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Double Jeopardy and Capital Sentencing: Preserving the Implied Acquittal of Death in the Wake of *Sattazahn v. Pennsylvania*

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I. Introduction

Imagine you are a capital defense attorney. The jury has convicted your client of capital murder in the guilt/innocence phase of the trial and sentenced him to life imprisonment during the sentencing phase. Although in many capital cases you would consider this to be a victory, in this particular instance you feel that a grave procedural error prejudiced your client in the guilt/innocence phase of the trial. You are convinced that if this error had not occurred, the jury would not have convicted your client of capital murder. Thus, you prepare an appeal seeking reversal of your client's conviction and remand for a new trial. Just as you are about to file the appeal, however, you pause for a moment and consider the possible chain of events that the appeal could set into motion.

On one hand, the appeal could fail and your defendant's conviction and life sentence would stand. However, given the strength of your arguments supporting reversal, you conclude that the appellate court would

likely agree to set your client's conviction aside and remand the case for new trial. You predict that in a new trial free of procedural errors prejudicing your client's case, the jury would decline to convict the defendant of capital murder. But what if the jury were to convict your client of capital murder in the guilt phase of the second trial despite the absence of the prejudicial error? Could the prosecution lawfully seek the death penalty in the sentencing phase of the second trial even though your client received a life sentence for that very offense in the sentencing phase of the first trial?

The answer to this question turns on whether your client was "acquitted" of the death penalty in the sentencing phase of the first trial. Such an acquittal entitles the defendant to invoke the Fifth Amendment's prohibition against double jeopardy to preclude any further consideration of the death penalty. Until recently, the law was clear that any jury-imposed life sentence constituted an acquittal of death barring the prosecution from seeking death on retrial following successful appeal of the underlying conviction.[1] Recent developments attaching increased legal significance to sentencing factors have called this rule into question, and it is no longer certain that all jury-rendered life sentences will provide capital defendants with double-jeopardy protection from the death penalty.[2]

In *Ring v. Arizona*,[3] the Supreme Court declared that aggravating circumstances that make the defendant eligible for the death penalty operate as the functional equivalent of elements of a greater offense because they increase the maximum imposable punishment.[4] Subsequently, in *Sattazahn v. Pennsylvania*,[5] a plurality of the Court asserted that the holding in *Ring* alters the definition of what constitutes an acquittal of death and suggested a test that would drastically reduce double-jeopardy protection from death on retrial.[6] This Note analyzes the merits of the *Sattazahn* plurality's

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1. *See infra* Part II.B (explaining the implied acquittal of death).

2. *See infra* notes 117–24 and accompanying text (explaining that the recent declaration that aggravating factors constitute elements of the crime of "capital murder plus one or more aggravator(s)" narrows the situations in which a defendant will receive an acquittal of death).

3. Ring v. Arizona, 536 U.S. 584 (2002). For a discussion of the *Ring* case, see Part IV.A.

4. *See Ring*, 536 U.S. at 609 (explaining that aggravating factors operate as the functional equivalent of a greater offense and thus must be found by the jury).

5. Sattazahn v. Pennsylvania, 537 U.S. 101 (2003). For a discussion of the *Sattazahn* case, see Part III.

6. *See Sattazahn*, 537 U.S. at 110–13 (stating that because *Ring* established that "the underlying offense of 'murder' is a distinct, lesser included offense of 'murder plus one or more aggravating circumstances,'" a defendant will not receive an acquittal of death unless the jury

assertions and ultimately concludes that although *Ring* does change the necessary elements of an acquittal of death, the plurality's proposed test narrows the situations in which a life sentence will provide double-jeopardy protection beyond what the law requires. Nonetheless, this Note urges capital defense attorneys to act now and request more specific verdict forms in their clients' initial capital-sentencing proceedings. These detailed forms will ensure that any information necessary to establish an acquittal of death under any test that may evolve is preserved, and thus ensure that defendants will not lose their rights under the Double Jeopardy Clause due to lack of proof.

Part II of this Note provides background information on Double Jeopardy jurisprudence and explains the previously established standard for an acquittal of death that the *Sattazahn* plurality now challenges.[7] Part III analyzes the *Sattazahn* opinion and introduces the plurality's proposed test of what constitutes an acquittal of death.[8] Part IV explains the plurality's justification for altering the prior understanding of what constitutes an acquittal of death and fleshes out the requirements of the plurality's proposed test.[9] In Part V, the Note conducts a legal analysis of the plurality's proposed test and anticipates the Supreme Court's likely course with respect to the future of the standard for a death acquittal, ultimately predicting that the plurality's test will not become controlling law but that some change in the definition of an acquittal of death is imminent.[10] Finally, Part VI discusses the ramifications of the plurality's new test and proposes a solution, forewarning capital defense attorneys to take precautions so that they will be able to establish the facts necessary to prove an acquittal of death no matter what course the Court ultimately takes.[11]

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unanimously concludes that the prosecution has failed to prove the existence of aggravating circumstances).

7. *See infra* Part II (explaining Double Jeopardy generally, the doctrine of implied acquittal, and the development of the implied acquittal of death).

8. *See infra* Part III (analyzing the *Sattazahn* opinion).

9. *See infra* Part IV (exploring the plurality's proposed test).

10. *See infra* Part V (predicting the future of the plurality's proposed test).

11. *See infra* Part VI (discussing the ramifications of an adoption of the plurality's test).

II. Background

The Double Jeopardy Clause, found in the Fifth Amendment to the United States Constitution, declares that "no person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb."[12] The goal of this provision is to prevent the additional expense, embarrassment, and anxiety of the defendant, as well as the heightened risk of erroneous conviction that would result if the government could use its vast power and resources in repeated attempts to convict a defendant of an alleged crime.[13] Jeopardy attaches when the jury is sworn in a jury trial and when the judge hears the first piece of evidence regarding the issue of guilt or innocence in a bench trial.[14] These events trigger the Double Jeopardy Clause, and when jeopardy later terminates, the Fifth Amendment prohibits the government from further prosecuting the individual for the alleged offense.[15] The three basic events that will terminate jeopardy are conviction, acquittal, and discharge of the jury without the defendant's consent when such discharge was not a manifest necessity.[16]

Although it is well settled under the Fifth Amendment that an acquittal terminates jeopardy and bars retrial,[17] the issue of what constitutes an acquittal is a frequently litigated question. As *Sattazahn* illustrates, the Court's decisions in this area constantly tweak and refine the definition of

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12. U.S. CONST. amend. V.

13. *See, e.g.*, Green v. United States, 355 U.S. 184, 187–88 (1957) (noting that the underlying idea of the Double Jeopardy Clause is that the State should not be allowed to use its power and resources to repeatedly attempt to convict a defendant of an offence, thereby subjecting him to embarrassment, expense, and anxiety and increasing the possibility that he be found guilty despite his innocence). The Double Jeopardy Clause, originally a prohibition on the federal government, applies to the states via the Fourteenth Amendment. Benton v. Maryland, 395 U.S. 784, 794 (1969).

14. *See* Serfass v. United States, 420 U.S. 377, 388 (1975) ("In the case of a jury trial, jeopardy attaches when a jury is empaneled and sworn. In a nonjury trial, jeopardy attaches when the court begins to hear evidence.") (citations omitted).

15. *See Green*, 355 U.S. at 188 (discussing the various events that will end a defendant's jeopardy and bar subsequent retrial).

16. *See id.* (noting that a verdict of guilt or innocence will bar a second trial on the same charge and also that discharge of the jury without the defendant's consent will bar retrial when a completion of the first trial was not impossible); United States v. Ball, 163 U.S. 662, 671 (1896) (explaining that an acquittal is final and cannot be reviewed without putting the defendant twice in jeopardy); United States v. Perez, 22 U.S. (9 Wheat.) 579, 580 (1824) (stating that the trial can be terminated over the defendant's objection without barring retrial when "there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated" and concluding that a hung jury constitutes such a situation).

17. *Green*, 355 U.S. at 188.

acquittal for purposes of double jeopardy. Before exploring the ramifications of the *Sattazahn* plurality's departure from prior death penalty jurisprudence, this Note will discuss the foundation of the implied acquittal and the subsequent development of the pre-*Sattazahn* understanding of what constitutes an acquittal of death.[18]

A. The Implied Acquittal

That an acquittal of an offense is final and bars retrial for that offense even if it was based on an erroneous foundation is a deeply-rooted principle in our criminal law,[19] but equally well established is the principle that double jeopardy does not bar retrial when a conviction is later set aside for trial error.[20] When the defendant successfully appeals a conviction of a lesser included offense on grounds of trial error, it has not always been clear which of these principles would determine the charges the government could lawfully bring on retrial. As long as the conviction on the lesser offense stood, it was universally accepted that the government was barred from any further prosecution for the offense set forth in the indictment.[21] However, a split developed among the states as to whether a defendant's successful appeal of that conviction waived his double-jeopardy protection with respect to the greater offense on which the jury had refused to convict in addition to the lesser offense for which he was convicted.[22]

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18. *See infra* Part II.A–B (explaining the implied acquittal and discussing its application in the capital-sentencing context).

19. *See* Fong Foo v. United States, 369 U.S. 141, 143 (1962) (holding that the verdict of acquittal was final and could not be reviewed even though it was "based upon an egregiously erroneous foundation"); *Ball*, 163 U.S. at 671 ("The verdict of acquittal was final, and could not be reviewed, on error or otherwise, without putting [the defendant] twice in jeopardy, and thereby violating the Constitution.").

20. *See Ball*, 163 U.S. at 672 ("[A] defendant, who procures a judgment against him upon an indictment to be set aside, may be tried anew upon the same indictment, or upon another indictment, for the same offence of which he had been convicted.").

21. *See* Green v. United States, 355 U.S. 184, 193 (1957) (discussing the well-established idea that conviction on a lesser included offense provides the defendant with a valid defense of former jeopardy for that offense and any greater offenses upon which the jury refused to convict).

22. *See id.* at 216 n.4 (Frankfurter, J., dissenting) (listing the nineteen states that permitted retrial for the greater offense and the seventeen states that barred retrial for the greater offense).

The Supreme Court finally resolved this issue in *Green v. United States*[23] by holding that retrial for the greater offense violated double jeopardy.[24] Although the dissent argued that after a defendant calls the propriety of the proceeding into question "a complete reexamination of the issues in dispute is appropriate and not unjust,"[25] the majority held that conviction of a lesser included offense constitutes an implied acquittal of the greater offenses, which a defendant cannot waive by appealing the conviction.[26] The Court reasoned that it would be fundamentally unfair to require a defendant to "barter his constitutional protection against a second prosecution" for the greater offense "as the price of a successful appeal from an erroneous conviction" on the lesser offense.[27]

B. Development of the Implied Acquittal in Capital-Sentencing Proceedings

Green established that conviction of a lesser included offense in a trial on the merits constitutes an implied acquittal of any greater offense and bars retrial on that greater offense, but the Supreme Court has been hesitant in extending these principles to sentencing proceedings.[28] *Stroud v. United States*[29] was the first major case to

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23. Green v. United States, 355 U.S. 184 (1957). In *Green*, the Supreme Court considered whether a conviction of a lesser included offense by a jury authorized to find the defendant guilty of a greater offense constituted an implied acquittal of the greater offense, thus barring retrial for the greater offense after the conviction of the lesser offense was set aside upon defendant's motion. *Id.* at 189–90. In Green's first trial, the jury was presented with charges of first- and second-degree murder and found the defendant guilty of second-degree murder. *Id.* at 190. This conviction was reversed on the defendant's appeal and remanded for a new trial, in which defendant was again tried for first-degree murder despite the first jury's refusal to convict on that charge. *Id.* The new jury convicted Green of first-degree murder, and he appealed this conviction all the way to the Supreme Court. *Id.* at 186. The Court held that retrial of first-degree murder was a violation of the Fifth Amendment because "[c]onditioning an appeal of one offense on a coerced surrender of a valid plea of former jeopardy on another offense exacts a forfeiture in plain conflict with the constitutional bar against double jeopardy." *Id.* at 193–94.

24. *Id.* at 193–94.

25. *Id.* at 219 (Frankfurter, J., dissenting).

26. *Id.* at 193–94, 198.

27. *Id.* at 193.

28. *See* Bullington v. Missouri, 451 U.S. 430, 437–38 (1981) (noting that the Court has resisted attempts to extend the principle that an acquittal bars retrial to sentencing proceedings); North Carolina v. Pearce, 395 U.S. 711, 719–20, 723–24 (1969) (explaining that "the guarantee against double jeopardy imposes no restrictions upon the length of a sentence imposed upon reconviction").

29. Stroud v. United States, 251 U.S. 15 (1919). In *Stroud*, the Supreme Court considered whether the defendant could be subjected to the death penalty on retrial even though the previous jury found him "guilty as charged in the indictment without capital punishment." *Id.* at 17. The Court noted that the indictment contained only one count, and the fact that the jury mitigated punishment to life imprisonment "did not render the conviction less than one for

consider whether a life sentence serves as jeopardy protection against the death penalty in a subsequent trial following reversal of the conviction.[30] The *Stroud* Court held that the prior life sentence did not bar retrial for death, but in so holding the Court relied on the fact that the sentencing procedure in that case was part of the single trial on first-degree murder.[31] The general rule remains that imposition of a particular sentence is not deemed to be an acquittal of any harsher sentence that could be imposed,[32] but in *Bullington v. Missouri*[33] the

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first degree murder." *Id.* at 17–18. Accordingly, the Court held that because the conviction and sentence were reversed upon the defendant's appeal, the imposition of the death penalty did not violate the Double Jeopardy Clause of the Fifth Amendment. *Id.* at 18.

30. In several cases the Supreme Court recognizes *Stroud* as one of the first major cases dealing with this issue. *See, e.g.*, *Bullington*, 451 U.S. at 439 (discussing *Stroud* as relevant precedent).

31. *Stroud*, 251 U.S. at 18.

32. *See* United States v. DiFrancesco, 449 U.S. 117, 134, 137 (1980) (noting that the "Court's decisions in the sentencing area clearly establish that a sentence does not have the qualities of constitutional finality that attend an acquittal" and further explaining that "the Double Jeopardy Clause does not require that a sentence be given a degree of finality that prevents its later increase"); *Pearce*, 395 U.S. at 723 ("[N]either the double jeopardy provision nor the Equal Protection Clause imposes an absolute bar to a more severe sentence upon reconviction.").

33. Bullington v. Missouri, 451 U.S. 430 (1981). In *Bullington*, the Supreme Court considered whether a life sentence rendered in a sentencing proceeding resembling a trial on guilt or innocence constituted an acquittal of the death penalty, thus barring the government from seeking the death penalty on retrial. *Id.* at 432. The jury in the first trial found Bullington guilty of capital murder at the guilt/innocence phase, but returned a verdict fixing Bullington's penalty at life without eligibility for probation or parole for fifty years at the sentencing phase. *Id.* at 435–36. The defendant's conviction was later reversed on procedural error and remanded for new trial, in which the government again sought the death penalty. *Id.* at 436. After the Supreme Court of Missouri rejected the defendant's double jeopardy claims, the Supreme Court of the United States granted certiorari to consider the issue. *Id.* at 437. The Court recognized that the Double Jeopardy Clause does not impose an absolute prohibition against the imposition of a harsher sentence at retrial after the defendant successfully appeals his conviction. *Id.* at 438. Nonetheless, the Court held that because the sentencing phase in Bullington's first trial resembled a trial on the question of guilt or innocence, the jury's life sentence constituted an acquittal of death barring retrial on the issue of death. *Id.* at 446. The court explained that the sentencing phase prescribed by the Missouri statutes was markedly different from the sentencing phase in *Stroud* and other cases where double jeopardy was held inapplicable to sentencing. *Id.* at 438. Specifically, the Court noted that Missouri's capital-sentencing statute contained substantive standards to guide the discretion of the sentencer, based the jury's decision on evidence introduced in a separate proceeding that formally resembled a trial, and required the prosecution to establish certain facts beyond a reasonable doubt in order to obtain the death penalty. *Id.* The Court concluded that in such a sentencing proceeding the jury must determine whether the state proved its case, and thus imposition of a life sentence means that the jury has acquitted the defendant of the factors necessary to impose death. *Id.* at 444–45.

Supreme Court carved out an exception to this rule for capital-sentencing proceedings that "have the hallmarks of the trial on guilt or innocence."[34]

In *Bullington*, the jury in the first trial in state court found the defendant guilty of first-degree murder in the guilt/innocence phase of the trial and sentenced him to life without possibility of probation or parole for fifty years in the sentencing phase.[35] The sentencing procedure in Bullington's first trial was significantly different than the procedures "employed in any of the Court's cases where the Double Jeopardy Clause has been held inapplicable to sentencing" in that the jury's discretion was limited to two alternatives, the decision was guided by substantive standards and based on evidence introduced in a trial-like proceeding, and the prosecution was required to prove the existence of certain facts beyond a reasonable doubt before the jury could impose the death penalty.[36] The *Bullington* Court explained that this bifurcated sentencing proceeding "was itself a trial on the issue of punishment so precisely defined by the Missouri statutes."[37] Unlike the sentencing proceeding employed in *Stroud*, this trial-like sentencing proceeding made it possible to discern from the jury's imposition of a life sentence that the prosecution failed to prove its case on the issue of death.[38] Thus, the Court concluded that when the sentencing proceeding at a defendant's first trial resembles a trial on 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."[39] This principle announced in *Bullington* has had far-reaching implications because nearly all modern capital-sentencing statutes require trial-like procedures in the sentencing phase.[40] These death penalty statutes require the jury to find the existence of one or more aggravating factors (aggravators) before the defendant can

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34. *Id.* at 439.

35. *Id.* at 435–36 (discussing the disposition of the defendant's first trial).

36. *Id.* at 438.

37. *Id.*

38. *Id.* at 444–45.

39. *Id.* at 446.

40. *See id.* at 432–33 (comparing the Missouri statute to "most death penalty legislation enacted after this Court's decision in *Furman v. Georgia*"). *But see* Lowenfield v. Phelps, 484 U.S. 231, 244–45 (1988) (emphasizing that "[t]o pass constitutional muster, a capital-sentencing scheme must 'genuinely narrow the class of persons eligible for the death penalty'" and noting that most states satisfy this narrowing function by requiring the jury to find the existence of at least one aggravator at the sentencing phase, but holding that there is "no reason why this narrowing function may not be performed by jury findings at either the sentencing phase of the trial or the guilt phase" (quoting Zant v. Stephens, 462 U.S. 862, 877 (1983))).

become eligible for the death penalty.[41] If the jury finds the defendant death eligible, the jury then considers whether the death penalty is appropriate by weighing the aggravators against any mitigating circumstances (mitigators) presented by the defendant and will impose death if the aggravators sufficiently outweigh the mitigators.[42]

The Court further explained the principle announced in *Bullington* in the case of *Arizona v. Rumsey*.[43] In *Rumsey*, the trial judge sentenced the defendant to life after deciding that the prosecution failed to prove the existence of any of the aggravating factors that would render imposition of the death penalty permissible under Arizona's capital-sentencing scheme.[44] Subsequently, on the State's cross-appeal, the Arizona Supreme Court decided that the trial court erred in concluding that no aggravating factors existed, and thus remanded the case for a resentencing proceeding in which defendant was

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41. *See, e.g.*, VA. CODE ANN. § 19.2–264.4 (2001) (declaring that "[t]he penalty of death shall not be imposed unless the Commonwealth shall prove beyond a reasonable doubt that" at least one of the statutory aggravators existed).

42. *See* Lockett v. Ohio, 438 U.S. 586, 604 (1978) ("[T]he Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.") (citations omitted).

43. *See* Arizona v. Rumsey, 467 U.S. 203, 209 (1984) (articulating the *Bullington* principles). In *Rumsey*, the Court considered whether double jeopardy prohibits the state from sentencing a defendant to death after the life sentence initially returned by the jury in a trial-like sentencing proceeding was set aside on appeal. *Id.* at 205. A jury convicted the defendant of armed robbery and first-degree murder, and in a separate sentencing hearing prescribed by Arizona statute, the trial judge returned a special verdict denying the presence of any aggravating circumstances and accordingly sentenced the defendant to life imprisonment without possibility of parole for twenty-five years. *Id.* at 205–06. In making his findings on the existence of the aggravating circumstances, the trial judge interpreted the "pecuniary gain" aggravator to apply only to killings for hire rather than any murder committed to obtain money. *Id.* at 206–07. In addition to the life sentence, the court sentenced the defendant to twenty-one years imprisonment for the armed robbery and declared that the two sentences were to run consecutively. *Id.* at 206. The defendant appealed the determination that the sentences should run consecutively, which permitted the government to cross-appeal the trial judge's determination that the pecuniary gain aggravator applied only to contract killings. *Id.* at 206–07. The Arizona Supreme Court rejected the defendant's challenge to his sentence but agreed with the government that the trial court misinterpreted the pecuniary gain aggravator, and thus set the life sentence aside and remanded for resentencing. *Id.* at 207. On remand, the trial court found the existence of the pecuniary gain aggravator and sentenced the defendant to death. *Id.* at 208. In setting that sentence aside, the Supreme Court explained that *Bullington* controlled the disposition of the case and held that the trial judge's findings denying the existence of any aggravating circumstances constituted an acquittal and created a legal entitlement to the life sentence. *Id.* at 212.

44. *Id.* at 206.

sentenced to death.[45] The U.S. Supreme Court set the sentence aside, noting that "the double jeopardy principle relevant to [Rumsey's] case is the same as that invoked in *Bullington*: an acquittal on the merits by the sole decisionmaker in the proceeding is final and bars retrial on the same charge."[46] The Court explained that life sentences in such cases constitute an acquittal of death because the trial court's judgment is based on the finding that the prosecution failed to prove the facts necessary to impose death and is thus "sufficient to establish legal entitlement to the life sentence."[47] The *Rumsey* Court further noted that because a life sentence rendered in these trial-like sentencing proceedings amounts to an acquittal on the merits, it will bar retrial even if based on legal error.[48]

Importantly, the critical issue for purposes of double jeopardy identified in the *Bullington* and *Rumsey* case line is not simply whether the defendant received a life sentence at his first trial, but whether that first life sentence "was an 'acquittal' based on findings sufficient to establish legal entitlement to the life sentence."[49] For the life sentence to constitute an acquittal, the factfinder in the sentencing proceeding must determine that the prosecution failed to prove its case on the issue of death.[50] The general rule is that "a retrial following a 'hung jury' does not violate the Double Jeopardy Clause" because in that instance the declaration of a mistrial is a manifest necessity, and retrial is necessary for resolution of the case.[51] This hung-jury-permits-retrial rule applies with equal force in capital-sentencing proceedings[52] despite the fact that nearly every state has statutory provisions imposing a life sentence in the event of a hung jury in a capital-sentencing proceeding, which

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45. *Id.* at 207–08.

46. *Id.* at 211.

47. *Id.*

48. *Id.*; *see also* Fong Foo v. United States, 369 U.S. 141, 143 (1962) (holding that an acquittal bars retrial even if it was based on an "egregiously erroneous foundation").

49. *See* Sattazahn v. Pennsylvania, 537 U.S. 101, 108 (2003) (setting forth the relevant inquiry for purposes of double jeopardy in the capital-sentencing context).

50. *See* Bullington v. Missouri, 451 U.S. 430, 444–45 (1981) (explaining that because the trial-like sentencing proceeding "*explicitly requires* the jury to determine whether the prosecution has 'proved its case'" the jury's decision that the defendant does not deserve the penalty of death constitutes an acquittal of death).

51. *Sattazahn*, 537 U.S. at 109 (quoting Richardson v. United States, 468 U.S. 317, 324 (1984)).

52. *See id.* (noting that no double-jeopardy protection exists when the jury deadlocks and denying the defendant's argument that the uniqueness of capital-sentencing proceedings justifies affording the defendant double-jeopardy protection when a life sentence is imposed after a jury deadlock) (quoting *Richardson*, 468 U.S. at 324).

arguably solves the problem of resolution.[53] The theory is that when the jury is deadlocked, it has neither convicted nor acquitted the defendant of the death penalty. In such a situation the Court has explained that double jeopardy does not bar retrial because of "society's interest in giving the prosecution one complete opportunity to convict those who have violated its laws."[54] As long as the jury unanimously sentenced the defendant to life, however, *Bullington* and its progeny would consider the verdict to be a jeopardy-terminating event whether it was the result of a unanimous finding that the aggravators were not proven, a majority finding that the aggravators were not proven, or a finding that, despite existence of aggravators, death was not proper due to factors in mitigation. *Sattazahn v. Pennsylvania* casts doubt on this understanding, however, because in Part III of the opinion, a plurality of the Justices call for a much narrower definition of what constitutes an acquittal of death.[55]

III. Sattazahn v. Pennsylvania

A. Facts

On the evening of April 12, 1987, David Allen Sattazahn and his accomplice hid in a wooded area with guns in hand waiting to rob the manager of Heidelberg Family Restaurant, Richard Boyer.[56] At closing time, the two men accosted Boyer in the restaurant's parking lot, drew their guns, and demanded the deposit bag holding the restaurant's receipts from that day.[57] Boyer threw the bag of money toward the roof of the restaurant and began to run away, ignoring Sattazahn's order to retrieve the bag.[58] Both Sattazahn and

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53. *See, e.g.*, PA. STAT. ANN. tit. 42, § 9711(c)(1)(v) (2003) ("[T]he 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."); VA. CODE ANN. § 19.2–264.4(E) (2001) ("In the event the jury cannot agree as to the penalty, the court shall dismiss the jury, and impose a sentence of imprisonment for life.").

54. Arizona v. Washington, 434 U.S. 497, 509 (1977) (stating that a hung jury is the "classic basis for a proper mistrial" and explaining that the rule allowing a "trial judge [to] discharge a genuinely deadlocked jury and require the defendant to submit to a second trial . . . accords recognition to society's interest in giving the prosecution one complete opportunity to convict those who have violated its laws").

55. *See infra* notes 84–87 and accompanying text (discussing the plurality's new definition of what constitutes an acquittal of death and its possible effects on capital defendants).

56. Sattazahn v. Pennsylvania, 537 U.S. 101, 103 (2003).

57. *Id.*

58. *Id.*

his accomplice fired shots at Boyer, and when Boyer fell dead, the two men grabbed the deposit bag and fled the scene.[59]

The Commonwealth of Pennsylvania prosecuted Sattazahn, and on May 10, 1991, a jury convicted him of first-degree murder and other charges.[60] During the sentencing phase, the prosecution sought the death penalty and presented evidence on the statutory aggravating circumstance of "commission of the murder while in the perpetration of a felony."[61] The defense presented Sattazahn's lack of a significant history of prior convictions and his age at the time of the crime as mitigating circumstances.[62]

Under Pennsylvania law, the jury must return a death sentence if it unanimously finds the existence of one or more aggravating circumstances and no mitigating circumstances, or if it unanimously finds the existence of one or more aggravating circumstances that outweigh any established mitigating circumstances.[63] In all other cases the verdict must be a life sentence, and the relevant statute further provides that the court may discharge the jury and impose a life sentence if it appears the jury will be unable to reach a unanimous agreement on the appropriate sentence.[64] Sattazahn's jury was deadlocked nine to three in favor of life, and upon the defendant's motion the trial judge discharged the jury as hung and entered the default life sentence provided by the Pennsylvania statute.[65]

Sattazahn appealed his conviction, challenging, among other things, the trial judge's jury instruction that stated that a finding beyond a reasonable doubt that Sattazahn was armed with an unlicensed firearm "shall be evidence of his intention to commit" crimes of violence such as first-degree murder.[66] The Pennsylvania Superior Court found that the trial judge's instruction was a conclusive presumption that effectively relieved the prosecution of its burden to prove Sattazahn acted with the intent to commit murder and other crimes of violence.[67] Accordingly, the court reversed Sattazahn's conviction and remanded for new trial.[68]

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59. *Id.*
60. *Id.*
61. *Id.* at 104.
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.* at 104–05.
66. Commonwealth v. Sattazahn, 631 A.2d 597, 603–04 (Pa. Super. Ct. 1993).
67. *Id.* at 606.
68. *Sattazahn*, 537 U.S. at 105.

On remand, the prosecution again sought the death penalty and this time alleged two aggravating circumstances.[69] Sattazahn objected to the prosecution's attempt to seek death and to introduce the new aggravating circumstances, but the trial court and the state appellate court both denied the motion.[70] The jury in the second trial convicted Sattazahn of first-degree murder and sentenced him to death in the penalty phase.[71] On direct appeal the Pennsylvania Supreme Court affirmed the guilty verdict and the death sentence, concluding that neither the Double Jeopardy Clause nor the Due Process Clause barred the Commonwealth from seeking death on retrial.[72] The United States Supreme Court granted certiorari.[73]

B. Opinion of the Supreme Court

Before the Court, the defendant argued that (1) although retrial following a hung jury does not normally violate the Double Jeopardy Clause, the statutory life sentence imposed by the court following the hung jury in the penalty phase triggered double-jeopardy protections,[74] and (2) the death sentence unfairly deprived him of the life and liberty interest created by the Pennsylvania statute mandating imposition of a life sentence after a hung jury, and thus deprived him of due process in violation of the Fourteenth Amendment.[75] The four-Justice dissent, authored by Justice Ginsburg, agreed with the defendant's contention that the court-imposed life sentence following the hung jury provided double-jeopardy protection.[76] The dissent reasoned that although the entry of the life sentence by the trial court did not constitute an acquittal, it nonetheless terminated jeopardy because it was a trial-terminating judgment for life not prompted by a procedural move on the part of the defendant.[77] In making this decision, the dissent emphasized: (1) the perilous choice that the defendant would face if the imposed life sentence did

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69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* at 109.

75. *Id.* at 115.

76. *See id.* at 119 (Ginsburg, J., dissenting) ("[O]nce the trial court entered a final judgement of life for Sattazahn, the Double Jeopardy Clause barred Pennsylvania from seeking the death penalty a second time.").

77. *Id.* at 123–24 (Ginsburg, J., dissenting) (reasoning that the final judgment entered by the Pennsylvania trial court triggered the defendant's interest in avoiding renewed prosecution).

not terminate jeopardy and (2) the unique severity and finality of the death penalty.[78]

The majority of the Court held that neither the Double Jeopardy Clause of the Fifth Amendment nor the Due Process Clause of the Fourteenth Amendment barred the Commonwealth from seeking the death penalty against Sattazahn on retrial.[79] With respect to Sattazahn's due process argument, the majority concluded that nothing in the Pennsylvania statute indicates that the "life" or "liberty" interest in the life sentence was immutable and that Sattazahn deprived himself of any such interest when he sought to invalidate the underlying conviction.[80]

In response to Sattazahn's double-jeopardy argument, the majority explained that the critical inquiry for determining whether jeopardy has terminated in capital-sentencing proceedings is whether there has been an acquittal.[81] The majority concluded that neither the jury deadlock nor the court's entry of a life sentence constituted an acquittal because neither involved findings resolving any factual matter that would establish legal entitlement to the life sentence.[82] Thus, the majority went on to hold that double jeopardy did not bar the prosecution from seeking death on retrial, rejecting the dissent's contention that the statutorily imposed life sentence provided double-jeopardy protection to the defendant despite its nonacquittal status.[83]

The Court could have reached its holding in *Sattazahn* by simply applying previously established double-jeopardy principles because the jury was hung on the issue of death and thus did not acquit the defendant under the *Bullington* test.[84] Rather than relying on *Bullington*'s definition of an acquittal

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78. *Id.* at 126–27 (Ginsburg, J., dissenting) (explaining that under the majority's decision a defendant who was sentenced to life after a jury deadlock must "relinquish either her right to file a potentially meritorious appeal, or her state-granted entitlement to avoid the death penalty" and further emphasizing the unique severity and finality of the death penalty).

79. *Id.* at 116.

80. *Id.* at 115–16.

81. *Id.* at 109 ("[T]he touchstone for double-jeopardy protection in capital-sentencing proceedings is whether there has been an 'acquittal.'").

82. *Id.* at 109–10 (explaining that a deadlocked jury is a nonresult and thus not based on findings sufficient to establish legal entitlement to life and that the court-imposed life sentence is similarly not based on findings sufficient to constitute an acquittal because the trial judge has no discretion in prescribing the sentence after mistrial is entered).

83. *See id.* at 113–15 (discussing the various problems with the dissent's reasoning and ultimately rejecting the dissent's conclusion that the statutorily imposed life sentence provides jeopardy protection).

84. *See supra* notes 49–55 and accompanying text (explaining that a life sentence after a hung jury does not constitute an acquittal under *Bullington*).

of death, however, three members of the Court—Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas—outlined a different rationale for concluding that Sattazahn's life sentence did not provide double-jeopardy protection.[85] As explained above, the Supreme Court's opinions dealing with double jeopardy in the death penalty context prior to *Sattazahn* were thought to stand for the proposition that a hung jury on the issue of death would not protect the defendant from death on retrial, but any unanimous decision by the jury to impose life constituted an acquittal based on findings sufficient to create a legal entitlement to the life sentence.[86] The *Sattazahn* plurality's rationale for its holding called into question this understanding of what constitutes an acquittal of death when it explained that Sattazahn could face the death penalty in his second trial not merely because the jury failed to come to a unanimous decision for life, but because it failed to reach a unanimous decision that the prosecution did not prove the existence of the aggravating factors.[87] This Note contends that this plurality opinion offers a much narrower test for what constitutes an acquittal of death and, if adopted by a majority of the Court, will necessitate a major change in capital murder verdict forms.

IV. The Sattazahn *Plurality's New Definition of the Implied Acquittal of Death*

A. Rationale for a Narrower Definition of the Implied Acquittal of Death—the Impact of Apprendi *and* Ring

The new theory of what constitutes an acquittal of death introduced in the *Sattazahn* plurality was inspired by two recent criminal cases "clarif[ying] what constitutes an 'element' of an offense for purposes of the Sixth Amendment's jury-trial guarantee."[88] These decisions involved the Sixth Amendment jury trial right, but they annunciate a principle applicable in other areas of the law, such as the double jeopardy issue discussed in *Sattazahn*. In *Apprendi v. New Jersey*,[89] the Supreme Court held that "[o]ther than the fact of

85. Sattazahn v. Pennsylvania, 537 U.S. 101, 110–14 (2003).

86. *See supra* notes 44–50 and accompanying text (explaining that although a life sentence after a hung jury does not constitute an acquittal under *Bullington*, a unanimous decision by the jury to impose life does).

87. *See infra* Part IV (explaining the plurality's test).

88. *Sattazahn*, 537 U.S. at 111.

89. Apprendi v. New Jersey, 530 U.S. 466 (2000). The *Apprendi* Court considered whether the Sixth Amendment's jury-trial guarantee, applicable to the states via the Fourteenth

a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum" constitutes an element of the offense that the prosecution must prove to the jury beyond a reasonable doubt.[90] Subsequently, in *Ring v. Arizona*,[91] the Court explained that the Sixth Amendment jury trial right "would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death."[92] Thus, the

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Amendment, and the Due Process Clause of the Fourteenth Amendment require that all factual findings increasing the defendant's sentence beyond that statutorily prescribed maximum be submitted to the jury and proved beyond a reasonable doubt. *Id.* at 469. The defendant in *Apprendi* fired several shots into the home of an African-American family that had recently moved into his all-white neighborhood, and subsequently pleaded guilty to two second-degree offenses and one third-degree offense for the aforementioned shooting and shootings on three other occasions. *Id.* at 469–70. As part of the plea agreement, the State reserved the right to seek an enhanced sentence pursuant to New Jersey law on the ground that the offense involving the African-American family was motivated by racial bias. *Id.* at 470. The trial judge found by a preponderance of the evidence that Apprendi's actions were the result of racial bias and thus rendered a sentence higher than the statutory maximum on the relevant count. *Id.* at 471. The defendant appealed, arguing that the Constitution requires the finding of racial bias underlying his sentencing enhancement be proved to a jury beyond a reasonable doubt. *Id.* at 471. The Appellate Division of the Superior Court of New Jersey upheld the enhanced sentence and a divided New Jersey Supreme Court affirmed, finding that the hate crime provision did not allow impermissible burden shifting and thus did not constitute an element of a separate offense. *Id.* at 472–73. The U.S. Supreme Court reversed, holding that "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt." *Id.* at 490. The Court explained that a long history of common-law rulings linking "verdict and judgment and the consistent limitation on judges' discretion to operate within the limits of the legal penalties provided" served as the foundation for its decision. *Id.* at 482.

90. *Id.* at 490.

91. Ring v. Arizona, 536 U.S. 584 (2002). In *Ring*, the Court determined that the *Apprendi* decision's holding that any factor increasing the defendant's punishment beyond the statutory maximum must be proven to a jury beyond a reasonable doubt applies with equal force in the capital-sentencing process. *Id.* at 588–89. A jury found the defendant guilty of first-degree murder for his involvement in an armed robbery resulting in the death of an armored van driver, but under Arizona law, he could not receive a death sentence unless the trial judge made further findings. *Id.* at 591–92. Pursuant to the Arizona sentencing scheme, a trial judge sentenced Ring to death after concluding in a separate sentencing hearing that the prosecution had proven the existence of the requisite aggravating factors and that the existing mitigator did not warrant leniency. *Id.* at 594–95. Ring appealed, contending that under *Apprendi*, Arizona's capital-sentencing scheme violated the Sixth and Fourteenth Amendments to the U.S. Constitution because it entrusts a judge to find the existence of factors that raise the defendant's maximum penalty. *Id.* at 595. The Court found that the judge's finding of an aggravating circumstance exposed the defendant to a harsher sentence than that authorized by the jury verdict, rejected Arizona's argument that capital cases should be treated differently with regard to the Sixth Amendment protection defined in *Apprendi*, and thus held the scheme unconstitutional under *Apprendi*. *Id.* at 604, 607, 609.

92. *Id.* at 609.

Court extended the principle announced in *Apprendi* to the capital-sentencing context.[93] Though these cases dealt only with the Sixth Amendment jury trial right, declaring that aggravating factors constitute "elements" has significant implications in the double-jeopardy context.

Prior to these decisions, aggravating factors making the defendant death eligible were considered to be mere sentencing factors, and it was believed that the sentencing proceeding simply imposed a sentence for the capital crime previously found by a jury beyond a reasonable doubt.[94] Therefore, prior double jeopardy cases in the capital-sentencing context could only justify the extension of double-jeopardy protection to capital-sentencing proceedings on the rationale that the proceedings were analogous to a trial on guilt or innocence.[95] In light of *Ring*'s ruling that aggravating factors are in effect elements of a greater crime, however, it becomes clear that the capital-sentencing proceeding does not merely *resemble* a trial on guilt or innocence; it is an actual trial of the defendant's guilt or innocence for the offense of "murder plus one or more aggravating circumstances."[96] This revelation legitimizes the Court's application of the Double Jeopardy Clause to capital-sentencing proceedings,[97] which the Court previously stumbled over because the Clause guarantees only that no one shall be "subject *for the same offence* to be twice put in jeopardy of life or limb."[98] According to the *Sattazahn* plurality, this revelation also illuminates two conditions that a jury-rendered life sentence must satisfy in order to constitute an acquittal: (1) that the jury finds the prosecution failed to prove the existence of aggravating factors and (2) that such finding be unanimous.[99]

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93. *Id.*

94. *See* Sattazahn v. Pennsylvania, 537 U.S. 101, 110 (2003) (explaining that prior to *Apprendi* and *Ring*, capital-sentencing proceedings "dealt only with the *sentence* to be imposed for the 'offence' of capital murder" and thus "differed from trials in a respect crucial for purposes of the Double Jeopardy Clause").

95. *See id.* at 110–11 ("[I]n search for a rationale to support *Bullington* and its 'progeny,' the Court continually tripped over the text of the Double Jeopardy clause.").

96. *See id.* (stating that *Ring* held, for purposes of the Sixth Amendment's jury-trial guarantee, that murder is a lesser included offense of murder plus one or more aggravators and no justifiable reason exists to distinguish between what constitutes an offense for the jury-trial guarantee versus the double-jeopardy protection).

97. *See id.* at 110–11 (noting that prior to *Ring* the Court "continually tripped over the text of the Double Jeopardy Clause" because the capital-sentencing proceedings were thought to only involve the sentence to be imposed and later explaining that *Ring* "illuminated" the justification for application of jeopardy protection to capital sentencing).

98. U.S. CONST. amend. V (emphasis added).

99. *Sattazahn*, 537 U.S. at 112. The plurality stated that:

> In the post-*Ring* world, the Double Jeopardy Clause can, and must, apply to some

B. The First Requirement of the Plurality's Test for an Implied Acquittal of Death—Jury Rejection of the Aggravators

With the newfound understanding that a capital-sentencing proceeding is actually a trial on the merits for the crime of murder plus one or more aggravators, Justice Scalia concluded that the only way a defendant can be acquitted of that crime is if the jury finds that the prosecution failed to prove the elements required for conviction.[100] Failure of proof on any essential element constitutes an acquittal of an offense in guilt/innocence proceedings,[101] and applying this concept with equal force in the capital context serves to maintain consistency in the application of double-jeopardy protection for all offenses. Justice Scalia asserted that requiring jury rejection of aggravators for an acquittal is analytically necessary in light of the *Ring* decision, presumably under the assumption that it would be contradictory to classify a jury verdict in which the jury found beyond a reasonable doubt that all of the elements of the crime were satisfied as an acquittal.[102]

Because the jury's conclusion on the existence of aggravators does not dictate the verdict in a capital-sentencing proceeding, a jury-rendered life sentence does not necessarily mean that the jury found that the prosecution failed to prove the elements of the crime of murder plus one or more aggravators. Unlike traditional guilt/innocence trials where jurors must vote for a conviction if they conclude that the prosecution has proven all elements of a crime beyond a reasonable doubt (and the defendant did not establish an affirmative defense),[103] jurors in capital-sentencing proceedings are not

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> capital-sentencing proceedings . . . . If a jury unanimously concludes that a State has failed to meet its burden of proving the existence of one or more aggravating circumstances, double-jeopardy protections attach to that "acquittal' on the offense of "murder plus aggravating circumstance(s)."

Id.

100. *See id.* (concluding that because "'murder plus one or more aggravating circumstances' is a separate offense from 'murder simpliciter,'" one must determine whether the factfinder has made findings that constitute an acquittal of the offense of murder plus one or more aggravators).

101. *See, e.g.*, United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977) (explaining that in order to determine whether a factfinder's action in a trial on the issue of guilt or innocence constitutes an acquittal, one must determine whether the factfinder's conclusion in favor of the defendant "represents a resolution, correct or not, of some or all of the factual elements of the offense charged").

102. *See infra* notes 113–27 and accompanying text (explaining that this assumption overlooks situations in which the jury finds the existence of all the elements of a crime but acquits the defendant because of an affirmative defense such as self-defense).

103. *See, e.g.*, VA. MODEL JURY INSTRUCTIONS, Criminal Instruction No. G33.200(A) (2003) ("If you find from the evidence that the Commonwealth has proved beyond a reasonable

obligated to vote for death even if they find the prosecution has proved the existence of one or more aggravators.[104] The finding of aggravators by a jury simply makes the defendant death eligible; jurors may consider any mitigating factors and have discretion to set the punishment at life despite an affirmative finding as to the existence of aggravating circumstances.[105] If the jury does find the existence of aggravating factors beyond a reasonable doubt but nonetheless sets the punishment at life, the defendant would clearly not be "acquitted" under the plurality's test and could thus face retrial on the issue of death following successful appeal of his conviction.[106] This life verdict would not constitute an acquittal because under Justice Scalia's test only a finding that the prosecution failed to prove the elements of the crime establishes legal entitlement to the life sentence. Because many life verdicts are based on a determination that the proven aggravators are insufficient or that the mitigating circumstances outweigh the aggravators rather than a finding that the prosecution failed to prove

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doubt each of the above elements of the offense as charged, then you *shall* find the defendant guilty . . . .") (emphasis added).

104. *See* PA. STAT. ANN. tit. 42, § 9711(c)(1)(iv) (2004) (stating that "the verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance . . . and no mitigating circumstance or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances"); VA. MODEL JURY INSTRUCTIONS, Criminal Instruction No. P33.122 (2003) ("If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt both of these [aggravating] circumstances, then you *may* fix the punishment of the defendant at death.") (emphasis added). The Pennsylvania jury instruction gives the jury less discretion than Virginia but still permits life sentences in situations where all aggravators are proven.

105. This discretion given to juries varies among jurisdictions. In Virginia, the jury is presumably free to set the punishment at life even if it finds the prosecution proved the aggravators beyond a reasonable doubt and finds no mitigating circumstances. *See* VA. MODEL JURY INSTRUCTIONS, Criminal Instruction No. P33.122 (2003) (explaining that even if the jury finds that the prosecution has proved the aggravators, "if [the jury] nevertheless believe[s] from all the evidence, including evidence in mitigation, that the death penalty is not justified, then [the jury] shall fix the punishment of the defendant" at life). In contrast, Pennsylvania allows for a life sentence in situations where the jury finds the prosecution proved the existence of aggravators beyond a reasonable doubt, but only if the jury found mitigating factors and the aggravators do not outweigh those mitigating factors. PA. STAT. ANN. tit. 42, § 9711(c)(1)(iv) (2004); *see also* Blystone v. Pennsylvania, 494 U.S. 299, 303, 305–08 (1990) (upholding the constitutionality of the Pennsylvania statute requiring the jury to sentence the defendant to death if it finds at least one aggravating circumstance and no mitigating circumstances and stating that the statute was not impermissibly mandatory because it did not automatically impose a sentence of death upon conviction and allowed the jury to consider and give effect to all relevant mitigating evidence).

106. *See* Priya Nath, Case Note, Sattazahn v. Pennsylvania, 15 WASH. & LEE CAP. DEF. J. 419, 425 (2003) (introducing the notion that a jury life sentence in which the jury was unanimous in finding an aggravating factor beyond a reasonable doubt would not constitute an acquittal under the plurality's test, and, thus, Justice Scalia would permit retrial on the issue of death).

the aggravators altogether, the plurality's new test of what constitutes an acquittal effectively excludes a large portion of jury verdicts that were considered acquittals under the *Bullington* case line.

C. The Second Requirement of the Plurality's Test for an Implied Acquittal of Death—Jury Unanimity in Rejection of the Aggravators

Not only did the *Sattazahn* plurality require a jury finding that the aggravating factors were not established for a life sentence to constitute an acquittal of death, Justice Scalia, along with Chief Justice Rehquist and Justice Thomas, also asserted that this finding must be unanimous.[107] An analysis of jury instructions and verdict forms from various jurisdictions reveals that although unanimity is required in order for a positive finding that the aggravators were established, it is not required for a negative finding that aggravators were not established.[108] Because unanimity is not necessary for the jury to enter a finding that it rejects the existence of aggravators, the resulting life verdict could be the result of either a unanimous or a split jury on the issue of aggravators.[109] In a case where only a majority of jurors rejected the aggravators, the plurality would conclude that the jury was "hung" on the existence of aggravators; thus, the finding was not an acquittal of death.[110] Therefore, this requirement further limits the situations previously believed to constitute an acquittal of death by excluding those life sentences resulting from a non-unanimous rejection of the aggravators.

Beyond reducing the situations in which the jury will acquit the defendant of death, the unanimity requirement forces capital defense attorneys either to revamp the current verdict forms or risk losing the implied acquittal of death altogether. In a case in which the jury failed to find the existence of an aggravating factor beyond a reasonable doubt and thus returned a life verdict, the verdict form will not disclose whether the jury was unanimous in denying the aggravators or whether it split on that issue.[111] Therefore, this ambiguity in current verdict forms

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107. *See* Sattazahn v. Pennsylvania, 537 U.S. 101, 112 (2003) ("If a jury *unanimously* concludes that a State has failed to meet its burden of proving the existence of one or more aggravating circumstances, double-jeopardy protections attach to that 'acquittal' on the offense of 'murder plus aggravating circumstance(s).'") (emphasis added).

108. *See infra* Part VI.A (discussing the current inadequacy of the verdict forms).

109. *See* Nath, *supra* note 106, at 424 (explaining that verdict forms do not reveal whether the jury was unanimous in rejecting an aggravating factor or split on that question).

110. *See id.* (explaining that if the jury is split on the existence of aggravators, it is hung on that issue, and the plurality would not consider the defendant acquitted of the death penalty).

111. *See id.* (noting that the verdict form will not disclose whether the jury was unanimous or split in rejecting the aggravating circumstances).

effectively eliminates the implied acquittal of death under the plurality's test because a capital defendant will be unable to establish the requisite unanimity and thus unable to establish his legal entitlement to the prior life sentence.[112]

V. The Future of the Plurality's New Test of What Constitutes an Implied Acquittal of Death

A. Legal Analysis of the New Test

1. Analysis of the First Requirement—Jury Rejection of the Aggravators

The *Sattazahn* plurality suggests that because the *Ring* Court declared that the existence of one or more aggravating factors constitutes an element of an offense, a life verdict in which the jury unanimously finds the existence of one or more aggravators can no longer be understood to confer upon the defendant legal entitlement to that life sentence.[113] Although the plurality's contention that there cannot be an acquittal of an offense if all the elements of that offense have been proven beyond a reasonable doubt is true in many cases, the plurality overlooks situations in which the prosecution has proven all elements of the offense beyond a reasonable doubt, but the defendant produces an affirmative defense either justifying or excusing his actions.[114] The *Sattazahn* plurality thus failed to consider that a defendant's proof of mitigators could serve as an affirmative defense acquitting him of death despite the fact that the prosecution proved the existence of one or more aggravators.

Justification and excuse defenses eliminate or reduce the punishment for the offense even though a defendant is otherwise fully accountable. A justification, such as self-defense, negates criminal liability for conduct which would otherwise be criminal because such conduct is socially acceptable under the special justifying circumstances.[115] An excuse, such as insanity or duress, also negates

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112. *See id.* ("Because the verdict form will not reveal whether the jury unanimously rejected the aggravator (an 'acquittal') or whether it was split on the existence of the aggravator (a 'hung jury'), the defendant will not be able to establish his 'acquittal' of the aggravating factor and, therefore, cannot establish his 'legal entitlement to a life sentence.'").

113. *See* supra notes 84–87 and accompanying text (discussing the plurality opinion).

114. If the defendant relies on a defense that negates an element of the crime charged rather than an excuse or justification defense, he cannot be acquitted of the crime unless the jury rejects one or more of its elements.

115. *See* WAYNE R. LAFAVE, CRIMINAL LAW § 9.1(a)(3), at 447 (4th ed. 2003) (explaining that under special justifying circumstances, one will be relieved of criminal liability for otherwise criminal conduct).

criminal liability for actions that would otherwise constitute an offense, but does so because the defendant lacks responsibility given the unique circumstances, and thus punishment is inappropriate.[116] Both justification and excuse defenses provide a basis for an acquittal despite the fact that all the elements of the offense are fully established.[117] Similar to justification and excuse defenses that result in a complete acquittal, circumstances that qualify as reasonable provocation and invoke a state of passion within the defendant serve as a partial defense, acquitting the defendant of murder and reducing his conviction to involuntary manslaughter even though all the necessary elements of murder are fully established.[118]

These defenses show that there are situations in which a jury can find all elements of an offense beyond a reasonable doubt and still acquit the defendant on the grounds that extenuating circumstances exist that either justify the behavior or excuse unacceptable behavior fully or partially. Presumably because of the speed with which the law has been developing with regard to status of aggravators as elements,[119] the *Sattazahn* plurality overlooked this means of acquittal when it analyzed the effect of *Ring* in the double-jeopardy context and summarily stated that the jury must reject the aggravating circumstances to acquit the defendant of death.[120] Arguably, however, a finding that mitigating factors outweigh the aggravating factor(s) is

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116. *See id.* § 9.1(a)(4), at 448 ("Excuses are in some respects like justifications . . . . The principle distinction, however, is that in the case of an excuse conviction is deemed inappropriate because of a lack of responsibility on the part of the defendant.").

117. *See id.* (explaining that both justification and excuse defenses "provide a basis for acquittal"). *But see* MARKUS D. DUBBER, CRIMINAL LAW: MODEL PENAL CODE § 7, at 190 (2002) (explaining that the Model Penal Code actually treats the absence of justifications and excuses as material elements of every crime).

118. *See* LAFAVE, *supra* note 115, § 9.1(b)(2), at 454 (describing how certain circumstances may reduce a murder conviction to one of involuntary manslaughter). LaFave explains:

> A killing is murder if done (1) with intent to kill, (2) with intent to do serious bodily harm, (3) with a depraved heart . . . , or (4) in the commission or attempted commission of a felony, subject to the qualification that an intentional homicide is only manslaughter if the killing occurred in a heat of passion.

Id.

119. *Apprendi* declared that any fact other than prior conviction increasing the penalty beyond the prescribed statutory maximum operates as the functional equivalent of an element of a greater offense in 2000. This principle was not extended to the capital-sentencing context until the Court decided *Ring* in June of 2002, and *Sattazahn* was decided only seven months later on January 14, 2003.

120. *See* Sattazahn v. Pennsylvania, 537 U.S. 101, 112 (2003) (stating that if the jury unanimously concludes the prosecution failed to prove any aggravators, that conclusion would operate as an acquittal of death and would thus bar the state from retrying the defendant for his life).

analogous to the excuse and partial-excuse defenses and should thus entitle the defendant to an acquittal of death. Just as the excuse defenses eliminate or lessen punishment when certain circumstances deemed by society to negate or reduce the defendant's responsibility are present and thus render the otherwise applicable punishment inappropriate, mitigating circumstances require the jury to impose a life sentence when it finds that the situations introduced by the defendant negate or outweigh the aggravating factor(s) and consequently render the death penalty inappropriate.[121] Therefore, there is a strong argument that requiring a jury rejection of the aggravators in order for a defendant's jury-rendered life verdict to constitute an acquittal unjustifiably circumscribes the situations in which defendants will receive double-jeopardy protection.

A comparison between the insanity defense and the use of mitigators for capital defendants within the federal criminal scheme illustrates the similarities between excuse defenses in trials on the merits and the use of mitigators in capital-sentencing proceedings. Moreover, such a comparison provides a solid justification for rejecting the *Sattazahn* plurality's contention that an acquittal of death does not exist unless the jury rejects the existence of aggravators. The insanity defense[122] excuses an otherwise guilty defendant because it provides a defense even though all elements of the offense have been established.[123] In comparison, the presence of mitigating factors that outweigh the aggravating factor(s) requires the jury to sentence a death-eligible defendant to life despite the fact that the elements of murder plus one or more aggravating factors have been established.[124] Furthermore, in both instances, the burdens of production

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121. *See, e.g.*, 18 U.S.C. § 3593 (2000) (stating that to justify a sentence of death, the aggravating factors must sufficiently outweigh all the mitigating factors found to exist).

122. *See* 18 U.S.C § 17 (2000) (outlining insanity as an affirmative defense and stating the burden of proof).

123. *See* United States v. Frisbee, 623 F. Supp. 1217, 1220 (N.D. Cal. 1985) (discussing the insanity defense). The court notes that the federal insanity defense:

> [R]epresents an attempt by Congress to define the circumstances in which an otherwise culpable defendant will be excused for his or her conduct because of mental disease or defect, and that the section has no effect on the admissibility of evidence offered by a defendant to negate the existence of specific intent and thereby show his or her innocence.

Id.

124. *See* 18 U.S.C. § 3593(e) (2000) (explaining that before the jury can consider the death penalty, it must unanimously find the existence of one or more aggravators and stating that in order for a jury to sentence the defendant to life, the aggravators must sufficiently outweigh the mitigating factors, or, in the absence of mitigating factors, the aggravating factor(s) alone must be sufficient to justify the death penalty). From this statutory language, it can be inferred that a jury finding that the factors in mitigation outweigh the aggravators provides the defendant with

and proof as to the existence of the exculpating circumstances are on the defendant.[125] Although this analogy between the insanity defense and the use of mitigators in capital-sentencing proceedings is not seamless,[126] it exposes a flaw in the *Sattazahn* plurality's explanation for its conclusion that the jury must reject the aggravators to produce an acquittal. Namely, the plurality failed to address the possibility that proving mitigators that outweigh the aggravator(s) could constitute an affirmative defense serving to acquit the defendant of the death penalty despite the affirmative finding as to the existence of aggravators. Allowing an acquittal in these circumstances would minimize the departure from the pre-*Ring* understanding that a jury-rendered life sentence provides double-jeopardy protection from death and attach meaningful significance to a jury's unanimous determination that the death penalty is inappropriate under the circumstances.[127]

Some life sentences returned after the jury finds the existence of aggravators, however, will not constitute an acquittal in light of *Ring* even if the Court recognizes mitigators as an affirmative defense. This outcome will result because many jurisdictions allow the jury to sentence the defendant to life even if the jury does not find the existence of any mitigating factors.[128] In

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a defense to the death penalty.

125. *See id.* § 17(b) ("The defendant has the burden of proving the defense of insanity by clear and convincing evidence."); *id.* § 3593(c) ("The burden of establishing the existence of any mitigating factor is on the defendant, and is not satisfied unless the existence of such a factor is established by a preponderance of the information.").

126. To establish an insanity defense, the defendant must prove to the jury that he passes a very specific test proving his free will was impaired. *See* LAFAVE, *supra* note 115, §§ 7.2–7.5 (setting forth the various insanity tests). In contrast, the defendant can introduce any aspect of his character or record and any circumstance of the offense to justify a sentence less than death. *See* Locket v. Ohio, 438 U.S. 586, 601 (1978) (explaining that "the sentencing process must permit consideration of the 'character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death'" (quoting Woodson v. North Carolina, 428 U.S 280, 304 (1976))).

127. *See supra* notes 49–55 and accompanying text (setting forth the test for an acquittal of death developed before the *Ring* decision).

128. *E.g.*, IND. PATTERN JURY INSTRUCTIONS, Criminal, 15.13 (3d ed. 2003). The Indiana instructions state that:

> Even if you unanimously find that the State has met its burden of proof as to both the existence of at least one charged aggravating circumstance and as to the aggravating circumstance(s) outweighing the mitigating circumstance(s), the law allows you to recommend that the Judge impose a term of years instead of the sentence of [death] . . . .

Id. Federal law contains a similar provision. It states that in determining whether a sentence of death is justified, the jury should:

> [C]onsider whether all the aggravating factor or factors found to exist sufficiently

a situation where the jury finds the existence of one or more aggravators (the elements) and no mitigators (the affirmative defense) yet nonetheless returns a life verdict, the *Sattazahn* plurality's conclusion that this life sentence would not be an acquittal is analytically sound. Absent an affirmative defense, a finding that all elements of an offense are established will not constitute an acquittal because in such a case all factual issues relating to guilt or innocence are resolved in favor of the prosecution.[129] Thus, regardless of whether the Court recognizes proof of mitigators as an affirmative defense, recognition of the *Ring* decision's classification of aggravators as elements in the double-jeopardy context will serve to narrow the situations previously deemed to be an acquittal under *Bullington*. The quantity of life sentences that will no longer constitute an acquittal will be much greater, however, if the Court rejects the argument that proof of mitigators is the functional equivalent of an affirmative defense because then none of the life sentences returned after the jury finds the existence of aggravators will qualify as an acquittal.

To rebut the contention that an acquittal cannot exist when one or more aggravators are established and there is not an affirmative defense excusing culpability, defense attorneys may argue that acknowledging the implications of *Ring* in the double-jeopardy context would lead to other changes in criminal procedure drastically altering capital murder jurisprudence. Thus, these

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> outweigh all the mitigating factor or factors found to exist to justify a sentence of death, or *in the absence of a mitigating factor*, whether the aggravating factor or factors alone are sufficient to justify a death sentence.

18 U.S.C. § 3593(e) (2000) (emphasis added). This statute indicates that a jury in the federal system could return a life sentence after finding aggravators and no mitigators on the grounds that it believes the aggravators alone are insufficient. *See also* VA. MODEL JURY INSTRUCTIONS, Criminal Instruction No. P33.122 (2003) (stating to the jury that "[i]f you find from the evidence that the Commonwealth has proved beyond a reasonable doubt both of these [aggravating] circumstances, then you *may* fix the punishment of the defendant at death" and further explaining that, even if the jury finds that the prosecution has proved the aggravators, "if [they] nevertheless believe from all the evidence . . . that the death penalty is not justified, then [the jury] shall fix the punishment of the defendant" at life) (emphasis added). *But see* PA. STAT. ANN. tit. 42, § 9711(c)(1)(iv) (2004) (stating that "the verdict *must* be a sentence of death if the jury unanimously finds at least one aggravating circumstance . . . and no mitigating circumstance or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances") (emphasis added).

129. *See* United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977) (explaining that what constitutes an acquittal will be determined by examining "whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged"); United States *ex rel.* Rivera v. Sheriff of Cook County, 8 F. Supp. 2d 763, 768–69 (N.D. Ill.) (explaining the definition of acquittal pronounced in *Martin Linen* by stating that the definition focuses on factual issues relating to guilt or innocence and noting that the affirmative defense of insanity does relate to guilt or innocence), *rev'd*, 162 F.3d 486 (7th Cir. 1998).

defense attorneys will urge that the classification of aggravators as elements should be limited to the Sixth Amendment context in which it was pronounced, and all life sentences should continue to constitute an acquittal of death under *Bullington*. This slippery slope argument contends that if the Court applies *Ring*'s classification of aggravators as elements outside the context of the Sixth Amendment jury trial guarantee to disadvantage the defendant in the area of double-jeopardy, defendants will argue that the classification similarly extends to other areas that would advantage the defendant.[130] For example, capital defendants will argue that in jurisdictions in which defendants have a right to an indictment by a grand jury, prosecutors must set forth the aggravators in the indictment in order for a sentence of death to stand.[131] If *Ring*'s treatment of aggravators as elements applies in the context of defendants' entitlement to grand jury indictments, this argument will prevail because an indictment must list all of the essential elements of the crime charged.[132]

Similarly, defendants will demand that because the aggravators are elements of the crime of capital murder plus one or more aggravators, the prohibition on hearsay and other rules of evidence must apply to evidence proffered by the prosecution to prove the existence of aggravators.[133] This rule

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130. *See* Sattazahn v. Pennsylvania, 537 U.S. 101, 111 (2003) ("We can think of no principled reason to distinguish, in this context, between what constitutes an offense for purposes of the Sixth Amendment's jury-trial guarantee and what constitutes an 'offence' for purposes of the Fifth Amendment's Double Jeopardy Clause.").

131. The Fifth Amendment of the United States Constitution states that "no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury." U.S. CONST. amend. V. The Due Process Clause of the Fourteenth Amendment does not incorporate the right to indictment by a grand jury, but many states have similar constitutional or statutory provisions conveying the right to criminal defendants. *See* Lem Woon v. Oregon, 229 U.S. 586, 590 (1913) ("[T]he 'due process of law' clause does not require the State to adopt the institution and procedure of a grand jury.").

132. *See* Hamling v. United States, 418 U.S. 87, 117 (1974) (explaining the requirement that an indictment list each element of a charged crime). The Court stated:

> Our prior cases indicate than an indictment is sufficient if it, first, *contains the elements of the offense charged* and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense.

Id. (emphasis added); *see also* FED. R. CRIM. P. 7 (stating that the indictment must contain "a plain, concise, and definite written statement of the essential facts constituting the offense charged").

133. *See* Specht v. Patterson, 386 U.S. 605, 610 (1976) (holding that the separate proceeding brought under the Colorado Sex Offenders Act after conviction of specified sex offenses constituted the making of a new charge and thus the defendant was entitled under the Due Process Clause to certain procedural safeguards such as representation by counsel, opportunity to be heard, to be confronted with witnesses against him, to cross-examine, and to

would require many states to abandon the practice of applying looser evidentiary standards to sentencing proceedings and potentially withhold from the jury evidence that is relevant to the sentencing issue.[134] In addition to restricting the admissibility of evidence in the sentencing hearing before the jury, changes may be necessary in other aspects of the sentencing process. In Virginia, for example, the final sentencing event requires the sentencing judge to review the jury's finding of aggravators after he considers the post-sentence report containing a victim impact statement.[135] The current Virginia law permits hearsay within the postsentence report,[136] and by mandating inclusion of a victim impact statement, the Virginia law effectively requires it.[137] If aggravators are elements for purposes of evidentiary rules, the Virginia regime may no longer be valid because a judge's validation of the jury's determination that the defendant is death eligible will be based, at least in part, on hearsay evidence.

While addressing all of these potential changes will undoubtedly be burdensome on the judiciary and temporarily place capital murder jurisprudence on shaky ground, these issues do not constitute a valid reason for denying the import of the *Ring* decision in the context of double jeopardy.

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offer evidence of his own). If aggravators are considered elements of the crime of murder plus one or more aggravator(s), then the capital-sentencing phase constitutes a trial on a new charge, and all procedural safeguards should apply to the determination of aggravators.

134. *See* Gregg v. Georgia, 428 U.S. 153, 190 (1976) (explaining that the solution to the problem presented when evidence relevant to sentencing is prejudicial or otherwise excluded by the rules of evidence for determination of a defendant's guilt is to bifurcate the trial and "abid[e] strictly by the rules of evidence until and unless there is a conviction, but once guilt has been determined open the record to the further information that is relevant to sentence" (quoting ALI, MODEL PENAL CODE § 201.6 cmt. 5, at 74–75 (Tentative Draft No. 9, 1959))). Arguably, the extension of *Ring* would require states to cease using a lax evidentiary standard for evidence of aggravators, but the lower standard would still be permissible as applied to evidence in mitigation.

135. VA. CODE ANN. §19.2–264.5 (2001).

136. O'Dell v. Commonwealth, 364 S.E.2d 491, 508 (Va. 1988). The court explained:

> During the sentencing phase of a capital murder case, the court may consider hearsay evidence, favorable or unfavorable to the defendant, contained in a postsentence report. This is implicit from the language of Code § 19.2–264.5 and Code §19.2–299, which permit a probation officer "to thoroughly investigate and report upon the history of the accused and any other and all other relevant facts."

Id.

137. Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." FED. R. EVID. 801(c). The Victim Impact Statement required in the post-sentence report in Virginia capital-sentencing proceedings is a written statement including all relevant information relating to the impact of the offense upon the victim. VA. CODE ANN. § 19.2–299.1 (2001).

The Court's decision in *Ring* necessitates each of these changes, and one cannot reasonably argue that denying the expansion of *Ring* to the double-jeopardy context will successfully avoid these issues.[138] *Ring* declared that aggravators are elements of the offense of death-eligible capital murder as a matter of federal constitutional law,[139] and thus any argument advocating equal treatment of aggravators and traditional elements of crimes is meritorious and cannot be circumvented by ignoring the ramifications of *Ring* in the context of double jeopardy. If the Court refuses to treat mitigating factors that outweigh the aggravators as an affirmative defense, the *Sattazhan* plurality's conclusion that the jury must reject the existence of aggravators to acquit the defendant of death is a direct outgrowth of *Ring*'s declaration that aggravators are elements.[140] This is because absent an affirmative defense, no acquittal results when all elements of an offense are established.[141] The Court will not deny this simply because of the slippery-slope argument that recognition of aggravators as elements necessitates changes in other areas of the law.

2. *Analysis of the Second Requirement—Jury Unanimity in Rejection of the Aggravators*

Just as the plurality's failure to consider the possibility that proving mitigators that outweigh the aggravators could function as an affirmative defense undermined its assertion that the jury must reject the aggravators in order for there to be an acquittal of death, its assertion that the jury rejection must be unanimous is also flawed. The plurality's insistence that such a finding be unanimous goes beyond what the law currently requires and imposes a tougher standard for the acquittal of death than that employed for acquittals of other offenses. In most jurisdictions, when the defendant faces a

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138. *See* Ring v. Arizona, 536 U.S. 584, 619–20 (2002) (O'Connor, J., dissenting) (explaining that *Apprendi* has "had a severely destabilizing effect on our criminal justice system" and predicting that the majority's decision in *Ring* would exacerbate the situation).

139. Sattazahn v. Pennsylvania, 537 U.S. 101, 111 (2003). The Court explained:

> [In *Ring*, the Court] held that aggravating circumstances that make a defendant eligible for the death penalty "operate as 'the functional equivalent of an element of a greater offense'" [and thus] for purposes of the Sixth Amendment's jury-trial guarantee, the underlying offense of "murder" is a distinct, lesser included offense of "murder plus one or more aggravating circumstances."

Id.

140. *See supra* notes 103–06 and accompanying text (explaining that, absent an affirmative defense, the defendant will not be acquitted if all elements of the crime have been established).

141. *See supra* notes 103–06 and accompanying text (noting that a prosecutor's proof of all of a crime's elements results in a guilty verdict except in certain circumstances).

single charge at trial, the jury must unanimously conclude that the prosecution has failed to prove the elements of the crime to establish an acquittal for the defendant.[142] This outcome occurs because the jury must reach a unanimous verdict, and a hung jury will result if all jurors do not agree that the prosecution failed to prove its case.[143] When the defendant faces an array of greater and lesser included offenses and there is doubt as to grade, however, it is impossible to discern whether the jury unanimously rejected the elements of any greater offense when it reached a unanimous decision to convict on some lesser included offense.

Unlike the case in which a defendant faces only one single charge, jurors deciding on multiple grades of an offense can agree on a unanimous verdict despite lack of unanimity in rejecting elements of an offense by convicting the defendant of the highest lesser included offense upon which all jurors unanimously conclude that all elements have been established. The instructions given to the jury when it has been presented with more than one grade of offense or a series of greater and lesser included offenses simply state that the jury should convict on the lesser offense if it fails to find unanimously that the prosecution proved the element of the greater offense. Thus, the jury instructions do not specifically require unanimity in rejecting greater offenses in order to convict on a lesser included offense.[144] Furthermore, the general verdict forms used in cases where the defendant faces multiple charges contain no indication of the makeup of the jury's vote on the decision to reject the elements of the greater crime.[145] A conviction on the lesser offense could be the result of a unanimous finding by the jury that the prosecution failed to

142. *See* Johnson v. Louisiana, 406 U.S. 356, 363 (1972) (explaining that "when a jury in a federal court, which operates under the unanimity rule and is instructed to acquit a defendant if it has a reasonable doubt about his guilt . . . [,] cannot agree unanimously upon a verdict, the defendant is not acquitted, but is merely given a new trial") (citations omitted). Although the federal criminal law and the criminal law of many states require a unanimous verdict for conviction, state law that does not require unanimous convictions is not a violation of the Due Process Clause of the Fourteenth Amendment. *Id.* at 359. Thus, in jurisdictions that do not require a unanimous verdict for conviction, it will be impossible to discern from a general verdict of not guilty whether the jury was unanimous in concluding the prosecution failed to prove its case even when the defendant faces only one charge.

143. *See id.* at 363 (explaining that a hung federal jury results in a new trial rather than an acquittal).

144. *See, e.g.*, VA. MODEL JURY INSTRUCTIONS, Criminal Instruction Nos. P33.720, G33.700 (instructing the jury on "Doubt as to Grade of Offense" and "Lesser Included Offenses," respectively).

145. *See, e.g.*, Green v. United States, 355 U.S. 184, 190–92 (1957) (holding that a conviction of second-degree murder constitutes an acquittal of murder in the first degree despite the fact that the general verdict returned by the jury was completely silent on the charge of first-degree murder).

prove the elements of the greater offense, or merely a decision by the majority that the greater elements were not established and an acquiescence on the part of the minority to convict only on the lower offense. Despite the impossibility of discerning whether the jury members unanimously rejected the elements of the greater crimes, our jurisprudence recognizes that a conviction of a lesser offense constitutes an acquittal of any greater offense.[146] By requiring that the jury's decision on the rejection of the aggravators be unanimous before recognizing a defendant's life sentence as an acquittal of death, the *Sattazahn* plurality creates a more onerous hurdle for capital defendants during the sentencing phase than that faced by ordinary defendants in trials on the merits.

Requiring more of capital defendants contradicts the long-standing "death is different" principle that courts traditionally invoke to provide capital defendants extra procedural protections.[147] Rather than giving capital defendants every benefit of doubt because of the severity and finality of the punishment that they face, the plurality's test proposes a more stringent standard for an acquittal of death in capital-sentencing proceedings without offering any explanation to justify the disparate and harsher treatment.[148] The lack of a discernable reason to limit the application of this stricter standard to the capital-sentencing context suggests that adoption of the plurality's test to capital-sentencing proceedings will call into question the well-established doctrine of implied acquittal in guilt/innocence proceedings. This unnecessary departure from prior double-jeopardy jurisprudence will undoubtedly create an enormous administrative burden for the courts and confuse juries with additional instructions and requirements.

B. The Likelihood That the New Test Will Become Controlling Law

Despite the shortcomings of Justice Scalia's new standard for what constitutes an acquittal of death,[149] he obtained the support of both Chief

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146. *See supra* notes 23–27 and accompanying text (explaining the *Green* decision's holding that conviction of a lesser included offense constitutes an acquittal of any greater offenses).

147. *See, e.g.*, Project, *Eighteenth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals* 1987–1988, 77 GEO. L.J. 931, 1162–63 (1989) ("The Court has repeatedly emphasized . . . that because of the unique nature of the penalty states are required to apply stricter procedural safeguards in capital cases than those used in noncapital cases in order to assure heightened sentencing reliability.").

148. *See supra* notes 137–41 and accompanying text (explaining why the plurality's test is harsher than the test for acquittal in traditional guilt/innocence proceedings).

149. *See supra* Part V.A (exploring the merits of the plurality's proposed test).

Justice Rehnquist and Justice Thomas in Part III of the *Sattazahn* opinion.[150] Justice Scalia, however, failed to persuade a majority to join Part III of his opinion, and thus his proposition that the jury must unanimously reject the existence of any aggravating factors to establish an acquittal of death is not currently controlling law.[151] On the other hand, the possibility exists that more Justices will adopt the new standard if they are presented with a case that squarely addresses the conflict between *Ring* and the *Bullington* case line.[152]

In *Sattazahn*, the defendant's original jury hung on the issue of death with nine jurors voting for life in prison and three voting to impose the death penalty.[153] A hung jury on the issue of death does not constitute a jeopardy-terminating event even under the more lenient test employed in *Bullington* and its successors;[154] thus, the Court did not need to consider whether jury rejection of the aggravators, let alone a unanimous jury rejection of the aggravators, is a prerequisite to an acquittal of death in light of *Ring*. Furthermore, the issues in *Sattazahn* were convoluted by the fact that the hung jury triggered imposition of a statutorily-mandated life sentence.[155] If a state seeks the death penalty on retrial in a case in which the jury unanimously agreed on a life verdict but either reached that conclusion after finding that the prosecution proved the aggravators beyond a reasonable doubt or rejected the aggravators but did not indicate whether that rejection was unanimous, the Court will be directly confronted with the issues raised by Scalia in the *Sattazahn* plurality and would have to either reject or accept, in whole or in part, the new test proposed therein.[156]

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150. Sattazahn v. Pennsylvania, 537 U.S. 101, 110–13 (2003).

151. *See* State v. Mata, 668 N.W.2d 448, 480 (Neb. 2003) (noting that because Section III of the *Sattazahn* opinion was only joined by three Justices, and thus has not been endorsed by a majority of the Court, it does not necessarily represent an accurate statement of the law).

152. Judges tend to avoid deciding legal issues until the facts before the court necessitate such determination. *See, e.g.*, Bourjaily v. United States, 483 U.S. 171, 181 (1987) (stating "[w]e need not decide in this case whether the courts below could have relied solely upon Lonardo's hearsay statements to determine that a conspiracy had been established by a preponderance of the evidence" because the case's facts presented other evidence corroborating the existence of a conspiracy).

153. *See Sattazahn*, 537 U.S. at 104–05 (stating that the defendant's first jury returned a note signed by the foreman declaring that they were deadlocked at nine-to-three in favor of life imprisonment).

154. *See supra* Part III.B (explaining that the dissent focused on the defendant's entitlement to the statutorily-imposed life sentence).

155. *See Sattazahn*, 537 U.S. at 104–05 (describing the Pennsylvania law that prescribes a life sentence in the event of a hung jury on the issue of death).

156. *See supra* Part IV (explaining the plurality's new definition of the implied acquittal of death).

1. Prediction Regarding the Plurality's First Requirement – Rejection of Aggravators

If a case comes up on appeal in which the jury unanimously sentenced the defendant to life after having unanimously concluded the prosecution proved the existence of one or more aggravators, the Court would be forced to consider the first part of the plurality's test, which requires jury rejection of the aggravators in order for the defendant to be acquitted and gain double-jeopardy protection from death. This requirement will become controlling law only if a majority of the Justices agree that: (1) *Ring*'s classification of aggravators as elements should be extended to the double-jeopardy context, (2) the use of mitigating factors to persuade the jury to return a life sentence is not analogous to the use of an affirmative defense in the guilt/innocence stage and thus cannot serve to acquit the defendant when the elements of murder plus aggravator(s) have been established beyond a reasonable doubt, and (3) there should not be an exception created whereby a life sentence returned when the jury unanimously agreed that the aggravators were proven should provide double-jeopardy protection even though the sentence does not technically constitute an acquittal.

There is a very high likelihood that when the Court is directly faced with the issues raised by the *Sattazahn* plurality, a majority of the Justices will agree that aggravators are the functional equivalent of elements within the context of double jeopardy. Undoubtedly, the three members of the *Sattazahn* plurality would reach this conclusion, and several other Justices would be compelled to concur in this result based on the prior stance in *Apprendi* and *Ring*.[157] Because treating aggravating factors as the functional equivalent of elements for the purpose of analyzing what constitutes an acquittal of death is the logical extension of the Court's holding in *Ring*, those Justices concurring in that decision will likely agree that a life sentence returned after the jury unanimously finds one or more aggravators cannot constitute an acquittal of murder plus one or more aggravators absent an affirmative defense.[158]

A majority of the Court, however, may likely conclude that a capital defendant's use of mitigators is analogous to a defendant's exercise of an excuse defense in guilt/innocence proceedings and should thus serve as an affirmative defense, acquitting the defendant of the death penalty when the

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157. *See supra* notes 123–24 and accompanying text (explaining why, in light of *Ring*, a jury rejection of the aggravators is a prerequisite to an acquittal of death absent an affirmative defense negating culpability despite establishment of the aggravators).

158. *See supra* notes 123–24 and accompanying text (describing the role that aggravators play in the sentencing stage).

mitigators are found to outweigh the aggravators despite the fact that all the elements of murder plus one or more aggravators have been established. None of the Justices addressed this possibility in *Sattazahn*, but the portion of the dissent's opinion that states that it is very unusual for a defendant to prevail by final judgment without an acquittal lends support to the proposition that the use of mitigators at a capital-sentencing proceeding to obtain a life sentence functions as an affirmative defense to death because it would drastically reduce the number of life sentences that would not constitute an acquittal under the post-*Ring* analysis.[159] The plurality asserted that, post-*Ring*, there cannot be an acquittal of death if the jury unanimously finds the existence of aggravators, and Justice O'Connor indicates that she too agrees that *Ring* mandates such a result.[160] These Justices, however, may simply have overlooked the situations in which affirmative defenses trigger acquittals. If capital defense attorneys direct the Court's attention to the functional similarities between mitigators in capital-sentencing proceedings and excuse defenses, a majority may very well conclude that mitigators serve as an affirmative defense and thus hold that a capital defendant who was granted a life sentence based on a jury finding that the mitigating factors outweighed the aggravators is entitled to double-jeopardy protection from death upon retrial.

Despite the merits of the argument that proof of mitigators outweighing the aggravators should be treated as an affirmative defense to the death penalty, if the Court continues to limit its analysis of what constitutes an acquittal of death to proof on the elements alone or rejects the analogy between the use of mitigators and excuse defenses, the *Sattazahn* plurality's

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159. *See* Sattazahn v. Pennsylvania, 537 U.S. 101, 120 (2003) (Ginsburg, J., dissenting) (stating that "[t]he standard way for a defendant to secure a final judgment in her favor is to gain an acquittal" but noting that there are atypical situations in which a defendant prevails by final judgment without being acquitted, which are recognized by double-jeopardy jurisprudence).

160. *Id.* at 116 (O'Connor, J., dissenting); *see also supra* notes 85–88 and accompanying text (explaining the plurality's assertion that there cannot be an acquittal if the jury does not reject the aggravating factors). O'Connor stated in her dissent:

> I do not join Part III, which would further extend the reach of *Apprendi* because I continue to believe that case was wrongly decided . . . . It remains my view that "*Apprendi*'s rule that any fact that increases the maximum penalty must be treated as an element of the crime is not required by the Constitution, by history, or by our prior cases." . . . [Thus] I would resolve petitioner's double jeopardy claim . . . under *Bullington*.

Id. (O'Connor, J., dissenting) (quoting Ring v. Arizona, 536 U.S. 584, 619 (2002)). From this statement, one can infer that O'Connor agrees with the plurality's proposition that the analysis of what constitutes an acquittal of death must be altered in light of *Ring*, but declines to join only because she disagrees with *Ring* itself.

assertion that the jury must reject the aggravators in order for there to be an acquittal of death will likely become controlling law.[161] Nonetheless, a majority of the Court could conceivably agree that the jury must reject the existence of one or more aggravators to reach an acquittal of death and still hold that a jury-rendered life sentence provides double-jeopardy protection by carving out an exception under which all jury-rendered life sentences terminate jeopardy even if the sentence is not actually an acquittal.

In *Sattazahn*, the dissent noted that jeopardy can terminate in situations other than acquittals and concluded that a state-mandated life sentence when the jury deadlocks on the sentencing issue is an example of such a situation.[162] To justify the decision to afford double-jeopardy protection to Sattazahn despite the lack of an acquittal on the merits, the dissent noted that (1) the majority's holding denying double-jeopardy protection "confront[ed] the defendant with a perilous choice" between facing death on retrial or foregoing a potentially meritorious appeal, and (2) the death penalty is unique in its severity and finality, thus heightening a defendant's interests in avoiding a second prosecution.[163] Arguably, both of these considerations would apply to a case in which the jury returned a life verdict after concluding that the prosecution established the existence of one or more aggravators.[164] Although only four Justices were willing to provide double-jeopardy protection to Sattazahn when the jury could not agree on a sentence and life was judicially imposed,[165] it is possible that more members of the Court would be inclined to vote in favor of an exception providing double-jeopardy protection despite the

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161. *See supra* notes 123–24 and accompanying text (explaining why, in light of *Ring*, a jury rejection of the aggravators is a prerequisite to an acquittal of death absent an affirmative defense negating culpability despite establishment of the aggravators).

162. *See Sattazahn*, 537 U.S. at 119 (Ginsburg, J., dissenting) (noting that the Supreme Court's "decisions recognize that jeopardy can terminate in circumstances other than an acquittal" and concluding that "once the trial court entered a final judgment of life for Sattazahn, the Double Jeopardy Clause barred Pennsylvania from seeking the death penalty a second time" even though entry of that life sentence was not technically an acquittal).

163. *See id.* at 126–27 (Ginsburg, J., dissenting) (explaining that in the decision to give Sattazahn jeopardy protection, the dissent gave weight to two considerations: (1) holding otherwise would confront the defendant with a perilous choice, and (2) the punishment of death is "'unique in both its severity and its finality'" (quoting Monge v. California, 524 U.S. 721, 732 (1998))).

164. If the defendant in such a case wished to appeal his conviction, under the plurality's test he would have to forego the life sentence returned by the jury and potentially face the severe and final penalty of death. *See id.* at 112 (explaining that the only way a defendant's life sentence would protect him from death on retrial is if it was the result of the jury's unanimous conclusion that one or more aggravators were not proven beyond a reasonable doubt).

165. *See supra* notes 76–78 and accompanying text (discussing the *Sattazahn* dissent).

lack of an acquittal when the life sentence represents the jury's unanimous conclusion that the death penalty is inappropriate. The *Sattazahn* majority's sharp criticism of the dissenting opinion, however, suggests that this outcome will not occur.[166]

2. *Prediction Regarding the Plurality's Second Requirement—Unanimity in the Rejection of Aggravators*

Although a majority of the Court will likely accept the *Sattazahn* plurality's assertion that the jury must reject the existence of the aggravators in order for a life sentence to provide double-jeopardy protection (at least absent any affirmative defense), Justices Scalia, Rehnquist, and Thomas will have a difficult time convincing a majority to hold that the jury must *unanimously* reject the aggravators to trigger double-jeopardy protection on the issue of death. As noted above, requiring unanimous rejection of the aggravators is a stricter standard than that applied in guilt/innocence proceedings, where conviction of a lesser included offense constitutes an implied acquittal of any greater offense without any inquiry into the unanimity of the jury's conclusion that the prosecution failed to prove all of the elements of the greater crime.[167]

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166. *See Sattazahn*, 537 U.S. at 113 (stating that the statement upon which the dissent relied to justify affording jeopardy protection to the nonacquittal life sentence at issue was nothing more than dictum and was a "thin reed on which to rest" the dissent's conclusion).

167. *Supra* Part V.A.2. One could possibly argue that because all facts necessary to sentence a capital defendant to life imprisonment have been established beyond a reasonable doubt at the trial on the merits, the capital-sentencing proceeding is more closely analogous to a trial on the merits in which the defendant faces only one charge (death-eligible capital murder) and thus requiring jury unanimity in rejection of the elements of that charge in order for the defendant to establish an acquittal is no more difficult than what is asked of an ordinary defendant. *See supra* notes 142–43 and accompanying text (explaining that in a guilt/innocence proceeding where the defendant faces a single charge the jury must unanimously conclude that the prosecution failed to prove the elements of the crime in order for there to be an acquittal). This argument, however, ignores the prior case law analogizing capital-sentencing proceedings to trials on the merits in which the defendant faces greater and lesser included offenses and receives an implied acquittal of greater offenses upon conviction of a lesser included offense without inquiry into the unanimity of the jury's rejection of the elements of the greater offenses. *See* Bullington v. Missouri, 451 U.S. 430, 445–47 (1981) (treating a jury life sentence as an implied acquittal of the death penalty). Although *Ring* may have challenged the strength of this analogy by explaining that the defendant is being tried for the single offense of capital murder plus one or more aggravators at the sentencing proceeding, the capital-sentencing proceeding in which the defendant receives a life sentence is still more similar to a guilt/innocence proceeding where the defendant is convicted of a lesser included offense than a guilt/innocence proceeding where the defendant is acquitted of the single crime with which he was charged and sent home a free man. Therefore, requiring unanimous rejection of the aggravators in order for a life sentence to constitute an acquittal of death is clearly a tougher showing than that required of

Because of the heightened procedural protection typically provided to capital defendants, it is unlikely that a majority of the Court would adopt a test that makes it more difficult for a capital defendant than an ordinary defendant to prove an acquittal.[168] Moreover, a majority of the Court is unlikely to determine that the stricter test proposed by the *Sattazahn* plurality should be applied to implied acquittals in guilt/innocence proceedings to cure the disparate treatment that would arise from limiting its application to capital-sentencing proceedings because the criterion for what constitutes an implied acquittal in guilt/innocence proceedings is well established and workable.[169] Thus, the portion of the plurality's test requiring that the jury's rejection of the aggravators be unanimous to establish an acquittal of death will not likely gain the support of a Court majority.

Therefore, this Note predicts that a majority of the Court (1) will not adopt the portion of the plurality's test requiring unanimous rejection of the aggravators;[170] (2) will hold that the plurality's assertion that the jury must reject the aggravators in order for there to be an acquittal of death and double-jeopardy protection is true absent an affirmative defense;[171] and (3) will recognize proof of sufficient mitigators as an affirmative defense, resulting in acquittal despite proof of aggravators.[172] This statement, however, is merely a prediction and illustrates only one possible way the Court could resolve the uncertainty of what constitutes an acquittal of death after the *Ring* decision.

When presented with a case that squarely presents the issues introduced by the *Sattazahn* plurality, the Court may reject the plurality's test altogether and reaffirm the acquittal of death test proposed in *Bullington,* require rejection of aggravators for an acquittal of death but not unanimity in the rejection, or agree that *Ring* indeed narrows the situations in which a life sentence constitutes an acquittal but carve out a category of situations in which a nonacquittal provides double-jeopardy protection. The Court may also decide to adopt the plurality's test as stated in *Sattazahn*. Because of the

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ordinary defendants in an analogous trial on the issue of guilt.

168. *See supra* notes 147–48 and accompanying text (describing the death is different principle).

169. *See supra* notes 23–27 and accompanying text (discussing *Green v. United States*, in which the Supreme Court first established the test for an implied acquittal in guilt/innocence proceedings).

170. *See supra* notes 167–69 and accompanying text (stating why it is unlikely that the Court will adopt the test requiring unanimous rejection of the aggravators).

171. *See supra* notes 157–60 and accompanying text (discussing the possibility of treating mitigating factors as affirmative defenses).

172. *See supra* notes 157–60 and accompanying text (noting the possibility that a majority would consider mitigators to act as affirmative defenses to the death penalty).

uncertainty involved in the future of the death acquittal standard and the unique severity and finality of the punishment, capital defense attorneys must explore the ramifications of adoption of the plurality's test by the majority so as not to inadvertently risk their defendants' lives by winning an appeal.

VI. Ramifications of the Sattazahn *Plurality's New Test If Adopted by a Majority of the Court*

The current verdict forms employed in capital-sentencing proceedings are insufficient to preserve the information necessary to establish an acquittal of death if the plurality's test is adopted in full.[173] Although this Note concludes that the likelihood of the plurality's test becoming controlling law is not great, the small chance that it will be adopted by a majority of the Court is enough to merit caution on the part of defense counsel, given the severity and finality of the penalty at stake. Given the uncertainty in what is necessary to establish an acquittal of death in a post-*Ring* world, capital defense attorneys must make every effort to change the verdict forms to maximize a defendant's ability to establish the requisite elements of an acquittal of death under any test the Court may adopt.

A. The Current Inadequacy of Capital Murder Verdict Forms

Although capital-sentencing verdict forms are not uniform among jurisdictions, an analysis of model capital verdict forms from several jurisdictions reveals that they are generally organized to solicit one of three responses from the jury: (1) the jury did not find aggravators and thus sentenced the defendant to life, (2) the jury unanimously found one or more aggravating circumstances beyond a reasonable doubt thus making the defendant death eligible but set punishment at life after considering all the evidence in aggravation and mitigation, or (3) the jury unanimously found one or more aggravating circumstances beyond a reasonable doubt and after considering all the evidence in aggravation and mitigation decided to set punishment at death.[174] This minimal specificity is more than enough to

173. *See supra* Part V.A (providing a legal analysis of the plurality's test).

174. *See, e.g.*, KY. INSTRUCTIONS TO JURIES § 12.10A (1999) (setting forth one verdict form which simply states "we, the jury, fix the Defendant's punishment . . . at confinement in the penitentiary for life" and another form which would be used by the jury when they find aggravating factors which states that the jury found "beyond a reasonable doubt that the following aggravating circumstances or circumstances exist," leaves a space for the jurors to list

establish an acquittal of death under *Bullington* because, under that test, all that is required to establish an acquittal of death is a jury-rendered life sentence.[175] In light of the *Sattazahn* plurality and the doubt it casts on the *Bullington* test, however, capital defense attorneys must advocate verdict forms that provide more insight into jury findings underlying life sentences.[176]

A closer look at Virginia's capital-sentencing verdict forms illustrates the ways in which current sentencing phase verdict forms are insufficient to ensure preservation of a defendant's acquittal of death in this time of uncertainty. In each capital-sentencing proceeding in Virginia, the jury is provided with: (1) at least two verdict forms on which it could return a life sentence, and (2) one on which it could return a death sentence.[177] An analysis of the two types of verdict forms provided in each case for returning a life sentence reveals that courts are currently not demanding enough specificity about the rationale for jurors' life sentences to ensure protection of capital defendant's rights under the Double Jeopardy Clause after the *Ring* decision. The jury uses the first type of life sentence verdict form if it finds that the Commonwealth failed to prove an aggravating circumstance.[178] This form simply states that the jury found the defendant guilty of capital murder in the guilt/innocence proceeding and fixes the punishment at life after consideration of all the evidence in aggravation and mitigation.[179] The jury uses the second type of life sentence verdict form when it unanimously finds that the prosecution has proved one or both of the statutory aggravators beyond a

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the specific aggravators found, and leaves a space for the jury to select the appropriate punishment).

175. *See supra* notes 33–42 and accompanying text (setting forth the *Bullington* test for what constitutes an acquittal of death).

176. The problems with lack of specificity in verdict forms may be more or less severe depending on the jurisdiction, as verdict forms vary.

177. *See* VA. MODEL JURY INSTRUCTIONS, Criminal Instruction Nos. P33.130–P33.130G (2003) (noting the required verdict forms that must be provided to a capital jury in Virginia). The Virginia Model Jury Instructions provide seven verdict forms for capital-sentencing proceedings. In each case, the jury will be given form P33.130A, which is the form the jury will use to return its sentencing verdict if it finds that the Commonwealth failed to prove aggravating circumstances. *Id.* at Criminal Instruction No. P33.130A. In addition to this form, the jury will be given up to three forms to return a life sentence after proving the existence of one or both of Virginia's statutory aggravators—vileness and future dangerousness. One of these forms states that the jury found vileness unanimously beyond a reasonable doubt, the second future dangerousness, and the third both. Which of these forms the jury receives will depend upon the evidence of aggravators offered at trial. *Id.* Similarly, the jury will be given up to three forms on which to return a death sentence. *Id.* at Criminal Instruction No. P33.130.

178. *Id.* at Criminal Instruction No. P33.130A.

179. *Id.*

reasonable doubt but nonetheless decides to fix the punishment at life.[180] This type of life sentence verdict form states that the jury found unanimously and beyond a reasonable doubt against the applicable aggravator(s) and fixed the punishment at life after "having considered all the evidence in aggravation and mitigation of the offense."[181]

The first problem with these verdict forms is that the form used by the jury when it rejects the aggravators is insufficient to preserve an acquittal of death under the *Sattazahn* plurality's test. If a majority of the Court adopts the plurality's test in full, a life-sentenced defendant who successfully appeals his conviction can be retried for death unless the verdict form demonstrates that the jury acquitted him of death by unanimously finding that the aggravators were not proven.[182] By not returning the second type of verdict form listing the relevant aggravating circumstances, the jury indicates that it did not unanimously find the existence of any aggravators,[183] but this rejection is equivocal. The rejection could mean that some jurors found the aggravator proven while others did not, which would not constitute an acquittal under the plurality's test. It could also mean that the jury was unanimous in finding that the aggravator was not proven, which would constitute an acquittal under the plurality's test. Therefore, while this verdict form would be sufficient to establish an acquittal if a majority of the Court adopts only the first part of the plurality's test requiring rejection of the aggravators, it would not suffice to establish an acquittal of death if the majority also agrees with the plurality's contention that the rejection of the aggravators must be unanimous.[184] If capital defense attorneys do not object to the use of these forms and insist that the jury disclose its finding specifically, capital defendants receiving life verdicts after the jury unanimously rejected the aggravators will be deprived of their right under the Double Jeopardy Clause to avoid retrial for their lives following a successful appeal of the underlying conviction if the plurality's test is adopted in full. This result will occur because capital defendants will not be able to establish the requisite unanimity from the jury's verdict.

The second problem with these verdict forms is that the form used by the jury when it sentences the defendant to life after unanimously finding the

180. *Id.* at Criminal Instruction Nos. P33.130B–130D.

181. *Id.*

182. *See* Sattazahn v. Pennsylvania, 537 U.S. 101, 112 (2003) (opining that "if petitioner's first sentencing jury had unanimously concluded that Pennsylvania failed to prove any aggravating circumstances, that conclusion would operate as an 'acquittal' of the greater offense").

183. VA. MODEL JURY INSTRUCTIONS, Criminal Instruction No. P33.130 (2003).

184. *See supra* Part IV.B–C (discussing the requirements of the *Sattazahn* plurality's test).

existence of one or more aggravators beyond a reasonable doubt would be insufficient to establish an acquittal if the Court holds that proof of sufficient mitigators serves as an affirmative defense. The form currently used when the jury sentences the defendant to life after finding the existence of aggravators simply states that the decision to sentence the defendant to life was based on consideration of "all the evidence in aggravation and mitigation of the offense."[185] This vague language does not indicate whether the life sentence was based on a jury finding that the defendant established mitigating factors that outweighed the aggravators or on a jury determination that death was inappropriate even though the defendant did not establish sufficient mitigating factors.[186] If capital defense attorneys do not demand that juries disclose their findings on mitigators specifically, capital defendants in jurisdictions that do not require a death sentence when aggravators and no mitigators are proven will be unable to establish that the jury found the requisite mitigating factors should the Court recognize that finding as grounds for an acquittal of death.

B. Proposed Solution—New Verdict Forms for Capital Sentencing

Although the lack of specificity in current capital-sentencing verdict forms will only create a problem for capital defendants if a majority of the Court holds that a divergence from the previous test of what constitutes an acquittal is mandated by the *Ring* decision and announces a test requiring heightened specificity, the probability that *Ring* will have at least some effect on the test is high.[187] While it is unlikely that a majority of the Court will

185. VA. MODEL JURY INSTRUCTIONS, Criminal Instruction Nos. P33.130B–130D (2003).

186. In Virginia, the jury is not required to sentence the defendant to death when it finds the existence of aggravators and the absence of mitigators. *See* VA. MODEL JURY INSTRUCTIONS, Criminal Instruction No. 33.122 (2003) (explaining that even if the jury finds that the prosecution has proved the aggravators, "if [the jury] nevertheless believe[s] from all the evidence, including evidence in mitigation, that the death penalty is not justified, then [the jury] shall fix the punishment of the defendant" at life). Thus, a life verdict returned after the jury finds the existence of aggravators could be the result of a finding that the defendant proved sufficient mitigating factors that negate those aggravators or simply a determination by the jury that death was not warranted despite the absence of mitigators. This confusion would not result, however, in jurisdictions mandating a death sentence when the jury finds that one or more aggravators were established beyond a reasonable doubt and no mitigators were proven or when the jury unanimously finds one or more aggravators that outweighs any mitigators because in such a case, all life sentences returned after the jury found the aggravators were necessarily based on a jury finding of sufficient mitigators. *See, e.g.*, PA. STAT. ANN. tit. 42, § 9711(c)(1)(iv) (2004) (setting forth this type of capital-sentencing scheme).

187. *See supra* Part V.B (discussing the likelihood that a Court majority will adopt some or all of the plurality's test in light of *Ring*).

adopt the *Sattazahn* plurality's test in full,[188] the plurality introduced some of the implications of *Ring* within the context of double jeopardy and illuminated the need for change in the test of what constitutes an acquittal of death.[189] Capital defense attorneys must heed this warning and advocate special verdict forms now so that their clients will have the information necessary to establish an acquittal of death no matter how the standard evolves in the near future.

In order for defendants to establish an acquittal of death if the test proposed in the *Sattazahn* plurality becomes controlling law, verdict forms must disclose whether jury rejection of the aggravators was unanimous.[190] To achieve this level of specificity, this Note proposes that capital defense attorneys advocate the use of a verdict form that requires the jury to select one of three alternatives: (1) that the jury *found* unanimously that the prosecution *failed* to prove the existence of aggravator(s) beyond a reasonable doubt, (2) that the jury *did not find* unanimously that the prosecution *proved* the existence of aggravator(s) beyond a reasonable doubt, or (3) that the jury *found* unanimously that the prosecution *proved* the existence of aggravator(s) beyond a reasonable doubt. If this verdict form is employed, capital defendants who receive a life sentence after the jury unanimously rejects the aggravators can easily establish their legal entitlement to that life sentence should the *Sattazahn* plurality's test become controlling law.

The second contingency requiring more specificity in the verdict forms is the possibility that the Court will not only acknowledge the import of *Ring* and thus treat aggravators as elements for purposes of analyzing what constitutes an acquittal, but that it will also recognize proof of mitigators as an affirmative defense. Under such a rule, a capital defendant who received a life sentence after the jury unanimously found the existence of one or more aggravators would need to prove that the life sentence was the result of a jury finding that the defense established sufficient mitigators, rather than mere jury sympathy.[191] To achieve this specificity, capital defense attorneys should request that the verdict forms used by the jury to return a life sentence when it unanimously finds the prosecution proved the aggravator(s) beyond a

188. *See supra* notes 170–72 and accompanying text (predicting the Court's likely resolution of the issues raised by the *Sattazahn* plurality).

189. *See* Sattazahn v. Pennsylvania, 537 U.S. 101, 111–12 (2003) (explaining that *Ring* has illuminated the part of our jurisprudence dealing with what constitutes an acquittal of death and subsequently proposing a new standard).

190. *See supra* Part IV.B–C (discussing the requirements of the plurality's test of what constitutes an acquittal of death).

191. *See supra* notes 113–27 and accompanying text (introducing the effects of a rule that would treat proof of sufficient mitigators as an affirmative defense).

reasonable doubt require the jury to indicate whether it found that the defense established the existence of sufficient mitigating factors under the applicable evidentiary standard.[192]

Unfortunately, requesting this level of specificity in jury verdict forms will not ensure their use in capital-sentencing proceedings given that the law in its current state does not require more than simply showing a jury-rendered life sentence to establish an acquittal of death. While there is no constitutional bar to special verdicts in criminal proceedings when the defendant requests such a verdict,[193] judges nonetheless tend to resist the use of special verdicts.[194] Commentators attribute this resistance to the fact that special verdicts raise the constitutional issue of interfering with jury deliberation and can serve to preclude jury nullification.[195] This problem is arguably not a concern in the

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192. This solution to the proof problems associated with recognition of sufficient mitigators as an affirmative defense assumes that if a majority of the Court agrees that mitigators should serve to produce an acquittal, they will reject the plurality's contention that an acquittal of death based on rejection of aggravators must be unanimous. Presumably, if the Court does hold that an acquittal of death based on rejection of aggravators must be the result of a unanimous rejection of the aggravators and also recognizes mitigators as an affirmative defense, the jury forms used when the jury returns a life verdict based on non-unanimous rejection of aggravators must also disclose whether the jury found the defense proved sufficient mitigators in all jurisdictions that permit life sentences when aggravators are established and mitigators are either not found or not sufficient to overcome those aggravators. This is so because under the unanimity test for acquittal based on rejection of aggravators, a non-unanimous rejection of the aggravators would not qualify as an acquittal absent an affirmative defense. Requiring the jury to disclose its findings with regard to mitigators when it finds that the prosecution failed to prove aggravators would introduce many practical problems because under current law the jury does not make any findings as to mitigators unless and until it unanimously concludes the prosecution has proved the existence of one or more aggravators. *See, e.g.*, VA. MODEL JURY INSTRUCTIONS, Criminal Instruction No. P33.127 (2003) ("*If you find* the Commonwealth has proved beyond a reasonable doubt the existence of an aggravating circumstance, in determining the appropriate punishment you shall consider any mitigation evidence . . . .") (emphasis added). Because it is very unlikely that the Court would draw the analogy to the excuse defenses used in trials on guilt or innocence but ignore the analogy to implied acquittals in trials on guilt or innocence where unanimity in rejection of aggravators is not required, this possibility and the complications that would arise therefrom are beyond the scope of this Note.

193. *See* Peter Westen, *The Three Faces of Double Jeopardy: Reflections on Government Appeals of Criminal Sentences*, 78 MICH. L. REV. 1001, 1013 n.44 (1980) ("Nor is there presumably any constitutional bar to their [special verdicts'] use in criminal cases at a defendant's request.").

194. *See* Sherman J. Clark, *The Courage of Our Convictions*, 97 MICH L. REV. 2381, 2436 (1999) ("Special verdicts . . . are disfavored in criminal cases.").

195. *See* WAYNE LAFAVE ET AL., CRIMINAL PROCEDURE § 24.10(a), at 1167 (4th ed. 2004) (explaining that special verdicts are disfavored in criminal trials because "[t]he general verdict facilitates jury independence by allowing the jury to sidestep the outcome that may follow inescapably from a careful dissection of the crime for each of the factual elements dictated by

situation at hand, however, because in most jurisdictions the jury is free to sentence the defendant to life regardless of the findings on aggravators and mitigators, which eliminates the potential barrier to jury nullification.[196] Furthermore, many courts will allow special findings when defendants request them.[197] Ultimately, a capital defense attorney should request these special verdict forms regardless of the trial judge's expected response. By making the request and placing an objection on the record in the event that the judge denies the request, a capital defense attorney preserves this issue for later consideration by the appellate court in the event that a majority of the Court adopts a narrower test of what constitutes an acquittal requiring more specificity in jury verdicts.[198]

VII. Conclusion

The *Sattazahn* plurality was correct in asserting that the *Ring* decision affects how the Double Jeopardy Clause applies to capital-sentencing proceedings, but the Court probably will not accept the plurality's contention that, in light of that decision, no acquittal exists unless the jury unanimously rejects the aggravating factors.[199] *Ring*'s declaration that aggravators are the functional equivalent of elements must change the way we evaluate acquittal of death, but we need only look to the way elements of other crimes are treated in traditional trials to determine what this change entails. The *Sattazahn* plurality's test for what constitutes an acquittal of murder plus one or more

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law"); Kate H. Nepveu, Note, *Beyond "Guilty" or "Not Guilty": Giving Special Verdicts in Criminal Jury Trials*, 21 YALE L. & POL'Y REV. 263, 264 (2003) (explaining that the use of special verdicts and special interrogatories raises "the constitutional issue of interfering with jury deliberations").

196. *See supra* note 104 and accompanying text (explaining that many jurisdictions do not require the jury to return death under any circumstances but noting that Pennsylvania does require a death sentence if the jury finds that the aggravators sufficiently outweigh any mitigators).

197. *See* LAFAVE ET AL., *supra* note 195, § 24.10(a), at 1168 ("Many courts also will allow special findings when a defendant requests such findings.").

198. *See, e.g.*, United States v. Dennis, 786 F.2d 1029, 1042 (11th Cir. 1986) (explaining how an attorney may preserve an issue for appeal). The court stated:

> To preserve an issue at trial for later consideration by an appellate court, one must raise an objection that is sufficient to apprise the trial court and the opposing party of the particular grounds upon which appellate relief will later be sought. A general objection or an objection on other grounds will not suffice.

Id.

199. *See supra* Part V (analyzing the plurality's test).

aggravator(s) varies significantly from what our jurisprudence requires for an acquittal of an offense in guilt/innocence proceedings and therefore will likely be rejected.

The plurality's test departs from the test of acquittal in guilt/innocence proceedings in two significant ways. First, requiring unanimity in the rejection of the aggravators would impose a tougher standard than that which is applied in traditional cases on guilt or innocence, in which a defendant receives an implied acquittal of the greater offense when he is convicted of the lesser offense without any inquiry into the jury's findings on the elements of the greater offense.[200] Second, although jury rejection of elements is required for an acquittal in guilt/innocence proceedings absent an affirmative defense, when a defendant proves an affirmative defense, he will receive an acquittal of his crime even though the elements were established.[201] The capital defendant's proof of sufficient mitigating factors is analogous to an excuse defense in guilt/innocence trials, and thus, by failing to recognize that proof of mitigators could produce an acquittal despite the proof of aggravators, the plurality imposes on the capital defendant a greater burden than is faced by an ordinary defendant on trial for a less serious crime.[202] Rather than requiring unanimous rejection of aggravators, the most logical way to incorporate *Ring* into the analysis of what constitutes an acquittal of death is to require the defendant to show either that (1) the jury, unanimously or otherwise, rejected the aggravators, or (2) the defendant proved mitigators that the jury found sufficient to outweigh or negate the aggravators.

While this solution would allow for the most symmetry between the definition of acquittal of the charged offense and the definition of acquittal of death, we have no guarantee that the Court will follow this course. For this reason, capital defense attorneys must ensure that their verdict forms include enough information to meet the test adopted by the *Sattazahn* plurality opinion and any other test the Court may adopt. Not only must verdict forms disclose whether the jury found sufficient mitigators when returning a life sentence after finding aggravators, the forms must also disclose whether the jury's rejection of the aggravating factors was unanimous when returning a life

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200. *See supra* Part V.A.2 (explaining how the plurality's insistence that rejection of aggravators be unanimous to establish an acquittal goes beyond what the law currently requires and imposes a tougher standard for the acquittal of death than that employed for acquittals of other offenses).

201. *See supra* Part V.A.1 (explaining how an affirmative defense will acquit a defendant even though all elements of an offense are established and noting the ways in which mitigating circumstances are analogous to affirmative defenses).

202. *See supra* Part V.A (exploring the ramifications of the *Sattazahn* plurality's test).

sentence based on rejection of aggravators.[203] Only with this level of specificity will the verdict forms be adequate to preserve the information necessary to establish an acquittal of death under any test the Court may ultimately adopt.

203. *See supra* Part VI.B (proposing specified verdict forms).