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Fifth Amendment--The Covert Narrowing of Double Jeopardy Precedent: The Supreme Court's Real Reason for Hearing Schiro v. Farley

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FIFTH AMENDMENT—THE COVERT NARROWING OF DOUBLE JEOPARDY PRECEDENT: THE SUPREME COURT'S REAL REASON FOR HEARING *SCHIRO V. FARLEY*

Schiro v. Farley, 114 S. Ct. 783 (1994)

I. INTRODUCTION

In *Schiro v. Farley*,[1] the Supreme Court denied Thomas Schiro's claim that his death sentence violated both the Double Jeopardy Clause and principles of collateral estoppel. Relying on *Stroud v. United States*,[2] the Court reasoned that because a second sentencing proceeding is ordinarily constitutional following a retrial, an original sentencing hearing does not violate the Double Jeopardy Clause.[3] Further, Justice O'Connor stated that Schiro failed to meet his burden of showing that the issue upon which he desired collateral estoppel effect had been decided in his favor.[4]

This Note argues that, although the majority reached the correct result, the Court's true motivation for granting certiorari was to adjust the scope of *Bullington v. Missouri*.[5] By ignoring *Bullington*'s focus on capital sentencing procedure and instead referring to it as a "narrow exception," Justice O'Connor removed the effective use of *Bullington* as precedent without having to explicitly overrule the case. The fact that Justice O'Connor could easily have distinguished the two cases on a factual basis, without adjusting the scope of *Bullington*, brings this point to bear.

This Note further argues that, with regard to the issue of collateral estoppel, Justice Stevens' dissent was a misstatement of the law. The majority correctly focused on the burden of proof detailed in *Ashe v. Swenson*[6] and rightly found that Schiro failed to meet this burden.

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1 114 S. Ct 783 (1994).
2 251 U.S. 15 (1919).
3 *Schiro*, 114 S. Ct. at 789.
4 *Id.* at 790.
5 451 U.S. 430 (1981).
6 397 U.S. 436 (1970).

II. BACKGROUND

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb."[7] The United States Supreme Court has viewed the Clause as having three distinct purposes: "It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense."[8] The Court has determined, however, that among these concerns, the controlling constitutional principle is the need to protect against successive prosecutions.[9] In addressing this issue, the Court has struggled to establish a rule as to when a sentencing hearing is itself a successive prosecution.[10] Implicit within this quandary is the issue of jury action or inaction on a given matter, and what constitutes an acquittal for purposes of double jeopardy and collateral estoppel analysis—specifically, when jury silence on a given charge is tantamount to an acquittal for double jeopardy purposes.

A. SENTENCING AS A SUCCESSIVE PROSECUTION

In *Stroud v. United States*,[11] the Court held that where a court grants a new trial due to assignment of error, a defendant may not claim double jeopardy based upon the imposition of a harsher sentence at retrial.[12] Stroud was indicted for first degree murder after killing a prison guard at Leavenworth, Kansas where he was incarcerated.[13] At his first trial, the jury found Stroud guilty and sentenced him to death.[14] After an admission of error by the prosecuting attorney, the court reversed the verdict and sentence, and the State retried Stroud.[15] At his second trial, the jury again found Stroud guilty, but chose not to impose the death sentence.[16] Upon writ of error to the United States Supreme Court, the Solicitor General of the United States confessed error and the case was again reversed and re-

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7 U.S. CONST. amend. V.

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

9 United States v. DiFrancesco, 449 U.S. 117, 132 (1980).

10 *See* Stroud v. United States, 251 U.S. 15 (1919); Bullington v. Missouri, 451 U.S. 430 (1981).

11 251 U.S. 15 (1919).

12 *Id.* at 18.

13 *Id.* at 16.

14 *Id.*

15 *Id.* at 16-17.

16 The jury's verdict read "guilty as charged in the indictment without capital punishment." *Id.* at 17.

manded.[17] At his third trial, the jury again found Stroud guilty of first degree murder but made no recommendation as to capital punishment.[18] The trial court imposed the death sentence.[19] Stroud appealed to the Supreme Court claiming a violation of the Double Jeopardy Clause based on the jury's decision in the second trial not to sentence him to death.[20]

Writing for a unanimous Court, Justice Jay found no merit in Stroud's claim.[21] Justice Jay reasoned that, although the second jury did indeed provide guilt "without capital punishment," all three of the convictions established guilt for first degree murder.[22] Therefore, the second jury's decision to impose a sentence of life rather than death was a proper mitigation of punishment but did not reduce the charge to one of a lesser offense.[23] Justice Jay reasoned that Stroud could not, therefore, argue that the result acted as an acquittal for double jeopardy purposes.[24] The Court further provided that the three multiple trials and convictions did not violate the purposes of the Double Jeopardy Clause because the earlier trials were reversed based upon the petitioner's request for a finding of error.[25]

The Court again addressed the issue of sentencing in relation to the Double Jeopardy Clause in *United States v. DiFrancesco*.[26] The United States appealed DiFrancesco's sentence, claiming that it was too lenient in light of the trial court's finding that the defendant fit the category of a "dangerous special offender."[27] The court of appeals dismissed the Government's claim based on the Double Jeopardy Clause.[28] The United States Supreme Court disagreed, reasoning that

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17 The Court provided: "Such further proceedings be had in said cause, in conformity with the judgement of this court, as according to right and justice, and the laws of the United States ought to be had, the said writ of error notwithstanding." *Id.*

18 *Id.*

19 *Id.*

20 *Id.* Stroud also claimed error based on failure to allow change of venue, refusal of motion to quash, and unreasonable search and seizure. The Court did not find any of these arguments compelling. *Id.* at 18-22.

21 *Id.* at 17-18.

22 *Id.* at 17.

23 *Id.* at 18.

24 *Id.*

25 *Id.*

26 449 U.S. 117 (1980).

27 *Id.* at 123. Under the Organized Crime Control Act of 1970, the United States has the right, in certain circumstances, to appeal the sentence of those classified as dangerous special offenders. Here, the Government argued that the district court's decision to sentence DiFrancesco to only one additional year of incarceration failed to address the intent of the Act. Specifically, the district court sentenced the defendant to two 10 year sentences which would run concurrently with a nine year sentence imposed in an unrelated trial. *Id.* at 118-22.

28 *Id.* at 123.

the "prohibition against multiple trials is the 'controlling constitutional principle'."[29] Writing for the majority, Justice Blackmun therefore concluded that a government appeal of a sentence does not necessarily offend the Double Jeopardy Clause.[30] The Court further reasoned that, based on principles of common law, courts should not view the imposition of a sentence with the same finality as an acquittal.[31] Justice Blackmun concluded that the Double Jeopardy Clause, itself based upon principles of common law, did not provide defendants any specific right to know their sentence at any specific moment in time.[32] The Court further provided that such a result did not violate the double jeopardy bar against multiple punishment.[33] Justice Blackmun reasoned that if a defendant has not begun to serve the original sentence, it is constitutional to either lessen or increase it.[34]

Bullington v. Missouri[35] altered the line of decisions represented by *Stroud* and *DiFrancesco*. In *Bullington*, the Court addressed whether the reasoning of *Stroud* applies when a jury makes a sentencing decision at a second stage where the prosecution has to prove certain elements beyond a reasonable doubt prior to the jury imposing the death penalty.[36] Under Missouri law, a defendant convicted of first degree murder receives one of only two possible sentences, death or life imprisonment.[37] To impose death, the same jury that found the defendant guilty at trial must find, beyond a reasonable doubt, the existence of aggravating circumstances that warrant the death penalty.[38]

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29 *Id.* at 132 (citing United States v. Wilson, 420 U.S. 332, 336 (1975)).

30 "[W]here a Government appeal presents no threat of successive prosecutions, the Double Jeopardy Clause is not offended." *Id.* (citing United States v. Martin Linen Supply Co., 430 U.S. 564, 569-70 (1977)).

31 *Id.* at 133. At common law, a court could increase the sentence of a defendant so long as it acted within the same term. Similarly, a judge in the United States may recall a defendant to adjust the sentence, provided the defendant has not yet begun to serve that sentence. *Id.* at 133-34.

32 "The Double Jeopardy Clause does not provide the defendant with the right to know at any specific moment in time what the exact limit of his punishment will turn out to be. [For example] there is no double jeopardy protection against revocation of probation and the imposition of imprisonment." *Id.* at 137.

33 *Id.* at 138-42.

34 *Id.* at 139.

35 451 U.S. 430 (1981).

36 *Id.* at 432.

37 *Id.*

38 The Court stated:

> The hearing must be held before the same jury that found the defendant guilty, and "additional evidence in extenuation, mitigation, and aggravation of punishment" shall be heard. "Only such evidence in aggravation as the prosecution has made known to the defendant prior to his trial shall be admissible." The jury must consider whether the evidence shows that there exist any of the 10 aggravating circumstances or the 7 mitigating circumstances specified by the statute . . . A jury that imposes the death penalty must designate in writing the aggravating circumstance or circumstances that

Bullington was indicted for capital murder after abducting a woman and drowning her.[39] The jury found the defendant guilty, and the prosecution sought the death penalty.[40] The jury rejected the prosecution's argument and returned a recommendation of life imprisonment.[41] Bullington appealed and the Missouri Court of Appeals reversed and remanded his conviction.[42] While preparing for the new trial, the prosecution informed the defendant that it would again seek the death penalty.[43] The defense argued that such prosecution would violate the Double Jeopardy Clause.[44] The trial court agreed and prohibited the prosecution from seeking the death penalty.[45] The prosecution sought a mandamus ruling on the issue from the Missouri Court of Appeals for the Western District which rejected the prosecution's argument.[46] On appeal to the Missouri Supreme Court, the prosecution successfully argued its case to pursue the death penalty.[47] The Supreme Court of the United States granted certiorari.[48]

Recognizing its earlier holdings in *Stroud* and *DiFrancesco,* the Court distinguished this case by virtue of the sentencing procedure that Bullington faced under Missouri law.[49] Specifically, the Court determined that the jury's limited ability to choose one of only two sentences, and the trial-like nature of the sentencing hearing, were significant distinguishing factors.[50] The Court reasoned that similarity

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it finds beyond a reasonable doubt.

Id. at 433-34.

39 *Id.* at 435.

40 The prosecution argued the presence of two statutorily recognized aggravating circumstances: "that '[t]he offense was committed by a person . . . who has a substantial history of serious assaultive criminal convictions', and that '[t]he offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture, or depravity of mind.'" *Id.* (alterations in original).

41 *Id.* at 435-36.

42 The appeal was granted based upon the Supreme Court's holding in Duren v. Missouri, 439 U.S. 357 (1979), which found Missouri's provision allowing women to claim automatic exemption from jury duty to be a violation of the Sixth and Fourteenth Amendment rights to draw a jury from a fair cross-section of society. *Id.* at 436.

43 *Id.*

44 *Id.*

45 *Id.*

46 *Id.*

47 The Missouri Supreme Court, in a divided vote, found no violation of the Double Jeopardy Clause. *Id.* at 437.

48 449 U.S. 819 (1980).

49 Bullington v. Missouri, 451 U.S. 430, 437-38 (1981).

50 The Court stated:

> The jury in this case was not given unbound discretion to select an appropriate punishment from a wide range authorized by statute. Rather, a separate hearing was required and was held, and the jury was presented both a choice between two alternatives and standards to guide the making of that choice. Nor did the prosecu-

to trial was the primary distinguishing characteristic from its previous cases.[51] Although there was a bifurcated process at issue in *DiFrancesco*, the Court distinguished it from the process in *Bullington* because it allowed for appellate review on appeal of sentence rather than providing another opportunity to convince a trier of fact to impose a heavier sentence.[52] Thus, the majority reasoned that in addressing a question of double jeopardy in regards to sentencing, the key issue is one of procedure.[53] Specifically, when the sentencing procedure forces the prosecution to prove a case beyond a reasonable doubt, the jury's rejection of that case acts as an acquittal as to the issue argued, just as it would at trial.[54] Because Bullington had already faced a 'trial' on the issue of the death penalty and was acquitted, retrying that issue would violate the Double Jeopardy Clause.[55]

Intrinsic within the holding of *Bullington* is the question of what constitutes an acquittal for purposes of sentencing. The Court had already addressed this question in *Green v. United States*.[56] Green was indicted on charges of first and second degree murder.[57] The jury returned a verdict of guilty as to second degree murder, but left the verdict sheet for first degree murder blank.[58] On appeal, the court reversed Green's conviction based on insufficient evidence.[59] On remand, Green was again tried for both first and second degree murder, notwithstanding his plea of former jeopardy as to first degree murder.[60] At this second trial, the jury found Green guilty of first degree murder and sentenced him to death.[61] After the court of appeals rejected Green's plea of double jeopardy, the Supreme Court granted

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tion simply recommend what it felt to be an appropriate punishment. It undertook the burden of establishing certain facts beyond a reasonable doubt in its quest to obtain the harsher of the two alternative verdicts. The presentence hearing resembled and, indeed, in all relevant respects was like the immediately preceding trial on the issue of guilt or innocence. It was itself a trial on the issue of punishment so precisely defined by the Missouri statutes.

Id. at 438.

51 *Id.* at 439.

52 *Id.* at 440.

53 *Id.* at 441.

54 "By enacting a capital sentencing procedure that resembles a trial on the issue of guilt or innocence . . . Missouri *explicitly requires* the jury to determine whether the prosecution has 'proved its case.' . . . A verdict of acquittal on the issue of guilt or innocence is, of course, absolutely final." *Id.* at 444-45 (emphasis in original).

55 *Id.* at 446.

56 355 U.S. 184 (1957).

57 *Id.* at 185.

58 *Id.* at 186.

59 *Id.*

60 *Id.*

61 *Id.*

certiorari to address the Double Jeopardy Clause.[62]

The Supreme Court held that the first jury's silence on the issue of first degree murder was tantamount to an acquittal for purposes of double jeopardy.[63] The Court reasoned that Green was in "direct peril" of being found guilty of first degree murder at his first trial.[64] Indeed, prior to the reversal of his conviction for second degree murder, it is undisputed that the state could not have retried Green on the charge of first degree murder.[65] The majority found that the advent of reversal should not change the implicit acquittal that the initial jury delivered on that charge.[66] As a result, the Court concluded that the second prosecution of Green for first degree murder, a charge on which he had won an acquittal, violated the very essence of the Double Jeopardy Clause.[67]

B. COLLATERAL ESTOPPEL WITHIN THE DOUBLE JEOPARDY CLAUSE

In *Ashe v. Swenson*,[68] the Supreme Court determined that the Double Jeopardy Clause implicitly contains the doctrine of collateral estoppel.[69] The state initially tried Ashe for robbing a poker player named Knight.[70] The jury acquitted Ashe due to insufficient evidence.[71] Subsequently, the state tried Ashe for robbing Roberts, who was a member of the same poker group as Knight.[72] After the court denied Ashe's motion to dismiss based on the previous acquittal, the jury found Ashe guilty.[73] On appeal, the Supreme Court of Missouri upheld the conviction, refusing to recognize Ashe's claim of double jeopardy.[74] The defendant applied for a writ of habeas corpus in federal court.[75] Both the United States District Court for the Western

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62 352 U.S. 915 (1956).

63 Green v. United States, 355 U.S. 184, 191-93.

64 *Id.* at 190.

65 *Id.* at 191.

66 The Court stated:

> [Green] was forced to run the gantlet once on that charge [first degree murder] and the jury refused to convict him. When given the choice between finding him guilty of either first or second degree murder it chose the latter. In this situation the great majority of cases in this country have regarded the jury's verdict as an implicit acquittal on the charge of first degree murder.

Id. at 190.

67 *Id.*

68 Ashe v. Swenson, 397 U.S. 436 (1970).

69 *Id.*

70 *Id.* at 438.

71 *Id.* at 439.

72 *Id.*

73 *Id.* at 439-40.

74 *Id.* at 440.

75 *Id.*

District of Missouri and the Eighth Circuit denied Ashe's claim of double jeopardy.[76] The Supreme Court granted certiorari.[77]

The Court reasoned that the question was whether or not the principles of collateral estoppel are embodied in the Fifth Amendment's guarantee against double jeopardy.[78] The majority defined "collateral estoppel" as prohibiting the relitigation of an issue between the same parties once a valid trier of fact has finally and ultimately determined the issue.[79] Applying this rule to Ashe's case, the majority found that recharging Ashe for the same crime simply by changing the identity of the victim violated the principle of collateral estoppel.[80] The Court went on to hold that recharging Ashe similarly violated the principles of the Double Jeopardy Clause, and, therefore, it reasoned that the principle of collateral estoppel was implicit within the Fifth Amendment guarantee against being twice placed in jeopardy.[81]

III. Facts and Procedural History

On the evening of 4 February 1981, Thomas Schiro raped and killed Laura Luebbehusen in her home.[82] At the time of the crime, Schiro was serving a three year suspended sentence for robbery at the Second Chance Halfway House in Evansville, Indiana.[83] While at the halfway house, Schiro worked across the street from Luebbehusen's home pursuant to a work release program.[84]

Earlier that night, around 7:00 p.m., Schiro went to an Alcoholics

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76 Both of these courts relied on the Supreme Court's decision in Hoag v. New Jersey, 356 U.S. 464 (1958). *Id.* at 440-41.

77 393 U.S. 1115 (1969).

78 The Court's decision in *Hoag* did not address this question as it simply posed the question in terms of the Fourteenth Amendment prior to the advent of Benton v. Maryland, 395 U.S. 784 (1969). *Id.* at 442-43.

79 The Court points out that, although this concept began as an issue of civil law, its validity in reference to criminal law has long been recognized. *Id.* at 443.

80 The Court stated that:

> Straightforward application of the federal rule [of collateral estoppel] to the present case can lead to but one conclusion. For the record is utterly devoid of any indication that the first jury could rationally have found that an armed robbery had not occurred, or that Knight had not been a victim of that robbery. The single rationally conceivable issue in dispute before the jury was whether the petitioner had been one of the robbers. And the jury by its verdict found that he had not. The federal rule of law, therefor, would make a second prosecution for the robbery of Roberts wholly impermissible.

Id. at 445.

81 *Id.* at 445-46.

82 Schiro v. Clark, 963 F.2d 962, 965 (7th Cir. 1992).

83 *Id.*

84 *Id.*

Anonymous Meeting.[85] Rather than stay for the meeting, however, Schiro went to a local liquor store and stole some alcohol.[86] Schiro took the stolen alcohol to a pornographic movie shop.[87] After exposing himself to the cashier, he was kicked out of the shop.[88] From there, he went directly to Luebbehusen's home at approximately 9:30 p.m.[89]

Schiro gained entry into Luebbehusen's home by claiming that his car would not start and asking to use her phone.[90] After pretending to use the phone, Schiro also asked to use the bathroom.[91] Similar to his conduct at the adult movie shop, Schiro exposed himself to Luebbehusen upon exiting the bathroom.[92] He then told her that she should not be alarmed because he was gay.[93] Schiro further communicated that a number of his gay friends had wagered with him that he would be unable to have intercourse with a woman.[94] After discussing homosexuality for awhile, Luebbehusen informed Schiro that she was a lesbian.[95]

Although Luebbehusen previously had told Schiro that she had been raped as a child, had never otherwise had intercourse, and had no interest in having sex with him, Schiro coerced her into engaging in intercourse.[96] Afterward, Luebbehusen attempted to leave, but Schiro stopped her, dragged her into the bedroom, and raped her.[97] Schiro forced Luebbehusen to consume drugs and alcohol throughout the evening.[98] When the liquor ran out Schiro took Luebbehusen to buy more.[99] When they returned, Schiro fell asleep, but woke up when he heard Luebbehusen trying to leave the house.[100] At this point, Schiro restrained and raped her again.[101]

Afterward, Schiro felt that he would have to kill Luebbehusen to prevent detection of his crime.[102] Schiro hit her over the head with a

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85 *Id.*
86 *Id.*
87 *Id.*
88 *Id.*
89 *Id.*
90 Schiro v. State, 451 N.E.2d 1047, 1050 (Ind. 1983).
91 *Id.*
92 *Id.*
93 *Id.*
94 *Id.*
95 *Id.*
96 Schiro v. Farley, 114 S. Ct. 783, 786 (1994).
97 Schiro v. State, 451 N.E.2d 1047, 1050 (Ind. 1983).
98 Schiro v. Clark, 963 F.2d 962, 966 (7th Cir. 1992).
99 *Id.*
100 Schiro v. State, 451 N.E.2d 1047, 1050 (Ind. 1983).
101 Schiro v. Farley, 114 S. Ct. 783, 786 (1994).
102 *Id.*

glass vodka bottle until the bottle broke.[103] He then picked up a metal iron and continued to beat her.[104] When Luebbehusen resisted, Schiro strangled her to death.[105] After Schiro killed her, he dragged the body into another room and sexually assaulted the corpse.[106]

Luebbehusen's roommate, Darlene Hooper, found the body the next morning with Luebbehusen's legs spread apart and her pants pulled down to her ankles.[107] Blood covered the walls and floors.[108] The Hoopers called the police who began an investigation.[109] Later, Dr. Albert Venables, a pathologist, performed an autopsy on the body.[110] During the autopsy, Dr. Venables discovered lacerations on the nipples and thighs and a tear in the vagina, all of which he determined were caused after the victim's death.[111]

The police later discovered Luebbehusen's car one block away from the Second Chance Halfway House.[112] The police asked the halfway house's director, Ken Hood, to check the sign-in sheets on the night of Luebbehusen's death.[113] At this time, Schiro approached a counselor and stated that he had something he needed to talk about.[114] The counselor referred Schiro to Hood, to whom Schiro confessed the killing of Luebbehusen.[115] Hood informed the police of this confession and escorted Schiro to police headquarters.[116] Mary T. Lee, Schiro's girlfriend, later came forward to say that Schiro had admitted the killing to her shortly after it had happened.[117]

Schiro was charged with three counts of murder for the death of Luebbehusen.[118] Count I alleged that he "knowingly" killed Luebbehusen.[119] Count II charged him with killing while committing rape.[120] Lastly, Count III charged Schiro with killing while commit-

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103 *Id.*
104 *Id.*
105 *Id.*
106 *Id.*
107 Schiro v. Clark, 754 F. Supp. 646, 650 (N.D. Ind. 1990) (Michael Hooper, Darlene's ex-husband, was also present when the body was discovered).
108 *Id.*
109 *Id.*
110 *Id.*
111 *Id.*
112 *Id.*
113 *Id.*
114 *Id.*
115 *Id.*
116 *Id.*
117 *Id.*
118 Schiro v. Farley, 114 S. Ct. 783, 787 (1994).
119 *Id.*
120 *Id.*

ting criminal deviate sexual conduct.[121] The defense argued that Schiro was either not guilty by reason of insanity or guilty but mentally ill.[122] The trial court gave the jury ten possible verdicts, consisting of the above three counts, lesser included offenses, not guilty by reason of insanity, guilty but mentally ill, and not guilty.[123] The jury returned a verdict of guilty as to Count II—killing while attempting to commit rape—and left all of the remaining verdicts blank.[124] There was no explicit culpability requirement as to the killing within this count.[125] Under Indiana law, the jury could have returned a guilty verdict on more than one count.[126]

At the sentencing hearing, the prosecution sought the death penalty.[127] Under Indiana law, the State must prove beyond a reasonable doubt the existence of at least one statutorily recognized aggravating circumstance.[128] Two aggravating factors were particularly relevant to Schiro's crime: intentional killing in the course of rape, and intentional killing in the course of criminal deviate conduct.[129] The defense argued that mitigating circumstances should bar imposition of death.[130] Based on these factors, the jury unanimously recommended against the imposition of the death penalty.[131] Acting contrary to this recommendation, the judge imposed the death penalty upon Schiro.[132]

On direct appeal to the Supreme Court of Indiana, Schiro raised seven errors for appeal.[133] Most relevant among these was the ques-

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121 *Id.*

122 *Id.* (Indiana law permits the alternative verdict of guilty but mentally ill).

123 *Id.*

124 *Id.* The verdict sheets relating to the three explicit counts did not provide space or ask for a decision as to guilt or innocence on each count. Rather, each count allowed for only a finding of guilt as to the specific charges within. The jury's only opportunity to express innocence as to a specific count if it had chosen to return a verdict of guilty on another count was to leave the sheet in question blank.

125 Brief for Petitioner at 9, Schiro v. Farley, 114 S. Ct. 783 (1994) (No. 92-7549).

126 Schiro v. Farley, 114 S. Ct. 783, 787 (1994).

127 Petitioner's Brief at 9, *Schiro* (No. 92-7549).

128 *Id.*

129 *Id.* at 9-10.

130 *Id.*

131 *Id.* at 10.

132 Under Indiana law:

> If the [death penalty] hearing is by the jury, the jury shall recommend to the court whether the death penalty should be imposed. . . . The court shall make the final determination of the sentence, after considering the jury's recommendation, and the sentence shall be based on the same standards that the jury was required to consider. The court is not bound by the jury's recommendation.

Schiro v. State, 451 N.E.2d 1047, 1054 (Ind. 1983) (alterations in original) (quoting IND. CODE 35-50-2-9).

133 *Id.* at 1049.

tion of whether the trial court erred in imposing the death penalty.[134] The court addressed two important sub-questions within this basis of appeal: first, whether the death penalty procedure under the Indiana Code places a defendant in double jeopardy, and second, whether the imposition of the death penalty in Schiro's case failed to conform adequately to that Code.[135]

Schiro argued that the trial court's failure to adhere to the jury's recommendation against the imposition of death placed him in double jeopardy.[136] Citing *Bullington v. Missouri*,[137] Schiro claimed that since the State had the opportunity to argue for the death penalty in front of a jury, it should not get to relitigate that issue a second time before the sentencing judge.[138] The court denied this claim, distinguishing Schiro's case from *Bullington* on the grounds that the sentencing procedure did not amount to a retrial since only the judge could make a final determination of sentence, regardless of the jury's recommendation.[139]

However, the court ordered the trial judge to make written findings as to the aggravating and mitigating circumstances that led to the imposition of death.[140] Schiro objected to this *nunc pro tunc* entry[141] as a violation of the Double Jeopardy Clause and claimed that it was inconsistent with the Indiana Code.[142] The court denied Schiro's arguments, stating that the *nunc pro tunc* entry was not a relitigation of issues, but rather simply a clarification of process.[143]

Schiro's arguments did find favor, however, within two dissenting opinions. Specifically, Justice Prentice observed that the sentencing judge had no basis by which to find that Schiro had intentionally killed Luebbehusen, since the count under which he was convicted contained no express level of required culpability.[144] He went on to state that this lack of explicit *mens rea* meant the jury could have con-

134 *See Id.*

135 *Id.* at 1053.

136 *Id.* at 1054.

137 451 U.S. 430 (1981) (after the initial trial and sentence to life in prison were overturned, the Court determined that, under the Double Jeopardy Clause, the State could not seek death penalty a second time after guilt was found at retrial).

138 Schiro v. State, 451 N.E.2d 1047, 1054 (Ind. 1983).

139 *Id.* at 1055.

140 Under Indiana's death penalty statute, trial judges must lay out their written findings for imposing a sentence of death. The Supreme Court of Indiana felt that this was not properly done in this case and ordered the trial judge to make a *nunc pro tunc* entry explaining his rational for sentencing Schiro to death. *Id.* at 1056.

141 The entry specified that the trial judge had found no mitigating circumstances and had determined that Schiro was guilty of intentionally killing while committing rape.

142 *Id.*

143 *Id.* at 1057.

144 *Id.* at 1068 (Prentice, J., dissenting).

victed Schiro for killing intentionally, knowingly, or accidently.[145] Justice Prentice claimed that there was no way that the trial judge could have determined beyond a reasonable doubt that Schiro was guilty of 'intentional' murder for sentencing purposes.[146] Justice DeBruler shared this view, concluding that the *nunc pro tunc* entry provided no explicit formula explaining how the trial judge reached his final determination as to the culpability for killing.[147]

Following the United States Supreme Court's denial of certiorari,[148] Schiro sought post-conviction relief in the Indiana Supreme Court on the grounds that the trial judge was biased, the judge improperly considered Schiro's behavior during trial, and Schiro received ineffective assistance of counsel.[149] The court rejected Schiro's claim that the trial judge based his sentence solely on his behavior, pointing to the trial judge's proper finding of the aggravating circumstance of killing while committing rape.[150] The court also quickly dismissed Schiro's claim of ineffective counsel.[151] Justice DeBruler again dissented, agreeing with the defendant's assertion that the trial judge considered Schiro's behavior without allowing for the opportunity to respond to such observations.[152] The United States Supreme Court again denied Schiro's writ of certiorari.[153]

Schiro then instituted a writ of habeas corpus in the United States District Court for the Northern District of Indiana.[154] The district judge remanded back to state court to allow Schiro to exhaust all state remedies prior to federal habeas corpus proceedings.[155] Schiro raised four bases of appeal including issues of res judicata, ineffective representation, accumulated error, and foreclosure.[156] The Supreme Court of Indiana quickly disposed of the first three claims.[157] As to the issue of foreclosure, Schiro claimed that since the jury's conviction

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145 *Id.* (Prentice, J., dissenting).

146 *Id.* (Prentice, J., dissenting).

147 *Id.* at 1067-68 (DeBruler, J., dissenting).

148 Schiro v. Indiana, 464 U.S. 1003 (1983). This was the first of three certiorari denials this case would receive prior to the Court granting certiorari in 1993.

149 Schiro v. State, 479 N.E.2d 556, 558 (Ind. 1985).

150 Schiro claimed that the trial judge sentenced him based on observations that Schiro was continuously rocking while in the jury's view, but would halt such activity whenever the jury was absent. The trial judge does indeed refer to this rocking motion within his *nunc pro tunc* entry regarding his decision to impose death, however, read in context, this comment is presented to demonstrate the absence of any mitigating factors. *Id.* at 559.

151 *Id.* at 561.

152 *Id.* at 562 (DeBruler, J., dissenting).

153 Schiro v. Indiana, 475 U.S. 1036 (1986).

154 Schiro v. State, 533 N.E.2d 1201, 1204 (Ind. 1989).

155 *Id.*

156 *Id.*

157 *Id.* at 1203-08.

for felony murder lacked the element of intent, the aggravating circumstance of "intentional" killing could not be considered in the penalty phase.[158] The Supreme Court of Indiana disagreed, reasoning that because felony murder is not a lesser included offense of intentional murder, the issue of intent had not been foreclosed regardless of the jury's failure to confront that issue.[159] Justice DeBruler disagreed with this analysis in the dissent, stating that the jury's failure to return a guilty verdict on Count I—"knowingly" killing—acts as an implicit acquittal on the issue of intent, a higher level of culpability.[160]

The Supreme Court again denied Schiro's writ of certiorari.[161] The Court's denial contained a rare separate written concurrence from Justice Stevens.[162] Justice Stevens began by pointing out that a denial of a writ of certiorari is not meant to be construed as an affirmance of a lower court's decision.[163] Indeed, such denial "expresses no opinion on the merits of the case."[164] Justice Stevens chose to comment on the merits, however, based upon the troubling aspects of this particular case.[165] Recognizing that the issues had yet to be addressed in federal court, Justice Stevens observed that Indiana's ruling on the issue of double jeopardy should not detract from the important federal dimension that such a question posed.[166] Specifically, he drew attention to the fact that although Indiana's ruling fails to regard silence as to Count I as an acquittal on the issue of intent, such a decision may not determine the constitutional collateral estoppel aspects of that issue.[167]

After the third denial of certiorari, Schiro once again raised issues of double jeopardy and foreclosure in federal district court.[168] Schiro's double jeopardy claim rested on the Indiana Supreme Court's order for a *nunc pro tunc* entry and on the trial judge's decision to ignore the jury's recommendation against imposition of the

158 *Id.* at 1207.

159 *Id.* at 1208.

160 Justice DeBruler felt that the prosecution had three opportunities upon which to argue the issue of intent: before the jury at trial, before the jury at the sentencing hearing, and before the judge after the jury's recommendation against death. Only in the last of these cases did the prosecution succeed. The failure to convince the jury, however, should have foreclosed the issue of intent altogether. *Id.* at 1209.

161 Schiro v. Indiana, 493 U.S. 910 (1989).

162 *Id.* (Stevens, J., concurring).

163 *Id.* (Stevens, J., concurring).

164 *Id.* (Stevens, J., concurring).

165 *Id.* at 911 (Stevens, J., concurring).

166 *Id.* at 913 (Stevens, J., concurring).

167 *Id.* (Stevens, J., concurring). This view was a precursor to Justice Stevens' dissent in Schiro v. Farley four years later.

168 Schiro v. Clark, 754 F. Supp. 646 (N.D. Ind. 1990).

death penalty.[169] Citing to *United States v. Cosentino*,[170] the district court determined that the new entry did not violate double jeopardy since it was based entirely on evidence already in the record.[171] The district court further relied on the Supreme Court's decision to allow a new sentencing hearing in *Hitchcock v. Dugger*,[172] determining that if a new hearing can be held, the Supreme Court of Indiana may at least demand a more explicit statement from the sentencing judge.[173] As to the trial judge's decision to reject the jury's recommendation, the district court determined that the Indiana Supreme Court had rightly and properly decided the constitutionality of the procedure in earlier proceedings.[174] On the issue of foreclosure, the district court cited to *Michigan v. Long*,[175] stating that the question of whether or not there is an acquittal is largely a matter for state law.[176] As a result, the court found no constitutional merit to Schiro's argument of foreclosure.[177]

Schiro appealed to the Seventh Circuit, again raising his claim of double jeopardy.[178] Following the reasoning of the district court, the Seventh Circuit reinforced that the decision as to what constitutes an acquittal is largely a matter for state law and had already been determined contrary to Schiro's claim.[179] Citing to *Ashe v. Swenson*,[180] the Seventh Circuit went on to address the collateral estoppel argument raised by Justice Stevens in denial of certiorari.[181] Based on this precedent, the court concluded that Schiro had not adequately demonstrated that the jury verdict actually and necessarily determined the issue he sought to foreclose.[182]

Finally, the Supreme Court granted certiorari[183] to determine whether the imposition of the death penalty on Schiro was a violation of the Double Jeopardy Clause or collateral estoppel or both.[184]

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169 *Id.* at 651-53.

170 869 F.2d 301, 309 (7th Cir. 1989).

171 Schiro v. Clark, 754 F. Supp. 646, 651 (N.D. Ind. 1990).

172 481 U.S. 393 (1987).

173 Schiro v. Clark, 754 F. Supp. 646, 651-52 (N.D. Ind. 1990).

174 *Id.* at 653-54.

175 463 U.S. 1032 (1983).

176 Schiro v. Clark, 754 F. Supp. 646, 660 (N.D. Ind. 1990).

177 *Id.*

178 Schiro v. Clark, 963 F.2d 962 (7th Cir. 1992).

179 *Id.* at 970.

180 397 U.S. 436 (1970).

181 Schiro v. Clark, 963 F.2d 962, 970 n.7 (7th Cir. 1992).

182 *Id.*

183 Schiro v. Clark, 113 S. Ct. 2330 (1993).

184 *Id.*

IV. SUMMARY OF OPINIONS

A. MAJORITY OPINION

In an opinion written by Justice O'Connor,[185] the Supreme Court affirmed the lower court's decision refusing to vacate Thomas Schiro's death sentence.[186] Relying on *Stroud v. United States*,[187] Justice O'Connor reasoned that because a second sentencing proceeding is ordinarily constitutional following a retrial, an original sentencing hearing does not violate the Double Jeopardy Clause.[188] The Court further rejected Schiro's claim that his death sentence violated the constitutional principles of collateral estoppel.[189] Specifically, Justice O'Connor stated that Schiro failed to meet his burden of showing that the issue upon which he desired foreclosure had been decided in his favor.[190]

Justice O'Connor began by addressing the State's claim that to grant relief to Schiro would be contrary to the holding of *Teague v. Lane*.[191] Recognizing that the State failed to address this issue in its brief, Justice O'Connor declined to address the State's concern.[192] Reasoning that a State may waive the *Teague* bar, Justice O'Connor referred to the State's silence on the issue as "significant."[193] While the Supreme Court could have addressed the *Teague* argument on its own, Justice O'Connor declined to do so.[194]

Next, Justice O'Connor addressed Schiro's argument that his death sentence violated the Double Jeopardy Clause.[195] Citing *United States v. DiFrancesco*,[196] the Court recognized that the controlling constitutional principle of the Clause is to prevent subsequent prosecution for the same offense.[197] Schiro urged that the court should treat his sentencing phase as a subsequent prosecution. Following the principles of *Stroud*, Justice O'Connor declined to recognize Schiro's claim,[198] declaring that if a second sentencing proceeding is generally

185 Chief Justice Rehnquist, and Justices Scalia, Kennedy, Souter, Thomas, and Ginsburg joined Justice O'Connor.
186 Schiro v. Farley, 114 S. Ct. 783 (1994).
187 251 U.S. 15 (1919).
188 Schiro v. Farley, 114 S. Ct. 783, 789 (1994).
189 *Id.* at 790-92.
190 *Id.* at 790.
191 *Id.* at 788; Teague v. Lane, 489 U.S. 288 (1989) (barring retroactive application of new rules to federal habeas corpus cases).
192 Schiro v. Farley, 114 S. Ct. 783, 788-89 (1994).
193 *Id.*
194 *Id.* at 789.
195 *Id.*
196 449 U.S. 117 (1980).
197 Schiro v. Farley, 114 S. Ct. 783, 789 (1994).
198 *Id.*

not violative of the Double Jeopardy Clause, a first sentencing hearing certainly cannot be such a violation.[199] In support of this proposition, Justice O'Connor further reasoned that according to *North Carolina v. Pearce*,[200] a second sentencing hearing was allowable if the first was improperly based on evidence of prior crimes which ought to have been deemed inadmissible for sentencing purposes.[201] Further, Schiro's argument that he had to relitigate the issue of intent was in and of itself unpersuasive.[202] Indeed, Justice O'Connor found that since a larger amount of relitigation of past crimes takes place in sentencing based on previous conduct, Schiro's argument lacked merit.[203]

Justice O'Connor went on to state that the Court's previous decision in *Bullington v. Missouri*[204] was not to the contrary.[205] Interpreting *Bullington*, Justice O'Connor pointed out that the Court did not find an absolute prohibition against harsher sentencing at retrial.[206] Rather, the majority reasoned that the finding in *Bullington* provided a "narrow exception" because the capital sentencing scheme at issue was manifestly different from previous questions of double jeopardy that the Court had addressed.[207] Justice O'Connor found that the facts of Schiro's case were markedly distinguishable.[208] Since no second capital sentencing hearing ever took place, the majority reasoned that Schiro's case did not implicate the *Bullington* prohibition.[209] Indeed, Justice O'Connor found that the State conducted only one trial and one capital sentencing procedure as part of its "one fair opportunity" to prosecute a defendant.[210]

The Court went on to dismiss Schiro's claim that collateral estoppel should act to vacate his death sentence.[211] Relying on *Ashe v. Swenson*,[212] Justice O'Connor reasoned that to demonstrate issue preclusion defendants must show that an issue or fact has been validly

199 *Id.*
200 395 U.S. 711 (1969).
201 Schiro v. Farley, 114 S. Ct. 783, 789 (1994).
202 *Id.* at 789-90.
203 *Id.*
204 451 U.S. 430 (1981) (holding that a harsher sentence may not be assigned on retrial even though the earlier conviction was overturned altogether).
205 Schiro v. Farley, 114 S. Ct. 783, 790 (1994).
206 *Id.*
207 *Id.*
208 *Id.*
209 *Id.*
210 *Id.*
211 *Id.* at 790-92.
212 397 U.S. 436 (1970).

and finally decided in their favor.[213] Schiro's claim that the jury's failure to return a verdict on Count I—"knowingly" killing—should act as an acquittal failed to satisfy this burden.[214] Justice O'Connor provided that although the Indiana Supreme Court had already decided the question of whether the jury's failure to return a verdict as to Count I signified an acquittal, the preclusive effect of the jury's action provided a federal question that the Court had to address.[215]

Justice O'Connor reasoned that under the principles of *Ashe*, the Court first had to consider whether the jury in Schiro's case could have rationally grounded its verdict on an issue other than intent.[216] To determine the answer, the Court took into account the record of the entire proceeding, placing the burden on the defendant to demonstrate conclusively that an issue had been foreclosed.[217] Justice O'Connor reasoned that because the jury instructions were ambiguous, the jury could have grounded its verdict on an issue other than Schiro's intent to kill.[218] Specifically, the majority referred to the fact that the jury was not instructed nor expected to return verdicts as to every count.[219] Justice O'Connor also pointed to evidence that may have led the jury to believe that it could only return a verdict on one count.[220] Notably, closing arguments for both the defense and the prosecution implied that this was what the jury ought to do.[221] Justice O'Connor reasoned that although the jury instructions allowed for the return of more than one verdict, there was no way to conclusively determine whether the jury understood this in light of the implications from closing argument.[222]

Justice O'Connor further determined that the jury instructions as to the question of intent were ambiguous, regardless of Schiro's claim that intent was not necessary to a finding of guilt for Count II.[223] Relying on the trial record, the majority pointed to the fact that the trial judge instructed the jury that the State had to prove intent for both murder and felony murder.[224] Justice O'Connor reasoned that as a result of such instructions by the judge, the jury could rationally have believed that it was required to find knowing or intentional killing

213 Schiro v. Farley, 114 S. Ct. 783, 790 (1994).
214 *Id.*
215 *Id.* at 790-91.
216 *Id.* at 791.
217 *Id.*
218 *Id.*
219 *Id.*
220 *Id.*
221 *Id.*
222 *Id.*
223 *Id.*
224 *Id.*

before returning a verdict of guilty on any of the three counts.[225]

The majority further provided that the evidence from trial indicated that the issue of intent was not significant in the trying of the case.[226] Justice O'Connor stated that Schiro's defense counsel never raised the argument that the jury ought to find Schiro not guilty as to the first count because of the issue of intent.[227] Further, even at the sentencing hearing, the defense never addressed the issue of intent, but rather attempted only to provide mitigating factors that the judge and jury should consider in weighing the appropriate sentence to impose.[228]

The majority did acknowledge that, in certain circumstances, a jury's silence is an acquittal for purposes of double jeopardy.[229] Justice O'Connor reasoned, however, that for collateral estoppel to have effect in such circumstances, the burden of showing that an issue has been "actually and necessarily" determined lies with the defendant.[230] Because the Court determined that the jury instructions at the initial trial were ambiguous and could have been interpreted to mean that the jury could only return one verdict, the threshold test for raising a question of collateral estoppel could not be met.[231]

B. JUSTICE STEVENS' DISSENT

Justice Stevens, writing in dissent,[232] would vacate Schiro's death sentence based on collateral estoppel.[233] Justice Stevens reasoned that because the jury was twice offered the ability to find intent, but declined to do so both times, the opportunity for the trial judge to sentence based on an aggravating circumstance which required intent ought to have been foreclosed.[234] Indeed, Justice Stevens made the even stronger claim that the majority opinion violated the very essence of the Double Jeopardy Clause.[235]

Justice Stevens argued that, even though the majority opinion centered on the gruesome facts of Schiro's crime, it is for precisely that reason that the issue of foreclosure ought to have weighed in

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225 *Id.* at 792.
226 *Id.*
227 *Id.*
228 *Id.*
229 *Id.*
230 *Id.*
231 *Id.* at 790-92.
232 Justice Blackmun, who also wrote a separate dissent, joined Justice Stevens' dissent.
233 Schiro v. Farley, 114 S. Ct. 783, 794 (1994) (Stevens, J., dissenting).
234 *Id.* (Stevens, J., dissenting).
235 *Id.* (Stevens, J., dissenting).

Schiro's favor.[236] Specifically, Justice Stevens reasoned that such a horrific crime should tend to increase a jury's tendency towards imposing death.[237] The jury's failure to find Schiro guilty of intentional murder and its refusal to recommend the death sentence were therefore, according to Justice Stevens, indicative of its resolve on the issue of intent.[238] The dissent further argued that there were more than adequate grounds upon which the jury could have reached this conclusion.[239] Indeed, even though no one at trial disputed that Schiro was responsible for causing Luebbehusen's death, the defense raised the issue of intent by calling into question Schiro's mental condition.[240] Specifically, Justice Stevens found compelling evidence that showed Schiro's addiction to drugs and alcohol, prior mental problems, and a love interest in a mannequin.[241]

Justice Stevens further argued that, despite the majority's contention, a close inspection of the verdict forms presented no issue of ambiguity.[242] The dissent reasoned that since each of the ten forms contained a space for the jury to check if it agreed with that specific instruction, the only way to record disagreement was to leave a particular form blank.[243] Following the precedent of *Green v. United States*,[244] Justice Stevens argued that silence as to a particular count in combination with a return of guilty as to another count is an acquittal of the former count.[245] Justice Stevens reasoned that such a result ought to have foreclosed the issue of intent for sentencing purposes.[246] As a result, Justice Stevens concluded that the trial judge

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236 *Id.* (Stevens, J., dissenting).
237 *Id.* (Stevens, J., dissenting).
238 *Id.* (Stevens, J., dissenting).
239 *Id.* (Stevens, J., dissenting).
240 *Id.* (Stevens, J., dissenting).
241 *Id.* (Stevens, J., dissenting).
242 *Id.* (Stevens, J., dissenting).
243 *Id.* (Stevens, J., dissenting).
244 335 U.S. 184 (1957).
245 Justice Stevens specifically stated that: "the jury's silence on two counts should be treated no differently, for double jeopardy purposes, than if the jury had returned a verdict that expressly read: 'We find the defendant not guilty of intentional murder but guilty of felony murder.'" Schiro v. Farley, 114 S. Ct. 783, 795 (1994).
246 Stevens quoted language from Indiana Supreme Court Justice DeBruler's dissent:

> At the trial, the prosecution used every resource at its disposal to persuade the jury that appellant had a knowing state of mind when he killed his victim. It failed to do so. At the sentencing hearing before the jury it had an opportunity to persuade the jury that appellant had an intentional state of mind when he killed his victim. The jury returned a recommendation of no death. At the sentencing hearing before the judge, the prosecution had yet another opportunity to demonstrate an intentional state of mind, and finally succeeded. In my view, the silent verdict of the jury on Count I, charging a knowing state of mind, must be deemed the constitutional equivalent of a final and immutable rejection of the State's claim that appellant deserves to die because he had an intentional state of mind. That verdict acquitted ap-

improperly based Schiro's death sentence on an issue the jury had already rejected, violating the Double Jeopardy Clause.[247]

The second portion of Justice Stevens' dissent provided direct criticism of the majority's reasoning.[248] Specifically, the dissent attacked the majority's assertion that the jury may not have resolved the issue of intent in Schiro's favor by addressing Schiro's confession, the jury instructions, and the jury's belief on whether or not it could return multiple verdicts.[249] Justice Stevens reasoned that even though the confession could have been sufficient to find intent, there was no indication from the record as a whole that it was sufficient.[250] As for the jury instructions, Justice Stevens argued that, as most naturally read, they did not support a finding of ambiguity.[251] Lastly, Justice Stevens argued that the majority's finding that the jury might have believed it could return only one verdict was tenuous at best.[252] Specifically, he pointed to the fact that the instructions to the jury foreman provided that such foreman "must sign and date the verdict(s) to which you all agree."[253] In addition, Justice Stevens argued that the majority's reliance on innocuous statements by the prosecution and defense in closing arguments was no basis by which to uphold a death sentence.[254]

Justice Stevens concluded by pointing out that once the jury found Schiro guilty of felony murder, the State would certainly not have been able to reprosecute Count I, regardless of whether the jury left the form blank or actually indicated acquittal.[255] The dissent reasoned, therefore, that as to Count I, the jury's inaction was an implicit acquittal on the issue of intent. Therefore, according to Justice Stevens, the trial judge's decision to sentence Schiro based on an issue of intent violated the Double Jeopardy Clause.[256]

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pellant of that condition which was necessary to impose the death penalty under this charge.

Id. (Stevens, J., dissenting).

247 *Id.* at 796 (Stevens, J., dissenting).

248 *Id.* (Stevens, J., dissenting).

249 *Id.* (Stevens, J., dissenting).

250 *Id.* (Stevens, J., dissenting).

251 Specifically, there were two separate instructions, one for knowing or intentional killing in Count I, and a separate, non-intent instruction related to felony murder. The specific jury instructions to which Justice Stevens referred were No. 8 as to Count I and No. 4 as to felony murder in Counts II and III. Justice Stevens further pointed out that not once during any time when the Supreme Court of Indiana addressed this case did the parties raise an issue of ambiguity. *Id.* at 797 (Stevens, J., dissenting).

252 *Id.* (Stevens, J., dissenting).

253 *Id.* (Stevens, J., dissenting).

254 *Id.* (Stevens, J., dissenting).

255 *Id.* at 798 (Stevens, J., dissenting).

256 *Id.* (Stevens, J., dissenting).

C. JUSTICE BLACKMUN'S DISSENT

Justice Blackmun dissented to express his view that *Bullington v. Missouri*[257] provided a basis by which the Court should vacate Schiro's death sentence.[258] Under *Bullington*, courts cannot force defendants to face the possibility of death at a subsequent sentencing hearing if they had been acquitted of capital punishment at an earlier sentencing procedure.[259] Justice Blackmun argued that the sentencing procedure in Schiro's case was nearly identical to the procedure in *Bullington*.[260] Because of the "trial-like" approach of the sentencing hearing, defendants must feel themselves in jeopardy when the jury returns to give its recommended sentence.[261] Justice Blackmun contended that this possibility of peril ought to prevent the trial judge from overturning the recommendation against death, especially when, as in Schiro's situation, the decision conflicts with the jury's implied acquittal of Count I—knowingly killing.[262]

IV. ANALYSIS

This Note argues that the real reason for the Supreme Court's granting of certiorari was to narrow the scope of *Bullington v. Missouri*.[263] By refusing to apply the holding of *Bullington* to Schiro's case, the Court implicitly adjusted the focus that had been placed on procedure without explicitly stating such a result. Justice O'Connor could have easily distinguished the two cases on purely factual grounds. Instead, however, Justice O'Connor chose to refer to *Bullington* as a "narrow exception" and ignore its focus on procedure.[264] This resulted in the Court's reaching the correct decision in *Schiro* for ill thought out reasons.

This Note further argues that Justice Stevens' dissent misstated the law of collateral estoppel. The majority correctly placed the burden of proof on the defendant under the precedent of *Ashe v. Swenson*, and Justice Stevens' own arguments indicate the correctness of the majority's result.

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257 451 U.S. 430 (1981).

258 Schiro v. Farley, 114 S. Ct. 783, 792-93 (1994) (Blackmun, J., dissenting).

259 *Id.* at 793 (Blackmun, J., dissenting).

260 *Id.* (Blackmun, J., dissenting).

261 *Id.* (Blackmun, J., dissenting).

262 *Id.* (Blackmun, J., dissenting).

263 451 U.S. 430 (1981).

264 Schiro v. Farley, 114 S. Ct. 783, 790 (1994).

A. *BULLINGTON* VERSUS *SCHIRO*: DISTINGUISHING FACT VERSUS PROCEDURE

Justice O'Connor summarily rejected Schiro's claim that *Bullington* ought to control by stating that the two cases were "manifestly different."[265] A close look at the two cases, however, suggests that this distinction is not immediately obvious. Indeed, the sentencing procedure outlined in *Bullington* is nearly identical to that presented in *Schiro.* Specifically, both cases dealt with a bifurcated process[266] in which the prosecution had to prove aggravating circumstances beyond a reasonable doubt to allow for the imposition of the death penalty.

Justice O'Connor appears to recognize the special nature of this process in *Bullington,* but fails to recognize the procedural similarity to *Schiro.* Justice O'Connor's language in *Schiro* bears this out:

> In Bullington we recognized the general rule that "the Double Jeopardy Clause imposes no absolute prohibition against the imposition of a harsher sentence at retrial." Nonetheless, we recognized a *narrow exception* to this general principle because the capital sentencing scheme at issue "differ[ed] significantly from those employed in any of the Court's cases where the Double Jeopardy Clause has been held inapplicable to sentencing."[267]

The trial-like nature of the sentencing process which Bullington faced in Missouri is almost identical to the punishment phase that Schiro faced in Indiana. Both men faced either death or life in prison. In both cases, the prosecution had to show the existence of aggravating circumstances beyond a reasonable doubt. Both cases allowed the defense to show mitigating circumstances to negate the effect of the prosecution's arguments. And both cases required the trier of fact to make written findings explaining its decision.

There were, of course, some procedural differences between the two cases. However, these differences seemingly only add weight to Schiro's claim of double jeopardy. Specifically, under Missouri law, in *Bullington,* the jury was the final trier of fact. In *Schiro,* however, under Indiana law, the jury recommended sentence in full view of the defendant, but the final trier of fact was the sentencing judge. Therefore, while *Bullington* addressed the issue of a bifurcated process, *Schiro,* for all intents and purposes, addressed a trifurcated process. In other words, not only did Schiro face the same two tiered procedure as Bullington, he had to run the gantlet a third time as well. Such a

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265 *Id.*

266 A bifurcated trial is a "[t]rial of issues separately, *e.g.,* guilt and punishment . . . in criminal trial." BLACK'S LAW DICTIONARY 163 (6th ed. 1990).

267 Schiro v. Farley, 114 S. Ct. 783, 790 (1994) (emphasis added) (citations omitted).

process gives the prosecution vast leeway in approaching argument and proving the aggravating circumstance and issue of intent necessary to impose death. Specifically, as Justice Blackmun pointed out in his dissent, the prosecution argued its case at trial before the jury, at sentencing before the jury, and at sentencing before the judge.

As an issue of *procedure*, the cases are certainly not "manifestly different" as Justice O'Connor argued. Quite the opposite, as a question of *procedure* the two cases are, if anything, manifestly similar. The similarity between the two cases breaks down only when the surrounding facts are compared. Specifically, Bullington argued double jeopardy in relation to a second sentencing hearing, while Schiro raised that same issue in regards to a first sentencing hearing. This difference is the basis by which Justice O'Connor distinguished the two cases. Why then did she insist on referring to *Bullington* as a "narrow exception"?

There are two possible explanations. First, and most unlikely, is that Justice O'Connor simply did not recognize the need to differentiate between a *procedural* comparison and a *factual* one. Justice O'Connor's own language, however, makes this explanation suspect. Specifically, after laying out the procedural elements of the sentencing process in *Bullington* as a "narrow exception," she subsequently stated that this case did not implicate "the *Bullington* prohibition against a second capital sentencing proceeding."[268] Thus, Justice O'Connor saw the factual versus procedural difference but chose not to make it. The second possible explanation is that Justice O'Connor intentionally ignored the difference between procedure and fact in an attempt to reduce the scope of *Bullington*. This argument is more compelling.

A vastly different Court decided *Bullington* thirteen years prior to *Schiro*. The vote in *Bullington* was a bare majority of five justices while the other four joined in dissent. Interestingly, of the five in the majority, only two justices remained on the Court in 1994: Justice Blackmun, the 1981 author, and Justice Stevens. Their dissents in *Schiro*, especially Justice Blackmun's, bear out Justice O'Connor's true motivation in referring to *Bullington* as a "narrow exception." Justice O'Connor changed the scope of *Bullington*'s precedent by misapplying it rather than openly adjusting it. As a result, *Bullington*, for all intents and purposes, has lost its proper focus on sentencing procedure and has become instead an anomaly in the Supreme Court's history of double jeopardy cases.

Justice O'Connor has likely succeeded in creating a "narrow exception" where none previously existed. Even more troubling, such a

268 *Id.*

result was not necessary to the proper determination of *Schiro*. *Bullington* and *Schiro* are distinguishable based upon purely factual circumstances. Justice O'Connor's recognition of this makes her reference to *Bullington*'s procedure as a "narrow exception" a covert operation to eliminate with prejudice what was the focus of a narrowly decided case thirteen years ago.

B. COLLATERAL ESTOPPEL AND INTENT: JUSTICE STEVENS' MISAPPLICATION

Justice Stevens' dissenting argument that Schiro's death sentence should be overturned under collateral estoppel principles is a clear misstatement of prior case law. Specifically, Justice Stevens' attempt to apply the doctrine of implied acquittal from *Green v. United States*[269] ignored important distinguishing factors that make *Green* inapplicable to Schiro's case. As a result, the majority correctly relied on the burden of proof standard defined in *Ashe v. Swenson* in declining to address Schiro's collateral estoppel claim.

Justice Stevens argued that the issue of intent was foreclosed for sentencing purposes based on the jury's silence as to Count I—"knowing" murder:

> After a full trial, the jury was given the opportunity to find Schiro guilty on each of three counts of murder, on just two of those counts, or on just one. As in the similar situation in *Green v. United States*, the jury's silence on two counts should be treated no differently, for double jeopardy purposes, than if the jury had expressly read: "We find the defendant not guilty of intentional murder but guilty of felony murder."[270]

Even allowing for the truth of this statement, the result urged by Justice Stevens is not inevitable. Specifically, because felony murder is not a lesser included offense of intentional murder, the jury's failure to return a verdict on Count I expresses no opinion on the relevant issue of *mens rea* for Count II. Indeed, the jury could have found guilt under Count II, applying the culpability standards of intent, knowing, or reckless. There is no basis, however, to argue under which of these standards the jury reached its conclusion of guilt.

Justice Stevens argued, however, that the failure of the jury to return a guilty verdict on Count I indicated its opinion on the issue of intent. Because the jury had the option to return more than one count of guilt, he concluded that the failure to return a verdict of guilty on Count I could only have related to proof of intent: "The only rational explanation for such a verdict is a failure of proof on the issue of intent—a failure that should have precluded relitigation of

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269 355 U.S. 184 (1957).

270 *Id.* at 795 (Stevens, J., dissenting) (citations omitted).

that issue at sentencing."[271]

This conclusion is simply incorrect. Jury dynamics are anything but straightforward, and indeed many "rational explanations" exist that could explain the jury's decision without necessarily foreclosing the issue of intent. As Professor Paul H. Robinson points out:

> Juries commonly do not understand the instructions that they are given. If they do understand the instructions, they frequently are unable to remember them or apply them during jury deliberations. Even if they are able to apply them, they sometimes will not apply them if they do not agree with them.[272]

Numerous studies bear out the complications inevitable in jury dynamics. Of significance to Schiro's case, one study showed that only 65.8% of instructed jurors remembered that intent was a necessary element of first degree murder, instead of simply finding that the defendant caused the death in question.[273]

Schiro's case was more complicated than most. The jury had ten different verdict sheets which contained three separate counts, lesser included offenses, not guilty by reason of insanity, guilty but mentally ill, and not guilty. Most lawyers would have difficulty separating out the elements that distinctly apply to each verdict sheet, thus, it is evident that twelve lay persons would encounter many problems. The most probable scenario in *Schiro* is that the jury simply acted as rational human beings, attempting to combine justice with time management. Specifically, the jury likely quit deliberating after they reached agreement on a charge that accurately described what happened. It should come as no surprise that the jury would have decided on Count II. Count II provided that Schiro killed while committing rape. By finding guilt on that charge, the jury returned the most detailed verdict possible while avoiding a debate about terms such as "intent" in Count I and "criminal deviate conduct" in Count III. The fact that all three of these counts provided for the same penalty would have made the jury's decision to stop deliberating even easier.

Further, if, as Justice Stevens argued, the jury knew it could return more than one count and had decided against the issue of intent, the jury would have also returned a guilty verdict on the lesser included offense of either second degree murder or manslaughter along with Count II. Since the jury did not, Justice Stevens' argument

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271 *Id.* (Stevens. J., dissenting).

272 Paul H. Robinson, *Are Criminal Codes Irrelevant?*, 68 S. CAL. L. REV. 159, 170 (1994).

273 Geoffrey P. Kramer & Dorean M. Koenig, *Do Jurors Understand Criminal Jury Instructions? Analyzing the Results of the Michigan Juror Comprehension Project*, 23 U. MICH. J.L. REF. 401, 420 (1990).

fails its own test of logic. The more compelling argument is that a jury will simply take the easiest road to agreement. Specifically, if the jury could quickly find Schiro guilty of Count II, it may not have thought it necessary to proceed, especially since that charge most accurately described the events that took place on the night of the killing.

Allowing for this possibility, along with many others, the majority acted correctly in refusing to address Schiro's claim of collateral estoppel. As long as the possibility that intent had not been foreclosed remained, Schiro failed to establish his threshold burden. The requirements of *Ashe v. Swenson* clearly state that the burden falls on defendants to "actually and necessarily" show that an issue has been decided in their favor. The fact that felony murder is not a lesser included offense of Count I impedes Schiro's ability to do this, and provides clear distinction from *Green.*

VI. CONCLUSION

The United States Supreme Court held that Thomas Schiro's death sentence did not violate either the Double Jeopardy Clause or implicit principles of collateral estoppel. While this is the correct result, the Court reached its conclusion through the misapplication of precedent. This result has the potential to significantly redefine the Supreme Court's line of double jeopardy cases. Specifically, Justice O'Connor, by referring to *Bullington*'s focus on procedure as a "narrow exception," attempted to change the precedential value of a narrowly decided, thirteen-year-old case. The majority ignored the fact that it could have distinguished *Bullington* and *Schiro* on purely factual grounds and altered *Bullington* to create a "narrow exception" where none previously existed. How lower courts will interpret this reference remains to be seen; however, it is certain that such a discrete attempt at narrowing will only confuse the proper focus of *Bullington* on procedure.

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