Duquesne Law Review

Volume 40 | Number 1 | Article 6

2001

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*

Jennifer L. Czernecki

Follow this and additional works at: https://dsc.duq.edu/dlr

Part of the Law Commons

Recommended Citation

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).
Available at: https://dsc.duq.edu/dlr/vol40/iss1/6

This Recent Decision is brought to you for free and open access by Duquesne Scholarship Collection. It has been accepted for inclusion in Duquesne Law Review by an authorized editor of Duquesne Scholarship Collection.

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*

CRIMINAL LAW — CONSTITUTIONAL LAW — SENTENCING AND PUNISHMENT DOUBLE JEOPARDY — HARSHER PENALTY UPON RETRIAL — The Pennsylvania Supreme Court held that the Double Jeopardy Clause of the Pennsylvania Constitution does not bar the imposition of the death penalty upon retrial when, in the original sentencing hearing, the trial judge grants a life sentence on behalf of a hung jury.

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

On the night of April 12, 1987, David Allen Sattazahn ("Sattazahn") and co-conspirator Jeffrey Hammer ("Hammer") carried out a robbery that they had planned for several weeks against restaurant manager Richard Boyer ("Boyer").[1] As Boyer left the restaurant, the two men confronted him and when Boyer attempted to flee, both Sattazahn and Hammer fired shots which left Boyer dead in the parking lot.[2]

During a police inquiry in 1989, Hammer made a statement that incriminated both he and Sattazahn as accomplices in the robbery that killed Boyer.[3] The court granted Hammer a plea bargain for third-degree murder in return for his testimony against Sattazahn.[4] At trial, the jury found Sattazahn guilty of many charges, including first-degree murder.[5] During sentencing, Justice Keller dismissed the jury when it could not unanimously decide on a sentence, and then entered a mandatory life sentence.[6] Sattazahn appealed to the

---

1. Commonwealth v. Sattazahn, 763 A.2d 359, 362 (Pa. 2000).
2. *Sattazahn*, 763 A.2d at 362.
3. Commonwealth v. Sattazahn, 631 A.2d 597, 601 (Pa. Super. Ct. 1993).
4. *Sattazahn*, 763 A.2d at 364. Hammer had also been sentenced to 240 years in prison for prior felonies, but because of the bargain against Sattazahn, he could be eligible for parole for these in just 19 years. *Id.*
5. *Id.* at 362. The jury also found Sattazahn guilty of second and third-degree murders, various counts of aggravated assault, possession of an instrument of crime, carrying a firearm without a license, and criminal conspiracy. *Id.*
6. *Id.* When the sentencing phase ends in a hung jury, the judge has no discretion to

Superior Court of Pennsylvania, which remanded for a new trial based on erroneous jury instructions.[7]

On remand, the Commonwealth filed a "notice of intent to seek the death penalty," which the defense attempted to thwart by filing a motion to "prevent the Commonwealth from seeking the death penalty" at retrial.[8] The Court denied *allocatur*, resulting in the second trial for Boyer's death.[9] On retrial, the jury reinstated Sattazahn's conviction of first-degree murder but this time sentenced him to death.[10] On direct appeal to the Supreme Court of Pennsylvania, Justice Newman affirmed both Sattazahn's conviction of first-degree murder and his death sentence.[11]

Justice Newman's analysis began with a routine evaluation of the sufficiency of evidence to support the elements of first-degree murder beyond a reasonable doubt.[12] Upon review, the court

---

issue a sentence and must issue a life sentence. 42 PA. CONS. STAT. § 9711(c)(1)(v)(1998 & Supp. 2000).

7. *Sattazahn*, 631 A.2d at 605-06. The Commonwealth has the burden of proving every element of a crime beyond a reasonable doubt, and if a jury instruction is given that assumes one of the elements of the crime, it relieves the prosecution of proving each element and is therefore impermissible. *Id.* At the trial level, there were many instructions involving these impermissible presumptions. *Id.* at 606. For example, the Superior Court found error in the jury instruction regarding the determination of "whether defendant had the specific intent to kill" because the jury was advised:

> [C]onsider all the evidence regarding his words and conduct and the attending circumstances that may show his state of mind . . . [A]dditionally, if you believe that the defendant intentionally used a deadly weapon on a vital part of the victim, you *may* regard that as an item of circumstantial evidence from which you may, if you choose, infer that the defendant had the specific intent to kill.

Id. (emphasis added). The latter part of this instruction allows an impermissible presumption because it relieves the Commonwealth's burden of proving the element of "intent." *Id.*

8. *Sattazahn*, 763 A.2d at 362-63. The Commonwealth, to support its seeking of the death penalty, revived the aggravating circumstance that Sattazahn had been involved in the "commission of the killing while in the perpetration of a felony" and also added Sattazahn's "significant history of felony convictions involving the threat of violence to the person." *Id.* at 362. Sattazahn's felony history included several burglaries, a robbery and third degree murder. *Id.* at 362-63.

9. *Id.* at 363. *Allocatur* is "a word formerly used to denote that a writ or order was allowed." BLACK'S LAW DICTIONARY 75-76 (Deluxe 6th ed. 1990).

10. *Sattazahn*, 763 A.2d at 363.

11. *Id.* at 369. When the lower court issues a death sentence, the Pennsylvania Supreme Court hears an automatic appeal. *See infra* note 12.

12. *Sattazahn*, A.2d at 363. "In all cases where the sentence of death has been imposed this court will conduct an independent review of the sufficiency of evidence supporting the verdict of guilt on the charge of first-degree murder even where the defendant does not challenge the verdict." Commonwealth v. Clark, 710 A.2d 31, 34 (Pa. 1998). In Pennsylvania, to prove murder in the first-degree, the prosecution must prove beyond a reasonable doubt that the defendant "unlawfully killed a human being and did so in an intentional, deliberate and premeditated manner." *Sattazahn*, 763 A.2d at 363. This "specific intent to kill," which is solely a characteristic of a murder in the first degree, "may be inferred from the defendant's

concluded that the evidence presented at trial adequately supported Sattazahn's conviction.[13]

Justice Newman then turned to Sattazahn's contentions that the defense did not have the opportunity to sufficiently cross-examine Hammer in order to expose the witness's bias.[14] The majority held that the defense had an adequate opportunity to present Hammer's bias to the jury.[15] The jury heard each facet of Hammer's plea negotiations, which, Justice Newman determined, presented ample information for the jury to detect any bias he may have had.[16]

The majority next rejected Sattazahn's argument that a misread jury instruction hindered the jury's fact-finding ability, reasoning that the complete jury instruction, not simply portions of it, shall be taken into consideration.[17] The court found that the instruction was clearly presented to the jury.[18]

Sattazahn also argued that the court erroneously admitted into evidence his prior offenses and convictions.[19] Justice Newman replied that for over sixteen years, the Pennsylvania Supreme Court has consistently allowed the prosecution to offer evidence of the defendant's prior felonies in the sentencing phase "so that a jury may assess whether these prior crimes involved violence sufficient to support the aggravating circumstance."[20]

---

use of a deadly weapon upon a vital part of the victim's body." *Id.*

13. *Id.* In addition to Hammer's testimony, an autopsy revealed that the gunshot wounds throughout Boyer's body were all attributed to the .22 caliber gun that Sattazahn used the day of the murder. *Id.* A gun shop owner also testified, confirming that Sattazahn had purchased from him the gun and two slugs embedded in Boyer's body; several cartridges found in the parking lot were attributed to the same weapon. *Id.*

14. *Id.* Sattazahn asserted that the defense is entitled to an adequate cross-examination of the witness in order to expose any bias of the witness. *Id.* at 363-64. Also, it is a general premise that the jury should be made aware of any bias a witness may have due to gaining a plea agreement in exchange for his testimony; then the jury can decide whether to credit the witness's testimony. *Id.* at 364.

15. *Id.* The court found that while "the trial court sustained several objections related to defense counsel's cross-examination of Hammer when counsel asked Hammer to read a count of the murder charge against him, this ruling did not hinder Sattazahn's ability to show that Hammer was biased." *Id.*

16. *Id.* Hammer had two plea arrangements, which included escaping the death penalty and becoming eligible for parole in 19 years for his past criminal record, both in exchange for his testimony against Sattazahn. *Id. See supra* note 4. Though Sattazahn also argued that Hammer presented inconsistent statements to the police and that the defense did not have the opportunity to cross-examine Hammer about these statements, the court rejected this argument because Hammer had, in fact, admitted to the jury that he lied to police on several occasions. *Id.*

17. *Sattazahn*, A.2d at 363.

18. *Id.* at 365.

19. *Id.*

20. *Id.* Justice Newman relied on the Court's precedent set sixteen years earlier in

Importantly, Sattazahn's principal challenge was the "constitutionality of allowing the Commonwealth to seek the death penalty on retrial" after the court issued a life sentence in the original trial.[21] He asserted protection from the death penalty under Pennsylvania's Constitutional provisions guaranteeing a right of appeal and protection from double jeopardy.[22]

However, previously, the Pennsylvania Supreme Court in *Commonwealth v. Martorano* relied on United States Supreme Court precedent to demonstrate that when a defendant's first conviction is set aside, double jeopardy protection assumes no limits to the defendant's penalty upon retrial.[23] If, at trial, the jury unanimously determines that the defendant's penalty is something less than death, the court then considers the sentence to be an "acquittal on the merits," and precludes the state from seeking the death penalty on retrial.[24] However, when an "original conviction is nullified at a defendant's behest, 'the slate [is] wiped clean'" and the prosecution can seek a greater sentence upon retrial.[25] Justice Newman explained that, here, like in *Martorano*, the Commonwealth permissibly sought the death penalty on retrial

---

Commonwealth v. Beasley, 479 A.2d 460 (1984). *Id.* at 365. Furthermore, a Pennsylvania statute provides that a "significant history of felony convictions involving the use or threat of violence to the person" is permissible as an aggravating circumstance. 42 PA. CONS. STAT. § 9711(d)(9)(1998 & Supp. 2000). Sattazahn's felony history included several burglaries, a robbery, and third-degree murder. *Sattazahn*, 763 A.2d at 365.

21. *Id.* at 366.

22. *Sattazahn*, 763 A.2d at 366. The Pennsylvania Constitution provides a right of appeal:

> There shall be a right of appeal in all cases to a court of record from a court not of record; and there shall also be a right of appeal from a court of record or from an administrative agency to a court of record or to an appellate court, the selection of such court to be as provided by law; and there shall be such other rights of appeal as may be provided by law.

PA. CONST. art. V, § 9.

The Pennsylvania Constitution also provides protection from double jeopardy: "No person shall, for the same offense, be twice put in jeopardy of life or limb . . ." PA. CONST. art. I, § 10.

23. *Sattazahn*, 763 A.2d at 366-67 (citing Commonwealth v. Martorano, 634 A.2d 1063, 1068-69 (Pa. 1993)). In *Bullington v. Missouri*, 451 U.S. 430, 434-35 (1981), a sentencing hearing resembling a trial was conducted during the sentencing phase of a death penalty case, in which there was opportunity for additional evidence and argument. The jury unanimously sentenced the defendant to life in prison and on retrial, and the U.S. Supreme Court held that the state was unable to seek the death penalty because the prosecution had obviously not proved its case for death in the trial, making this an "acquittal on the merits." *Id. See also* Arizona v. Rumsey, 467 U.S. 203 (1984) (relying on propositions set forth in *Bullington*).

24. *Id.* at 366-67.

25. *Id.*

because the trial judge imposed the life sentence after dismissing a hung jury.[26]

Sattazahn contested this theory, arguing that Pennsylvania's death penalty statute does not distinguish between a unanimous jury verdict and a verdict given by a judge resulting from a deadlocked jury; therefore, both types of verdicts yield an acquittal on the merits.[27] The majority declined to accept this contention by reiterating that in Pennsylvania, a "default judgment does not trigger a double jeopardy bar to the death penalty" upon retrial.[28] Justice Newman's reasoning began by examining the two relevant subsections of the sentencing statute.[29] The court explained that subsection (v), which mandates a life sentence in case of a hung jury, differs from subsection (iv), which allows the sentence of either life imprisonment *or* the death penalty; thus, a distinction must exist between the two or else subsection (v) would be unnecessary.[30]

Consequently, the majority attacked the defense's argument that the right of appeal, due process, and equal protection provisions of the Pennsylvania Constitution prohibit the Commonwealth from seeking the death penalty on retrial.[31] Sattazahn asserted that Pennsylvania's grant of a right to appeal, one not given in the

---

26. *Id.* at 367.

27. *Id.*

28. *Sattazahn*, 763 A.2d at 367 (citing *Martorano*, 634 A.2d at 1070). The court relied on the language in *Martorano* to explain:

> Under Pennsylvania's sentencing scheme, the judge has no discretion to fashion sentence once he finds that the jury is deadlocked. The statute directs him to enter a life sentence [citation omitted] . . . [A] default judgment does not trigger a double jeopardy bar to the death penalty upon retrial.

Id.

29. *Id.* The two relevant subsections of the sentencing statute are 42 PA. CONS..STAT. § 9711(c)(1)(iv) and (v). Subsection (iv) provides for the imposition of the death penalty or a life sentence when the jury unanimously finds sufficient evidence for either. 42 PA. CONS. STAT. § 9711(c)(1)(iv)(1998 & Supp. 2000). Subsection (iv) provides:

> 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.

§ 9711(c)(1)(iv). Subsection (v) declares that when the jury cannot reach a unanimous verdict, the court shall impose a life sentence. § 9711(c)(1)(v). It 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." § 9711(c)(1)(v).

30. *Sattazahn*, 763 A.2d at 367-68.

31. *Id.* at 368.

federal Constitution, affords greater protection than the U.S. Constitution to defendants on trial.[32] Without protection of the right to appeal, Sattazahn argued that there is a "chilling effect" on the exercise of this state-granted constitutional right.[33] The majority, reiterating a United States Supreme Court case cited in *Martorano*, held that there is no "chilling effect" on a defendant's right to appeal.[34] The court stated that the *Martorano* decision remains applicable law in Pennsylvania.[35]

Finally, Sattazahn contended that the court at retrial erred by allowing the Commonwealth to introduce an additional aggravating factor.[36] Renouncing this assertion, the court reiterated that "an order for a new trial wipes the slate clean" so, although Sattazahn's crimes and felony convictions "involving the threat of violence to the person" did not occur until after the first trial, they were permissible as evidence at retrial.[37]

The Pennsylvania Supreme Court, finding no error, affirmed Sattazahn's conviction as well as his death sentence.[38] Dissenting, Justice Saylor disagreed with the majority's proclamation that no "chilling effect" is placed on defendant's right to appeal.[39] Justice Saylor argued that exposing a defendant to the death penalty upon retrial, after having received a life sentence, certainly places a chilling effect on this right.[40] He claimed that "justice would be better served" if a defendant is guaranteed on retrial no stricter a sentence than originally received.[41]

---

32. *Id.* Sattazahn claimed that Article V of the Pennsylvania Constitution affords greater protection in its double jeopardy, due process and equal protection provisions. *Id.* *See supra* note 22.

33. *Id.* at 368. Sattazahn argued that allowing the Commonwealth to seek the death penalty on retrial "acts as a *de facto* denial of the right to appeal" and that any "rational defendant who receives a life sentence imposed by a judge after a hung jury during the penalty phase will forego his or her appeal for fear of being executed should he or she win on appeal but lose upon retrial." *Id.*

34. *Id.* In *Chaffin v. Stynchcombe*, the Court stated that "the choice occasioned by the possibility of a harsher sentence . . . does not place an impermissible burden on the right of a criminal defendant to appeal . . . his conviction." *Id.* (citing Chaffin v. Stynchcombe, 412 U.S. 17, 30, 35 (1973)).

35. *Sattazahn*, 763 A.2d at 368-69.

36. *Id.* at 369. The court commented that by the time of retrial, Sattazahn "had a significant history of felony convictions that involve the threat of violence to the person." *Id.* *See supra* note 20.

37. *Id.* *See supra* note 25.

38. *Id.* at 369.

39. *Id.* (Saylor, J., dissenting).

40. *Sattazahn*, 763 A.2d at 369 (Saylor, J., dissenting).

41. *Id.* (Saylor, J., dissenting).

The Fifth Amendment of the United States Constitution confers a right against double jeopardy, that is, that no United States citizen shall be prosecuted twice for the same crime.[42] In 1896, the Supreme Court, in *United States v. Ball*, set the standard with regard to a court's power to retry a person whose first conviction has been set aside.[43] In *Ball*, three defendants were tried for murder.[44] At the initial trial, two of the defendants were found guilty of murder while the third was acquitted.[45] Subsequently, on review, the court dismissed the original indictment but a grand jury reinstated a new indictment against all three, and a jury found the three guilty of murder.[46] On appeal, the Court was faced with two issues: (1) whether the formally acquitted defendant was immune to second indictment because his Constitutional right to freedom from double jeopardy was violated; and (2) whether the other two defendants faced a violation of their same rights after the original indictment had been set aside.[47] First, the Court concluded that the formerly acquitted defendant certainly could not be retried.[48] Relying on the United States Constitution's Double Jeopardy Clause, the Court stated that the former acquittal was a bar to the second indictment.[49]

As to the second issue, the majority felt that no bar existed to the two defendants' retrial.[50] Explaining, the Court held that "a defendant, who procures a judgment against him upon an indictment [which is] set aside, may be tried anew upon the same indictment," whereas "a general verdict of acquittal . . . is a bar to

42. U.S. CONST. amend. V. The Fifth Amendment of the United States Constitution reads:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; *nor shall any person be subject to the same offence to be twice put in jeopardy of life or limb*; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Id. (emphasis added).

43. *Martorano*, 634 A.2d at 1068. (citing United States v. Ball, 163 U.S. 662 (1896)).

44. 163 U.S. 662 (1896).

45. *Ball*, 163 U.S. at 664-65.

46. *Id.* at 665.

47. *Id.* at 666-74.

48. *Id.* at 669.

49. *Id.* at 670. The Court stated that an acquittal is absolute, and there exists "no reason for allowing its validity and conclusiveness to be impugned in another case." *Id.* *See supra* note 42.

50. *Ball*, 163 U.S. at 672.

a second indictment."[51] In the end, the acquitted defendant's conviction was reversed, and the two other defendants' convictions were affirmed.[52] Many decisions thereafter relied on *Ball*, confirming that the "constitutional guarantee against double jeopardy imposes no limitations upon the power to retry a defendant who has succeeded in getting his first conviction set aside."[53]

Shortly thereafter, in 1919, the Supreme Court in *Stroud v. United States* first addressed the question of whether a harsher sentence could be imposed upon retrial.[54] The Court stretched the basic principle in *Ball* by averring that the power to retry a defendant is the power to impose whatever sentence necessary, be it greater or lesser than the original sentence.[55] In *Stroud*, the defendant was found guilty of first degree murder and was sentenced to be hanged.[56] After the first conviction was set aside on error, a second trial ensued and Stroud was again found guilty, but the jury imposed the punishment of a life sentence.[57] Once more the judgment was reversed due to error, and at the third trial, again a jury found Stroud guilty of first-degree murder, and this time sentenced him to death.[58] On appeal of this sentence, the Court briefly replied that Stroud's Fifth Amendment double jeopardy rights were not violated because each trial that ensued had been set aside due to error.[59]

In following the auspices of *Ball*, the Court found that no

---

51. *Id.* at 669.

52. *Id.* at 674.

53. *Martorano*, 634 A.2d at 1068.

54. 251 U.S. 15 (1919).

55. *Stroud*, 251 U.S. at 15-16, 18.

56. *Id.*

57. *Id.* at 16. The first conviction was set aside due to a "confession of error by the U.S. District Attorney." *Id.*

58. *Id.* at 17. The second conviction was reversed again due to error by the Solicitor General of the United States whereby the mandate for vacating the former sentence and ordering a new trial stated, "such further proceedings be had in said cause, in conformity with the judgment of this court, as according to right and justice, and the laws of the United States ought to be had, the said writ of error notwithstanding." *Id.*

59. *Id.* at 18. The Court stated:

> Moreover, the conviction and sentence upon the former trials were reversed upon writs of error sued out by the plaintiff in error. The only thing the appellate court could do was to award a new trial on finding error in the proceeding, thus the plaintiff in error himself invoked the action of the court that resulted in further trial. In such cases [the defendant] is not placed in second jeopardy within the meaning of the Constitution.

Id.

limitation existed to prevent retrying Stroud, and furthermore, similar to the right to retry a defendant, no limitation exists on the sentence to be imposed.[60] At the second trial in which Stroud was given a life sentence, the jury instruction read that he shall be punished "without capital punishment," whereas upon retrial, the jury heard no such instruction.[61] The Court declared that the difference was immaterial because in the second case, the jury *could* have imposed a life sentence, but instead found that Stroud was worthy of the stricter sentence.[62]

More recently, in *North Carolina v. Pearce*, the Supreme Court, while reaffirming *Ball's* basic premise and pulling from the rationale in *Stroud*, faced the same question of whether defendants have a Constitutional guarantee from a harsher penalty upon retrial.[63] Stating that Double Jeopardy Clause does not preclude a harsher sentence on retrial, the *Pearce* court, in examining two different federal habeas corpus proceedings, gave a more explicit and extended rationale for its decision than its predecessors.[64] In both cases, the defendants, Pearce and Rice, were convicted of crimes and were sentenced to prison terms.[65] Each original conviction was later reversed and set aside in post-conviction proceedings, and their second trials resulted in longer prison sentences than those originally issued.[66] Both defendants, in the habeas corpus proceedings, challenged these increased sentences by arguing that their Constitutional guarantee, granted in the Fifth Amendment Double Jeopardy Clause, should cause them to avoid imposition of a harsher sentence on retrial.[67]

---

60. *Stroud*, 251 U.S. at 17-18.

61. *Id.* at 18.

62. *Id.*

63. 395 U.S. 711 (1969).

64. *Id. Habeas corpus* is a writ that brings a party before the court, not to establish the party's guilt or innocence, but to determine whether he is "restrained of his liberty by due process." BLACK'S LAW DICTIONARY 709 (Deluxe 6th ed. 1990).

65. *Pearce*, 395 U.S. at 713-15. Defendant Pearce was convicted in North Carolina of "assault with intent to rape" and was sentenced to 12-15 years in prison. *Id.* Defendant Rice was sentenced to a term of 10 years in Alabama for four counts of burglary. *Id.*

66. *Id.* Pearce's conviction was reversed by the Supreme Court of North Carolina when Pearce, himself, instituted the post-conviction proceeding. *Id.* at 713. He was retried, re-convicted and sentenced to eight additional years. *Id.* Pearce appealed only to have his sentence affirmed, and the habeas corpus proceeding ensued. *Id.* In Rice's proceeding, he argued that he "had not been accorded his constitutional right to counsel," which resulted in the original judgment being set aside. *Id.* at 714. On retrial, he was found guilty of three of the four original charges and sentenced to a prison term of 25 years before the habeas corpus proceeding was initiated. *Pearce*, 395 U.S. at 714.

67. *Id.* at 714-15. Before the U.S. Supreme Court granted *certiorari* in the *habeas*

The Supreme Court found otherwise when it held that when a judgment is set aside and a new trial ordered, no Constitutional limitation exists "upon the power to retry a defendant."[68] Justice Stewart, delivering the majority's opinion, declared this to be a "well-established part of our constitutional jurisprudence."[69]

Justice Stewart's analysis then set forth the basic principle upon which our most recent decisions are based: "[the rationale that there exists no Constitutional limitation upon the power to retry a defendant] ultimately rests upon the premise that the original conviction has, at the defendant's behest, been wholly nullified and the *slate wiped clean*"; therefore, nothing bars a harsher penalty upon retrial.[70] Justice Stewart also addressed the defendants' challenges of an Equal Protection violation, but again concluded that there had been no Constitutional violation and reinstated the more stringent penalties.[71]

Twelve years later, the Supreme Court added an exception to the long-standing premise set forth in *Pearce* and its predecessors. In *Bullington v. Missouri*, the defendant Robert Bullington was charged with and found guilty of capital murder.[72] Following a sentencing hearing, in which the prosecution offered evidence of aggravating circumstances, Bullington was sentenced to life in

---

corpus proceeding, the district courts, affirmed by the relevant Courts of Appeals, agreed with both of the defendants that their Constitutional rights had been violated by way of imposing a harsher sentence on retrial. *Id.* at 713-15. For example, in Rice's case, the trial court failed to "give him credit for the time he had already served in prison," resulting in the harsher sentence. *Id.*

68. *Id.* at 720-21.

69. *Id.* at 719-20. Justice Stewart, delivering the majority's opinion, stated: "The principle that [the Double Jeopardy Clause] does not preclude the Government's retrying a defendant whose conviction is set aside because of an error in the proceedings leading to conviction is a well-established part of our constitutional jurisprudence." *Id.* at 720. (citing United States v. Tateo, 377 U.S. 463, 465 (1964)).

70. *Pearce*, 395 U.S. at 721. (emphasis added). Justice Stewart also added:

> To hold to the contrary would be to cast doubt upon the whole validity of the basic principle enunciated in *United States v. Ball* and upon the unbroken line of decisions that have followed that principle for almost 75 years. We think those decisions are entirely sound, and we decline to depart from the concept they reflect.

Id.

71. *Id.* at 722-23. The defendants challenged on the Equal Protection basis by stating that persons "who do not seek new trials, cannot have their sentences increased" and that there is only "a risk on those who have their original convictions set aside." *Id.* at 722. The Court replied, "we deal here, not with increases in existing sentences, but with the imposition of wholly new sentences after wholly new trials." *Id.*

72. 451 U.S. 430, 435 (1981). Bullington had abducted and drowned his victim. *Id.* He was also charged and found guilty of kidnapping, armed criminal action, burglary, and flourishing a dangerous and deadly weapon. *Id.*

prison "without eligibility for probation or parole for 50 years."[73] Bullington requested and was granted a new trial.[74] The prosecution filed a formal notice of its intent to again seek the death penalty.[75] The defense moved to strike, arguing that Bullington's constitutional rights would be violated if the prosecution was allowed to seek the death penalty at the retrial.[76] The United States Supreme Court granted *certiorari* to determine whether the prosecution's seeking of the death penalty at retrial is violative of a defendant's constitutional rights.[77]

Justice Blackmun began answering this question by reestablishing the Court's traditional standard to be that "the Double Jeopardy Clause imposes no absolute prohibition against the imposition of a harsher sentence at retrial after a defendant has succeeded in having his original conviction set aside."[78] Blackmun then distinguished *Bullington* from the former cases which established this basic premise.[79] The difference, he stated, was that the life sentence imposed on Bullington was granted in a separate sentencing hearing after facts were presented and the prosecution had the burden of proving beyond a reasonable doubt certain elements in order to establish worthiness of the death penalty; in prior cases, the prosecution recommended appropriate sentences

---

73. *Bullington*, 451 U.S. at 435-36. The prosecution offered the following aggravating circumstances: "the offense was committed by a person . . . who has a substantial history of serious assaultive criminal convictions and that the offense was outrageously or wantonly vile, horrible or inhumane in that it involved torture, or depravity of mind." *Id.* at 435. The sentencing hearing consisted of argument, jury instructions and jury deliberation. *Id.*

74. *Id.* at 436. The Court granted the new trial to Bullington because of a case, Duren v. Missouri, 439 U.S. 357 (1979), decided in the interim. *Id.* In *Duren*, the court decided that "Missouri's constitutional and statutory provisions allowing women to automatically be exempt from jury service deprived the defendant of his constitutional right to a jury drawn from a fair cross-section of the community." *Id.*

75. *Id.* at 436.

76. *Id.* at 436-37. Dismissing the defendant's arguments, the Missouri Supreme Court held:

> [N]either the Double Jeopardy Clause nor the Eighth Amendment, nor the Due Process Clause barred the imposition of the death penalty upon petitioner at his new trial, and that allowing the prosecution to seek capital punishment would not impermissibly chill a defendant's effort to seek redress for any constitutional violation committed at his initial trial.

Id. at 437.

77. *Id. Certiorari* is the grant of a writ that allows a court to exercise its discretion "to choose the cases it wishes to hear." BLACK'S LAW DICTIONARY 228 (Deluxe 6th ed. 1990).

78. *Bullington*, 451 U.S. at 438. (citing *Pearce*, 395 U.S. at 711 and *Stroud*, 251 U.S. at 15).

79. *Id.*

and the jury used their discretion to determine the sentence.[80] Justice Blackmun described the separate sentencing hearing as "itself a trial on the issue of punishment."[81] He further explained that when a state mandates a sentencing hearing that resembles a trial, that state "explicitly requires the jury to determine whether the prosecution has 'proved its case,'" making a determination of the sentence absolutely final.[82]

Justice Powell dissented on the basis that the well-settled precedent the Court set forth in *Stroud* and *Pearce*, and other cases with similar outcomes, is irreconcilable with the majority's decision.[83] His argument rested on the notion that the Double Jeopardy Clause does not preclude harsher sentences on retrial, regardless of whether there was a trial-like sentence hearing; instead the Clause only precludes a second determination of the defendant's guilt or innocence.[84] Reiterating a previous declaration of the Court, Justice Powell remarked that a corresponding right of society is that appropriate punishment be given for the blatant guilt of a defendant, and in *Bullington*, it was clear that Missouri decided that death was the appropriate sentence; therefore, the Constitution cannot bar the state's sentencing determination.[85]

Three years later, in *Arizona v. Rumsey*, Justice O'Connor relied on *Bullington* to disallow the death penalty upon retrial because Arizona, like Missouri, held a trial-like sentencing hearing.[86] The

---

80. *Id.*

81. *Id.* At the statutorily mandated sentence hearing, there were arguments by both the defense and the prosecution, testimony, jury instructions and then deliberation for the final determination of sentence. *Id.*

82. *Id.* at 444-45. (emphasis removed). Blackmun continued, quoting a former case:

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that 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.

Id. at 445 (quoting Green v. United States, 355 U.S. 184 (1957)).

83. *Bullington*, 451 U.S. at 447 (Powell, J., dissenting).

84. *Id.* at 451 (Powell, J., dissenting). Justice Powell stated that a second sentence determination by a jury is just as "correct" as one given by the first jury. *Id.*

85. *Id.* at 452-53. Justice Powell reinforced the U.S. Supreme Court's explanation of its position in an earlier case on why the Double Jeopardy Clause allows a retrial following a reversal for error at trial: "Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial." *Id.* (citing United States v. Tateo, 377 U.S. 463, 466 (1964)).

86. 467 U.S. 203, 205, 209-10 (1984). The defendant was found guilty of armed robbery and first degree murder and after a sentencing hearing, the defendant received life in prison. *Id.* at 205. Due to a statutory misinterpretation by the judge, the life sentence was set aside,

judge in *Rumsey* sat as the factfinder during sentencing and rejected the death penalty in favor of a less harsh sentence; thus, the Court concluded that the Double Jeopardy Clause precluded a harsher sentence upon retrial.[87] After briefly reviewing the *Bullington* decision, Justice O'Connor concluded that the similar facts of the cases, with respect to the sentencing hearing, warranted direct application of the *Bullington* decision.[88] Therefore, the defendant was protected under the Double Jeopardy Clause of the Constitution.[89]

However, Justice Rehnquist, dissenting in *Rumsey*, firmly asserted that *Bullington* was wrongly decided, and furthermore argued that the rationale in *Bullington* was inapplicable to this case where the resentencing was "to correct a legal error."[90] Distinguishing the facts, Justice Rehnquist stated that the jury in *Bullington* was able to use its discretion to decide "if capital punishment was appropriate," whereas in *Rumsey*, "the trial judge's discretion . . . was carefully confined and directed to determining whether certain specified aggravating factors existed."[91] This, Rehnquist argued, is not the same type of trial-like sentencing hearing as in *Bullington*; therefore, different rules should have applied.[92]

Turning the tables in 1986, the Supreme Court, in *Poland v. Arizona*, refused to further extend the principle set forth in *Bullington* — that the result of a trial-like sentencing hearing is an "acquittal on the merits" — and returned to the "clean slate" rule set forth seventeen years earlier in *North Carolina v. Pearce*.[93] In

---

and in a new sentencing hearing, a debate ensued regarding whether the death penalty could be imposed the second time around. *Id.* at 206-08. Eventually, the United States Supreme Court granted *certiorari*. *Id.* at 209.

87. *Id.* at 210.

88. *Id.* at 212

89. *Id.*

90. *Id.* at 213 (Rehnquist, J., dissenting).

91. *Rumsey*, 467 U.S. at 213 (Rehnquist, J., dissenting).

92. *Id.* at 213-14 (Rehnquist, J., dissenting). Justice Rehnquist ended:

> [T]he fact that in this case the legal error was ultimately corrected by the trial court did not mean that the State sought to marshal the same or additional evidence against a capital defendant which had proved insufficient to prove the State's "case" against him the first time. There is no logical reason for a different result here simply because the Arizona Supreme Court remanded the case to the trial court for the purpose of correcting the legal error, particularly when the resentencing did not constitute the kind of "retrial" which the *Bullington* Court condemned. Accordingly, I would reverse the decision of the Arizona Supreme Court in this case.

Id. at 214-15 (Rehnquist, J., dissenting).

93. 476 U.S. 147, 152-157 (1986). *See supra* notes 63-71 and accompanying text. *See also*

Poland, two defendants were convicted of first-degree murder and at the sentencing hearing, overseen by the trial court judge, the prosecution presented evidence of two aggravating circumstances, one of which the trial judge rejected.[94] The judge, weighing the existing aggravating circumstance against mitigating evidence, sentenced the defendants to death.[95] On appeal, the Arizona Supreme Court found insufficient evidence to support the aggravating circumstance, and granted a retrial to the defendants on various bases.[96] However, at the retrial, the prosecution introduced evidence of the two original aggravating circumstances and also included a third; the trial judge found positively for all three circumstances and again sentenced the defendants to death.[97] The defendant-petitioners argued that the imposition of the death penalty on retrial violated their double jeopardy rights because the Arizona Supreme Court's conclusion that no evidence supported the original aggravating circumstances "amounted to an 'acquittal' from the death penalty."[98]

The Supreme Court granted *certiorari* and Justice White, writing for the Court, addressed whether "reimposing the death penalties on petitioners violated the Double Jeopardy Clause."[99] The majority's analysis began with an overview of the rule expounded

---

Martorano, 634 A.2d at 1070.

94. *Poland*, 476 U.S. at 149. Defendants, Michael and Patrick Poland, were found guilty of murder for disguising as police officers and robbing a cash delivery van of $281,000, then putting the van's guards in sacks weighted with rocks and into the bottom of a lake. *Id.* at 148-49. The autopsies showed the guards died either from drowning or a heart attack before drowning. *Id.* An aggravating circumstance is "any circumstance attending the commission of a crime or tort which increases its guilt or enormity or adds to its injurious consequences, but which is above and beyond the essential constituents of the crime or tort itself." BLACK'S LAW DICTIONARY 65 (Deluxe 6th ed. 1990). In *Poland*, the prosecution presented evidence of two aggravating circumstances: "1) that petitioners had 'committed the offense as consideration for the receipt, or in expectation of the receipt, of something of pecuniary value' and 2) that petitioners had 'committed the offense in an especially heinous, cruel or depraved manner.'" *Poland*, 476 U.S. at 149. The judge replied that the "pecuniary gain" circumstance was not present but that the other aggravating circumstance was. *Id.*

95. *Id.* A mitigating circumstance is one that is considered by the court, not as a justification for the offense, but which may be used to reduce "the degree of moral culpability." BLACK'S LAW DICTIONARY 1002 (Deluxe 6th ed. 1990).

96. *Poland*, 476 U.S. at 149-50. The defendants appealed on the basis that insufficient evidence existed to find the "heinous, cruel or depraved" aggravating circumstance, and that "the jury's verdict was tainted by a jury-room discussion of evidence not admitted at trial." *Id.* The court also concluded that the application of the "pecuniary interest" circumstance was misunderstood at the trial court, and, due to the misunderstanding, it could be presented again on retrial. *Id.* at 150.

97. *Id.*

98. *Id.* at 151.

99. *Id.*

in *Bullington* and *Rumsey*, which established that a defendant is "acquitted" when the prosecution fails to prove its case.[100] However, Justice White distinguished *Poland* by refusing to apply the *Bullington* rule when the fact-finder simply fails to find the existence of an aggravating circumstance.[101] Rather, the appropriate measure is the "clean slate" rule of *Pearce* where no constitutional bar exists to retrial or a harsher penalty, unless the prosecution has not proved its case for the death penalty, in which case there is an "acquittal" on the merits.[102] Therefore, the court held that the rejection of an aggravating circumstance was not an acquittal and "did not foreclose its consideration by the reviewing court."[103] Furthermore, because the reviewing court did not "find the evidence legally insufficient to justify imposition of the death penalty, there was no death penalty 'acquittal.' "[104]

Justice Marshall, with whom Justices Brennan and Blackmun joined, dissented with the holding based on a factual difference between *Rumsey* and *Poland.*[105] In *Rumsey,* he argued, the imposition of the death penalty was barred by the Constitution's Double Jeopardy Clause, "even though the 'acquittal' was predicated upon one mistaken interpretation of state law."[106] Contrarily, in *Poland,* though the trial court misinterpreted the law, the majority held because one of the two aggravating circumstances was affirmed, there was no "acquittal."[107] Justice Marshall found these outcomes inconsistent and stated that, due to the factual similarities, the majority should not have made a distinction between *Rumsey* and *Poland,* and should have applied the rule set forth in *Rumsey.*[108]

---

100. *Id.* at 154.

101. *Poland,* 476 U.S. at 155-56. Justice White stated "[w]e are 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.* at 156.

102. *Id.* at 155, 157. *See also Martorano,* 634 A.2d at 1070.

103. *Id.* at 157.

104. *Id.* Justice White finished by stating that in the *Poland* case the "clean slate" rule applied to the second sentencing hearing because of the lack of an acquittal on the merits at defendants' first hearing. *Id.*

105. *Id.* (Marshall, J., dissenting).

106. *Poland,* 476 U.S. at 157-60 (Marshall, J., dissenting).

107. *Id.* (Marshall, J., dissenting).

108. *Id.* at 159-60 (Marshall, J., dissenting). Marshall stated:

> The initial death sentences that petitioners received were 'convictions' and their reversal for insufficiency of the evidence to support the sole aggravating circumstance found by the sentencing judge must be accorded the same effect as an 'acquittal' at trial — the same effect as Rumsey's life sentence. As much as Rumsey's life sentence

In 1993, the Pennsylvania Supreme Court was presented with the same question that had been answered by the United States Supreme Court in this history of cases. In *Commonwealth v. Martorano*, a jury found two defendants guilty of first degree murder and during the sentencing hearing, the judge dismissed the hung jury and imposed mandatory life sentences on both of the defendants.[109] The issue confronted by the Pennsylvania Supreme Court was whether "the Commonwealth is precluded from seeking the death penalty on retrial, where, following their first trial, respondents were convicted of first-degree murder and sentenced to life imprisonment, *not* by a unanimous jury verdict, but by the trial judge following the jury's deadlock."[110]

The Supreme Court of Pennsylvania began its *per curiam* opinion by determining that the state's crimes code requires that any first degree murder conviction shall be followed by a death penalty unless there is a clear violation of constitutional rights.[111] The court then proceeded to examine whether the constitutional rights of the defendants had been violated.[112] The majority discussed the development of the law as evidenced by the decisions of *Ball, Pearce, Bullington, Rumsey,* and *Poland.*[113]

The defendant-respondents contended that *Bullington* controlled because in their case, as in *Bullington*, the determination of a life

---

> constituted the all-important 'acquittal on the merits' even though predicated on an error of law, so, too did the reversal of petitioners' death sentences.

Id.

109. *Martorano*, 634 A. 2d at 1064. The defendants, Martorano and Daidone, hired Willard Maron to kill, in a "gangland-style slaying," union organizer John McCullough because McCullough was heading a new union that "would have competed with an existing union controlled by organized crime." *Id. See supra* note 23.

110. *Id.* at 1067-68. Prior to this issue making it to the supreme court, a discrepancy arose as to whether the trial court and the superior court should have set bail for the defendants. *Id.* at 1064-65. The Commonwealth stood firm, declaring that defendants in a capital case should not be given the "privilege" of being released by bail. *Id.* However, the trial court found otherwise and allowed for the defendants' release pending retrial. *Id.*

111. *Id.* at 1068. *Per Curiam* is a Latin phrase meaning "by the court." BLACK'S LAW DICTIONARY 1136 (Deluxe 6th ed. 1990). Different from an opinion written by one particular judge, a *per curiam* opinion is one that is written by the entire court. *Id.*

112. *Martorano*, 634 A.2d at 1068. The court not only determined the lack of a double jeopardy violation but also denied the existence of equal protection and due process violations. *Id.* at 1071.

113. *Id.* at 1068-70. The court chronologically presented the law as developed in these prior decisions. It stated that *Ball* first answered the question as to the propriety of retrying a defendant by holding that a general acquittal bars a defendant's retrial. *Id.* The Court affirmed this principle in. *Pearce,* then pronounced an exception in in *Bullington* and *Rumsey. Id.* Lastly, the Court returned to the "clean slate" provision of *Pearce* in *Poland v. Arizona. Id. See supra* notes 43-53, 63-82, 88-89, 93-104 and accompanying text.

sentence in a sentencing hearing was considered an "acquittal on the merits" which precluded a harsher sentence on retrial.[114] Moreover, the defendants advocated the irrelevance of "whether the life sentence is the result of a unanimous jury verdict or imposed by operation of law following a jury deadlock."[115] Both cases, they argued, were "acquittals on the merits."[116] The supreme court distinguished *Martorano* from *Bullington*; in *Martorano*, the jury did not make the final determination of the life sentence.[117] Rather, the judge dismissed the jury as hung and imposed a mandatory life sentence, relieving any decision on the merits.[118] The court found that "the state had failed to prove its case;" consequently, the trial judge's statutory duty to impose the life sentence did not function as an "acquittal".[119] The court concluded that the imposition of the death sentence upon retrial posed no violation of the defendants' constitutional double jeopardy rights.[120]

Relying heavily on the decision in *Martorano*, the Pennsylvania Supreme Court in *Sattazahn* addressed identical arguments from the defendant and concluded with identical results.[121] The decisions in both cases rested on this long history of United States Supreme Court decisions. While the Pennsylvania Double Jeopardy Clause does mirror its federal counterpart, the Pennsylvania cases can be distinguished from their federal predecessors.

The Right to Appeal Clause in the Pennsylvania Constitution has no federal counterpart.[122] The prospect of the death penalty upon

---

114. *Martorano*, 634 A.2d at 1070.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* In *Bullington*, the defendant was sentenced in a trial-like sentencing hearing with the final determination made by a jury. *See Bullington*, 451 U.S. at 430.

119. *Martorano*, 634 A.2d at 1070. The court explained:

> What respondents fail to apprehend is the significance of the absence of decision in the instant case . . . . 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.

Id.

120. *Id.* In so holding, the court addressed the respondents' constitutional challenges that imposing the death penalty on retrial is violative of their equal protection and due process rights. *Id* at 1071. The majority relied on *Pearce* in declaring that no equal protection violation occurred, because the two totally separate issues "cannot be rationally dealt with in terms of 'classifications'." *Id.* The court also relied on *Pearce* to tackle its due process challenge, stating that a violation requires "vindictiveness" in imposing a harsher sentence. *Id.* at 1071-72.

121. *See supra* notes 23-30 and accompanying text.

122. *Sattazahn*, 763 A.2d at 368. Article V of the Pennsylvania Constitution provides

retrial does place a "chilling effect" on this right to appeal. The court in *Sattazahn* justified its rejection of this "chilling effect" theory by averring that the ability to impose a harsher sentence balances a defendant's "right to a fair trial" with "society's interest in imposing the appropriate punishment."[123] The court did not further elaborate except to reiterate that in *Martorano*, it relied on a United States Supreme Court case establishing that no "chilling effect" was created.[124] The court did not delve too far in an attempt to distinguish the Pennsylvania cases.

History shows that when the sentencing phase resembles a trial and the jury returns a sentence, there is a bar to a harsher sentence upon retrial.[125] In *Sattazahn*, there was a trial-like sentencing phase. However, the court distinguished *Sattazahn* on the basis that the judge was mandated by statute to issue a life sentence, which was not the equivalent to an "acquittal." Seemingly contradicting itself, the court also commented that "if the jury's failure to reach a unanimous agreement as to [a] sentence could function as a verdict, subsection (v) [of the sentencing statute] would be superfluous."[126] In essence, a judge's imposition of the life sentence functions as the voice of the jury when the jury cannot unanimously agree. It is only sensible that a judge's issuance would equal an acquittal; otherwise, subsection (v) would be unnecessary.

When a trial judge issues a mandatory life sentence in a trial-like sentencing hearing, a constitutionally protected right should exist against the prospect of death upon retrial. To reconcile otherwise would certainly place a "chilling effect" upon the state-granted right to appeal. The court's mission of granting a "fair trial" as well as "society's interest in the appropriate punishment" are both better served by protecting defendants' rights against a harsher penalty. The court would grant the defendant a fair trial with a sentencing hearing in which both the defendant and the jury are made aware of the possibility of a judge-issued life sentence. As for society's

---

the Right of Appeal to "the accused in all cases of felonious homicide." PA. CONST. amend. V, § 1. *See also* notes 22, 32, 42, *supra*.

123. *Sattazahn*, 763 A.2d. at 368.

124. *Id.*

125. *See Bullington*, 451 U.S. at 430; *Rumsey*, 467 U.S. at 203. *See supra* notes 79-80, 88 and 89 and accompanying text. *See also supra* notes 81-82 and accompanying text.

126. *Sattazahn*, 763 A.2d at 367-68. Subsection (v) of the sentencing statute 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." 42 PA. CONS. STAT. § 9711(c)(1)(v)(1998 & Supp. 2000). *See supra* notes 6 and 29.

interest, there is no doubt that the judge-granted life sentence is an "appropriate" punishment, as it is *mandated by statute.*

Perhaps, then, the root of the discrepancy in Pennsylvania is the existence of subsection (v) of the sentencing statute, which mandates a life sentence in case of a hung jury. Without it, the *harsher* sentence issue would be virtually eliminated, as would the issue as to whether there had been an "acquittal." As long as the statute exists, the problem confronted in *Sattazahn* will remain. The federal approach is sound, but until the Pennsylvania Courts are willing to distinguish the subtle differences of Pennsylvania cases from that of their federal ancestors, the Double Jeopardy Clause of the Pennsylvania Constitution imposes no bar to the death penalty upon retrial after the trial judge has granted a life sentence on behalf of a hung jury.

Jennifer L. Czernecki