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Let's Make It a True Daily Double (Jeopardy): How James Harrison Was Acquitted of the Death Penalty Only to Face It Again

Tyler Z. Bernstein
Boston College Law School, tyler.bernstein@bc.edu

LET'S MAKE IT A TRUE DAILY DOUBLE (JEOPARDY): HOW JAMES HARRISON WAS ACQUITTED OF THE DEATH PENALTY ONLY TO FACE IT AGAIN

Abstract: On May 10, 2011, in *Harrison v. Gillespie,* the U.S. Court of Appeals for the Ninth Circuit held that defendants do not have a per se constitutional right to poll the jury before a trial judge declares a mistrial. Further, the court held that the Double Jeopardy Clause does not preclude a court from considering the death penalty as a potential sentence on retrial. This Comment argues, however, that in doing so, the court made it more likely that capital defendants will receive the death penalty, because a fresh jury may impose the death penalty, even though the previously discharged jury merely deadlocked over which lesser included punishment to impose.

Introduction

James Harrison was convicted of first-degree murder and faced the possibility of being sentenced to death.[1] The penalty-phase jury, confronted with whether Harrison deserved to die for what he had done, seemingly deadlocked on this issue.[2] In its communications with the judge, the jury indicated that it could not agree on which lesser alternative punishment to impose, a fact which suggested that the ultimate punishment—death—was off the table.[3] In response to this indication, Harrison asked that the judge poll the jury to confirm that it in fact had eliminated the death penalty from its deliberations.[4] Rather than entertain this request, however, the trial judge summarily discharged the jury.[5]

Yet, monumental implications hinged on what—if anything—the jury had collectively decided prior to being discharged.[6] If, on the one hand, the jury had rejected the death penalty, then the Double Jeopardy Clause would bar the government from seeking capital punish-

[1] Harrison v. Gillespie (*Harrison IV*), 640 F.3d 888, 892–93 (9th Cir. 2011) (en banc).
[2] *Id.* at 893.
[3] *See id.*
[4] *Id.*
[5] *Id.* at 894.
[6] *Id.* at 906.

ment against Harrison on retrial.[7] On the other hand, if the jurors did not reach a final decision, then the prosecution would have a fresh opportunity to obtain a death sentence in the future.[8]

Part I of this Comment describes Harrison's trial and traces his appeals through the legal system.[9] Then, Part II explores acquittals as the hallmark of double jeopardy protections, and how a majority of the Ninth Circuit determined that the penalty-phase jury never acquitted Harrison of the death penalty for double jeopardy purposes.[10] Part III discusses the discretionary power of trial judges to poll juries before discharging them and the risks inherent in that discretion.[11] Finally, Part IV argues that the majority, by misunderstanding the purpose of capital sentencing proceedings, circumvented the Double Jeopardy Clause and rendered its protections inapplicable in a situation in which they are needed most.[12]

I. Harrison's Trial and Appeal

On November 21, 2006, a jury found James Harrison guilty of first-degree murder in Nevada state court.[13] At sentencing, however, when the State sought the death penalty, the jury deadlocked over what sentence to impose.[14] In response, Harrison requested that the judge poll the jury to determine whether the jury had unanimously rejected death as a potential punishment.[15] Instead, after speaking with the foreperson, the judge concluded that the jury was at an impasse as to Harrison's sentence, declared a mistrial, and discharged the jury without polling.[16]

After this discharge, the trial judge collected the verdict forms on which the jury was to record its determinations of fact and Harrison's sentence.[17] Upon examining the forms, the court noted that the jury

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[7] *See* U.S. Const. amend. V ("No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb."); *Harrison IV,* 640 F.3d at 906.

[8] *See Harrison IV,* 640 F.3d at 900–01 (stating that there was no "valid and final judgment" that would preclude seeking the death penalty on retrial).

[9] *See infra* notes 13–45 and accompanying text.

[10] *See infra* notes 46–63 and accompanying text.

[11] *See infra* notes 64–76 and accompanying text.

[12] *See infra* notes 77–96 and accompanying text.

[13] *Harrison IV,* 640 F.3d at 893.

[14] *Id.*

[15] *Id.* at 893–94.

[16] *Id.*

[17] *Id.* at 894.

completed only two of the four forms.[18] The two completed forms revealed that the jury had found one aggravating factor and twenty-four mitigating factors.[19] The remaining two forms were to be used to record Harrison's sentence.[20] If the jury determined that the sole aggravating factor outweighed the mitigating factors, the first verdict form enabled it to choose between a fixed term of imprisonment, life with the possibility of parole, life without parole, or death.[21] But, if the jury found that the mitigating circumstances outweighed the aggravating circumstance, the second form allowed the jury to select a punishment of a fixed term of imprisonment, life with the possibility of parole, or life without parole—but not death.[22] Unable to agree on the appropriate punishment, the jury failed to complete either of these latter two forms and Harrison's sentence remained undetermined.[23]

On retrial, approximately seven months later, Harrison filed a motion to prevent the prosecution from again seeking the death penalty.[24] Relying on affidavits from three former jurors, he alleged that the sentencing-phase jury unanimously decided against applying the death penalty and had determined that the mitigating factors outweighed the aggravating factor.[25] Therefore, he argued, the State should be barred from again seeking the death penalty.[26] The trial court, however, denied this motion as well as Harrison's request to stay further penalty-phase proceedings.[27] Harrison subsequently petitioned the Nevada Supreme Court, again arguing that the juror affidavits demonstrated an unambiguous rejection of the death penalty.[28] The Nevada Supreme Court issued a temporary stay of further penalty-phase proceedings, but ultimately, on September 7, 2007, denied Harrison's petition and vacated the stay.[29]

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[18] *Id.*
[19] *Harrison IV,* 640 F.3d at 894.
[20] *Id.*
[21] *Id.* at 894–95.
[22] *See id.* at 895.
[23] *Id.*
[24] *Id.*
[25] *Harrison IV,* 640 F.3d at 895.
[26] *Id.*
[27] *Id.*
[28] *Id.* at 895–96.
[29] *Id.* at 896.

On June 20, 2008, Harrison filed a habeas corpus petition in the U.S. District Court for the District of Nevada, raising two arguments.[30] First, he argued that he should not be subject to the death penalty because the jury had unanimously concluded that the mitigating circumstances outweighed the aggravating circumstance.[31] Second, he argued that the trial court had erred in declaring a mistrial without first polling the jurors to determine whether they had unanimously decided that the mitigators trumped the aggravator.[32] With regards to his first contention, the district court held that the partially completed jury verdict forms did not establish that the jury had determined that the mitigating factors outweighed the aggravating factor.[33] It did not comment, however, on Harrison's second contention that the trial had erred in its mistrial declaration.[34]

Harrison appealed this ruling to a panel of the Ninth Circuit, maintaining solely that the Nevada trial court erred in declaring a mistrial without first polling the jury to determine if it had collectively reached a verdict about the imposition of the death penalty.[35] A merits panel of the Ninth Circuit stayed the pending state court proceedings and granted Harrison's habeas petition.[36] A majority of the active court judges then voted to rehear the case en banc.[37] On rehearing en banc, the Ninth Circuit concluded that jeopardy never attached to Harrison.[38] Thus, the State remained free to seek the death penalty again on retrial.[39]

In reaching this outcome, the court held that there is no per se constitutional right to poll a penalty-phase jury about whether it had excluded death as a potential sentence.[40] According to the court, such a right would engender two unacceptable risks.[41] First, it might permit

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[30] Harrison v. Nevada (*Harrison I*), No. 2:08-cv-00802-RCJ-RJJ, 2008 WL 2570925, at *1–2 (D. Nev. June 25, 2008), *rev'd,* 596 F.3d 551 (9th Cir. 2010), *aff'd en banc,* 640 F.3d 888 (9th Cir. 2011).

[31] *See Harrison IV,* 640 F.3d at 896.

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] Harrison v. Gillespie (*Harrison II*), 596 F.3d 551, 561 (9th Cir. 2010), *rev'd en banc,* 640 F.3d 888 (9th Cir. 2011).

[36] *Id.* at 575.

[37] Harrison v. Gillespie (*Harrison III*), 608 F.3d 1117, 1118 (9th Cir. 2010) (voting to rehear the case en banc).

[38] *Harrison IV,* 640 F.3d at 906.

[39] *Id.*

[40] *Id.* at 905–06.

[41] *Id.* at 906.

judicially coerced compromise verdicts.[42] Second, it would allow defendants to treat tentative, preliminary votes as irrevocable final verdicts.[43] Although the court held that such a right is not constitutionally required, judges have discretion to poll a jury to determine whether it has reached a partial verdict.[44] Consequently, the majority held that the trial judge did not abuse her discretion, because the deadlocked jury did not indicate it excluded the death penalty as a possible sentence.[45]

II. Acquittals as the Touchstone of Double Jeopardy Protections in Capital Sentencing Proceedings

Harrison based his request—to poll the jury prior to its discharge—on the Fifth Amendment's Double Jeopardy Clause,[46] which states that "[n]o person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb."[47] In theory, this principle prevents the government, with its immense resources and power, from making repeated attempts to convict an individual for an alleged offense.[48] Multiple trials subject a defendant to prolonged embarrassment, expense, and anxiety, and increase the likelihood of an erroneous conviction.[49] In 1981, In *Bullington v. Missouri,* the U.S. Supreme Court extended the scope of the Double Jeopardy Clause.[50] It did so by holding that the Double Jeopardy Clause applies to capital sentencing proceedings because those proceedings resemble a trial on the merits.[51] Thus, the Double Jeopardy Clause bars the prosecution not only from making repeated attempts to prove a defendant's guilt, but also from making repeated attempts at securing a death sentence.[52]

The gravamen for triggering the constitutional double jeopardy protection is whether there has been an acquittal.[53] Acquittals can be either express or implied.[54] An express acquittal occurs when the jury

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[42] *Id.*
[43] *Id.*
[44] *See Harrison IV,* 640 F.3d at 906.
[45] *Id.*
[46] Harrison v. Gillespie (*Harrison IV*), 640 F.3d 888, 901 (9th Cir. 2011) (en banc).
[47] U.S. Const. amend. V.
[48] Green v. United States, 355 U.S. 184, 187 (1957).
[49] *Id.* at 187–88.
[50] 451 U.S. 430, 446 (1981).
[51] *Id.*
[52] *See id.*
[53] *See* Sattazahn v. Pennsylvania, 537 U.S. 101, 109 (2003).
[54] *Harrison IV,* 640 F.3d at 898.

returns a verdict in the accused's favor.[55] An implied acquittal occurs when a jury fails to convict on a greater charge but instead reaches a verdict on a lesser included offense.[56]

For Fifth Amendment protections to attach to a failure to convict, the defendant must provide explicit factual findings that the government failed to prove the existence of aggravating factors beyond a reasonable doubt.[57] For example, in 2003, in *Sattazahn v. Pennsylvania,* the Supreme Court held that a life sentence—imposed by statute when the jury deadlocked—did not constitute an acquittal for double jeopardy purposes.[58] Because the jury failed to make any findings with respect to the alleged aggravating and mitigating circumstances, the default life sentence judgment under Pennsylvania law did not implicate the Double Jeopardy Clause on retrial.[59]

Furthermore, incomplete or improperly completed jury forms are not sufficiently final to attach the Double Jeopardy Clause.[60] In *Harrison,* for instance, the completed jury forms did not address whether the jury found that the mitigating factors outweighed the sole aggravating factor.[61] Consequently, the Ninth Circuit ruled that the jury never reached a "valid and final judgment" equivalent to an acquittal for Double Jeopardy purposes.[62] Absent a complete and definite decision concerning Harrison's sentence, there could be no acquittal.[63]

III. Jury Polling as a Matter of Judicial Discretion

Harrison conceded that the partially completed jury forms did not amount to a partial verdict in his favor.[64] Nevertheless, he argued that the judge should have polled the jury prior to its discharge to determine whether it had unanimously rejected the death penalty.[65] If it had, the Double Jeopardy Clause would preclude the state from seeking the death penalty again on retrial.[66]

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[55] *Id.*
[56] *Id.*
[57] *See Sattazahn,* 537 U.S. at 110.
[58] *Id.* at 109.
[59] *Id.* at 109–10.
[60] *See id.* at 110; *Harrison IV,* 640 F.3d at 900.
[61] *Harrison IV,* 640 F.3d at 900.
[62] *See id.* at 900–01.
[63] *Id.*
[64] Harrison v. Gillespie (*Harrison IV*), 640 F.3d 888, 901 n.9 (9th Cir. 2011) (en banc).
[65] *Id.* at 901.
[66] *Id.*

The Ninth Circuit, however, disagreed and held that a judge is not constitutionally required to inquire into a jury's preliminary determinations before that judge declares a mistrial and discharges the jury.[67] Instead, the court concluded that the decision to conduct a jury poll is entrusted to the sound discretion of the trial judge.[68] It did so, in part, by reasoning that the Supreme Court has never required a trial judge to mechanically follow particular devices or procedures before declaring a mistrial based on juror deadlock.[69]

Two primary rationales informed the *Harrison* majority's decision to affirm the trial judge's exercise of discretion in not polling the jury: the potential for judicial coercion and the lack of finality of preliminary determinations.[70] First, the judge, in attempting to break a deadlock through a mid-deliberation inquiry, may subtly appear to side with one of the factions in a hung jury.[71] This intervention may improperly persuade the jury and provide the appearance that the judge, and therefore the law itself, favors one side over the other.[72] Second, mid-deliberation inquiry into a jury's preliminary determinations runs the risk of causing provisional votes to hastily solidify into final decisions.[73] Such premature calcification of juror viewpoints precludes the opportunity for new insights or opinions about the case through continued deliberation.[74] Therefore, the majority in *Harrison* reasoned that only a unanimous, final decision, announced in open court can ensure accurate and true verdicts.[75] Presumably cognizant of these unacceptable legal ramifications, the Ninth Circuit concluded that the trial judge had exercised sound discretion in deciding not to poll the jury about whether it had eliminated the death penalty for double jeopardy purposes.[76]

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[67] *See id.* at 902.

[68] *Id.*

[69] *See id.* at 905 (citing Renico v. Lett, 130 S. Ct. 1855, 1864 (2010) (holding that a trial judge is not required to compel the jury to continue to deliberate, to question jurors individually, or consider particular means of breaking an impasse)).

[70] 640 F.3d at 902.

[71] Note, *On Instructing Deadlocked Juries,* 78 YALE L.J. 100, 137 (1968).

[72] *See id.*

[73] *Harrison IV,* 640 F.3d at 903.

[74] *Id.* at 903–04.

[75] *Id.* at 904.

[76] *See id.* at 906.

IV. A Confused Characterization of Capital Sentencing Hearings

The *Harrison* majority undermined Harrison's right to be free from Double Jeopardy by misunderstanding the appropriate function of capital sentencing proceedings.[77] The majority emphasized the role of capital sentencing proceedings as driven by a need to arrive at a final, valid verdict.[78] Yet, by engaging in an extended discussion of the role of acquittals and verdicts, it failed to consider whether the jury had eliminated the death penalty from its deliberations.[79] Focusing on this narrow issue would have vindicated, not undermined, Harrison's Fifth Amendment right to know whether he was eligible for the death penalty in a subsequent retrial.[80]

The majority abrogated and minimized the longstanding protections of the Double Jeopardy Clause by engaging in a technical analysis of what constituted a verdict.[81] In dismissing the jury without asking whether it had unanimously rejected the death penalty, the trial judge failed to recognize the unique nature of the death penalty as well as the fundamental role of the capital-sentencing phase.[82] Polling the penalty-phase jury may have revealed the jury's unanimous rejection of the death penalty for Harrison.[83] Although the jury deadlocked over Harrison's ultimate sentence,[84] it may have unanimously concluded that the death penalty was an inappropriate sentence.[85] Had the trial judge polled the jury to ascertain this likely acquittal of the death penalty, Harrison could have received a final (if partial) verdict that the prosecution did not prove that the aggravator outweighed the mitigators be-

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[77] *See* Harrison v. Gillespie (*Harrison IV*), 640 F.3d 888, 914 (9th Cir. 2011) (en banc) (Reinhardt, J., dissenting); Daniel R. Williams, *Mitigation and the Capital Defendant Who Wants to Die: A Study in the Rhetoric of Autonomy and the Hidden Discourse of Collective Responsibility,* 57 Hastings L.J. 693, 729 (2006).

[78] *See Harrison IV,* 640 F.3d at 893.

[79] *See id.* at 897–901; *id.* at 914 (Reinhardt, J., dissenting); Williams, *supra* note 77, at 729.

[80] *See Harrison IV,* 640 F.3d at 914 (Reinhardt, J., dissenting).

[81] *See id.* at 897–901. *But cf.* Sattazahn v. Pennsylvania, 537 U.S. 101, 109 (2003) (explaining that an acquittal is the sole relevant issue in Double Jeopardy analysis).

[82] *See Harrison IV,* 640 F.3d at 916 (Reinhardt, J., dissenting); Jeffrey Abramson, *Death-Is-Different Jurisprudence and the Role of the Capital Jury,* 2 Ohio St. J. Crim. L. 117, 118 (2004); Marcia A. Widder, Comment, *Hanging Life in the Balance: The Supreme Court and the Metaphor of Weighing in the Penalty Phase of the Capital Trial,* 68 Tul. L. Rev. 1341, 1374 (1994).

[83] *See Harrison IV,* 640 F.3d at 894, 905.

[84] *Id.* at 893.

[85] *Id.* at 917 (Reinhardt, J., dissenting).

yond a reasonable doubt.[86] Confirmation by means of a jury poll that the state failed to prove Harrison's death-eligibility would have protected Harrison from the prospect of the death penalty again on retrial under the Double Jeopardy Clause.[87]

The high stakes of capital sentencing proceedings underscore the vast ramifications of the majority's failure to focus on the function that these proceedings serve.[88] Because death, as punishment, is different from all others, it requires different treatment.[89] As such, extra precautions exist to ensure that a punishment unique in its severity and irrevocability is limited in its application and fairly administered when appropriate.[90] Informed by both the Fifth and Eighth Amendments, the Supreme Court required separate capital sentencing proceedings for determining a defendant's death-eligibility as a procedural mechanism for limiting the then-existing arbitrary state death penalty schemes.[91]

In appreciating the unique and severe nature of the death penalty, Nevada has itself recognized that its capital sentencing hearings exist for the purpose of determining whether a defendant is death-eligible.[92] Contrary to the majority decision in *Harrison,* capital sentencing proceedings do not exist simply to decide what actual sentence should be imposed after the jury decides the defendant is not death eligible.[93] Nevada law supports the dissent's characterization of the role of sentencing hearings, and permits the trial judge, faced with a jury dead-

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[86] *Id.* at 914 (Thomas, J., dissenting).

[87] *Id.* at 917 (Reinhardt, J., dissenting); *see* Janet C. Hoeffel, *Risking the Eighth Amendment: Arbitrariness, Juries, and Discretion in Capital Cases,* 46 B.C. L. Rev. 771, 779 (2005).

[88] *See* Zant v. Stephens, 462 U.S. 862, 876 (1983); Gregg v. Georgia, 428 U.S. 153, 187 (1976); *Harrison IV,* 640 F.3d at 917 (Reinhardt, J., dissenting).

[89] Abramson, *supra* note 82, at 118.

[90] *Id.* at 118–19; Hoeffel, *supra* note 87, at 810.

[91] *See Zant,* 462 U.S. at 876; *Gregg,* 428 U.S. at 187; Abramson, *supra* note 82, at 118 (explaining how, among other things, bifurcated trials helped mitigate against the arbitrariness and capriciousness in existing death penalty schemes that violated the Eighth Amendment).

[92] *See* Nev. Rev. Stat. § 175.556 (2011) (explaining that in a capital case, a jury verdict is not required for a life without parole sentence but can be imposed by a judge when the jury fails to decide upon a sentence); *Harrison IV,* 640 F.3d at 916 (Reinhardt, J., dissenting); Hollaway v. State, 6 P.3d 987, 996 (2000) (noting that the state implemented separate capital sentencing proceedings in capital cases for the specific purpose of genuinely narrowing the class of death-eligible offenders); Mary Sigler, *Contradiction, Coherence, and Guided Discretion in the Supreme Court's Capital Sentencing Jurisprudence,* 40 Am. Crim. L. Rev. 1151, 1152 (2003).

[93] *Zant,* 462 U.S. at 876 (holding that aggravating circumstances must narrow the field of persons eligible for the death penalty); *see Harrison IV,* 640 F.3d at 916 (Reinhardt, J., dissenting); *Hollaway,* 6 P.3d at 996 (explaining that capital sentencing proceeds exist to narrow potential death-eligible offenders).

locked over the appropriate sentence, to enter a sentence of life without parole.[94] It logically follows that because a non-capital sentence may be imposed without a jury verdict, the primary concern of Nevada capital sentencing hearings cannot be to arrive at a final sentence, after death is eliminated.[95] Giving a judge this power reveals that the jury fulfills its constitutional role after it resolves the paramount question of death eligibility.[96]

Recognition that death is different required states to institute separate procedural tools to ensure that capital punishment schemes passed constitutional muster.[97] Thus, contrary to the majority holding, the trial judge arguably committed constitutional error by not polling a soon-to-be discharged jury that had indicated its probable unanimous rejection of the death penalty.[98] Failure to do so may have circumvented Harrison's rights under the Double Jeopardy Clause and allowed his likely acquittal of the death penalty to leave the courthouse with his jury.[99]

Conclusion

In *Harrison,* the en banc Ninth Circuit concluded that the trial court did not abuse its discretion by declining to poll the discharged jury to determine whether the jury had excluded the death penalty as a potential sentence. The court did so by holding that a defendant does not have a per se constitutional right to poll a jury. Thus, under this reasoning, the trial judge exercised sound discretion by dismissing the deadlocked jury. In coming to this conclusion, however, the Ninth Circuit disregarded the uniqueness of the death penalty and the additional constitutional safeguards it requires.

By denying the capital defendant the opportunity to poll the discharged jury, the *Harrison* majority arguably circumvented the Double Jeopardy Clause and allowed the prosecution multiple opportunities to secure a death sentence. Although the jury deadlocked on which sentence to impose, it likely dismissed the death penalty as a possible sentence. Jeopardy would have attached to the partial death penalty ruling and barred the state from seeking it upon retrial. Thus, jury polling comports with the explicit function of capital sentencing proceedings:

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[94] *See* § 175.556.

[95] *See id.*; *Harrison IV,* 640 F.3d at 916 (Reinhardt, J., dissenting).

[96] *See Harrison IV,* 640 F.3d at 916 (Reinhardt, J., dissenting).

[97] *See* Abramson, *supra* note 82, at 118.

[98] *See Harrison IV,* 640 F.3d at 906 (Thomas, J., dissenting).

[99] *See id.*

narrowing the pool of death eligible offenders. Thus, even though the jury could not decide on which sentence to impose, it likely decided against the death penalty. Only a polling of the jury prior to discharging it could have unearthed this decision.

Tyler Z. Bernstein

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