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# Capital Retrials and Resentencing: Whether to Appeal and Resentencing Fairness

Whitnan J. Hou\*

## *I. The End Is Only the Beginning*

The end of a capital murder trial is the end only in name. What follows is the beginning of a lengthy appellate process. In the more obvious case of the death-sentenced defendant, appeal is mandatory and automatic to the Supreme Court of Virginia.<sup>1</sup> The automatic appeal may allege trial error and/or sentencing phase error.<sup>2</sup> The court must review disproportionality of the sentence and whether the sentence was the result of passion or prejudice.<sup>3</sup> If a new trial is awarded for trial error, both the guilt and penalty phases will be relitigated before a new jury.<sup>4</sup> In such a case, it is clear that the death sentence is available to the new jury.<sup>5</sup> If, however, only a new sentencing proceeding is awarded, the new jury, which has the death sentence available, will be deciding life or death on less evidence than that available to the original jury.

A life-sentenced defendant, however, is not provided an automatic appeal; instead the appeal is both voluntary and discretionary, must allege trial error, and is reviewed by the Court of Appeals of Virginia.<sup>6</sup> Until recently, a life sentence

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\* J.D. Candidate, May 2004, Washington & Lee University School of Law; B.S., University of California, Los Angeles. The author would like to thank Professor Roger Groot and the students of the Virginia Capital Case Clearinghouse, in particular Priya Nath, for their assistance, edits, insights, and for keeping me on track through this arduous ordeal. This article is dedicated to my parents, Jonathon P. Hou and Tao-Jan Hou, and my sister, Bertina Hou, for their continued love and support during my abrupt career change.

1. See VA. CODE ANN. § 17.1-313(A) (Michie 2003) (“A sentence of death, upon the judgment thereon becoming final in the circuit court, shall be reviewed on record by the Supreme Court.”).

2. See VA. CODE ANN. § 17.1-313(C) (stating that the court may consider any errors enumerated by appeal).

3. *Id.* (describing the factors the court must consider when reviewing a death sentence on automatic appeal).

4. See *Green v. Commonwealth*, 546 S.E.2d 446, 452 (Va. 2001) [hereinafter *Green I*] (ordering a new trial because allowing an unqualified juror to remain on the jury constitutes manifest error); *Green v. Commonwealth*, 580 S.E.2d 834, 850 (Va. 2003) [hereinafter *Green II*] (finding no error in the new trial).

5. See *Green I*, 546 S.E.2d at 452 (ordering a new trial because allowing an unqualified juror to remain on the jury constitutes manifest error).

6. See VA. CODE ANN. § 17.1-406(A) (Michie 2003) (stating in pertinent part: “[A]ny aggrieved party may present a petition for appeal to the Court of Appeals from (i) any final

was believed to be an implied acquittal of death.<sup>7</sup> Under that premise, the successful appellant could be retried for capital murder and be subjected only to a maximum punishment of life imprisonment.<sup>8</sup> After *Sattazahn v. Pennsylvania*,<sup>9</sup> that result is doubtful.<sup>10</sup> Capital practitioners should, therefore, be cautious about appealing such cases.

This article will examine the difficulties posed by the two paradigms in reverse order. In Part II, the article will address how life-sentenced capital defendants have lost double jeopardy protection. It will then suggest analyses designed to clarify which defendants can safely appeal and which cannot safely do so. Part III of the article will then examine the death-sentenced defendant and the difficulties faced by the defendant at resentencing if his appeal is successful.

## II. *The Life-Sentenced Capital Defendant*

A defendant, found guilty of capital murder, can be sentenced to life imprisonment in Virginia in one of four ways: (1) unanimous verdict for life with no finding of aggravating factors; (2) unanimous verdict for life because the jury finds both mitigators and aggravators; (3) a statutorily imposed life sentence because the jury deadlocked on punishment; or (4) the judge, after review of the post-sentence report, sets aside the jury's death verdict and imposes life. An appeal by a life-sentenced capital defendant is reviewed by the Court of Appeals of Virginia.<sup>11</sup> A successful appeal by a life defendant can only occur if there was error in the first trial.<sup>12</sup> If the conviction and sentence are reversed, the defendant receives a completely new trial.<sup>13</sup>

For over two decades, defendants sentenced to life appealed their sentences with the assurance that the double jeopardy bar protected them from death

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conviction in a circuit court of a traffic infraction or a crime . . ."). See generally VA. CODE ANN. § 17.1-407(C) (Michie 2003) (stating that the petition for appeal may be granted by the reviewing judge on the basis of the record); VA. CODE ANN. § 17.1-407(D) (stating that if the petition is not granted under subsection (C), the counsel for petitioner is entitled to present orally before a panel of judges the reasons why the appeal should be granted).

7. *Bullington v. Missouri*, 451 U.S. 430, 444-46 (1981) (holding that a life sentence acts as an acquittal of death and bars death on retrial because the capital sentencing procedure resembled a trial on the issue of guilt).

8. *Id.*

9. 537 U.S. 101 (2003).

10. *Sattazahn v. Pennsylvania*, 537 U.S. 101, 110 (2003) (holding that only a unanimous finding that the State had failed to prove any aggravators will result in an acquittal of death).

11. The life-sentenced defendant cannot appeal the sentence because life is the minimum on a capital conviction. Also, he cannot appeal based on sentencing phase error because, as he received life, no sentencing phase error could have prejudiced him.

12. See *Green I*, 546 S.E.2d at 452 (noting that the defendant could appeal his life sentence because the trial court erred in the seating of a juror).

13. *Id.*

sentences in their new trials if their appeals were successful.<sup>14</sup> The recent decision in *Sattazahn* places that conclusion in serious doubt. *Sattazahn* stratifies capital murder and limits the protection of the double jeopardy bar.<sup>15</sup>

#### A. Double Jeopardy

In 1981 the United States Supreme Court held in *Bullington v Missouri*<sup>16</sup> that double jeopardy barred the imposition of a death sentence in a retrial after a defendant is sentenced to life.<sup>17</sup> In *Bullington*, the jury unanimously imposed a life sentence and did not indicate whether it found any aggravators.<sup>18</sup> Under the controlling Missouri statute, the jury was required to find that the alleged aggravator existed beyond a reasonable doubt before it could sentence a defendant to death.<sup>19</sup> The Court held that for purposes of double jeopardy, a unanimous jury's finding for life meant that the defendant was acquitted of death.<sup>20</sup> "Chief Justice Bardgett, in his dissent from the ruling of Supreme Court majority, observed that the sentence of life imprisonment which petitioner received at his first trial meant that 'the jury has already acquitted the defendant of whatever was necessary to impose the death sentence.' We agree."<sup>21</sup>

In *Arizona v Rumsey*,<sup>22</sup> the United States Supreme Court reviewed a sentencing scheme similar to that in *Bullington*.<sup>23</sup> In Arizona, however, the trial judge acted as the sentencer.<sup>24</sup> Like the jury in *Bullington*, the trial judge sentenced the

14. See generally *Bullington*, 451 U.S. at 430. Since *Bullington*, a life sentence effectively prevented the State from seeking death in a retrial.

15. *Sattazahn*, 537 U.S. at 112 (stating that murder plus a finding of aggravators is a separate offense from murder and failure to find aggravators).

16. 451 U.S. 430 (1981).

17. *Bullington*, 451 U.S. at 444-46 (holding that a life sentence acts as an acquittal of death and bars death on retrial because the capital sentencing procedure resembled a trial on the issue of guilt). The life sentence from the first trial means that the jury has already acquitted him of whatever was necessary to impose the death sentence. *Id.* at 445; see U.S. CONST. amend. V (providing that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb").

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

19. *Id.* at 434; see MO. REV. STAT. § 565.012.4 (1978) (stating that a jury "must be convinced beyond a reasonable doubt that any aggravating circumstance or circumstances that it finds to exist are sufficient to warrant the imposition of the death penalty"). The current controlling statute has a similar requirement. See MO. REV. STAT. § 565.032 (1999) (providing that a judge or jury shall consider whether an enumerated statutory aggravating circumstance is established by the evidence beyond a reasonable doubt).

20. *Bullington*, 451 U.S. at 446.

21. *Id.* at 445 (quoting *State ex rel. Westfall v. Mason*, 594 S.W.2d 908, 922 (Mo. 1980) (Bardgett, C.J., dissenting)) (internal citations omitted).

22. 467 U.S. 203 (1984).

23. *Arizona v. Rumsey*, 467 U.S. 203, 209 (1984).

24. *Id.* at 205.

defendant to life, but he also issued a special verdict indicating that his decision was based on the absence of aggravating factors.<sup>25</sup> The Supreme Court of Arizona remanded the case for resentencing because it found that the trial judge misinterpreted one of the enumerated aggravating factors.<sup>26</sup> On resentencing, the trial court again returned a special verdict, but this time found one aggravating circumstance and sentenced the defendant to death.<sup>27</sup> The Supreme Court of Arizona, relying on *Bullington*, reversed the death sentence and imposed life.<sup>28</sup> The United States Supreme Court affirmed because it was clear that the original life sentence was based on the State's failure to prove any aggravating factors.<sup>29</sup>

In *Sattazahn v Pennsylvania*,<sup>30</sup> the Supreme Court made an already complex issue far more intricate.<sup>31</sup> The factual circumstances in *Sattazahn* were very similar to *Bullington*, except that the jury in *Sattazahn*'s first trial was deadlocked at 9-3 in favor of life.<sup>32</sup> In accordance with state law, the trial judge dismissed the jury and sentenced the defendant to life.<sup>33</sup> The Court held that the life sentence from the first trial did not act as an acquittal of death because the sentencing body, the jury, "made no findings with respect to the alleged aggravating circumstance. That result—or more appropriately, that non-result—cannot fairly be called an acquittal 'based on the findings sufficient to establish legal entitlement to the life sentence.'"<sup>34</sup>

In Part III of *Sattazahn*, Justice Scalia posited that " 'murder plus one or more aggravating circumstances' is a separate offense from 'murder' *simpliciter*."<sup>35</sup> He based his statement on *Ring v Arizona*,<sup>36</sup> which mandated that any element that raises the maximum punishment a defendant may receive must be found by a jury beyond a reasonable doubt.<sup>37</sup> Because aggravating factors change the maximum punishment, murder plus aggravating factors is a specific and separate offense from murder absent aggravating factors.<sup>38</sup> For double jeopardy to apply,

25. *Id.* at 205–06.

26. *Id.* at 207.

27. *Id.* at 208.

28. *Id.* at 208–09.

29. *Rumsey*, 467 U.S. at 212.

30. 537 U.S. 101 (2003).

31. *Sattazahn*, 537 U.S. at 106 (examining whether double jeopardy barred the imposition of the death penalty on retrial when the life sentence from the first trial was statutorily mandated because the jury could not agree to a sentence unanimously).

32. *Id.* at 104.

33. *Id.* at 104–05.

34. *Id.* at 109 (quoting *Rumsey*, 467 U.S. at 211).

35. *Id.* at 112.

36. 536 U.S. 584 (2002).

37. *Sattazahn*, 537 U.S. at 111; *Ring v. Arizona*, 536 U.S. 584, 609 (2002).

38. *Sattazahn*, 537 U.S. at 112.

the sentencing body must clearly show that its decision for a life sentence was based on the State's failure to prove aggravating circumstances.<sup>39</sup>

### B. *The Virginia Sentencing Scheme*

Virginia Code section 19.2-264.4 governs sentencing proceedings in capital cases.<sup>40</sup> The sentencing proceeding is held before the same jury that determined the defendant's guilt.<sup>41</sup> During the sentencing phase, the jury must consider any mitigating evidence presented by the defendant.<sup>42</sup> The jury may impose a sentence of death only if the Commonwealth has proven the existence of at least one statutory aggravator, vileness or future dangerousness, beyond a reasonable doubt.<sup>43</sup> If the jury cannot agree on the penalty, the judge must dismiss the jury and impose a life sentence.<sup>44</sup> In addition, even if the jury returns a death verdict, the court may, after review of the post-sentence report, set aside a sentence of death and impose a life sentence.<sup>45</sup>

39. *Id.* at 113.

40. See VA. CODE ANN. § 19.2-264.4(A) (Michie Supp. 2003) ("Upon a finding that the defendant is guilty of an offense which may be punishable by death, a proceeding shall be held which shall be limited to a determination as to whether the defendant shall be sentenced to death or life imprisonment.")

41. See VA. CODE ANN. § 19.2-264.3(C) (Michie 2000) ("If a jury finds the defendant guilty . . . then a separate proceeding before the same jury shall be held as soon as is practicable on the issue of the penalty . . .").

42. *Eddings v. Oklahoma*, 455 U.S. 104, 117 (1982) (holding that state courts must consider all relevant mitigating evidence); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) ("[T]he Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a *mitigating factor*, any aspect of the 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.")

43. VA. CODE ANN. § 19.2-264.4(C). Section 19.2-264.4(C) states:

The penalty of death shall not be imposed unless the Commonwealth shall prove beyond a reasonable doubt that there is a probability based upon evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense of which he is accused that he would commit criminal acts of violence that would constitute a continuing serious threat to society, or that his conduct in committing the offense was outrageously or wantonly vile.

*Id.*; see also *Ring*, 536 U.S. at 609 (holding that any factor that raises the maximum punishment that a defendant may receive is an element of the offense and must be proven to a jury beyond a reasonable doubt).

44. VA. CODE ANN. § 19.2-264.4(E); see also *Eaton v. Commonwealth*, 397 S.E.2d 385, 399 (Va. 1990) (stating that section 19.2-264.4(E) is applicable only after a reasonable period of deliberation and a finding that further deliberations would be fruitless).

45. See VA. CODE ANN. § 19.2-264.5 (Michie Supp. 2003) (stating that the court may set aside a death sentence upon review of the post-sentence report and impose a life sentence).

### C. *What Does It All Mean?*

The state of the law regarding double jeopardy barring retrials for death is now unclear. *Bullington* and *Rumsey* appeared to make clear the plain rule that a verdict for life imprisonment, by judge or jury, is considered an acquittal of death for purposes of double jeopardy.<sup>46</sup> Double jeopardy would bar death on retrial.

*Sattazahn* introduces the notion that a life verdict does not necessarily bar death on retrial.<sup>47</sup> At a minimum, *Sattazahn* stands for the proposition that a statutorily mandated life sentence imposed after a jury deadlock at the penalty phase is not an acquittal of death and does not bar death on retrial.<sup>48</sup> On the other hand, it can be extremely far-reaching. If a jury sentences a defendant to life imprisonment and does not indicate that the determination was unanimously based on the State's failure to prove aggravators, the double jeopardy bar may not protect a defendant from death in a subsequent retrial.<sup>49</sup> This circumstance negates the protection that *Bullington* provided—that any life verdict effectively barred death in a retrial.<sup>50</sup>

The language in Virginia Code section 19.2-264.4(E) is similar to the Pennsylvania statute in *Sattazahn*.<sup>51</sup> The Pennsylvania statute states that “the court may, in its discretion, discharge the jury if it is of the opinion that further deliberation will not result in a unanimous agreement as to the sentence, in which case the court shall sentence the defendant to life imprisonment.”<sup>52</sup> The Virginia Code states that “[i]n the event the jury cannot agree as to the penalty, the court

46. See *Bullington*, 451 U.S. at 446 (holding that because the sentencing phase resembled a trial on guilt or innocence that a life sentence found by a jury is an acquittal of death); *Rumsey*, 467 U.S. at 211 (holding that death was barred on retrial because the judge rejected the existence of all the alleged aggravating factors). Any statute that mandates that the judge is the only sentencer is no longer constitutional. *Ring*, 536 U.S. at 609. *Ring* holds that any factor that raises the maximum punishment that a defendant may receive is an element of the offense and must be proven to a jury beyond a reasonable doubt. *Id.* at 602. The only instances in which a judge may serve as the sentencing authority is when the defendant waives his Sixth Amendment right to a trial by jury or pleads guilty.

47. See *Sattazahn*, 537 U.S. at 112–13 (holding that the statutorily mandated life sentence did not bar death on retrial because the jury made no findings as to any aggravators); see also *Poland v. Arizona*, 476 U.S. 147, 156–57 (1986) (holding that death is not barred in a retrial because the original death sentence was based on an aggravator found in error). In *Poland*, the United States Supreme Court held that, for purposes of double jeopardy, the abrogation of a single aggravator from the first trial did not amount to an acquittal of death because another aggravator was available. *Id.* at 157. The Court stated that “[a]ggravating circumstances are not separate penalties or offenses, but are ‘standards to guide the making of [the] choice’ between the alternative verdicts of death and life imprisonment.” *Poland*, 476 U.S. at 156. Because *Poland* occurred under Arizona’s judge-sentencing scheme, it is extremely unlikely that a case replicating *Poland* will ever occur. *Id.*

48. *Sattazahn*, 537 U.S. at 113.

49. *Id.* at 112.

50. *Bullington*, 451 U.S. at 446.

51. See *Sattazahn*, 537 U.S. at 104–05 (summarizing Pennsylvania’s capital sentencing statutes).

52. 42 PA. CONS. STAT. ANN. § 9711(c)(1)(v) (West Supp. 2003).

shall dismiss the jury, and impose a sentence of imprisonment for life."<sup>53</sup> This similarity indicates that *Sattazahn* will affect the level of protection offered by the default life sentence in subsection E. Before *Sattazahn*, a defendant could hope for a deadlocked jury on the issue of punishment and receive a life sentence that barred any subsequent death sentence. After *Sattazahn*, that protection is no longer available—death will still be available to the Commonwealth following a successful appeal.<sup>54</sup> Therefore, a defendant sentenced to life imprisonment should be wary of appealing his life sentence.

A jury that deadlocks on penalty by definition has not reached a unanimous life verdict. Even when a jury does reach a unanimous life verdict, *Sattazahn* appears to permit a retrial for death. *Sattazahn* reinforces that two levels of capital murder exist—capital life and capital death.<sup>55</sup> These are distinct offenses.<sup>56</sup> Capital death requires the additional finding of aggravating factors.<sup>57</sup> Capital life, however, does not require the finding of aggravating factors—it is “murder simpliciter.”<sup>58</sup> Therefore, while capital life is a lesser included offense, capital death is a separate and distinct offense from capital life and requires the finding of additional elements.<sup>59</sup>

The result is that *Bullington* does not survive *Sattazahn* while *Rumsey* does. *Bullington* cannot survive because *Sattazahn* requires the jury to conclude unanimously that the State failed to prove the aggravating factors for double jeopardy to bar death in a new trial.<sup>60</sup> *Rumsey*, however, survives because the judge, in a special verdict, specifically found that the State did not prove the aggravating factors.<sup>61</sup>

An additional consideration is the effect of *Sattazahn* on Virginia Code section 19.2-264.5. Section 19.2-264.5 allows a judge to reverse a jury's death verdict after reviewing the post-sentence report.<sup>62</sup> If a jury gives death, it has unanimously found that at least one aggravator was proven.<sup>63</sup> If, after review of

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53. VA. CODE ANN. § 19.2-264.4(E) (Michie Supp. 2003).

54. *Sattazahn*, 537 U.S. at 113. An analogy can be made to the hung jury cases. Following a mistrial because of a hung jury on guilt/innocence, the defendant can be retried for the same offense. See *United States v. Perez*, 22 U.S. 194, 194 (9 Wheat. 579, 580) (1824) (holding that discharge of a jury that failed to reach a verdict does not bar a defendant from being retried on the same charges).

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

56. *Id.*

57. *Id.*

58. See *id.* at 112 (noting the two separate offenses of murder plus one or more aggravators and murder simpliciter).

59. *Id.* at 111.

60. *Id.* at 113.

61. *Rumsey*, 467 U.S. at 205–06.

62. See VA. CODE ANN. § 19.2-264.5 (Michie 2000) (stating that the court may set aside a death sentence and impose a life sentence after considering the post-sentence report).

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



the post-sentence report, the judge sets aside the verdict and imposes life with no explanation, death is still available in a new trial because the capital death element was proven in the first trial. However, if the jury gives death and the judge imposes life because no aggravator was sufficiently proven, then death is barred on retrial. This is so because *Rumsey* supports the premise that a life sentence bars death on retrial if the judge explicitly finds the absence of aggravators.<sup>64</sup>

This analysis requires inquiry into how the jury reached its unanimous life verdict. If the jury first unanimously found that the State had failed to prove an aggravator, the defendant should be acquitted of death because the aggravator, after *Ring*, is an element of capital death.<sup>65</sup> If, however, the jury unanimously found that the State has proven at least one aggravator, but, nonetheless, unanimously decided upon a life verdict, the State has proven all of the elements of capital death. In that instance, the life verdict will not be an acquittal of death.<sup>66</sup>

The difficulty is that verdict forms often do not reveal the jury's findings on the aggravators. The Virginia statutory verdict forms, for example, make no provision for the jury to find unanimously the absence of aggravators.<sup>67</sup> It merely states that the jury "considered all of the evidence in aggravation and mitigation" before sentencing the defendant to life.<sup>68</sup> This jury verdict form is certainly insufficient in light of *Sattazahn*. Any jury using this form or a similar one may sentence a defendant to life without protecting the defendant from death. A jury that sentences a defendant to life might have found unanimously that no aggravators were proven or that one or both aggravators were proven, but that the mitigation was sufficient to overcome the aggravating factor(s). The jury's life verdict upon such a form is entirely unrevealing about whether it did or did not make a unanimous finding that an aggravator was proven or not proven. Verdict forms in federal cases are more revealing, but still inadequate. Those jury forms require the jury to state whether it did or did not unanimously

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64. *Rumsey*, 467 U.S. at 211. The judge sentencing life after explicitly finding the absence of aggravators is similar to a judge reversing a jury conviction if he finds that the State failed to prove its case. A defendant cannot be retried for the same offense if the judge reverses a guilty verdict by finding that the evidence was insufficient to support the verdict. *Hudson v. Louisiana*, 450 U.S. 40, 45 n.5 (1981) (noting its opinion in *Burks v. United States*, 437 U.S. 1 (1978), held that a retrial is barred when the "[s]tate has failed as a matter of law to prove its case despite a fair opportunity to do so").

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

66. *See id.* at 112 (holding that only a unanimous finding that the State had failed to prove any aggravators will result in an acquittal of death).

67. *See* VA. CODE ANN. § 19.2-264.4(D) (Michie Supp. 2003) (lacking language indicating that the jury unanimously found the absence of aggravating factors).

68. *See* VA. CODE ANN. § 19.2-264.4(D)(2) ("We the jury, on the issue joined, having found the defendant guilty of (here set out statutory language of the offense charged) and having considered all of the evidence in aggravation and mitigation of such offense, fix his punishment at (i) imprisonment for life . . . .").

find an aggravator proven.<sup>69</sup> The forms do not require the jury to state whether it unanimously found an aggravator not to be proven.<sup>70</sup> Failure to find unanimously an aggravator proven is, of course, not the same as unanimously finding that the aggravator was not proven.

In a Virginia case, a life-sentenced defendant can never establish that his jury did or did not unanimously find aggravators proven or not proven.<sup>71</sup> *Sattazahn*, thus, implies that any Virginia life-sentenced defendant can be retried for death.<sup>72</sup> In a federal case, a life-sentenced defendant whose jury did find at least one aggravator can be retried for death.<sup>73</sup> A life-sentenced federal defendant whose jury stated that it did not unanimously find any aggravators can also be retried for death because he cannot establish that his jury unanimously found that no aggravator was proven.<sup>74</sup> Future capital jury verdict forms must be drafted carefully and tailored specifically to the deliberation process within the jury room. Those forms must indicate explicitly whether the jury found future dangerousness and/or vileness beyond a reasonable doubt and, if it did not, whether it unanimously found that the Commonwealth had failed to prove either or both aggravators.

There appears to be no Virginia case in which a life-sentenced defendant would be safe from a retrial for death after a successful appeal. A life sentence under section 19.2-264.4(E), mandating life if a jury is deadlocked on punishment, does not block death on retrial because of the holding in *Sattazahn*.<sup>75</sup> A life verdict based on the statutory verdict forms found in section 19.2-264.4(D) does not provide double jeopardy protection because the forms do not provide a way for the jury to show clearly that the life verdict was based on the Commonwealth's failure to prove at least one aggravating factor. Finally, a life sentence under section 19.2-264.5 protects a defendant from death on retrial only in the special case in which a judge imposes life because no aggravators were sufficiently proven—*Rumsey* protection. If the judge makes no findings about aggravators, *Sattazahn* applies and death is not barred.

The trial has always been the first battle of a long and rigorous campaign. With *Sattazahn*, a life sentence effectively truncates that campaign into a last stand. Unless the defendant is sentenced to death in the first trial, there will seldom be reason to appeal and risk the death sentence.

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69. U.S. CT. OF APPEALS FOR THE 8TH CIRCUIT, 8TH CIRCUIT JURY INSTRUCTIONS, MODEL DEATH PENALTY JURY INSTRUCTIONS, SPECIAL VERDICT FORM 12.22, at [http://www.juryinstructions.ca8.uscourts.gov/criminal\\_instructions.htm](http://www.juryinstructions.ca8.uscourts.gov/criminal_instructions.htm) (last visited Oct. 25, 2003).

70. *Id.*

71. See VA. CODE ANN. § 19.2-264.4(D) (Michie Supp. 2003).

72. See *Sattazahn*, 537 U.S. at 112–13.

73. *Id.*

74. *Id.*

75. *Id.* at 113.

### III. *The Death-Sentenced Capital Defendant*

Given *Sattazahn*, it is apparent that an appeal seeking reversal of a capital defendant's life sentence may not be in his best interest. An appeal is the only viable course of action for a defendant already sentenced to death. Unlike appeals pursued by life-sentenced defendants, which are discretionary, a defendant sentenced to death is given an automatic appeal to the Supreme Court of Virginia.<sup>76</sup> The Supreme Court of Virginia considers trial error and must decide whether the sentence was influenced by passion or prejudice and whether the sentence was disproportionate to the punishment in similar cases.<sup>77</sup> After review, the court may affirm the death sentence, commute the sentence to life, remand for a new sentencing phase, or recommend a new trial.<sup>78</sup> If the Supreme Court of Virginia overturns the death sentence on disproportionality grounds, the court must commute the sentence to life and there is no resentencing proceeding.<sup>79</sup> If the court reverses based on trial error, the defendant will be awarded a new trial in its entirety.<sup>80</sup> Defendants in this case will, therefore, be tried and sentenced by the same retrial jury. Defendants who succeed on an appeal based on sentencing phase error or passion/prejudice grounds will be awarded only a new sentencing proceeding.<sup>81</sup> When the Supreme Court of Virginia remands the case for a new sentencing phase, section 19.2-264.3(C) of the Code provides for a resentencing proceeding before a new jury.<sup>82</sup> This newly empaneled jury will lack evidence crucial to its determination between life and death.

In its conception, the bifurcated system was developed to provide the sentencing body with a fair procedure to determine a defendant's punishment.<sup>83</sup>

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76. See VA. CODE ANN. § 17.1-313(A) (Michie 2003) ("A sentence of death, upon the judgment thereon becoming final in the circuit court, shall be reviewed on the record by the Supreme Court.").

77. See VA. CODE ANN. § 17.1-313(C) (describing factors the court must examine when reviewing a death sentence on automatic appeal).

78. See VA. CODE ANN. § 17.1-313(D) (describing the actions that the Supreme Court of Virginia may take after reviewing an automatic appeal of a death sentence). The court can only recommend a new trial if the defendant alleges trial error. *Green I*, 546 S.E.2d at 452 (ordering a new trial because allowing an unqualified juror to remain on the jury constitutes manifest error).

79. When the Supreme Court of Virginia makes that decision, it has, in effect, decided that the evidence was insufficient to support the verdict. This decision is an appellate acquittal of death and can be analogized to when an appellate court reverses a conviction because it finds that the prosecution's evidence was insufficient to support the verdict. See *Burks*, 437 U.S. at 18 (holding that double jeopardy bars a second trial when a reviewing court finds the evidence legally insufficient).

80. *Green I*, 546 S.E.2d at 452

81. See *supra* note 78 and accompanying text.

82. See VA. CODE ANN. § 19.2-264.3(C) (Michie 2000) ("If the sentence of death is subsequently set aside or found invalid, and the defendant or the Commonwealth requests a jury for purposes of resentencing, the court shall impanel a different jury on the issue of penalty.").

83. *Gregg v. Georgia*, 428 U.S. 153, 195 (1976) (arguing that "concerns . . . that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance").

Because guilt and punishment are determined by a single jury, impressions from the guilt phase are retained in the sentencing phase by the jury.<sup>84</sup> Evidence only relevant to sentencing is not presented in the guilt portion of the trial because that evidence is not relevant and might be prejudicial to the defendant on the issue of guilt.<sup>85</sup> A resentencing jury, however, is deprived the impressions that are normally created in the guilt phase and ends up deciding life or death on less evidence than was available to the original sentencing jury.<sup>86</sup>

Admittedly, in a situation in which there is a single defendant and the question of guilt or innocence is very clear, this practice is not necessarily prejudicial. However, for example, if mental condition is at issue, much of the mitigating evidence is front-loaded in the guilt phase.<sup>87</sup> If the defendant is found guilty, the jury is given a second dose of this evidence in the mitigation phase.<sup>88</sup> This proves to be crucial because, although juries may not be absolutely convinced that the defendant suffers from a mental abnormality, the introduction of mental condition evidence in the guilt phase and reintroduction in the sentencing phase at least creates the possibility of influencing a jury's decision for life.<sup>89</sup> A resentencing jury hears the evidence only once. That jury will not have the opportunity to mull over how the mental condition may have affected the defendant's action during the crime. Also, a resentencing jury may never hear the evidence regarding the role of the victim during the commission of the crime or whether, in the case of co-defendants, there is some doubt as to the responsibility of the defendant that is being resentenced.

Fundamentally, the defendant's original trial provides him with a more complete proceeding. The original jury had the opportunity to hear the whole case from two opposing points of view.<sup>90</sup> That jury also had the chance to

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84. See generally Scott E. Sundby, *The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty*, 83 CORNELL L. REV. 1557 (1998) [hereinafter Sundby, *The Capital Jury and Absolution*] (examining how remorse is perceived and how it affects juries when choosing whether to sentence a defendant to life or death); Scott E. Sundby, *The Capital Jury and Empathy: The Problem of Worthy and Unworthy Victims*, 88 CORNELL L. REV. 343 (2003) [hereinafter Sundby, *The Capital Jury and Empathy*] (examining how behavior of victims affects a jury's decisionmaking when choosing between sentencing a defendant to life or death).

85. *Gregg*, 428 U.S. at 190.

86. See *supra* note 84 and accompanying text.

87. See John H. Blume & Pamela Blume Leonard, Column, *Capital Cases: Principles of Developing and Presenting Mental Health Evidence in Criminal Cases*, 24 THE CHAMPION 63, 67-68 (Nov. 2000) (describing the application of front-loading the mitigation).

88. *Id.* at 68; see VA. CODE ANN. § 19.2-264.4(B) (Michie Supp. 2003) (including extreme mental or emotional disturbance and significant impairment "of defendant . . . to conform his conduct to requirements of law" as possible mitigating evidence in the sentencing phase).

89. *Blume & Leonard, supra* note 87, at 68. Blume and Leonard quoted a juror who served on a jury that gave life to a defendant who front-loaded evidence of mental retardation into the guilt phase. *Id.* "We weren't sure he was mentally retarded, but we weren't sure he wasn't either." *Id.*

90. *Penon v. Ohio*, 488 U.S. 75, 84 (1988) (stating that the adversarial system is premised

observe the defendant's reactions as the guilt phase played out.<sup>91</sup> Although the purpose of the bifurcated system is to create a clear demarcation between the purposes of the guilt and sentencing phases, the jury still carries observations and information from the guilt phase that influences its sentencing decision.<sup>92</sup> A resentencing jury is denied an opportunity to hear both sides of the case or to observe the defendant through the trial process.

### A. A Brief History Lesson

The use of a separate sentencing phase in capital cases is actually a very recent creation. America's practice of executing criminals is rooted in England, in which the death sentence was applied to as many as 222 different crimes by the 1700s.<sup>93</sup> Even before the United States gained independence, its citizens struggled with the morality of the death penalty.<sup>94</sup> Over the next century and a half, support for the death penalty waxed and waned and resulted in fewer crimes punishable by death and in the abolition of the death penalty in some states.<sup>95</sup> States began to seek rehabilitation rather than retribution.<sup>96</sup>

The movement towards rehabilitation materialized as the principle of individualization, which grasped a foothold and gained momentum over the first half of the twentieth century.<sup>97</sup> To determine a just sentence, this principle requires that information beyond what is sufficient for a conviction is necessary.<sup>98</sup> In 1949 the United States Supreme Court, in *Williams v New York*,<sup>99</sup> recognized that the nature of sentencing required a more flexible standard of

on truth and fairness and is "best discovered by statements on both sides of the question" (quoting Irving R. Kaufman, *Does the Judge Have a Right to Qualified Counsel?*, 61 A.B.A. J. 569, 569 (1975)).

91. Sundby, *The Capital Jury and Absolution*, *supra* note 84, at 1561.

92. *Id.* at 1588.

93. DEATH PENALTY INFO. CTR., HISTORY OF THE DEATH PENALTY, PART I, ¶ 3, at <http://deathpenaltyinfo.org/article.php?scid=15&did=410#> Introduction of the Death Penalty (last visited Sept. 16, 2003). Crimes included stealing and cutting down a tree. *Id.* Great Britain's death penalty practice also went through its own evolution. *Id.* By 1837, 100 of the 222 crimes punishable by death were eliminated. *Id.*

94. *Id.* at ¶ 7. Virginia was the first colony to attempt to limit application of the death penalty by eliminating capital punishment for all crimes except for murder and treason. *Id.* The bill, however, was defeated by one vote. *Id.*

95. *Id.* at ¶¶ 11-13.

96. See *Williams v. New York*, 337 U.S. 241, 247-48 (1949) (stating that automatic death sentences have retreated in the face of individualized sentencing and that the practice of probation is one example in which indeterminate sentences have taken the place of rigidly fixed punishments).

97. See Caren Myers, Note, *Encouraging Allocation At Capital Sentencing: A Proposal for Use Immunity*, 97 COLUM.L.REV. 787, 793 (1997) (arguing that defendants should be provided immunity regarding guilt or innocence in subsequent proceedings when making their allocution because it furthers the goals of the separate sentencing phase by supplying the sentencing body with greater information with which to determine punishment).

98. *Id.*

99. 337 U.S. 241 (1949).

presenting evidence than the standard for determining guilt.<sup>100</sup> “[B]y careful study of the lives and personalities of convicted offenders many could be less severely punished and restored sooner to complete freedom and useful citizenship.”<sup>101</sup> Therefore, a differentiation between evidence for sentencing and evidence for guilt was necessary and, to a certain extent, common law sentencing inherently did realize that differentiation.<sup>102</sup>

Under common law sentencing, the jury’s role ended upon conviction of the accused.<sup>103</sup> The judge then heard any evidence relevant to sentencing and determined the sentence.<sup>104</sup> However, capital cases utilized a unitary trial proceeding in which the jury determined both the guilt and the penalty in the same proceeding.<sup>105</sup> Thus, the jury heard evidence relevant to sentencing that was not separated from evidence relevant to determining guilt.<sup>106</sup> This design affected a defendant’s presumption of innocence by allowing the jury to base its determination of guilt on evidence relevant only to sentencing.<sup>107</sup> States resolved this quandary by moving toward a bifurcated system— separate proceedings for guilt and sentencing.<sup>108</sup> This structure allowed a jury to focus on one issue at a time. In the guilt phase, the focus is on the factual circumstances of the crime itself.<sup>109</sup> The sentencing stage fulfilled the concept of individualized punishment by addressing the character of the defendant and the heinousness of the crime.<sup>110</sup>

### 1. *Bifurcated Trials— Not a New Idea*

The bifurcation of trials has been in practice in one form or another for over a century. Initially, states split trials between a guilt phase and an insanity phase.<sup>111</sup> This procedure intended to provide jurors with a clear demarcation between evidence tending to inculpate the defendant and evidence tending to

100. *Williams*, 337 U.S. at 247 (“And modern concepts individualizing punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial.”).

101. *Id.* at 249; see also Kristen F. Grunewald & Priya Nath, Article, *Defense-Based Victim Outreach: Restorative Justice in Capital Cases*, 15 CAP. DEF. J. 315, 322–25 (2003) (describing the development of restorative justice and rehabilitation).

102. *Myers*, *supra* note 97, at 794.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Myers*, *supra* note 97, at 795.

109. *Id.*

110. *Id.* at 796.

111. See Verla Seetin Neshund, Comment, *The Bifurcated Trial: Is It Used More Than It Is Useful?*, 31 EMORY L.J. 441, 441–45 (1982) (stating that the bifurcation of insanity cases in the United States was first enacted over a century ago in Wisconsin in 1878).

exculpate the defendant on the grounds of legal incapacity.<sup>112</sup> Despite this intent, the practice of bifurcation in cases in which insanity is a defense has declined in the past few decades and is mandated by statute in only a few states.<sup>113</sup>

In the late 1950s, states began to consider replacing the more common unitary trial system for capital cases with a bifurcated trial system.<sup>114</sup> California and Pennsylvania started the trend and Connecticut, New York, Texas, Georgia, and Florida followed into the early 1970s.<sup>115</sup> In 1972 the United States Supreme Court decided *Furman v. Georgia*,<sup>116</sup> in which the Court found that a death penalty statute that placed unbridled discretion in a sentencing body violated the Eighth

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112. *Id.* at 441.

113. *Id.* at 442-43. Since 1970, a dozen states have refused to apply bifurcated trials to insanity cases. *Id.* at 442. The state supreme courts of Arizona, Florida, and Wyoming have held that statutes are unconstitutional if they require bifurcated trials when insanity is used as a defense. *Id.* at 442. Only California, Colorado, and Wisconsin mandate this practice through state statutes. *Id.* at 443; see also Debra T. Landis, Annotation, *Necessity or Propriety of Bifurcated Criminal Trial on Issue of Insanity Defense*, 1 A.L.R.4TH SUPP. 155 (2003) (listing California, Colorado, and Wisconsin as the only states requiring bifurcation of guilt and insanity by statute). Several courts have found that applying a bifurcated system in cases in which insanity is a defense is unconstitutional. See, e.g., *State v. Shaw*, 471 P.2d 715, 724 (Ariz. 1970) (holding explicitly that a bifurcation statute unconstitutionally denied criminal defendants due process because it excluded evidence of mental condition as a defense to the prosecution's assertion of intent during the guilt trial); *State ex rel. Boyd v. Green*, 355 So. 2d 789, 794 (Fla. 1978) (holding that its statutory bifurcated trial system unconstitutionally denied due process to defendants raising the insanity defense); *Sanchez v. State*, 567 P.2d 270, 280 (Wyo. 1977) (holding that the state's bifurcation statute violated the due process clauses of the state and federal constitutions).

Bifurcated proceedings in cases in which insanity is a defense are mandated by statute in California, Colorado, and Wisconsin. See CAL. PENAL CODE § 1026(a) (West 2003) (providing that: "if defendant pleads only not guilty by reason of insanity, then the question whether the defendant was sane or insane at the time the offense was committed shall be promptly tried, either before the same jury or before a new jury"); COLO. REV. STAT. ANN. § 16-8-104 (West Supp. 1996) ("The issues raised by the plea of not guilty by reason of insanity shall be tried separately to different juries, and the sanity of the defendant shall be tried first."); WIS. STAT. ANN. § 971.165(1)(a) (West 1998) ("The plea of not guilty shall be determined first and the plea of not guilty by reason of mental disease or defect shall be determined second.").

114. Myers, *supra* note 97, at 795 n.38 (stating that the California legislature adopted a bifurcated system for capital cases in 1957).

115. See Scott W. Howe, *The Failed Case for Eighth Amendment Regulation of the Capital-Sentencing Trial*, 146 U. PA. L. REV. 795, 842 n.181 (1998) (stating that California and Pennsylvania adopted bifurcated trials in the 1950s, joined by Connecticut, New York, and Texas in the 1960s; Georgia and Florida followed in the early 1970s).

116. 408 U.S. 238 (1972).

and the Fourteenth Amendments.<sup>117</sup> After *Furman*, thirty-five states enacted new death penalty statutes prior to the Court's review of *Gregg v Georgia*<sup>118</sup> in 1976.<sup>119</sup>

## 2. *Gregg v. Georgia*

In *Gregg*, the United States Supreme Court stated that a bifurcated system, patterned after the Model Penal Code, is the best method to ensure that the death penalty is not "imposed in an arbitrary or capricious manner."<sup>120</sup> The Court reviewed the Georgia sentencing scheme to determine whether the statute provided necessary guidance to overcome Eighth and Fourteenth Amendment objections.<sup>121</sup> The *Gregg* Court argued that the imposition of the death penalty is constitutional and, in particular, it is the manner or procedure in which the sentence is given that must pass constitutional muster.<sup>122</sup> The Court stated:

[W]hen a human life is at stake and when the jury must have information prejudicial to the question of guilt but relevant to the question of penalty in order to impose a rational sentence, a bifurcated system is more likely to ensure elimination of the constitutional deficiencies identified in *Furman*.<sup>123</sup>

*Gregg* recognized that jury sentencing is preferable in capital cases because it maintains the "link between contemporary community values and the penal system."<sup>124</sup> However, it is difficult for a jury in a unitary trial to separate evidence relevant to sentencing that is not admissible for guilt. To resolve this difficulty, the Court clarified its support for bifurcation.<sup>125</sup> "[T]hese concerns are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information."<sup>126</sup> In

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117. *Furman v. Georgia*, 408 U.S. 238, 239-40 (1972); see U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted" (emphasis added)); U.S. CONST. amend. XIV (stating "nor shall any State deprive any person of life, liberty, or property, without due process of law" (emphasis added)). The Court never clarified an acceptable standard, but instead issued a per curiam decision with several opinions in support. *Furman*, 408 U.S. at 239.

118. 428 U.S. 153 (1976).

119. Howe, *supra* note 115, at 800 n.17 (1998) (stating thirty-five states passed new death penalty statutes after *Furman* and before 1976); see generally *Gregg v. Georgia*, 428 U.S. 153, 195 (1976).

120. *Gregg*, 428 U.S. at 195.

121. *Id.* at 158.

122. *Id.* at 187.

123. *Id.* at 191-92.

124. *Id.* at 190 (quoting *Witherspoon v. Illinois*, 391 U.S. 510, 519 n.15 (1968)).

125. *Id.* at 195.

126. *Gregg*, 428 U.S. at 195. The Court did not mandate that a bifurcated trial was the only



light of *Gregg*, every state in which capital punishment is used now provides for a bifurcated proceeding in capital cases.<sup>127</sup>

B. "Well, you haven't been where I've been."<sup>128</sup>

Jury impressions, residual doubt, attaching responsibility to co-defendants, and the role of the victim are all factors that are related to the commission of the crime and are only presented in the guilt phase.<sup>129</sup> Studies have shown that the demarcation between the guilt phase and the sentencing phase created by bifurcation more resembles a sieve than a brick wall.<sup>130</sup> Juries are incapable of forgetting the guilt phase proceedings and relying only on the information presented in the penalty phase to reach their sentences.<sup>131</sup> Invariably the appearance, demeanor and reactions of the defendant during the guilt phase proceedings greatly influence a juror's deliberation of the sentence.<sup>132</sup>

Many jurors decide on punishment as early as the presentation of evidence during the guilt phase.<sup>133</sup> More commonly, it is the prodeath juror who decides early.<sup>134</sup> Therefore, although the purpose of bifurcating capital murder trials was to separate the unique responsibilities involved in determining guilt and punishment, it is clearly difficult in practice to do this.<sup>135</sup> But early juror determination on death is not a foregone conclusion that a defendant will definitely receive the death sentence.<sup>136</sup> Many jurors still remain undecided through the guilt phase.<sup>137</sup>

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solution. *Id.* It stated that any proceeding that would comport with the concerns of *Furman* would be satisfactory. *Id.*

127. Beth S. Brinkmann, Note, *The Presumption of Life: A Starting Point for a Due Process Analysis of Capital Sentencing*, 94 YALE L.J. 351, 366 (1984); see also VA. CODE ANN. § 19.2-264.3(C) (Michie 2000) (stating that "[i]f the jury finds the defendant guilty of an offense which may be punishable by death, then a separate proceeding before the same jury shall be held").

128. Alex Kotlowitz, *In the Face of Death*, N.Y. TIMES, July 6, 2003, § 6 (Magazine) at 32 (reporting how a jury, convinced that death was the appropriate punishment at the guilt phase, ultimately chose life for the defendant after being confronted with mitigation evidence).

129. Sundby, *The Capital Jury and Empathy*, *supra* note 84, and accompanying text.

130. *Id.*

131. *Id.* at 371.

132. Sundby, *The Capital Jury and Absolution*, *supra* note 84, at 1561.

133. Melissa E. Whitman, Article, *Communicating with Capital Juries: How Life Versus Death Decisions Are Made, What Persuades, and How to Most Effectively Communicate the Need for a Verdict of Life*, 11 CAP. DEF. J. 263, 282 (1999) (recommending trial strategies to better communicate to capital juries).

134. *Id.*

135. *Id.* at 281; see also Kotlowitz, *supra* note 128, at 36 (reporting that towards the end of the guilt phase the jurors drew a picture of an electric chair on a chalkboard).

136. Whitman, *supra* note 133, at 282.

137. *Id.*

### 1. Remorse

An especially important factor in a juror's decision is the defendant's showing of remorse.<sup>138</sup> "[A]ssessments of character and remorse may carry great weight and, perhaps, be determinative of whether the [defendant] lives or dies."<sup>139</sup> In a study conducted by the Capital Jury Project, Professor Scott Sundby stated that "jurors frequently cited a defendant's lack of remorse as a significant factor in precipitating their decision to impose the death penalty."<sup>140</sup> Because few defendants testify, jurors based their impression of remorse on demeanor and behavior at trial and "the nature of the defendant's actions at the time of the crime."<sup>141</sup>

Jurors who sentenced a defendant to death often were influenced by the defendant's apparent lack of emotion during the trial.<sup>142</sup> The study pointed out one instance in which the defendant laughed during the proceedings and openly engaged in flirtatious behavior with one of the jurors.<sup>143</sup> This defendant was then sentenced to death.<sup>144</sup> The jurors who selected death admitted that had the defendant shown any indication of remorse through his behavior at trial, they would have sentenced the defendant to life instead.<sup>145</sup> Life jurors observed very similar behavior, although they used very different adjectives to describe it.<sup>146</sup>

Because life and death jurors perceive the physical attributes of remorse very similarly, the proper remorse analysis should focus "on whether [the defendant] owns up to his actions in some manner and accepts some responsibility for what he has done."<sup>147</sup> Defendants who denied any responsibility at all are more likely to be sentenced to death.<sup>148</sup> Conversely, defendants who admit to

138. Sundby, *The Capital Jury and Absolution*, *supra* note 84, at 1558 (stating "that a defendant's lack of remorse often plays an influential role in shaping the outcome of capital trials").

139. *Riggins v. Nevada*, 504 U.S. 127, 144 (1992) (Kennedy, J., concurring).

140. Sundby, *The Capital Jury and Absolution*, *supra* note 84, at 1558.

141. *Id.* at 1561.

142. *Id.* at 1563.

143. *Id.*

144. *Id.* at 1560-63.

145. *Id.* at 1565. Jurors that gave the death sentence often described the defendant's attitude as "[n]onchalant"; "appeared unconcerned"; "[j]ust really bored with the whole thing"; "blase, expressionless"; and "[c]lucky." *Id.* at 1563-64. Jurors that gave life sentences described the defendant's attitude as "[h]e just showed no emotion"; "[v]ery clinical"; "[h]e appeared relaxed"; "he was just trying to be a tough guy." *Id.* at 1566.

146. Sundby, *The Capital Jury and Absolution*, *supra* note 84, at 1567.

147. *Id.* at 1573-74.

148. *Id.* at 1574-75. With the rising number of individuals being released from prison for wrongful convictions, the question arises, how can an innocent person accept any responsibility for a crime that he or she never committed? See generally DEATHPENALTYINFO. CTR., 100TH DEATH ROW EXONEREE FREED IN ARIZONA: DNA EVIDENCE VINDICATES MAN WRONGFULLY CONVICTED OF 1991 MURDER, at <http://www.deathpenaltyinfo.org/article.php?scid=1&did=283> (last visited Sept. 22, 2003).

culpability, but contest the degree, are more likely to receive a sentence of life.<sup>149</sup> In short, a range of subtle factors are developed in the guilt phase that influence the jury's perception of remorse.

The timing of the defendant's display of remorse is just as important.<sup>150</sup> "[T]he earlier the defendant personally expresses some type of acceptance of responsibility for the killing, the greater likelihood that the jury will be receptive to later claims of regret."<sup>151</sup> Statements of regret that are expressed in the penalty phase, without any prior indications in the guilt phase, are often considered "disingenuous attempts to avoid the death sentence."<sup>152</sup> The earlier the defense laid the groundwork, the less likely that the jurors would dismiss the defendant's expression of remorse as manipulative.<sup>153</sup> Most cases that resulted in life sentences involve a unified and coherent theme that bridges the guilt and the penalty phases.<sup>154</sup>

Resentencing juries do not get the opportunity to develop these factors and to judge the level of remorse a defendant exudes. They will not see the demeanor or behavior of the defendant in relationship to evidence of the crime because evidence of guilt is presented only to the original jury. The resentencing jury only hears a summary of the previous proceedings.<sup>155</sup> If the defendant showed remorse by admitting responsibility for the crime, he will be denied the benefits of that admission defense. The summary of the Commonwealth will not indicate any sign of remorse; it will show only that the defendant admitted to the crime. Also, a resentencing jury will lack the impression of the finely laid theme that defense attorneys introduce in the guilt phase.<sup>156</sup> A resentencing jury that only hears the remorseful statements of a defendant at sentencing, without the cohesive theme that the defense attorneys carefully craft during the guilt phase, is more likely to conclude that such statements are disingenuous.<sup>157</sup>

The showing of remorse in resentencing can also be affected deleteriously by the defendant's incarceration on death row while awaiting appeal or a new trial. Upon conviction, the defendant is placed into an environment in which his humanity is stripped away.<sup>158</sup> Death row inmates are confined in isolation for

149. Sundby, *The Capital Jury and Absolution*, *supra* note 84, at 1584.

150. See Whitman, *supra* note 133, at 275 (noting that "the earlier defendants express remorse the better").

151. Sundby, *The Capital Jury and Absolution*, *supra* note 84, at 1586.

152. *Id.* at 1587.

153. *Id.* at 1587-88.

154. *Id.* at 1594.

155. Stockton v. Commonwealth, 402 S.E.2d 196, 204 (Va. 1991) (stating that use of the guilt phase transcript is appropriate for the purpose of informing the jury of the nature of the offense and the circumstances under which it was committed).

156. Sundby, *The Capital Jury and Absolution*, *supra* note 84, at 1594.

157. *Id.* at 1586-87.

158. G. Richard Strafer, *Volunteering for Execution: Competency, Voluntariness and the Propriety of Third Party Intervention*, 74 J. CRIM. L. & CRIMINOLOGY 860, 871 (1983) (stating that, unlike term-

extraordinarily long periods, are not integrated into the general prison population, and are not provided privileges available to non-death inmates.<sup>159</sup> Prison conditions combined with the prolonged uncertainty of the appellate process result in many death row inmates simply giving up.<sup>160</sup> Generally, many death row inmates are racked with intense remorse, but have simply given way to despair as they perceive the seeming futility of their cause.<sup>161</sup> A resentencing jury, instead of seeing the remorseful defendant accepting the gravity of his crime, will sit in judgment of a defendant no longer able to express emotion at all.

## 2. *Role of the Victim*

The jury's impression of the victim carries as much weight, if not more, as the defendant's expression of remorse in determining sentencing. Jurors often discuss the victim's role in the crime and the victim's character during deliberations.<sup>162</sup> If the juror identifies with the victim, that juror is more likely to sentence the defendant to death.<sup>163</sup> Jurors considered victims who engaged in mundane activities as innocent because they happened to be in the wrong place at the wrong time.<sup>164</sup> On the other hand, jurors who perceive the victim as distasteful or engaging in high-risk or antisocial behavior are more likely to give life sentences.<sup>165</sup> In this regard, jurors focus more on the activity of the victim in the moments leading up to the murder than on the victim's general reputation.<sup>166</sup>

Virginia allows the role of the victim to be presented in mitigation if he or she participated in the crime or consented to it.<sup>167</sup> However, much of the evidence regarding the victim's conduct is material to the crime itself and is

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nally ill patients who usually have strong life-affirming support systems, death row inmates are subjected to a "life-negating" environment in which death row inmates are subjected to imprisonment in remote locations, provided limited visitation rights, and that the inmate and his visitor are subjected to further indignities during visitation).

159. *Id.* at 869. The article mentions "rehabilitative" programs and exercise as privileges provided to non-death inmates that death row inmates are not given. *Id.*

160. *Id.* at 868 (quoting one prisoner likening the uncertainty to a vise pulling the prisoner in two separate directions and stating that many prisoners mentioned a preference for suicide).

161. *Id.* at 865.

162. Sundby, *The Capital Jury and Empathy*, *supra* note 84, at 350.

163. *Id.* at 359.

164. *Id.* Activities that the victims were performing included using the ATM, the bathroom, and filling the car with gas. *Id.*

165. *Id.* at 357 tbl.11.

166. *Id.* at 370.

167. See VA. CODE ANN. § 19.2-264.4(B)(iii) (Michie Supp. 2003) (noting the situation in which "the victim was a participant in the defendant's conduct or consented to the act").

presented in the guilt phase.<sup>168</sup> Like the issue of remorse, impressions of the victim's relationship to the crime are carried by the jurors from the guilt phase into the penalty phase and greatly influence a jury's determination between a sentence of life or death.<sup>169</sup> In a resentencing proceeding, the jury is not exposed to the same degree to the participation or the character of the victim. If the victim contributed to the commission of the crime by his or her practice of high-risk activity, a resentencing jury should have the opportunity to consider that activity during its deliberations.

### C. *Residual Doubt*

"Residual doubt acts as an operative mitigating factor when juries decide not to impose a death sentence because they are not absolutely certain of the defendant's guilt."<sup>170</sup> Residual doubt or "lingering" doubt is defined as:

- (1) actual, reasonable doubt about guilt of any crime; (2) actual, reasonable doubt that the defendant was guilty of a capital offense, as opposed to other offenses; (3) a small degree of doubt about (1) or (2), sufficient to cause the juror not to want to foreclose (by execution) the possibility that new evidence might appear in the future.<sup>171</sup>

The concept implies that the evidence presented in the guilt phase lacks the persuasiveness to convince a juror of the defendant's absolute guilt.<sup>172</sup> Jurors report that the reason why their juries returned life sentences was because of the juries' belief that there existed some inkling of doubt as to the defendant's guilt.<sup>173</sup>

A recent study found that residual doubt may not play as significant a factor in capital sentencing deliberations as previously believed.<sup>174</sup> Most jurors could not distinguish between reasonable doubt and residual doubt.<sup>175</sup> In fact, many jurors were offended when asked by the study whether during the sentencing phase they ever entertained the idea that the defendant might be innocent.<sup>176</sup> The only exceptions that the study found to the concept of residual doubt were

168. Sundby, *The Capital Jury and Empathy*, *supra* note 84, at 354.

169. *Id.* at 371.

170. Christina S. Pignatelli, Article, *Residual Doubt: It's a Life Saver*, 13 CAP. DEF. J. 307, 313-14 (2001) (examining the public, judicial, and legislative response to the role of residual doubt).

171. William S. Geimer & Jonathon Amsterdam, *Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty Cases*, 15 AM. J. CRIM. L. 1, 27 (1987-88) (positing that juries finding aggravating and mitigating factors operate far differently in practice than was intended in theory).

172. Pignatelli, *supra* note 170, at 307.

173. Geimer & Amsterdam, *supra* note 171, at 27 (defining lingering doubt).

174. Sundby, *The Capital Jury and Absolution*, *supra* note 84, at 1577.

175. *Id.* at 1578-79.

176. *Id.* at 1578.

cases with multiple defendants and those in which the prosecution presented mostly circumstantial evidence.<sup>177</sup> The jurors were unsure as to the defendant's actual level of participation in the crime.<sup>178</sup> Each of these juries felt that death should be reserved only for the ringleader and returned a life sentence for the less culpable defendant.<sup>179</sup>

Although residual doubt may not play a great role in every case, it nonetheless can play a significant role for many defendants. In *Lockhart v. McCree*,<sup>180</sup> the United States Supreme Court recognized that one of the benefits of unitary juries, or a single jury presiding over the guilt and penalty phases, in capital cases was the idea of residual doubt.<sup>181</sup> The Court stated that "it seems obvious to us that in most, if not all, capital cases much of the evidence adduced at the guilt phase of the trial will also have a bearing on the penalty phase."<sup>182</sup>

Although the Court has held that a defendant does not have a constitutional right to a jury instruction on residual doubt, it has largely left the application of residual doubt at sentencing to the states.<sup>183</sup> The federal government acknowledges the defendant's interest in residual doubt and allows for it to be used as a mitigating factor.<sup>184</sup> Virginia, however, does not.<sup>185</sup> In *Stackton*, the Supreme Court of Virginia held that residual doubt cannot be argued at a new sentencing hearing because the issue of guilt was already decided.<sup>186</sup>

Whether a state allows or denies an instruction on residual doubt as a mitigating factor, residual doubt may still play a role in a jury's sentencing decision.<sup>187</sup> The United States Supreme Court recognized that, even though a defendant is not entitled to a jury instruction, the defendant's interest in the residual doubt claim still exists.<sup>188</sup> Resentencing juries lack the lingering doubt

177. *Id.* at 1577.

178. *Id.* at 1580.

179. *Id.* at 1581.

180. 476 U.S. 162 (1986).

181. *Lockhart v. McCree*, 476 U.S. 162, 181 (1986) (agreeing with the State of Arkansas's argument that defendants might benefit at sentencing from a jury's residual doubt about evidence presented in the guilt phase).

182. *Id.*

183. *Franklin v. Lynaugh*, 487 U.S. 164, 172-73 (1988) (stating that the Court has never held that a defendant has a constitutional right to a jury instruction regarding residual doubt); Pignatelli, *supra* note 170, at 312.

184. See 18 U.S.C. § 3592(a)(8) (2000) (stating that "any other circumstance of the offense that mitigate against imposition of the death sentence").

185. See *Stackton*, 402 S.E.2d at 206-07 (precluding argument about residual doubt because guilt had already been determined in the first phase of the trial).

186. *Id.* at 207.

187. *Geimer & Amsterdam*, *supra* note 171, at 28-34; see also Pignatelli, *supra* note 170, at 314 (stating that comments from capital jurors in Virginia indicated that their own residual doubt affected their decision to recommend life sentences).

188. *Lockhart*, 476 U.S. at 181.

that original trial juries may harbor. A resentencing jury will never hear that there were other actors in the commission of the murder or that the weapon was never recovered.<sup>189</sup> That tiny scrap of information can mean the difference between life and death.

#### D. The Solution

The solution is very simple. At minimum, to provide a fair process for the defendant the defense should be included in preparing the summary of the guilt phase for the newly empaneled resentencing jury. The inclusion of the defense can be conducted in one of two ways: (1) allow the defense to present information from the guilt phase directly to the jury; or (2) have the defense and Commonwealth collaborate, in advance, on the guilt phase summary to be presented to the new resentencing jury. There is no need for a completely new trial. Nor is a jury instruction on residual doubt or the role of the victim required—Virginia precedent prevents the relitigation of guilt because it was already properly resolved.<sup>190</sup>

Allowing the defense to present information from the guilt phase may cause problems. The presentation of information from the guilt phase to the new jury by each side may resemble a mini-trial on the issue of guilt. Information presented in this fashion may prove confusing to the jury.

Allowing the defense and the Commonwealth to formulate the summary is preferable. First, it may be less confusing to the jury because it preserves the single messenger practice that is used currently in resentencing proceedings. The Commonwealth's attorney still presents the summary to the new jury, but the summary itself is a collaborative work between the Commonwealth and the defense. Alternatively, the judge, in his role as a neutral player, can present the joint summary to the jury. Secondly, with both sides working together on the summary, a fuller picture of the crime can be relayed to the new jury. Lastly, in fulfilling the goal of individualized sentences, information from the guilt phase that is beneficial to the defendant will aid the jury in determining the most appropriate sentence.

#### IV. Conclusion

In light of *Sattazahn*, attorneys should be aware that appealing a life sentence may put their client's life at risk.<sup>191</sup> Unless the life sentence is accompanied by a finding that no aggravating circumstances were proven, double jeopardy may not protect the defendant from a subsequent sentence of death on retrial.<sup>192</sup> A

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189. See *Buchanan v. Kentucky*, 483 U.S. 402, 419–25 (1987) (affirming the life sentence of a defendant in a case in which there were multiple defendants); *May v. State*, 710 So. 2d 1362, 1369–70 (Ala. Crim. App. 1997) (stating that the defendant was sentenced to life in a case in which no weapon was recovered).

190. *Stockton*, 402 S.E.2d at 207.

191. *Sattazahn*, 537 U.S. at 112.

192. *Id.*

successful appeal would place the defendant back into a death-possible position.

Double jeopardy, of course, does not apply in the instance where the defendant was sentenced to death. Juries base many of their decisions for life or death on facts and impressions garnered in the guilt phase. Current practice only provides resentencing juries with one point of view—the Commonwealth's. To resolve this inherent unfairness, defense counsel should be permitted to introduce limited guilt phase evidence that may bear on sentencing. The preferable solution is to incorporate defense issues into the summary presented by the Commonwealth. The Commonwealth could continue to present the summary, but the final product would provide a more complete picture of the guilt phase for the new jury.



