SUPREME COURT OF THE UNITED STATES

No. 92–7549

THOMAS SCHIRO, PETITIONER *v.* ROBERT FARLEY, SUPERINTENDENT, INDIANA STATE PRISON, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[January 19, 1994]

JUSTICE STEVENS, with whom JUSTICE BLACKMUN joins, dissenting.

The jury found Thomas Schiro guilty of felony murder but not intentional murder. Thereafter, in a separate sentencing hearing, the same jury unanimously concluded that Schiro did not deserve the death penalty, presumably because he had not intended to kill.[1] Nevertheless, without finding any aggravating circumstance, the trial judge overrode the jury's recommendation and sentenced Schiro to death. Months later, when the Indiana Supreme Court remanded the case to give the judge an opportunity to justify that sentence, the judge found

[1]Under Indiana's death penalty statute, the State may seek the death penalty for murder by proving beyond a reasonable doubt the existence of at least one statutory aggravating circumstance. Ind. Code §35–50–2–9(a) (Supp. 1978). The only aggravating circumstance at issue here was whether the defendant committed the murder by intentionally killing the victim while committing or attempting to commit rape or one of six other enumerated felonies. §35–50–2–9(b)(1). When trial is by jury, the jury that convicted the defendant may recommend the death penalty only if it finds that the state proved beyond a reasonable doubt that at least one aggravating circumstance exists and that the aggravating circumstances outweigh any mitigating circumstances. §35–50–2–9(e).

that Schiro had intentionally killed his victim. That finding, like the majority's holding today, violated the central purpose of the Double Jeopardy Clause. After the issue of intent had been raised at trial and twice resolved by the jury, and long after that jury had been discharged, it was constitutionally impermissible for the trial judge to reexamine the issue. Because the death sentence rests entirely on that unauthorized finding, the law requires that it be set aside.

The Court devotes most of its opinion to a discussion of the facts. I cannot disagree that the gruesome character of the crime is significant. It is important precisely because it is so favorable to prosecutors seeking the death penalty. Such facts undoubtedly would increase jurors' inclination to impose the death penalty if they believed the defendant had intentionally killed his unfortunate victim. Yet in this case, despite the horror of the crime, the jurors *still* unanimously refused to find Schiro guilty of intentional murder and unanimously concluded that he should not be executed. These determinations are enigmatic unless the jury resolved the intent issue in Schiro's favor.

The principal issue at trial was Schiro's mental condition. No one disputed that he had caused his victim's death, but intent remained at issue in other ways. Five expert witnesses—two employed by the State, one selected by the court, and two called by the defense—testified at length about Schiro's unusual personality, *e.g.,* Tr. 1699, his drug and alcohol addiction, *id.,* at 1859, 1877, and his history of mental illness, *e.g., id.,* at 1412, 1414, 1703–1708, 1871, 1877. Lay and expert witnesses described Schiro's bizarre attachment to a mannequin, *id.,* at 1469–1470; 1699–1702, and other incidents that lent support to a claim of diminished capacity. Conceivably, that evidence might have persuaded the jury to find Schiro not responsible by reason of insanity, App. 37, or guilty of murder, voluntary manslaughter, or involuntary manslaughter but mentally ill. *Id.,* at 37–38. Instead, that evidence and the details of Schiro's confessions apparently convinced the jury that at the time of his offense, Schiro did not have the requisite mental state to support a conviction for intentional murder.

A careful perusal of the verdict forms demonstrates

that there is nothing even arguably ambiguous about the jury's verdict and that the jurors expressed their conclusion in the only way they could. Each of the 10 forms contained a space to be checked to record agreement with a proposed verdict. The only way to record disagreement was to leave the space blank. Thus, by leaving nine forms blank and checking only one, the jurors rejected seven alternatives that were favorable to the defendant (two involving lesser offenses, one finding the defendant not responsible by reason of insanity, three finding him guilty of murder or lesser offenses but mentally ill, and one finding him not guilty of anything), rejected two alternatives favorable to the prosecution (guilty on Counts I and III), and ultimately recorded their conclusion that he was guilty on Count II.[2] The jurors

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[2]Each form began: "We, the jury, find the defendant . . ." The 10 alternatives were:

(1) ". . . not responsible by reason of insanity at the time of the death . . .";

(2) ". . . guilty of Murder but mentally ill . . . ."

(3) ". . . guilty of the Murder of Laura Luebbehusen as charged in Count I of the information."

(4) ". . . not guilty."

(5) ". . . guilty of Murder while the said Thomas N. Schiro was committing and attempting the crime of rape as charged in Count II of the information."

(6) ". . . guilty while . . . committing and attempting to commit the crime of criminal deviate conduct as charged in Count III of the information."

(7) ". . . guilty of . . . the included offense of Voluntary Manslaughter."

(8) ". . . guilty of . . .the included offense of Involuntary Manslaughter."

(9) ". . . guilty of. . .Voluntary Manslaughter, but mentally ill."

(10) ". . . guilty of . . . Involuntary Manslaughter, but mentally ill." App. 37–38.

therefore found Schiro guilty on Count II and not guilty on the remainder of the charges. Notably, only the fourth verdict form provided for a not guilty verdict, and that form could not be executed unless the defendant was not guilty of all charges. The only way the jurors could return a verdict of guilty on Count II and not guilty on the other counts was to check the fifth form and leave the others blank—which is exactly what they did.

Even if the record were less clear, the governing rule of law would lead to the same conclusion. After a full trial, the jury was given the opportunity to find Schiro guilty on each of three counts of murder, on just two of those counts, or on just one. As in the similar situation in *Green* v. *United States*, 355 U. S. 184 (1957), the jury's silence on two counts should be treated no differently, for double jeopardy purposes, than if the jury had returned a verdict that expressly read: "`We find the defendant not guilty of intentional murder but guilty of felony murder.'" *Id.,* at 191.[3] The only rational explanation for such a verdict is a failure of proof on the issue of intent—a failure that should have precluded relitigation of that issue at sentencing. As Justice DeBruler of the Indiana Supreme Court explained in his dissenting opinion:

> "At the trial, the prosecution used every resource at its disposal to persuade the jury that appellant had a knowing state of mind when he killed his victim. It failed to do so. At the sentencing hearing before the jury it had an opportunity to persuade the jury that appellant

[3]"American courts have held with uniformity that where a defendant is charged with two offenses, neither of which is a lesser offense included within the other, and has been found guilty on one but not on the second he cannot be tried again on the second . . . ." 355 U. S., at 194, n. 14. See also *Price* v. *Georgia*, 398 U. S. 323, 328–329 (1970).

> had an intentional state of mind when he killed his victim. The jury returned a recommendation of no death. At the sentencing hearing before the judge, the prosecution had yet another opportunity to demonstrate an intentional state of mind, and finally succeeded. In my view, the silent verdict of the jury on Count I, charging a knowing state of mind, must be deemed the constitutional equivalent of a final and immutable rejection of the State's claim that appellant deserves to die because he had an intentional state of mind. That verdict acquitted appellant of that condition which was necessary to impose the death penalty under this charge." *Schiro* v. *State*, 533 N. E. 2d 1201, 1209 (1989).

In this case the trial judge's decision to override the jury's recommendation against the death sentence rested entirely on his finding that Schiro had intentionally killed his victim—an aggravating circumstance that, in Indiana capital sentencing proceedings, must be established beyond a reasonable doubt. Ind. Code §35–50–2–9(e)(1) (Supp. 1978). In other words, the judge sentenced Schiro to death because he was guilty of intentional murder, even though the jury had found otherwise. Even though the Court has held that the Constitution does not preclude a judge from overriding a jury's recommendation of a life sentence, *Spaziano* v. *Florida*, 468 U. S. 447, 490 (1984), an egregious violation of the collateral estoppel principles embedded in the Double Jeopardy Clause occurs if the judge can base a capital sentence on a factual predicate that the jury has rejected.[4] That is what happened here.

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[4]To be sure, it is generally accepted among the Federal Courts of Appeals that a judge may base a sentence in a noncapital case upon factors that the jury did not find beyond a reasonable doubt. See, *e.g.*, *United States* v. *Carrozza*, 4 F. 3d 70, 80 (CA1 1993); *United States* v.

Having failed to convict Schiro of intentional murder after a full trial, the State plainly could not retry him for that offense after the jury was discharged. An estoppel that would bar a retrial should equally foreclose a death sentence predicated on a postverdict reexamination of the central issue resolved by the jury against the State. Schiro's execution will nonetheless go forward because the trial judge made a postverdict finding equivalent to a determination that Schiro was guilty of intentional murder. The Court attempts to justify this anomalous result by relying on the improbable assumption that the jury may not have resolved the intent issue in Schiro's favor. The Court advances three reasons in support of that assumption: Schiro's "confession to the killing, the instruction requiring the jury to find intent to kill, and the uncertainty as to whether the jury believed it could return more than one verdict."

Olderbak, 961 F. 2d 756, 764–765 (CA8 1992), cert. denied, 506 U. S. ___ (1992); *United States* v. *Averi*, 922 F. 2d 765, 765–766 (CA11 1991); *United States* v. *Rodriguez-Gonzalez*, 899 F. 2d 177, 180–182 (CA2), cert. denied, 498 U. S. 844 (1990); *United States* v. *Isom*, 886 F. 2d 736, 738–739 (CA4 1989); *United States* v. *Juarez-Ortega*, 866 F. 2d 747, 749 (CA5 1989); see also *McMillan* v. *Pennsylvania*, 477 U. S. 79 (1986) (applying preponderance-of-evidence standard to sentencing considerations under state mandatory minimum statute satisfies due process). This view stems from the lower standard of proof required to establish sentencing factors in noncapital cases. *United States* v. *Mocciola*, 891 F. 2d 13, 16–17 (CA1 1989) But reliance upon this principle cannot sustain such a practice in a capital case where the sentencing factors—just as the elements at trial—must be proved beyond a reasonable doubt.

Ante, at 14.[5] None justifies the majority's result.

As to Schiro's confessions, such statements must be evaluated in the context of the entire record. Even though they would have been sufficient to support a guilty verdict on the intentional murder count, it is quite wrong to suggest that they necessitated such a verdict. See *Schiro* v. *State*, 451 N. E. 2d 1047, 1068 (1983) (Prentice, J., concurring and dissenting) (stating that a finding of intentional killing "was not compelled"). The record as a whole, including the experts' testimony, is fully consistent with the conclusion that the jury rejected the prosecutor's submission on the intent question.

The Court also seeks support from the trial court's Instruction No. 8, which informed the jury that to sustain the charge of murder, the State had to prove

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[5]The Court correctly avoids reliance upon the quite different rationale—namely, the distinction between a "knowing" killing and an "intentional" killing—that the Indiana Supreme Court adopted. Noting that Count I merely required the jury to find that Schiro had "knowingly" killed his victim, whereas the aggravating circumstance supporting the death penalty required proof that he had "intentionally" killed, the court concluded that the verdict on Count I "could not be considered to have included any conclusion" on the intent issue raised at the sentencing hearing. *Schiro* v. *State,* 533 N. E. 2d 1201, 1208 (Ind. 1989). Yet because an "intentional" killing requires greater awareness of the consequences of the act than a "knowing" killing, such an illusory distinction is plainly unsatisfactory. As the dissenting justices pointed out, the difference between the two states of mind is insignificant and, in this instance, esoteric: "To accord the difference, one would have to believe that a person can be presently unaware that he is strangling another, while at the same time having a goal presently in mind to strangle such other person." *Id.,* at 1209.

intent. *Ante,* at 12.[6] Most naturally read, however, that instruction referred only to the knowing or intentional murder charge in Count I. It did not, as the Court's opinion suggests, expressly refer to "both" felony and intentional murder, *ante,* at 12; on the contrary, it made no mention of felony murder. In Indiana, intent to kill is not an element of felony murder. Accordingly, the definition of murder in Instruction No. 4 clearly indicated that a person commits murder either when he knowingly or intentionally kills someone *or* when he "[k]ills another human being while committing or attempting to commit arson, burglary, child molesting, criminal deviate conduct, kidnapping, rape or robbery." App. 21; Ind. Code §35–42–2–1 (Supp. 1978). If Instruction No. 8 were intended to refer to the felony murder charges in Counts II and III, it plainly misstated the law. The instruction *did* accurately state the elements of the knowing or intentional murder charge in Count I, however. It is worth noting that not one of the seven opinions that various members of the Indiana Supreme Court wrote at different stages of this litigation construed that instruction as applicable to Counts II and III.[7]

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[6]Specifically, Instruction No. 8 provided that "to sustain the charge of murder," the State must prove (1) that "the defendant engaged in the conduct which caused the death of Laura Luebbehusen," and (2) that "when the defendant did so, he knew the conduct would or intended the conduct to cause the death of Laura Luebbehusen." App. 22–23. The instruction further stated that "[i]f you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, and that the defendant was not insane at the time of the murder, then you should find the defendant guilty." *Id.,* at 23.

[7]If, as the Court assumes, the jury believed "that it was required to find a knowing or intentional killing in order to

Finally, the Court surmises that the jury "might have believed it could only return one verdict." *Ante,* at 11. In view of the trial court's instruction that the jury foreman "must sign and date the verdict(s) to which you all agree," App. 28, this speculation is unfounded. Similarly unwarranted is the majority's reliance upon isolated remarks by the prosecution and defense counsel to substantiate this speculation. Defense counsel understandably urged the jury to return only one verdict because he was seeking a verdict that would exonerate his client or minimize his culpability. Any one of seven of the ten forms submitted to the jury would have served that purpose. In fact, after defense counsel made the amorphous reference to one verdict in his closing argument, he went on to suggest that the jurors consider first the question of insanity, "because depending on that, *you may just stop there* or go on." App. to Brief for Respondents 17 (emphasis added).

As to the prosecutor's comment about "one verdict," *id.,* at 27, if that statement meant that the jury could only return one of the 10 forms, it blatantly misstated Indiana law.[8] More plausibly, the comment referred to a verdict in the general sense as the jury's

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convict Schiro on any of the three murder counts," *ante,* at 12–13, there is no rational explanation for its failure to return a guilty verdict for intentional murder (Count I) if it believed convicting Schiro of killing during the commission of rape (Count II) also required a knowing or intentional killing.

[8]The judge's final instructions to the jury set forth no limitation on the number of verdicts it might properly return, and Indiana juries have regularly found a defendant guilty of both *mens rea* murder and felony murder with respect to a single killing. See, *e.g., Roche* v. *State*, 596 N. E. 2d 896 (Ind. 1992); *Lewis* v. *State*, 595 N. E. 2d 753 (Ind. App. 1992); *Hopkins* v. *State*, 582 N. E. 2d 345 (Ind. 1991).

one opportunity to return one or more verdict forms. In any event, we should not uphold a death sentence based on such an insubstantial and improper predicate.

Nothing the Indiana Supreme Court said supports the Court's speculation about the jury's reasons for failing to return a guilty verdict on Count I. Moreover, the Court refuses to acknowledge that the only way the jury could use the verdict forms submitted to it to express the conclusion that Schiro was guilty on Count II and not guilty on Counts I and III was to do just what it did— that is, to authorize the foreman to sign the verdict form for felony murder and to leave blank those forms for intentional murder and criminal deviate conduct.[9] Once found not guilty of intentional murder, Schiro could not thereafter have been prosecuted a second time for that offense. Given that Schiro admitted the killing, the only issue that the jury's verdict on Count I could possibly have resolved in his favor is the intent issue. Since there is not even an arguable basis for assuming that the

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[9]The Court's suggestion that the jury may have reached "a guilty verdict on Count II . . . without ever deliberating on Count I," *ante*, at 12, is not only pure speculation, but highly improbable. Presumably jurors would normally begin their deliberations with the first count in the indictment or the first verdict form the court submitted to them.

It is also noteworthy that the record explains why the jury concluded that Schiro was not guilty of killing while committing or attempting to commit criminal deviate conduct as charged in Count III— namely, that Schiro killed his victim *prior* to the deviate sexual conduct on which the charge was based rather than *while* he was engaged in that predicate felony. Thus the record fully supports the jury's disposition of the three counts at the guilt phase of the trial as well as its decision at the penalty phase.

jury's verdict on Count I was grounded on any other issue, the collateral estoppel component of the Double Jeopardy Clause also precluded the State from attempting to prove intentional murder at the penalty phase to support a sentence of death.

As Justice Stewart explained in his opinion for the Court in *Ashe* v. *Swenson*, 397 U. S. 436, 444 (1970) (footnotes omitted):

> "The federal decisions have made clear that the rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality. Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to `examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.' The inquiry `must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings.' *Sealfon* v. *United States*, 332 U. S. 575, 579. Any test more technically restrictive would, of course, simply amount to a rejection of the rule of collateral estoppel in criminal proceedings, at least in every case where the first judgment was based upon a general verdict of acquittal."

A fair appraisal of the general verdict of acquittal on Count I compels the conclusion that Schiro's death sentence rests entirely on the trial judge's constitutionally impermissible reexamination of the critical issue resolved in Schiro's favor by the jury's verdict on Count I. The Court's contrary conclusion rests on a "technically restrictive" approach that amounts to a rejection of the rule of collateral estoppel in capital sentencing proceedings.

I respectfully dissent.