CASE NO. 01A300

IN THE SUPREME COURT OF THE UNITED STATES

DAVID ALLEN SATTAZAHN,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE PENNSYLVANIA SUPREME COURT

THIS IS A CAPITAL CASE

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Dated: December 17, 2001

-- THIS IS A 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. Is a capital defendant=s life and liberty interest in the imposition of a life sentence by operation of state law, following a capital sentencing hearing in which the sentencing jury fails to reach a unanimous verdict, violated when his first conviction is later overturned and the state seeks and obtains a death sentence on retrial?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

A. Relevant Procedural History 2

B. How the Federal Constitutional Question Was Preserved 7

I. Summary of Argument 7

II. 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. 10

III. The Capital Retrial of David Sattazahn after His First Capital Sentencing Proceeding Resulted in the Imposition of a Life Sentence by Operation of 42 PA. C.S. ' 9711(c)(1)(v) Violated His Due Process Life and Liberty Interest in the Sentence Mandated by Pennsylvania=s Death Penalty Statute. 25

CONCLUSION 33

TABLE OF AUTHORITIES

FEDERAL CASES

Arizona v. Rumsey, 467 U.S. 203 (1984) 11, 12, 13, 20, 21

Beck v. Alabama, 447 U.S. 625 (1980) 7

Buchanan v. Kentucky, 483 U.S. 402 (1987) 30

Bullington v. Missouri, 451 U.S. 430 (1981) 8, 11, 12, 13, 19-24

Burks v. United States, 437 U.S. 1 (1978) 22

Dupuy v. Butler, 837 F.2d 699 (5th Cir. 1988) 28

Evitts v. Lucey, 469 U.S. 387 (1985) 25

Fetterly v. Paskett, 997 F.2d 1295 (9th Cir. 1993) 25, 28

Ford v. Georgia, 498 U.S. 411 (1991) 7

Ford v. Wainwright, 447 U.S. 399 (1986) 25

Foster v. Delo, 39 F.3d 873 (8th Cir. 1994) 25, 28

Gardner v. Florida, 430 U.S. 349, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977) 29

Green v. United States, 355 U.S. 184 (1957) 22

Harris v. Blodgett, 853 F. Supp. 1239 (W.D. Wash. 1994), aff'd sub. nom., Harris v. Wood, 64 F.3d 1432 (9th Cir. 1995) 28

Hicks v. Oklahoma, 447 U.S. 343 (1980) 25, 28

Lockhart v. McCree, 476 U.S. 162 (1986) 31

Mills v. Maryland, 486 U.S. 367 (1988) 7

North Carolina v. Pearce, 395 U.S. 711 (1969) 11

Ohio Adult Parole Authority v. Woodard, 523 U.S. 272 (1998) 25, 28, 29

Poland v. Arizona, 476 U.S. 147 (1986) 11, 13, 20, 24

Rust v. Hopkins, 984 F.2d 1486 (8th Cir. 1993) 28

Schiro v. Farley, 510 U.S. 1215 (1994) 13, 23

Serfass v. United States, 420 U.S. 377 (1975) 22

Smalis v. Pennsylvania, 476 U.S. 140 (1986) 8, 13, 16-18

Toney v. Gammon, 79 F.3d 693 (8th Cir. 1996) 28

United States v. Jorn, 400 U.S. 470 (1971) 22

United States v. Martin Linen Supply Co., 430 U.S. 564 (1977) 15

United States v. Perez, 9 U.S. (Wheat) 579 (1824) 15

Walker v. Deeds, 50 F.3d 670 (9th Cir. 1995) 28

Wilkins v. Bowersox, 933 F. Supp. 1496 (W.D. Mo. 1996), aff'd, 145 F.3d 1006 (8th Cir. 1998) 28

Wolff v. McDonald, 418 U.S. 539 (1974) 28

STATE CASES

Brasfield v. State, 600 S.W.2d 288 (Tex. 1980) 13

Commonwealth v. Daidone, 453 Pa. Super. 550, 684 A.2d 179 (1997), *aff'd sub nom.*, Commonwealth v. Martorano, 559 Pa. 533, 741 A.2d 1221 (1999) 11

Commonwealth v. Jones, 546 Pa. 161, 683 A.2d 1181 (1996) 26, 27

Commonwealth v. Martorano, 535 Pa. 178, 634 A.2d 1063 (1993) 5, 11, 14, 18, 26

Commonwealth v. Maxwell, 505 Pa. 152, 477 A.2d 1309 (1984) 31

Commonwealth v. Sattazahn, 428 Pa. Super. 413, 631 A.2d 597 (1993).....3

Commonwealth v. Sattazahn, 537 Pa. 639, 644 A.2d 162 (1994) 4

Commonwealth v. Sattazahn, 539 Pa. 270, 652 A.2d 293 (1994) 4

Commonwealth v. Sattazahn, 547 Pa. 742, 690 A.2d 1162 (1997) 4

Commonwealth v. Sattazahn, 563 Pa. 533, 763 A.2d 359 (2000) ..... 1, *passim*

Sanne v. State, 609 S.W.2d 762 (Tex. 1980) 13

Ward v. State, 239 Ga. 205, 236 S.E.2d 365 (1977) 6

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PETITION FOR WRIT OF CERTIORARI TO THE PENNSYLVANIA SUPREME COURT

Petitioner, David Allen Sattazahn, respectfully prays that the Court issue its Writ of Certiorari to review the decision of the Supreme Court of Pennsylvania, rendered on November 27, 2000, which affirmed Mr. Sattazahn=s conviction and sentence of death.

OPINIONS BELOW

The opinion of the Supreme Court of Pennsylvania was filed on November 27, 2000, and is reported at Commonwealth v. Sattazahn, 563 Pa. 533, 763 A.2d 359 (2000). The opinion is attached hereto as Appendix A.

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) (attached as Appendix B).) On October 1, 2001, Justice Souter granted Petitioner an extension until December 17, 2001 to timely file a petition for a writ of certiorari. See Appendix C. This petition is timely filed. This Court=s jurisdiction is invoked under 28 U.S.C. ' 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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;

and 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 . . . .

It also involves a constitutional life and liberty interest arising out of 42 Pa. C.S. '' 9711(c)(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

A. Relevant Procedural History

On May 9, 1991, in a capital murder trial, David Allen Sattazahn was found guilty of first, second, and third degree murder, and related charges in a jury trial in the Berks County Court of Common Pleas, Commonwealth v. Sattazahn, No. 2194/89. The case proceeded to a capital sentencing hearing, at which the Commonwealth and the defense presented evidence and argument. The hearing was tried to completion, and the trial court instructed the jury on its sentencing options and obligations.

The court instructed the jury that it must return a death sentence if it unanimously determined that the aggravating circumstances proven by the Commonwealth beyond a reasonable doubt outweighed the mitigating circumstances proven by a preponderance of the evidence by the defense, and that it must return a sentence of life imprisonment in all other circumstances. 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. The sentencing jury did not unanimously agree as to the appropriate sentence. Consequently, the trial court discharged the jury and sentenced Mr. Sattazahn to life imprisonment, as is statutorily mandated under 42 Pa. C.S. ' 9711(c)(1)(v).

The Commonwealth could not appeal this adjudication of sentence, and Mr. Sattazahn did not appeal any issue relating to this legal determination of life over death.

On March 12, 1992, Mr. Sattazahn appealed to the Pennsylvania Superior Court, challenging his convictions. Commonwealth v. Sattazahn, No. 01024 PHILA (Pa. Super.). On July 30, 1993, the Superior Court reversed his convictions. 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 Mr. Sattazahn 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 Mr. Sattazahn=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 the appeal as having been improvidently granted. Commonwealth v. Sattazahn, 539 Pa. 270, 652 A.2d 293 (1994). The case was remanded to the Court of Common Pleas for a new trial.

On March 9, 1995, despite the statutorily mandated rejection of the death sentence and imposition of a life sentence after the 1991 capital sentencing hearing, the Commonwealth filed notice of intent to seek the death penalty on retrial. Four days later, Mr. Sattazahn filed a motion to prevent the Commonwealth from capitally retrying him. The Court of Common Pleas, per Judge Keller, held that neither the Constitutions of the Commonwealth of Pennsylvania or of the United States, nor Pennsylvania law, prevented Mr. Sattazahn Afrom 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). Mr. Sattazahn appealed this order to the Superior Court, No. 02274 PHILA 1995. On April 18, 1996, a split panel of the Court affirmed. Slip op. (Apr. 18, 1996) (with Brosky, J., dissenting), *rearg. denied*, June 21, 1996. 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).

In October of 1998, Mr. Sattazahn=s counsel of seven years, John Elder, was permitted to withdraw from the case, and John T. Adams was appointed as his new counsel. Mr. Adams reasserted and preserved Petitioner=s objections to capital retrial in an *in camera* pretrial proceeding on December 29, 1998. N.T. *In Camera* Pretrial Hearing, 12/29/98, at 3-4. The trial court again rejected Mr. Sattazahn=s objections to a capital retrial, and permitted the Commonwealth to capitally retry Petitioner before a death-qualified jury.

The retrial was conducted between January 12 and January 22, 1999. On January 22, the death-qualified jury found Mr. Sattazahn guilty of first degree murder and related charges. Later that same day, the court conducted a brief sentencing-stage hearing at which Athe remote risk of a death sentence upon retrial@ became a reality: Mr. Sattazahn was sentenced to death. The trial

court formally imposed sentence on February 16, 1999, and Mr. Sattazahn filed a notice of appeal on February 25, 1999.

Mr. Sattazahn challenged his conviction and sentence on a number of grounds, including those asserted herein. The Pennsylvania Association of Criminal Defense Lawyers filed an amicus brief in support of several of Petitioner=s arguments, including that the successive death-after-life reprosecution to which the Commonwealth had subjected Mr. Sattazahn violated the double jeopardy clause of the Fifth Amendment as well as Mr. Sattazahn=s life and liberty interest in the final adjudication of life without parole that had been rendered in the sentencing hearing in his first trial. 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).[1] The Court relied upon its 1993 per curiam decision in Commonwealth v. Martorano, 535 Pa. 178, 634 A.2d 1063 (1993), to reject Petitioner=s double jeopardy claim. Sattazahn, 563 Pa. at 545-49, 763 A.2d at 366-68. The Court also relied upon Martorano to summarily reject Petitioner=s due process claim. Id. at 549, 763 A.2d at 368. Although the Court professed that the due process claim had been raised as a state law issue, it opined that APennsylvania=s constitutional analysis of these issues is the same as the federal approach.@ Id.

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).

[1] Three Justices dissented on the grounds that the capital retrial unconstitutionally burdened Petitioner=s state constitutional right to appeal.

The Pennsylvania Supreme Court also normally would have independently reviewed the arbitrariness and disproportionality of the death-after-life verdict imposed in this case. See 42 Pa. C.S. ' 9711(h)(3)(i) (mandatory review of the entire record for Apassion, prejudice or any other arbitrary factor@); 42 Pa. C.S. ' 9711(h)(3)(iii) (court must reverse if Athe sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the circumstances of the crime and the character and record of the defendant@). However, the Pennsylvania Supreme Court failed to conduct this review in this case. The state court=s opinion contains no mention of any review for passion, prejudice, or arbitrary factor and the state legislature repealed comparative proportionality review in the interim period between Mr. Sattazahn=s life sentence and his subsequent capital retrial.[2]

[2] Had such a review been conducted, the outcome is obvious. See Ward v. State, 239 Ga. 205, 208, 236 S.E.2d 365, 369 (1977) (ATo affirm the death penalty we must find that the death penalty is not disproportionate to the penalty imposed in similar cases. That is impossible here because we have an identical case involving the same defendant in which the death penalty was not imposed. The same defendant was tried previously on the same charges and the jury imposed a life sentence. Therefore the death sentence in the case under review is obviously disproportionate to the life sentence previously imposed against the same defendant in the same case. Accordingly, the law requires us to vacate the death sentence and direct the imposition of a life sentence.@).

B. How the Federal Constitutional Question Was Preserved

The constitutional issues presented herein were preserved when Mr. Sattazahn raised them: (1) in his pre-trial appeal to the Pennsylvania Superior Court and subsequent petition for allowance of appeal seeking discretionary review by the Pennsylvania Supreme Court; and (2) in his direct appeal to the Pennsylvania Supreme Court following imposition of his death-after-life sentence. The questions were addressed either explicitly by the Superior Court of Pennsylvania pre-trial opinion to which the Supreme Court of Pennsylvania denied allocatur or in the Supreme Court of Pennsylvania=s opinion affirming Mr. Sattazahn=s death sentence on direct review.[3]

REASONS FOR GRANTING THE WRIT

1. Summary of Argument

David Sattazahn was tried and convicted of first degree murder. After his conviction, his case proceeded -- per Pennsylvania law -- to a second evidentiary proceeding. The jury was unable to reach a unanimous verdict, and he was sentenced to life imprisonment as a matter of law. Because this jury deadlock actually resulted in the imposition of a sentence, the case fundamentally differs from those in which a jury deadlocks on the question of guilt of criminal charges. In the former, the trial proceedings are finally determined; in the latter, the Ahung jury@

[3] A federal question is presented for review by this Court when that question was presented to and/or addressed by the state=s highest court. E.g., Mills v. Maryland, 486 U.S. 367, 371 (1988) (Ain view of the Maryland court=s review on the merits, our jurisdiction over the federal constitutional question is established@); Beck v. Alabama, 447 U.S. 625, 630-31 n.6 (1980) (jurisdiction established where capital defendant had Apresent[ed] his claim in some fashion to the [state] Supreme Court@); Ford v. Georgia, 498 U.S. 411 (1991) (equal protection claim presented, although issue raised and decided in state court as sixth amendment error).

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 Ahung 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.

A State violates the Double Jeopardy Clause of the Fifth Amendment when it subjects a defendant who received a life sentence in his original capital sentencing trial to a capital retrial and death sentence after reversal of his original conviction. Bullington v. Missouri, 451 U.S. 430 (1981). Here, the State presented evidence sufficient to convince some -- but not other -- jurors that death was the appropriate sentence. 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. Smalis v. Pennsylvania, 476 U.S. 140 (1986). David Sattazahn was sentenced to death after obtaining a life sentence when initially placed in jeopardy. Subjecting him to a successive capital prosecutions, including twice facing the hazards of a capital sentencing hearing, violated double jeopardy.

David Sattazahn is one of four defendants in less than a decade to have won statutory acquittals of death under 42 Pa. C.S. ' 9711(c)(1)(v) and overturned constitutionally infirm convictions only to face second jeopardy of death on retrial. This rising tide of death-after-life trials demonstrates that Pennsylvania has disregarded this Court=s messages in Smalis and Bullington on this important and recurring question of federal constitutional law. This Court should grant certiorari, vacate Petitioner=s death sentence, and remand to the Pennsylvania

Supreme Court to comply with Smalis and Bullington, or alternatively grant the writ to affirmatively 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. 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. Pennsylvania was not constitutionally required to select this particular capital sentencing scheme, but having done so, due process ensures that Pennsylvania may not arbitrarily deny David Sattazahn the life sentence that resulted from this process. Pennsylvania cannot deny David Sattazahn the life sentence it was required by law to impose as a product of his initial capital sentencing trial, without violating his life and liberty interest in the capital sentencing process mandated by state law. Nor, once the first sentencing proceeding rendered him death ineligible, could it try him before a death-qualified jury from which qualified, impartial jurors had been improperly excused for cause.

This Court should grant certiorari to review this important and increasingly occurring question of federal constitutional law on which this Court has not expressly spoken. In so doing, this Court should reverse David Sattazahn=s death sentence, and grant him the non-capital retrial to which his acquittal of death and the vacation of his unconstitutional first conviction entitle him.

2. 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 elected to be tried by jury in his original trial in 1991. After he was convicted of first degree murder, the case proceeded -- per Pennsylvania law -- to a second evidentiary proceeding. In that proceeding, the Commonwealth introduced evidence of a single aggravating circumstance,[4] and Mr. Sattazahn presented mitigating evidence of his lack of any significant history of prior criminal convictions and his age at the time of the crime. Commonwealth v. Sattazahn, 563 Pa. 533, 539, 763 A.2d 359, 362 (2000). The Commonwealth was required to prove its aggravating circumstance beyond a reasonable doubt. Mr. Sattazahn was required to prove mitigation by a preponderance of the evidence. 42 Pa. C.S. ' 9711(c)(iii).

Following the presentation of evidence and argument by both sides, the trial court instructed the jury that it must return a death sentence if it unanimously found one or more aggravating circumstances and no mitigating circumstances, or aggravating circumstance(s) that outweighed the mitigating circumstances proven by the defense. The jury was further instructed that, in all other circumstances, it must return a sentence of life imprisonment. The trial court also told the jury that the court would impose a sentence of life imprisonment if the jury could not reach a unanimous verdict of either life or death. The sentencing jury was not unanimous as to the appropriate sentence. Consequently, as the jury had been instructed, the trial court sentenced Mr. Sattazahn to life imprisonment as a matter of law, as mandated under 42 Pa. C.S. ' 9711(c)(1)(v).

[4] That circumstance was that the defendant had committed the killing during the perpetration of a felony (robbery). 42 Pa. C.S. ' 9711(d)(6).

Mr. Sattazahn successfully appealed his conviction. However, on retrial, the Court of Common Pleas -- and the Superior Court on interlocutory appeal -- permitted the prosecution to again try him capitally pursuant to 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.[5] The Commonwealth marshaled new evidence in aggravation in the second trial,[6] and, with this new evidence, Mr. Sattazahn was sentenced to death.

On direct appeal, the Pennsylvania Supreme Court, in a 4-3 decision, 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.

The state court, tracking its analysis of double jeopardy in Martorano, narrowly interpreted this Court=s double jeopardy rulings as applying only where there has been a prior factfinding by the ultimate sentencer that resulted in an Aimplied 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,

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[5] Ironically, the death-after-life aspect of the Martorano per curiam decision **B** which was never briefed by the parties **B** turned out to be irrelevant to the disposition of that case. The state courts ultimately barred any reprosecution of the two defendants **B** let alone capital reprosecution **B** and freed them on *state* double jeopardy grounds because of extensive intentional misconduct by the prosecution in the first trial. Commonwealth v. Daidone, 453 Pa. Super. 550, 684 A.2d 179 (1997), *aff=d sub nom.*, Commonwealth v. Martorano, 559 Pa. 533, 741 A.2d 1221 (1999).

[6] The additional aggravating circumstance -- that Mr. Sattazahn had Aa significant history of felony convictions involving the use or threat of violence to the person@ -- was based upon convictions obtained *after* the first capital trial for crimes committed *after* the date of the homicide in this case.

> 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. The state court attempted to distinguish Bullington v. Missouri, 451 U.S. 430 (1981), on the grounds that the unanimous jury verdict in that case Aimpliedly decided that the prosecution had not proved its case for death,@ whereas the non-unanimous Ahung jury@ in this case did not itself reach a verdict. Id. at 546, 763 A.2d at 366. It then attempted to distinguish Arizona v. Rumsey, 467 U.S. 203 (1984), on the grounds that the 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 **B** the court maintained **B** Athe imposition of a life sentence by the trial judge [did not] operate as an acquittal.@ Id. at 548, 763 A.2d at 367.

The state court anchored its no-acquittal reasoning on the fact that A[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, Athe 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.

As discussed below, the state court decided this important issue of federal constitutional law in a manner that conflicts with numerous relevant decisions of this Court **B** including at least

one decision that overturned the Pennsylvania Supreme Court for a similar misinterpretation of what constitutes a judicial acquittal for purposes of the Double Jeopardy Clause.[7]

A State violates the Double Jeopardy Clause of the Fifth Amendment when it subjects a defendant who received a life sentence in his original capital sentencing trial to a capital retrial and death sentence after reversal of his original conviction. Bullington v. Missouri, 451 U.S. 430 (1981) (double jeopardy where jury had sentenced capital defendant to life imprisonment after trial-like capital sentencing proceeding); Arizona v. Rumsey, 467 U.S. 203 (1984) (double jeopardy where, after trial-like capital sentencing proceeding, trial judge sentenced capital defendant to life based upon erroneous view that the evidence did not support any aggravating circumstances). This is because when a capital defendant receives a life sentence after a Acapital sentencing proceeding [that] >was itself a trial on the issue of punishment,= 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. 1215 (1994) (quoting and citing Bullington).[8]

Pennsylvania violated David Sattazahn=s double jeopardy rights when it capitally retried him and sentenced him to death after he had been subjected to a trial-trial capital sentencing proceeding in his initial trial and been sentenced to life imprisonment. For double jeopardy purposes, it is of no moment that his sentencing trial concluded with a statutorily mandated

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[7] See Smalis v. Pennsylvania, 476 U.S. 140 (1986) (reversing decision of the Pennsylvania Supreme Court that a demurrer granted by the trial court as a matter of law at the close of the prosecution=s case-in-chief did not constitute a factual determination of guilt or innocence and hence was not the functional equivalent of an acquittal).

[8] See also Sanne v. State, 609 S.W.2d 762, 766-67 (Tex. 1980) (under federal double jeopardy clause, defendant originally sentenced to life imprisonment may not be sentenced to death upon retrial); Brasfield v. State, 600 S.W.2d 288, 298 (Tex. 1980) (same); cf. Poland v. Arizona, 476 U.S. 147 (1986) (no double jeopardy where trial judge sentenced capital defendant to death based upon finding of a single aggravating circumstance that was not supported by the evidence when death sentence could have been supported by another aggravating circumstance that the trial court erroneously believed was not present; double jeopardy would have attached if court=s error had resulted in a life sentence).

directed verdict of life imprisonment after the jury had failed to reach a unanimous verdict, as opposed to by a verdict by a unanimous jury or by a judge who was assigned the task of finding and weighing aggravating and mitigating circumstances.

This Court=s precedents make clear that double jeopardy attaches whenever a capital defendant is subjected to trial-like capital sentencing proceedings, tried to completion, and the sentencing proceedings terminate with the imposition of a sentence other than death. Bullington, Rumsey, *supra*.

The Pennsylvania Supreme Court=s holdings in Sattazahn and Martorano that double jeopardy does not protect a capital defendant who has been sentenced to life after a jury sentencing proceeding unless the defendant=s life sentence was the product of a unanimous jury verdict are untenable. Its view is that double jeopardy cannot attach when a life sentence is not imposed Aby a unanimous jury verdict, but by the trial judge following the jury=s deadlock on penalty.@ Martorano, 535 Pa. at 188, 634 A.2d at 1067-68; Sattazahn, 563 Pa. at 547-49, 763 A.2d at 367-68. This cramped interpretation of the Fifth Amendment elevates form over substance and badly misapprehends this Court=s decisions on double jeopardy.

Pennsylvania=s erroneous double jeopardy decisions fail to acknowledge the surpassing importance of the trial-like nature of the state=s capital sentencing proceeding and the outcome that exposure to initial jeopardy produces. Instead, the decisions rest on fundamental misconceptions as to the consequences of a deadlocked capital sentencing jury and as to what constitutes an actual or implied Aacquittal@ of a death sentence. Under Pennsylvania=s capital sentencing scheme, a non-unanimous capital sentencing jury is not a Ahung jury@ that prematurely terminates the trial proceedings without any final resolution of the case. The jury is discharged, but this does not produce a mistrial. On the contrary, the legislature specifically

envisioned that a capital sentencing trial might produce a divided jury that could not agree on the appropriate sentence. It dealt with that possibility by giving the trial judge discretion to discharge the jury and, upon discharge, requiring the court to impose a life sentence as a matter of law.

This distinction makes a difference. The typical hung jury produces a mistrial that does not determine the outcome of the trial. This is not an acquittal and does not terminate the case. The typical hung jury produces no legal judgment and no jeopardy bar attaches. United States v. Perez, 9 U.S. (Wheat) 579, 580 (1824). However, when a trial court enters a directed verdict for the defendant after discharging a deadlocked jury, that directed verdict constitutes a judgment of acquittal that Aact[s] to terminate a trial in which jeopardy has long since attached.@ United States v. Martin Linen Supply Co., 430 U.S. 564, 570 (1977). Pennsylvania law mandates that, if the jury cannot reach a unanimous verdict after consideration of the evidence on the issue of whether the defendant should live or die, Athe court shall sentence the defendant to life imprisonment.@ 42 Pa. C.S. ' 9711(c)(v). It necessarily follows that:

> such a judgment of acquittal plainly concludes a pending prosecution in which jeopardy has attached, following the introduction at trial of evidence on the general issue. In that circumstance we hold that >although retrial is sometimes permissible after a mistrial is declared but no verdict or judgment has been entered, the verdict of acquittal foreclosed retrial and thus barred appellate review.:

Martin Linen, 430 U.S. at 576 (quoting United States v. Wilson, 420 U.S. 332, 348 (1975)).

The discharge of a non-unanimous capital-sentencing jury in Pennsylvania does not produce a mistrial without final judgment. Quite the opposite. It produces an unappealable directed verdict of life imprisonment that terminates the capital sentencing trial. This judicially imposed life sentence is an acquittal of death that triggers double jeopardy protections.

The Pennsylvania double jeopardy decisions **B** including the decision in this case **B** compound their misunderstanding of the consequences of jury deadlock by repeating a twenty-year-old error concerning the implications of judicial acquittals entered as a matter of law. The Pennsylvania Supreme Court clearly believes that a factual acquittal of death is necessary for double jeopardy to attach and that this requires express factfinding in favor of life.[9] As a result, it also believes that the issuance of the statutorily mandated Adefault judgment@ for life following discharge of a non-unanimous jury Ais not sufficient to establish legal entitlement to a life sentence@ because the judge who imposed the life sentence has Ama[de] no findings and resolve[d] no factual matter.@ Sattazahn, 563 Pa. at 548, 763 A.2d at 367; Martorano, 535 Pa. at 194, 634 A.2d at 1070.

This position virtually recapitulates the error the court previously made in Smalis v. Pennsylvania, 476 U.S. 140, 142-43 (1986). In Smalis, the Pennsylvania Supreme Court had held that the grant of a demurrer as a matter of law following the prosecution=s case-in-chief was

[9] Such a requirement is, of course, absurd. Where the state has the burden of proving guilt, a defendant need not establish factual innocence to be entitled to an acquittal. Where the state has the burden of persuasion on the issue of death, a defendant need only show that the state has failed to carry that burden by failing to persuade. The court=s directed verdict of life is simply a declaration that the prosecution has failed to meet the burden of persuasion necessary for it to impose death. Where the burden of persuasion requires a unanimous decision for death, the failure to persuade all jurors to vote for death is an acquittal of death.

not an acquittal warranting double jeopardy protection. It wrote:

> In deciding whether to grant a demurrer, the court does not determine whether or not the defendant is guilty on such evidence, but determines whether the evidence, if credited by the jury, is legally sufficient to warrant the conclusion that the defendant is guilty beyond a reasonable doubt. . . . Hence, by definition, a demurrer is not a factual determination. . . . [T]he question before the trial judge in ruling on a demurrer remains purely one of law. We conclude, therefore, that a demurrer is not the functional equivalent of an acquittal . . . .

Smalis, 476 U.S. at 143 (quoting Commonwealth v. Zoller, 507 Pa. 344, 357-58, 490 A.2d 394, 401 (1985)).[10]

This Court flatly disagreed, noting that Athe Pennsylvania Supreme Court=s characterization, as a matter of double jeopardy law, of an order granting a demurrer is not binding on us.@ Smalis, 476 U.S. at 144 n.5. While accepting Pennsylvania=s definition of what the trial judge must consider in granting a demurrer, this court held that the resulting ruling, Athat as a matter of law the State=s evidence is insufficient to establish his factual guilt[,] is an acquittal under the Double Jeopardy Clause.@ Id. at 144.

[10] Zoller and Smolis were consolidated on appeal to the Pennsylvania Supreme Court, and this Court granted certiorari in Smolis.

Even accepting Pennsylvania=s definition of what the trial judge must consider before imposing a life sentence as a matter of law,[11] however, it is clear that double jeopardy attached to Petitioner=s initial capital sentencing trial. AUnder 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.@ Sattazahn, 563 Pa. at 548, 763 A.2d at 367. The jury was deadlocked. The judge imposed a directed verdict of life. Smalis presages the double jeopardy consequences of that ruling: the entry of a life sentence is an acquittal of death. Smalis, 476 U.S. at 145 n.8 (AIn [Arizona v.] Rumsey, a trial judge sitting as a sentencer entered an

[11] Obviously, the trial court is not required to make any specific factfindings as to the existence of aggravating or mitigating circumstances or their relative weight before imposing a life sentence. That notwithstanding, the Pennsylvania Supreme Court is simply wrong that the trial court has not -- at least implicitly -- rendered an actual factfinding of acquittal. All the defense must do to establish legal entitlement to a life sentence is to prove a simple negative -- the absence of a finding that death has been proven. Under Pennsylvania law, a jury=s failure to unanimously agree that death should be imposed amounts to a decision, by operation of law, that death is *not* the appropriate punishment. Pennsylvania law explicitly states that death is an appropriate sentence in only two, and only two, scenarios: (1) when the sentencing jury unanimously agrees both that the state has proven one or more aggravating circumstances and that the defendant has proven no mitigating circumstances; and (2) when the sentencing jury unanimously agrees that the aggravating circumstance(s) that all jurors have found to exist outweigh the combination of mitigating circumstances that any of the jurors have found to exist. When this does not occur, either because the weighing process has produced a contrary outcome or because the jurors have not unanimously agreed on an outcome, the defendant is legally entitled to a life sentence, which the court is statutorily required to impose. All the trial needs to find is that the jury is deadlocked. The consequences of that deadlock B that the Commonwealth has failed to muster evidence sufficient to convince the jury to impose death -- mandates Aenter[ing] an >acquittal,= i.e., a life sentence.@ Smalis, 476 U.S. at 145 n.8

›acquittal,= i.e., a life sentence. . . . The Court held that the Double Jeopardy Clause barred a second sentencing hearing.@).

Had Pennsylvania simply followed this Court=s guidance in Smalis, there would be no case or controversy here. Unfortunately, it did not. Instead, the decisions of Pennsylvania=s supreme court assert that double jeopardy attached in Bullington only because the acquittal of death by the sentencing jury in that case was unanimous. E.g., Martorano, 535 Pa. at 191, 634 A.2d at 1061 (Bullington Aheld that, where the first jury returns a unanimous verdict of life imprisonment, the Double Jeopardy Clause of the Fifth Amendment bars imposition of the death penalty upon retrial.@). They assert that double jeopardy attached in Rumsey because of the nature of the trial court=s factfinding, rather than the nature of the trial court=s judgment.[12] But this Court has *never* read either case that way. This Court=s conception of an Aacquittal@ of death

[12] The Pennsylvania Supreme Court badly misreads Rumsey as requiring a specific factfinding of aggravating and mitigating circumstances that could legally support no sentence other than life before the resulting judgment could amount to an acquittal on the merits. But this Court said no such thing. It said, Aas required by state law, the court then *entered judgment in respondent=s favor* on the issue of death. That judgment . . . amounts to an acquittal on the merits and, as such, bars any retrial of the appropriateness of the death penalty.@ Justice O=Connor indicated in a subordinate clause that the judgment in that particular case had been Abased on findings sufficient to establish legal entitlement to the life sentence,@ but did not say -- as Pennsylvania erroneously contends -- that the judgment could not amount to an acquittal on the merits *unless* it was based on findings sufficient to establish legal entitlement to the life sentence. This Court has consistently held that any judgment in the defendant=s favor -- even one that is based on erroneous factfinding that would be insufficient to establish legal entitlement to a life sentence or guilt-stage acquittal -- implicates double jeopardy and bars retrial.

is the imposition of a life sentence after a trial-like proceeding tried to completion.

Bullington hinged on the procedural requirements that made Missouri=s capital sentencing proceeding trial-like, 451 U.S. at 433-35, and repeatedly stressed that the binary choice of sentences resulting from those proceedings -- either life or death[13] -- would determine whether the prosecution had proven its case for death, id. at 444-45. Moreover, the Court expressly included among its description of the Asubstantive standards@ and Aprocedural protections@ that qualified Missouri life sentences for double jeopardy protection that A[i]f the jury is unable to agree, the defendant receives the alternative sentence of life imprisonment.@ Id. at 435. If juror unanimity had been a prerequisite to double jeopardy, this Court would not have mentioned the life sentence resulting from a non-unanimous jury, would have specifically disclaimed double jeopardy protections for those sentences, or would have reserved that question.

Thus, as this Court explained in Rumsey, Athe Double Jeopardy Clause applies to Missouri=s *capital sentencing proceeding*@ -- not just to a unanimous jury verdict -- and bars imposition of the death penalty on retrial whenever Aan initial conviction, set aside on appeal, *has resulted in rejection of the death sentence*.@ Rumsey, 467 U.S. at 209. It similarly applies to Arizona=s capital sentencing proceeding, id. at 209-10; Poland v. Arizona, 476 U.S. 147, 154 n.4 (1986), and -- as discussed below -- to Pennsylvania=s.

The characteristics of Pennsylvania=s Acapital sentencing proceeding [are] indistinguishable for double jeopardy purposes from the capital sentencing proceeding[s] in Missouri@ and Arizona. Rumsey, 467 U.S. at 209.

! The sentencer is required to choose between two options: in Arizona, death or

[13] Id. at 432 (AMissouri law provides two, and only two, possible sentences for a defendant convicted of capital murder: (a) death, or (b) life imprisonment without eligibility for probation or parole for 50 years.@); id. at 440 (ABullington=s Missouri jury was given -- and under the State=s statutes could be given -- only two choices, death or life imprisonment.@).

life without possibility of parole for 25 years; in Missouri, life without possibility of release for 50 years; in Pennsylvania, life without possibility of parole.

- The sentencer must make this decision guided by detailed statutory standards defining aggravating and mitigating circumstances, based on evidence introduced in a separate proceeding that formally resembles a trial.
- The sentencing statute requires proof of aggravating circumstances beyond a reasonable doubt, pursuant to procedures governing the admissibility of evidence.
- The statute identifies those circumstances in which a death sentence may be imposed and when a life sentence may be imposed.

Rumsey, 467 U.S. at 209-10; Bullington, 451 U.S. at 432-35; 42 Pa. C.S. ' 9711; 42 Pa. C.S. ' 9756(c); 61 Pa. C.S. ' 331.21. AFor these reasons, when the Missouri@ or Arizona, or Pennsylvania Asentencer imposes a sentence of life imprisonment in a capital sentencing proceeding, it has determined that the prosecution has failed to prove its case.@ Rumsey, 467 U.S. at 209. Because Athe anxiety and ordeal suffered by a defendant in Missouri=s@ and Arizona=s and Pennsylvania=s Acapital sentencing proceeding are the equal of those suffered in a trial on the issue of guilt, . . . the Double Jeopardy Clause prohibits the State from resentencing the defendant to death after the sentencer has in effect acquitted the defendant of that penalty.@ Id.

The Pennsylvania sentencing jury=s discretion is even more circumscribed than is that of a Missouri sentencing jury: the Missouri jury Ais instructed that it is not compelled to impose the death penalty, even if it decides that a sufficient aggravating circumstance or circumstances exist and that it or they are not outweighed by any mitigating circumstance or circumstances,@ Bullington, 451 U.S. at 434-35; while the Pennsylvania capital sentencer is instructed that it *must* impose a death sentence whenever it unanimously finds the existence of one or more aggravating circumstances that outweigh the mitigating circumstances present in the case, 42 Pa. C.S.

' 9711(c)(1). However, like Missouri, any jury decision to impose the death penalty must be unanimous; and if the jury cannot agree on a sentence, the defendant is sentenced to life imprisonment by operation of law. Bullington, 451 U.S. at 434-35; 42 Pa. C.S. ' 9711(c)(1)(iv)-(v). AThat the sentencer in [Pennsylvania when a jury deadlocks] is the trial judge rather than the jury does not render the sentencing proceeding any less like a trial,@ nor does the fact that Ano appeal need be taken if life imprisonment is imposed.@ Rumsey, 467 U.S. at 210.

> In short, a sentence imposed after a completed [Pennsylvania] capital sentencing hearing is a judgment like the sentence at issue in Bullington v. Missouri, which this Court held triggers the protections of the Double Jeopardy Clause.
>
> The double jeopardy principle relevant to respondent=s case is the same as that invoked in Bullington: an acquittal on the merits by the sole decisionmaker in the proceeding is final and bars retrial on the same charge. Application of the Bullington principle renders respondent=s death sentence a violation of the Double Jeopardy Clause because respondent=s initial sentence of life imprisonment was undoubtedly an acquittal on the merits of the central issue in the proceeding -- whether death was the appropriate punishment for respondent=s offense. . . . [A]s required by state law, the court then entered judgment in respondent=s favor on the issue of death. That judgment, based on findings sufficient to establish legal entitlement to the life sentence, amounts to an acquittal on the merits and, as such, bars any retrial of the appropriateness of the death penalty.

Id. at 210-11; see Green v. United States, 355 U.S. 184, 190-91 (1957) (conviction of defendant for second degree murder was an implied acquittal of accompanying charges of first degree murder, and double jeopardy barred retrial for first degree murder when conviction was reversed on appeal).

Here, David Sattazahn=s legal entitlement to the life sentence he received in his first capital sentencing proceeding is beyond question. The state presented evidence that convinced some jurors and not others. It did not present enough good evidence to obtain a death sentence. As a result, the trial court sentenced Mr. Sattazahn to life. The historic policies underlying the Double Jeopardy Clause make clear why double jeopardy attaches under these circumstances:

> The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding. *This is central to the objective of the prohibition against successive trials.* The Clause does not allow Athe State . . . to make repeated attempts to convict an individual for an alleged offense,@ since A[t]he constitutional prohibition against >double jeopardy= was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense.@ Green v. United States, 355 U.S. 184, 187 (1957); see Serfass v. United States, 420 U.S. 377, 387-388 (1975); United States v. Jorn, 400 U.S. 470, 479 (1971).

Burks v. United States, 437 U.S. 1, 11 (1978) (footnote and parallel citations omitted).

In Bullington, this Court indicated that double jeopardy entitled the prosecution to Aone fair opportunity@ to obtain a capital conviction, Bullington, 451 U.S. at 442 (quoting Burks), but only one opportunity. The Court declared:

> A verdict of acquittal on the issue of guilt or innocence is, of course, absolutely final. The values that underlie this principle . . . are equally applicable when a jury has rejected the State's claim that the defendant deserves to die[. **&**] . . . The "embarrassment, expense and ordeal" and the "anxiety and insecurity" faced by a defendant at the penalty phase of a Missouri capital murder trial surely are at least equivalent to that faced by any defendant at the guilt phase of a criminal trial. The "unacceptably high risk that the [prosecution], with its superior resources, would wear down a defendant," id., at 130, 101 S.Ct., at 433, thereby leading to an erroneously imposed death sentence, would exist if the State were to have a further opportunity to convince a jury to impose the ultimate punishment.

Bullington, 451 U.S. at 445.

This was the law at the time of Pennsylvania=s per curiam decision in Martorano. However, if the Pennsylvania courts entertained any doubt as to what Bullington really meant, this Court=s decision three months later in Schiro v. Farley, 510 U.S. 222 (1994) should have eliminated it. Under double jeopardy, this Court wrote, Athe primary evil to be guarded against is successive prosecutions: >[T]he prohibition against multiple trials is the controlling constitutional principle.=@ Id. at 230 (quoting United States v. DiFrancesco, 449 U.S. 117, 132 (1980)). Finding that a Acapital sentencing proceeding >[is] itself a trial on the issue of

punishment,= requiring a defendant to submit to a second, identical proceeding [is] tantamount to permitting a second prosecution of an acquitted defendant.@ Id. at 232.

The capital sentencing jury in David Sattazahn=s first trial did not unanimously agree that he should be sentenced to death. Under the Pennsylvania capital sentencing statute, this required the imposition of a life sentence as a matter of law. His capital retrial after successfully challenging his unconstitutional conviction Awas tantamount to permitting a second prosecution of an acquitted defendant@ and was barred by double jeopardy.

> Since we necessarily afford absolute finality to a jury's verdict of acquittal -- no matter how erroneous its decision -- it is difficult to conceive how society has any greater interest in retrying a defendant when, on review, it is decided as a matter of law that the jury could not properly have returned a verdict of guilty.

Bullington, 451 U.S. at 442-43 (quoting Burks, 437 U.S. at 16); Poland v. Arizona, 476 U.S. at 153 n.2 (same).

David Sattazahn was sentenced to death after obtaining a life sentence when initially placed in jeopardy. Subjecting him to a successive capital prosecutions, including twice facing the hazards of a capital sentencing hearing, violated double jeopardy. His death sentence must be vacated, and Pennsylvania forever barred from seeking death in his case.

However, this double jeopardy problem is no longer an isolated one. David Sattazahn is one of four defendants in less than a decade to have won statutory acquittals of death under 42 Pa. C.S. ' 9711(c)(1)(v) and overturned constitutionally infirm convictions only to face second jeopardy of death on retrial. In addition to Mr. Sattazahn, there have been Albert Daidone, Raymond Martorano, and Orlando Maisonet.[14] This rising tide of death-after-life trials demonstrates that Pennsylvania has disregarded this Court=s messages in Smallis and Bullington.

[14] Commonwealth v. Maisonet, Nov. Term, 1990, Nos. 3483-3486 (Phila. C.P., Crim. Div.). This case is pending on retrial.

This Court should grant certiorari, vacate Petitioner=s death sentence, and remand to the Pennsylvania Supreme Court to comply with Smallis and Bullington, or alternatively grant the writ to affirmatively declare that a life sentence imposed by operation of law following a capital sentencing hearing that has been tried to completion implicates double jeopardy.

3. The Capital Retrial of David Sattazahn after His First Capital Sentencing Proceeding Resulted in the Imposition of a Life Sentence by Operation of 42 PA. C.S. ' 9711(c)(1)(v) Violated His Due Process Life and Liberty Interest in the Sentence Mandated by Pennsylvania=s Death Penalty Statute.

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. Evitts v. Lucey, 469 U.S. 387, 393 (1985) (due process interest in state created right to direct appeal); see Hicks v. Oklahoma, 447 U.S. 343, 346 (1980) (liberty interest in state-created capital sentencing procedures); Ford v. Wainwright, 447 U.S. 399, 427-31 (1986) (O=Connor, J., concurring) (liberty interest in state-created right to proceedings to determine competency to be executed); Ohio Adult Parole Authority v. Woodard, 523 U.S. 272, 288-89 (1998) (O=Connor, J, with Souter, Ginsburg & Breyer, JJ., concurring) (life interest in state-created right to capital clemency proceedings); id. at 291-92 (Stevens, J., concurring) (life interest in commutation procedures Aabundantly clear@). Although the right to the particular procedure is established by state law, the violation of the life and liberty interest it creates is governed by *federal* constitutional law. Hicks, 447 U.S. at 346; Ford, 477 U.S. at 428-29; see Evitts, 469 U.S. at 393 (state procedures employed Aas >an integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant=@ must comport with due process).[15]

[15] See also Fetterly v. Paskett, 997 F.2d at 1300 (AThere is, of course, nothing in the Constitution of the United States that requires Idaho=s legislature to approach [capital sentencing] as it has done . . . . However, the

failure of a state to abide by its own statutory commands may implicate a liberty interest protected by the Fourteenth Amendment against arbitrary deprivation by a state.@); Foster v. Delo, 39 F.3d 873, 882 (8th Cir. 1994) (AWhere a state creates a right, such as a defendant=s right to a review of his sentence, the Fourteenth Amendment of course entitles him to procedures to ensure that the right is not arbitrarily denied.@).

The Pennsylvania capital sentencing code unequivocally establishes when a defendant on trial for his life may be sentenced to death and when he must be sentenced to life imprisonment. 42 Pa. C.S. ' 9711(c)(1)(iv)-(v). The Pennsylvania Supreme Court has explained:

> Subsection (c)(1)(iv) of our death penalty statute provides that a jury must impose a sentence of death if they unanimously find at least one aggravating circumstance and no mitigating circumstances or unanimously find one or more aggravating circumstances which outweigh any mitigating circumstances, and that in all other cases, the verdict must be a sentence of life imprisonment. 42 Pa.S.C. ' 9711(c)(1)(iv).

Commonwealth v. Jones, 546 Pa. 161, 198-99, 683 A.2d 1181, 1199 (1996).

Where the sentencing proceeding is tried to completion, a judgment of sentence must be imposed in accordance with the jury=s unanimous verdict, or, in the absence of a verdict, by operation of law under 42 Pa. S.C. ' 9711(c)(1)(v). The Pennsylvania Supreme Court has been unequivocal as to the outcome of such a proceeding: A***subsection (c)(1)(v) . . . mandates that a court impose a life sentence where the jury is unable to reach a unanimous agreement***.@ Jones, 546 Pa. at 199, 683 A.2d at 1199. The Court was equally clear in this case:

> AUnder 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***.@

Commonwealth v. Sattazahn, 563 Pa. at 548, 763 A.2d at 367 (quoting Commonwealth v. Martorano, 535 Pa. 178, 194, 634 A.2d 1063, 1070 (1993)); id. at 539, 763 A.2d at 362 (explaining that trial court had Aentered a *mandatory* life sentence@).[16]

[16] See also Jones, 546 Pa. at 198, 683 A.2d at 1199 (AWhere the jury is unable to reach a unanimous agreement as to the sentence, the court must impose a sentence of life.); Martorano, 535 Pa. 178, 198, 634 A.2d 1063, 1072 (1993) ("In the absence of a unanimous verdict, subsection (v) provides for the discharge of the jury and imposition of a life sentence by the court.").

Furthermore, Pennsylvania law and trial practice requires that the jury be aware at the time of its sentencing deliberations of the legal consequences of a deadlock as to sentence. The sentencing statute requires the trial court *to instruct the jury* as to the legal consequences of its failure to reach a verdict, 42 PA. C.S. ' 9711(c)(1) (ABefore 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.@), and juries are so instructed; e.g. Jones, 546 Pa. at 199, 683 A.2d at 1199 (example of this instruction). The Pennsylvania Rules of Criminal Procedure mandate that the trial court also provide the capital sentencing jury a verdict slip that specifically explains that ATHE JUDGE WILL SENTENCE THE DEFENDANT TO LIFE IMPRISONMENT@ if the jury cannot reach a unanimous sentencing verdict. PA. R. CRIM. P. 358A (subsequently renumbered as PA. R. CRIM. P. 807).[17] As a result, sentencing juries know

[17] The pertinent section of the verdict slip reads as follows:

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

from the outset of deliberations that by disagreeing on the applicable sentence, the defendant will receive a life sentence.

Thus, there can be no question that the discharge of a non-unanimous capital sentencing jury under 42 PA. C.S. ' 9711(c)(1)(v) actually produces a sentence: it does so *as a matter of law*. The procedures are statutorily delineated; the outcome is mandatory. By establishing sentencing procedures that require the imposition of a life sentence whenever a capital sentencing jury does not unanimously agree to impose death, and requiring the judicial imposition of a life sentence when the jury cannot agree on a sentence, the law of Pennsylvania vested in David Sattazahn a constitutionally protected life and liberty interest in the life sentence that was the product of these proceedings. Hicks, 447 U.S. at 346.[18] Having chosen a particular

[18] See also Toney v. Gammon, 79 F.3d 693, 699-700 (8th Cir. 1996) (where court had discretion under MO. REV. STAT. ' 558.026.1 to sentence sex offender to either consecutive or concurrent sentences for crimes of a sexual nature committed at the same time, the statute created Aa constitutionally protected liberty interest in the sentence resulting from the exercise of this discretion, and that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State@); Walker v. Deeds, 50 F.3d 670, 673 (9th Cir. 1995) (NEV. REV. STAT. ' 207.010, requiring trial court to make particularized findings under habitual offender statute creates liberty interest in that sentencing procedure); Foster v. Delo, 39 F.3d 873, 882 (8th Cir. 1994) (due process interest in state-mandated proportionality review in capital cases); Fetterly v. Paskett, 997 F.2d 1295, 1299-1300 (9th Cir. 1993) (IDAHO CODE ' 19-2515(c) created liberty interest in capital sentencing procedures requiring jury to balance mitigating circumstances (collectively) against each aggravating circumstance (individually)); Rust v. Hopkins, 984 F.2d 1486, 1492-93 (8th Cir. 1993) (NEB. REV. STAT. ' 29-2523 created liberty interest in consideration of aggravating circumstances based on proof beyond a reasonable doubt, and ' 29-2525 creates liberty interest in appellate review based upon statutory standards); Fetterly v. Paskett, 997 F.2d 1295, 1299-1300 (9th Cir. 1993) (due

capital sentencing scheme, Pennsylvania cannot -- without violating due process -- deny a defendant the benefits of the sentence mandated by these procedures. Hicks, 447 U.S. at 346-47; Wolff v. McDonald, 418 U.S. 539, 557 (1974); see also Ohio Adult Parole Authority v. Woodard, 523 U.S. at 292-93 (Stevens, J., concurring) (same re: appellate and post-conviction remedies).

At a minimum, Pennsylvania cannot deny David Sattazahn the statutorily mandated life sentence that was the product of his initial capital sentencing trial. Subjecting Mr. Sattazahn to a capital resentencing hearing, and the resulting death sentence, when the Commonwealth had no basis or ability to appeal his life sentence, arbitrarily denied Mr. Sattazahn=s liberty interest in the sentence mandated by the Pennsylvania death penalty statute.

Moreover, David Sattazahn had a *life* as well as liberty interest in full enforcement of the life sentence imposed at his first trial by operation of Pennsylvania law. This life interest is even stronger than the liberty interest present in non-capital cases, and requires more solicitous treatment by the Courts. As Justice Stevens has explained:

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process interest in capital sentencing procedures); Dupuy v. Butler, 837 F.2d 699, 703 (5th Cir. 1988) (due process interest in exercise of discretion between statutorily available sentencing options); Wilkins v. Bowersox, 933 F. Supp. 1496, 1524-26 (W.D. Mo. 1996) (due process interest in state-mandated appellate proportionality review), aff=d, 145 F.3d 1006 (8th Cir. 1998); Harris v. Blodgett, 853 F. Supp. 1239, 1286-90 (W.D. Wash. 1994) (same), aff=d sub. nom., Harris v. Wood, 64 F.3d 1432 (9th Cir. 1995).

> The interest in life that is at stake in this case warrants even greater protection than the interests in liberty at stake in [non-capital] cases. For Adeath is a different kind of punishment from any other which may be imposed in this country. From the point of view of the defendant, it is different in both its severity and its finality . . . . From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.@ Gardner v. Florida, 430 U.S. 349, 357-58, 97 S.Ct. 1197, 1204, 51 L.Ed.2d 393 (1977) (citations omitted) (plurality opinion).

Woodard, 523 U.S. at 293-94.

Society has a heightened interest in ensuring that a capital defendant receives the benefit of the statutorily mandated life sentence he has earned at trial. Had David Sattazahn been afforded a fair trial the first time around, he would not be on death row today. If acquitted, he would be free. If fairly convicted, he would be serving a life sentence. Indeed, had Mr. Sattazahn been *unfairly* convicted but failed to enforce his constitutional rights, he could not be on death row, because the prosecution could not have appealed his life sentence. David Sattazahn is on Pennsylvania=s death row today only because he was unconstitutionally convicted and enforced his constitutional rights. To permit such a death-after-life sentence is to reward a state=s anti-constitutional conduct and punish a defendant for properly and successfully exercising the rights to which he is constitutionally guaranteed. The state has no valid interest in such an arbitrary, capricious, and unprincipled outcome. David Sattazahn=s life and liberty interest in the statutorily mandated outcome of his first capital sentencing trial plainly encompasses being free from the subsequent infliction of a death-after-life sentence.

Mr. Sattazahn=s liberty interest in respecting and enforcing the life sentence he received *as a matter of law* in his first capital trial is not, however, limited to overturning his death-after-life sentence. Respect for that statutorily mandated sentence necessarily requires that his case be

treated as non-capital on retrial and that he not be subjected to practices that could not be directed at a capital-ineligible defendant.

In Mr. Sattazahn=s case, this means the right to a *non-capital* jury trial in which jurors opposed to the death penalty are not excluded for cause. This Court has implicitly acknowledged that the trial of a capitally ineligible defendant before a death-qualified jury is justified only when necessary to jointly try that defendant with another who legitimately may be subject to the death penalty. Buchanan v. Kentucky, 483 U.S. 402, 414-25 (1987). There is no conceivable state interest in empaneling a death-qualified jury in a case that does not involve any death-eligible defendant. Moreover, excluding jurors for cause in a non-capital case because of their beliefs about the death penalty is clearly improper. A juror=s views about the death penalty are irrelevant in cases in which a defendant is not Aeligible@ for death. The state has no right to exclude for cause a juror who can fairly determine a defendant=s guilt or innocence in a non-capital case, even though his or her views about the death penalty might constitute a substantial impairment in a capital case.[19] And conversely, a non-capital defendant has no right to exclude for cause in a non-capital case a juror who can fairly determine guilt or innocence, but who would automatically impose a death sentence if the defendant were convicted. When a juror is improperly excused for cause, the defendant=s right to an impartial jury is denied and a new trial is required. But even if that were not so, subjecting a non-capital defendant to trial by a death-qualified jury is so presumptively prejudicial and so thoroughly undermines confidence in the

[19] There is substantial evidence that death-qualified juries are more prone to convict than juries that do not undergo the death-qualification process, simply by virtue of being asked questions relevant to sentencing, and to convict of more serious charges; and that death-qualified jurors evaluate evidence in a way markedly more favorable to the prosecution than jurors excluded as a result of their opposition to the death penalty; are more likely to hold a defendant=s failure to testify against him; are more concerned about erroneous acquittals than erroneous convictions; and require less evidence to find proof of guilt beyond a reasonable doubt. Commonwealth v. Maxwell, 505 Pa. 152, 170-76, 477 A.2d 1309, 1319-22 (1984) (Nix, C.J., dissenting); Lockhart v. McCree, 476 U.S. 162 (1986) (Marshall, J., with Brennan & Stevens, JJ., dissenting).

judical process and the outcome of the trial itself that it cannot be permitted.

Here, it is undisputed that David Sattazahn could not have been sentenced to death if he had been provided a fair trial in 1991. Had his conviction been upheld, the Commonwealth would have had no opportunity even to appeal the life sentence imposed in his case by operation of law. It is only because the Commonwealth violated his trial rights in the first place that he even faced a second trial. Subjecting Mr. Sattazahn to death-after-life as a reward for vindicating his right to a fair trial does nothing to advance the Aoverwhelming public interest@ that the death penalty be imposed fairly and constitutionally and that Aany decision to impose the death sentence be, and appear to [the community to] be, based on reason rather than caprice,@ vindictiveness, or unfairness.

On the contrary, a death trial after a life sentence fundamentally violates these principles and amounts to an arbitrary deprivation of a defendant=s life and liberty interest in the mandatory life sentence that was imposed as a matter of law in his first trial. Permitting David Sattazahn=s retrial and death sentence before a death-qualified jury would unquestionably demonstrate that in Pennsylvania death is different, but not in any manner envisioned by the Constitution. This Court should not countenance so clearly arbitrary, capricious, and unjust a result. This Court should grant certiorari and declare that David Sattazahn is entitled not only to the vacation of his death sentence, but to a new trial before a properly constituted jury in which the Commonwealth is precluded from seeking death.

CONCLUSION

For all the foregoing reasons, this Court should grant this Petition for Writ of Certiorari to the Pennsylvania Supreme Court to resolve the disputed issues of law and to reverse Petitioner's death sentence.

Respectfully submitted,

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