SUPREME COURT OF THE UNITED STATES

No. 01–7574

DAVID ALLEN SATTAZAHN, PETITIONER *v.* PENNSYLVANIA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA, EASTERN DISTRICT

[January 14, 2003]

JUSTICE O'CONNOR, concurring in part and concurring in the judgment.

I join Parts I, II, IV, and V of the Court's opinion in this case. I do not join Part III, which would further extend the reach of *Apprendi* v. *New Jersey,* 530 U. S. 466 (2000), because I continue to believe that case was wrongly decided. See *id.,* at 523–553 (O'CONNOR, J., dissenting); see also *Ring* v. *Arizona,* 536 U. S. ___, ___ (2002) (slip op., at 1–2) (O'CONNOR, J., dissenting). 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." *Id.*, at ___ (slip op., at 1).

I would resolve petitioner's double jeopardy claim on the sole ground that under *Bullington* v. *Missouri,* 451 U. S. 430 (1981), and its progeny a life sentence imposed by operation of law after a capital sentencing jury deadlocks and fails to reach a unanimous verdict is not an "acquittal on the merits" barring retrial. Because death penalty sentencing proceedings bear the hallmarks of a trial, we held in *Arizona* v. *Rumsey*, 467 U. S. 203, 211 (1984), that "an acquittal on the merits by the sole decisionmaker in the proceeding is final and bars retrial on the same charge." A defendant is "acquitted" of the death penalty for purposes of double jeopardy when the sentencer "decide[s] that the

prosecution has not proved its case that the death penalty is appropriate." *Poland* v. *Arizona,* 476 U. S. 147, 155 (1986) (emphasis deleted and internal quotation marks omitted). In the absence of a death-penalty acquittal, the "clean slate" rule recognized in *North Carolina* v. *Pearce,* 395 U. S. 711, 719–721 (1969), applies and no double jeopardy bar arises.

When, as in this case, the jury deadlocks in the penalty phase of a capital trial, it does not "decide" that the prosecution has failed to prove its case for the death penalty. Rather, the jury makes no decision at all. Petitioner's jury did not "*agre[e]* . . . that the prosecution ha[d] not proved its case." *Bullington*, *supra*, at 443 (emphasis added). It did not make any findings about the existence of the aggravating or mitigating circumstances. See *Rumsey*, *supra*, at 211 (where the trial judge "entered findings denying the existence of each of the seven statutory aggravating circumstances," the resulting "judgment, based on findings sufficient to establish legal entitlement to the life sentence, amounts to an acquittal on the merits and, as such, bars any retrial of the appropriateness of the death penalty"). In short, the jury did not "acquit" petitioner of the death penalty under *Bullington* and *Rumsey*.

That Pennsylvania law mandates a life sentence when a capital sentencing jury deadlocks does not, for the reasons given by the Court, *ante*, at 8–9, transform that life sentence into a death-penalty acquittal. Because petitioner was neither acquitted nor convicted of the death penalty in his first trial, the Double Jeopardy Clause was not offended by a retrial to determine whether death was the appropriate punishment for his offenses. There is no need to say more.