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SCHIRO v. FARLEY

114 S. Ct. 783 (1994)
United States Supreme Court

FACTS

On the morning of 5 February 1981, the semiclad body of Laura Luebbehusen was found in her home by her roommate, Darlene Hooper, and Ms. Hooper's ex-husband. Ms. Luebbehusen had been severely beaten with an iron and a vodka bottle, raped and sexually assaulted (both before and after her ultimate death), and eventually strangled to death. The petitioner, Thomas Schiro, confessed to a half-way house counselor that he had murdered Ms. Luebbehusen and that he did the act under the influence of drugs and alcohol. At trial, the State produced evidence showing that Schiro had forced Ms. Luebbehusen to consume drugs and alcohol before killing her. The State also produced evidence showing that Schiro, following the murder, attempted to destroy evidence linking him to the crime.

Schiro was charged with three counts of murder.¹ Count I alleged that Schiro "knowingly" killed Ms. Luebbehusen; Count II charged Schiro with killing the victim while committing the crime of rape (felony murder); and in Count III he was accused of killing Ms. Luebbehusen while committing criminal deviate conduct. The State only sought the death penalty on Counts II and III.

At trial, the petitioner conceded that he had killed Ms. Luebbehusen but argued that he was not guilty by reason of insanity or, in the alternative, that he was guilty but mentally ill, an alternative verdict allowed in Indiana.² The jury returned a verdict of guilty on Count II, killing during the course of a rape, but left the remaining verdict sheets blank. At the penalty phase of the trial, the jury unanimously recommended that Schiro be sentenced to life in prison.³

The judge, with authority granted to him by Indiana law, rejected the jury's recommendation and sentenced Schiro to death, but without making findings required by state law. The State later petitioned the Indiana Supreme Court to remand the case to the trial court in order for it to make written findings of fact regarding aggravating and mitigating circumstances. The trial court found on remand that the State had proven beyond a reasonable doubt that "the defendant committed the murder by intentionally killing the victim while committing or attempting to commit . . .

rape." Finding no mitigating factors, the judge sentenced Schiro to death.

After relief was denied on direct appeal,⁴ Schiro then sought habeas corpus relief in state court but was denied.⁵ The petitioner then filed for habeas corpus relief in the federal courts but was denied because Schiro had not exhausted all of his state remedies.

Upon remand, the Indiana Supreme Court again affirmed the conviction and sentence for a third time,⁶ rejecting Schiro's claim that the jury's failure to convict on the first degree murder count amounted to an acquittal of intentional murder, and that the Double Jeopardy Clause prohibited the State from using the intentional murder aggravating circumstance for purposes of sentencing.⁷ Furthermore, the Indiana Supreme Court stated that felony murder "is not an included offense of [murder] and where the jury . . . finds the defendant guilty of one of the type of murders and remains silent on the other, it does not operate as an acquittal of the elements of the type of murder the jury chose not to consider."⁸ The United States Supreme Court denied certiorari.⁹

The federal district court and the U.S. Court of Appeals for the Seventh Circuit denied the petitioner's subsequent writ of habeas corpus.¹⁰ The Seventh Circuit agreed with the Indiana Supreme Court's ruling stating that the intentional murder aggravating circumstance did not violate the Double Jeopardy Clause. The Seventh Circuit also concluded that collateral estoppel was not implicated because the petitioner did not show that the jury's verdict had "actually and necessarily" determined the issue that he wanted foreclosed.¹¹

In the instant petition to the U.S. Supreme Court, Schiro alleged (1) that because of the jury's implied acquittal at the guilt phase on intentional murder, the reliance by the judge on intentional murder as an aggravating circumstance at the sentencing phase of the trial violated the Double Jeopardy Clause; and (2) that because the jury had found in his favor on intentionality of the offense at the guilt phase, the State should be precluded from relitigating the issue under the doctrine of collateral estoppel.

¹ At the time of the crime, the State of Indiana defined murder as:

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 murder, a felony.

Ind. Code § 35-42-1-1 (1978).

² The jury was given the choice of ten possible verdicts: (1) Guilty of Murder as charged in Count I; (2) Guilty of Murder/Rape as charged in Count II; (3) Guilty of Murder/Deviate Conduct in Count III; (4) Guilty of Voluntary Manslaughter; (5) Guilty of Involuntary Manslaughter; (6) Not Guilty; (7) Not responsible by reason of insanity; (8) Guilty of Murder but mentally ill; (9) Guilty of Voluntary Manslaughter but mentally ill; (10) Guilty of Involuntary Manslaughter but mentally ill. *Schiro v. State*, 451 N.E.2d 1047, 1062 (Ind. 1983).

³ In Indiana, to impose a death sentence, a jury must find that the state has proven: ". . . beyond a reasonable doubt that at least one (1) of the aggravating circumstances listed in subsection (b) exists; and (2) Any mitigating circumstances that exist are outweighed by the aggravating circumstance or circumstances." Ind. Code § 35-50-2-9 (i) (1994). Subsection (b) sets out the aggravating circumstance found in this case as: "The defendant committed the murder by intentionally killing the victim while committing or attempting to commit . . . rape." Ind. Code § 35-50-2-9 (b) (1) (Supp. 1978).

⁴ *Schiro v. State*, 451 N.E.2d 1047 (Ind. 1983), cert. denied, *Schiro v. Indiana*, 464 U.S. 1003 (1983).

⁵ *Schiro v. State*, 479 N.E.2d 556 (Ind. 1985), cert. denied, *Schiro v. Indiana*, 475 U.S. 1036 (1986).

⁶ *Schiro v. State*, 533 N.E.2d 1201 (Ind. 1989).

⁷ *Id.* at 1208.

⁸ *Id.*

⁹ *Schiro v. Indiana*, 493 U.S. 910 (1989).

¹⁰ *Schiro v. Clark*, 754 F. Supp. 646 (N.D. Ind. 1990); *Schiro v. Clark*, 963 F.2d 962 (7th Cir. 1992).

¹¹ *Schiro v. Clark*, 963 F.2d at 970.

HOLDING

The United States Supreme Court held that the trial court did not violate the Double Jeopardy Clause by relying on intentional murder as an aggravating circumstance.¹² The court reasoned that Indiana "simply conducted a single sentencing hearing in a course of a single prosecution."¹³ Thus, the State has the right to at least one fair opportunity to fully prosecute an individual accused of a crime. In addition, the Court ruled that the petitioner did not carry his burden of proof in making out his prima facie claim for constitutional collateral estoppel. Despite the jury's implied acquittal, reasoned the Court, it could have based its decision on a number of other factors and therefore Schiro had not shown that the issue of intentionality had been previously decided in his favor.¹⁴

ANALYSIS/APPLICATION IN VIRGINIA

I. Double Jeopardy Clause

The Court addressed the petitioner's Double Jeopardy claim by first noting that the Double Jeopardy Clause is a bar against repeated attempts to convict an individual of the same crime after a jury has determined the individual innocent. Where no threat of multiple punishment or successive prosecutions exists, however, the Double Jeopardy Clause is not offended. The *Schiro* court, however, implicitly acknowledged that leaving the verdict sheet blank on Count I was an acquittal of that offense.¹⁵ Because of the unique bifurcated nature of the capital trial, however, it is possible to consider the same conduct both at the guilt phase and at the penalty phase without implicating double jeopardy, if the prosecution relies upon that conduct to prove something other than guilt. Thus, the Double Jeopardy Clause's bar on successive prosecutions for the same offense normally will not be violated in the context of a single capital trial.

In contrast to *Bullington v. Missouri*,¹⁶ in the petitioner's case, Indiana did not re-prosecute the petitioner for intentional murder: "[I]t simply conducted a single sentencing hearing in the course of a single prosecution."¹⁷ Justice O'Connor went on to note that the State has a

right to "one fair opportunity" to prosecute an individual, and that right extends to presenting evidence at an ensuing sentencing proceeding. After *Schiro*, attempts to put forth a Double Jeopardy claim within the context of a single capital trial will most likely be unsuccessful, although the opinion leaves open the possibility that the prosecutor could be precluded at the penalty phase from relitigating issues clearly lost at trial.¹⁸

The majority's opinion, as it pertains to Double Jeopardy, is open to criticism. The Court supports its position that the sentencing phase of a capital trial is not a successive prosecution for Double Jeopardy purposes with cases based on a defendant's right to appeal and not on any cases pertaining to the single sentencing proceeding at issue in *Schiro*.¹⁹ The only case cited by the Court that is properly analogous to Schiro's case was *Bullington, supra*, and that case was decided in favor of the defendant.

II. Collateral Estoppel Claim

The Court held that constitutional collateral estoppel did not preclude Indiana from finding the existence of aggravating circumstances that the petitioner had committed intentional murder. The Court began its inquiry by outlining the necessary procedures required to invoke collateral estoppel.²⁰ A state is collaterally estopped from litigating an issue "when an issue of ultimate fact has once been determined by a valid and final judgment . . ." ²¹ That issue, however, must have been necessary to the decision. In other words, for an issue to be precluded the jury's previous decision must have depended on that issue and that issue alone. The defendant carries the burden of proving that the prosecution is foreclosed from relitigating the issue.²²

After reviewing the relevant factors, the Court found that Schiro had not carried his burden.²³ The Court, however, left open the possibility that a defendant could establish that an issue determined at the guilt phase in favor of the defendant precludes use of the issue at the penalty trial. The Court ruled that Schiro failed to meet the issue preclusion requirements.

¹² *Schiro v. Farley*, 114 S. Ct. 783 (1994).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ See *Green v. United States*, 355 U.S. 184 (1957) (holding that an implied acquittal occurs when the jury is dismissed without returning any verdict on a charge upon which it had full authority to return a verdict).

¹⁶ 451 U.S. 430 (1981). Robert Bullington was convicted of capital murder and the jury at the penalty phase sentenced him to a term of years. The conviction was overturned and upon retrial the State again sought the death penalty. The Supreme Court held that because Bullington had received a prison sentence after a trial-type capital penalty proceeding, Double Jeopardy barred an additional sentencing hearing. The prison sentence in the early trial amounted to an acquittal for Double Jeopardy purposes.

¹⁷ *Schiro*, 114 S. Ct. at 790.

¹⁸ See discussion of collateral estoppel claim *infra*.

¹⁹ The Court relies upon cases involving (1) retrial after appeal (*Stroud v. United States*, 251 U.S. 15 (1919)), (2) receipt of higher sentence on appeal (*Lockhart v. Nelson*, 488 U.S. 33 (1988)), and (3) the use of prior convictions to enhance a sentence (*Spencer v. Texas*, 385 U.S. 554 (1967)). None of these cases speak to Schiro's assertion that the penalty trial should be considered a successive prosecution.

²⁰ The Court must first "examine the record of a prior proceeding taking into account the pleadings, evidence, charge, and other relevant

matter. The burden is on the defendant (Schiro) to demonstrate that the issue whose relitigation he seeks to foreclose was actually decided in the first proceeding." *Schiro*, 114 S. Ct. at 791.

²¹ *Ashe v. Swenson*, 397 U.S. 436 (1970). The defendant in *Ashe* had been charged with participating in a robbery of a group of poker players. While it was clear that a robbery had taken place, the main issue in *Ashe's* trial was whether he could be placed at the scene of the crime. *Ashe* was acquitted at his first trial on robbery of one of the victims. At a second trial for robbery of another one of the victims, the witnesses felt they were better able to identify *Ashe* and therefore he was convicted.

The Supreme Court reversed this conviction because it found from the record that in order for the defendant to have been acquitted in the first trial, the jury must have found that *Ashe* was not at the scene of the crime. Hence the state was collaterally estopped from re-prosecuting *Ashe* because a fact necessary for a finding of guilt had previously been found in defendant's favor.

²² See, e.g., *Dowling v. United States*, 493 U.S. 342 (1990).

²³ Justice O'Connor, writing for the majority, listed several factors in making her determination. First, the petitioner failed in demonstrating that he was not the intruder. Second, the jury could have grounded its verdict on an issue other than Schiro's intent to kill. Third, the jury's instruction on the issue of intent to kill was found to be ambiguous. *Schiro*, 114 S. Ct. at 792.

It is important to note that the jury in *Schiro* acquitted on intent to kill at the guilt phase and then unanimously recommended life at the penalty phase of the trial. The jury never found intent to kill. At the penalty phase, the jury could have found intent to kill and still recommended life due to the mitigating evidence presented at the penalty phase. Unfortunately, that part of the record was not discussed by the majority and furthermore, there is no indication that at the penalty phase any evidence was presented on that issue. Although the issue of insanity was argued by defense counsel in his plea for clemency, it is unclear from the opinion whether any evidence as to Schiro's intent to kill was presented at the penalty phase. It may have only been presented at the guilt phase, when it was only relevant to the relationship of insanity and intent to kill. The Court held that the jury could have "grounded its verdict on an issue other than Schiro's intent to kill."²⁴ The Court stated that the jury could have thought that they were only able to return one verdict: "[O]n this record," noted Justice O'Connor, "it is impossible to tell which of these statements the jury relied on." The Court mentioned that the judge gave an instruction which did not differentiate for the jury between the two types of murder (intentional murder and felony murder). This line of reasoning appears to be questionable. Justice O'Connor's argument implies that the jury may have relied upon statements made by the attorney rather than on the judge's jury instructions. The law, however, presumes that a jury will rely solely upon the judge's jury instructions for the law upon which to base its verdict.²⁵ The Court's reasoning suggests that the jury relied both on the attorney's statements as well as the judge's charge.

Overall, this decision does not have any direct application to Virginia criminal law and procedure. This is true primarily because Virginia's aggravating circumstances, unlike Indiana's, do not specifically duplicate elements of any of the sections of Indiana's capital murder

²⁴ *Id.* at 791.

²⁵ The only major exception to this presupposition is a very limited one found in *Bruton v. United States*, 391 U.S. 123 (1968) (ruling that a jury instruction to consider co-defendant's confession only against him at jury trial is insufficient).

²⁶ Indiana, unlike Virginia, includes intentionality of the killing within its aggravating circumstances scheme. See note 2, *supra*.

²⁷ An example of this point is a defendant charged with two counts of capital murder, one being in commission of rape, and the other in the commission of a robbery. If the jury acquits as to the rape count, and convicts as to the robbery count, the Commonwealth at the penalty phase is precluded from any argument or use of the rape evidence.

statute.²⁶ *Schiro* suggests, however, that under collateral estoppel, in those cases where it can be determined that factual issues have necessarily been decided against the Commonwealth at the guilt phase, the Commonwealth is precluded at the penalty trial from offering evidence alluding to the matters that have been decided adversely to it.²⁷

After *Schiro*, certain Double Jeopardy claims which have been pursued in capital cases are proven invalid. In Virginia, the Commonwealth is required to accept a defendant's plea of guilty at any point at which he proffers it.²⁸ For example, it has been argued that if a defendant pleads guilty to first degree murder under *Grady v. Corbin*,²⁹ the Commonwealth would be barred from pursuing the capital murder charge. This is the case, it was argued, because the offense involves conduct for which the defendant has been previously found guilty. *Grady* has recently been overruled, but even if it had not been, *Schiro* makes clear that in a capital case, the guilt phase and sentencing phase is a single proceeding for constitutional purposes. "The state is entitled to 'one fair opportunity' to prosecute a defendant, and that opportunity extends not only to prosecution at the guilt phase, but also to present evidence at an ensuing sentencing proceeding."³⁰ Thus, the Court makes clear that there are some legal issues which may be kept out at a penalty phase; however, any attempt to plead to a lesser included offense and claim double jeopardy is now clearly futile.

A less significant but permissible alternative to this discredited approach is to request a jury instruction that the jury is first to consider the predicate offense. If they acquit for that offense, then they would not go on to consider the offense of capital murder.

Summary and analysis by:
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²⁸ See Va. Code Ann. § 19.2-283: "No person shall be convicted of a felony unless by his confession of guilt in court, or by his plea, or by the verdict of a jury, accepted and recorded by the court, or by judgment of the court trying the case without a jury according to law."

²⁹ 110 S. Ct. 2084 (1990) (holding that the Double Jeopardy Clause bars a subsequent prosecution if, to establish an essential element of an offense charged in that prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted), overruled by *United States v. Dixon*, 113 S. Ct. 2849 (1993).

³⁰ *Schiro*, 114 S. Ct. at 792.

BURDEN v. ZANT

114 S. Ct. 654 (1994)
United States Supreme Court

FACTS

In March 1982, a Georgia jury convicted Jimmie Burden, Jr. of the previously unsolved 1974 murders of a woman and her three children. A complex series of events, including a possible conflict of interest by defense counsel, led to Burden's conviction, and led also to his ineffective assistance claim at federal habeas.

The case began in 1981 when Burden was arrested on suspicion of having burglarized his sister's house. The court appointed Kenneth Kondritzer, a local public defender, to represent Burden. While awaiting trial, Burden's nephew, Henry Lee Dixon, accused Burden of having participated in the 1974 murders. After warrants were issued for Burden and

Dixon in connection with these murders, Kondritzer began representing Dixon. Kondritzer represented Dixon in a hearing held in November 1981, where the court ruled that there was insufficient evidence to hold Dixon for the crimes.

The state indicted Burden for the murders on December 7, 1981. Kondritzer continued to act as his counsel until he left the office of the public defender at the end of December 1981 and Kondritzer's partner, Michael Moses, took over. At trial, the prosecutor's only substantive evidence linking Burden to the murders was Dixon's testimony. Though the record fails to unequivocally establish that Dixon testified under a grant