Double Jeopardy and the Death Penalty: A Fundamental Constitutional Protection with Life or Death Consequences

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I. INTRODUCTION

You have been charged with first-degree murder. Somehow you survived the trial, although it was without a doubt the most trying experience of your life. You were found guilty, but the jury could not come to a unanimous decision regarding a sentence, so you managed to walk away with your life. Clearly the remainder of your life will be spent behind bars, but you are grateful to know you will not be executed. At least the scariest part of the whole ordeal is over.

Then you get a visit from your lawyer, who tells you he thinks you have a good chance on appeal. Although you dread having to go through the nightmare of another trial, this is the best news you have heard in months. You begin to feel optimistic, maybe you can beat this thing after all. The only problem is if you are found guilty again the jury will reconsider the death penalty, and this time you could end up sentenced to die. Your lawyer tells you to take a few days to think it over, but he must notify the court of your appeal soon.

You are facing the toughest decision of your entire life. Do you take a chance on appeal and risk death, or do you take your life sentence and try to forget what could have been? Can you really roll the dice and gamble your life away?

The Double Jeopardy Clause of the Fifth Amendment states “no person shall... be subject for the same offense to be twice put in jeopardy of life or limb.” 1 Although on the surface this language appears clear, interpreting its meaning has caused problems on many levels. 2 In Ex Parte Lange, Justice Miller stated, “If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offence.” 3 Yet more than a century later, the ins and outs of this constitutional protection are still being debated.

In January 2003, yet another issue arose in the ongoing saga of double jeopardy analysis. The United States Supreme Court dealt with a very narrow and specific set of facts, involving procedural questions.

1. U.S. Const. amend. V.
the Court had never answered in the history of double jeopardy case law. What is the effect of a deadlocked jury in a sentencing hearing for the application of the death penalty on the termination of jeopardy?

This comment will explore this issue as presented in Sattazahn v. Pennsylvania\(^4\), and analyze not only the arguments made in both the majority and dissenting opinions, but other considerations which arise when deciding if double jeopardy protections should apply. Also considered in the comment is the effect of the Sattazahn decision on future criminal defendants. What consequences will this decision have for the death row defendant when trying to decide whether to appeal his possibly erroneous conviction?

In considering these issues, this comment will show why defendants like David Sattazahn deserve the protections of the Double Jeopardy Clause; the protections guaranteed them by the Constitution of the United States of America. Without protections for these individuals, the various principles behind the Double Jeopardy Clause are defeated, capital sentencing is denied the extraordinary deliberation it deserves, and the rights to both a fair trial and an appeal are destroyed.

Part II outlines the background of the case law on the Double Jeopardy Clause and its protections. Part III introduces the reader to Sattazahn v. Pennsylvania, providing background in both fact and procedure. Part IV outlines the arguments for double jeopardy protections in this particular type of case and is broken into five subparts, each covering different aspects of the overall theme. Subsection A analyzes the arguments made by both the majority and the dissent in the Sattazahn decision on the clearest factor that separates them: Is an acquittal required for double jeopardy protections to apply? Subsection B discusses how the rationales for the Double Jeopardy Clause show how its protections should and do apply to final judgments that do not amount to acquittals. In subsection C, the rationales previously outlined are balanced with society's interest in putting a guilty man to death. Subsection D considers the unique nature of capital sentencing, and how its severity and finality call for more careful consideration of issues such as double jeopardy protection. The consequences of the Sattazahn decision are considered in subsection E, specifically how it forces future criminal defendants into a "choice" between their right to appeal and their entitlement to life. Finally, Part V concludes the comment.

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II. History of Double Jeopardy Analysis

Since the late 1800s, the Supreme Court has struggled to define and clarify both the reaches and limitations of the Double Jeopardy Clause. There are several key cases which must be cited when discussing the history of the Double Jeopardy Clause. Included in those cases, and discussed chronologically below, are United States v. Ball, Stroud v. United States, North Carolina vs. Pearce, Bullington v. Missouri, Arizona v. Rumsey, and Poland v. Arizona. Each of these cases represents a new step or novel idea within the ongoing analysis of double jeopardy protections.

One of the earliest decisions to address the issue of a court's ability to retry defendants whose convictions had been overturned came in 1896 with United States v. Ball. In that case, three defendants, two of whom had been convicted and one who had been acquitted of murder, were re-tried and found guilty after their indictments had been quashed on remand. The Court held that “a verdict of acquittal, although not followed by any judgment, is a bar to a subsequent prosecution for the same offense,” and therefore found double jeopardy terminate the case for the defendant who was originally acquitted. Therefore, no bar exists to the retrial of those defendants convicted in their first trial.

The next significant case in double jeopardy case law came in 1919 with Stroud v. United States. The government tried the defendant on three different occasions for the crime of murder in the first degree. He was first sentenced to hang, then charged without capital punishment, and finally found guilty as charged with no recommendation dispensing with capital punishment. Defendant claimed that

11. Ball, 163 U.S. at 662.
12. Id.
13. Id. at 671.
14. Id. at 672.
17. Id. at 16-17.
the last trial violated the protections of the Fifth Amendment, but after a very short discussion the Supreme Court disposed of the argument and found defendant not to be placed in second jeopardy.\(^{18}\)

Nearly a half-century later, the Supreme Court gave birth to what has come to be known as the "clean slate" rule.\(^{19}\) In North Carolina v. Pearce, two separate defendants brought Double Jeopardy, Due Process, and Equal Protection claims after they were sentenced to longer prison terms on retrial.\(^{20}\) The Supreme Court held "that neither the double jeopardy provision nor the Equal Protection Clause imposes an absolute bar to a more severe sentence upon reconviction."\(^{21}\) Provided that the defendant was fully "credited"\(^{22}\) with time already served, no bar existed to the imposition of a longer or more severe prison sentence upon retrial.\(^{23}\) The basis for this decision "rest[ed] ultimately upon the premise that the original conviction ha[d]. . . . been wholly nullified and the slate wiped clean."\(^{24}\)

Perhaps one of the more important double jeopardy cases for the death penalty came in Bullington v. Missouri, decided in 1981, which focused on the applicability of double jeopardy to sentencing.\(^{25}\) In Bullington, the defendant had been convicted of murder and sentenced to life imprisonment.\(^{26}\) He was later granted a new trial after the Supreme Court handed down its decision in Duren v. Missouri\(^ {27}\), ruling that Missouri's automatic exemption of women from jury service was unconstitutional.\(^ {28}\) The government tried to seek the death penalty on retrial, and the Missouri Supreme Court held that there was no bar to them doing so.\(^ {29}\) The Supreme Court reversed and agreed with the dissent in its statement that "the jury ha[d] already acquitted the defendant of whatever was necessary to impose the death sentence."\(^ {30}\)

Bullington focused its analysis on the "very different situation"\(^ {31}\) in which there is a bifurcated proceeding, where sentencing is decided

\(^{18}\) Id. at 17-18.
\(^{19}\) Pearce, 395 U.S. 711.
\(^{20}\) Id.
\(^{21}\) Id. at 723.
\(^{22}\) Id. at 719.
\(^{23}\) Pearce, 395 U.S. 711.
\(^{24}\) Id. at 721.
\(^{25}\) Bullington, 451 U.S. 430.
\(^{26}\) Id.
\(^{27}\) See generally Duren v. Missouri, _______.
\(^{28}\) Bullington, 451 U.S. 430.
\(^{29}\) Id.
\(^{30}\) Id. at 445.
\(^{31}\) Id. at 446.
separately in a proceeding with the “hallmarks of a trial on guilt or innocence.”32 Particular sentencing procedures, such as the separate proceeding where the prosecution is required to prove additional facts to justify a particular sentence, and the sentencer’s discretion, determined by the standards enacted to guide the judge or jury, become of vital importance in deciding whether Pearce applies.33 In making this decision, Justice Blackmun reinstated a crucial exception to the rule stated in Pearce, which was first explained in Burks v. United States.34 That exception states, “A defendant may not be retried if he obtains a reversal of his conviction on the ground that the evidence was insufficient to convict.”35 Therefore, “the ‘clean slate’ rationale . . . is inapplicable whenever a jury agrees or an appellate court decides that the prosecution has not proved its case.”36 The majority in Bullington reached the conclusion that “because the sentencing proceeding . . . was like the trial on the question of guilt or innocence, the protection afforded by the Double Jeopardy Clause to one acquitted by a jury also is available to him, with respect to the death penalty, at his retrial.”37 In sum, once a verdict is reached and a defendant acquitted on the question of guilt or innocence, that verdict is without question final.38

The Court continued with this line of thinking just a few years later in Arizona v. Rumsey.39 Rumsey was convicted of both armed robbery and murder, and sentenced to life imprisonment.40 The state supreme court remanded the case to the trial court on appeal and Rumsey was resentenced to death.41 It was later found that this violated the Double Jeopardy Clause and Rumsey’s sentence was again set at life imprisonment.42 The State, however, petitioned for a writ of certiorari, and the Court decided that the defendant’s initial life sentence constituted an “acquittal” of the death penalty, therefore preventing the resentencing of death.43 The Court specifically stated in this decision that although Rumsey had requested that the Court overrule

32. Id. at 439.
33. Id.
34. Id. at 442; see generally Pearce, 395 U.S. 711; Burks v. United States, __________.
35. Bullington, 451 U.S. at 442.
36. Id. at 443.
37. Id. at 446.
38. Id. at 445.
40. Id.
41. Id.
42. Id.
43. Id.
Bullington, they refused to do so.\textsuperscript{44} Once again it was stressed that “an acquittal on the merits by the sole decisionmaker in the proceeding is final and bars retrial on the same charge.”\textsuperscript{45}

Finally, there was \textit{Poland v. Arizona}, the last in a string of cases distinguishing Bullington.\textsuperscript{46} In this case, two men were convicted of first-degree murder and the sentencing judge gave them both the death penalty.\textsuperscript{47} After reversal by the Arizona Supreme Court, petitioners were again convicted and sentenced to death.\textsuperscript{48} The Court rejected petitioner’s argument that “a capital sentencer’s failure to find a particular aggravating circumstance alleged by the prosecution always constitutes an ‘acquittal’ of that circumstance for double jeopardy purposes.”\textsuperscript{49} Justice White reiterated that “\textit{Bullington} indicated that the proper inquiry is whether the sentencer or reviewing court has ‘decided that the prosecution has not proved its case’ that the death penalty is appropriate.”\textsuperscript{50} Here, the prosecution clearly had proven its case, as the petitioners had been sentenced to the death penalty by the initial sentencing judge.\textsuperscript{51}

Just as the language of the Fifth Amendment is “deceptively plain,”\textsuperscript{52} so too may be the history and case law outlining its application. As the \textit{Sattazahn} decision illustrate, many issues still remain debatable and somewhat unresolved.\textsuperscript{53} First of all, how do the constitutional guarantees to a fair trial and the right to an appeal fit in? Even more troublesome are the many problems that arise when the death penalty is added to the mix, and the intricacies of this unique and final sentence must also be considered. Should defendants be put in the position to decide between an appeal and their lives?

III. \textbf{DAVID ALLEN SATTAZAHN V. PENNSYLVANIA}

On Sunday evening, April 12, 1987, two men hid in a wooded area waiting to rob the manager of the Heidelberg Family Restaurant.\textsuperscript{54} The two men were David Allen Sattazahn and his accomplice, Jeffrey

\textsuperscript{44.} Id. at 212.
\textsuperscript{45.} Id. at 211.
\textsuperscript{46.} Poland, 476 U.S. 147; see generally Bullington, 451 U.S. 430.
\textsuperscript{47.} Poland, 476 U.S. 147.
\textsuperscript{48.} Id.
\textsuperscript{49.} Id. at 155.
\textsuperscript{50.} Id. at 155.
\textsuperscript{51.} Poland, 476 U.S. 147 (1986).
\textsuperscript{52.} Crist, 437 U.S. at 32.
\textsuperscript{53.} See Sattazahn, 537 U.S. at 101.
\textsuperscript{54.} Sattazahn, 537 U.S. at 103.
Hammer. The man they waited to accost was Richard Boyer. It was just about closing time, and both Sattazahn and Hammer were ready with their guns drawn. As Boyer left the restaurant and walked across the parking lot, both men attacked him and demanded the bank deposit bag containing the entire day’s money and receipts. Boyer responded by tossing the bag towards the roof, to which Sattazahn and Hammer responded with a command to retrieve it. Instead of following that command, Boyer attempted to escape. As he was running away, Sattazahn and Hammer both fired shots and Boyer fell dead. The two men then retrieved the bank deposit bag and fled.

Sattazahn was prosecuted by the Commonwealth of Pennsylvania and found guilty of several charges, one of which was first-degree murder. In the sentencing phase, the jury deadlocked after three and a half hours of deliberation, and Sattazahn moved that the jury be discharged. Pursuant to Pennsylvania law, the trial judge discharged the jury and entered the required life sentence.

Sattazahn’s conviction was overturned on appeal by the Pennsylvania Superior Court due to an error in the jury instructions by the trial judge. On remand, Pennsylvania filed a notice of their intent to seek the death penalty. Sattazahn attempted to prevent Pennsylvania from seeking the death penalty on retrial but his motion was denied. The second trial resulted in another conviction for first-degree murder, but this time Sattazahn was sentenced to death.

On direct appeal, the Pennsylvania Supreme Court affirmed both the conviction of first-degree murder and the death sentence on retrial. Relying on earlier decisions, the court concluded that seeking the death penalty on retrial did not violate the Double Jeopardy

55. Id.
56. Id.
57. Id.
58. Id.
59. Id.
60. Id.
61. Id.
62. Id.
63. Id.
64. Id. at 104.
65. Id. at 105.
66. Id.
67. Id.
68. Id.
69. Id.
70. Id.
Clause or the Due Process Clause. The Supreme Court granted certiorari and considered Sattazahn's claims of Double Jeopardy and Due Process. The Court held that the Pennsylvania Supreme Court was correct in its conclusion that "neither the Fifth Amendment's Double Jeopardy Clause nor the Fourteenth Amendment's Due Process Clause barred Pennsylvania from seeking the death penalty against petitioner on retrial."

IV. ARGUMENT

The arguments presented in the remainder of this comment, calling for double jeopardy protection for defendants like David Sattazahn, are divided among the following five sections. The first section establishes a foundation for the right to those protections by explaining two categories of cases, one of which encompasses situations like that of David Sattazahn, in which double jeopardy protections are triggered without an acquittal. The rationales for the double jeopardy clause and its protections are considered in the second section. This is particularly important as the reasons behind both our laws and constitutional protections are a key element in determining their scope and application. The third section considers the other side of the coin. What is the government interest against which to balance the interests of the accused? Here the interests are different than in a typical double jeopardy analysis, as the case is in the sentencing phase rather than in a guilt determining phase. Also coming into play in these circumstances are the unique, severe, and final nature of capital sentencing. The character, effects, and ramifications of the sentence must be considered when deciding what types of protections should be given to the death penalty, and this is explored in the fourth section of the argument. Finally, the consequences of this particular decision are considered in the fifth and final section of the argument.

The Decisive Factor: Is Acquittal Required for Double Jeopardy Protection?

The key issue that divided the majority and dissent in Sattazahn was whether an acquittal was required to trigger double jeopardy protections. The majority rested its argument on precedent as described above, most notably citing Bullington and Rumsey. Justice Scalia

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71. Id.
72. Id.
73. Id. at 116.
75. Id.; see also Rumsey, 467 U.S. 203; Bullington, 451 U.S. 430.
reminded the Court that these cases held "that an 'acquittal' at a trial-like sentencing phase, rather than the mere imposition of a life sentence, is required to give rise to double-jeopardy protections."76 He also reiterated "that the relevant inquiry for double-jeopardy purposes was not whether the defendant received a life sentence the first time around, but rather whether a first life sentence was an 'acquittal' based on findings sufficient to establish legal entitlement to the life sentence.77 In other words, in order for double jeopardy to attach, it was necessary that there be "findings that the government failed to prove one or more aggravating circumstances beyond a reasonable doubt."78

In the end, the majority held that Sattazahn was never "acquitted" of the death penalty and therefore was not entitled to double-jeopardy protection.79 As Justice O'Connor stated in her concurrence, "When, as in this case, the jury deadlocks in the penalty phase of a capital trial, it does not 'decide' that the prosecution has failed to prove its case for the death penalty.80 Even the dissent admitted that the fact that Sattazahn was not "acquitted" of the death penalty constituted an "undeniable point" in the analysis of the case.81

The dissent, however, went on to argue that acquittal is not necessary to trigger double jeopardy protection.82 In making this argument, Justice Ginsburg relied on United States v. Scott, which acknowledged that "this Court has also developed a body of law guarding the separate but related interest of a defendant in avoiding multiple prosecutions even where no final determination of guilt or innocence has been made."83

United States v. Scott outlined two categories of cases in which double-jeopardy protection can be triggered without an acquittal.84 The first category includes cases where the trial judge declares a mistrial.85 This situation "all but invariably contemplates that the prosecutor will be permitted to proceed anew notwithstanding the defendant's plea of double jeopardy."86 The Court, however, has traditionally weighed the contrary interests of the defendant in having his trial com-

76. Sattazahn, 537 U.S. 107.
77. Id. at 108.
78. Id. at 108.
80. Id. at 117.
81. Id. at 119.
82. Id. at 120.
84. Id.
85. Id.
86. Id.
pleted by the tribunal and of society in insuring that justice is doled out to offenders.\textsuperscript{87} The second of those categories involves "termination of a trial in defendant's favor before any determination of factual guilt or innocence."\textsuperscript{88} In this situation, unlike the typical mistrial, granting such a motion "obviously contemplates that the proceedings will terminate then and there in favor of the defendant."\textsuperscript{89}

\textit{Sattazahn}, as the dissent argued, falls into the second category, as it involved a termination of the proceeding in his favor before any determination of guilt or innocence.\textsuperscript{90} In \textit{Sattazahn}, the jury deadlocked and no mistrial was declared.\textsuperscript{91} In fact, "Pennsylvania law provided that the trial proceedings would terminate 'then and there' in Sattazahn's favor."\textsuperscript{92} Pennsylvania law actually required that the judge conclude the proceedings by entering a life sentence.\textsuperscript{93}

Although it pointedly identified these two categories of double jeopardy protections, the dissent in \textit{Sattazahn} did concede two facts.\textsuperscript{94} One is that "double jeopardy law with respect to Scott's second category is relatively undeveloped."\textsuperscript{95} The other is that \textit{Scott} "did not hone in on a case like Sattazahn's."\textsuperscript{96} The dissent did, however, make several important points that indicate that double jeopardy protections should be triggered in the case of David Sattazahn.\textsuperscript{97} First of all, Justice Ginsburg explained how "the Court's reasoning" in \textit{Scott} gives "credence to the view that a trial-terminating judgment for life, not prompted by a procedural move on the defendant's part, creates a legal entitlement protected by the Double Jeopardy Clause."\textsuperscript{98} More importantly, \textit{Scott} "recognized that defendants have a double jeopardy interest in avoiding multiple prosecutions even when there has been no determination of guilt or innocence, and that this interest is implicated by preverdict judgments terminating trials."\textsuperscript{99}

This concept explained by Justice Ginsburg in the \textit{Sattazahn} dissent is not novel or innovative. As is explained in \textit{Crist v. Bretz}, "It

\begin{itemize}
\item \textsuperscript{87} \textit{Id.}
\item \textsuperscript{88} \textit{Id.} at 94.
\item \textsuperscript{89} \textit{Id.} at 94.
\item \textsuperscript{90} \textit{Sattazahn}, 537 U.S. at 122.
\item \textsuperscript{91} \textit{Id.}
\item \textsuperscript{92} \textit{Id.}
\item \textsuperscript{93} \textit{Id.}
\item \textsuperscript{94} \textit{Id.}
\item \textsuperscript{95} \textit{Id.}
\item \textsuperscript{96} \textit{Id.} at 123.
\item \textsuperscript{97} \textit{Id.}
\item \textsuperscript{98} \textit{Id.}
\item \textsuperscript{99} \textit{Scott}, 437 U.S. at 92.
\end{itemize}
became firmly established by the end of the 19th century that a defendant could be put in jeopardy even in a prosecution that did not culminate in a conviction or an acquittal, and this concept has been long established as an integral part of double jeopardy jurisprudence.\textsuperscript{100} There are many concerns, including "the finality of judgments, the minimization of harassing exposure to the harrowing experience of a criminal trial, and the valued right to continue with the chosen jury,"\textsuperscript{101} which necessitate double jeopardy protection in a variety of situations. As Justice Ginsburg states in the \textit{Sattazahn} dissent, "the interest in avoiding a renewed prosecution following a final judgment is surely engaged here."\textsuperscript{102}

\textbf{Rationales for the Double Jeopardy Clause: Why Protection is Necessary Without Acquittal}

The many rationales given for the Double Jeopardy Clause support the argument that its protections are necessary in situations that do not end with an acquittal. \textit{Green v. United States} stated, "The 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."\textsuperscript{103} Included in these hazards are the possibility that the all-powerful state will repeatedly try a defendant for the same crime,\textsuperscript{104} the expense and embarrassment that such an ordeal will cost a defendant,\textsuperscript{105} the continued state of insecurity and anxiety in which a defendant is forced to live,\textsuperscript{106} the possibility that although innocent, he may eventually be found guilty,\textsuperscript{107} and the right of an accused to have his trial completed by a particular tribunal.\textsuperscript{108} Risks such as these occur in a variety of situations that do not involve an acquittal, as "the heavy personal strain of the second trial is the same in either case," as is "the risk that, though innocent, the defendant may be found guilty at a second trial."\textsuperscript{109}

\begin{itemize}
\item \textsuperscript{100} Crist, 437 U.S. at 34.
\item \textsuperscript{101} Id. at 38.
\item \textsuperscript{102} Sattazahn, 537 U.S. at 123-124.
\item \textsuperscript{103} Green v. United States, 355 U.S. 184, 187 (1957).
\item \textsuperscript{104} Scott, 437 U.S. at 96.
\item \textsuperscript{105} Green, 355 U.S. at 187. See also Arizona v. Washington, 434 U.S. 497, 503-504 (1978).
\item \textsuperscript{106} Id.
\item \textsuperscript{107} Id.
\item \textsuperscript{108} Washington, 434 U.S. at 503.
\item \textsuperscript{109} Scott, 437 U.S. at 108.
\end{itemize}
A famous quote from Green, which was used in many cases to follow, starts, “The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense.”\(^{110}\) This proposal warns against the “all-powerful state relentlessly pursuing a defendant”\(^ {111}\) through multiple trials for the same crime. An important distinction, however, is made between defendants when considering whether this rationale is applicable and protection should be given.

First there is the defendant who has “either been found not guilty” or “had at least insisted on having the issue of guilt submitted to the first trier of fact.”\(^ {112}\) Second, there is the defendant who “chooses to avoid conviction and imprisonment, not because of his assertion that the Government has failed to make out a case against him, but because of a legal claim that the Government’s case against him must fail even though it might satisfy the trier of fact that he was guilty beyond a reasonable doubt.”\(^ {113}\) Defendants who fit into the second category do not require or deserve protection from the all-powerful State, whereas those in the first category do require and deserve such protection.

Defendants like Sattazahn fall into the first category of defendants. Sattazahn, and any future defendants in similar positions, have insisted on having the issue of guilt or innocence submitted to the trier of fact, yet pursuant to state statutes are forced to accept a life sentence when a decision cannot be reached. As the dissent stated:

Unlike Scott, Sattazahn did not successfully avoid having the question of guilt or innocence submitted to the first jury. The ‘issue of guilt’ in his case indeed was ‘submitted to the first trier of fact.’ Sattazahn was thus ‘forced to run the gauntlet once’ on death. Nor did Sattazahn himself bring about termination of his first trial. Once the jury deadlocked, state law directly mandated that the trial end. In short, the reasons we thought double jeopardy protection did not attach in Scott are absent here.\(^ {114}\)

In other words, Sattazahn did not attempt to avoid a decision on guilt or innocence, but sent that question to the jury, and was then required to accept a life sentence by virtue of the statute. Since he did not choose to avoid conviction based on a legal claim outside of the

\(^{110}\) Green, 355 U.S. at 187.

\(^{111}\) Scott, 437 U.S. at 96.

\(^{112}\) Id.

\(^{113}\) Id.

\(^{114}\) Sattazahn, 537 U.S. at 125-126. (citations omitted)
question of guilt or innocence, but insisted on having the jury decide that question, he is entitled to the protections of the Double Jeopardy Clause.

The oft-quoted Green decision went on to express another concern which the Double Jeopardy Clause is intended to protect against when it said, "...thereby subjecting him to embarrassment, expense, and ordeal and compelling him to live in a continuing state of anxiety and insecurity." This rationale is also discussed in Arizona v. Washington, which focused on the increased "financial and emotional burden on the accused" and the prolonged "period in which he is stigmatized by an unresolved accusation of wrongdoing." This is perhaps the clearest, most basic reason for holding that a defendant is put in jeopardy regardless of the fact that his trial is suspended without a verdict.

Who can deny that a man, having experienced a trial for murder, with the possibility of death looming over him, hasn't been through embarrassment, anxiety, and insecurity? Who can deny the financial expense and emotional burdens a man, on trial for his life, has undergone? Who can deny the stigma that a charge of murder, be he innocent or guilty, leaves on a person's life? More importantly, having been spared his life, who can expect a man to suffer through all of this again? Common sense tells us that all of these perils which double jeopardy is meant to protect against are "plainly implicated by the prospect of a second capital sentencing proceeding."

The last concern expressed in the renowned Green quote was "...the possibility that even though innocent he may be found guilty." Arizona v. Washington also articulated concern for the possibility that the second trial "may even enhance the risk that an innocent defendant may be convicted." This rationale is implicated in a slightly different manner when the issue is sentencing, but is still relevant and important. When it comes to the death penalty, the issue becomes whether the second trial risks putting to death a man who does not deserve it, be it because he is truly innocent or because his crime does not meet the requisites for capital punishment. Although different in result, the risk encountered remains the same and equally dangerous.

117. Crist, 437 U.S. at 35.
118. Sattazahn, 537 U.S. at 124.
119. Green, 355 U.S. at 188.
120. Washington, 434 U.S. at 504.
Finally, Arizona v. Washington discussed an additional rationale when it stated the constitutional protection of double jeopardy "embraces the defendant's 'valued right to have his trial completed by a particular tribunal'."\textsuperscript{121} The reason this right is entitled to constitutional protection is because "even if the first trial is not completed, a second prosecution may be grossly unfair."\textsuperscript{122} Again, though slightly different due to the intricacies and consequences of sentencing, the risk of unfairness is equally hazardous and must be considered in determining whether double jeopardy attaches.

All of these cases identify a variety of reasons, including money, psychology, reputation, and simple considerations of fairness and the right to be free from an all-powerful State, which justify the existence of double jeopardy protections. All of these concerns, be they the right to have a trial completed by a particular group of jurors, or the increased chance that an innocent man will be found guilty, are implicated by a second trial, regardless of whether a verdict of acquittal is handed down in the first. The consequences of a second trial on any question of the guilt of a criminal defendant do not depend solely on the outcome of the first.

\textit{Balancing the Rationales for Protection with Society's Interest in Killing?}

When considering the rationales given for the Double Jeopardy Clause and its protections, courts balance those rationales with the interests of the state. In cases deciding whether double jeopardy should prevent a second trial on guilt or innocence, the state is concerned with furthering society's interest in "giving the prosecution one complete opportunity to convict those who have violated its laws."\textsuperscript{123} In other words, it is important for the state to have one comprehensive chance to determine the guilt or innocence of each criminal defendant, and to make sure the correct person is put in prison and punished for his crime.

However, when the issue involves sentencing, most notably the choice between life in prison and the death penalty, the interests of both the state and society change. At this stage, the prosecution has had a complete opportunity to convict the defendant, the defendant has been found guilty of violating the laws of the state, and the defendant is assured to spend a great deal of time paying for his crime. The

\textsuperscript{121} Id. at 503. (quoting Wade v. Hunter, 336 U.S. 684, 689 (1949)).
\textsuperscript{122} Id.
\textsuperscript{123} Id. at 509.
state is not, and can no longer be, concerned with whether it has received a fair shot at trying and convicting those who violate its laws.

Therefore, the interests of both the state and its people shift to the consequences of either putting the guilty man to death for his crime, or putting him away for the rest of his life. The question then becomes: Is this a valuable interest with which society should be concerned? Or should the state and its people be content with putting a decidedly guilty man in prison for what will probably be the rest of his natural life? In answering this question, it is important to consider both the nature and consequences of capital sentencing and the many issues that arise when discussing the death penalty.

First of all, it is often asked whether the death penalty is really worth its exorbitant cost. According to the Death Penalty Information Center, "Death penalty cases are much more expensive than other criminal cases and cost more than imprisonment for life with no possibility of parole." Why are we paying the inflated price of killing men for murder when it's less expensive to try them and house them for life? More importantly, why should we shoulder these financial burdens twice for the same defendant?

The only seemingly logical justification for the added expense of capital sentencing is that the death penalty is more effective in producing positive societal results than life imprisonment. Most of our society would be quite willing to pay more in taxes to execute convicted murderers if they knew it worked to deter prospective criminals and prevent further crimes from ever occurring. Shouldering the burden upfront would save everyone money in the long run, as it would cut costs related to both the violence of crime and prosecuting future criminals. However, as the next consideration shows us, this seemingly logical presumption is simply not the case.

Many scholars and laymen alike often debate whether the death penalty actually achieves its goal of deterrence and prevention of future crime. The Death Penalty Information Center reports the views of an overwhelming number of criminologists who believe that "research fails to support a deterrence justification for the death penalty." Some reports state that executions may actually increase the


number of murders rather than deter murders. Rationally, it seems that if the death penalty were achieving any goal at all it would be deterrence of future crimes. However, it appears that it is not even successfully reaching this objective. Why do we as a society press so vigorously for a system that is not even accomplishing its most basic, fundamental goals? Even more interestingly, why would we push for this practice multiple times with a single criminal defendant?

In addition, the question is often raised whether the death penalty is issued equally among different races and social classes. Studies show shocking evidence of discrimination both regarding the race of the defendant and the race of the victim in death penalty cases. The most dangerous combination for a death penalty case is a black defendant with a non-black victim. Also important in capital sentencing cases is attorney representation. Those in lower social classes simply cannot afford the type of lawyers they need to save themselves from what could be a death sentence. Justice Ruth Bader Ginsburg stated it best when she said "People who are well represented at trial do not get the death penalty. . . I have yet to see a death case among the dozens coming to the Supreme Court on eve-of-execution stay applications in which the defendant was well represented at trial."  

Finally, and of course the most important concern of all, is the number of innocent men and women we as a country are putting to death each year. Since 1973, 115 innocent people have been exonerated from death row. The latest man to be exonerated from death row was Ryan Matthews who was cleared by the help of DNA evidence on August 9, 2004. In addition to those exonerated, 227 inmates have been granted clemency since 1976, for reasons varying from doubts about the defendant's guilt to governors' conclusions about the death penalty process. This means that a total of 342 individuals have been taken off death row in the last 30 years for one reason or another.

128. Id.
Of course, in analyzing double jeopardy as it relates to sentencing, those who will be affected by the protections, or lack thereof, have been found guilty, had their convictions overturned, and then found guilty a second time. It must be conceded that the chance of these individuals actually being innocent remains somewhat diminutive. The reality, however, is that we simply do not know. Is it not better to put ten guilty men in prison for the rest of their lives than to put one innocent man to death? The alternative is not to let these men and women go free, to allow them to get away with murder. These defendants have already been found guilty, whether they truly committed the crime or not. In these cases we are simply talking about sparing these defendants their lives, the majority of which will still be spent in prison.

Considering the numerous concerns with the practice of capital sentencing, we must pause at the notion of prosecuting someone not once, but twice, for this problematic sentence. Does the scale really tip in favor of society's interest in killing over the justifications for double jeopardy protection? Or should we give death penalty candidates a break after the first trial determines their sentence to be life? When considering such a final sentence as death, it seems it is better to err on the side of caution, and choose life.

**The Death Penalty: A Unique and Final Punishment Deserving of Special Consideration**

No one can deny that the death penalty is a sentence "unique in both its severity and its finality." As our cases have recognized, "...the penalty of death is different in kind from any other punishment imposed under our system of criminal justice." Yet all too often this vital fact is forgotten, and capital sentencing is not given the special consideration it deserves and needs.

The death penalty is the most controversial sentence in our criminal justice system. As the one sentence that many claim a moral, religious, or ethical opposition to, the death penalty stirs arguments and debates between many individuals and groups. Even those who do not claim any clear opposition to the death penalty question whether it can be or is applied equally and effectively among our criminal defendants. Differences in opinion over this divisive topic draw lines within political parties, attorneys, and even families.

No matter where an individual falls in the many disagreements surrounding the death penalty, its severity and finality are not debatable. No matter where one comes down on the question of whether capital sentencing should be used in our American system of criminal justice, no matter what one thinks about the sentence’s application, the importance of this practice and its effect on people’s lives is unquestioned.

Death is the most severe and final punishment one can receive. Questions of whether a criminal defendant truly committed the crime for which they are convicted may always loom, but once he has been executed, the answers no longer matter. Prison terms, by contrast, can be shortened, lengthened, or even brought to an end. When DNA or newly discovered evidence exonerates someone, they can be released from prison. Although they may have missed out on many years of their lives, they will have some time left to enjoy. Executions, however, take a matter of minutes and end the life of the defendant forever. Executions affect family members, friends, and society as a whole.

Obviously less important than the execution of innocent people, but still of grave concern, is the amount of stress and emotion that someone on trial for their life must go through, and the heartache that their families also face. The mental and emotional burden, which any defendant who is subject to possible execution must endure, is simply unimaginable. Living your life on a daily basis, for months and sometimes even years, wondering if your time will soon come to an end has to be incredibly trying. Living your life knowing that your fate is in the hands of twelve strangers has to put you on edge every second of every day.

In addition to the defendant on trial, there are mothers, fathers, sisters, brothers, spouses, children, aunts, uncles, grandparents, and close friends who not only watch their loved one go through this experience, but have their own reactions and feelings as well. Their emotions, though perhaps not as stinging and burdensome as the individual actually on trial for his or her life, are also difficult and complicated and must be of some concern.

As the dissenting opinion in Sattazahn argued, “These qualities heighten Sattazahn’s double jeopardy interest in avoiding a second prosecution.”134 All of the concerns and rationales behind the Double Jeopardy Clause are exacerbated when the result is death. All the “hazards” of a second trial, including the emotional and financial burdens, are aggravated when the result is not freedom or imprisonment.

134. Sattazahn, 537 U.S. at 127.
but imprisonment or death. Also, the possibility of error becomes much more serious and the results much more grave. The consequences of error involve putting an innocent man to death rather than simply in prison. Finally, as Justice Ginsburg stated, “Death... makes the ‘dilemma’ a defendant faces when she decides whether to appeal all the more ‘incredible’.”135 The defendant is forced to take a gamble with his life to ensure his right to a fair trial. Death is “indeed a penalty ‘different’ from all others”136 and is therefore deserving of more heightened consideration when discussing double jeopardy.

Consequences: The Choice Between the Right to Appeal or Entitlement to Life

The argument has been made, and successfully so, that when a defendant has a conviction overturned by his own appeal he can be tried again on the ground that he has “waived his plea of former jeopardy by asking that the conviction be set aside.”137 The Government made this argument in Green, stating that Green “...waived his constitutional defense of former jeopardy... by making a successful appeal of his improper conviction.”138 However, the Court in Green rejected this argument for precisely the same reason why it should be rejected here in the discussion of the death penalty.

Justice Black reminded us in Green that waiver, although “vague,” and “used for a great variety of purposes, good and bad... connotes some kind of voluntary knowing relinquishment of a right.”139 Green, however, had “no meaningful choice,” and therefore could not have possibly “voluntarily” given up his rights.140 As Justice Holmes stated in Kepner v. United States:

Usually no such waiver is expressed or thought of. Moreover, it cannot be imagined that the law would deny to a prisoner the correction of a fatal error, unless he should waive other rights so important as to be saved by an express clause in the Constitution of the United States.141

Although somewhat different, a similar dilemma exists in a case such as Sattazahn. For someone like Sattazahn, the question becomes whether he has waived his “state-granted entitlement to avoid the death

135. Id.
136. Id.
137. Green, 355 U.S. at 189.
138. Id. at 191.
139. Id.
140. Id. at 192.
penalty," as opposed to waiving a constitutional protection. Nevertheless, as the dissent argued, "...the considerations advanced in Green should inform our decision here." As Justice Ginsburg explained,

Under the Court's decision, if a defendant sentenced to life after a jury deadlock chooses to appeal her underlying conviction, she faces the possibility of death if she is successful on appeal but convicted on retrial. If, on the other hand, the defendant loses her appeal, or chooses to forgo an appeal, the final judgment for life stands.

The consequences of this "choice" are immense, far-reaching, and simply unacceptable. The American criminal justice system prides itself on giving every defendant a speedy trial before a jury of his peers that is both fair and just in determining his guilt or innocence, as well as his sentence. These ideals have been outlined in the Constitutions of our country and states, as well as many statutes and rules that govern the procedure and content of all trials in our criminal justice system. While it is impossible to avoid every mistake, be it in the evidence allowed, the procedure followed, or the instructions given, the one thing that can be done to eradicate as many problems as possible is to allow the defendant to appeal those errors.

When a defendant is put in the position where he must choose between this highly valued right to an appeal and his right to life, a very disturbing situation emerges. There will be those defendants who are willing to accept the mistakes, give in to the misconduct of prosecutors, judges, and juries, just to protect themselves from execution. Yet there will also be those defendants who choose to fight those errors, and pay for it with their lives. Regardless of which direction the individual goes the reality is that the defendant is faced with a situation in which there really is no choice at all, at least not a meaningful one.

As the dissent stated in Sattazahn, "we have previously declined to interpret the Double Jeopardy Clause in a manner that puts defendants in this bind." It is difficult to swallow the argument that asks us to begin to change this precedent in a situation involving the death penalty. If there ever is, or has been, a situation in which we should err on the side of caution, it is in the area of capital sentencing. Even if the result is that in some situations it gives the defendant more choice than we might like, even if the result opens the system to some occasional

142. Sattazahn, 537 U.S. at 126.
143. Id. at 127.
144. Id. at 126.
145. Id. at 127.
abuse, we have protected the rights to appeal, and the rights to life for many more individuals who needed it.

V. Conclusion

The rationales behind the double jeopardy clause, encompassing everything from protection from the state to the mental, emotional, and financial burdens of a second trial, call for its protections in a wide variety of situations. The protections of double jeopardy do not stop simply at the defendant who has been acquitted by the sole decisionmaker on the issue of guilt or innocence. The defendant who has endured a trial on the issue of death, and had the proceedings terminated with a decision in his favor is also deserving of these protections. More importantly, when balanced against the interests of the state in executing a man for his crime, the interests in protecting this defendant become clear.

Not only do the rationales behind the implementation of the Double Jeopardy Clause support its protections in this context, but the nature and character of the death penalty also call for special considerations in making this monumental decision. It cannot be ignored that the death penalty is the most unique, controversial, severe, and final punishment ever to be implemented, handed down, and practiced in the history of our country. The execution of a criminal defendant cannot be taken back, and the process in which it is decided cannot be done in a fair and just manner. If there is ever a time to err on the side of caution and carefulness, it is in the area of capital sentencing.

Finally, the consequences of denying individuals in this situation double jeopardy protections are simply too disastrous to ignore. Placing an individual in the position of choosing between a fair trial and his life is a violation of all of our most basic American ideals regarding the criminal justice system. The ramifications of this “choice” not only affect the defendant himself, but all the players in our adversary system.

For all the reasons outlined in this comment, defendants like David Sattazahn deserve the protections of the Double Jeopardy Clause; the protections that are guaranteed by the Constitution of the United States of America. Without protections for these individuals, the various principles behind the Double Jeopardy Clause are defeated, capital sentencing is denied the extraordinary deliberation it deserves, and the rights to both a fair trial and an appeal are destroyed.

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