for the death penalty.<sup>126</sup> The fact that the state had "one complete opportunity to convict those who have violated its laws"<sup>127</sup> was not determinative of whether or not the defendant was acquitted of the death penalty.<sup>128</sup>

Finally, although the death penalty is a "different" type of punishment and the argument that it should be treated differently is appealing, this argument also does not find support in the Court's prior cases. The Court has recognized the uniqueness of the death penalty,<sup>129</sup> but has never held that there should be an exception to a court's ability to impose the death penalty on retrial beyond that recognized in *Bullington*.<sup>130</sup> Thus, the simple fact that the death penalty is being imposed on retrial does not merit an exception from the general rule that a court can impose whatever punishment is legally authorized, even if it is more severe than the original punishment.<sup>131</sup>

## V. IMPACT

In *Sattazahn*, the Supreme Court reaffirmed the general rule that courts can impose any legally authorized sentence on retrial.<sup>132</sup> The Court also reaffirmed that when the sentencing body acquits the defendant of the death penalty, the state cannot seek

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125. See *Sattazahn v. Pennsylvania*, 537 U.S. 101, 108–09 (2003).

126. *Id.* at 117 (O'Connor, J., concurring).

127. *Id.* at 124 (Ginsburg, J., dissenting) (quoting *Arizona v. Washington*, 434 U.S. 497, 509 (1978)).

128. *Id.* at 109.

129. *Monge v. California*, 524 U.S. 721, 732 (1998); *Gregg v. Georgia*, 428 U.S. 153, 188 (1976).

130. See, e.g., *Poland v. Arizona*, 476 U.S. 147, 156–57 (1986). See also *Commonwealth v. Sattazahn*, 763 A.2d 359, 369 (Pa. 2000) (Saylor, J., dissenting) (recognizing that state and federal precedent would allow a defendant in *Sattazahn's* situation to be exposed to the imposition of the death penalty on retrial).

131. See *North Carolina v. Pearce*, 395 U.S. 711, 720 (1969).

132. See *Sattazahn*, 537 U.S. at 106.

the death penalty on retrial.<sup>133</sup> The Court's ruling might impact the decisions made by criminal defendants facing the choice of whether or not to appeal, and may similarly influence state legislatures and courts when they amend or interpret capital-sentencing statutes.

### A. Appeals by Criminal Defendants

Following *Sattazahn*, a criminal defendant who has received a mandatory life sentence because a jury could not agree on the death penalty will have to make a very difficult choice: either appeal and potentially face a harsher punishment on retrial, or forego an appeal and be required to carry out the original sentence.<sup>134</sup> Although forcing a defendant to make this decision is not necessarily unconstitutional, *Sattazahn* might cause some defendants to accept their original sentences because they fear the prospect of receiving harsher sentences following an unsuccessful appeal.

It cannot simply be assumed, however, that the *Sattazahn* decision will actually deter criminal defendants from appealing their sentences. For instance, in 1985, four years after the *Bullington* decision, less than five thousand criminal appeals were filed in U.S. federal courts.<sup>135</sup> By 1999, that number had more than doubled.<sup>136</sup> While this increase is attributable to a number of factors such as rising prison populations, it suggests that criminal defendants during that time period were not significantly deterred from pursuing their appeals. As the *Chaffin* Court noted, the actual chilling effect of possibly facing a harsher sentence, given the somewhat speculative nature of that possibility, may not be of great significance.<sup>137</sup>

### B. Sattazahn's Influence on State Laws

*Sattazahn* may cause some state legislatures to revise their sentencing statutes, and will influence the way state courts in-

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133. *Id.* at 107–08.

134. *See supra* notes 105–06, 116 and accompanying text.

135. JOHN SCALIA, U.S. DEP'T OF JUSTICE, FEDERAL CRIMINAL APPEALS, 1999 WITH TRENDS 1985–1999, at 1 (2001).

136. *Id.*

137. *Chaffin v. Stynchcombe*, 412 U.S. 17, 33–35 (1973).

interpret those statutes, depending on whether they believe that *Sattazahn* was rightly or wrongly decided. If the Pennsylvania legislature, for example, did “intend[] that the life sentence should survive vacation of the underlying conviction,”<sup>138</sup> it might amend its sentencing scheme to express such an intent.<sup>139</sup> A state court might also interpret its state’s statutory sentencing scheme to fall either inside or outside of *Sattazahn*’s reach.

For example, in 1983, the Missouri legislature revised the state’s laws defining proper procedures for capital cases.<sup>140</sup> One commentator noted that Missouri’s new laws and judicial interpretations of those laws “substantially broadened the class of defendants to whom the death penalty is applicable and substantially decreased the likelihood of successful appeal from a sentence of death.”<sup>141</sup> This suggests that, in the wake of *Bullington*, Missouri desired to strengthen its death penalty laws to limit the chance that a *Bullington*-type situation would reoccur.

In contrast, but presumably with a similar desire, Arizona has not substantially changed its sentencing laws since the Court’s decisions in *Rumsey* and *Poland*.<sup>142</sup> The Arizona Supreme Court recently followed the *Sattazahn* decision when it applied its capital-sentencing statute and affirmed the imposition of the death penalty on a number of defendants who appealed their original convictions.<sup>143</sup> States that agree with the *Sattazahn* decision will likely follow the approaches of Missouri or Arizona: either strengthen their death penalty laws, or interpret *Sattazahn* to apply in similar cases. States that disagree with *Sattazahn* might choose to change their sentencing laws, or interpret *Sattazahn* very narrowly to limit its application.<sup>144</sup> As the vast majority of states currently sanction the death penalty,<sup>145</sup> it would be surpris-

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138. *Sattazahn*, 537 U.S. at 110.

139. As of the writing of this article, no significant changes had been made to Pennsylvania’s sentencing statute. See 42 PA. CONS. STAT. ANN. § 9711 (West 1998 & Supp. 2003).

140. See MO. ANN. STAT. §§ 565.030, .032 (West 1999 & Supp. 2003).

141. Ellen Yankiver Suni, *Recent Developments in Missouri: The Death Penalty*, 54 U. MO. KAN. CITY L. REV. 553, 553 (1986).

142. See ARIZ. REV. STAT. ANN. § 13-703.01 (West 2001 & Supp. 2002).

143. See *State v. Ring*, 65 P.3d 915, 928–31 (Ariz. 2003).

144. For instance, one recent unpublished case from the Sixth Circuit suggested that *Sattazahn* might not apply in a similar case. See *Pitcher v. Huffman*, 65 Fed. Appx. 979, 982–83 n.1 (6th Cir. 2003) (unpublished opinion).

145. See, e.g., Jaime L. Henshaw, Note, *Atkins v. Virginia: The Court’s Failure to Recognize What Lies Beneath*, 37 U. RICH. L. REV. 1185, 1207 (2003) (noting that thirty-eight states allow the death penalty).

ing if any more than a few states choose to adjust their capital-sentencing statutes in efforts to limit *Sattazahn*.

## VI. CONCLUSION

Although the state of the law has not been changed dramatically by the *Sattazahn* decision, *Sattazahn* does restrict the circumstances under which the *Bullington* exception will be applied in capital-sentencing cases. The *Sattazahn* Court made it clear that if a defendant is not acquitted of the death penalty, the state may seek the death penalty on retrial.<sup>146</sup> Based on its reasoning and its interpretation of *Scott*, the Court appears unwilling to further extend the protections of the Double Jeopardy Clause to similar cases in the future.<sup>147</sup>

The Supreme Court has had difficulty explaining the proper application of the Double Jeopardy Clause in the context of capital-sentencing proceedings. Despite the Court's attempts at clarification, courts and legislatures will likely continue to struggle when deciding how to properly balance the rights of criminal defendants with the states' interests in imposing appropriate punishments. For now, however, the Court has confirmed that in capital-sentencing proceedings, it is not the life sentence imposed at the first trial that is the touchstone for double jeopardy, but whether the imposition of the life sentence acquitted the defendant of the death penalty.<sup>148</sup>

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146. *Sattazahn v. Pennsylvania*, 537 U.S. 101, 106–07, 109 (2003).

147. *Scott* suggested that double jeopardy may attach even where no determination of guilt or innocence had been made. See *United States v. Scott*, 437 U.S. 82, 92 (1978). The *Sattazahn* majority characterized that statement as mere dictum and declined to apply it to *Sattazahn*'s case. See *Sattazahn*, 537 U.S. at 113–14. This may imply that the Justices in the majority will decline to extend double jeopardy protections under similar circumstances in the future. The majority may also be blurring the line that separates a court's sua sponte actions from its actions in response to a defendant's motion. See *id.* at 114 ("Surely double jeopardy protections cannot hinge on whether a trial court characterizes its action as self-initiated or in response to motion."). The Court will need to revisit *Sattazahn* in different contexts, such as when a judge declares a mistrial or where a defendant receives less than a life sentence at his first trial, to clarify exactly when double jeopardy attaches and how *Sattazahn* will be applied.

148. See *id.* at 537 U.S. at 107, 109.

