

In The
Supreme Court of the United States

—◆—
DAVID ALLEN SATTAZAHN,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

—◆—
**On Writ Of Certiorari To The
Supreme Court Of Pennsylvania**

—◆—
PETITIONER'S BRIEF

—◆—
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Dated: June 3, 2002

**CAPITAL CASE
QUESTIONS PRESENTED**

1. Does the Double Jeopardy Clause of the Fifth Amendment bar imposition of the death penalty upon reconviction after an initial conviction, set aside on appeal, in which the trial court imposed a statutorily mandated life sentence when the capital sentencing jury failed to reach a unanimous verdict?

2. Whether a capital defendant's life and liberty interest in the mandatory imposition of a life sentence required by state law where the sentencing jury fails to reach a unanimous verdict was violated when the state sought death sentence on retrial?

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CITATION TO OPINIONS BELOW

The opinion of the Supreme Court of Pennsylvania is reported as *Commonwealth v. Sattazahn*, 563 Pa. 533, 763 A.2d 359 (2000), and is reprinted in the Joint Appendix (hereinafter "J.A.") at 91-109.

JURISDICTION

The decision of the Pennsylvania Supreme Court was rendered on November 27, 2000. Petitioner timely filed an application for reargument, which was denied on July 20, 2001. *Commonwealth v. Sattazahn*, 2001 WL 826060 (Pa. July 20, 2001). On October 1, 2001, Justice Souter granted Petitioner an extension until December 17, 2001 to file his petition for a writ of certiorari, which was filed on that date and granted on March 18, 2002. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, which provides in relevant part:

nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb. . . .

2. It also involves Section 1 of the Fourteenth Amendment to the United States Constitution, which provides in relevant part:

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

3. It also involves a constitutional life and liberty interest arising out of 42 PA. C.S. §§ 9711(c)(1)(iv) & (v), which provide in pertinent part:

(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.

STATEMENT OF THE CASE

Petitioner, David Allen Sattazahn, was convicted of murder, robbery, and related offenses following a jury trial in the Berks County Court of Common Pleas in May 1991. *Commonwealth v. Sattazahn*, No. 2194/89 (Berks C.P.). At trial, the prosecution presented evidence that Richard Boyer was found shot to death on April 13, 1987, following an apparent robbery of the restaurant Mr. Boyer managed. Record, N.T. 5/2-3/91 at 45-48. The Commonwealth's case relied primarily on the testimony of Petitioner's co-defendant, Jeffrey Hammer. Pursuant to an agreement

with the Commonwealth,¹ Mr. Hammer testified that he and Petitioner had both been involved in planning the robbery and had cased the restaurant in the days before the April 12, 1987 robbery. Their plan, he testified, had been to rob the manager and then handcuff him. Record, N.T. 5/6/91 at 514-15. Prior to the robbery, Mr. Hammer and Petitioner retrieved two handguns, holsters, and ammunition. Record, N.T. 5/6/91 at 494-96. Mr. Hammer testified that he had a .41 caliber gun and Petitioner carried a .22 caliber gun.

Mr. Hammer further testified that he and Petitioner waited for the manager to leave the restaurant and, as Mr. Boyer was walking towards his truck, they approached him and told him to drop the bank bag. Record, N.T. 5/6/91 at 504. Mr. Boyer threw the bag twice then began to run away. Mr. Hammer testified that both he and Petitioner had fired their weapons. He said that Petitioner was the first to shoot, and that after Mr. Hammer fired, he heard two or three more shots. Record, N.T. 5/6/91 at 506-09. Mr. Hammer testified that Petitioner then retrieved the bank bag, they fled the scene and subsequently divided the money. Record, N.T. 5/6/91 at 510-11, 515, 520-21.

The Commonwealth also presented evidence, through the autopsy and police testimony, indicating that the decedent had suffered wounds consistent with a .22 caliber weapon and that cartridges found at the scene had been fired from a Ruger Mark II .22 caliber gun. Record, N.T. 5/3/91 at 239, 338. Although the salesperson in the

¹ In exchange for his testimony, the Commonwealth agreed that Mr. Hammer would receive a sentence of a term of years rather than face capital prosecution. Record, N.T. 5/3/91 at 580.

gun store could not identify Petitioner as the person who purchased that weapon some two months before the robbery/murder (see Record, N.T. 5/3/91 at 381), the Commonwealth also presented a police handwriting expert who concluded that the signature on paperwork generated in the sale of that weapon was consistent with Petitioner's handwriting. Record, N.T. 5/6/91 at 481-85.

Following presentation of the evidence, the jury found Petitioner guilty and the case proceeded to a capital sentencing hearing on May 9, 1991. At the start of the hearing, the trial court provided the jury introductory instructions on the nature of aggravating and mitigating circumstances and the parties' respective burdens of proof. Record, N.T. 5/9/91 at 19-20; J.A. at 10-11. The parties then presented evidence in support of aggravating and mitigating circumstances, and rested their respective cases. Record, N.T. 5/9/91 at 20-30.

After the close of evidence, the court recessed for the day. The next morning, following argument, the trial court fully instructed the jury on its sentencing options and obligations. Record, N.T. 5/10/91, at 55-60; J.A. at 15-20.

The court again instructed the jury that the Commonwealth bore the burden of proving aggravating circumstances beyond a reasonable doubt, while the defense was required to prove mitigating circumstances by a preponderance of the evidence. Record, N.T. 5/10/91, at 55-56; J.A. at 15-16. The Court also instructed the jury that it must return a death sentence if all of the jurors found at least one aggravating circumstance and no mitigating circumstances or if the jury found that aggravating circumstances outweighed mitigating circumstances, but that the jury must return a sentence of life imprisonment in all other circumstances. Record, N.T. 5/10/91, at 55; J.A.

at 15-16 ("If you do not all agree on one or more of the other of these findings then the only verdict you may return is a sentence of life imprisonment."); *id.* at 57; J.A. at 17 ("As I told you earlier, and as the verdict slip indicates, you must agree unanimously on one of the two general findings before you can sentence the defendant to death").

The trial court further instructed the jury that the court was required as a matter of law to impose a sentence of life imprisonment if the jury could not reach a unanimous verdict of either life or death:

If you are still unable to agree on a verdict after conscientious and thorough deliberations, report that to me. If it seems to me that you are hopelessly deadlocked *it will be my duty to sentence the defendant to life imprisonment.*²

Record, N.T. 5/10/91, at 58; J.A. at 18.

Per Rule 358A of Pennsylvania's *Rules of Criminal Procedure* (subsequently renumbered as PA. R. CRIM. P. 807), the court also provided the jury with a verdict slip, which it instructed the jury to read before commencing its deliberations. Record, N.T. 5/10/91, at 58-59, 60; J.A. at 18, 19. Part D of the instructions on that verdict slip stated in bold capital letters (J.A. at 27):

D. IF, AFTER SUFFICIENT DELIBERATION, YOU CANNOT UNANIMOUSLY REACH A SENTENCING VERDICT, DO NOT COMPLETE OR SIGN THIS SLIP, BUT RETURN IT TO THE JUDGE. THE JUDGE WILL DETERMINE IF FURTHER DELIBERATIONS ARE

² All emphasis supplied unless otherwise indicated.

**REQUIRED; IF THEY ARE NOT, THE JUDGE
WILL SENTENCE THE DEFENDANT TO
LIFE IMPRISONMENT.**

After three-and-one-half hours of deliberation, the jury returned with a note, signed by the jury foreperson, stating: "Your Honor - [¶] We, the jury are hopelessly deadlocked at 9-3 for life imprisonment. Each one is deeply entrenched in their position. We do not expect anyone to change his or her position." Record, N.T. 5/10/91, at 67; Court Exhibit No. 4; J.A. at 25.

The trial court conducted the factual inquiry mandated by Pennsylvania law to ascertain whether the sentencing jury was unable to reach a unanimous verdict. Record, N.T. 5/10/91, at 62-64; J.A. at 21-24. Finding the jurors deadlocked, the trial court discharged the jury and announced that it would impose a life sentence upon Petitioner, as statutorily mandated by 42 PA. C.S. § 9711(c)(1)(v):

THE COURT: . . . The Court at this time finding that you are unable to find unanimously for either sentence of death or life imprisonment will discharge you from your duties in deliberating any further in this particular case. And because of that, as a result of your inability to unanimously decide, the Court, by virtue of the law, will at the time of formal imposition of sentence sentence this defendant to life imprisonment.

Record, N.T. 5/10/91, at 64; J.A. at 23-24.

On February 14, 1992, the court formally imposed that life sentence and remanded Petitioner into the custody of the state prison system to serve that sentence. See Record, Sentencing Order, Sentencing Guideline Sentence Form/Commitment Authorization; J.A. at 30, 35, 40. .

The Commonwealth could not appeal this adjudication of sentence, nor could Petitioner appeal any issue relating to this legal determination of life over death.

On March 12, 1992, Petitioner appealed his convictions to the Superior Court of Pennsylvania, the Commonwealth's intermediate appellate court. *Commonwealth v. Sattazahn*, No. 01024 PHILA (Pa. Super.). On July 30, 1993, the Superior Court reversed. *Commonwealth v. Sattazahn*, 428 Pa. Super. 413, 631 A.2d 597 (1993), *rearg. denied* Oct. 6, 1993. The Commonwealth filed for allowance of appeal, and Petitioner sought allowance of cross-appeal on other guilt-stage issues. *Commonwealth v. Sattazahn*, No. 0544 M.D. 1993 (Pa.). On April 15, 1994, the Supreme Court of Pennsylvania denied Petitioner's motion and initially granted the Commonwealth allowance of appeal. *Commonwealth v. Sattazahn*, 537 Pa. 639, 644 A.2d 162 (1994). However, on December 30, 1994, the Court dismissed that appeal as having been improvidently granted. *Commonwealth v. Sattazahn*, 539 Pa. 270, 652 A.2d 293 (1994). The case returned to the Berks County Court of Common Pleas for a new trial.

On March 9, 1995, the Commonwealth filed notice of intent to seek the death penalty on retrial. J.A. at 47-53. Four days later, Petitioner moved to prevent the Commonwealth from capitally retrying him. The Court of Common Pleas, per Judge Keller, held that neither the state or federal constitutions nor Pennsylvania law, prevented Petitioner "from choosing between his right to appeal a life sentence mandated by 42 Pa. C.S.A. §9711(c)(2) and the remote risk of a death sentence upon retrial." Opinion of the Trial Court, at 1 (July 19, 1995) ("Pretrial Opinion"); J.A. at 54.

Petitioner appealed this order to the Superior Court, No. 02274 PHILA 1995. On April 18, 1996, a split panel of the Superior Court affirmed. Slip op. (Apr. 18, 1996) (with Brosky, J., dissenting), *rearg. denied*, June 21, 1996; J.A. at 73-81. The intermediate appellate court relied upon the Pennsylvania Supreme Court's per curiam decision in *Commonwealth v. Martorano*, 535 Pa. 178, 634 A.2d 1063 (1993), which held that a directed verdict of life imposed by the trial court after the sentencing jury could not reach a unanimous verdict did not constitute an acquittal of death and so did not implicate double jeopardy. The Supreme Court of Pennsylvania denied Mr. Sattazahn's petition for allowance of appeal from the Superior Court's decision. *Commonwealth v. Sattazahn*, 547 Pa. 742, 690 A.2d 1162 (1997) (No. 469 M.D. 1996). Petitioner reasserted and preserved his objections to capital retrial in an *in camera* pretrial proceeding on December 29, 1998. Record, N.T. *In Camera* Pretrial Hearing, 12/29/98, at 3-4; J.A. at 83. The trial court again rejected Petitioner's objections to a capital retrial. *Id.*

The retrial was conducted between January 12 and January 22, 1999. On January 22, the death-qualified jury found Petitioner guilty of first degree murder and related charges. Later that same day, the court conducted a brief sentencing-stage hearing³ at which "the remote risk of a death sentence upon retrial" became a reality: Mr. Sattazahn was sentenced to death. *See* Record, Verdict Slip at 2; J.A. at 86. The trial court formally imposed sentence on

³ The entire defense case at resentencing occupies twelve pages of transcript. Record, N.T. 1/22/99, at 592-603.

February 16, 1999, Record, Sentencing Order; J.A. at 90, and Petitioner filed a notice of appeal on February 25, 1999.

Petitioner challenged his conviction and sentence on a number of grounds, including those asserted herein. On November 27, 2000, the Pennsylvania Supreme Court upheld Petitioner's conviction and death sentence by a bare 4-3 majority. *Commonwealth v. Sattazahn*, 563 Pa. 533, 763 A.2d 359 (2000); J.A. at 91-109.⁴ As had the Superior Court in 1996, the Pennsylvania Supreme Court relied upon its 1993 per curiam decision in *Martorano* to reject Petitioner's double jeopardy claim. *Sattazahn*, 563 Pa. at 545-49, 763 A.2d at 366-68; J.A. at 100-05. It wrote:

Sattazahn argues that *Martorano* was wrongly decided because it is irrelevant whether the life sentence is a result of a unanimous jury verdict or operation of law following jury deadlock because either situation is an acquittal on the merits. This is the exact issue raised by the Appellant in *Martorano* and after a thorough discussion of *North Carolina v. Pearce*, 395 U.S. 711 (1969); *Bullington v. Missouri*, 451 U.S. 430 (1981); *Arizona v. Rumsey*, 467 U.S. 203 (1984) and *Poland v. Arizona*, 476 U.S. 147 (1986) we rejected it.

Sattazahn, 563 Pa. at 547, 763 A.2d at 367; J.A. at 102-03.

The state court, tracking its analysis of double jeopardy in *Martorano*, interpreted this Court's double jeopardy

⁴ Three Justices dissented on the grounds that the capital retrial unconstitutionally burdened Petitioner's state constitutional right to appeal.

rulings as applying only where there has been a prior factfinding by the ultimate sentencer that resulted in an “implied acquittal” of death. It wrote:

In *Martorano*, we applied *Bullington* and *Rumsey* and held that the Commonwealth is not precluded from seeking the death penalty on retrial, where, following their first trial, defendants were convicted of first-degree murder and sentenced to life imprisonment, not by a unanimous jury verdict, but by the trial judge following the jury’s deadlock regarding the penalty. The hung jury did not act as an acquittal on the merits as did the proceedings at issue in *Bullington* and *Rumsey*.

Sattazahn, 563 Pa. at 547, 763 A.2d at 367; J.A. at 102. The state court distinguished *Bullington* on the grounds that the unanimous jury verdict in that case had “impliedly decided that the prosecution had not proved its case for death,” whereas the non-unanimous “hung jury” in this case did not itself reach a verdict. *Id.* at 546, 763 A.2d at 366; J.A. at 101. It then distinguished *Rumsey* on the grounds that the trial court in *Rumsey* had imposed a life sentence only after itself making predicate findings of fact that the prosecution had failed to prove its case for death, whereas here “the imposition of a life sentence by the trial judge [did not] operate as an acquittal.” *Id.* at 548, 763 A.2d at 367; J.A. at 103 (quoting *Martorano*).

The state court anchored its no-acquittal reasoning on the fact that “[u]nder Pennsylvania’s sentencing scheme, the judge has no discretion to fashion sentence once he finds that the jury is deadlocked. The statute directs him to enter a life sentence.” *Id.* (citing 42 PA. C.S. § 9711(c)(1)(v)). Therefore, the court opined, “the judge

makes no findings and resolves no factual matter. Since judgment is not based on findings which resolve some factual matter, it is not sufficient to establish legal entitlement to a life sentence. A default judgment does not trigger a double jeopardy bar to the death penalty upon retrial." *Id.*

The Pennsylvania Supreme Court also relied upon *Martorano* to summarily reject Petitioner's due process claim. *Id.* at 549, 763 A.2d at 368; J.A. at 105-07. Although the state court stated that the due process claim had been raised as a state law issue, it opined that "Pennsylvania's constitutional analysis of these issues is the same as the federal approach." *Id.*; J.A. at 105.

Petitioner timely sought reargument based upon the state court's failure to take into consideration this Court's post-*Martorano* double jeopardy decisions, and because the state court had failed to address his due process claim. With two Justices dissenting, the Pennsylvania Supreme Court denied Petitioner's application for reargument on July 20, 2001. *Commonwealth v. Sattazahn*, 2001 WL 826060 (Pa. July 20, 2001) (per curiam). On December 17, 2001, Petitioner timely filed a Petition for writ of certiorari, seeking review of his case. This Court granted certiorari.

SUMMARY OF ARGUMENT

David Sattazahn received a life sentence after a capital trial and sentencing proceeding, tried to completion in 1991. After reversal of his original conviction, Pennsylvania once again sought, and this time obtained, a death sentence in his second capital trial. This death sentence

violated the Double Jeopardy Clause of the Fifth Amendment. *Bullington v. Missouri*, 451 U.S. 430 (1981).

Pennsylvania law places upon the prosecution the burden of persuading all twelve capital sentencing jurors that death is the appropriate punishment. If the jury unanimously agrees on a sentence – whether it is life or death – the court must impose the jury's verdict. Whenever the jury is unable to reach a unanimous verdict, the prosecution has failed to meet its burden of persuasion. When that occurs, as it did in Petitioner's initial capital trial, Pennsylvania law mandates that the trial court discharge the jury and impose a sentence of life imprisonment as a matter of law.

Because this type of jury deadlock actually results in the imposition of a sentence, the case fundamentally differs from those in which a jury deadlock on the question of guilt or sentencing produces a "hung jury." In the former, the trial proceedings are finally determined; in the latter, the "hung jury" prematurely terminates the trial proceedings without any final resolution. As a result of this factual and legal distinction, long-established principles of double jeopardy, due process, and fundamental fairness apply to the retrial of a life-sentenced defendant that are inapplicable in the context of a "hung jury" mistrial. When Pennsylvania capitally retried Petitioner and sought and obtained a sentence of death, that death-after-life sentence violated the Fifth and Fourteenth Amendments.

Pennsylvania's capital sentencing hearings are trial-like proceedings on the issue of punishment that are materially indistinguishable from those of the Missouri and Arizona death penalty statutes to which this Court has held jeopardy attaches. *Bullington*; *Arizona v. Rumsey*,

467 U.S. 203 (1984). Consequently, when a Pennsylvania capital defendant receives a life sentence after a capital sentencing proceeding tried to completion, "requiring [him] to submit to a second, identical proceeding [is] tantamount to permitting a second prosecution of an acquitted defendant." *Schiro v. Farley*, 510 U.S. 222, 231 (1994).

Here, the prosecution presented evidence and argument that was insufficient to convince nine of twelve jurors that Petitioner should be sentenced to death. Because of the Commonwealth's failure of proof, the trial court imposed a life sentence as a matter of law. 42 PA. C.S. § 9711(c)(1)(v). Trial court rulings that the prosecution has failed, as a matter of law, to establish a defendant's guilt constitute acquittals for double jeopardy purposes. And regardless of how the final adjudication of Petitioner's first sentencing hearing is characterized, the fact remains that he was sentenced to death after obtaining a life sentence when initially placed in jeopardy. Subjecting him to successive capital prosecutions, including twice facing the hazards of a trial-like capital sentencing hearing tried to completion, violated double jeopardy. This Court should reverse Petitioner's death sentence and declare that a life sentence imposed by operation of law following a capital sentencing hearing that has been tried to completion implicates double jeopardy.

Similarly, when a state mandates certain capital sentencing procedures or establishes the right to particular appellate, post-conviction, or post-sentencing review in capital cases, it creates Fourteenth Amendment life and liberty interests in those procedures. *Hicks v. Oklahoma*, 447 U.S. 343 (1980); *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272 (1998); *Ford v. Wainwright*, 477

U.S. 399, 427-31 (1986) (O'Connor, J., concurring). Here, Pennsylvania enacted a capital sentencing scheme that provided three possible verdicts: a unanimous verdict of death; a unanimous verdict of life; and a sentence of life by operation of law as a result of the jury's inability to reach a unanimous verdict. The life sentence that is the product of these procedures is final and unappealable by either side.

These procedures are an integral part of Pennsylvania's system for finally adjudicating whether a capital defendant will live or be sentenced to die. This and the unmistakably mandatory character of Pennsylvania's capital sentencing provisions create a substantial and legitimate expectation that a capital defendant who receives a judicially-imposed directed verdict for life resulting from a jury deadlock will not be subject to execution for his offense. Further, Pennsylvania makes no statutory distinction between the treatment of life sentences imposed by judicially directed verdicts and those imposed by unanimous juries in the event the defendant successfully appeals his conviction. Nor did it advise the sentencing jury or Petitioner that a successful appeal could jeopardize its non-unanimous verdict and his life sentence. These factors further strengthen the expectation that Pennsylvania would respect the life sentence that was mandated by its sentencing laws.

Pennsylvania was not constitutionally required to impose a directed life verdict when its capital sentencing juries deadlock, but having chosen this approach, it created a constitutionally protected life and liberty interest in the resulting life sentence. Pennsylvania may not arbitrarily deny Petitioner the life sentence mandated by its laws. This Court should reverse Petitioner's death sentence, and enforce his life and liberty interest in the

directed life verdict that was mandated by Pennsylvania's capital sentencing statute.

♦

ARGUMENT

I. The Capital Retrial of David Sattazahn after His First Capital Sentencing Proceeding Resulted in the Imposition of a Life Sentence by Operation of Law Violated His Federal Constitutional Right to Be Free from Double Jeopardy.

David Sattazahn received a life sentence after a capital trial and sentencing proceeding, tried to completion in 1991. After reversal of his original conviction, Pennsylvania once again sought, and this time obtained, a death sentence in his second capital trial.

After Petitioner was convicted of first degree murder in his original trial, the case proceeded – per Pennsylvania law – to a second evidentiary proceeding. That proceeding was governed by title 42, section 9711 of the Pennsylvania Criminal Code. The capital sentencing statute guided the discretion of Petitioner's capital sentencer in deciding between the sentencing options of life without parole or death by providing detailed statutory standards defining aggravating and mitigating circumstances, establishing evidentiary requirements and burdens of proof applicable to these circumstances, and carefully setting forth the circumstances in which each of the alternative sentences may be imposed.

Pennsylvania's capital sentencing statute provides for two – and only two – sentencing options: life without possibility of parole or death. In seeking death, the

Commonwealth is required to prove one or more statutorily enumerated aggravating circumstances beyond a reasonable doubt.⁵ When a jury is empaneled as the capital sentencer, it must unanimously agree that the Commonwealth has proven an aggravating circumstance before the jury may weigh that particular circumstance in its sentencing determination. On the other hand, a capital defendant is permitted to present any statutorily enumerated or constitutionally recognized mitigating circumstance⁶ and must prove each circumstance by a preponderance of the evidence. The jury is required to weigh all mitigating circumstances found by any one or more of the jurors. 42 PA. C.S. § 9711(c)(1)(iii).

The capital sentencing statute also affords a capital defendant "a 'presumption of life'" in the penalty phase of trial. *Commonwealth v. Travaglia*, 502 Pa. 474, 499, 467 A.2d 288, 300 (1983). In so doing, it places the burden of persuasion on the prosecution such that death may not be imposed unless the capital sentencer has unanimously determined beyond a reasonable doubt that at least one aggravating circumstance exists and, even then, death may not be imposed unless the defendant has failed to prove any mitigating circumstances or if the aggravating circumstance(s) outweigh the mitigating circumstance(s) found. 42 PA. C.S. § 9711(c)(1)(iv)-(v); *Blystone v. Pennsylvania*, 494 U.S. 299, 305 (1990).⁷ When the defendant is

⁵ The aggravating circumstances are set forth in 42 PA. C.S. § 9711(d).

⁶ The statutorily enumerated mitigating circumstances are set forth in 42 PA. C.S. § 9711(e).

⁷ See also *Commonwealth v. Baker*, 531 Pa. 541, 569, 614 A.2d 663, 677 (1992) (Pennsylvania's death penalty "statute . . . decides a 'tie,' and equal balance of aggravation and mitigation, in favor of the defense.").

of the Commonwealth's system of finally adjudicating life or death, and both are statutorily mandated.¹⁹

In addition, trial-like capital sentencing proceedings have "qualities of constitutional finality" not present in non-capital cases. *See supra* at 6-7. The defendant in such proceedings has a substantial and legitimate expectation that, if a lifelocked jury produces a mandatory life sentence, he will be deprived only of his liberty and not of his life.

Further, Respondent's assertion that Petitioner's expectation of finality "does not survive the vacation of the original life sentence" is both unfounded and a misnomer. Petitioner did not vacate his life sentence; he overturned his conviction.²⁰ Moreover, he did not and Pennsylvania as a matter of law *could not* appeal his life sentence. *Initial Brief* at 36-37. With nothing to be vacated, there was no intervening act for the life sentence to survive. Instead, the statutory unavailability of appellate review of a life

¹⁹ There is no support for Respondent's argument that the Pennsylvania sentencing statute treats life sentences differently depending upon whether they are the product of a unanimous jury verdict or a statutorily directed judicial verdict. The sole substantive reference to life verdicts in Pennsylvania's sentencing statute does not distinguish between the two. 42 Pa. C.S. § 9711(c)(1)(iv) ("The verdict must be a sentence of life imprisonment in all other cases."). The remaining sections dealing with life sentences either tell the jury to fill out the verdict form when it has reached a unanimous verdict, 42 Pa. C.S. § 9711(f), or set forth the mechanisms by which the court must impose that sentence, 42 Pa. C.S. § 9711(c)(1)(v) (lifelocked jury); 42 Pa. C.S. § 9711(g) (unanimous jury).

²⁰ If it were otherwise, a life verdict from a unanimous capital sentencing jury also would not survive reversal of a first-degree conviction.

sentence provided yet additional expectation of its finality, *cf. United States v. DiFrancesco*, 449 U.S. 117, 139 (1980) (where the legislature "has specifically provided that the sentence is subject to appeal . . . there can be no expectation of finality in the original sentence"), particularly in a legislative scheme in which the sentencing trial was a separate proceeding adjudicating the functional equivalent of a separate offense. *Ring v. Arizona*, 122 S. Ct. 2428, 2243 (2002).

Finally, Respondent contends that this Court's life and liberty interest cases recognize only transient procedural protections, and do not carry over to subsequent proceedings. But that is only because the violations presented to the Court thus far involve deprivations of the original process, so there is no favorable outcome to protect. *Evitts v. Lucey*, 469 U.S. 387 (1985) unquestionably would guarantee the future effective assistance of counsel that initially was denied. *Ford v. Wainwright*, 477 U.S. 399 (1986) guarantees notice and effective participation in future competency proceeding, and unquestionably protects the defendant's legitimate expectation in the enforcement of a favorable outcome. Thus, *Ford* guarantees that an individual adjudicated to be incompetent will not be executed while incompetent. Similarly, a person who received favorable consideration in Ohio's clemency proceedings, *Ohio Adult Parole Authority v. Woodward*, 477 U.S. 272 (1998), would have a protected interest in the enforcement and finality of any grant of clemency.

Pennsylvania created a constitutionally protected life and liberty interest in the finality of the life judgment statutorily mandated as a result of a lifelocked jury. That right vested when the court found the jury deadlocked and imposed a mandatory life sentence. Subjecting Petitioner

to a capital resentencing once that right has vested violated due process.

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