NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

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

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

No. 92–7549. Argued November 1, 1993—Decided January 19, 1994

At petitioner Schiro's state court trial on three counts of murder—including, in Count I, the charge that he ``knowingly'' killed the victim, and, in Count II, that he killed her while committing rape—the jury returned a verdict of guilty on Count II, but left the remaining verdict sheets blank. The trial court imposed the death sentence, finding that the State had proved the statutory aggravating factor that Schiro ``committed the murder by intentionally killing the victim while committing or attempting to commit . . . rape,'' and that no mitigating circumstances had been established. After twice affirming the sentence in state proceedings, the Indiana Supreme Court again affirmed on remand from the Federal District Court in habeas proceedings, rejecting Schiro's argument that the jury's failure to convict him on the Count I murder charge operated as an acquittal of intentional murder, and that the Double Jeopardy Clause prohibited the use of the intentional murder aggravating circumstance for sentencing purposes. The Federal Court of Appeals accepted this conclusion in affirming the District Court's denial of habeas relief, ruling also that collateral estoppel was not implicated since Schiro had to show that the jury's verdict actually and necessarily determined the issue he sought to foreclose and his Count II conviction did not act as an acquittal with respect to the Count I murder charge.

Held:

1. Although this Court undoubtedly has the discretion to reach the State's argument that granting relief to Schiro would require the retroactive application of a new rule, in violation of

the principle announced in *Teague* v. *Lane,* 489 U. S. 288, the Court will not do so in the present circumstances, where the State did not raise the *Teague* argument either in the lower courts or in its brief in opposition to the petition for a writ of certiorari. Pp. 6–7.

Syllabus

2. The Double Jeopardy Clause does not require vacation of Schiro's death sentence. His argument that his sentencing proceeding amounted to a successive prosecution for intentional murder in violation of the Clause is inconsistent with the Court's prior decisions. Because a second sentencing proceeding following retrial ordinarily is constitutional, see, *e.g., Stroud* v. *United States,* 251 U. S. 15, 17–18, an initial sentencing proceeding following trial on the issue of guilt does not violate the Clause. The Court has also upheld the use of prior convictions to enhance sentences for subsequent convictions, even though this means a defendant must, in a certain sense, relitigate in a sentencing proceeding conduct for which he was previously tried. See, *e.g., Spencer* v. *Texas,* 385 U. S. 554, 560. In short, as applied to successive prosecutions, the Clause is written in terms of potential or risk of trial and conviction, not punishment. *Bullington* v. *Missouri,* 451 U. S. 430, 438, 446, distinguished. Pp. 7–9.

3. Nor does the doctrine of collateral estoppel require vacation of Schiro's death sentence. The Court does not address his contention that the doctrine bars the use of the ``intentional'' murder aggravating circumstance, because he has not met his burden of establishing the factual predicate for the application of the doctrine, namely that an issue of ultimate fact has once been determined in his favor. See, *e.g., Ashe* v. *Swenson,* 397 U. S. 436, 443. Specifically, because an examination of the entire record shows that the trial court's instructions on the issue of intent to kill were ambiguous, and that uncertainty exists as to whether the jury believed it could return more than one verdict, the verdict actually entered could have been grounded on an issue other than intent to kill, see *id.,* at 444, and, accordingly, Schiro has failed to demonstrate that it amounted to an acquittal on the intentional murder count. Pp. 10–14.

963 F. 2d 962, affirmed.

O'CONNOR, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and SCALIA, KENNEDY, SOUTER, THOMAS, and GINSBURG, JJ., joined. BLACKMUN, J., filed a dissenting opinion. STEVENS, J., filed a dissenting opinion, in which BLACKMUN, J., joined.