

FIFTH & FOURTEENTH AMENDMENTS — DOUBLE JEOPARDY CLAUSE — A STATE CAPITAL SENTENCING PROCEEDING INVOLVING THE EXAMINATION OF AN AGGRAVATING CIRCUMSTANCE THAT IS NOT PRECLUDED AT TRIAL DOES NOT VIOLATE THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT — *Schiro v. Farley*, 62 U.S.L.W. 4064 (U.S. Jan. 18, 1994).

The Supreme Court of the United States recently held that a sentencing judge's consideration of a felony murder defendant's intent to kill as an aggravating circumstance did not violate the Double Jeopardy Clauses of the Fifth and Fourteenth Amendments to the United States Constitution. *Schiro v. Farley*, 62 U.S.L.W. 4064 (U.S. Jan. 18, 1994). In rendering this decision, the Court reasoned that the State conducted one trial and one sentencing hearing. *Id.* at 4067. The Court determined that although exceptions existed to this general rule where certain sentencing issues were left unresolved from trial, these exceptions were not applicable in this case. *Id.* at 4067 (citing *Bullington v. Missouri*, 451 U.S. 430, 438 (1981)). Additionally, the Court also held that defendant's sentencing hearing did not violate the collateral estoppel doctrine. *Id.* at 4068. In so doing, the majority posited that the defendant did not prove that the jury had determined that he lacked intent to kill. *Id.*

On February 5, 1981, Thomas Schiro raped Laura Luebbehusen numerous times and subsequently strangled her to death. *Id.* at 4065. He later confessed to several individuals, both before and after his arrest, that he had killed Luebbehusen. *Id.*

The State of Indiana charged Schiro with three counts of murder. *Id.* The first count charged Schiro with "knowingly" killing Luebbehusen, the second, with killing the victim while committing the act of rape, and the third, with killing during the commission of criminal deviant conduct. *Id.* At trial, the jury found Schiro guilty under Count Two, and refrained from recording a verdict for the other two counts. *Id.* Accordingly, the jury recommended that the defendant be sentenced to life imprisonment, rather than to death.

As per Indiana statute, however, the trial judge rejected the jury's recommendation and sentenced the defendant to death. *Id.* (citing IND. CODE ANN. § 35-50-2-9(e)(2)). The statute upon which the judge relied permitted the trial judge to override a life sentence where the State proved beyond a reasonable doubt that at least one of nine aggravating circumstances surrounded the murder of the victim. *Id.* (citing IND. CODE ANN. § 35-50-2-9(b) (Supp. 1978)). Employing § 35-50-2-9(b), the judge found that "the defendant committed the murder by intentionally killing the victim while committing or attempting to commit rape." *Id.*

On direct appeal, the Indiana Supreme Court affirmed the capital

sentence. *Id.* (citing *Schiro v. State*, 451 N.E.2d 1047 (Ind. 1983)). Subsequently, on petition for certiorari, the Supreme Court of the United States declined to hear the defendant's case. *Id.* (citing *Schiro v. Indiana*, 464 U.S. 1003 (1983)). The defendant then returned to state court, seeking postconviction relief, which was thereafter denied. *Id.* This denial was then affirmed by the State supreme court. *Id.* (citing *Schiro v. State*, 479 N.E.2d 556 (Ind. 1985)). After the defendant petitioned the Supreme Court for certiorari to consider this issue of postconviction relief, the Court again denied the defendant's prayer for post-sentencing relief. *Id.* (citing *Schiro v. Indiana*, 475 U.S. 1036 (1986)).

Next, the defendant filed a petition for a writ of *habeas corpus* in the United States District Court for the Northern District of Indiana. *Id.* The Court of Appeals for the Seventh Circuit affirmed the district court's denial of a writ, noting that: first, the jury's failure to address the intentional murder charge did not constitute an acquittal; and second, the sentencing judge's subsequent consideration of that charge did not violate the doctrine of collateral estoppel. *Id.* (citing *Schiro v. Clark*, 963 F.2d 962 (1992)). The court of appeals reasoned that since the defendant could not prove beyond a reasonable doubt that the jury's verdict represented an acquittal, the issue of intentional murder was not barred from subsequent proceedings. *Id.* Following this decision, the Supreme Court of the United States granted certiorari to determine whether the sentencing judge's consideration of an aggravating circumstance which had not been resolved at trial violated the defendant's constitutional protection against successive prosecutions for the same crime. *Id.* (citing *Schiro v. Farley*, 508 U.S. — (1993)).

Writing for the majority, Justice O'Connor first considered whether providing Schiro with federal *habeas* relief would amount to a retroactive application of a new rule, in violation of *Teague v. Lane*, 489 U.S. 288 (1989) (plurality opinion). *Id.* Declining to address the effect of the *Teague* bar in the case at hand, the Justice noted that the State had failed to incorporate the issue in its brief opposing the writ of certiorari, and thus, effectively waived any right to later use the defense. *Id.*

Next, Justice O'Connor rejected the petitioner's argument that the consideration of the intent to kill as an aggravating circumstance at sentencing was analogous to a successive prosecution in violation of the Double Jeopardy Clause. *Id.* at 4066. In rejecting this contention, the Justice first acknowledged past cases in which the Court had held that the Double Jeopardy Clause protects an accused from being tried or punished more than once for the same crime. *Id.* (citing *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969); *United States v. Wilson*, 420 U.S. 332, 339 (1975); *United States v. DiFrancesco*, 449 U.S. 117, 132, 136 (1980)). Accordingly, Justice O'Connor stated that a criminal sentencing hearing conducted subsequent to a trial and a conviction is constitutionally

permissible. *Id.* Additionally, the Justice continued, prior convictions may be considered to augment subsequent convictions without violating the Double Jeopardy Clause. *Id.* (citing *Spencer v. Texas*, 385 U.S. 554, 560 (1967)).

Despite this precedent, however, the majority acknowledged the existence of a narrow exception to the rule that sentencing proceedings do not constitute successive prosecutions. *Id.* at 4067 (citing *Bullington v. Missouri*, 451 U.S. 430 (1981)). Noting that the Court in *Bullington* had held that a second capital sentencing proceeding at a retrial was, in effect, a second prosecution of an acquittee, and therefore, a violation under the Double Jeopardy Clause, Justice O'Connor opined that this case was distinguishable in two respects. *Id.* First, the Justice stated that the petitioner was never retried for the same offense, and second, Schiro never endured a second capital sentencing proceeding. *Id.* Accordingly, the Court concluded that a state is entitled to "one fair opportunity" to prosecute a defendant, and that this opportunity encompasses both the trial and the sentencing hearing. *Id.*

Next, the majority rejected the petitioner's argument that the imposition of the death sentence must be vacated because the sentence violated the collateral estoppel doctrine. *Id.* Recognizing prior cases where the Court had incorporated the doctrine into the Double Jeopardy Clause in criminal proceedings, *id.* (citing *Ashe v. Swenson*, 397 U.S. 436 (1970); *Dowling v. United States*, 493 U.S. 342, 347 (1990)), the Court opined that an issue of fact could be precluded from reconsideration in future proceedings when the defendant could prove, actually and necessarily, that the issue was already decided. *Id.* Accordingly, the Justice stated that the petitioner's failure to prove that, in convicting him for felony murder, the jury had actually and necessarily determined that he lacked the intent to kill negated the possibility of later raising a collateral estoppel argument on this issue. *Id.*

The Court nonetheless reviewed the argument *de novo* in light of the barring effect of the jury verdict, acknowledging the Indiana Supreme Court's holding that the jury's silence regarding the charge of intentional murder did not operate as an acquittal. *Id.* Under this standard of review, Justice O'Connor considered whether a rational jury could have premised its verdict on any issue other than an intent to kill. *Id.* In concluding that such alternative issues did indeed exist, the Court set forth various theories to support this rationale. *Id.*

First, Justice O'Connor commented that a blank space on the verdict sheet next to the space requiring a finding of whether or not the defendant committed the act of intentional murder did not operate as an acquittal of the crime. *Id.* The majority explained that while the jury was instructed that more than one verdict could be returned, both the prosecution and defense referred to the jury's obligation to return one verdict. *Id.*

Second, Justice O'Connor posited that if the jury had initially found Schiro guilty of murder while committing rape, the jury may have ended the inquiry there and not addressed any other possible verdict. *Id.* Third, the Court suggested that the jury instructions could have influenced the jury to leave the charge of intentional murder blank. *Id.* at 4068. Justice O'Connor noted that in one of the instructions, the trial judge had required intent to be proven for both intentional and felony murder. *Id.* Considering that when reading these instructions to the jury the trial judge had indicated that the jury could provide the best source of law, the Court posited that the jury could have actually found Schiro guilty of intentional murder despite the verdict. *Id.* Finally, the Court noted that the trial evidence, particularly Schiro's own confessions, warranted a finding that the petitioner acted with intent. *Id.* Acknowledging that a jury's silence in some instances may operate as an acquittal, the Court expounded that no such finding will be made unless a defendant can prove beyond a reasonable doubt that a finding was indeed made and decided in his favor. *Id.* Accordingly, the Court affirmed the state supreme court's decision to permit the judge's consideration of Schiro's intent to kill as an aggravating circumstances at his sentencing for a felony murder conviction, and concluded that such a consideration at sentencing did not violate the Double Jeopardy Clause. *Id.*

In a dissenting opinion, Justice Blackmun argued that Schiro's case fell within the exception set forth in *Bullington*; thus, mandating that his death sentence should be vacated. *Id.* The Justice posited that the essence of *Bullington* was that capital sentencing proceedings can violate the Double Jeopardy Clause because the proceedings are "trial-like." *Id.* As such, Justice Blackmun opined that Schiro's case was analogous to *Bullington* and not distinguishable as the majority had suggested, because the sentencing phase so closely resembled a retrial. *Id.* at 4068-69 (Blackmun, J., dissenting).

Justice Blackmun further disagreed with the majority's conclusion that the doctrine of collateral estoppel did not preclude the judge's consideration of Schiro's intent to kill at sentencing. *Id.* The Justice explained that although the intent issue may not have been, in fact, determined, Schiro was impliedly acquitted of intentional murder because the jury failed to find him guilty on that charge and recommended a life sentence. *Id.* at 4069 (Blackmun, J., dissenting). The Justice found that the trial judge's consideration of the aggravating circumstance, despite the implied acquittal, constituted a violation of the Double Jeopardy Clause. *Id.*

Justice Stevens, joined by Justice Blackmun, also dissented. *Id.* (Stevens, J., dissenting). The Justice argued that the jury's verdict represented an acquittal for intentional murder, and that, as a result, the sentencing proceeding unconstitutionally subjected the defendant to double jeopardy of successive prosecutions for the same crime. *Id.* Justice Stevens

further maintained that the jury acquitted Schiro of intentional murder based upon evidence presented at trial which suggested that the defendant was suffering from mental health problems. *Id.*

In furthering this rationale, the Justice focused upon the belief that the jury had acquitted Schiro of intentional murder. *Id.* Accordingly, Justice Stevens argued, the aggravating factor of intent to kill should not have been considered at sentencing. *Id.* This proposition, the Justice asserted, was further supported by the reasoning that the jury had acquitted Schiro of the count of intentional murder because it was convinced by the evidence that the defendant lacked the necessary mental state to warrant such a finding. *Id.*

Next, the Justice criticized the majority's conclusion that the jury's findings on the verdict sheet were ambiguous. *Id.* The only way which the jury could record a disagreement with respect to a particular verdict, the Justice explained, was to leave the verdict form blank. *Id.* This implied acquittal, the Justice contended, was wrongfully ignored by the trial judge who subsequently sentenced Schiro based upon considerations which the jury did not explicitly offer. *Id.*

Additionally, Justice Stevens argued that the majority's decision severely undermines collateral estoppel in capital sentencing hearings. *Id.* at 4072 (Stevens, J., dissenting). Not only is it improper to suggest that Schiro's confessions warranted a guilty verdict on the intentional murder count, the Justice claimed, but the impropriety became further exacerbated by the fact that the sentencing judge actually instructed the jury that to determine that the defendant committed intentional murder requires a finding of intent. *Id.* at 4071 (Stevens, J., dissenting). Furthermore, the Justice stated, it was clear from the instructions that the finding of intent referred only to the intentional murder count and not to the felony murder count. *Id.* Recounting the majority's suggestion that the jury could have felt restricted to render only one verdict, Justice Stevens labeled such a proposition "unfounded," and further proffered that the majority's reliance on isolated statements to support such a supposition was ostensibly tenuous. *Id.*

As a final point, the Justice noted that the standard of review for collateral estoppel in criminal cases is an objective one, which factors in all circumstances of a given proceeding and is not "technically restrictive." *Id.* at 4071-72 (quoting *Ashe v. Swenson*, 397 U.S. 436, 444 (1970) (Stevens, J., dissenting)). On this principle, Justice Stevens criticized the actions of the trial judge to reject the jury's findings and thereafter reexamine the intent issue as unconstitutional and improper. *Id.* at 4072 (Stevens, J., dissenting). In closing, the Justice opined that the approach taken by the majority was "technically restrictive" and in clear violation of the collateral estoppel doctrine as it applies to criminal proceedings. *Id.*

Analysis

The Supreme Court's recent decision in *Schiro v. Farley* demonstrates a movement by the Court to apply a more limited interpretation of the Double Jeopardy Clause than it had in the past. In justifying this interpretation, the majority attempted to reconcile precedents, noting that its decision was "not to the contrary." *Id.* at 4067. The effect of the Court's holding, however, is to erode the fundamental principle associated with protecting an individual from successive prosecutions for the same crime. *Id.* This erosion becomes clear upon examining the facts of *Schiro*. In *Schiro*, the trial judge rejected the jury's findings and reexamined an issue raised at trial. *Id.* By affirming Schiro's death sentence, the Court essentially expanded the range of circumstances that can be authorized at sentencing. Such an expansion, however, seriously threatens to undermine the protections of the Double Jeopardy Clause.

The Court's affirmation of Schiro's death sentence proclaims a clear message that states will be afforded a greater opportunity at sentencing despite what was previously believed to have been ensured under the Constitution. Not only can the states introduce past convictions of a defendant, but now they can also introduce any aggravating circumstances that were not "actually and necessarily" determined in the defendant's favor at trial. *See id.* at 4068. This expansion acknowledging the states' authority to sentence defendants who have committed heinous crimes exemplifies the Court's willingness to uphold death sentences where no conspicuous procedural violations exist.

In conclusion, the Court's decision in *Schiro* reflects the majority's view that a judge may override a jury's recommendation and impose the death sentence based upon aggravating factors present at trial, but not expressly accepted by the jury. Although the sentence imposed on Schiro may seem fitting for the crime, the majority's decision severely limits the constitutional protections granted to defendants against successive prosecutions for the same crime under the Double Jeopardy Clause.