Duquesne Law Review

Volume 42 | Number 1 Article 8

2003

A State May, Consistent with the Double Jeopardy Clause of the Fifth Amendment Seek the Death Penalty on Retrial following a Jury Deadlock at the First Capital-Sentencing Proceeding and Resulting Default Sentence of Life Imprisonment: *Sattazahn v. Pennsylvania*

James R. Franks

A State May, Consistent With the Double Jeopardy Clause of the Fifth Amendment, Seek the Death Penalty on Retrial Following a Jury Deadlock at the First Capital-Sentencing Proceeding and Resulting Default Sentence of Life Imprisonment: *Sattazahn v. Pennsylvania*

CONSTITUTIONAL LAW – FIFTH AMENDMENT – DOUBLE JEOPARDY – FOURTEENTH AMENDMENT – The United States Supreme Court held that the Double Jeopardy Clause of the Fifth Amendment did not prevent Pennsylvania from seeking the death penalty on retrial because neither the jury deadlock in the capital-sentencing phase proceeding, nor the resulting entry of a default sentence of life imprisonment, constituted an acquittal on the merits.

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

On Sunday evening, April 12, 1987, David Allen Sattazahn ("Sattazahn") and Jeffrey Hammer ("Hammer") hid and waited in a wooded area in order to rob Boyer, the manager of the Heidelberg Family Restaurant.[1] For several weeks, Sattazahn and Hammer had watched Boyer and determined that Sunday would be the busiest day of the week at the restaurant.[2] After the restaurant closed for the night, Sattazahn and Hammer confronted Boyer in the parking lot.[3] Boyer was carrying a bank deposit bag containing the day's receipts as he walked through the parking lot, and Sattazahn and Hammer tried to take the bag from Boyer with their guns drawn.[4] In response to the attempted robbery by Sattazahn and Hammer, Boyer first threw the bank deposit bag in the direction of the restaurant, and then he threw the bag in the direction of the roof of the restaurant.[5] Sattazahn told Boyer to get the bank deposit bag, but Boyer refused and attempted to run.[6]

1. Commonwealth v. Sattazahn, 763 A.2d 359, 362 (Pa. 2000).
2. *Commonwealth v. Sattazahn*, 763 A.2d at 362.
3. *Id.*
4. *Id.* Sattazahn was carrying a .22 caliber Ruger semiautomatic pistol, and Hammer was carrying a .41 caliber revolver. *Id.*
5. *Id.*
6. *Id.*

While running away, Boyer was shot by Sattazahn and Hammer and fell to the ground.[7] Grabbing the bank deposit bag, Sattazahn and Hammer took flight.[8]

Seeking the death penalty, the Commonwealth of Pennsylvania prosecuted Sattazahn and Hammer.[9] At his trial on May 10, 1991, a jury convicted Sattazahn of first-, second- and third-degree murder, in addition to convictions for other charges.[10] In light of the murder convictions, the penalty phase followed, in accordance with Pennsylvania law.[11] The Commonwealth presented evidence of one aggravating circumstance: the commission of the murder while in the perpetration of a felony.[12] As mitigating circumstances, Sattazahn presented his lack of a significant history of prior criminal convictions and his age at the time of the crime.[13] Both sides presented their evidence, and after deliberating for three and one-half hours, the jury returned a note, signed by the jury foreman, stating that they were "hopelessly deadlocked at nine (9) to three (3) for life imprisonment."[14] Sattazahn made a motion that the jury be discharged and the court enter a sentence

---

7. *Commonwealth v. Sattazahn*, 763 A.2d at 362.

8. *Id.*

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

10. *Sattazahn*, 537 U.S. at 103. At trial, Sattazahn was also found guilty of two counts of aggravated assault, possession of an instrument of crime, carrying a firearm without a license, and criminal conspiracy. *Commonwealth v. Sattazahn*, 763 A.2d at 362. During the course of a police investigation in 1989, Hammer made an incriminating statement as to he and Sattazahn being accomplices in the robbery in which Boyer was killed. *Commonwealth v. Sattazahn*, 631 A.2d 597, 601 (Pa. Super. Ct. 1993). In return for his testimony against Sattazahn, the court granted Hammer a plea bargain for third-degree murder. *Commonwealth v. Sattazahn*, 763 A.2d at 364. At the time of the plea bargain, the Commonwealth was seeking the death penalty against Hammer. *Id.* In light of Hammer's criminal past, he was also facing potential jail time of 240 years, but as a result of his guilty plea and testimony against Sattazahn, Hammer was looking at possible parole for all of his crimes in nineteen (19) years. *Id.*

11. *Sattazahn*, 537 U.S. at 103. "After a verdict of murder of the first degree is recorded and before the jury is discharged, the court shall conduct a separate sentencing hearing in which the jury shall determine whether the defendant shall be sentenced to death or life imprisonment." 42 PA. CONS. STAT. ANN. § 9711(a)(1) (West 2000).

12. *Sattazahn*, 537 U.S. at 103. "Aggravating circumstances must be proved by the Commonwealth beyond a reasonable doubt," while "mitigating circumstances must be proved by the defendant by a preponderance of the evidence." 42 PA. CONS. STAT. ANN. §9711(c)(iii) (West 2000). "Aggravating circumstances shall be limited to the following: ... (6) The defendant committed a killing while in the perpetration of a felony." 42 PA. CONS. STAT. ANN. § 9711(d)(6) (West 2000).

13. *Sattazahn*, 537 U.S. at 104. "Mitigating circumstances shall include the following: (1) The defendant has no significant history of prior criminal convictions . . . (4) The age of the defendant at the time of the crime." 42 PA. CONS. STAT. ANN. § 9711(e)(1), (4) (West 2000).

14. *Sattazahn*, 537 U.S. at 104.

of life imprisonment.[15] The judge discharged the jury and entered a life sentence as required by Pennsylvania law.[16]

The Pennsylvania Superior Court determined, on Sattazahn's appeal, that the trial judge had erred in instructing the jury as to various offenses that Sattazahn had been charged with, including first-degree murder.[17] Sattazahn's first-degree murder conviction was reversed and remanded for a new trial by the Pennsylvania Superior Court.[18] Pennsylvania filed a notice of intent to seek the death penalty, which included both the aggravating circumstance advocated in the first sentencing hearing, and a second, additional aggravating circumstance.[19] The second aggravating circumstance was Sattazahn's "significant history of felony convictions involving the use or threat of violence to the person."[20] These felony convictions were based on guilty pleas entered by Sattazahn, after the first trial, to "a murder, multiple burglaries, and a robbery."[21]

In preparation for the retrial, Sattazahn entered a motion to prevent Pennsylvania from seeking the death penalty and adding the second aggravating circumstance.[22] The trial court denied Sattazahn's motion, the Superior Court of Pennsylvania affirmed the trial court's denial,[23] the Pennsylvania Supreme Court denied *allocatur*,[24] and the second trial ensued.[25]

---

15. *Id.* Sattazahn made his motion under 42 PA. CONS. STAT. ANN. § 9711(c)(1)(v). *Id.* Subparagraphs (iv) and (v) of §9711(c) read as follows:

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

42 PA. CONS. STAT. ANN. § 9711(c)(1)(iv), (v) (West 2000).

16. *Sattazahn*, 537 U.S. at 104-05.

17. *Id.* at 105.

18. *Id.* (citing Commonwealth v. Sattazahn, 631 A.2d 597 (Pa. Super. Ct. 1993)).

19. *Sattazahn*, 537 U.S. at 105.

20. *Id.* "Aggravating circumstances shall be limited to the following: . . . (9) The defendant has a significant history of felony convictions involving the use or threat of violence to the person." 42 PA. CONS. STAT. ANN. § 9711(d)(9) (West 2000).

21. *Sattazahn*, 537 U.S. at 105.

22. *Id. See also Commonwealth v. Sattazahn*, 763 A.2d at 362.

23. Commonwealth v. Sattazahn, 679 A.2d 257 (Pa. Super. Ct. 1996).

24. Commonwealth v. Sattazahn, 690 A.2d 1162 (Pa. 1997). The term *allocatur* (in Latin meaning "it is allowed") is used in Pennsylvania to denote permission to appeal. BLACK'S LAW DICTIONARY 75 (7th ed. 1999).

25. *Sattazahn*, 537 U.S. at 105.

Sattazahn was again convicted of first-degree murder; however, the jury "this time imposed a sentence of death."[26] In accordance with Pennsylvania law, Sattazahn's sentence of death was directly appealed to the Pennsylvania Supreme Court, which upheld the first-degree murder conviction and the death sentence.[27] The Pennsylvania Supreme Court concluded that Pennsylvania was not barred from seeking the death penalty at Sattazahn's retrial by either the Double Jeopardy Clause or the Due Process Clause of the United States Constitution.[28] The United States Supreme Court granted *certiorari*.[29] The United States Supreme Court affirmed the judgment of the Supreme Court of Pennsylvania and upheld Sattazahn's first-degree murder conviction and the sentence of death he received in the second trial.[30]

The Court granted *certiorari* to determine whether the Double Jeopardy Clause of the Fifth Amendment barred Pennsylvania from seeking the death penalty against Sattazahn on retrial.[31] In addition, the Court considered whether the subsequent death sentence deprived Sattazahn of his life and liberty interests under the Fourteenth Amendment, and consequently amounted to a violation of his due process rights.[32] The Court held that neither the Double Jeopardy Clause of the Fifth Amendment, nor the Four-

---

26. *Id.*

27. *Id. See also Commonwealth v. Sattazahn*, 763 A.2d at 369. In Pennsylvania, a sentence of death is automatically and directly appealed to the Pennsylvania Supreme Court, in accordance with 42 PA. CONS. STAT. ANN. § 9711(h)(1-4), which reads as follows:

> (1) A sentence of death shall be subject to automatic review by the Supreme Court of Pennsylvania pursuant to its rules. (2) In addition to its authority to correct errors at trial, the Supreme Court shall either affirm the sentence of death or vacate the sentence of death and remand for further proceedings as provided in paragraph (4). (3) The Supreme Court shall affirm the sentence of death unless it determines that: (i) the sentence of death was the product of passion, prejudice or any other arbitrary factor; or (ii) the evidence fails to support the finding of at least one aggravating circumstance specified in subsection (d). (4) If the Supreme Court determines that the death penalty must be vacated because none of the aggravating circumstances are supported by sufficient evidence, then it shall remand for the imposition of a life imprisonment sentence. If the Supreme Court determines that the death penalty must be vacated for any other reason, it shall remand for a new sentencing hearing pursuant to subsections (a) through (g).

42 PA. CONS. STAT. ANN. § 9711(h)(1-4) (West 2000).

28. *Sattazahn*, 537 U.S. at 105.

29. *Id. See also* Sattazahn v. Pennsylvania, 535 U.S. 926 (2002). "An extraordinary writ issued by an appellate court, at its discretion, directing a lower court to deliver the record in a case for review. The United States Supreme Court uses *certiorari* to review most of the cases that it decides to hear." BLACK'S LAW DICTIONARY 220 (7th ed. 1999).

30. *Sattazahn*, 537 U.S. at 116.

31. *Id.* at 106.

32. *Id.* at 115.

teenth Amendment's Due Process Clause, barred Pennsylvania from seeking the death penalty against Sattazahn on retrial.[33]

Under the line of cases extending from *Bullington v. Missouri*,[34] the majority found that the "touchstone for double jeopardy protection in capital-sentencing proceedings is whether there has been an acquittal."[35] The Court determined that a deadlocked sentencing phase jury, which has made no findings as to the alleged aggravating circumstance, does not fairly represent an acquittal.[36] It was further determined by the Court that the default entry of a life sentence by a judge, lacking discretion to fashion a sentence following a deadlocked sentencing phase jury, does not amount to an acquittal.[37]

Extending the reach of *Apprendi v. New Jersey*,[38] three members of the majority found that first degree murder is a lesser included offense of the greater offense of first-degree murder plus at least one aggravating circumstance.[39] The Court found that neither the judge nor the jury acquitted Sattazahn of the greater offense of first-degree murder plus aggravating circumstance(s).[40] As such, Justice Scalia concluded that Sattazahn's appeal and successful invalidation of his conviction of the lesser offense did not represent a double-jeopardy bar to Pennsylvania retrying him on both the lesser and greater offenses.[41]

---

33. *Id.* at 116.

34. 451 U.S. 430 (1981).

35. *Sattazahn*, 537 U.S. at 109.

36. *Id.*

37. *Id.* at 110. "A default judgment does not trigger a double jeopardy bar to the death penalty upon retrial." *Id.* at 738-39. (citing *Commonwealth v. Sattazahn*, 763 A.2d at 367, which quotes Commonwealth v. Martorano, 634 A.2d 1063, 1070 (Pa. 1993)).

> Instructions to jury. (1) Before the jury retires to consider the sentencing verdict, the court shall instruct the jury on the following matters: . . . (v) the court may, in its discretion, discharge the jury if it is of the opinion that further deliberation will not result in a unanimous agreement as to the sentence, in which case the court shall sentence the defendant to life imprisonment.

42 PA. CONS. STAT. ANN. § 9711(c)(1)(v) (West 2000).

38. 530 U.S. 466 (2000).

39. *Sattazahn*, 537 U.S. at 111-12. In part III of his opinion, Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, declared that the central issue in analyzing a capital-sentencing proceeding for violation of Double Jeopardy focuses on the separate offense analysis set forth in *Apprendi*, rather than an examination of whether the capital-sentencing phase proceeding had the "hallmarks" of a trial, which was the basis for the Court's holding in *Bullington*. *See id.* at 107, 111-12.

40. *Id.* at 113.

41. *Id.* (citing, for comparison: Green v. United States, 355 U.S. 184, 189 (1957) (citing United States v. Ball, 163 U.S. 662 (1896)); and Selvester v. United States, 17 U.S. 262, 269 (1898)).

Sattazahn also argued that the subsequent death sentence in the retrial deprived him of his life and liberty interests under the Fourteenth Amendment, and therefore, the second sentencing proceeding amounted to a violation of his due process rights.[42] The Court did not find Sattazahn's argument to be persuasive, holding that there was nothing in Pennsylvania law that would indicate that the life sentence in the first trial somehow afforded him any immutable life and liberty interests.[43] The Court also rejected the argument that the Pennsylvania Legislature created an "entitlement" to the life sentence by requiring the court to enter a life sentence following a hung jury at the capital-sentencing phase, holding that the Pennsylvania Supreme Court had already concluded that the statute embodied no such legislative intent.[44] Regardless, the court determined that if Sattazahn had been deprived of such an interest, it was "only by operation of the process that he himself had invoked to invalidate the underlying first-degree murder conviction on which it was based."[45] Sattazahn's due process claim was deemed by the Court to be "nothing more than his double-jeopardy claim in different clothing."[46]

Justice O'Connor concurred in part and concurred in the judgment of the majority.[47] Justice O'Connor did not agree with the Court's extension of the reach of *Apprendi* with regard to first degree murder being a lesser included offense of the greater offense of first-degree murder plus at least one aggravating circumstance.[48] According to Justice O'Connor's opinion, it was enough to resolve Sattazahn's double jeopardy claim solely under *Bulling-*

---

42. *Sattazahn*, 537 U.S. at 115.

43. *Id.* at 115-16.

44. *Id.* at 110.

45. *Id.* at 116.

46. *Id.* Justice Scalia stated:

> The Bill of Rights speaks in explicit terms to many aspects of criminal procedure, and the expansion of those constitutional guarantees under the open-ended rubric of the Due Process Clause invites undue interference with both considered legislative judgments and the careful balance that the Constitution strikes between liberty and order.

Id. (citing Medina v. California, 505 U.S. 437, 443 (1992)).

47. *Sattazahn*, 537 U.S. at 116 (O'Connor, J., concurring in part, dissenting in part). Justice O'Connor joined in Parts I, II, IV, and V, but did not join in Part III of the Court's opinion. *Id.*

48. *Id.* at 116-17 (O'Connor, J., concurring in part, dissenting in part). Justice O'Connor stated: "It remains my view that *Apprendi's* rule that any fact that increases the maximum penalty must be treated as an element of the crime is not required by the Constitution, by history, or by our prior cases." *Id.* at 117 (O'Connor, J., concurring in part, dissenting in part) (citing *Apprendi*, 530 U.S. at 619).

ton[49] and its progeny.[50] Justice O'Connor determined that the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution was not violated by "a retrial to determine whether death was the appropriate punishment for his [Sattazahn's] offenses" because he was "neither acquitted nor convicted of the death penalty in the first trial."[51]

Justice Ginsburg authored a dissenting opinion which was joined by Justices Stevens, Souter and Breyer.[52] Justice Ginsburg would have held that "the Double Jeopardy Clause barred Pennsylvania from seeking the death penalty in the retrial" in light of the trial court entering a final judgment of life imprisonment for Sattazahn in the first trial.[53] Relying on *United States v. Scott*[54] as to the termination of a trial, Justice Ginsburg determined that "[a]fter the jury deadlocked at the sentencing stage, no mistrial was declared" because Pennsylvania law provided for termination of the proceedings "then and there in Sattazahn's favor" with the rendering of a life sentence.[55] Pennsylvania could not then "re-try the sentencing issue at will," and completion of the initial proceeding was not rendered impossible by the hung jury, as the judge was required by Pennsylvania law to conclude the proceeding by entering a final judgement of life imprisonment.[56] The dissent also considered that: (a) the Court's present holding would place a defendant in the perilous position of risking a subsequent sentence of death if the defendant were to appeal his original first-degree murder conviction and sentence of life imprisonment; and (b) the death penalty, being "unique in both its severity and its finality,"[57] serves to increase a defendant's "double jeopardy interest" with regard to precluding a subsequent prosecution.[58]

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides United States citizens the right to be free from being twice put in jeopardy for the same of-

---

49. *Bullington*, 451 U.S. 430. *See supra* note 34.
50. *Sattazahn*, 537 U.S. at 117 (O'Connor, J., concurring in part, dissenting in part).
51. *Id.* at 118 (O'Connor, J., concurring in part, dissenting in part).
52. *Id.* (Ginsburg, J., dissenting).
53. *Id.* at 119 (Ginsburg, J., dissenting).
54. 437 U.S. 82 (1978).
55. *Sattazahn*, 537 U.S. at 122 (Ginsburg, J., dissenting).
56. *Id.* (Ginsburg, J., dissenting) (citing 42 PA. CONS. STAT. ANN. § 9711(c)(1)(v)). *See supra* note 15.
57. *Sattazahn*, 537 U.S. at 127 (citing Monge v. California, 524 U.S. 721, 732 (1998)).
58. *Sattazahn*, 537 U.S. at 126-27.

fense.[59] In 1896, the United States Supreme Court decided *United States v. Ball*,[60] which addressed the issue of whether a double jeopardy bar is raised by retrying a defendant on the same or another indictment for the same offense, when a previous judgment against the defendant for the same offense was set aside.[61] In the first trial, two of the three defendants were convicted of murder and sentenced to death, while the other defendant was acquitted of the murder charge and discharged.[62] The convicted defendants appealed their murder convictions, claiming that the indictment was flawed.[63] Holding that the indictment was fatally defective, the Court reversed the judgments against the two convicted defendants and remanded the case for further proceedings.[64] On remand, a grand jury returned an indictment of murder against all three defendants.[65] The previously acquitted defendant filed a plea of "former jeopardy and former acquittal."[66] The previously convicted defendants filed a plea of former jeopardy by reason of their former trial and conviction, and by reason of the dismissal of the original indictment.[67]

As to the previously acquitted defendant ("M. F. Ball"), the majority held that upon completion of the first trial, he was discharged due to his jury acquittal, and not because of a flaw or failing in the original indictment.[68] The Court further held that the reversal against the other convicted defendants, due to a flawed indictment, could not undermine the legitimate effect of the ac-

59. U.S. CONST. amend. V. The Fifth Amendment's grant of protection reads as follows:

> 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 for 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).

60. 163 U.S. 662 (1896).

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

62. *Id.* at 670. In the first trial, John C. Ball and Robert E. Boutwell were convicted and sentenced to death for the murder of William T. Box ("Box") in the Chickasaw Nation, in Indian Territory. *Id.* at 663-64. The other defendant, Millard Fillmore Ball, was found not guilty of the murder of Box. *Id.*

63. *Id.* at 664.

64. *Id.* at 664-65. The original indictment was held to be fatally flawed for not alleging where or when the victim died. *Id.* at 664.

65. *Id.* at 665.

66. *Ball,* 163 U.S. at 665.

67. *Id.*

68. *Id.* at 670.

quittal that the jury had awarded M. F. Ball.[69] The Court held that the verdict of acquittal was final, and the Constitutional prohibition against a defendant being placed twice in jeopardy precluded review of such acquittal for any reason, including error.[70] M. F. Ball's conviction in the second trial was accordingly reversed, and judgment was rendered for him upon his plea of former acquittal.[71]

Regarding the previously convicted defendants in *Ball*, the majority held that the reversal of their previous conviction did not raise a double jeopardy bar relative to a new trial on the same offense.[72] The subsequent murder convictions and sentences of death for the two previously convicted defendants were affirmed by the Court.[73]

In 1919, the United States Supreme Court in *Stroud v. United States*[74] addressed the issue of whether a defendant, initially convicted of murder and given a life sentence, could be given the death penalty upon retrial for the same offense and conviction of murder.[75] The Court held that the Double Jeopardy Clause of the Constitution does not bar a subsequent murder conviction and sentence of death at retrial when a reversal of a murder conviction and sentence of life imprisonment in a previous trial were obtained by means of writs of error sued out by the defendant himself.[76]

In the first of three murder trials, Stroud was convicted of murdering a guard in the United States prison at Leavenworth, Kansas, and sentenced to death by hanging.[77] Upon confession of error by the U.S. District Attorney, Stroud's first murder conviction was reversed and a second trial was held.[78] In the second trial, Stroud was again convicted of murder, but this time, he was given a sentence of life imprisonment.[79] "Upon writ of error to [the Court] the Solicitor General of the United States confessed error," and the

69. *Id.*
70. *Id.* at 671.
71. *Ball*, 163 U.S. at 671.
72. *Id.* at 671-72. The Court stated that "a defendant who procures a judgment against him upon an indictment to be set aside may be tried upon the same indictment, or upon another indictment, for the same offense of which he had been previously convicted." *Id.*
73. *Id.* at 674.
74. 251 U.S. 15 (1919).
75. *Stroud*, 251 U.S. at 16-17.
76. *Id.* at 18.
77. *Id.* at 16-17.
78. *Id.*
79. *Id.*

second murder conviction was accordingly reversed.[80] At the completion of the third trial, Stroud was convicted of murder and sentenced to death.[81]

The Court also held that while a jury may mitigate the punishment for a murder conviction to life imprisonment by means of adding the words "without capital punishment" to the verdict (as the jury did in Stroud's second trial), such mitigation does not reduce the conviction to anything less than first degree murder.[82] In Stroud's third trial, the judge particularly called the jury's attention to the statutory provision allowing them the option of adding the words "without capital punishment" to the verdict.[83] As such, a life sentence imposed in connection with a prior murder conviction did not raise a double jeopardy bar relative to the imposition of a death sentence upon retrial for the same offense.[84]

Fifty years after *Stroud*, the Court in *North Carolina v. Pearce*[85] considered the extent to which the Double Jeopardy Clause precludes a harsher sentence after a subsequent conviction in a retrial, when the earlier conviction was set aside as the result of some process invoked by the defendant himself.[86] Justice Stewart, relying on *Ball*, *Stroud* and their progeny, held that when, at the defendant's behest, an original conviction has been set aside and wholly nullified (in effect wiping the slate clean), the Double Jeopardy Clause does not restrict the general power of a judge to impose a longer prison sentence in the subsequent conviction than originally received by defendant.[87]

In *Pearce*, the Court considered the appeals of two defendants whose original convictions were each reversed upon post-conviction proceedings, and followed by retrials in which each de-

---

80. *Stroud*, 251 U.S. at 16-17. A writ of error is "[a] writ issued by an appellate court directing a lower court to deliver the record in the case for review." BLACK'S LAW DICTIONARY 1604 (7th ed. 1999). Confessing error is defined as "[a] plea admitting to an assignment of error." BLACK'S LAW DICTIONARY 293 (7th ed. 1999). An assignment of error is defined as "[a] specification of the trial court's alleged errors on which the appellant relies in seeking an appellate court's reversal, vacation, or modification of an adverse judgment." BLACK'S LAW DICTIONARY 116 (7th ed. 1999).

81. *Stroud*, 251 U.S. at 16-17.

82. *Id.* Adding the words "without capital punishment" to a murder conviction results in the convicted person being sentenced to imprisonment for life. *Id.* at 18. In the absence of the words "without capital punishment . . . the court can do no less than inflict the death penalty." *Id.*

83. *Id.* at 18.

84. *Sattazahn*, 537 U.S. at 106 (citing *Stroud*, 251 U.S. at 15).

85. 395 U.S. 711 (1969).

86. *Pearce*, 395 U.S. at 713.

87. *Id.* at 719-21.

fendant was again convicted but received a longer sentence.[88] Pearce was twice convicted of assault with intent to commit rape and sentenced to twelve to fifteen years in his first trial; he received what amounted to an extension of his prison term in the second trial.[89] Rice, the other appellant, pleaded guilty to four separate second-degree burglary charges in his first trial and was sentenced to prison terms amounting to a total of ten years.[90] Upon retrial, Rice was convicted of three of the charges and received prison terms aggregating twenty-five years.[91]

The Court in *Pearce* held that the power of the state to retry a defendant who's first conviction was set aside is in no way limited by the Double Jeopardy Clause of the Constitution.[92] Justice Stewart further opined that a defendant whose conviction is set aside due to a procedural error may be retried and convicted by the state, and that such a retrial and conviction derives from "a well-established part of our constitutional jurisprudence."[93] Finally, the Court determined that, in addition to the state's power to retry a defendant, the state also has a corresponding power to impose any legally authorized subsequent sentence regardless of whether the subsequent sentence is greater than the previous sentence, provided that a subsequent conviction is obtained.[94] The Court in *Pearce* reasoned that to hold otherwise would cast doubt upon the principle enunciated in *Ball* and its progeny.[95]

In 1989, the Supreme Court refused to extend the rationale of *Pearce* to what the Court deemed to be the very different facts of *Bullington v. Missouri*.[96] In *Bullington*, the defendant was convicted of capital murder, and after a separate presentencing hearing, was sentenced by the jury to life imprisonment, to be served for a minimum of 50 years prior to being eligible for probation or

88. *Id.* at 712-15.

89. *Id.* at 713. Pearce was tried and retried in North Carolina, and appealed his second conviction and sentence up through the United States District Court for the Eastern District of North Carolina and the United States Court of Appeals for the Fourth Circuit, from which the Supreme Court granted *certiorari*. *Id.* at 713-14.

90. *Id.* at 714.

91. *Pearce*, 395 U.S. at 714. Rice's trial and retrial were held in Alabama. *Id.* at 714-15. Rice appealed his second conviction and sentence up through the United States District Court for the Middle District of Alabama and the United States Court of Appeals for the Fifth Circuit, from which the Supreme Court granted *certiorari*. *Id.* at 715.

92. *Id.* at 719-20.

93. *Id.* at 720 (citing United States v. Tateo, 377 U.S. 463, 465 (1964)).

94. *Id.*

95. *Id.* at 721.

96. 451 U.S. 430, 445 (1981).

parole.[97] Upon his post-trial motion, the defendant was granted a new trial, and the prosecution provided notice that it again would seek the death penalty on the same aggravating circumstances it had sought to prove at the first trial.[98] Bullington filed a motion (based on double jeopardy grounds) to prevent the prosecution from again seeking the death penalty on the same aggravating circumstances.[99] The Supreme Court granted *certiorari* to determine whether the prosecution's pursuit of the death penalty in the retrial represented a violation of Bullington's rights under the Double Jeopardy Clause of the Constitution.[100]

In previous cases such as *Ball*, *Stroud* and *Pearce*, the Court had resisted attempts to extend to sentencing the principle that an acquittal raises a double jeopardy bar to the imposition of a more severe sentence upon retrial.[101] Justice Blackmun, who delivered the opinion of the Court, distinguished *Bullington* from these prior cases, noting that a jury has limited discretion with regard to selecting an appropriate punishment from a wide range of statutory options.[102] In Bullington's trial, the sentencing procedures had the hallmarks of a trial on guilt or innocence, in that the prosecution was required to prove additional facts, such as one or more aggravating circumstances, beyond a reasonable doubt.[103]

Given that an acquittal on the issue of guilt or innocence is final, the Court further reasoned that such a principle correspondingly applies to a jury's rejection of the state's argument for the death penalty.[104] In light of such considerations, the majority held that when the sentencing proceeding has the hallmarks of a trial with regard to the question of guilt or innocence, the protection afforded by the Double Jeopardy Clause to a defen-

97. *Bullington*, 451 U.S. at 430.
98. *Id.*
99. *Id.*
100. *Id.* at 437.
101. *Id.* at 437-38.
102. *Bullington*, 451 U.S. at 438.
103. *Id.* at 439.
104. *Id.* at 445. The Court stated:

> 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. (quoting Green v. United States, 355 U.S. 184, 187-88 (1957)).

dant who is acquitted by a jury is also available to such defendant with respect to the imposition of the death penalty upon retrial.[105]

Deeming the majority's opinion in *Bullington* to be irreconcilable with the precedents of the Court, Justice Powell dissented.[106] Relying on *Stroud* and *Pearce*, Justice Powell argued that while the Double Jeopardy Clause applies to subsequent determinations of guilt or innocence, it does not similarly apply to sentencing decisions after a retrial.[107] Justice Powell found the majority's justification for applying an implicit-acquittal principle to sentencing wholly unpersuasive.[108] In contrast to determinations as to guilt or innocence, Justice Powell argued that the law provides only limited standards for assessing the validity of a sentencing decision.[109] In further support of his position, Justice Powell argued that under the Double Jeopardy Clause the possibility of a higher sentence is acceptable (whereas the possibility of error as to guilt or innocence is not) because the sentencing decision of the second jury is as correct as that of the first jury.[110]

In 1984, the Court extended the rule of *Bullington* to *Arizona v. Rumsey*,[111] a similar case in which a trial judge (rather than a jury) sat as the sentencer in the sentencing proceeding of a defendant convicted of first-degree murder.[112] Denis Wayne Rumsey ("Rumsey") was convicted of first degree murder and armed robbery by an Arizona jury.[113] The trial judge, in accordance with Arizona statutory sentencing requirements, imposed sentence without the assistance of a jury.[114] The trial judge determined that there were no aggravating or mitigating circumstances, and entered a statutorily mandated sentence of life imprisonment, without possibility of parole for twenty-five years.[115] Rumsey appealed the imposition of consecutive sentences for his robbery and

105. *Bullington*, 451 U.S. at 446.

106. *Id.* at 447. Justice Powell was joined in the dissent by Chief Justice Burger, Justice White and Justice Rehnquist. *Id.*

107. *Id.* at 447.

108. *Id.* at 451.

109. *Id.* at 450.

110. *Bullington*, 451 U.S. at 451.

111. 467 U.S. 203 (1984).

112. *Rumsey*, 467 U.S. at 211. In *Bullington*, *see supra* note 95, the jury sat as the sentencer in the sentencing proceeding relative to Bullington's first-degree murder conviction. *Id.* at 209.

113. *Id.* at 205.

114. *Id.* at 205-06.

115. *Id.* Rumsey was also sentenced to a 21-year prison term for armed robbery. *Id.* at 206 The prison terms for each of the murder and armed robbery convictions were to run consecutively. *Id.*

murder convictions, which allowed the state of Arizona to cross-appeal the life sentence.[116] The Arizona Supreme Court rejected Rumsey's arguments as to his consecutive sentences, but remanded the case for resentencing of the murder conviction due to an error of interpretation by the trial court as to an aggravating circumstance.[117] On remand, the trial court imposed the death penalty at the completion of a new sentencing hearing, which Rumsey argued was in violation of the Double Jeopardy Clause and the rule in *Bullington*.[118] Rumsey's mandatory appeal to the Supreme Court of Arizona resulted in his sentence being reduced from death to life imprisonment without possibility of parole for twenty-five years.[119] The State of Arizona filed for a *writ of certiorari*, which the United States Supreme Court granted.[120] The United States Supreme Court affirmed the judgement of the Supreme Court of Arizona, and Rumsey's life sentence was maintained.[121]

In *Rumsey*, Justice O'Connor, who delivered the opinion of the Court, determined that the sentencer being the trial judge rather than the jury did not render the sentencing proceeding any less like a trial.[122] For purposes of comparison, Justice O'Connor identified three elements of the sentencing proceeding in *Bullington* that made it comparable to a trial for double jeopardy purposes: (i) the discretion of the sentencer (the jury in *Bullington*) is limited to only two options: death or life imprisonment without possibility of parole for fifty years; (ii) the sentencer makes its decision guided by substantive standards and based on evidence introduced in a separate proceeding that formally resembles a trial; and (iii) the prosecution has to prove, beyond a reasonable doubt, certain statutorily defined facts to support a sentence of death.[123] Aside from the sentencer being the trial judge, three substantially equivalent elements were deemed by the Court to be present in the capital sentencing proceeding employed by the state of Arizona in *Rumsey*.[124] The fact that the sentencer was a trial judge, rather than a jury, was held to be of no consequence by the Court because

116. *Id.* at 206-07.
117. *Rumsey*, 467 U.S. at 207.
118. *Id.* at 207-08.
119. *Id.* at 208-09.
120. *Id.* at 209.
121. *Id.* at 213.
122. *Rumsey*, 467 U.S. at 210.
123. *Id.* at 209.
124. *Id.* at 209-10.

double jeopardy jurisprudence treats bench and jury trials alike.[125] As such, the capital sentencing proceedings of Missouri (as seen in *Bullington*), and of Arizona (as seen in *Rumsey*), were held by the Court to be indistinguishable for double jeopardy purposes.[126] It was further held by the Court that an acquittal on the merits bars retrial, even if it is based on legal error.[127]

Two years later, in *Poland v. Arizona*,[128] the Court addressed the issue of whether the Double Jeopardy Clause barred a further capital sentencing proceeding when, upon appeal of a death sentence, the appellate court determines that the evidence was: (i) insufficient to support the only aggravating circumstance relied upon by the trial court; and (ii) sufficient to support a sentence of death.[129] In distinguishing *Poland* from *Bullington* and *Rumsey*, the Court determined that the "clean slate" rule of *Pearce* was applicable and ruled that the Double Jeopardy Clause did not foreclose a second sentencing hearing.[130]

In *Poland*, Patrick and Michael Poland (hereinafter "the Polands") had robbed a Purolator van and killed the two Purolator guards by dumping them in a lake in sacks weighted with rocks.[131] In the first trial, the jury convicted the Polands of first-degree murder, and the trial judge, sitting as sentencer in a separate proceeding, sentenced the Polands to death based on evidence provided in support of the aggravating circumstance of committing the offense in an especially heinous, cruel, or depraved manner.[132] In light of his statutory interpretation, the trial judge determined that the additional aggravating circumstance of committing the offense as consideration for the receipt of, or in the expectation of the receipt of pecuniary gain was not applicable.[133] On appeal of their death sentences, the Arizona Supreme Court determined that the evidence was insufficient to support a finding of the especially heinous, cruel, or depraved aggravating circumstance, but that the trial judge committed legal error by not relying on the aggravating circumstance of committing the offense for receipt of

125. *Id.* at 210 (citing United States v. Morrison, 429 U.S. 1, 3 (1976)).
126. *Rumsey*, 467 U.S. at 210.
127. *Id.* at 211.
128. 476 U.S. 147 (1986).
129. *Poland*, 476 U.S. at 148.
130. *Id.* at 152, 154, 156-57.
131. *Id.* at 148.
132. *Id.* at 149.
133. *Id.*

pecuniary gain.[134] The Arizona Supreme Court further held that if the defendants were again convicted of first-degree murder upon retrial, the trial court may find the existence of the pecuniary gain to be an aggravating circumstance.[135] On remand, the Polands were again convicted of first-degree murder and sentenced to death.[136] The trial judge, in delivering the subsequent sentence of death, found that both the pecuniary gain and the especially heinous, cruel, or depraved aggravating circumstances, as alleged by the prosecution, were applicable.[137]

On appeal of the second death sentence, the United States Supreme Court distinguished *Poland* from *Rumsey* in that, unlike the trial judge in *Poland*, the trial judge in *Rumsey* did not find any aggravating circumstances and entered a sentence of life imprisonment.[138] Relying on both *Bullington* and *Rumsey*, the Court determined that the relevant inquiry in *Poland* was whether the trial judge or the reviewing court, sitting as sentencer, had found that the prosecution did not prove its case for the death penalty, and in effect acquitted the Polands.[139] Justice White, who delivered the opinion of the Court, found that at no point did either the sentencer (trial judge) or the reviewing court hold that the prosecution had failed to prove its case as to whether the Polands deserved the death penalty.[140] In addition, Justice White stated that under *Bullington*, "the proper inquiry is whether the sentencer or reviewing court has 'decided that the prosecution has not proved

---

134. *Poland*, 476 U.S. at 149-50. The Arizona Supreme Court explained that the offense commissioned for receipt of pecuniary gain aggravating circumstance is not limited to situations involving contract killings. *Id.*

135. *Id.* at 150.

136. *Id.*

137. *Id.*

138. *Id.* at 153-54. As in *Poland*, the trial judge in *Rumsey* made the same error of interpretation as to the pecuniary gain aggravating circumstance. *Id.*

139. *Poland*, 476 U.S. at 154.

140. *Id.* Commenting more particularly on the lack of acquittal by either the sentencing judge or the reviewing court, Justice White in *Poland* stated:

> Plainly, the sentencing judge did not acquit, for he imposed the death penalty. While the Arizona Supreme Court held that the sentencing judge erred in relying on the "especially heinous, cruel, or depraved" aggravating circumstance, it did not hold that the prosecution had failed to prove its case for the death penalty. Indeed, the court clearly indicated that there had been no such failure by remarking that "the trial court mistook the law when it did not find that the defendants 'committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value,' " and that upon retrial, if the defendants are again convicted of first degree murder, the court may find the existence of this aggravating circumstance.

Id. at 154-55.

its case' *that the death penalty is appropriate*."[141] The Court was not prepared to extend *Bullington* further to include a capital sentencing hearing, such that it would be viewed as a set of mini-trials relative to the existence of each aggravating circumstance.[142] In conclusion, Justice White held that because there was no acquittal of the death penalty, the clean slate rule applied, and the Double Jeopardy Clause did not bar the second capital sentencing hearing.[143]

Justice Marshall, in his dissent, argued that there was no difference between *Poland* and *Rumsey*.[144] Justice White deemed the fact that the Polands did not receive life sentences inconsequential for purposes of distinguishing *Poland* from *Rumsey*.[145] The dissent pointed out that in *Rumsey*, an acquittal on the merits was deemed to have been reached when the life sentence was imposed based on the lack of a finding of any aggravating circumstances, despite the fact that the conclusion was based on an error of law.[146] Because the reversal of the death sentence in *Poland* was likewise predicated on an error of law, Justice Marshall argued that in light of *Rumsey*, such a reversal should also have the effect of an acquittal on the merits, and as such the Double Jeopardy Clause should bar the State of Arizona from again seeking the death penalty against the Polands.[147] Justice Marshall also found it impermissible to remand the case for further fact finding relative to the possibility of proving the existence of other aggravating circumstances.[148]

In 2000, the United States Supreme Court, in *Apprendi v. New Jersey*, addressed the question of what constitutes an element of an offense for purposes of the jury-trial guarantee under the Sixth

---

141. *Id.* at 155 (emphasis in original).

142. *Id.* at 156. Aggravating circumstances are not separate penalties or offenses, but are "standards to guide the making of [the] choice" between the alternative verdicts of death and life imprisonment. *Id.*

143. *Id.* at 157.

144. *Poland*, 476 U.S. at 157 (Marshall, J., dissenting). Justice Marshall was joined by Justice Brennan and Justice Blackmun in the single dissenting opinion of *Poland*. *Id.* (Marshall, J., dissenting).

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

146. *Id.* at 158 (Marshall, J., dissenting).

147. *Id.* at 159-60 (Marshall, J., dissenting).

148. *Id.* at 160-61 (Marshall, J., dissenting). "In no other circumstance would the Double Jeopardy Clause countenance the offer of a second chance to the State and the trial judge to find a better theory upon which to base a conviction." *Id.* at 161 (Marshall, J., dissenting).

Amendment of the United States Constitution.[149] In *Apprendi*, the Court ruled that aside from the existence of a prior conviction, one or more facts that result in a penalty being increased beyond the minimum set by statute must be proved beyond a reasonable doubt before a jury.[150] Such a penalty-increasing fact was deemed by the Court to constitute an element of the offense.[151]

In December of 1994, Apprendi had fired several bullets into the home of an African-American family located in what had previously been an all-white neighborhood.[152] Pursuant to a guilty plea, Apprendi was convicted of second-degree possession of a firearm for an unlawful purpose and unlawful possession of a prohibited weapon.[153] The trial judge extended Apprendi's sentence under New Jersey's hate crime statute, which allowed for such an extension upon the judge's finding by a preponderance of the evidence that a defendant acted for purposes of intimidating his victim based on the victim's particular characteristics.[154] The Court held that it was unconstitutional for the state legislature of New Jersey to prevent a jury from assessing facts that may increase a criminal defendant's penalty.[155] The Court further held that "such facts must be established by proof beyond a reasonable doubt."[156]

More recently, the Court in *Ring v. Arizona*[157] addressed the issue of whether the Sixth Amendment requires a jury, rather than a judge, to determine the existence of any aggravating circumstances for purposes of imposing the death penalty in a capital sentencing proceeding.[158] The Court ruled that since Arizona's enumerated aggravating factors operate as "the functional equiva-

149. 530 U.S. 466 at 469, 476 (2000). The Sixth Amendment of the United States Constitution reads as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. CONST. amend. VI.

The Court also considered the importance of the Due Process Clause of the Fourteenth Amendment. *Apprendi*, 530 U.S. at 466-67, 469.

150. *Apprendi*, 530 U.S. at 490.
151. *Id.* at 482-83.
152. *Id.* at 469.
153. *Id.* at 469-70.
154. *Id.* at 471-72.
155. *Apprendi*, 530 U.S. at 490.
156. Id.
157. 536 U.S. 584 (2002).
158. *Ring*, 536 U.S. at 588.

lent of an element of a greater offense"[159] (*i.e.*, murder plus one or more aggravating circumstances), such aggravating factors must be found, not by a judge sitting alone as sentencer, but rather by a jury is accordance with the Sixth Amendment.[160]

Timothy Ring ("Ring") was convicted by an Arizona jury of felony murder for the killing of an armored car guard in the course of robbing an armored car.[161] In accordance with Arizona law, the trial judge sitting alone could sentence Ring to death if further findings were made in the course of the sentencing hearing.[162] At Ring's sentencing hearing, which was held before the trial judge in the absence of a jury, another suspect (Greenham) testified that Ring had planned the robbery in advance and was the one who actually shot and killed the armored car guard.[163] In light of Greenham's testimony, and following a separate sentencing proceeding in which the trial judge made determinations as to aggravating and mitigating circumstances, the trial judge entered a special verdict sentencing Ring to death.[164] Ring appealed his death sentence, arguing that the Sixth and Fourteenth Amendments to the United States Constitution were violated by Arizona's capital sentencing scheme because it placed the responsibility for finding a fact that could increase the defendant's maximum penalty from a sentence of life in prison to a sentence of death in the judge.[165]

The Court reasoned that a defendant's right to a jury trial, guaranteed by the Sixth Amendment, would be "senselessly diminished if it were held to encompass the fact-finding necessary to increase a defendant's sentence by two years," as held in *Apprendi*, but at the same time "not to [encompass] the fact-finding necessary to sentence a defendant to death," as held in *Walton*.[166] In light of *Apprendi*, the Court reversed Ring's death sentence,

---

159. *Id.* at 609 (citing *Apprendi*, 530 U.S. at 494).

160. *Ring*, 536 U.S. at 609. The Court in *Ring* overruled Walton v. Arizona, 497 U.S. 639 (1990), which held that "Arizona's capital sentencing scheme [allowing a judge to sit alone as sentencer] was compatible with the Sixth Amendment because the additional facts found by the judge qualified as *sentencing considerations*, rather than *elements* of the offense of capital murder." *Id.* at 588 (emphasis added).

161. *Id.* at 591-92.

162. *Id.* at 592.

163. *Id.* at 593. Greenham testified against Ring and another suspect (Ferguson) as part of a plea bargain in which Greenham pleaded guilty to second-degree murder. *Id.*

164. *Id.* at 594-95.

165. *Ring*, 536 U.S. at 595. The Sixth Amendment's jury trial guarantee is made applicable to the States by the Fourteenth Amendment. *Id.* at 597.

166. *Id.* at 609. *See supra* note 157.

and remanded the case for further proceedings in accordance with their opinion.[167] The Court in *Ring* overruled *Walton* in light of *Apprendi*.[168]

In her dissent in *Ring*, Justice O'Connor stated that she would overrule *Apprendi* rather than *Walton*.[169] Justice O'Connor argued in *Ring*, as she did in her dissent in *Apprendi*, that a rule requiring "any fact that increases the maximum penalty [to be] treated as an element of the crime is not required by the Constitution, by history, or by the Court's prior cases."[170] Such a rule, the dissent found, ignores the nation's significant history of discretionary sentencing by judges.[171] Justice O'Connor further argued that the extension of the rule in *Apprendi* to situations such as *Ring* would have a destabilizing effect on the criminal justice system, as it would result in the capital sentencing schemes of five states being declared unconstitutional, and those of another four states being cast into doubt, resulting in a flood of death sentence challenges.[172]

Section one of the Fourteenth Amendment to the United States Constitution commands that no State shall "deprive any person of life, liberty, or property, without due process of law."[173] Sattazahn advanced a second argument that, in addition to violating the Double Jeopardy Clause, his second capital-sentencing proceeding

---

167. *Ring*, 536 U.S. at 609.

168. *Id.* Justice Ginsburg stated: "[W]e hold that *Walton* and *Apprendi* are irreconcilable; our Sixth Amendment jurisprudence cannot be home to both. Accordingly, we overrule *Walton* to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty." *Id.*

169. *Id.* at 619 (O'Connor, J., dissenting). Justice O'Connor was joined in her dissent by Chief Justice Rehnquist. *Id.* (O'Connor, J., dissenting).

170. *Id.* (O'Connor, J., dissenting).

171. *Id.* at 619 (O'Connor, J., dissenting).

172. *Ring*, 536 U.S. at 620-21 (O'Connor, J., dissenting). The states whose capital sentencing schemes are declared unconstitutional in light of *Ring* are Colorado, Idaho, Montana, Nebraska and Arizona. *Id.* at 620 (O'Connor, J., dissenting). "There are 168 prisoners on death row in these states." *Id.* (O'Connor, J., dissenting). The states whose capital sentencing schemes are rendered doubtful in light of *Ring* are Alabama, Delaware, Florida and Indiana (as these states have hybrid capital sentencing schemes). *Id.* at 621 (O'Connor, J., dissenting). "There are 629 prisoners on death row in these states." *Id.* (O'Connor, J., dissenting).

173. *Sattazahn*, 537 U.S. at 115. Section one of the Fourteenth Amendment reads as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

served to deprive him of his due process rights under the Fourteenth Amendment.[174] Citing *Medina v. California*,[175] the Court determined that Sattazahn's "due-process claim [was] nothing more than his double-jeopardy claim in different clothing."[176]

In *Medina*, the Court addressed the question of whether a California statute, which placed the burden on the defendant to prove his own incompetence to stand trial for murder, represented a violation of the Due Process Clause of the Fourteenth Amendment.[177] Prior to Medina's murder trial, he was granted a competency hearing, which was conducted, in accordance with California state law, under a presumption of competence, with the defendant bearing the burden of showing incompetence by a preponderance of the evidence.[178] Medina was found by a jury to be competent to stand trial, convicted of first-degree murder, and sentenced to death.[179] Medina argued that the imposition of such a burden upon him by the California statute represented a violation of the Due Process Clause of the Fourteenth Amendment.[180]

The Court rejected Medina's argument based on their determination that California's procedure was constitutionally adequate to guard against a violation of his due process rights, or more specifically, to guard against the criminal trial of an incompetent person.[181] Speaking more broadly, the Court further held that the Due Process Clause of the Fourteenth Amendment has traditionally required that only the most basic procedural safeguards be observed, and that a "more subtle balancing of society's interests against those of the accused [have] been better left to the legislative branch."[182] Medina's due process challenge was rejected by

---

174. *Sattazahn*, 537 U.S. at 115.

175. 505 U.S. 437 (1992).

176. *Sattazahn*, 537 U.S. at 116. (citing Medina v. California, 505 U.S. 437 (1992)). The Court stated in *Medina*:

> The Bill of Rights speaks in explicit terms to many aspects of criminal procedure, and the expansion of those constitutional guarantees under the open-ended rubric of the Due Process Clause invites undue interference with both considered legislative judgments and the careful balance that the Constitution strikes between liberty and order.

Medina, 505 U.S. at 443.

177. *Medina*, 505 U.S. at 439.

178. *Id.* at 440.

179. *Id.* at 441

180. *Id.* at 442-43.

181. *Id.* at 453.

182. *Medina*, 505 U.S. at 453

the Court, and his murder conviction and sentence of death were affirmed.[183]

Under *Bullington*, the protection provided by the Double Jeopardy Clause of the United States Constitution is available to protect a defendant from the imposition of the death penalty upon retrial when the defendant has been acquitted of a death sentence in the prior capital-sentencing proceeding, provided that the capital-sentencing proceeding bears all of the hallmarks of a trial with regard to the question of guilt and innocence.[184] A capital sentence hearing is deemed to bear the hallmarks of a trial if: (i) the discretion of the sentencer is limited, *e.g.*, to a choice between only death or life imprisonment; (ii) the sentencer makes its decision based on evidence introduced in a separate proceeding that resembles a trial; and (iii) in support of a death sentence, the state must prove, by a preponderance of the evidence, facts that are prescribed by statute.[185]

Once it has been established that the sentencing hearing bears the hallmarks of a trial, the controlling question becomes one of determining what amounts to an acquittal of a death penalty sentence for purposes of raising a double jeopardy bar which would preclude the state from seeking the death penalty in a resentencing hearing. In light of *Bullington* and *Rumsey*, an acquittal by a jury or a judge sitting as the sole decision-maker in the sentencing proceeding "is final and bars retrial on the same charge."[186] In particular, a judgment amounts to an acquittal on the merits when it is based on findings that are sufficient to establish legal entitlement to a sentence of life imprisonment.[187] Such a result would bar resentencing on the question of the death penalty.[188] In further describing what amounts to an acquittal, the Court in *Poland* held that a death penalty acquittal occurs when "the sentencer or reviewing court has decided that the prosecution has not proved its case that the death penalty is appropriate."[189]

If it is determined that an acquittal of the death penalty on the merits has occurred, the Double Jeopardy Clause bars the state from again seeking the death penalty upon retrial. However, if an

183. *Id.*
184. *Bullington*, 451 U.S. at 446.
185. *Rumsey*, 467 U.S. at 209-10.
186. *Id.* at 211.
187. *Id.*
188. *Id.*
189. *Poland*, 476 U.S. at 155-56.

acquittal on the merits of a death penalty is not reached, then the clean slate rule of *Pearce* is applicable, and the Double Jeopardy Clause does not afford the defendant protection from the state again seeking the death penalty upon retrial.[190]

In Sattazahn's first sentencing hearing, the jury made no findings as to whether the prosecution had or had not proved the alleged aggravating circumstance beyond a reasonable doubt.[191] In light of the deadlocked sentencing jury, the judge, in accordance with Pennsylvania law, had no discretion with regard to the statutorily required entry of the sentence of life imprisonment.[192] Under the line of cases extending from *Bullington*, it is clear that neither the sentencing jury nor the judge arrived at an acquittal on the merits with regard to Sattazahn's penalty of death. As such, it reasonably follows that the Double Jeopardy Clause did not bar the State of Pennsylvania from again seeking the death penalty against Sattazahn.

The Court's extension of *Apprendi* to *Ring*, for purposes defining murder plus one or more aggravating circumstances as being a separate offense from murder *simpliciter*, appears to be superfluous with regard to holding that the Double Jeopardy Clause did not bar Pennsylvania from again seeking the death penalty against Sattazahn upon retrial.[193] In Sattazahn's case, the sentencing jury made no decision or findings at all as to the aggravating circumstance, and the judge had no discretion with regard to his statutorily required entry of the penalty of life imprisonment. *Bullington* and its progeny have limited the reach of the Double Jeopardy Clause, meaning that it does not bar the pursuit of a death sentence upon retrial, in light of the facts of *Sattazahn*.

The Court's ruling in *Sattazahn* will likely have the result of placing certain defendants in murder cases in a perilous position. A defendant, who has received a sentence of life imprisonment as the result of a hung sentencing jury, which is deemed not to have provided an acquittal on the merits as to the death penalty, will have to decide whether to accept life imprisonment, or run the risk of receiving a death sentence upon retrial if he challenges his conviction. While such concerns are valid, they are not necessarily determinative with regard to double jeopardy. The determinative

190. *Pearce*, 395 U.S. at 721, 723.
191. *Sattazahn*, 537 U.S. at 109.
192. *Id.* *See supra* note 15, for 42 PA. CONS. STAT. ANN. § 9711(c)(1)(v) (West 2000).
193. *Sattazahn*, 537 U.S. at 111-12.

issue is whether the defendant has secured an acquittal of the death penalty on the merits. In *Sattazahn*, no such acquittal was secured, and therefore, the Double Jeopardy Clause does not represent a bar to retrial on the death penalty question.

It has been proposed that elimination of subsection (v) of Pennsylvania's sentencing statute (which requires a judge to enter a sentence of life imprisonment in the case of a hung sentencing jury) could eliminate both the harsher sentence issue and the question of whether there has been an acquittal.[194] However, the elimination of subsection (v) could lead to additional problems, not least of which would be procedural.

Even in the absence of subsection (v), a sentencing jury deciding the question of death or life imprisonment could still become deadlocked. Perhaps the equivalent of a mistrial as to the sentencing phase would then be declared, in which case a resentencing hearing would be held. In the absence of additional facts, a resentencing hearing before the same jury would likely again result in a hung jury. A resentencing hearing before a new jury would hardly seem reasonable, as the new jury would not have heard for themselves all of the facts of the case.[195] As such, elimination of subsection (v) of Pennsylvania's sentencing statute alone would not appear to represent a viable option with regard to addressing or otherwise obviating the harsher sentence issue, and the issue of whether an acquittal has been achieved.

James R. Franks

194. Jennifer L. Czernicki, Recent Decision, *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*, 40 DUQ. L. REV. 127, 144 (2001). *See supra* note 15, for 42 PA. CONS. STAT. ANN. § 9711(c)(1)(v) (West 2000).

195. In Pennsylvania, after delivering a verdict of murder of the first degree, the same jury then determines whether the defendant shall be sentenced to death or life imprisonment, in a separate sentencing hearing. 42 PA. CONS. STAT. ANN. § 9711(a)(1) (West 2000). Paragraph (1) of § 9711(a) reads as follows: "After a verdict of murder of the first degree is recorded *and before the jury is discharged*, the court shall conduct a separate sentencing hearing in which *the jury* shall determine whether the defendant shall be sentenced to death or life imprisonment." 42 PA. CONS. STAT. ANN. § 9711(a)(1) (West 2000) (emphasis added).