

Under *Sattazahn v. Pennsylvania*, Defendant may still be tried for the offense of “murder with aggravators.”

Citing *Sattazahn v. Pennsylvania*, 537 U.S. 101, 123 S.Ct. 732 (2003), Defendant argues that he cannot be tried for the offenses of murder with aggravators because he has already been convicted of murder *simpliciter*.

Defendant’s argument ignores the fact that he has not been acquitted of the offenses of murder with aggravators. Instead, his trial for those offenses is ongoing. “[A] capital trial comprises just one trial, divided into guilt and sentencing phases, and has always been understood as such, both by this court and by the U.S. Supreme Court. “ *State v. Ring*, 204 Ariz. 534, ¶ 50, note 19, 65 P.3d 915, 935 (2003) (*Ring III*).

Because no sentence has been imposed, jeopardy has not yet attached. The United States Supreme Court has held that once a sentence has been imposed in a capital case, jeopardy attaches. *Bullington v. Missouri*, 451 U.S. 430, 446, 101 S.Ct. 1852, 1862 (1981). Thus, a capital defendant sentenced to life imprisonment at his first trial may not face the death penalty upon retrial. *Id.* See also *Arizona v. Rumsey*, 467 U.S. 203, 104 S.Ct. 2305 (1984) (double jeopardy clause prohibited State from sentencing defendant to death after his life sentence was set aside on appeal.)

Here, in contrast to *Bullington* and *Rumsey*, jeopardy has not yet attached because no sentence has been imposed. “Under the *Bullington* line of cases . . . , the touchstone for double-jeopardy protection in capital-sentencing proceedings is whether there has been an ‘acquittal.’” *Sattazahn v. Pennsylvania*, 537 U.S. 101, 108, 123 S.Ct. 732, 738 (2003). An acquittal of murder plus aggravating

circumstances occurs when “a jury unanimously concludes that a State has failed to meet its burden of proving the existence of one or more aggravating circumstances. . .” *Id.* at 112, 123 S.Ct. at 740. That has not occurred here, and thus there has been no acquittal. Just like the defendant in *Sattazahn*, Defendant has been convicted in the guilt phase of the lesser offense of first degree murder, but not acquitted of the greater offense of murder with aggravators. *Id.* Thus, like *Sattazahn*, he may still be tried for the greater offense of murder with aggravators and potentially sentenced to death. *Id.*