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CONSTITUTIONAL LAW—DOUBLE JEOPARDY—The New Role of Double Jeopardy in Capital Sentencing. *Hopkinson v. State*, 664 P.2d 43 (Wyo. 1983).

In 1983, the Wyoming Supreme Court again heard arguments concerning the death sentence imposed on convicted killer Mark Hopkinson.¹ The bizarre facts in the Hopkinson murder story can only be briefly summarized.² In 1975, Mark Hopkinson and his family became entangled in a legal dispute over water rights with their neighbors in Uinta County.³ The neighbors were represented by Vincent Vehar, an Evanston attorney. As the legal battle developed the friction between Hopkinson and Vehar intensified. Ultimately, Hopkinson decided to have Vehar killed.

During the summer of 1977, Hopkinson hired an accomplice and directed him to place a bomb in the basement of the Vehar residence. In the early morning hours of Sunday, July 7th, 1977, the cohort executed the bombing plan. Vehar, his wife, and one son perished in the explosion.

Approximately one year later, Jeff Green, a former Hopkinson friend and employee, served as a major witness in the trial of another of Hopkinson's associates. During the trial, Green broke down and implicated Hopkinson in numerous crimes, including the Vehar murders. His testimony resulted in a federal grand jury indictment and the subsequent conviction of Hopkinson on charges of interstate transportation of explosives.⁴ Hopkinson was sentenced and confined to a federal minimum security prison in Lompoc, California.⁵ From the Lompoc prison, Hopkinson made a series of phone calls⁶ establishing a plan to murder Jeff Green. On May 20th, 1979, Jeff Green's mutilated body was discovered in Bridger Valley in southern Wyoming.

Four months later, Mark Hopkinson was brought to trial on multiple charges including the first degree murders of the Vehars and Jeff Green.⁷ The jury returned guilty verdicts on all of the charges.⁸ In the second phase of the bifurcated trial⁹ Hopkinson was sentenced to three consecutive terms of life imprisonment for the Vehar murders and condemned to die for the torture killing of Jeff Green.¹⁰

On appeal, the Wyoming Supreme Court affirmed the convictions and the life sentences. However, because of an error in the sentencing verdict form the court reversed the imposition of the death penalty for the Jeff

1. *Hopkinson v. State*, 664 P.2d 43 (Wyo. 1983).

2. *Id.* at 48-51.

3. *Id.* at 48.

4. *United States v. Hopkinson*, 631 F.2d 665 (10th Cir. 1980), *cert. denied*, 450 U.S. 969 (1981).

5. 664 P.2d at 49.

6. In a time span of two months Mark Hopkinson made a total of 114 calls from the prison. *See, e.g., Hopkinson v. State*, 632 P.2d 79, 96 (Wyo. 1981).

7. *Id.* at 97.

8. *Id.*

9. A Wyoming statute requires that when a defendant is convicted of first degree murder the judge must conduct a separate sentencing hearing to determine whether to impose a penalty of life imprisonment or death. *See WYO. STAT. § 6-4-102(a)* (1977) (now recodified as *WYO. STAT. § 6-2-102(a)* (1977)).

10. 632 P.2d at 97.

Green murder.¹¹ The case was remanded to the district court for a new capital sentencing hearing.¹²

A new jury was impaneled for the purpose of setting sentence on the first degree murder conviction for the death of Jeff Green. The evidence produced during the guilt phase of the original trial was not reintroduced to the new jury. Instead, the jurors were informed of most of the circumstances surrounding the murder through excerpts from the transcript of the original trial. The prosecution then submitted evidence to the second sentencing jury of five statutory aggravating factors which would indicate the need for the death penalty. This included evidence of two aggravating circumstances the first sentencing jury had deemed inapplicable to the facts of the case. Based on that evidence, the second jury recommended the death penalty.¹³ On appeal, Hopkinson argued that the submission to the second sentencing jury of those aggravating circumstances found inapplicable in the first sentencing hearing¹⁴ violated his fifth amendment protection against double jeopardy. The Wyoming Supreme Court ruled that there could not be an acquittal from an aggravating circumstance in the penalty phase of a bifurcated proceeding.¹⁵ Therefore, a statutory aggravating circumstance submitted but not found to exist in the first trial could be resubmitted and proven at the second hearing without subjecting the defendant to double jeopardy.¹⁶

This Note will briefly review major constitutional developments in the capital sentencing hearing, the standardization of sentencing procedure, and the resulting similarities to criminal trial procedure. The trial-like nature of the capital sentencing hearing will be shown to be particularly important in terms of the application of double jeopardy safeguards. The focus will then turn to the *Hopkinson* court's refusal to expand the scope of fifth amendment double jeopardy protections to death penalty hearings provided for in Wyoming statutes.¹⁷

11. *Id.* at 169-72. In the first Hopkinson trial the sentencing verdict form stated "[the jury members] do find the existence of the following aggravating circumstances at the time of the murders. . . ." The court said this was not a proper introduction to the second aggravating circumstance on the verdict form, which had requested that the jury indicate whether, "[t]he Defendant was previously convicted of another murder in the first degree or a felony involving the use of threat or violence to the person."

The sentencing jury found this second aggravating circumstance was present in the murder of Jeff Green. But, the court stated that contrary to the sentencing form's introductory statement, there was no evidence introduced from which the jury could conclude that the requisite convictions occurred prior to the Jeff Green murder. The state had introduced evidence that the Vehar murders had been committed prior to the Jeff Green murder. However, the sentencing verdict form required that the jury find that the convictions occurred prior to Green's murder. The court held the evidence produced at trial did not support the jury's response to the verdict form and remanded for a new sentencing hearing.

12. *Id.* at 172. See also WYO. STAT. § 6-2-102(a) (1977).

13. *Hopkinson v. State*, 664 P.2d 43, 47 (Wyo. 1983).

14. The Wyoming capital sentencing statute provides a list of eight aggravating circumstances, one of which must be proven before a death sentence may be imposed. See *infra* note 71.

15. 664 P.2d 43 at 48, 68-71.

16. *Id.* at 68-71.

17. The Wyoming capital sentencing scheme is outlined in WYO. STAT. §§ 6-2-101 to -103 (1977). See *infra* note 71.

Finally, an analysis of the reasoning of a recent state supreme court decision will be presented which holds the resubmission in a capital resentencing hearing of an aggravating circumstance found inapplicable in the first penalty trial is a violation of the fifth amendment prohibition against double jeopardy.¹⁸

THE STANDARDIZATION OF CAPITAL SENTENCING

The United States Constitution's eighth amendment prohibition against "cruel and unusual punishment" was adopted in the Bill of Rights in 1791. One hundred and eighty one years later in the landmark decision of *Furman v. Georgia*, the United States Supreme Court ruled, per curiam, that that clause restricted the state's imposition of the death penalty.¹⁹

In the four years following *Furman*, the constitutional status of the death penalty remained uncertain. Nonetheless, it was a period characterized by a virtual stampede of state reenactments of the death penalty.²⁰ Then, in July of 1976, in *Gregg v. Georgia*²¹ and its four companion cases,²² the Supreme Court commanded by a centrist plurality consisting of Justices Stewart, Powell, and Stevens, again addressed the issue of the constitutionality of the death penalty. The Court held that the death penalty was not per se unconstitutional. However, the plurality cautioned that central to their holding was "the conviction that the vesting of standardless sentencing power violates the eighth and fourteenth amendments."²³

Accordingly, the Court reviewed five capital sentencing statutes enacted in response to *Furman* and upheld three²⁴ as insuring that the sentence of death would not be "wantonly or freakishly imposed."²⁵ Those statutes receiving the Court's approval were similar to one another in format and provided: 1) a bifurcated proceeding with separate trials for guilt and sentencing; 2) that the burden of proof rest with the prosecution in both guilt and sentencing phases; 3) a list of aggravating factors at least one of which must be proven beyond a reasonable doubt before the jury can impose a death sentence; 4) a list of mitigating factors to be weighed and balanced with the aggravating factors in determining sentence; and 5) an automatic review of all death sentences by the state's highest court.²⁶ The

18. *State v. Silhan*, 275 S.E.2d 450 (N.C. 1981).

19. 408 U.S. 238 (1972). The *Furman* majority was badly divided. A weakly bound plurality of three denounced discretionary jury sentencing. *Id.* at 240 (Douglas, J., concurring); *Id.* at 306 (Stewart, J., concurring); *Id.* at 310 (White, J., concurring). The plurality was joined by concurring Justices Brennan and Marshall who ruled that death penalties were per se unconstitutional. *Id.* at 257 (Brennan, J., concurring); *Id.* at 314 (Marshall, J., concurring).

20. The legislature of 35 states, including Wyoming, enacted new death penalty statutes in the years 1972-1976. *Gregg v. Georgia*, 428 U.S. 153, 179-80 (1976).

21. 428 U.S. 153 (1976).

22. *Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts v. Louisiana*, 428 U.S. 325 (1976).

23. *Woodson v. North Carolina*, 428 U.S. 280, 302 (1976).

24. The statutes of Georgia, Florida, and Texas were upheld as constitutional. See *supra* note 21 and accompanying text.

25. 428 U.S. at 310 (Stewart, J., concurring).

26. See *supra* notes 20-21 and accompanying text.

Court indicated the purpose of requiring such factors was to provide the sentencing authority with specific guidelines to assist in reaching an informed decision. The immediate response of the rest of the states' legislators was the virtual adoption of the *Gregg* statute. This resulted in nationwide standardization of the capital sentencing proceeding.

Wyoming's Response to Furman

In 1977, the Wyoming Legislature, prompted by the Wyoming Supreme Court,²⁷ enacted a new capital punishment statute patterned after the sentencing procedures upheld in *Gregg*. Wyoming's present statutory plan provides that all defendants convicted of first degree murder will be sentenced to life imprisonment or death.²⁸ The sentencing hearing is conducted separately, before a judge²⁹ or jury,³⁰ and all evidence relevant to the sentence, including matters pertaining to any of the statutory aggravating or mitigating circumstances, are presented.³¹

After hearing all the evidence, the jury is directed to deliberate on the issue of proper sentence. In making that determination the jurors are to consider whether one or more aggravating circumstances have been proven beyond a reasonable doubt and whether the mitigating circumstances outweigh the aggravating circumstances.³² The death penalty may not be imposed unless the jury determines at least one of the statutory aggravating circumstances has been proven.³³

A jury verdict in favor of a capital sentence must be designated in writing³⁴ and is binding upon the judge.³⁵ Life imprisonment will be automatically imposed if the jury cannot agree upon a verdict within a reasonable time.³⁶

The judgment of conviction and sentence of death are subject to automatic review by the Wyoming Supreme Court.³⁷ Upon appeal the court has authority to remand for additional proceedings because of error, affirm the death sentence, or set the sentence aside and impose a penalty of life imprisonment.³⁸

Double Jeopardy in Standardized Capital Sentencing

The moral sentiment double jeopardy exemplifies is the conviction that no man should suffer twice for a single act.³⁹ That sentiment attained Constitutional status in the fifth amendment: "Nor shall any person be subject

27. In 1977, the Wyoming Supreme Court ruled that the Wyoming statutory sentencing procedure, which provided for the mandatory imposition of the death penalty for a conviction of first degree murder, was invalid. *Kennedy v. State*, 559 P.2d 1014 (Wyo. 1977).

28. WYO. STAT. § 6-2-101(b) (1977).

29. WYO. STAT. § 6-2-102(a) (i-iii) (1977).

30. WYO. STAT. § 6-2-102(b) (1977).

31. WYO. STAT. § 6-2-102(c) (1977).

32. WYO. STAT. § 6-2-102(d) (1977).

33. WYO. STAT. § 6-2-102(e) (1977).

34. *Id.*

35. WYO. STAT. § 6-2-102(f) (1977).

36. WYO. STAT. § 6-2-102(e) (1977).

37. WYO. STAT. § 6-2-103(a) (1977).

38. WYO. STAT. § 6-2-103(e) (i-iii) (1977).

39. SIGLER, *DOUBLE JEOPARDY*, at V (1969).

for the same offense to be twice put in jeopardy of life or limb." As interpreted by the United States Supreme Court in *North Carolina v. Pearce*,⁴⁰ the double jeopardy clause affords the accused three protections: 1) it protects against a second prosecution for the same offense after acquittal; 2) it protects against a second prosecution for the same offense after conviction;⁴² and 3) it protects against multiple punishments for the same offense.⁴⁸

However, in *Pearce* the central issue was whether double jeopardy afforded the same protections to the sentencing portion of the trial. The defendant in *Pearce* in a post-conviction proceeding had his original conviction overturned. Upon remand he was convicted a second time and sentenced to a longer prison term than had been imposed in the first trial.⁴⁴

The *Pearce* Court ruled that while the double jeopardy clause of the fifth amendment required that time already served must be fully credited in imposing sentences,⁴⁵ double jeopardy protections were not violated by the infliction of a more severe sentence on reconviction.⁴⁶ After *Pearce*, the role of double jeopardy protection in sentencing was considered to be minimal.

Another major decision involving the issue of double jeopardy protections in sentencing was that of *United States v. DiFrancesco*.⁴⁷ The defendant in *DiFrancesco* was sentenced under the Organized Crime Act of 1970 as a "dangerous special offender."⁴⁸ A defendant so designated and convicted was to receive an enhanced sentence,⁴⁹ and if the United States felt the sentence was not severe enough it had the right to appeal the sentence to the United States Court of Appeals.⁵⁰

The defendant claimed that the provision for appeal of his sentence violated his constitutional safeguards against double jeopardy. The Court rejected the double jeopardy argument stating the sentencing procedure did not approximate the ordeal of a trial on the basic issue of guilt or innocence.⁵¹ In support of this conclusion the Court considered a number of factors: 1) historically, a judge-mandated increase in sentencing was not thought to violate double jeopardy; 2) the appeal was on the record of the trial court; 3) the defendant was charged with knowledge of the special offender statute and therefore had no expectations regarding the finality of sentence until an appeal was taken; and 4) the appellate judge was allowed

40. 395 U.S. 711 (1969).

41. *United States v. Ball*, 163 U.S. 662 (1896).

42. *In Re Nielsen*, 131 U.S. 176 (1879).

43. *Ex Parte Lange*, 18 Wall. 163 (1873).

44. 395 U.S. at 711. The defendant in *Pearce* was originally sentenced for a term of twelve to fifteen years. In the second trial he was sentenced to an eight year prison term. When added to the time he had already spent in prison, this sentence amounted to a longer total sentence than had originally been imposed.

45. *North Carolina v. Pearce*, 395 U.S. 711, 723 (1969).

46. *Id.* at 720, 723.

47. 449 U.S. 117 (1980).

48. 18 U.S.C. § 3575(e), (f) (1982).

49. *Id.*

50. 18 U.S.C. § 3576 (1982).

51. *United States v. DiFrancesco*, 449 U.S. 117, 136 (1980).

to choose from a wide range of sentences as opposed to a trial on the merits where only one of two outcomes was possible.⁵² For these reasons the Court held that the imposition of a sentence under the Organized Crime Act did not have the qualities of constitutional finality that attend an acquittal at trial and therefore, the government's appeal of the sentence did not subject the defendant to double jeopardy.⁵³

After the *DiFrancesco* decision, the argument that the double jeopardy clause might offer some restrictions in capital resentencing lost much of its validity. However, in the spring of 1981 the issue was revived in the landmark case of *Bullington v. Missouri*.⁵⁴

In *Bullington*, the defendant was convicted of first degree murder.⁵⁵ At a separate sentencing phase provided for in response to *Gregg*, the jury was presented with two alternative choices. The defendant could receive the punishment of life imprisonment or he could be sentenced to die.⁵⁶ After reviewing and weighing the statutory aggravating and mitigating circumstances, the jury recommended that the defendant receive a life sentence.⁵⁷ However, the trial court then granted defendant's motion for a new trial because of error in the guilt phase of the proceedings.⁵⁸ The state filed notice that it again intended to seek the death penalty.⁵⁹ The trial court ruled that it would not allow the death penalty to be imposed because to do so would violate double jeopardy standards.⁶⁰ The prosecution then applied for a writ of prohibition to prevent the trial court from entering a formal order which would deny it the right to again seek the death penalty.⁶¹ The Missouri Supreme Court granted the state's request.

On certiorari, the United States Supreme Court analyzed earlier decisions addressing double jeopardy concerns in resentencing and concluded that the sentencing procedure in *Bullington* was significantly different than those employed in previous cases like *Pearce* and *DiFrancesco* where double jeopardy had been found not to attach.⁶²

Most importantly, in *Pearce* the state had only recommended a sentence and was not required to carry the burden of proof in the determination of exactly what sentence was proper.⁶³ However in *Bullington* the state was required to prove beyond a reasonable doubt the existence of at

52. *Id.* See also *Bullington v. Missouri*, 451 U.S. 430, 438-41 (1981). The *Bullington* Court stated there was at least one other factor that contributed to the holding in *DiFrancesco*. The *DiFrancesco* Court said that because the appeal under the Organized Crime Act did not have the hallmarks of a trial on the merits, double jeopardy did not apply. *Id.* at 440. The *Bullington* Court reasoned this was due in part to the fact that the state's standard of proof in *DiFrancesco* was by the preponderance of the evidence, rather than the beyond a reasonable doubt standard required in a criminal trial. *Id.* at 441.

53. *Id.* at 438-41.

54. 451 U.S. 430 (1981).

55. *Id.* at 435.

56. 451 U.S. at 432. See also MO. REV. STAT. § 565.008.1 (1978).

57. 451 U.S. at 436.

58. *Id.* at 436.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* at 438.

63. *United States v. DiFrancesco*, 449 U.S. 117, 136 (1980).

least one statutory aggravating circumstance in order to obtain a death sentence.⁶⁴ In *Bullington* the jury was not required to choose from a wide range of possible sentences,⁶⁵ unlike the judge in *DiFrancesco*.⁶⁶ Like a trial on the merits, only one of the two outcomes would be possible. For these reasons the majority in *Bullington* held that the Missouri sentencing procedure, standardized by the Court's earlier capital penalty decisions, had all the ingredients of a trial on the merits and double jeopardy protections would attach.⁶⁷

In so holding, the Court extended at least one of the three double jeopardy protections announced in *Pearce*⁶⁸ to the capital sentencing hearing. The Court held that a life sentence was essentially an acquittal of the death penalty, and the rule that double jeopardy prohibits a prosecution for the same offense after acquittal would apply. Since the state had been given one fair opportunity to prove its case, double jeopardy would prevent it from being afforded another in which it could utilize the experience and superior knowledge gained from the first sentencing hearing.⁶⁹

Double Jeopardy and Hopkinson

In the first *Hopkinson* sentencing hearing the jury was instructed on eight of the ten statutory aggravating circumstances.⁷⁰ After deliberating,

64. *Bullington v. Missouri*, 451 U.S. 430, 438 (1981). See also MO. REV. STAT. § 565.001 (1978).

65. *Id.*

66. *United States v. DiFrancesco*, 449 U.S. 117, 136 (1980).

67. *Bullington v. Missouri*, 451 U.S. at 431, 438, 446 (1981). In *Bullington*, the court analogized the separate sentencing phase to a trial on the merits. This analogy furthered two conclusions. First, it served to distinguish the *Bullington* case from prior cases like *Pearce* and *DiFrancesco* which held that double jeopardy protections did not apply to sentencing. Second, the court said, "by enacting a capital sentencing procedure that resembles a trial on the issue of guilt or innocence, Missouri explicitly requires that the jury determine whether the prosecution has proven its case." A sentence of life imprisonment meant that the prosecution has not proven its case on the issue of the death penalty and the defendant must be acquitted of the death penalty. Double jeopardy will attach to that acquittal and prevent the state from again seeking the death penalty if the court remands for a new sentencing trial.

68. See *supra* note 40 and accompanying text.

69. 451 U.S. at 446.

70. *Hopkinson v. State*, 664 P.2d 43, 92, 111 (Wyo. 1983) (Rose, J., dissenting). Subsections (h) and (j) of section 6-4-102 (recodified as 6-2-102) of the Wyoming statutes provide for the following mitigating and aggravating circumstances:

(h) Aggravating circumstances are limited to the following:

- (i) The murder was committed by a person under sentence of imprisonment;
- (ii) The defendant was previously convicted of another murder in the first degree or a felony involving the use or threat of violence to the person;
- (iii) The defendant knowingly created a great risk of death to two (2) or more persons;
- (iv) The murder was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, sexual assault, arson, burglary, kidnapping or aircraft piracy or the unlawful throwing, placing or discharging of a destructive device or bomb;
- (v) The murder was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody;
- (vi) The murder was committed for pecuniary gain;
- (vii) The murder was especially heinous, atrocious or cruel;
- (viii) The murder of a judicial officer, former judicial officer, district attorney, former district attorney, or former county and prosecuting attorney, during or because of the exercise of his official duty.

the jury determined that only four aggravating circumstances had been proven beyond a reasonable doubt.⁷¹ In the second sentencing hearing the state was allowed to resubmit two of the aggravating circumstances the first jury had held inapplicable.⁷² This time, the jury found such factors did exist beyond a reasonable doubt.⁷³

On appeal from the second sentencing hearing, Hopkinson contended that the resubmission of the statutory aggravating circumstances violated his constitutional protection against double jeopardy. By way of answer the court stated: "the principal reason [the second jury found such circumstances to exist] is probably because the jury was inadequately instructed in the first trial, but we need not guess any further or even at all."⁷⁴

The court then reviewed a number of major rulings on double jeopardy protections in the sentencing hearing. This included a review of *Bullington* which held that a jury verdict of a life sentence was essentially an acquittal of the death penalty and therefore double jeopardy would prevent the state from again seeking the death penalty on remand.⁷⁵ But the Wyoming Supreme Court declined to extend that holding to the situation at bar, although in *Hopkinson* the first sentencing jury had acquitted the defendant of two aggravating circumstances either one of which would support the death penalty. Instead, the court held that the State could submit the same aggravating circumstances to the second sentencing jury.⁷⁶

The *Hopkinson* court declined to extend the *Bullington* holding for two reasons: The first jury in *Hopkinson*, unlike the jury in *Bullington*, did not return a sentence of life imprisonment.⁷⁷ Second, the *Hopkinson* court also distinguished *Bullington* by classifying a statutory aggravating circumstance as merely an issue of fact. An issue of fact, the court said, does not command the same degree of finality as a finding of guilt, or the setting of a sentence as in *Bullington*.⁷⁸ Having found no persuasive authority that there was or should be any restriction on statutory required findings of

- (j) Mitigating circumstances shall be the following:
- (i) The defendant has no significant history of prior criminal activity;
 - (ii) The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance;
 - (iii) The victim was a participant in the defendant's conduct or consented to the act;
 - (iv) The defendant was an accomplice in a murder committed by another person and his participation in the homicidal act was relatively minor;
 - (v) The defendant acted under extreme duress or under the substantial domination of another person;
 - (vi) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired;
 - (vii) The age of the defendant at the time of the crime.

71. 664 P.2d 43, 69 (Wyo. 1983).

72. *Id.* The first jury had found WYO. STAT. § 6-2-102(h) (v, vi) inapplicable. See *supra* note 71.

73. 664 P.2d at 69.

74. *Id.*

75. 451 U.S. at 446.

76. 664 P.2d at 69.

77. *Id.* at 70.

78. *Id.*

fact,⁷⁹ the court concluded that double jeopardy principles were not violated by the resubmission of those aggravating circumstances held not to exist in the first trial.⁸⁰

ANALYSIS

Although both factors enumerated by the Wyoming court do distinguish *Hopkinson* from *Bullington*, it is at least arguable that the United States Supreme Court in *Bullington* did not intend that the application of double jeopardy protections would depend on the actual sentence given. The *Bullington* Court felt that because the capital sentencing procedure resembled a trial on the merits and particularly because the prosecution had to prove its case beyond a reasonable doubt, double jeopardy protections would prohibit the state from attempting to reprove its case. In *Hopkinson*, the following procedures were required for each statutory aggravating circumstance submitted to the jury: First, the state was required to present evidence supporting the existence of the statutory circumstance. Second, the state was required to prove the existence of that circumstance beyond a reasonable doubt. Third, the jury function, like that of a jury in trial on the merits, was to determine which of two outcomes was indicated by the evidence. Either a statutory aggravating circumstance would be proven applicable, or the defendant would essentially be acquitted of that particular aggravating circumstance.

The statutory aggravating circumstance, viewed in this way, is not just an issue of fact—contrary to the reasoning in *Hopkinson*. This argument is buttressed by the holdings in *Furman* and *Gregg* which stressed the importance and necessity of the jury finding a statutory aggravating factor before imposing the death penalty, and that the state has the burden of proving the existence of that factor.

In other words, the procedure in determining whether a statutory aggravating circumstance does, or does not apply, resembles a trial within the sentencing trial. *Bullington* held that double jeopardy would attach to the sentencing phase of a bifurcated proceeding because it had all the elements of a trial on the merits. Similarly, in *Hopkinson* double jeopardy should attach to a jury acquittal of a statutory aggravating circumstance to prevent the state from attempting to reprove it at a new sentencing hearing.

The *Hopkinson* majority also cited *Knapp v. Cardwell*, a 1982 federal district court case, as supportive of the holding in *Hopkinson*.⁸¹ However, as Justice Rose aptly pointed out in his dissent in *Hopkinson*, that case is inapplicable to the holding in *Hopkinson*.⁸² The *Knapp* decision stands for the proposition that double jeopardy notions are not violated when the state introduces an aggravating circumstance at a capital resentencing trial that was not submitted to the jury at the first trial.⁸³ In *Hopkinson*, the same

79. *Id.*

80. *Id.*

81. *Id.* (Court construes *Knapp v. Cardwell*, 667 F.2d 1253 (9th Cir. 1982)).

82. 664 P.2d at 120 (Rose, J., dissenting).

83. 667 F.2d at 1265.

aggravating circumstances were submitted to the jury in the second trial as in the first trial.⁸⁴ Since the first jury in *Knapp* never tried the issue of whether the aggravating circumstances existed there could be no acquittal. This is unlike the situation in *Hopkinson* where there was actually a trial and an acquittal. Without an acquittal the rule stated in *Pearce*: "double jeopardy protects against a second prosecution for the same offense after an acquittal,"⁸⁵ does not apply. Thus, *Knapp* did not address the *Hopkinson* situation, and lent little authoritative value to the majority's opinion.

However, the majority also relied on *State v. Gilbert*, which is supportive of the *Hopkinson* holding.⁸⁶ In *Gilbert*, the Supreme Court of South Carolina held that the failure of the first sentencing jury to find for or against the defendant on an aggravating circumstance did not preclude the submission of the same circumstance at the second trial on the basis of double jeopardy.⁸⁷ The *Gilbert* majority, like that in *Hopkinson*, felt there could not be a violation of double jeopardy protections when two sentencing juries had decided death was the appropriate sanction.⁸⁸

There is at least one factor in the *Gilbert* decision which undermines it as an authority in *Hopkinson*. The *Gilbert* court suggested that in the event one aggravating circumstance could not be resubmitted for constitutional reasons, but other valid statutory aggravating circumstances were proved to exist, then a sufficient basis existed for the application of the death penalty.⁸⁹ Based partly on that assumption the *Gilbert* court ruled the resubmission of an aggravating circumstance the first jury had found did not exist was permissible.

In the first *Hopkinson* decision the court had expressly rejected that reasoning stating: "when we do not know whether the result of the weighing process would have been different had the impermissible aggravating circumstance not been present, and where a man's life is at stake, we must return the case to the trial court for a new sentencing trial."⁹⁰ Thus, the *Gilbert* holding was premised on a conclusion which the Wyoming court had already deemed dangerously unacceptable. For this reason the *Hopkinson* court should have given little weight to the holding in *Gilbert*.

The Better Reasoned Case: State v. Silhan

In March of 1981, just two months after the *Bullington* decision was announced, the North Carolina Supreme Court rendered a decision on double jeopardy issues in capital sentencing in *State v. Silhan*.⁹¹ *Bullington* was not cited by the *Silhan* court, but after careful consideration of recent changes in capital sentencing procedures the court independently reached the same result. The standardized capital sentencing procedures had transformed the sentencing hearing into a trial where the jury had much

84. 664 P.2d at 69.

85. *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969).

86. 277 S.C. 53, 283 S.E.2d 179 (1981), *cert. denied*, 456 U.S. 984 (1982).

87. 283 S.E.2d at 182.

88. *Id.* See also *Hopkinson v. State*, 664 P.2d 43, 70 (Wyo. 1983).

89. 283 S.E.2d at 182.

90. 632 P.2d at 171-72.

the same kind of duty it had in determining defendant's guilt or innocence.⁹²

The *Silhan* court cited three functional tasks the capital sentencing jury must perform and analogized them to the function of jurors in a criminal trial on the merits:⁹³ 1) the state must prove and the jury must find beyond a reasonable doubt at least one of the enumerated aggravating circumstances; 2) the aggravating circumstances found to exist must be sufficiently substantial to call for the imposition of the death penalty; and 3) the mitigating circumstances must be found insufficient to outweigh the aggravating circumstances.

Since the capital punishment hearing was in substance a trial on the issue of sentence, the court concluded that the double jeopardy clause placed limitations on the state in a new capital sentencing hearing.⁹⁴

The first of these limitations was the same limitation announced in *Bullington*.⁹⁵ When a life sentence is imposed following a conviction of a capital crime, and the conviction is reversed and remanded to the trial court for a new trial, the state may not again seek the death penalty.⁹⁶

Second, if a defendant appealed the death sentence and the case was remanded for a new sentencing hearing, the state would be precluded from relying on any aggravating circumstance deemed inapplicable by judge or jury in the first hearing.⁹⁷

The second limitation was based on the following reasoning: The existence of a statutory aggravating circumstance is essential to a jury finding that the death penalty is appropriate. In addition, the state has the burden of proving beyond a reasonable doubt the existence of a statutory aggravating factor. Therefore, the process involved in the determination of the existence of a statutory aggravating circumstance is like that of a criminal trial.⁹⁸ Double jeopardy would prohibit the state from a second chance at proving its case when it had offered insufficient evidence in the first criminal sentencing trial.⁹⁹ So, logically, the jury's failure to find the existence of an aggravating circumstance after considering it would be tantamount to the defendant's having been acquitted of the circumstance.¹⁰⁰

The *Silhan* court then proposed comprehensive guidelines to determine whether to remand for a new capital sentencing hearing without violating the double jeopardy clause.¹⁰¹ If upon a defendant's appeal the court vacates a death sentence because of trial error, it will remand for a new sentencing hearing only if statutory aggravating circumstances exist which

91. 275 S.E.2d 450 (N.C. 1981).

92. *Id.* at 482-83.

93. *Id.* at 482.

94. *Id.*

95. See *supra* text accompanying note 57.

96. 275 S.E.2d at 482.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

would not be constitutionally or legally prohibited.¹⁰² An aggravating circumstance would be proscribed at a new hearing if: a) there was not sufficient evidence to support it at the hearing appealed from; or, b) the jury at the hearing appealed from failed to find that it existed; or, c) there would be some other legal impediment.¹⁰³

CONCLUSION

The Wyoming Supreme Court has held that the resubmission, in a capital sentencing hearing, of a statutory aggravating circumstance found not to exist in the first trial is not a violation of double jeopardy principles. The court reasoned that the determination of whether an aggravating circumstance is applicable to the case is an issue of fact. Since there cannot be an acquittal from an issue of fact, the court concluded, there cannot be an acquittal of a statutory aggravating circumstance.

There are two flaws in this rationale. The United States Supreme Court has held that double jeopardy protections will apply to capital resentencing hearings because these hearings have all the elements of a trial in the merits. Similarly, determining whether a statutory aggravating circumstance applies has all the elements of a trial on the merits. Therefore, double jeopardy should prevent the resubmission of an aggravating circumstance where one jury has already acquitted the defendant of that circumstance.

Though the Wyoming Supreme Court in the first *Hopkinson* decision stressed that "When a man's life is at stake" those aggravating factors submitted to the jury must rest on firm evidentiary grounds, the later *Hopkinson* decision creates the following anomaly: The double jeopardy clause would prohibit the State of Wyoming from retrying an individual on a charge of speeding if a jury had acquitted him. However, the *same* clause would not protect another man from the imposition of a death sentence based on the finding of one statutory aggravating circumstance though one jury has already acquitted him of the same circumstance.

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102. *Id.* at 483.

103. *Id.*

104. This will be true when the second sentencing jury finds that only one statutory aggravating circumstance exists; (assuming it is one that the first jury held inapplicable) that circumstance will warrant the death penalty.