A DOUBLE-TAKE AT DOUBLE JEOPARDY:
SCHIRO v. FARLEY

The right not to be placed in jeopardy more than once for the same offense is a vital safeguard in our society, one that was dearly won and one that should continue to be highly valued.1

INTRODUCTION

Thomas Schiro awaits execution in the State of Indiana for a murder he committed in 1981.2 At his trial, the State of Indiana charged Schiro with three counts of murder.3 The jury found Schiro guilty on a count of felony murder but did not return a verdict on a count of intentional murder.4 At his sentencing hearing, the State asked the jury to recommend the death penalty by finding an aggravating circumstance of intentional murder.5 The jury unanimously recommended to the trial judge that the death penalty not be imposed.6 However, the judge overrode the jury's recommendation and sentenced Schiro to death.7

On January 19, 1994, after numerous appeals, the United States Supreme Court in Schiro v. Farley8 affirmed the death sentence of Schiro.9 The Supreme Court held that Schiro's capital sentencing hearing and his judge-imposed capital sentence did not violate the Double Jeopardy Clause of the United States Constitution as applied through the Fourteenth Amendment.10 The Court's analysis focused

2. Telephone interview with Monica Foster, Attorney for Thomas Schiro (September 19, 1994). Schiro is currently awaiting a ruling on a "tendor of successive petition for post-conviction relief," which was granted on April 15, 1994. Id. The two issues addressed in this petition were: (1) if the current standard in Indiana for a jury over-ride should be applied to Schiro's case retroactively; and (2) if the death penalty must be based on a statutorily aggravating circumstance. Id.
4. Id.
5. Id.
7. Schiro, 451 N.E.2d at 1064 (DeBruler, J., concurring and dissenting).
10. Id. at 786-90.
more on detailing the gruesome facts surrounding the murder than on developing its jurisprudence of the Double Jeopardy Clause.\textsuperscript{11}

This Note will first explain how the Court reached its holding in \textit{Schiro}.\textsuperscript{12} This Note will then examine the development of the case law addressing Schiro's two double jeopardy arguments: that his sentencing hearing amounted to a subsequent prosecution and that his capital sentence violated principles of constitutional collateral estoppel.\textsuperscript{13} This Note will then explore the deference afforded to jury decisions in capital proceedings.\textsuperscript{14} This Note concludes that had the Court faithfully applied its previous double jeopardy holdings, it would have overturned Schiro's judge-imposed death sentence.\textsuperscript{15}

\textbf{FACTS AND HOLDING}

On February 5, 1981, Darlene Hooper discovered the semi-clad body of Laura Luebbehusen in the hallway of their home.\textsuperscript{16} Thomas Schiro later confessed to Ken Hood, the director of the halfway house where he was temporarily residing, and to his girlfriend that he murdered Luebbehusen.\textsuperscript{17} Hood then contacted the local police who subsequently searched Schiro's room at the halfway house and found further evidence which linked Shiro to the murder.\textsuperscript{18} Subsequently, the State of Indiana charged Schiro with three counts of murder and

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  \item Id. at 794-98 (Stevens, J., dissenting); Id. at 792-94 (Blackmun, J., dissenting).
  \item See infra notes 58-82.
  \item See infra notes 57-60 and accompanying text.
  \item See infra notes 191-213.
  \item See infra notes 284-90.
  \item Schiro v. Farley, 114 S. Ct. 783, 786 (1994). The Court illustrated that:
  Blood covered the walls and floor; Laura Luebbehusen's semi-clad body was lying near the entrance. The police recovered from the scene a broken vodka bottle, a handle and metal portions of an iron, and bottles of various types of liquor... The victim also had lacerations on one nipple and thigh, and a tear in the vagina, all caused after death. A forensic dentist determined that the thigh injury was caused by a human bite.
  \item Id. The facts as described by the Court can be contrasted to the facts as given by the Indiana Supreme Court in \textit{Schiro v. State}, where the court describes the events leading up to the crime as were testified to by Mary T. Lee, Schiro’s girlfriend. Schiro v. State, 451 N.E.2d 1047, 1050 (1983), \textit{habeas corpus denied sub nom.}, Schiro v. Clark, 754 F. Supp. 646 (N.D. Ind. 1990), \textit{aff'd}, 963 F.2d 962 (7th Cir. 1992), \textit{cert granted}, 113 S. Ct. 2330 (1993), \textit{aff'd sub nom.}, Schiro v. Farley, 114 S. Ct. 783 (1994). Lee testified that after Schiro gained access to the house, he and Luebbehusen had consensual sex after they had first discussed their homosexuality and Schiro had Luebbehusen try to insert a dildo into his anus. Id. After intercourse, Luebbehusen attempted to leave, but Schiro stopped her and raped her. Id. During this time, both were drinking; the two then left the house and returned with more liquor. Id. Then, while Luebbehusen slept, Schiro felt an “uncontrollable urge” to kill her, and did. Id.
  \item Schiro, 114 S. Ct at 786.
  \item Id. The police found a jacket in Schiro’s room and determined that blood on the jacket matched Luebbehusen’s blood. Id.
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held a jury trial on those counts. The three murder counts charged as follows: Count I — Schiro "knowingly" murdered Luebbehusen ("intentional murder"); Count II — Schiro murdered Luebbehusen while committing the crime of rape ("felony murder I"); and Count III — Schiro murdered Luebbehusen while engaging in criminal deviate conduct ("felony murder II"). Under Indiana law, intent to kill is not a prima facie element of felony murder.

At his trial, Schiro did not contest the fact that he murdered Luebbehusen. Instead, Schiro asked the jury to find him not guilty by reason of insanity, or in the alternative, guilty but mentally ill. Accordingly, Schiro's defense focused on his mental state at the time of the murder. As mitigating evidence, the defense called numerous witnesses who testified about Schiro's unusual personality and often bizarre behavior patterns.

At the close of the testimony, the trial judge gave the jury several possible verdicts to deliberate over in arriving at a decision. The trial judge placed each count on a separate verdict form and included a space that the jury could check to indicate agreement with a proposed verdict. The forms did not contain a space that the jury could

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19. Schiro, 114 S. Ct. at 787. At the time of trial, Indiana law defined murder as follows:

A person who:
(1) knowingly or intentionally kills another human being; or
(2) kills another human being while committing or attempting to commit arson, burglary, child molesting, criminal deviate conduct, kidnapping, rape or robbery; commits a murder, a felony.


21. Id. at 797 (Stevens, J., dissenting); see IND. CODE § 35-42-1-1 (Supp. 1978); see supra note 19.
22. Schiro, 114 S. Ct. at 787.
23. Id.
24. Id. at 794 (Stevens, J., dissenting).
25. Id. The defense presented evidence of "his drug and alcohol addiction, and his history of mental illness. Lay and expert witnesses described Schiro's bizarre attachment to a mannequin and other incidents that lent support to a claim of diminished capacity." Id. at 974 (Stevens, J., dissenting) (citations omitted). The Petitioner's Brief stated that:

Testimony also included the following: that Schiro began biting his fingernails in grammar school and by the time he reached adulthood had chewed off his fingertips due to nervousness; that although Schiro was then residing in a halfway house, two weekends prior to the killing he requested transfer to another facility which provided more intensive counseling; that he exhibited a decline in occupational functioning and in personal hygiene.


26. Schiro, 114 S. Ct. at 787. The other proposed verdicts included voluntary and involuntary manslaughter, guilty but mentally ill, not guilty by reason of insanity and not guilty. Id. at 787. See infra, note 28.
27. Schiro, 114 S. Ct at 794 (Stevens, J., dissenting).
check to indicate disagreement with a proposed verdict.\textsuperscript{28} After deliberating for five hours, the jury found Schiro guilty on Count II, felony murder I, by checking the appropriate form.\textsuperscript{29}

In order to sentence Schiro to death, the State needed to establish one of nine aggravating factors as required under Indiana Code section 35-50-2-9(b).\textsuperscript{30} At Schiro's sentencing, the State alleged two aggravating factors: (1) intentional murder in the course of rape; or (2) intentional murder in the course of criminal deviate conduct.\textsuperscript{31} The State bore the burden of proving these aggravating circumstances beyond a reasonable doubt.\textsuperscript{32} If the jury found that the State had proven these aggravating factors beyond a reasonable doubt, the jury could then weigh these factors against any mitigating evidence and recommend a sentence to the judge.\textsuperscript{33} However, under Indiana law, the trial court judge is not bound in the sentencing decision by the jury's recommendation.\textsuperscript{34}

When the jury reconvened for the sentencing hearing, it heard the arguments of counsel.\textsuperscript{35} The jury deliberated for sixty-one minutes

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\item \textit{Schiro, 114 S. Ct. at 787.} The only way to record disagreement was to leave the space blank. \textit{Id. at 784} (Stevens, J., dissenting). The only form that allowed for a verdict of not-guilty could only be used if the jury believed Schiro to be innocent of all charges. \textit{Id. at 795} (Stevens, J., dissenting).
\item \textit{Schiro, 114 S. Ct. at 787.}
\item Brief of Petitioner, Schiro v. Farley, 114 S. Ct. 783 (1994) (No. 92-7549).
\item \textit{Schiro, 114 S. Ct. at 787.}
\item \textit{Id.}
\item \textit{Id.} It should be noted that subsequent to Schiro's sentencing, in \textit{Martinez Chavez v. State}, the Indiana Supreme Court enunciated a new standard for overriding a jury recommendation of life imprisonment. \textit{See Martinez Chavez v. State}, 534 N.E.2d 731 (ind. 1989). The court stated that "[i]n order to sentence a defendant to death after the jury has recommended against death, the facts justifying a death sentence should be so clear and convincing that virtually no reasonable person could disagree that death was inappropriate in light of the offender and his crime. \textit{Id. at 735.} One of the issues Schiro is raising in his latest appeal is whether these standards should be applied to his case. \textit{See supra note 2.}
\item \textit{Id.}
\end{enumerate}
\end{footnotes}
and returned a unanimous recommendation against imposing the death penalty.\textsuperscript{36} Nonetheless, the trial court judge rejected the jury's recommendation and sentenced Schiro to death.\textsuperscript{37}

While Schiro's case was pending on direct appeal, the Indiana Supreme Court held that the trial court judge had not explained, in writing, his reasons for imposing a harsher sentence than the jury recommended and therefore remanded the judge's sentencing decision in order to give him a chance to elaborate.\textsuperscript{38} On remand, the trial judge found that the State had proven beyond a reasonable doubt that Schiro intentionally murdered Luebbehusen.\textsuperscript{39} Subsequently, on direct appeal, the Indiana Supreme Court affirmed Schiro's sentence.\textsuperscript{40} Schiro appealed to the United States Supreme Court and the Supreme Court denied certiorari.\textsuperscript{41}

After the denial of certiorari, Schiro sought post-conviction relief through the Indiana court system.\textsuperscript{42} Schiro raised two arguments.\textsuperscript{43} First, Schiro argued that the trial judge was biased.\textsuperscript{44} Second, Schiro argued that his trial counsel rendered constitutionally ineffective assistance.\textsuperscript{45} The Indiana Supreme Court rejected these arguments and affirmed the trial court's decision for a second time.\textsuperscript{46} Again, the United States Supreme Court denied certiorari.\textsuperscript{47}

In affirming Schiro's sentence for a third time, the Indiana Supreme Court rejected Schiro's argument that "the [Fifth Amendment] Double Jeopardy Clause [as applied through the Fourteenth Amendment] prohibited the use of the intentional murder aggravating

\textsuperscript{36} Brief of Petitioner, Schiro v. Farley, 114 S. Ct. 783 (1994) (No. 92-7549).
\textsuperscript{37} Schiro, 114 S. Ct. at 787. See infra note 195 and accompanying text.
\textsuperscript{38} Schiro, 451 N.E.2d at 1056.
\textsuperscript{39} Schiro, 114 S. Ct. at 787.
\textsuperscript{40} Schiro, 451 N.E.2d at 1063. This is one of only two cases where the Indiana Supreme Court has upheld a judge's decision that overrode a jury recommendation. Brief of Petitioner, Schiro v. Farley, 114 S. Ct. 783 (1994) (No. 92-7549).
\textsuperscript{42} Schiro, 114 S. Ct. at 788.
\textsuperscript{44} \textit{Id.} The Petitioner's Brief stated that:
A newspaper reporter testified that prior to the return of the guilt phase of the verdict, the trial judge stated, 'we're going to fry the boy.' The trial prosecutor's initial recollection of the judge's comment was 'I think the boy is going to fry.' After talking with the judge prior to the post-conviction hearing, the prosecutor then recalled that the judge said 'I think the boy is going to die.' The trial judge testified that he stated, 'soon we'll know whether he'll live or die' and that he did not make up his mind until the day of sentencing whether the death penalty would be imposed. Brief of Petitioner, Schiro v. Farley, 114 S.Ct. 783 (1994) (No.92-7549).
\textsuperscript{45} \textit{Id.}
\textsuperscript{46} Schiro, 479 N.E.2d at 562.
circumstance for sentencing purposes." 48 The court reasoned that felony murder was not a lesser included offense of intentional murder but was instead equal in rank. 49 As a result, the court stated that it could not hold that Schiro's conviction on Count II, felony murder Count I, was an implied acquittal of intentional murder. 50 On appeal, the United States Supreme Court again denied certiorari. 51

Schiro then appealed to the United States District Court for the Northern District of Indiana, maintaining in federal habeas corpus proceedings that his sentencing violated the Double Jeopardy Clause. 52 The district court denied relief, finding that a silent verdict does not constitute an acquittal under Indiana law. 53 On appeal, the United States Court of Appeals for the Seventh Circuit affirmed, accepting the Indiana Supreme Court's finding that the jury's silent verdict did not constitute an acquittal under Indiana law and holding that the Double Jeopardy Clause had not been violated by use of the intentional murder aggravating circumstance. 54 Schiro then filed a writ of certiorari with the United States Supreme Court to determine "whether the trial court violated the Double Jeopardy Clause by rely-

49. Schiro, 553 N.E.2d at 1208. In his dissent, Justice John Paul Stevens criticizes this distinction as "illusory" because an intentional killing would require an even higher degree of awareness. Schiro, 114 S. Ct. at 796 n.5 (Stevens, J., dissenting).
50. Schiro, 553 N.E.2d at 1208. The court further stated that the jury never specifically addressed the issue of whether the killing was intentional. Id. However, "the jury was specifically instructed that it could convict Schiro of mens rea murder if it found that 'when the defendant [committed the killing] . . . he intended the conduct to cause the death."' Brief of Petitioner, Schiro v. Farley, 114 S. Ct 783 (1994)No. 92-7549.

Judge DeBruler dissented on the grounds that Indiana law equated silence on Counts I and III with an acquittal. Schiro, 533 N.E.2d at 1208. Judge DeBruler pointed out that the prosecution took every opportunity at trial to convince the jury that Schiro had knowingly killed his victim, and after failing to do so, the State had another opportunity at the sentencing hearing. Id. at 1209. Judge DeBruler reasoned: "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 [Schiro] deserves to die because he had an intentional state of mind." Id. Judge DeBruler, citing Bullington v. Missouri, concluded that the verdict acquitted Schiro of the aggravating circumstance that was necessary to impose the death penalty. Id.; see Bullington v. Missouri, 451 U.S. 430 (1981). Judge Dickson concurred in the dissent. Schiro, 533 N.E.2d 1208-1209. (DeBruler, J., dissenting).

51. Schiro v. Indiana, 493 U.S. 910 (1989) (denying certiorari). Justice Stevens believed that certiorari should have been granted at that time and asserted that "[i]t cannot be disputed that petitioner was placed in jeopardy within the meaning of the Fifth Amendment to the Federal Constitution." Id. at 913. (Stevens, J., concurring).
53. Schiro, 754 F. Supp at 660.
ing on the intentional murder aggravating circumstance.\textsuperscript{55} The Supreme Court granted certiorari.\textsuperscript{56}

On appeal to the Supreme Court, Schiro argued that his capital sentence should be vacated because it violated the Double Jeopardy Clause.\textsuperscript{57} Schiro first contended that his capital sentencing hearing amounted to a successive prosecution for intentional murder.\textsuperscript{58} Schiro also asserted that his capital sentence addressed an ultimate fact that had been previously litigated at the guilt-innocence phase of the trial.\textsuperscript{59} Justice Sandra Day O'Connor, delivering the opinion of the Court, rejected both of Schiro's arguments.\textsuperscript{60}

Schiro argued that his sentencing hearing amounted to a successive prosecution in violation of the Double Jeopardy Clause.\textsuperscript{61} Schiro maintained that the jury had implicitly acquitted him of intentional murder at the guilt phase of his trial by not finding him guilty of Count I, intentional murder, the only charge that required intent to kill.\textsuperscript{62} In response, the Court noted that, in more than one instance, it has held that a second sentencing hearing does not violate the Double Jeopardy Clause.\textsuperscript{63} The Court stated that "[i]f a second sentencing hearing does not violate the Double Jeopardy Clause, we fail to see how an initial sentencing proceeding could do so."\textsuperscript{64}

The Court rejected Schiro's contention that the Court's holding in \textit{Bullington v. Missouri}\textsuperscript{65} should control the case.\textsuperscript{66} In \textit{Bullington}, the State of Missouri retried the defendant for murder, asking for the death sentence, after the defendant's original conviction and prison sentence was overturned and a new trial granted.\textsuperscript{67} The Court in \textit{Bullington} held that Missouri's attempt to seek the death penalty on retrial was unconstitutional.\textsuperscript{68} In \textit{Schiro}, the Court maintained that \textit{Bullington} was a narrow exception to the general rule that "the Double Jeopardy Clause imposes no absolute prohibition against the imposition of a harsher sentence at retrial."\textsuperscript{69} The Court noted that

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\item[55.] \textit{Schiro}, 114 S. Ct. at 788.
\item[57.] \textit{Schiro}, 114 S. Ct. at 786.
\item[58.] \textit{Id.} at 789.
\item[59.] \textit{Id.} at 790.
\item[60.] \textit{Id.} at 786.
\item[61.] \textit{Id.} at 789.
\item[63.] \textit{Schiro}, 114 S. Ct. at 789.
\item[64.] \textit{Id.}
\item[65.] 451 U.S. 430 (1981).
\item[66.] \textit{See Bullington}, 451 U.S. at 438; \textit{Schiro}, 114 S. Ct. at 790.
\item[67.] \textit{Bullington}, 451 U.S. at 435-36.
\item[68.] \textit{Id.} at 446.
\item[69.] \textit{Schiro}, 114 S. Ct. at 790. (citing \textit{Bullington}, 451 U.S. at 438).
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the exception in Bullington was not applicable because it only applies to a second capital sentence proceeding.\(^70\)

Schiro also argued that his capital sentence violated principles of constitutional collateral estoppel because the issue of his intent to kill had been conclusively litigated at the guilt-innocence phase of his trial.\(^71\) The Court agreed with Schiro that the principles of collateral estoppel apply in criminal cases.\(^72\) However, in order for the issue of his intent to be collaterally precluded, the Court noted that Schiro needed to prove that his intent to kill had been conclusively litigated at trial.\(^73\) As a result, the Court refused to estop the State. The Court determined that Schiro had not demonstrated that the jury necessarily acquitted him of intentional murder at trial.\(^74\)

Reviewing the jury's verdict de novo, under the standard pronounced in Ashe v. Swenson,\(^75\) the Court concluded that the jury could have grounded its verdict on an issue other than intent to kill.\(^76\) First, the Court asserted that the jury could have believed it was only allowed to return one verdict.\(^77\) Second, the Court found that the jury instructions on intent to kill were ambiguous.\(^78\) Under Indiana law, a person can commit murder knowingly or intentionally; however, the jury instruction did not differentiate between the two.\(^79\) The Court also noted that, from the jury instructions, the jury may have thought

\(^{70}\) Id.

\(^{71}\) Id.

\(^{72}\) Id. (citing Ashe v. Swenson, 397 U.S. 436 (1970)).

\(^{73}\) Id.

\(^{74}\) Id. at 791.

\(^{75}\) 397 U.S. 436 (1970).

\(^{76}\) See Ashe, 397 U.S. 444; Schiro, 114 S. Ct. at 791 (citing Ashe, 397 U.S. at 444).

\(^{77}\) Schiro, 114 S. Ct. at 791. This possibility was supported by isolated statements made by counsel for both sides. Id. In closing argument, the defense counsel told the jury it would have to pick one verdict out of eight or ten counts. Id. The prosecution also informed the jury they were only allowed to return "one verdict." Id.

\(^{78}\) Schiro, 114 S. Ct. at 791. The jury instruction provided that "(t)o sustain the charge of murder, the State must prove ... [t]hat the defendant engaged in conduct which caused the death of Laura Luebbehusen [and] [t]hat when the defendant did so, he knew the conduct would or intended the conduct to cause the death of Laura Luebbehusen." Schiro, 114 S. Ct. at 791. Indiana law defined murder as follows:

A person who:

(1) knowingly or intentionally kills another human being; or
(2) kills another human being while committing or attempting to commit arson, burglary, child molesting, criminal deviate conduct, kidnapping, rape or robbery; commits a murder, a felony.

\(^{79}\) See supra note 19. The jury instruction provided that "(t)o sustain the charge of murder, the State must prove ... [t]hat the defendant engaged in conduct which caused the death of Laura Luebbehusen [and] [t]hat when the defendant did so, he knew the conduct would or intended the conduct to cause the death of Laura Luebbehusen." Schiro, 114 S. Ct. at 791. Indiana law defined murder as follows:

\[\text{IND. CODE § 35-42-1-1 (Supp. 1978).}\]
an intentional or knowing state of mind was required on all three murder counts.80

Third, the Court stated that given Schiro's confession, the jury might not have believed that his intent to kill was a significant issue in the case.81 The Court supported this proposition by pointing to statements made by Schiro's defense counsel conceding, at the sentencing hearing, that the jury had probably resolved the issue of intent against Schiro at trial.82 Finally, the Court observed that the jury's finding on intent to kill was consistent with the evidence presented at trial.83

Justice Harry A. Blackmun dissenting from the Court's decision, maintaining that Schiro's capital sentencing hearing amounted to a successive prosecution.84 Justice Blackmun stated that the Court's decision in Bullington provided an alternative ground for vacating Schiro's death sentence.85 He noted that the decision in Bullington addressed a subsequent sentencing proceeding.86 Justice Blackmun further noted that in Bullington the Court addressed the unique nature of a capital sentencing proceeding.87 He also stated that the sentencing hearing in Bullington possessed "the hallmarks of a trial on guilt or innocence," based in part on the fact that Indiana had to prove its case beyond a reasonable doubt.88 Justice Blackmun concluded that "[t]he trial-like nature" of Schiro's capital sentencing proceeding combined with the trauma Schiro was forced to undergo in defending against the death sentence were sufficient circumstances to necessitate double jeopardy protection under Bullington.89

In a separate dissent, Justice John Paul Stevens criticized the Court for applying a "technically restrictive" approach to the principles of collateral estoppel in a manner that ran contrary to the guidelines pronounced in Ashe.90 Justice Stevens maintained that it was

80. Schiro, 114 S. Ct. at 792.
81. Id.
82. Id. The statement of counsel quoted by the Court was,
   The statute... provides for aggravating circumstances. There is one listed in
   the case, and one which you may consider. And that one is that the murder
   was committed, was intentionally committed in the commission of rape and
   some other things. I assume by your verdict Friday, or Saturday, that you've
   probably... decided that issue.
83. Schiro, 114 S. Ct. at 792.
84. Id. at 793 (Blackmun, J. dissenting).
85. Id. at 792-793 (Blackmun, J., dissenting).
86. Id. at 793 (Blackmun, J., dissenting).
87. Id. (Blackmun, J., dissenting).
88. Id. (Blackmun J., dissenting) (citing Bullington 451 U.S. at 439).
89. Id. (Blackmun, J., dissenting).
90. Schiro, 114 S. Ct. at 798 (Stevens, J., dissenting) (citing Ashe v. Swenson, 397
   U.S. at 444)(stating that collateral estoppel applies in criminal cases and should not be
constitutionally impermissible for the trial judge to examine the intentional murder issue on remand “[a]fter the issue of intent had been raised at trial and twice resolved by the jury, and long after that jury had been discharged.”

Justice Stevens began his analysis by characterizing the jury's silence on Count I, intentional murder, and Count III, felony murder II, as a finding of not guilty on those counts. He noted that the nature of the verdict forms left the jury with only one way to record disagreement with a verdict: leave the form blank. Justice Stevens stated that even if the trial record was less than clear on the issue of the jury's intent, “the governing law would lead to the same conclusion.”

Citing Green v. United States and the doctrine of implied acquittal, Justice Stevens maintained that the Court should have treated the jury's silence on Count I and Count III no differently than if the jury had returned a verdict that expressly stated that Schiro was “not guilty of intentional murder but guilty of felony murder.” In support of his position, Justice Stevens initially noted that the Court detailed the facts of Luebbenhusen's murder in order to support its assertion that the jury could only have found that Schiro intended to murder her. He criticized the Court for using the facts of Luebbenhusen's murder to form a conclusion as to intent because the jury did not find Schiro guilty of intentional murder despite having heard the morbid facts surrounding Luebbenhusen's death. Moreover, Justice Stevens noted that Schiro's mental health was the principal issue at his trial.

Justice Stevens next asserted that the same principles of estoppel that bar a retrial should foreclose a subsequent proceeding focused on a “central issue resolved by the jury against the State.” He examined and discarded the three specific reasons advanced by the Court for concluding that the issue of Schiro's intent may not have been resolved by the jury in Schiro's favor.

applied in a hypertechnical or restrictive manner). Justice Harry Blackmun joined in Justice Stevens' dissent.

91. Schiro, 114 S. Ct. at 794 (Stevens, J., dissenting).
92. Id. at 794-95 (Stevens, J., dissenting).
93. Id. at 794 (Stevens, J., dissenting).
94. Id. at 795 (Stevens, J., dissenting).
95. 355 U.S. 184 (1957).
96. See Green v. United States, 355 U.S. 184, 191 (1957); Schiro, 114 S. Ct. at 795 (Stevens, J., dissenting) (citing Green, 355 U.S. at 191).
97. Schiro, 114 S.Ct. at 794 (Stevens, J., dissenting).
98. Id. at 794. (Stevens, J., dissenting).
99. Id. (Stevens, J., dissenting).
100. Id. at 796 (Stevens, J., dissenting).
101. Id. at 96-798 (Stevens, J., dissenting).
Justice Stevens concluded that none of the reasons advanced by the Court justified the result it reached. First, Justice Stevens stated that the Court should have viewed Schiro's confessions in the context of the record as a whole. He maintained that the entire record, including expert testimony, was consistent with the conclusion that the jury rejected the prosecutor's submission on the issue of intent. Second, Justice Stevens repudiated the Court's contention that the jury instructions were ambiguous by noting that the instruction in question correctly stated the law for Count I, intentional murder, and was not intended to apply to the felony murder charges in Counts II or III. Justice Stevens found it significant that throughout Schiro's seven appeals, none of the seven different opinions written by the members of the Indiana Supreme Court construed the instruction in question as applicable to Count II and Count III. Third, Justice Stevens maintained that the Court's reliance on isolated statements made by Schiro's defense counsel did not support the Court's conclusion that the jury may have believed it could only return one verdict.

Justice Stevens concluded that the facts of Schiro's trial and sentencing supported a finding that the jury conclusively decided the issue of intent to kill in his favor. According to Justice Stevens, the trial judge violated principles of constitutional collateral estoppel by basing his capital sentence on a factual predicate the jury had rejected.

102. Id.
103. Id.
104. Id. at 795-796 (Stevens, J., dissenting).
105. Id. at 797 (Stevens, J., dissenting).
106. Id.
107. Id.
108. Id. at 794 (Stevens, J., dissenting). Justice Stevens concedes that the Court has held that "the Constitution does not preclude a judge from overriding a jury's recommendation of a life sentence." Id. at 796 (Stevens, J., dissenting) (citing Spaziano v. Florida, 468 U.S. 447 (1984)).
109. Id at 976 (Stevens, J., dissenting). Justice Stevens also criticized the Indiana Supreme Court for drawing a distinction between a "knowing" killing and an intentional killing. Id. n5 (Stevens, J., dissenting). Justice Stevens noted that the Indiana Court had stated that because Count I only required the jury to find that Schiro knowingly killed the victim, instead of intentionally killed her, the issue of intent was not conclusively litigated. Id. n5 (Stevens, J., dissenting). However, Justice Stevens argued that because an intentional killing required a higher degree of awareness, the distinction was illusory. Id. n5 (Stevens, J., dissenting).
BACKGROUND

DOUBLE JEOPARDY PROTECTIONS

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides that "[n]o person shall . . . for the same offence . . . be twice put in jeopardy of life or limb." This protection is enforceable against the states through the Fourteenth Amendment. In discussing the Double Jeopardy Clause, the United States Supreme Court has admitted that its "decisional law in the [double jeopardy] area is a veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator." However, the Supreme Court has held that double jeopardy protection attaches in three situations: (1) protecting against a second prosecution after acquittal; (2) protecting against a second conviction after conviction; and (3) protecting against multiple prosecutions. The Court has also held the Double Jeopardy Clause to encompass principles of collateral estoppel.

Successive Prosecutions and the Double Jeopardy Clause

The Basic Protection

In Green v. United States, the Court recognized that successive prosecutions for the same offense could cause a defendant to be "twice put in jeopardy of life or limb." A grand jury in the District of Columbia indicted Everett Green on counts of committing arson by maliciously setting fire to a house and causing the death of the woman inside the house. A trial on these counts was held and, after closing arguments, the judge instructed the jury that it could return a verdict of either first or second degree murder. Although the jury returned a verdict of second degree murder, Green appealed the verdict and the

110. U.S. CONST. amend. V.
117. Id., 355 U.S. at 185.
118. Id.
appellate court remanded for a new trial.\textsuperscript{119} On remand, a new jury convicted Green of first degree murder.\textsuperscript{120} On appeal, the United States Court of Appeals for the District of Columbia affirmed his conviction, rejecting Green’s defense of double jeopardy.\textsuperscript{121} The United States Supreme Court granted certiorari.\textsuperscript{122}

The Supreme Court held that the second prosecution violated the Double Jeopardy Clause.\textsuperscript{123} The Court characterized the original jury's verdict as an implied acquittal of the first degree murder charge.\textsuperscript{124} The Court stated that “it is not even essential that a verdict of guilt or innocence be returned for a defendant to have once been placed in jeopardy so as to bar a second trial on the same charge.”\textsuperscript{125}

The Court’s analysis in \textit{Green} can be contrasted to the Court’s subsequent decision in \textit{North Carolina v. Pearce}\textsuperscript{126} where the Court considered whether the Constitution prohibited a defendant from receiving a harsher sentence upon reconviction.\textsuperscript{127} The State of North Carolina charged Pearce with assault with intent to commit rape, of which he was subsequently convicted and sentenced to a prison term of twelve to fifteen years.\textsuperscript{128} After an appellate court set Pearce’s conviction aside, the State retried him.\textsuperscript{129} Again, the trial court convicted Pearce and sentenced him to an additional eight year prison term, resulting in a longer total sentence than the original one.\textsuperscript{130} The United States Court of Appeals for the Fourth Circuit Court found this longer sentence unconstitutional and therefore void.\textsuperscript{131}

The United States Supreme Court granted certiorari.\textsuperscript{132} The Supreme Court held that the Constitution did not prohibit the imposition of a harsher sentence upon reconviction.\textsuperscript{133} The Court noted that it could not “say that the constitutional guarantee against double jeop-

\begin{thebibliography}{99}
\bibitem{119} Id. at 186.
\bibitem{120} Id.
\bibitem{121} Id. (citing \textit{Green v. United States}, 236 F.2d 708 (D.C. Cir. 1956), \textit{cert. granted}, 352 U.S. 915 (1956), \textit{rev'd} 355 U.S. 184 (1957)).
\bibitem{122} \textit{Green v. United States}, 352 U.S. 915 (1956).
\bibitem{123} \textit{Green}, 355 U.S. at 190.
\bibitem{124} Id.
\bibitem{125} Id. at 188.
\bibitem{126} 395 U.S. 711 (1969).
\bibitem{127} \textit{Compare Pearce}, 395 U.S. at 717 (stating that the Double Jeopardy Clause did not prohibit the imposition of a harsher sentence upon retrial); \textit{with Green}, 355 U.S. at 190 (holding that a second prosecution violated the Double Jeopardy Clause).
\bibitem{128} \textit{Pearce}, 395 U.S. 713.
\bibitem{129} Id.
\bibitem{130} Id. at 714.
\bibitem{131} Id. at 714.
\bibitem{133} \textit{Pearce}, 395 U.S. at 717.
\end{thebibliography}
ardy of its own weight restricts the imposition of an otherwise lawful single punishment.” 134

Less than a year after Pearce, the Court in Price v. Georgia 135 applied the original rationale promulgated in Green. 136 The State of Georgia charged Clifton Price with murder. 137 At Price’s original sentencing, the jury returned a guilty verdict of manslaughter, making no reference to the charge of murder. 138 Following an appeal and remand for a new trial, the prosecution again sought a verdict on the charge of murder. 139 Again, the jury found Price guilty of manslaughter and the Georgia Court of Appeals affirmed this verdict. 140 Upon appeal by Price, the United States Supreme Court granted Certiorari. 141

Under the dictates of the Double Jeopardy Clause, the Supreme Court determined that Georgia could retry Price for voluntary manslaughter but not for murder. 142 The Court described the principle as “continuing jeopardy” and noted that “[s]uch a result flows inescapably from the Constitution’s emphasis on a risk of conviction and the Constitution’s explication in prior decisions of this Court.” 143

A Capital Sentencing Hearing as a “Successive Prosecution”

In Stroud v. United States, 144 the Court addressed whether Robert Stroud was twice placed in jeopardy when he received a capital sentence upon retrial. 145 Stroud was convicted of first degree murder and sentenced to death. 146 The Court of Appeals reversed his conviction and, on retrial, the jury found Stroud “guilty as charged without capital punishment.” 147 Following a writ of error, the judgment was reversed and the case went to trial a third time. 148 The jury once again found Stroud guilty but made no recommendation as to capital

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134. Id. at 721.
137. Id. at 324.
138. Id.
139. Id.
140. Id. at 324-25.
143. Id. at 327.
144. 251 U.S. 15 (1919).
146. Stroud, 251 U.S. at 16.
147. Id. at 16-17.
148. Id. at 17.
punishment. Nonetheless, the court imposed a death sentence and Stroud appealed directly to the United States Supreme Court. \textsuperscript{150}

In affirming Stroud's capital sentence, the Supreme Court stated that the Double Jeopardy Clause generally protected Stroud from being tried for the same offense a second time. \textsuperscript{151} However, the Court refused to grant double jeopardy protection to Stroud, reasoning that both of his convictions were for murder in the first degree. \textsuperscript{152}

In \textit{Bullington v. Missouri}, \textsuperscript{153} the Court limited its decision in \textit{Stroud} by not applying the reasoning in \textit{Stroud} to a bifurcated trial proceeding. \textsuperscript{154} In \textit{Bullington}, the jury convicted Robert Bullington of capital murder. \textsuperscript{155} Missouri state law mandated that a defendant receive a separate sentencing hearing following a guilty verdict on a charge of capital murder. \textsuperscript{156} At the sentencing hearing, the state needed to prove to the jury, beyond a reasonable doubt, aggravating

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\textsuperscript{149} Id.

\textsuperscript{150} Id.

\textsuperscript{151} Id. at 18.

\textsuperscript{152} Id.

\textsuperscript{153} 451 U.S. 430 (1981).

\textsuperscript{154} Bullington v. Missouri, 451 U.S. 430, 432, 436 (1981). Prior to \textit{Bullington}, in \textit{Gardener v. Florida}, the Court examined a bifurcated trial that followed much the same procedural steps as those taken in \textit{Bullington}. Gardner v. Florida, 430 U.S. 349, 351-52 (1977). The State of Florida charged Gardener with first degree murder. \textit{Id.} at 351. The jury convicted Gardener but advised the judge not to impose a death sentence based on mitigating circumstance evidence. \textit{Id.} at 352-53. However, the trial judge imposed the death penalty based in part on a pre-sentence report that he had not disclosed to the jury or counsel. \textit{Id.} at 353. The Court held Gardener's sentence unconstitutional. \textit{Id.} at 362. The Court first noted that death is a different kind of sentence from any other that could be imposed in the United States. \textit{Id.} at 357. Due in part to this fact, the Court also stated that the sentencing process must also satisfy the requirements of the Due Process Clause. \textit{Id.} at 358.

The Court's decision in \textit{Strickland v. Washington} provides another example of the special considerations the Court has afforded to bifurcated sentencing proceedings. Strickland v. Washington, 466 U.S. 668, 684-87. The State of Washington charged Strickland with first degree murder and he was sentenced to death. \textit{Id.} at 672-73. On appeal, Strickland requested that his death sentence be set aside due to ineffective counsel. \textit{Id.} at 678. After the Court explored the appropriate standards for effective counsel under Florida law, it stated that these same principles would apply to the capital sentencing proceeding. \textit{Id.} at 686. In so doing, the Court noted that it "need not consider the role of counsel in an ordinary sentencing . . . [a] capital sentencing like the one involved in this case is sufficiently like a trial in its adversarial format and in the existence of standards for the decision to that counsel's role in the proceeding is comparable to counsel's role at trial." \textit{Id.} at 686-87 (citations omitted).

\textsuperscript{155} Bullington, 451 U.S. at 435.

\textsuperscript{156} Id. at 433. (citing Mo. Rev. Stat. § 565.006 (1978)). The statute provided in relevant part:

Where the jury . . . returns a verdict of finding of guilty . . . the court shall resume the trial and conduct a presentence hearing before the jury . . . at which time the only issue before the court shall be the determination of the punishment imposed.

circumstances sufficient to warrant a recommendation of the death penalty.\textsuperscript{157}

At sentencing, the state argued for the death penalty and of aggravating circumstances in support of its argument.\textsuperscript{158} Upon the recommendation of the jury, the sentencing court rejected the state's argument and sentenced Bullington to life imprisonment.\textsuperscript{159} After the trial court granted a motion for a new trial, the state served notice that it again intended to seek the death penalty.\textsuperscript{160} In response, Bullington moved to strike the notice, maintaining that the state's decision to seek the death penalty a second time violated the Double Jeopardy Clause.\textsuperscript{161} Following a transfer to the Missouri Supreme Court, the court held that the Double Jeopardy Clause did not bar the imposition of a capital sentence upon Bullington at retrial.\textsuperscript{162} Bullington appealed and the United States Supreme Court granted certiorari.\textsuperscript{163}

In examining Bullington's case, the Supreme Court first sought to distinguish the case from others in which the Court had concluded that the Double Jeopardy Clause imposes "no absolute prohibition against the imposition of a harsher sentence at retrial."\textsuperscript{164} The Court noted that Bullington's sentencing proceeding had the "hallmarks of a trial on the guilt or innocence," a quality which was absent in \textit{Stroud}.\textsuperscript{165} The Court stated that Missouri, by enacting a reasonable doubt standard, ensured it would bear "almost the entire risk of error."\textsuperscript{166} The Court concluded that "having received one fair opportunity to offer whatever proof it could assemble, the State is not entitled to another."\textsuperscript{167} Therefore, the Court found that Bullington's sentence violated the Double Jeopardy Clause.\textsuperscript{168}

\textbf{Collateral Estoppel as Incorporated into the Double Jeopardy Clause}

In \textit{Ashe v. Swenson},\textsuperscript{169} the United States Supreme Court held that the concept of collateral estoppel applies in criminal cases as "em-

\begin{itemize}
\item \textsuperscript{157} Bullington, 451 U.S. at 434.
\item \textsuperscript{158} Id. at 435-436.
\item \textsuperscript{159} Id.
\item \textsuperscript{160} Id. at 436.
\item \textsuperscript{161} Id.
\item \textsuperscript{162} Id. at 437.
\item \textsuperscript{163} Bullington v. Missouri, 449 U.S. 819 (1980) (granting certiorari).
\item \textsuperscript{164} Bullington, 451 U.S. at 438 (citing North Carolina v. Pearce, 395 U.S. 711 (1969)). The court characterized \textit{North Carolina v. Pearce} as the general rule to which \textit{Green} and its progeny were an exception. \textit{Bullington}, \textit{Id.} at 444-45.
\item \textsuperscript{165} Id. at 439.
\item \textsuperscript{166} Id. at 446 (quoting Addington v. Texas, 441 U.S. 418, 424 (1979)).
\item \textsuperscript{167} Id. at 446 (quoting Burks v. United States, 437 U.S. 1, 16 (1978)).
\item \textsuperscript{168} Id.
\item \textsuperscript{169} 397 U.S. 436 (1970).
\end{itemize}
bodied in the Fifth Amendment guarantee against double jeopardy" and is applicable to the states through the Fourteenth Amendment.\textsuperscript{170} The State of Missouri charged Robert Ashe with armed robbery of one poker player in connection with an incident where six poker players were robbed.\textsuperscript{171} At trial, the jury found Ashe not guilty due to insufficient evidence.\textsuperscript{172} Subsequently, Missouri charged Ashe with the robbery of another poker player involved in the same game.\textsuperscript{173} The defense filed a motion to dismiss this new charge based on Ashe's previous acquittal.\textsuperscript{174} The trial court overruled the motion and the jury found Ashe guilty, resulting in a thirty-five year prison term.\textsuperscript{175} After several unsuccessful appeals, Ashe's request for habeas corpus relief reached the United States Supreme Court, and the Supreme Court granted certiorari.\textsuperscript{176}

In examining Ashe's case, the Court defined collateral estoppel as providing that "an issue of ultimate fact[,] . . . determined by valid and final judgment, . . . cannot be litigated by the same parties in any future lawsuit."\textsuperscript{177} The Court held that the principles of collateral estoppel as incorporated into the Double Jeopardy Clause barred the relitigation of Ashe's guilt at a second trial.\textsuperscript{178} The Court noted that the rule of collateral estoppel should not be applied in a "hypertechnical manner."\textsuperscript{179} The Court concluded that the question of whether collateral estoppel applied in any particular case was no longer a matter for the state courts, but a was a constitutional fact that courts "must decide through an examination of the entire record."\textsuperscript{180}

\begin{itemize}
  \item \textsuperscript{170} Ashe, 397 U.S. at 442-45.
  \item \textsuperscript{171} Ashe, 397 U.S. at 437-38.
  \item \textsuperscript{172} Id. at 439.
  \item \textsuperscript{173} Id.
  \item \textsuperscript{174} Id.
  \item \textsuperscript{175} Id. at 440.
  \item \textsuperscript{176} Ashe v. Swenson, 393 U.S. 111 (1965) (granting certiorari).
  \item \textsuperscript{177} Ashe, 397 U.S. at 443.
  \item \textsuperscript{178} Id. at 445.
  \item \textsuperscript{179} Id. at 444.
  \item \textsuperscript{180} Id. at 442-443, 445. See Iowa v. Butler, 505 N.W.2d 806 (Ia. 1993), for an example of a state case applying the principle of collateral estoppel in a criminal case and noting that collateral estoppel operated in criminal cases only when Double Jeopardy did not.
\end{itemize}

A year after Ashe, the Court revisited the notion of collateral estoppel operating in connection with a criminal case in Simpson v. Florida, 403 U.S. 384 (1971). In a per curiam opinion, the Court stated that "[i]t must, therefore be equally clear that unless the jury verdict in the second trial 'could have been grounded upon an issue other than that which the defendant seeks to foreclose from consideration' the constitutional guarantee against being twice put in jeopardy for the same offense vitiates petitioner's conviction." Simpson, 403 U.S. at 386-87.
In Dowling v. United States,181 the Court limited the operation of collateral estoppel in criminal cases.182 Reuben Dowling was charged with the armed robbery of a bank, during which he allegedly carried a small pistol and wore a mask.183 The United States sought to introduce the testimony of Vena Henry, who claimed that Dowling had robbed her home wearing a mask and carrying a small pistol.184 Although Dowling had been acquitted of that crime, the United States contended that the trial court should admit Henry's testimony under Federal Rule of Evidence 404(b) for the limited purpose of linking Dowling to the other man who had robbed her house and for strengthening its identification of Dowling as the bank robber.185 The trial court allowed Henry's testimony and Dowling was convicted of the charged offense.186 On appeal, the United States Court of Appeals for the Third Circuit affirmed Dowling's conviction, holding that the admission of Henry's testimony was harmless error.187 The United States Supreme Court granted certiorari to determine whether the admission of Henry's testimony violated principles of collateral estoppel as incorporated into the Double Jeopardy Clause.188

In rejecting the contention that the principles of collateral estoppel barred the testimony, the Supreme Court maintained that its decision in Ashe did not bar the later use of evidence in all circumstances simply because the evidence relates to alleged conduct for which a defendant has been acquitted.189 The Court declined to extend Ashe to cases where the ultimate issue in the subsequent case was not litigated in the prior acquittal.190 The Court reasoned that nothing in the record demonstrated that the issue of Dowling's identity was resolved in his favor during the prior proceeding.191 As a result, the Court held that collateral estoppel did not bar the admission of the evidence because there were "any possible number of explanations for the jury's acquittal."192 The Court concluded that its decision was

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183. Id. at 344.
184. Id. at 344-45.
185. Id. at 345. Fed. R. Evid. 404(b). Rule 404(b) provides:

In cases in which character or a trait of character of a person is an essential element of a charge, claim or defense, proof may also be made of specific instances of that person's conduct.

Id.
187. Id. at 346.
190. Id.
191. Id. at 352.
192. Id.
consistent with other cases where [the Court]... held that an acquittal in a criminal case... [did] not preclude the Government from relitigating an issue... when it is presented in a subsequent action governed by a lower burden of proof."

Judicial Deference to Jury Decisions in Capital Proceedings

The decision whether a man deserves to live or die must be made on scales that are not tipped deliberately toward death. With these words in Witherspoon v. Illinois, the United States Supreme Court set the stage for giving deference to jury decisions in capital proceedings. In Witherspoon, an Illinois statute "authorized the prosecution to exclude... all [jurors] who said that they were opposed to capital punishment and all who indicated that they had conscientious scruples against inflicting it." At trial, the judge stated during voir dire: "Let's get these conscientious objectors out of the way, without wasting any time on them." Subsequently, the trial court found Witherspoon guilty and sentenced him to death. After the Illinois Supreme Court denied Witherspoon relief, the United States Supreme Court granted certiorari to determine whether the use of the "death qualified" jury was unconstitutional.

In holding that the death sentence violated Witherspoon's constitutional rights, the Supreme Court noted that juries in capital cases perform important functions, such as maintaining a significant link...
between contemporary community values and the penal system.\textsuperscript{201} The Court noted that without this link "the determination of punishment could hardly reflect 'the evolving standards of decency that mark the progress of a maturing society.'\textsuperscript{202}

In \textit{Woodson v. North Carolina},\textsuperscript{203} the Court again discussed the deference which should be given to juries in capital cases.\textsuperscript{204} A North Carolina statute imposed an automatic death sentence without allowing for juror discretion.\textsuperscript{205} The Court held the North Carolina statute unconstitutional under the Eighth and Fourteenth Amendments to the United States Constitution.\textsuperscript{206} The Court maintained that jury determinations and legislative enactments were "the two crucial indicators of evolving standards of decency" and concluded that both factors pointed towards the repudiation of automatic death sentences.\textsuperscript{207}

In \textit{Lockett v. Ohio},\textsuperscript{208} the Court followed its holding in \textit{Woodson} in striking down an Ohio statute that prevented the sentencer in a capital case from giving weight to individualized mitigating evidence presented in an attempt to lessen the sentence.\textsuperscript{209} In so doing, the Court concluded that the Eighth and Fourteenth Amendments require that the sentencer be permitted to include in the record any mitigating evidence or evidence of the defendant's character that may provide a basis for a lesser sentence than death.\textsuperscript{210} The Court premised its holding on the fact that the death penalty creates a situation "profoundly different from all other penalties."\textsuperscript{211}

In \textit{Caldwell v. Mississippi},\textsuperscript{212} the Court further emphasized the crucial role a jury plays in capital sentencing.\textsuperscript{213} The prosecution

\begin{itemize}
  \item \textsuperscript{201} Witherspoon, at 519 n.15.
  \item \textsuperscript{202} \textit{Id.} at 519 n15 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)).
  \item \textsuperscript{203} 428 U.S. 280 (1976).
  \item \textsuperscript{205} \textit{Woodson}, 428 U.S. at 285-86 (citing N.C. GEN. STAT. § 14-17 (Cum. Supp. 1975)). The statute read in pertinent part that "[a] murder which shall be perpetrated . . . shall be deemed to be perpetrated and be punishable by death." N.C. GEN. STAT. § 14-17 (Cum. Supp. 1975). The Court contends that this statue was passed in part as a response to \textit{Furman v. Georgia}, which struck down statutes giving the jury untrammeled discretion in the imposition of death sentences. \textit{Furman v. Georgia}, 408 U.S. 238 (1972); \textit{Woodson}, 428 U.S. 285-86.
  \item \textsuperscript{206} \textit{Id.} at 305.
  \item \textsuperscript{207} \textit{Id.} at 293.
  \item \textsuperscript{208} 438 U.S. 586 (1978).
  \item \textsuperscript{209} Lockett v. Ohio, 438 U.S. 586, 602-09 (1978). The Ohio statute "required the judge to impose a death sentence, unless after 'considering the nature of the offense' and Lockett's 'history, character, and condition,' he found by a preponderance of the evidence" that mitigating circumstances existed. \textit{Id.} at 593-94 (quoting \textit{Ohio REV. CODE ANN. §§ 2229.03-2292.04(B) (Anderson 1975)}).
  \item \textsuperscript{210} Lockett, 438 U.S. at 604.
  \item \textsuperscript{211} \textit{Id.} at 605.
  \item \textsuperscript{212} 472 U.S. 320 (1985).
  \item \textsuperscript{213} \textit{Caldwell v. Mississippi}, 472 U.S. 320, 329-30 (1985).
\end{itemize}
made statements to the jury which led the jury to believe that it was not responsible for making the ultimate decision on the issue of whether capital punishment should be imposed. The Court concluded that it was "constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death sentence rests elsewhere." The Court noted that the jurisprudence surrounding the Constitution mandated that capital sentencers regard their task as a serious one. The Court emphasized that:

[J]urors confronted with the truly awesome responsibility of decreeing death for a fellow human being will act with regard for the consequences of their decisions. . . . Belief in the truth of the assumption that sentencers treat their power to determine the appropriateness of death as an 'awesome responsibility' has allowed this Court to view sentencer discretion as consistent with—and indeed as indispensable to the Eighth Amendment's 'need for reliability in the determination that the death is the appropriate punishment in a specific case.'

ANALYSIS

In Schiro v. Farley, the United States Supreme Court addressed the questions of whether Thomas Schiro's capital sentencing hearing amounted to a successive prosecution in violation of the Double Jeopardy Clause of the United States Constitution and whether principles of collateral estoppel, as embodied in the Double Jeopardy Clause, barred the issue of Schiro's intent to commit murder.

215. Id. at 328-29.
216. Id. at 329.
217. Id. at 329-30 (citations omitted). This line of jury deference cases was most recently endorsed by Justice Blackmun, where in a dissent to a denial of certiorari, he wrote:

I believe the Woodson-Lockett Line of cases to be fundamentally sound and routed in American standards of decency that have evolved over time. The notion of prohibiting a sentencer from exercising its discretion 'to dispense mercy on the basis of factors too intangible to write into a statute' is offensive to our sense of fairness and respect for the uniqueness of the individual . . . . The sentencer's ability to respond with mercy towards a particular defendant has always struck me as a particularly valuable aspect of the capital sentencing procedure.

Callins v. Collins, 114 S. Ct. 1127, 1133 (1994) (Blackmun, J., dissenting). In this same dissent, Justice Blackmun declared that he would no "longer tinker with the machinery of death," and stated, "I feel morally and intellectually obligated to concede that the death penalty experiment has failed." Id. at 1130.

from being raised again at his capital sentencing hearing.\textsuperscript{219} The Supreme Court held that Schiro's capital sentencing and the use of the intentional murder aggravating circumstance did not violate the Double Jeopardy Clause on either successive prosecution or collateral estoppel grounds.\textsuperscript{220}

Justice Harry A. Blackmun dissented.\textsuperscript{221} In his dissent, Justice Blackmun argued that the Court's decision in \textit{Bullington v. Missouri}\textsuperscript{222} provided an alternative ground for reversing Schiro's sentence, because Schiro's sentencing hearing was akin to a second trial.\textsuperscript{223} In a separate dissent, Justice John Paul Stevens argued that the evidence at Schiro's trial supported an inference that the jury had resolved the issue of Schiro's intent to commit murder in his favor, and the principles of collateral estoppel should have precluded the issue of intent from being raised again at his capital sentencing hearing.\textsuperscript{224}

The reasoning of the dissents is superior to the Court's reasoning.\textsuperscript{225} The Court's analysis is flawed for three reasons.\textsuperscript{226} First, the Court misapplied the implied acquittal doctrine recognized in \textit{Green v. United States}.\textsuperscript{227} Second, the Court did not address the trial-like nature of Indiana's capital sentencing scheme, which should have invoked double jeopardy protection under \textit{Bullington}.\textsuperscript{228} Third, the Court violated its own principles of constitutional collateral estoppel recognized in \textit{Ashe v. Swenson}\textsuperscript{229} by allowing the judge's finding of intentional murder to stand when the jury had already conclusively litigated the issue of Schiro's intent.\textsuperscript{230}

\textsuperscript{220} Id. at 786.
\textsuperscript{221} Id. at 792.
\textsuperscript{222} 451 U.S. 430 (1981).
\textsuperscript{224} \textit{Schiro}, 114 S. Ct. at 794-98 (Stevens, J., dissenting).
\textsuperscript{225} See infra notes 227-31 and accompanying text.
\textsuperscript{226} See supra notes 228-31.
\textsuperscript{227} 355 U.S. 184 (1957). See infra notes 232-42 and accompanying text.
\textsuperscript{228} See \textit{Bullington}, 451 U.S. at 436-39.
\textsuperscript{229} 397 U.S. 436 (1970).
\textsuperscript{230} See \textit{Ashe v. Swenson}, 397 U.S. 436, 444-45 (1970); \textit{Schiro}, 114 S. Ct. at 794-95 (Stevens, J., dissenting).
Schiro's Capital Sentencing Hearing as Violative of the Double Jeopardy Clause's Prohibition Against Successive Prosecutions

Schiro's Conviction of Felony Murder as an Implied Acquittal of Intentional Murder

The Court has long held that an acquittal operates to protect a defendant from subsequent prosecutions. In *Green*, the Court extended this notion to implied acquittals. The Court recognized in *Green* that a verdict of second degree murder constituted an implied acquittal of first degree murder when both had been charged. The Court also stated that it was not necessary for a jury to return a verdict of guilt or innocence in order to place a defendant in jeopardy.

In *Schiro*, the Court stated that *Green* was inapplicable because: (1) the jury never specifically addressed the issue of whether the murder was intentional; (2) the jury instructions were ambiguous; and (3) the jury may not have believed intent was a significant issue in the case due to Schiro's admission of guilt. However, at Schiro's trial, the nature of the verdict forms used left the jury no other way to find Schiro not guilty of intentional murder except to do exactly what the jury did: leave the form blank. Furthermore, the jury instructions given by the trial court specifically instructed the jury that it could convict Schiro on Count I, intentional murder, by finding that when Schiro committed the killing "he knew the conduct would or intended the conduct to cause the death" of Laura Luebbehusen. However, the jury did not convict Schiro of intentional murder.

When asked by the State of Indiana to find the existence of the intentional murder aggravating circumstance in order to sentence Schiro to death, the jury quickly returned a unanimous vote against the death penalty. The jury's unanimous rejection of the aggravating circumstances combined with its failure to convict Schiro on Counts I and III demonstrated its intent to acquit Schiro of intentional murder. Thus, applying the implied acquittal doctrine in *Green*, the felony murder verdict at the guilt-innocence phase of

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234. Id. at 188.
235. *Schiro*, 114 S. Ct. at 792.
236. Id. at 794-95 (Stevens, J., dissenting).
237. Id. at 791.
238. Id. at 787.
240. *Schiro*, 114 S. Ct. at 794-98 (Stevens, J., dissenting).
Schiro's trial should have kept the intentional murder aggravating circumstance from arising at the sentencing hearing.\(^{241}\)

The deference which the Court has historically given to jury verdicts in capital proceedings further discredits the Court's application of Green.\(^{242}\) In Witherspoon v. Illinois,\(^{243}\) the Court recognized that the jury provides a crucial link between the community and our justice system.\(^{244}\) Also signifying the deference which should be paid to a jury in a capital punishment case, in Woodson v. North Carolina,\(^{245}\) the Court struck down as unconstitutional a state statute which made a death sentence mandatory without allowing for juror discretion.\(^{246}\)

The Court in Woodson recognized the jury as a "crucial indicator[ ]... of evolving standards of human decency."\(^{247}\) In Caldwell v. Mississippi,\(^{248}\) the Court further elaborated on its rationale for deferring to the reliability of jury decisions in capital cases by noting the "awesome responsibility" a jury undertakes when it knows it will be a determining factor in the ending of a human life.\(^{249}\)

The jury at Schiro's sentencing undertook that same "awesome responsibility" and in sixty-one minutes unanimously decided against imposing the death penalty.\(^{250}\) Therefore, the Court in Schiro should have taken into consideration the decision of the jury which it had recognized as providing a reliable, critical indicator as to how a defendant's fate should be decided.\(^{251}\) The Court then should have weighed the jury's unanimous recommendation against the decision of the trial judge who, by more than one account, had made openly speculative statements about Schiro's capital punishment even before sen-
tencing. Had the Court correctly deferred to the jury’s determination, it would have overturned Schiro’s capital sentence.

Schiro’s Sentencing Hearing as a Second Trial on the Intentional Murder Charge

The Court declined to treat Schiro’s sentencing hearing as a successive prosecution because it had previously held that a second sentencing hearing does not usually violate the Double Jeopardy Clause. The Court cited Stroud v. United States for the proposition that an initial sentencing hearing cannot amount to a successive prosecution.

However, the Court’s decision in Bullington v. Missouri provides the answer to the Court’s own argument. In Bullington, the Court refused to extend the logic of Stroud to a bifurcated trial proceeding. The Court in Bullington noted that a sentencing hearing that had the “hallmarks of [a] trial on guilt or innocence” could implicate the Double Jeopardy Clause. The Court discussed the interaction of a bifurcated proceeding with the unique nature of capital sentencing. The Court cited several elements as critical, including a sentencing hearing that required the prosecution to prove the aggravating circumstance beyond a reasonable doubt and the existence of standards to guide the jury’s discretion. These elements are also present in Schiro.

Similar to Missouri’s sentencing scheme discussed in Bullington, Indiana’s sentencing hearing had the “hallmark of guilt or innocence”

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252. The Petitioner’s Brief stated that:
A newspaper reporter testified that prior to the return of the guilt phase of the verdict, the trial judge stated, ‘we’re going to fry the boy.’ The trial prosecutor’s initial recollection of the judge’s comment was ‘I think the boy is going to fry.’ After talking with the judge prior to the post-conviction hearing, the prosecutor then recalled that the judge said ‘I think the boy is going to die.’ The trial judge testified that he stated, ‘soon we'll know whether he'll live or die’ and that he did not make up his mind until the day of sentencing whether the death penalty would be imposed.

253. See supra notes 243-53 and accompanying text.
254. Schiro, 114 S. Ct. at 789.
255. 251 U.S. 15 (1919).
258. See Bullington, 451 U.S. at 436; see supra notes 260-69 and accompanying text.
260. Id. at 438-39.
261. Id. at 439.
262. Id. at 438.
263. See supra, notes 30-33 and accompanying text.
such that notions of double jeopardy came into play.\textsuperscript{264} The key feature of both sentencing schemes is that the state has to prove the intentional murder aggravating circumstance beyond a reasonable doubt.\textsuperscript{265} In addition, both sentencing hearings share other features normally associated with a trial on guilt or innocence.\textsuperscript{266} As described by the Court in Bullington, "counsel makes opening statements, testimony is taken, evidence is introduced, the jury is instructed and final arguments are made . . . [and][t]he jury then deliberates and returns a verdict."\textsuperscript{267} Allowing the State of Indiana to raise the issue of intentional murder both at Schiro's trial and at his sentencing hearing gave the State more than one opportunity to obtain the death sentence, violating a central purpose behind the Double Jeopardy Clause.\textsuperscript{268}

**Schiro's Capital Sentencing Hearing as Violative of the Principles of Collateral Estoppel as Incorporated into the Double Jeopardy Clause**

In *Ashe v. Swenson*,\textsuperscript{269} the Court noted that principles of collateral estoppel attach in criminal cases.\textsuperscript{270} The Court held that collateral estoppel barred a state from trying a defendant on a second charge arising out of the same occurrence after he had been acquitted on the first charge.\textsuperscript{271}

Based on *Ashe*, the Court in *Schiro* also should have reversed Schiro's death sentence because the trial judge's imposition of the sentence violated principles of collateral estoppel.\textsuperscript{272} Applying *Green*, the issue of Shiro's intent to murder had already been conclusively litigated during the guilt-innocence phase of Schiro's trial.\textsuperscript{273} The Court dismissed the issue of collateral estoppel by stating that Schiro had not proven that the issue of intentional murder had been conclusively litigated at his trial.\textsuperscript{274}

The Court's application of collateral estoppel is problematic for three reasons.\textsuperscript{275} First, the Court has noted that the interests of the

\textsuperscript{264} See *Schiro*, 114 S. Ct. at 793 (Blackmun, J., dissenting).
\textsuperscript{265} *Bullington*, 451 U.S. at 443; *Schiro*, 114 S. Ct. at 793 (Blackmun, J., dissenting).
\textsuperscript{266} *Bullington*, 451 U.S. at 439; *Schiro*, 114 S.Ct. at 793 (Blackmun, J., dissenting).
\textsuperscript{267} *Bullington*, 451 U.S. at 438; *Schiro*, 114 S. Ct. at 793 (Blackmun, J., dissenting).
\textsuperscript{268} See supra notes 167-69 and accompanying text.
\textsuperscript{269} 397 U.S. 436 (1970).
\textsuperscript{270} *Ashe*, 397 U.S. at 443-45.
\textsuperscript{271} Id. at 444-45.
\textsuperscript{272} See infra notes 270-72 and accompanying text.
\textsuperscript{273} *Schiro*, 114 S. Ct. at 795 (Stevens, J., dissenting).
\textsuperscript{274} Id. at 790.
\textsuperscript{275} See supra notes 270-75 and accompanying text; see infra notes 277-83 and accompanying text.
defendant in a criminal trial are of such a magnitude that society
should impose almost the entire risk of error on itself. At Schiro's
trial, the State failed to meet its burden of proof on the issue of in-
tentional murder, as was evidenced by the jury's failure to convict on
Count I. Due to this implied acquittal, the Court's requirement
that Schiro then prove that his intent to commit murder had been con-
clusively litigated at trial made him to bear the risk of error in a man-
ner contrary to the Court's holdings.

Second, the Court misapplied its holding in Dowling v. United
States. In Dowling, the Court held that testimony regarding the
subject matter of an original proceeding was admissible in a subse-
quent hearing because the defendant did not prove that an issue had
been conclusively litigated at the original proceeding and there could
have been any number of reasons for the jury's acquittal. However,
the Court professed its decision in Dowling to be consistent with cases
where the subsequent action is governed by a lower burden of proof.
The critical distinction in Schiro is that the burden of proof at the
guilt-innocence phase and the sentencing phase remained the same;
Indiana law required proof beyond a reasonable doubt in both proceed-
ings. Because the proceedings in Schiro mandated that Indiana
prove its case beyond a reasonable doubt, and Dowling professed to be
consistent with cases where the subsequent action was governed by a
lower burden of proof, the Court erred in applying the rationale of
Dowling to Schiro's sentencing hearing.

The Court's decision in Dowling also differs in that the two pro-
ceedings the Court addressed in that case involved different alleged
crimes. In Schiro, both Schiro's trial and sentencing hearing were
in regard to the same event, the murder of Luebbehusen. As a
result, the principles of collateral estoppel in Schiro were brought into

276. Bullington, 451 U.S. at 446 (citing Addington v. Texas, 441 U.S. 418, 242
(1979)).
277. See Green, 355 U.S. at 191 (stating that jury silence on an issue is an implied
acquittal); Schiro 114 S. Ct. at 787.
278. Compare Schiro, 114 S. Ct. at 790 (stating that the defendant bears the burden
of proving an issue has been conclusively litigated in a prior proceeding) with Adding-
ton, 441 U.S. at 424 (stating that in a criminal trial the risks to the defendant are so
great that society should impose the burden of error on itself).
279. 493 U.S. 392 (1990); see infra notes 281-87 and accompanying text.
281. Id. at 349.
282. Schiro, 114 S. Ct. at 793 (Blackmun, J., dissenting).
283. See supra notes 280-83 and accompanying text.
sharper focus than in *Dowling* because it is more likely that the issue of intent Schiro sought to foreclose had already been litigated.\(^\text{286}\)

Third, the Court in *Schiro* did not defer to the jury's trial verdict or sentencing decision.\(^\text{287}\) The Court focused on the gruesome circumstances surrounding Luebbehusen's murder.\(^\text{288}\) However, despite the brutality of the murder, of which the jury as factfinder was completely aware, a unanimous jury still found that the intentional murder circumstance did not exist.\(^\text{289}\) In light of the deference that the Court has held should be provided to the jury in capital cases, the jury's recommendation against the death penalty provides further evidence that the issue of Schiro's intent had already been conclusively litigated during the guilt-innocence phase of his trial.\(^\text{290}\)

CONCLUSION

In *Schiro v. Farley*,\(^\text{291}\) the United States Supreme Court affirmed Thomas Schiro's judge-imposed death sentence even though it could have reversed his sentence as violative of the Double Jeopardy Clause under either *Bullington v. Missouri*\(^\text{292}\) or *Ashe v. Swenson*.\(^\text{293}\) Under *Bullington*, the Supreme Court could have characterized Schiro's sentencing hearing as a second trial on Count I, the intentional murder charge.\(^\text{294}\) Under *Ashe*, the Court could have found that the issue of Schiro's intent was conclusively litigated by the jury on two separate occasions.\(^\text{295}\) Instead, the Court placed the burden on Schiro to prove that the jury had conclusively litigated the issue of intent in his favor.\(^\text{296}\) As such, the Court forced Schiro to prove that he should not be put to death because the jury had previously acquitted him of intentional murder.

In all respects, the Court declined to read its holdings in *Bullington* and *Ashe* in a light favorable to Schiro. Rather than deferring to the reliability of the jury and applying *Bullington* and *Ashe* to the jury's verdict of felony murder, the Court supplanted the role of the

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\(^{286}\) See *supra* notes 280-81 and accompanying text; *Schiro*, 114 S. Ct. at 798 (Stevens, J., dissenting).

\(^{287}\) *Schiro*, 114 S. Ct. at 787.

\(^{288}\) Id. at 794 (Stevens, J., dissenting).

\(^{289}\) Id.

\(^{290}\) See *supra* notes 196-218 and accompanying text.

\(^{291}\) 114 S. Ct. 783 (1994).


\(^{294}\) See *supra* notes 255-69 and accompanying text.

\(^{295}\) See *supra* notes 270-91 and accompanying text.

\(^{296}\) *Schiro*, 114 S. Ct. at 790.
jury by focusing on the violent aspects of Schiro’s crime in order to find an implied jury verdict of intent. Such a result runs contrary to the unique protections afforded to capital defendants and is inimical to the premises underlying the Double Jeopardy Clause. As the Court previously noted, “[i]f such great constitutional protections are given a narrow, grudging application they are deprived of much of their significance.”

Nancy A. Wood—’95
