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Running the Gauntlet: Once Is Enough When Running for Your Life

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RUNNING THE GAUNTLET: ONCE IS ENOUGH WHEN RUNNING FOR YOUR LIFE

INTRODUCTION

The United States Supreme Court faced a novel question in *Sattazahn v. Pennsylvania*:[1] whether or not a defendant, who has received a statutorily imposed life sentence, mandated by the state after the jury deadlocked during his capital sentencing hearing, is entitled to double jeopardy protection.[2] Justice Scalia, writing for the majority, concluded that the jury deadlock during the sentencing hearing was a "non-result," and should not be protected by double jeopardy.[3] In contrast, the dissent, led by Justice Ginsburg, argued that double jeopardy, in the context of capital sentencing hearings, should be interpreted more expansively to protect defendants from choosing between their constitutional right to appeal and their state-mandated life sentence.[4]

The *Sattazahn* Court's decision holds serious implications for criminal defendants sentenced to statutorily-imposed life imprisonment. In particular, after *Sattazahn*, the costs of an appeal may now be too high for a defendant given a statutory life term. Beyond the financial stress of an appeal, a defendant and his family must also face the anxiety of a second capital sentencing hearing. But, more importantly, in the wake of *Sattazahn*, that same defendant might ultimately pay for an unsuccessful appeal with his life.

Though the entirety of consequences from the Court's decision in *Sattazahn* remains to be seen, criminal defendants and their attorneys have already felt its impact. For instance, in July 2003, only six months after the *Sattazahn* decision, Kristen H. Gilbert withdrew her application for appeal, even though she steadfastly maintained her innocence.[5] Gilbert was convicted of killing four patients while working as a nurse at a veteran's hospital, and was sentenced to life in prison because the jury could not unanimously agree on imposing the death penalty.[6] Gilbert faced the ultimate dilemma in deciding whether to appeal her conviction, because after *Sattazahn*, if she appealed, double jeopardy would not protect her from receiving the death penalty on retrial. Faced with this uncertainty, Gilbert explained, "I do not wish to face the death penalty

1. 537 U.S. 101 (2003).
2. *Sattazahn*, 537 U.S. at 106.
3. *Id.* at 109.
4. *See id.* at 126 (Ginsburg, J., dissenting).
5. Kathleen Burge, *VA Nurse Drops Murder Appeal Cites Fear of Death Penalty if Granted a New Trial*, BOSTON GLOBE, July 29, 2003, at B1.
6. *Id.*

again, and I do not wish to subject my family to the ordeal of a death penalty trial again."[7]

Moreover, *Sattazahn*'s impact is not limited to defendants, but has also affected the attorneys who represent criminal defendants forced to consider these issues. After *Sattazahn*, criminal defense attorneys worry about the difficulty of advising clients under similar circumstances to pursue an appeal of their conviction.[8] Christopher Adams of the National Association of Criminal Defense Lawyers summed up this angst noting, "There is now a class of people basically prevented from appealing their case."[9] In short, in the post-*Sattazahn* world, a defendant's options for appeal may be significantly limited, and are, at the very least, significantly colored by the possibility that he may face death if he opts to challenge his conviction.

Finally, lurking in the shadows of *Sattazahn*, are recent studies that raise substantial questions regarding the effectiveness and reliability of the death penalty process.[10] In January 2003, former Illinois Governor George Ryan commuted the sentences of 167 on death row, saying he felt "a moral obligation to act because the system is 'haunted by the demon of error.'"[11] Nationwide, as of July 2003, 110 former death row inmates have been exonerated at retrial.[12] Richard Dieter, executive director of the Death Penalty Information Center, postulated on *Sattazahn*'s impact on this phenomena, and questioned how many of those former prisoners would have risked their appeals if they knew they could face another death sentence.[13]

Within this backdrop, this Comment will explore the Supreme Court's decision in *Sattazahn* and the historical setting that precipitated the *Sattazahn* Court's ultimate conclusions about double jeopardy and its application to capital sentencing. Specifically, Part I of this Comment will review the historical framework of United States Supreme Court double jeopardy decisions as well as the underlying context of capital punishment sentencing, including the evolution of the bifurcated trial. Part II will specifically consider and unravel both majority and dissenting opinions presented in *Sattazahn*. Part III will critically analyze these opinions with attention to the underlying principles of the double jeopardy doctrine and the fundamental tenants of capital sentencing theory. Within this framework, Part III will also suggest that the *Sattazahn* ma-

7. *Id.*

8. *See* Linda Greenhouse, *Justices Reject a Double-Jeopardy Claim*, N.Y. TIMES, Jan. 15, 2003, at A14.

9. *Id.*

10. *See* Ring v. Arizona, 536 U.S. 584, 614-19 (2002) (Breyer, J., concurring in the judgment) (discussing recent studies and journal articles that call into question the effectiveness and propriety of the death penalty).

11. *A Stir in Death Penalty Debate*, NEWSDAY, Jan. 13, 2003, at A13.

12. *See* Burge, *supra* note 5, at B1.

13. *Id.*

jority disregarded the Court's own precedent by refusing to acknowledge that "'death is a different kind of punishment from any other which may be imposed in this country.'"[14] Finally, the Comment concludes that the *Sattazahn* Court abandoned the primary protection historically and theoretically afforded by double jeopardy--specifically that once a defendant has run the gauntlet by submitting his case to a jury and receiving a final judgment, he will not be required to run that gauntlet again.

I. BACKGROUND

A. Historical Overview of Double Jeopardy

The Fifth Amendment of the United States Constitution declares "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . ."[15] The Supreme Court set forth the American double jeopardy standard in the landmark case, *Ball v. United States*.[16] The *Ball* decision established the principle that an acquittal, no matter how defective, is a final judgment protected by double jeopardy.[17] Moreover, the decision established the corollary of that principle: that double jeopardy does not protect a conviction that is overturned on an appeal initiated at the defendant's request.[18]

1. *Stroud v. United States*[19]

After the *Ball* Court set the American standard for double jeopardy doctrine, the Court next addressed the double jeopardy implications for a defendant who received a harsher sentence after retrial in *Stroud v. United States*.[20] In *Stroud*, the jury convicted the defendant of murder and sentenced him to death by hanging.[21] Due to a procedural error, however, the Circuit Court of Appeals overturned the conviction and remanded the case for a new trial.[22] Upon retrial, the jury again convicted the defendant of murder, but this time sentenced him to life in prison.[23] Once again, the appellate court set aside the verdict due to error, and the defendant was tried a third time.[24] At the conclusion of the third trial, the jury again found the defendant guilty of murder, but, rather than recommending a life sentence, the jury imposed death.[25]

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14. United States v. Fell, 217 F. Supp. 2d 469, 474 (D. Vt. 2002) (quoting Gardner v. Florida, 430 U.S. 349, 357 (1977)).
15. U.S. CONST. amend. V.
16. 163 U.S. 662 (1896).
17. *Ball*, 163 U.S. at 671.
18. *Id.* at 672.
19. 251 U.S. 15 (1919).
20. *Stroud*, 251 U.S. 15.
21. *Id.* at 16.
22. *Id.* at 16-17.
23. *Id.* at 17.
24. *Id.*
25. *Id.* at 17-18.

The *Stroud* Court held that, in accordance with *Ball*, double jeopardy did not protect the defendant's two prior reversals.[26] Accordingly, the *Stroud* Court concluded that the defendant was properly retried for the same offense.[27] As for receiving the death penalty after the third trial, the Court determined that the jury was given the option to recommend a life sentence, but declined to do so.[28] The fact that the defendant received a life sentence after his first retrial did not trigger double jeopardy protection because that sentence was vacated when the defendant successfully appealed his conviction.[29] Therefore, the Court concluded, the defendant was properly retried for murder, and his sentence, the death penalty, was a legitimate punishment for that crime.[30]

2. *North Carolina v. Pearce*[31]

Fifty years after *Stroud*, the Court again addressed the question of whether double jeopardy should protect a defendant from receiving a harsher sentence upon retrial in *North Carolina v. Pearce*.[32] In *Pearce*, the defendant was convicted of assault with intent to commit rape, and was sentenced to twelve to fifteen years in prison.[33] Several years after his conviction, the defendant successfully appealed his case and was granted a new trial.[34] Upon retrial, the defendant was again found guilty and was sentenced to eight years in prison.[35] However, when the court considered the defendant's second sentence, coupled with the time he had already served, his total sentence resulted in a longer prison term than his original sentence.[36]

On appeal, the Supreme Court held that double jeopardy does not bar a harsher sentence upon retrial when the original conviction has been set aside at the defendant's request.[37] Justice Stewart, writing for the majority, summed up the history and purpose of the double jeopardy doctrine by explaining that "the rationale [for double jeopardy] . . . rests ultimately upon the premise that the original conviction has, at the defendant's behest, been wholly nullified and the slate wiped clean."[38] However, the Court ultimately ruled that, although the defendant must be

26. *Id.* at 18.
27. *Id.*
28. *See id.*
29. *Id.*
30. *See id.*
31. 395 U.S. 711 (1969).
32. *Pearce*, 395 U.S. 711.
33. *Id.* at 713.
34. State v. Pearce, 145 S.E.2d 918, 920-21 (N.C. 1966).
35. *Pearce*, 395 U.S. 713.
36. *Id.*
37. *Id.* at 719-20.
38. *Id.* at 720-21.

given credit for the time he has served under his original sentence, the unexpired portion of the original sentence should be vacated.[39]

Thus, the *Pearce* Court concluded that, if acquitted, the defendant would not have to serve the remainder of his original sentence.[40] However, if convicted upon retrial, the defendant must serve his lawful punishment for his second conviction, even if that resulted in a longer total sentence than his original sentence.[41] This rationale has provided the basis for the modern double jeopardy standard: there is no constitutional guarantee protecting a defendant from a harsher sentence at retrial.[42]

3. *Bullington v. Missouri*[43]

Even after *Pearce*, the Supreme Court's treatment of double jeopardy remained unsettled, particularly in the context of the death penalty. In fact, only twelve years later, the Court in *Bullington v. Missouri*[44] refused to extend the *Pearce* rationale to life sentences imposed in the context of capital sentencing.[45]

Capital punishment in the United States went through significant transformations in 1972 with the Supreme Court's decision in *Furman v. Georgia*.[46] After *Furman*[47] and its progeny, states continuing to enforce the death penalty developed bifurcated trials to meet *Furman*'s dual constitutional mandates of guiding and limiting the jury's discretion, and ensuring that the jury has the opportunity to consider the defendant's individual circumstances.[48] A bifurcated trial divides a capital murder trial into two separate components: first, a trial on guilt or innocence, and then, if the defendant is found guilty, a separate sentencing hearing to consider the appropriateness of the death penalty.[49] For example, in *Bullington*, Missouri law required that during the capital sentencing hearing, the jury should consider additional evidence of mitigating and aggravating factors relevant to the defendant's crime. [50] Additionally, Missouri

39. *See id.* at 718-19, 721.
40. *Id.* at 721.
41. *See id.*
42. *See id.* at 720-21.
43. 451 U.S. 430 (1981).
44. *Bullington*, 451 U.S. 430.
45. *Id.* at 445.
46. 408 U.S. 238 (1972) (per curiam).
47. Each of the five Justices concurring in the judgment of the Court issued a separate opinion finding that the death penalty, as applied to three petitioners, one convicted of murder and two convicted of rape, constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. *Furman*, 408 U.S. at 256-57, 305, 310, 314, 370.
48. *See* United States v. Fell, 217 F. Supp. 2d 469, 475-76 (D. Vt. 2002) (discussing the reasoning behind the bifurcated trial system).
49. *See Bullington*, 451 U.S. at 433-34.
50. *See id.* at 433-34, 435 n.4. The defendant was sentenced under MO. REV. STAT. § 565.006 (1978), that provides in relevant part:

> Where the jury . . . returns a verdict or finding of guilty as provided in subsection 1 of this section [trials upon an indictment for capital murder], the court shall resume the trial and conduct a presentence hearing before the jury . . . at which time the only issue shall

law required the judge to instruct the jury that, even if they found proof of aggravating factors beyond a reasonable doubt, they were permitted, but not required, to impose the death penalty.[51]

Within this legislative and constitutional framework, the Supreme Court considered the application of the Double Jeopardy Clause to modern capital sentencing schemes. In *Bullington*, the defendant was convicted of capital murder.[52] The day after his conviction, the sentencing phase of the trial began with the prosecution presenting evidence of aggravating circumstances justifying the death penalty.[53] The defense presented no evidence of mitigating circumstances.[54] After deliberations, the jury recommended a life sentence for the defendant, rather than the death penalty.[55]

Shortly after his conviction, the Court granted the defendant a new trial.[56] The state promptly notified the defense of its intent to pursue the death penalty at retrial.[57] Bullington argued that his life sentence was protected by double jeopardy, thus barring the prosecution from retrying the death sentence.[58] The Supreme Court of Missouri, however, held that neither double jeopardy, nor any other constitutional provision, barred the prosecution from seeking the death penalty upon retrial.[59]

The Supreme Court granted certiorari and reversed the Supreme Court of Missouri in a landmark opinion that remains controversial to this day.[60] First, Justice Blackmun, writing for the majority, distinguished *Bullington* from previous double jeopardy cases.[61] Justice Blackmun

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> be the determination of the punishment to be imposed. In such hearing, subject to the laws of evidence, the jury . . . shall hear additional evidence in extenuation, mitigation, and aggravation of punishment, including the record of any prior criminal convictions and pleas of guilty or pleas of nolo contendere of the defendant, or the absence of any such prior criminal convictions and pleas. Only such evidence in aggravation as the prosecution has made known to the defendant prior to his trial shall be admissible. The jury . . . shall also hear argument by the defendant or his counsel and the prosecuting attorney regarding the punishment to be imposed. . . . Upon conclusion of the evidence and arguments, the judge shall give the jury appropriate instructions and the jury shall retire to determine the punishment to be imposed.

Id.

51. *Bullington*, 451 U.S. at 434-35 (citing MO. APPROVED INSTRUCTIONS CRIM. § 15.46 (1979)).

52. *Id.* at 435.

53. *Id.*

54. *Id.*

55. *Id.* at 435-36.

56. *Id.* at 436. After Bullington was convicted, the United States Supreme Court decided *Duren v. Missouri*, 439 U.S. 357 (1979), in which the Court found Missouri's constitutional and statutory provisions allowing women to claim automatic exemptions from jury duty deprived a defendant of his Sixth and Fourteenth Amendment rights. *Duren*, 439 U.S. at 360. Thus, the trial court granted Bullington a new trial based on *Duren*. *Bullington*, 451 U.S. at 436.

57. *Bullington*, 451 U.S. at 436.

58. *Id.*

59. State *ex rel.* Westfall v. Mason, 594 S.W.2d 908, 910 (Mo. 1980) (en banc).

60. *Bullington*, 451 U.S. at 437, 446.

61. *See id.* at 444-46.

found that, while *Pearce* stands for the principle that a retrial after appeal nullifies the first judgment and wipes the slate clean, this principle does not apply when a jury finds the prosecution has failed to prove every element of its case, including the aggravating factors necessary to impose the death penalty.[62] Further, Justice Blackmun grounded the Court's decision in precedent and suggested that the Court's decision in *Green v. United States*[63] foreshadowed this exception to the *Pearce* rationale.[64]

In *Green*, the jury declined to convict the defendant of first-degree murder, but did convict him of the lesser included charge of second-degree murder.[65] Upon retrial, the Court held that double jeopardy protected the defendant from facing a second trial on first-degree murder because the defendant "was forced to run the gantlet once on that charge and the jury refused to convict him."[66] Applying *Green*'s rationale to *Bullington*, Justice Blackmun explained that in a capital sentencing hearing, the prosecution carries the burden of proving such aggravating factors beyond a reasonable doubt.[67] Thus, Justice Blackmun concluded that a modern capital sentencing hearing resembled a trial, with a life sentence being the equivalent of an acquittal on the death penalty, and therefore warranting double jeopardy protection.[68]

Furthermore, Justice Blackmun declared that affording double jeopardy protection to the results of capital sentencing hearings was consistent with the underlying constitutional principle of protecting defendants from the "embarrassment, expense and ordeal" of multiple prosecutions.[69] Significantly, Justice Blackmun added that allowing the State, with its limitless resources, to continue to pursue the death penalty, would result in an "'unacceptably high risk' . . . [of] an erroneously imposed death sentence . . . ."[70]

In contrast, Justice Powell, writing for the dissent in *Bullington*, disagreed that a sentencing hearing in a bifurcated trial sufficiently resembled a trial on the merits thus warranting double jeopardy protection.[71] In a strongly worded dissent, Justice Powell proclaimed, "I consider the Court's opinion irreconcilable in principle with the precedents of this Court."[72] Citing both *Stroud* and *Pearce*, Justice Powell reiterated the long-established double jeopardy principle that a defendant may receive

62. *See id.* at 443-46.
63. 355 U.S. 184 (1957).
64. *See Bullington*, 451 U.S. at 442-43 (citing *Green*, 355 U.S. 184).
65. *Green*, 355 U.S. at 186.
66. *Id.* at 190.
67. *Bullington*, 451 U.S. at 446.
68. *See id.* at 445-46.
69. *Id.* at 445 (quoting *Green*, 355 U.S. at 187-88).
70. *Id.* (quoting United States v. DiFrancesco, 449 U.S. 117, 130 (1980)).
71. *See id.* at 451 (Powell, J., dissenting).
72. *Id.* at 447 (Powell, J., dissenting).

a harsher sentence upon retrial.[73] Furthermore, the dissent rejected the majority's conclusion that a jury's recommendation of a life sentence in a capital sentencing hearing amounted to an implicit acquittal of the death penalty.[74]

4. *Arizona v. Rumsey*[75]

Three years after *Bullington*, the Court, in *Arizona v. Rumsey*[76] extended double jeopardy protection to capital sentencing hearings in which the judge, rather than the jury, sentenced the defendant to life in prison.[77] The Supreme Court held that a life sentence issued by the trial judge amounts to "an acquittal on the merits," and in accordance with *Bullington*, must bar any retrial on sentencing, even if based on legal error.[78]

Justice Rehnquist, joined by Justice White, dissented on the basis that *Bullington* was wrongly decided, and, moreover, that the reasoning behind *Bullington* does not apply to cases in which resentencing is required due to legal error.[79] Justice Rehnquist argued "[b]ut for the trial judge's erroneous construction of governing state law, the judge would have been required to impose the death penalty."[80] Thus, Rehnquist concluded, there was no logical reason to overturn the death sentence in this case, simply because the Arizona Supreme Court corrected a legal error of the trial judge.[81]

Thus, double jeopardy doctrine evolved over the course of a hundred years. Beginning with the basic concept of permitting the State to retry a defendant who has successfully overturned his conviction, the Court then addressed the application of double jeopardy to a defendant who received a harsher sentence upon retrial. Finally, the Court considered the more complex issues of how double jeopardy doctrine should apply in a context of capital sentencing. *Bullington* and *Rumsey*, the Court's final words on double jeopardy before *Sattazahn*, represent the crossroads between traditional double jeopardy doctrine and the relatively new concept of capital sentencing hearings.

B. Overview of the History and Development of Capital Sentencing

Under English law in the late eighteenth century, a defendant's conviction on an indictment resulted in a specific statutorily determined sen-

73. *Id.*
74. *Id.* at 448-49 (Powell, J., dissenting).
75. 467 U.S. 203 (1984).
76. *Rumsey*, 467 U.S. 203.
77. *Id.* at 211-12.
78. *Id.* at 211.
79. *Id.* at 213 (Rehnquist, J., dissenting).
80. *Id.* at 214 (Rehnquist, J., dissenting).
81. *Id.* at 214-15 (Rehnquist, J., dissenting).

tence that the judge had no discretion to alter.[82] The judge's sole recourse, if he thought the sentence was exceedingly harsh, was to commute the sentence through the pardon process.[83]

In contrast, as American sentencing procedures developed during the nineteenth century, trial judges began to exercise wide discretion in determining a defendant's punishment within the parameters of statutorily prescribed limits.[84] During this period, the jury's role was to determine if the prosecution had proved every element of the charge beyond a reasonable doubt.[85] If the jury found the defendant guilty, the judge's role was to review a broad range of information regarding the case to determine the most appropriate sentence.[86] In accordance with the philosophy of individualized and indeterminate sentencing, the judge was permitted to consider a broad range of facts, including facts that would not be admissible at trial, such as hearsay.[87]

Currently, a judge's sentencing discretion is restricted by federal and state sentencing guidelines.[88] Capital sentencing hearings are restricted at the federal level by the Federal Death Penalty Act (FDPA) and at the state level by statutory requirements.[89] However, the more relaxed evidentiary standards permitted during the discretionary period of sentencing remain in place today.[90] Furthermore, in a post-*Furman* world, sentencing must meet the dual constitutional requirements of guiding and limiting the jury's discretion, as well as providing for individualized consideration of facts specific to the defendant's circumstances.[91] In order to meet these seemingly disparate goals, the FDPA, for example, treats aggravating death penalty factors as similar to elements of a capital offense, thus requiring the prosecution to prove such factors to the jury beyond a reasonable doubt.[92] However, if these factors were proven during the sentencing phase of the trial, the relaxed evidentiary standards, not permissible at trial, would be allowed.[93]

1. *Apprendi v. New Jersey*[94]

In recent years, the Supreme Court has struggled to determine the scope and nature of constitutional requirements with respect to modern

82. *See* Apprendi v. New Jersey, 530 U.S. 466, 479 (2000) (discussing criminal law treatment in eighteenth century England).
83. *See Apprendi*, 530 U.S. at 479.
84. *See id.* at 481.
85. *See Fell*, 217 F. Supp. 2d at 482.
86. *See id.*
87. *See id.*
88. *See id.*
89. *See id.*
90. *See id.* at 482-83.
91. *See id.* at 482.
92. *See id.*
93. *See id.* at 483.
94. 530 U.S. 466 (2000).

criminal sentencing. For example, in *Apprendi v. New Jersey*,[95] the Supreme Court considered the nature of sentencing factors that had the effect of enhancing a defendant's punishment for the crime but were not part of underlying crime. In particular, the Supreme Court examined whether the constitutional protections afforded criminal defendants at trial under the Fifth and Sixth Amendments applied with equal force solely in the context of sentencing. The *Apprendi* Court found that when proof of an additional fact increases the statutory maximum penalty for a crime, then that fact is the "functional equivalent" of an element, regardless of its label.[96] Further, the Court concluded that if a fact is the "functional equivalent" of an element, then the Due Process Clause of the Fifth Amendment and the Confrontation Clause of the Sixth Amendment require that a jury make that finding of fact beyond a reasonable doubt.[97]

2. *Ring v. Arizona*[98]

Only two years after deciding *Apprendi*, the Supreme Court, true to form, followed the same analysis in the context of capital sentencing in *Ring v. Arizona*.[99] In *Ring*, the jury convicted the defendant of felony murder.[100] According to state law, after the defendant's conviction, the trial judge was required to make further findings regarding the existence of aggravating and mitigating factors.[101] After his review, the sentencing judge recommended the death penalty,[102] a sentence later affirmed by the Arizona Supreme Court.[103] On appeal, the United States Supreme Court overturned the Arizona decision.[104] The *Ring* Court applied the *Apprendi* rationale to conclude that a sentencing factor enhancing the defendant's ultimate sentence from life to death is the functional equivalent of an element of the offense.[105] Accordingly, like *Apprendi*, the *Ring* Court found that to comport with Sixth Amendment guarantees, a jury and not a judge must find the existence of that sentencing factor beyond a reasonable doubt.[106] In short, after *Furman*, capital sentencing requires proof of aggravating and mitigating factors to determine the appropriateness of the death penalty. In *Ring*, the Court found the statutory aggrava-

95. *Apprendi*, 530 U.S. at 482-83. Apprendi pled guilty to one count of second-degree possession of a firearm after he fired several shots into the home of an African-American family, and stated he did not want the family living in his neighborhood because of their race. *Id.* at 469. Apprendi later retracted this statement. *Id.* Apprendi's conviction carried a prison sentence of five to ten years; however, because the court found, by a preponderance of the evidence, that the crime was racially motivated, his sentence was enhanced beyond the statutory limit to a twelve-year term. *Id.* at 470-71.

96. *Id.* at 494 n.19.

97. *Id.* at 490.

98. 536 U.S. 584 (2002).

99. *Ring*, 536 U.S. 584.

100. *Id.* at 592.

101. *Id.*

102. *Id.* at 594.

103. State v. Ring, 25 P.3d 1139, 1154-56 (Ariz. 2001) (en banc).

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

105. *Id.*

106. *Id.*

tors and mitigating factors to be functional equivalents of elements of the defendant's underlying crime and, thus, required that a jury make findings on those factors beyond a reasonable doubt.[107]

In addition to the significant effects on states' capital sentencing regimes,[108] the *Ring* opinion also illustrated the Court's disparate views on the capital sentencing process since *Furman*.[109] The majority emphasized that in order to meet the constitutional requirements of the Eighth Amendment, the states had devised elaborate capital sentencing procedures, but that this alone was not constitutionally sufficient if the process did not also incorporate other protections, such as the right to a trial by a jury under the Sixth Amendment.[110] Justice Scalia, joined by Justice Thomas, expressed his concern over the burdens placed on the states by *Furman*.[111] However, Justice Scalia joined with the majority largely because of his concerns over the erosion of the right to a jury trial.[112] Justice Breyer, who dissented in the *Apprendi* decision, nevertheless joined in the *Ring* decision based on his belief that a constitutional capital sentencing hearing under the Eighth Amendment requires that a death sentence must be imposed by a jury, and not a judge.[113]

Thus, the capital sentencing process today reflects the tension between *Furman*'s requirements of limiting the jury's discretion by providing sentencing guidelines, and the concomitant obligation to provide defendants with the benefit of individualized consideration. This inherent tension is exacerbated by the deep divisions within the Court as to what constitutional protections should apply to capital sentencing hearings and the rationales behind those protections. An appreciation of the history of the capital sentencing process as well as the Court's conflicting ideologies is essential to unravel and comprehend the Court's otherwise inexplicable decision in *Sattazahn*.

II. *SATTAZAHN V. PENNSYLVANIA*[114]

A. Facts and Procedural History

In *Sattazahn*, the defendant and his accomplice robbed a restaurant manager one evening, and shot him in the back as he tried to flee.[115] At

107. *Id.*

108. *See* Jason E. Barsanti, Ring v. Arizona: *The Sixth and Eighth Amendments Collide: Out of the Wreckage Emerges a Constitutional Safeguard for Capital Defendants*, 31 PEPP. L. REV. 519, 522-23 (2004) (noting that the *Ring* Court's decision requiring that juries impose the death penalty struck down capital sentencing schemes in seven states and called into question the schemes of at least four other states).

109. *See Ring*, 536 U.S. at 606-19.

110. *Id.* at 606-08.

111. *Id.* at 610-12 (Scalia, J., concurring).

112. *Id.* at 610 (Scalia, J., concurring).

113. *Id.* at 614, 618-19 (Breyer, J., concurring in the judgment).

114. 537 U.S. 101 (2003).

115. *Sattazahn*, 537 U.S. at 103.

trial, a jury convicted Sattazahn of numerous charges, including capital murder, assault, and conspiracy.[116] During the penalty phase of trial, the prosecution presented evidence of one aggravating circumstance: the commission of murder while perpetrating another felony.[117] The defense presented evidence of two mitigating circumstances: first, the defendant's lack of a significant criminal history, and second, his age at the time of the crime.[118] After three and a half hours of deliberation, the jury notified the judge that they were hopelessly deadlocked.[119] The judge dismissed the jury, and, as required by Pennsylvania statute,[120] entered a sentence of life imprisonment.[121]

Sattazahn appealed and successfully had his original conviction overturned on the basis that the trial judge erred when instructing the jury regarding the charges.[122] Upon retrial, the defendant was again convicted of capital murder.[123] During his capital sentencing hearing, the prosecution offered evidence not only of the original aggravating factor, but also of an additional aggravating factor not presented during the first trial.[124] The defendant argued that double jeopardy barred the state both from seeking the death penalty on retrial, and also from presenting evidence of the second aggravating circumstance on retrial.[125] The trial court denied the defendant's motion, and the jury sentenced him to death.[126]

On appeal before the Supreme Court of Pennsylvania, Sattazahn argued that his statutorily mandated life sentence should be protected by double jeopardy, despite being required as a result of a jury deadlock.[127] Moreover, the defense argued that the imposition of the death penalty violated Pennsylvania's constitutional guarantee granting a right to appeal, a right omitted from the Federal Constitution.[128] Sattazahn further

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116. *Id.*
117. *Id.* at 104.
118. *Id.*
119. *Id.*
120. *Id.* at 104-05 (citing 42 PA. CONS. STAT. § 9711(c)(1)(v) (Purdon Supp. 2002) which states "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.").
121. *Id.* at 105.
122. Commonwealth v. Sattazahn, 631 A.2d 597, 600, 606 (Pa. Super Ct. 1993).
123. *Sattazahn*, 537 U.S. at 105.
124. *Id.* During retrial, the Commonwealth presented evidence of two aggravating factors: the commission of the murder during the perpetration of another felony, and the defendant's prior felony convictions involving threats of violence against another person. *Id.*
125. *Id.*
126. *Id.*
127. Commonwealth v. Sattazahn, 763 A.2d 359, 367 (Pa. 2000).
128. *Sattazahn*, 763 A.2d at 368. The Pennsylvania Constitution provides in relevant part:
> There shall be a right of appeal in all cases to a court of record from a court not of record; and there shall also be a right of appeal from a court of record or from an administrative agency to a court of record or to an appellate court, the selection of such court to be as provided by law; and there shall be such other rights of appeal as may be provided by law.

PA. CONST. art. V, § 9.

argued that any rational defendant in his position would decline to exercise his state constitutional right to appeal if the ultimate failure of that appeal could result in losing the life sentence that he already received.[129]

The Pennsylvania Supreme Court rejected Sattazahn's arguments, instead finding that since the jury deadlocked during the sentencing proceeding, there was no clearly implied acquittal on the merits warranting double jeopardy protection.[130] Furthermore, the court added that there was no evidence that the legislature intended the imposition of a life sentence after jury deadlock to equate to a final sentence.[131] Finally, the court dismissed the defendant's argument that the imposition of the death penalty had a chilling effect on his state constitutional right to appeal, concluding "Sattazahn ignores the fact that . . . the United States Supreme Court has rejected the claim that a harsher sentence on retrial has a chilling effect on the defendant's right to appeal . . . his conviction."[132]

B. The Majority Opinion

Sattazahn presented the Court with an opportunity, for the first time, to define what constitutes a mistrial during a capital sentencing hearing.[133] Specifically, the Court addressed whether double jeopardy protects a defendant who receives a life sentence because of a jury deadlock during the sentencing phase of a capital trial from facing another death penalty prosecution upon retrial.[134] The Court sharply divided on the issue, with Justice O'Connor providing the tie-breaking vote in favor of the State's position that the life sentence was not a final verdict on the merits and therefore not protected by double jeopardy.[135]

Writing for the five justice majority, Justice Scalia first distinguished *Sattazahn* from *Bullington* and *Rumsey*.[136] Justice Scalia suggested that double jeopardy applied to those cases because they resulted from the jury's finding of additional facts during the sentencing hearing and not because of the life sentences initially imposed.[137] Further, Justice Scalia rejected the defendant's argument that *Bullington* recognized a unique standard for double jeopardy protection in the context of capital sentencing.[138] Rather, Justice Scalia explained that the relevant trigger for double jeopardy protection was merely whether or not the sentence equated to an acquittal on the merits.[139] Thus, because Sattazahn's life

129. *Sattazahn*, 763 A.2d at 368.
130. *Id.* at 367.
131. *Id.* at 368.
132. *Id.* at 368-69.
133. *See Sattazahn*, 537 U.S. at 119 (Ginsburg, J., dissenting).
134. *Id.* at 109.
135. *Id.* at 117 (O'Connor, J., concurring in part and concurring in the judgment).
136. *Id.* at 108-10.
137. *Id.*
138. *Id.* at 109.
139. *Id.*

sentence resulted from a jury deadlock, and not from the jury's findings on the merits, the majority reasoned that double jeopardy should not apply.[140]

Additionally, in Part III of the opinion, Justice Scalia discussed the impact of *Apprendi* and *Ring* to support his conclusion that a jury deadlock during capital sentencing is not protected by double jeopardy.[141] In particular, Justice Scalia reiterated that, under *Apprendi*, any fact that increases the maximum sentence a defendant may receive for his crime is the functional equivalent of an element of that crime, and must be proven beyond a reasonable doubt.[142] Justice Scalia noted that *Ring* applied *Apprendi*'s analysis to capital sentencing, and found that, in accordance with the Sixth Amendment, only a jury, and not a judge, can find the existence of additional aggravating factors.[143]

Applying *Apprendi* and *Ring* to the double jeopardy consideration, Justice Scalia reasoned that "'murder plus one or more aggravating circumstances'" is the offense on trial during the sentencing proceeding.[144] A jury's recommendation of a life sentence, therefore, is essentially an implied acquittal on the charge of "murder plus one or more aggravating circumstances" and a conviction of the lesser-included offense of murder.[145] Accordingly, Justice Scalia acknowledged that after *Ring*, double jeopardy protection must be afforded to the jury's life sentence when that result is essentially an "'acquittal' on the offense of 'murder plus aggravating circumstance(s).'"[146]

However, the majority refused to extend this reasoning to cases like Sattazahn's, where the jury deadlocked during the sentencing hearing.[147] In Mr. Sattazahn's case, his life sentence resulted from the default judgment mandated by Pennsylvania statute and not from a jury's findings on the merits.[148] Thus, because there was no implied acquittal on Sattazahn's charge of murder plus aggravating circumstances, the majority concluded that double jeopardy did not protect his statutorily imposed life sentence.[149]

Justice Scalia also added that the Pennsylvania Supreme Court correctly found that there was no evidence indicating that the state legislature intended the statutorily required life sentence to be a final verdict.[150]

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140. *Id.*
141. *Id.* at 111.
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.* at 112-13.
146. *Id.* at 112.
147. *Id.* at 103-04.
148. *Id.* at 113.
149. *See id.*
150. *Id.* at 110.

Justice Scalia suggested that, in the interest of saving the expense and resources required by another sentencing hearing, a State may be willing to accept the life sentence.[151] However, should the State have to go to the expense of a whole new trial, due to the defendant's successful appeal, the state may be "eager to attend to that unfinished business . . . ."[152]

Finally, Justice Scalia used his opinion to respond to several arguments raised by the dissent. First, Justice Scalia rejected the suggestion that the Court's earlier holding in *United States v. Scott*[153] mandated a different result in *Sattazahn*.[154] Specifically, Justice Scalia denounced the dissenters' assertion that because double jeopardy may protect a judge's termination of trial proceedings in favor of a defendant where the basis of the termination is not related to guilt or innocence, a similar application of double jeopardy is appropriate where the defendant is sentenced to death on retrial.[155] According to Justice Scalia, the dissent's reliance on *Scott* was misguided, and was "a thin reed on which to rest a hitherto unknown constitutional prohibition of the entirely rational course of making a hung jury's failure to convict provisionally final, subject to change if the case must be retried anyway."[156] Moreover, Justice Scalia explained that double jeopardy does not protect either the termination of charges on a motion for pre-indictment delay as in *Scott,* or the life sentence in *Sattazahn,* because, in both cases, the outcomes did not result from a jury's findings on the merits of the case.[157]

Furthermore, Justice Scalia addressed and summarily dismissed the argument that allowing the state to pursue the death penalty a second time following defendant's successful appeal of his underlying conviction would have a chilling effect on future appeals.[158] According to Justice Scalia, the chilling effect of multiple prosecutions has never been determinative of double jeopardy protection, and there was no reason for the Court to change course in *Sattazahn*.[159] Reiterating his earlier discussion of the state's economic interests, Justice Scalia stated "[t]his case hardly presents the specter of 'an all-powerful state relentlessly pursuing a defendant . . . .'"[160] Instead, Justice Scalia reasoned, the circumstances in *Sattazahn* illustrated a state, reasonably willing to conserve its eco-

151. *Id.*
152. *Id.*
153. 437 U.S. 82, 92 (1978) (rejecting "the view that the Double Jeopardy Clause prohibited any new trial after the setting aside of a of a judgment of conviction against the defendant or that it guarantees to him the right of being hung, to protect him from the danger of a second trial" (internal quotations omitted)).
154. *Sattazahn*, 537 U.S. at 113-14.
155. *Id.*
156. *Id.*
157. *Id.* at 114.
158. *Id.*
159. *Id.* (quoting *Scott*, 437 U.S. at 96).
160. *Id.* at 114-15.

nomic resources by accepting the default life sentence, unless required to undertake the expense of a retrial at the defendant's behest.[161]

In sum, the majority was unwilling to reexamine and ultimately modify the application of double jeopardy protection in the context of capital sentencing.[162] The Court held, quite narrowly, that double jeopardy only protects verdicts based on the findings of the jury, and a default judgment entered by the State because of a jury deadlock is not a final verdict.[163] Additionally, the majority concluded that, on balance, any potential chilling effect on the defendant's right to appeal was outweighed by the economic interests of the State.[164]

C. Justice Ginsburg's Dissent

Justice Ginsburg, with whom Justices Stevens, Souter, and Breyer joined, took issue with the majority, and instead found that the defendant's statutorily imposed life sentence should be considered a final verdict warranting double jeopardy protection.[165] Justice Ginsburg explained that even though Sattazahn's verdict resulted from a hung jury, this fact alone should not be dispositive, because jeopardy may terminate in circumstances other than acquittal.[166] Ginsburg suggested that Sattazahn's statutorily imposed life sentence belonged in the same category of cases as *Scott*, where a judge terminates the trial before a determination of guilt or innocence, and the prosecution may not immediately refile the indictment, but must seek a reversal of the trial court ruling.[167] Under Justice Ginsburg's reasonsing, this category includes proceedings where the court grants a motion to terminate,[168] or as in *Sattazahn*, where the State mandates a life sentence because of a jury deadlock.[169]

In *Scott*, Justice Ginsburg explained, the Court refused to grant double jeopardy protection because the defendant elected to terminate his trial before submission to the jury, even though the prosecution was willing to present its case.[170] Distinguishing *Sattazahn* from *Scott*, Justice Ginsburg underscored the fact that Sattazahn submitted his case to the jury, thereby "running the gauntlet" once on the death penalty.[171] Unlike the defendant in *Scott*, Justice Ginsburg noted that Sattazahn, did not

161. *Id.* at 115.
162. *See id.* at 109.
163. *See id.*
164. *See id.* at 110, 115.
165. *Id.* at 118 (Ginsburg, J., dissenting).
166. *Id.* at 119 (Ginsburg, J., dissenting).
167. *See id.* at 121-22 (Ginsburg, J., dissenting).
168. *See id.* at 122 n.3 (Ginsburg, J., dissenting) (explaining that the Court considers motions to terminate that are immediately subject to re-prosecution as mistrials, as distinguished from motions to terminate that must be appealed by the prosecution before retrial).
169. *Id.* at 122 (Ginsburg, J., dissenting).
170. *Id.* at 123 (Ginsburg, J., dissenting).
171. *Id.* at 125 (Ginsburg, J., dissenting).

voluntarily terminate his sentencing hearing.[172] In fact, Justice Ginsburg explained, Scott's voluntarily termination of the proceedings before submitting his case to the jury was the very basis for the Court's denial of double jeopardy protection.[173] Unlike the State in *Scott* however, Pennsylvania already had one complete opportunity to present its case against Sattazahn to the jury.[174] In short, Justice Ginsburg reasoned, Sattazahn's sentencing hearing terminated not because the jury deadlocked, but rather because the State required termination in accordance with its own statute.[175]

Furthermore, Justice Ginsburg stressed, the State was *required* to accept the statutory life sentence as a final judgment, and had no statutory right to appeal the sentence.[176] This, according to Justice Ginsburg, afforded Sattazahn far more entitlement to double jeopardy protection than the defendant's dismissal for pre-indictment delay in *Scott*.[177]

Moreover, Justice Ginsburg strongly criticized the impact of the majority's decision on defendants and warned that the holding would necessarily force defendants to choose between exercising their constitutional right to an appeal or risk losing a life sentence to a sentence of death.[178] According to Justice Ginsburg, this unenviable choice violates previous Court interpretations of double jeopardy.[179] To support her assertion, Justice Ginsburg explained that in *Green*, the Court refused to prolong jeopardy on a first-degree murder charge when the defendant, convicted of a related second-degree murder charge, successfully appealed his conviction.[180] Justice Ginsburg reasoned that the *Green* Court ultimately concluded that prolonging jeopardy would impermissibly require the defendant to "'barter [his] constitutional protection against a second prosecution for an offense punishable by death as the price of a successful appeal . . . of another offense.'"[181]

Finally, Justice Ginsburg stressed that Sattazahn was facing the death penalty, a punishment the Court has long recognized as being "'unique in both its severity and its finality.'"[182] Because Sattazahn was facing death, he had a heightened double jeopardy interest in protecting his life sentence and avoiding a second death penalty trial.[183] Thus, Jus-

172. *Id.* (The defendant in *Scott* voluntarily terminated his trial by making a motion for pre-indictment delay).
173. *Id.*
174. *Id.*
175. *Id.* at 123-24 (Ginsburg, J., dissenting).
176. *Id.* at 124 (Ginsburg, J., dissenting).
177. *Id.* at 123 (Ginsburg, J., dissenting).
178. *Id.*
179. *Id.* at 126-27 (Ginsburg, J., dissenting).
180. *Id.* at 127 (Ginsburg, J., dissenting).
181. *Id.* (quoting Green v. United States, 355 U.S. 184, 193 (1957)).
182. *Id.* (quoting Monge v. California, 524 U.S. 721, 732 (1998)).
183. *Id.*

tice Ginsburg concluded that the historical double jeopardy principles of protecting defendants from the ordeal and anxiety of multiple prosecutions are even more significant when considered in a death penalty context.[184]

III. ANALYSIS

A. Constitutional Analysis

Justice Scalia's reliance on *Apprendi v. New Jersey*[185] and *Ring v. Arizona*[186] to support his decision in *Sattazahn v. Pennsylvania*[187] is disingenuous, given that both *Apprendi* and *Ring* provide capital murder defendants with additional constitutional protections,[188] while *Sattazahn* strips constitutional safeguards away.[189] Since *Furman v. Georgia*,[190] the Court has addressed repeatedly the safeguards necessary to ensure that capital sentencing regimes adequately protect a defendant's constitutional rights.[191] For instance, the bifurcated trial evolved as a solution to the dual constitutional requirements of sufficiently guiding a jury's discretion while providing the defendant with the benefit of individualized consideration.[192] *Ring* provided further protections to capital murder defendants by ensuring that any aggravating factors justifying the imposition of the death penalty must be proven to a jury beyond a reasonable doubt.[193] *Sattazahn*, however, uses the reasoning of *Apprendi* and *Ring* to justify applying another constitutional protection, double jeopardy, in a draconian fashion, thus resulting in an outcome that places capital murder defendants in a worse position than they were before their appeal.[194]

Justice Scalia conceded in *Sattazahn* that a defendant's life sentence should be afforded double jeopardy protection, but only when such a sentence is based on a jury's findings as defined in *Apprendi* and *Ring*.[195] While this is a seemingly attractive argument at first glance, the ugly underside comes to light after close examination. In *Ring*, Justice Scalia proposed that the protections afforded to capital murder defendants, starting with *Furman*, had "no proper foundation in the Constitution."[196] Additionally, Justice Scalia stated that he was "reluctant to magnify the burdens that our *Furman* jurisprudence imposes on the States."[197] These

184. *Id.*
185. 530 U.S. 466 (2002).
186. 536 U.S. 584 (2002).
187. 537 U.S. 101 (2003).
188. *See Apprendi*, 530 U.S. at 490; *Ring*, 536 U.S. at 609.
189. *See Sattazahn*, 537 U.S. at 118.
190. 408 U.S. 238 (1972) (per curiam).
191. *See, e.g., Ring*, 536 U.S. at 606.
192. *See* Bullington v. Missouri, 451 U.S. 430, 432-33 (1981).
193. *See Ring*, 536 U.S. at 609.
194. *See Sattazahn*, 537 U.S. at 111-12.
195. *Id.* at 112.
196. *Ring*, 536 U.S. at 610 (Scalia, J., concurring).
197. *Id.*

"burdens" include the bifurcated trial, and constitutional protections such as requiring the prosecution to prove every element beyond a reasonable doubt, and guaranteeing the defendant that only a jury, not a judge, may impose a death sentence.[198] Justice Scalia, however, ultimately concurred in the *Ring* decision because he believed "our people's traditional belief in the right of trial by jury is in perilous decline."[199] Thus, even though Justice Scalia expressed significant reservations regarding the legitimacy of the current capital sentencing process, he nevertheless concurred in a judgment that effectively enhanced constitutional protections afforded to capital murder defendants.[200]

However, *Sattazahn*, presented Justice Scalia with an opportunity to take the rationales of *Apprendi* and *Ring* and use them to undermine the fundamental goals of the bifurcated trial process.[201] Essentially, by finding that only life sentences imposed as a result of a jury's findings are protected, Justice Scalia effectively eliminated from constitutional protection any life sentence imposed as a default judgment when a jury cannot unanimously agree to the death penalty, even if such a sentence is not subject to appellate review by the State.[202] Such sentences will only be considered final verdicts protected by double jeopardy if the State clearly expresses that intention.[203]

Justice Scalia is correct that, traditionally, double jeopardy doctrine allows for harsher sentencing upon retrial when a defendant successfully appeals his conviction.[204] However, Justice Scalia ignores that this double jeopardy doctrine developed well before the idea of a bifurcated trial was even imagined.[205] Furthermore, he is correct that *Apprendi* and *Ring* provide that a jury must find every element of an offense, including aggravating sentencing factors, beyond a reasonable doubt.[206] However, the *Sattazahn* majority ignores that *Apprendi* and *Ring* were driven by the necessity for further constitutional protections in the capital sentencing hearing process.[207] Thus, through selective interpretation, Justice Scalia cleverly cloaked his majority opinion in *Sattazahn* under traditional double jeopardy doctrine, *Apprendi* and *Ring*, while hoping others do not see his naked intention of undermining the last thirty years of capital sentencing jurisprudence.

198. *Id.*
199. *Id.* at 612 (Scalia, J., concurring).
200. *See id.*
201. *See Sattazahn*, 537 U.S. at 111-12.
202. *See id.* at 113-14.
203. *See id.* at 110.
204. *See, e.g.*, North Carolina v. Pearce, 395 U.S. 711, 722 (1969).
205. *See Bullington*, 451 U.S. at 442.
206. *See Ring*, 536 U.S. at 609.
207. *See Apprendi*, 530 U.S. at 490; *Ring*, 536 U.S. at 596-97.

B. Policy Discussion

The fundamental principle of the double jeopardy doctrine is to protect defendants from facing the embarrassment, anxiety and ordeal of multiple prosecutions.[208] Additionally, this principle recognizes that allowing the State, with its infinite resources, multiple opportunities to prosecute the same defendant, increases the likelihood of an improper conviction.[209] Furthermore, the Court has long held that death is different and unique among punishments.[210] In fact death is the ultimate punishment—entirely irreversible in its finality.[211] Therefore, when the underlying principles of the double jeopardy doctrine are combined with the constitutional requirements for capital punishment, the result should be an exponentially magnified concern for the rights of the defendant.[212] Regrettably, this is precisely what did *not* happen in *Sattazahn*.

For a defendant, who has already "run the gauntlet" once on the death penalty and received a life sentence by any means other than by the agreement of the jury, the *Sattazahn* decision effectively eliminates any prospect for appealing his underlying conviction, while avoiding the death penalty.[213] The defendant, under these circumstances, would only appeal his underlying conviction if he were willing to risk being prosecuted for the death penalty a second time.[214] In *Sattazahn*, Justice Ginsburg implored, "the perils against which the Double Jeopardy Clause seeks to protect are plainly implicated by the prospect of a second capital sentencing proceeding."[215] This is precisely the type of constitutional quagmire into which the Court has historically refused to place defendants.[216]

Furthermore, Justice Scalia's suggestion, that a state, in the interest of economic efficiency, would be willing to accept the default judgment of life imprisonment as a "conditionally" final verdict, is yet another attempt to relieve the States from the constitutional "burdens" of the *Furman* decision.[217] By suggesting, not once, but twice in his opinion that a state might reasonably seek to retry the death penalty should the defendant appeal his conviction, Justice Scalia has sent a clear message to states that unless they explicitly declare otherwise, a defendant foolish

208. *See Bullington*, 451 U.S. at 445-46.
209. *See id.*
210. *Sattazahn*, 537 U.S. at 127 (Ginsburg, J., dissenting).
211. *Id.*
212. *See id.*
213. *See id.* at 126 (Ginsburg, J., dissenting).
214. *See id.*
215. *Id.* at 124 (Ginsburg, J., dissenting).
216. *Id.* at 127 (Ginsburg, J., dissenting).
217. *See id.* at 110.

enough to appeal his conviction under these circumstances is fair game.[218]

In conclusion, there is no line of reasoning grounded in the underlying principles of double jeopardy and capital sentencing that supports the decision in *Sattazahn*. If anything, *Sattazahn* further illustrates the ideological gulf separating members of the Court on the issue of the death penalty. *Sattazahn* presented the Court with a double jeopardy question, which was answered on post-*Furman* capital sentencing backlash.

CONCLUSION

In *Sattazahn v. Pennsylvania*,[219] the Court rejected the principle of protecting defendants from the dilemma of exercising their right to appeal at the risk of being prosecuted a second time for the death penalty.[220] Furthermore, the Court's decision, based on a narrow application of traditional double jeopardy principles, was an attempt to alleviate some of the post-*Furman v. Georgia*[221] constitutional "burdens" placed on the States, at the expense of defendants.[222] Since 1972, when the Court found that the capital sentencing process constituted cruel and unusual punishment in *Furman*, our judicial system has responded by adding more and more constitutional protections around the capital sentencing process.[223] By requiring defendants such as Sattazahn to "run the gauntlet" on the death penalty more than once, the Court is not only undermining the fundamental goals of the double jeopardy doctrine, but is also out of step with the capital punishment jurisprudence of the last thirty years.

The current state of capital sentencing in America reflects a continuing conflict about issues such as whether the fundamental purpose of capital punishment should be deterrence or retribution, the potential unreliability of the process, and the risk of arbitrary application.[224] Ultimately federal and state legislatures bear the burden of creating a constitutional capital sentencing structure.[225] However, the Court will continue to play a major role in shaping the capital sentencing process. As illustrated in *Sattazahn*, however, defendants with the most to lose can become unwitting casualties of this continuing ideological battle.

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218. *See id.* at 110, 114-15.
219. 537 U.S. 101 (2003).
220. *See Sattazahn*, 537 U.S. at 126-28 (Ginsburg, J., dissenting).
221. 408 U.S. 238 (1972) (per curiam).
222. *See Sattazahn*, 537 U.S. at 108-13; Ring v. Arizona, 536 U.S. 584, 610 (2002) (Scalia, J., concurring).
223. *See Ring*, 536 U.S. at 606.
224. *See id.* at 614-18 (Breyer, J., concurring in the judgment).
225. *See* United States v. Fell, 217 F. Supp. 2d 469, 489 (D. Vt. 2002).

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