NO. 01-7574

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2001

DAVID ALLEN SATTAZAHN
Petitioner

V.

COMMONWEALTH OF PENNSYLVANIA
Respondent

On Petition For Writ of Certiorari To The
Supreme Court of Pennsylvania

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. **Does the Double Jeopardy Clause allow the prosecution to seek the death penalty in a capital retrial after petitioner won a new trial on appeal when the first jury deadlocked in the penalty phase of the first trial?**

   Answered in the affirmative by the court below

   Suggested Answer: Yes

2. **Does the Due Process Clause allow the prosecution to seek the death penalty in a capital retrial after the petitioner won a new trial on appeal when the second jury knows nothing about the first trial?**[1]

   Answered in the affirmative by the court below

   Suggested Answer: Yes

[1] This Court should be aware that these issues were presented to this Court in a previous Petition for Writ of Certiorari filed by Petitioner on or about May 30, 1997, assigned to No. 97-5451. That petition was denied by order of this Court dated October 6, 1997.

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The November 27, 2000 Opinion of the Supreme Court of Pennsylvania, ***Commonwealth v. Sattazahn***, 563 Pa. 533, 763 A.2d 359 (2000),is reproduced at petitioner's appendix A. The July 20, 2001 Order of the Supreme Court of Pennsylvania denying reargument, ***Commonwealth v. Sattazahn***, No. 258-01 Capital Appeal Docket, 2001 WL 826060 (July 20, 2001), is reproduced at petitioner's appendix B.

JURISDICTION

This Court has jurisdiction to consider the petition pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> nor shall any person be subject for the same offense 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.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> nor shall any state deprive any person of life, liberty, or property, without due process of law.

COUNTERSTATEMENT OF THE CASE

This brief is filed in opposition to the request for *certiorari* filed by David Sattazahn, Petitioner, from the sentence of death imposed by the Honorable Scott D. Keller in the Court of Common Pleas, Berks County, Pennsylvania, entered pursuant to the verdict of the jury recorded on January 22, 1999 pursuant to Petitioner's second trial. Petitioner was originally found guilty of first degree murder on May 10, 1991, at which time the jury deadlocked on the death penalty issue, and Petitioner was subsequently successful in obtaining a new trial on appeal.

Procedural History

David Sattazahn was arrested around July 17, 1989, for the murder of Richard Boyer and charged by Information filed at Docket No. 2194/89, in the Court of Common Pleas of Berks County, Pennsylvania. On or about September 14, 1989, the Commonwealth filed a Notice To Seek The Death Penalty.

From April 23 through May 10, 1991, Sattazahn was tried on these charges by a jury before the Honorable Scott D. Keller and convicted of first[2], second[3], and third degree[4] murder, robbery[5], two counts of aggravated assault[6], possession of an instrument of crime[7], carrying a firearm without a license[8], criminal conspiracy[9] to commit third degree murder, robbery, aggravated assault and possession of an instrument of crime.

In the penalty phase of the trial, the Commonwealth presented one aggravating circumstance - Sattazahn committed the killing while in the perpetration of a felony.[10] Sattazahn presented as mitigating circumstances his lack of a significant history of prior criminal

[2] 18 Pa.C.S.A. § 2502(a).
[3] 18 Pa.C.S.A. § 2502(b).
[4] 18 Pa.C.S.A. § 2502(c).
[5] 18 Pa.C.S.A. § 2701(a)(1)(i).
[6] 18 Pa.C.S.A. § 2702(a)(1) and (4).
[7] 18 Pa.C.S.A. § 907(a).
[8] 18 Pa.C.S.A. § 6106(a).
[9] 18 Pa.C.S.A. § 903(a)(1)(2).
[10] 42 Pa.C.S.A. § 9711(d)(6).

convictions and his age at the time of the crime. The jury deliberated without reaching a decision on death or life and without making any findings with regard to aggravating or mitigating factors. After three-and-one-half hours of deliberations, at the request of defense counsel, Judge Keller dismissed the jury as hung.

A few short months after the trial, on September 19, 1991, Sattazahn entered guilty pleas in the following cases in Berks County:

Docket	**Charge**	**Offense Date**
1419-89	Burglary	9/21/87
1982-89	Robbery	12/4/88
1983-89	Burglary	3/30/85 - 4/2/85
1984-89	Burglary	3/11/88 - 3/12/88
1985-89	Burglary	6/19/87 - 6/20/87
1986-89	Burglary	4/1/89 - 4/3/89

On February 14, 1992, Sattazahn was sentenced on the above charges, as well as being sentenced to life imprisonment on the first degree murder charge along with various consecutive sentences on the remaining convictions from trial which had not merged. On or about March 12, 1992, Sattazahn appealed his sentence at No. 2194/89 to the Pennsylvania Superior Court. Shortly thereafter, on March 17, 1992, Sattazahn entered a guilty plea to third degree murder in Schuylkill County, Pennsylvania, for a murder he had committed on December 26, 1987. On April 1, 1992, Sattazahn entered a guilty plea for burglary charges in Lebanon County, Pennsylvania.

On the direct appeal at No. 2194/89, the Pennsylvania Superior Court found there was insufficient evidence to support a conviction on the conspiracies to commit third degree murder and aggravated assault, thereby arresting judgment and dismissing these charges. Based on a jury instruction given pursuant to 18 Pa.C.S.A. § 6104, the Superior Court reversed and remanded for a new trial on the remaining charges. The Commonwealth sought reargument, which was denied on October 6, 1993. ***Commonwealth v. Sattazahn***, 428 Pa. Super. 413, 631

A.2d 597 (1993). The Commonwealth filed a Petition for Allowance of Appeal solely on the issue of the jury instruction given pursuant to 18 Pa.C.S.A. § 6102 and § 6104. Sattazahn filed a cross-petition on other issues. On April 15, 1994, the Supreme Court of Pennsylvania initially granted the Commonwealth's petition and denied Sattazahn's cross-petition, but then, on December 30, 1994, the Court dismissed the appeal as improvidently granted. ***Commonwealth v. Sattazahn***, 539 Pa. 270, 652 A.2d 293 (1994).

On March 9, 1995, in preparation for the retrial, the Commonwealth filed a Notice of Intent To Seek The Death Penalty And Specific Aggravating Circumstances for the penalty phase of the retrial. This notice set forth the circumstances presented at the first trial and added the circumstance that the defendant has a significant history of felony convictions involving the use or threat of violence to the person.[11]

On March 13, 1995, Sattazahn, through his attorney, John S. Elder, Esquire, filed a Motion to Prevent the Commonwealth from Seeking the Death Penalty and from Adding an Additional Factor in his retrial. After briefs and argument by the parties, Judge Keller denied Sattazahn's motion on May 31, 1995. On June 26, 1995, Sattazahn filed a notice of appeal from the trial court's order denying his motion. On April 18, 1996, a panel of the Pennsylvania Superior Court affirmed the judgment of the trial court. ***Commonwealth v. Sattazahn***, No. 02274 PHL 1995 (filed April 18, 1996). On June 21, 1996, reargument/reconsideration of the April 18, 1996 decision was denied by *per curiam* order of the Superior Court. On March 5, 1997, the Supreme Court of Pennsylvania denied Sattazahn's petition for allowance of appeal. ***Commonwealth v. Sattazahn***, No. 469 M.D. Allocatur Dkt. 1996 (March 5, 1997).

[11] 42 Pa.C.S.A. § 9711(d)(9).

Sattazahn then filed a Petition for *Writ of Certiorari* with this Court on or about May 30, 1997. This petition as denied by order of court dated October 6, 1997, and the second trial was scheduled.

On January 22, 1999, Petitioner was found guilty on all charges and the jury returned a verdict of death. This sentence was entered by the court on February 16, 1999, and Petitioner filed his appeal to the Supreme Court of Pennsylvania on February 26, 1999 challenging the same issues raised prior to trial - the propriety of the death penalty upon retrial. On November 27, 2000, the Supreme Court of Pennsylvania affirmed the sentence, ***Commonwealth v. Sattazahn***, 563 Pa. 533, 763 A.2d 359 (2000), and subsequently denied Petitioner's request for reargument. ***Commonwealth v. Sattazahn***, No. 258-01 Capital Appeal Docket, 2001 WL 826060 (July 20, 2001).

Sattazahn now files this second Petition for Writ of Certiorari requesting this Honorable Court to review the sole question of whether the Commonwealth has the right to seek the death penalty in his retrial for first degree murder - the same question presented in the petition which was denied by this Court on October 6, 1997.

Factual History

On four or five occasions, Sattazahn and Jeffrey Scott Hammer hid in pine trees behind Heidelberg Family Restaurant and watched the manager come out at night with the money bag. (Notes of Testimony, Trial 1/15/99 - 1/22/99[12], p. 268-269). They cleared an area in this wooded area so they could see the restaurant more clearly. (N.T. p. 270). They learned that the manager would be the last person to leave the restaurant at night and that on Sundays the restaurant did the most business. (N.T. p. 269, 277).

[12] Hereinafter reffered to as "N.T."

On Palm Sunday, April 12, 1987, at approximately 10:00 p.m., Sattazahn and Hammer hid in the cleared wooded area waiting to rob the manager. (N.T. p. 275). Hammer carried a .41 caliber Magnum revolver and Sattazahn had a .22 caliber Ruger semi-automatic pistol. (N.T. p. 274, 283). Around 11:00 p.m., Richard Boyer, the manager, closed the restaurant and began walking towards his car, carrying a bank deposit bag with the day's receipts. (N.T. p. 275, 281-282). Sattazahn and Hammer confronted Mr. Boyer with their guns drawn and demanded the money. (N.T. p. 283-284)

Mr. Boyer raised his hands but threw the bag towards the restaurant. (N.T. p. 284). Irritated, Sattazahn told him to get the bag. (N.T. p. 284). Mr. Boyer retrieved the bag, but then he again threw it towards the restaurant's roof and started to run away. (N.T. p. 284-286). Hammer fired one shot over Mr. Boyer's head as a warning. (N.T. p. 287). Sattazahn fired the .22 five times. (N.T. p. 211, 288). Mr. Boyer fell to the ground and the two gunmen, after grabbing the bank deposit bag, fled. (N.T. p. 288-290).

An autopsy showed that Mr. Boyer suffered two gunshot wounds in the lower back and one each in the left shoulder, the lower face and the back of the head. (N.T. p. 412-416). Several of the wounds were consistent with being caused by a .22 caliber bullet. (N.T. p. 412-416). The two slugs recovered from Mr. Boyer's body, as well as the five discharged cartridge cases found at the scene, were identified as being fired from the .22 caliber Ruger purchased by Sattazahn. (N.T. p. 211, 224, 229-242).

REASONS FOR DENYING THE WRIT

Sattazahn seeks discretionary review of the opinion of the Supreme Court of Pennsylvania on the grounds that the Supreme Court incorrectly decided the double jeopardy issue and the due process issue under the United States Constitution. This Honorable Court previously decided that the imposition of a higher sentence by a jury on retrial after reversal of a prior state conviction did not violate the double jeopardy clause or the due process clause. Therefore, Sattazahn's petition for writ of *certiorari* should be denied.

1. THE DOUBLE JEOPARDY CLAUSE DOES NOT PROHIBIT SEEKING THE DEATH PENALTY UPON RETRIAL BECAUSE PETITIONER WAS NOT ACQUITTED DURING THE DEATH PENALTY PHASE OF THE FIRST TRIAL.

Long established constitutional doctrine imposes no limitations whatsoever upon the power to retry a defendant who has succeeded in getting his first conviction set aside. ***North Carolina v. Pearce***, 395 U.S. 711, 719 (1969) (***citing Stroud v. United States***, 251 U.S. 15 (1919)). This constitutional guarantee also makes clear that the guarantee against double jeopardy imposes no restrictions upon the length of a sentence imposed upon reconviction. ***Id.*** at 719 (***citing United States v. Ball***, 163 U.S. 662 (1896)). These principles rest on the premise that the original conviction has, at the defendant's behest, been wholly nullified and the slate wiped clean. ***Id.*** at 721. "[A] corollary of the power to retry a defendant is the power, upon the defendant's reconviction, to impose whatever sentence may be legally authorized, whether or not it is greater than the sentence imposed after the first conviction." ***Id.*** at 720.

However, this power to resentence upon reconviction is not unfettered. Under ***Bullington v. Missouri***, 451 U.S. 430 (1981) and ***Arizona v. Rumsey***, 467 U.S. 203 (1984), the relevant inquiry is whether the sentencing judge or the reviewing court has decided that the prosecution has not proven its case for the death penalty in the first trial and hence has acquitted the petitioner. ***Poland v. Arizona***, 476 U.S. 147 (1986). Thus an exception has been created and

the clean slate rationale is inapplicable whenever an acquittal results in the death penalty phase of the trial from an agreement by a jury or a decision by an appellate court that the prosecution has not proven its case. ***Id.*** at 152. " '[T]he clean slate rationale…is inapplicable whenever a jury agrees or an appellate court decides that the prosecution has not proved its case.' " ***Id.*** at 152 (***citing Bullington v. Missouri***, 451 U.S. 430, 443 (1981)). In situations where a defendant has been acquitted in the first trial, either at the guilt phase or the death penalty phase of the trial, double jeopardy would apply and prevent the resentencing court from imposing a punishment greater than that originally imposed.

This is the basis of the argument presented by petitioner. Sattazahn alleges that because the jury deadlocked in the death penalty phase of the first trial, the trial court's imposition of the life sentence by application of law was tantamount to an acquittal, which would bar the prosecution from seeking the death penalty in the retrial. To support his cause, Sattazahn largely relies on ***Bullington*** and ***Rumsey***[13]**.** However, petitioner fails to recognize the critical distinctions between those cases and the instant case[14].

In ***Bullington***, the prosecution intended to seek the death penalty in defendant's retrial when the jury in defendant's first trial had found defendant guilty of first-degree murder but then had sentenced him to life imprisonment after a separate sentencing phase. ***Bullington*** at 435. This Honorable Court held that the protection afforded by the double jeopardy clause of the Fifth Amendment to a person acquitted by a jury was available to a person convicted of capital murder and sentenced to life imprisonment by the jury, with respect to the death penalty, at his retrial, since the sentencing procedure at the defendant's first trial was like the trial on the question of

[13] Neither ***Bullington*** nor ***Rumsey*** stand for the proposition that a deadlocked jury in the death penalty phase is the equivalent of acquittal. In fact, no cases cited by petitioner support this allegation.

[14] Petitioner also relies on ***Smalis v. Pennsylvania***, 476 U.S. 140 (1986) in support of his argument. However, this reliance is misplaced. ***Smalis*** stands for the principle that a demurrer granted in defendant's favor constitutes an acquittal for double jeopardy purposes, therefore barring retrial. Obviously those facts are distinguishable from those in the case at bar in that demurrer was not awarded to petitioner.

guilt or innocence and the sentence of life imprisonment at the first trial meant that the jury had already acquitted the defendant of whatever was necessary to impose the death sentence. ***Bullington*** at 446. The defendant in ***Rumsey*** was convicted by a jury of armed robbery and first degree murder, but the trial judge conducted a separate sentencing hearing in which the judge found no aggravating circumstances. ***Rumsey*** at 206-207. The finding of no aggravating circumstances statutorily barred the judge from sentencing the defendant to death, and thus, the trial judge sentenced the defendant to life imprisonment. ***Id.*** Upon the setting aside of the sentence of life imprisonment by the Arizona Supreme Court, the trial court held a new sentencing hearing and sentenced the defendant to death. ***Id.*** On *certiorari*, this Honorable Court held that the double jeopardy clause prohibited the state from sentencing the defendant to death after the life sentence he had initially received was set aside on appeal since Arizona's capital sentencing proceeding was like a trial and the defendant's initial sentence of life imprisonment constituted an acquittal of the death penalty. ***Id.***

The present case is easily distinguished from both ***Bullington*** and ***Rumsey.*** In those cases, the trial court deliberated over numerous facts and made a specific finding as to what the appropriate penalty should be in the first trial. Thus the penalty imposed by the court in the first trial was based upon an educated and well-reasoned conclusion. However, in the case at bar, the jury deadlocked regarding the appropriate penalty, thus no conclusion was reached. When a jury is deadlocked, it cannot reach a unanimous verdict and consequently cannot acquit or convict a defendant of the death penalty. The trial judge which imposes the life sentence when a jury does not reach a unanimous verdict in the penalty phase of a capital trial makes no factual determinations either - he merely follows the letter of the law over which he has no discretion. See 42 Pa.C.S.A. §9711(c)(1)(v)[15]. As a result, the death penalty phase of the first trial was

[15] Petitioner would have this Court believe that this imposition of a life sentence by operation of law acts as an "implied acquittal," but there is no foundation for this proposition. This Court's precedent does not recognize this

never tried to completion because a verdict was not rendered. Thus because no decisions are made as to the merits of the applicability of the death penalty when a jury is deadlocked, the clean slate rationale is applicable to the present case and petitioner's argument fails.

In this respect, the instant case is more like the facts of ***Chaffin v. Stynchcombe***, 412 U.S. 17 (1973). In ***Chaffin***, this Court was asked to judge the constitutionality of the jury's imposition of a life sentence upon retrial when the first jury only sentenced petitioner to 20 years imprisonment. ***Id.*** at 18. The court examined the long-standing principles espoused by this court in ***Pearce*** and ***Stroud***, the latter of which was a unanimous opinion, finding that once the first conviction was overturned, the slate was wiped clean. ***Id.*** at 23. This Court specifically chose not to overrule ***Stroud***, resulting in the allowance of a harsher sentence upon retrial. ***Id.*** Similarly, Sattazahn's original conviction has, at his own behest, been wholly nullified and the slate wiped clean. According to this Court's interpretation of our constitution, the Commonwealth has the power, upon Sattazahn's reconviction, to impose whatever sentence may be legally authorized, whether or not it is greater than the sentence imposed after his first conviction. Therefore, the imposition of the death penalty in Sattazahn's retrial was proper and accordingly, *certiorari* should be denied.

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term. Because "the law attaches particular significance to an acquittal," see ***Poland*** at 156 (***citing United States v. Scott***, 437 U.S. 82, 91 (1978)), this argument should not be taken lightly and this Court should not create additional exceptions when there is no legal authority to do so.

2. THE DUE PROCESS CLAUSE DOES NOT BAR THE PROSECUTION FROM SEEKING THE DEATH PENALTY UPON RETRIAL BECAUSE THE IMPOSITION OF THE DEATH PENALTY BY THE SECOND JURY, WHO KNEW NOTHING ABOUT THE FIRST TRIAL, COULD NOT BE A RESULT OF VINDICTIVENESS[16].

Although the Due Process Clause can be implicated upon the imposition of a harsher sentence upon retrial, the constitutional implications are not automatic. In order to invoke Fourteenth Amendment protections, petitioner must be able to show that the greater sentence was the result of vindictiveness on the part of the sentencing authority for the convict's successful attack of the first conviction. ***See Pearce, supra*** at 725. These protections exist to ensure that a convict does not forego his right to appeal out of fear of any future retaliatory action of the trial judge. ***Id.*** However, due process implications can be avoided if the resentencing court places adequate information on the record explaining the basis for the increased sentence. ***Pearce*** at 726.

In determining whether the ***Pearce*** rationale extends to a harsher sentence at trial after withdrawal of a guilty plea, this Court held that:

> While the ***Pearce*** opinion appeared on its face to announce a rule of sweeping dimension, our subsequent cases have made clear that its presumption of vindictiveness does not apply in every case where a convicted defendant receives a higher sentence on retrial. ***Texas v. McCollough***, 475 U.S. 134 (1986). As we explained in ***Texas v. McCollough***, the evil the ***Pearce*** Court sought to prevent was not the imposition of enlarged sentences after a new trial but vindictiveness of a sentencing judge. ***Ibid.*** *See also* ***Chaffin v. Stynchombe***, 412 U.S. 17 (1973) (the ***Pearce*** presumption was not designed to prevent the imposition of an increased sentence on retrial for some valid reason associated with the need for flexibility and discretion in the sentencing process, but was premised on the apparent need to guard against vindictiveness in the resentencing process).

[16] Sattazahn's argument regarding this issue is misguided. Although long-standing precedent has consistently employed the degree of vindictiveness as the test against which to measure the constitutional due process provisions, petitioner has chosen to ignore this guide and submit a legal argument virtually devoid of precedential authority.

Alabama v. Smith, 490 U.S. 794, 799 (1989). Consequently, this Court rejected the proposition that greater penalties on retrial were explained by vindictiveness with sufficient frequency to warrant the imposition of a prophylactic rule. ***Id.*** at 800.

In order to determine whether vindictiveness is present, the court should examine whether the second sentencing authority was aware of the penalty imposed by the first, the motive of the first sentencing authority to vindicate the prior sentence, and the interest in the sentencing authority to discourage meritless appeals. ***Chaffin*** at 26-27. When the second sentencing authority is a jury rather than a judge, it is almost axiomatic that vindictiveness does not exist. Juries do not have knowledge of the prior sentence, have no personal interest in the outcome of the case, and are not often sensitive to the institutional concerns regarding meritless appeals. ***Id.*** at 27-28. Thus the presumption of vindictiveness does not arise when a second jury, on retrial following a successful appeal, imposes a higher sentence than a prior jury. ***Id.*** at 26-27. A second jury, unlike the judge who has been reversed, will have no personal stake in the prior conviction and no motivation to engage in self-vindication. ***Id.*** at 27. Consequently there is no basis for holding that jury resentencing poses any real threat of vindictiveness. ***Id.*** at 28. Thus, the rendition of a higher sentence by a jury upon retrial does not violate the Due Process Clause so long as the jury is not informed of the prior sentence and second sentence is not otherwise shown to be a product of vindictiveness. ***Id.*** at 35.

This is the reason the ***Pearce*** presumption of vindictiveness does not apply to the present case. In Sattazahn's retrial, a second jury imposed the death penalty. During the course of Sattazahn's new trial, the court was excruciatingly careful to avoid any reference whatsoever to the fact that Sattazahn was subject to a first trial, even to the extent of making sure one of the first trial's exhibits, which included an area marked by a witnesses' initials during the first trial, were not used in the second trial. (N.T. p. 9, 147-148). As a result of these precautions, the jury

was not aware of the existence of the first trial, let alone the prior sentence. Thus the jury could not be vindictive towards petitioner for a successful appeal when they had no knowledge that prior court proceedings had taken place at all. Thus because vindictiveness is not present, the Commonwealth has the power, upon Sattazahn's reconviction, to impose whatever sentence may be legally authorized, whether or not it is greater than the sentence imposed after his first conviction. Therefore, the Commonwealth has the power to seek the death penalty in Sattazahn's retrial.

As this analysis dictates, the Due Process Clause is not offended by the possibility of a harsher sentence. The Pennsylvania decision which is questioned by Sattazahn before this Court, ***Commonwealth v. Martorano***, 535 Pa. 178, 634 A.2d 1063 (1993), reflects the thoughtful and thorough review and application by the Pennsylvania Supreme Court of this Honorable Court's prior decisions in ***Pearce*** and its progeny. Because this analysis is correctly grounded in well-established precedent, Sattazahn's claim is meritless and *certiorari* should be denied.

CONCLUSION

For the foregoing reasons, the Commonwealth of Pennsylvania respectfully requests this Honorable Court to deny this petition for a writ of *certiorari.*

Respectfully Submitted,

Date	**MARK C. BALDWIN** **District Attorney**
Date	**ALISA R. HOBART** **Assistant District Attorney**