NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2018

ANTHONY THOMAS - PETITIONER

VS.

DARREL VANNOY, WARDEN
LOUISIANA STATE PENITENTIARY - RESPONDENT(S)

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The petitioner asks leave to file the attached petition for writ of certiorari without prepayment of the costs and to proceed *in forma pauperis.*

[x] Petitioner has previously been granted leave to proceed *in forma pauperis* in the following court(s):

U.S. FIFTH CIRCUIT COURT OF APPEALS; U.S. MIDDLE DISTRICT COURT, LOUISIANA

[ ] Petitioner has not previously been granted leave to proceed *in forma pauperis* in any other court.

Petitioner's affidavit or declaration of declaration in support of this motion is attached hereto.

Anthony Thomas
(Signature)

AFFIDAVIT OR DECLARATION
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, Anthony Thomas, am the petitioner in the above entitled case. In support of my motion to proceed in forma pauperis, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received, weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	**Average monthly amount during the past 12 months**		**Amount expected next month**	
	You	Spouse	You	Spouse
Employment	$ 0	$ 0	$ 0	$ 0
Self-employment	$ 0	$ 0	$ 0	$ 0
Income from real property (such as rental income)	$ 0	$ 0	$ 0	$ 0
Interest and dividends	$ 0	$ 0	$ 0	$ 0
Gifts	$ 0	$ 0	$ 0	$ 0
Alimony	$ 0	$ 0	$ 0	$ 0
Child Support	$ 0	$ 0	$ 0	$ 0
Retirement (such as social security, pensions, annuities, insurance)	$ 0	$ 0	$ 0	$ 0
Disability (such as social security, insurance payments)	$ 0	$ 0	$ 0	$ 0
Unemployment payments	$ 0	$ 0	$ 0	$ 0
Public-assistance (such as welfare)	$ 0	$ 0	$ 0	$ 0
Other (specify): none	$ 0	$ 0	$ 0	$ 0
Total monthly income:	$ 0	$ 0	$ 0	$ 0

2. List your employment history for the past two years, most recent first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
none	none	none	$ 0
			$
			$

3. List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
none	none	none	$ 0
			$
			$

4. How much cash do you and your spouse have? $ 0
Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial institution	Type of account	Amount you have	Amount your spouse has
none	none	$ 0	$ 0
		$	$
		$	$

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

[ ] Home
Value 0

[ ] Other real estate
Value 0

[ ] Motor Vehicle #1
Year, make & model none
Value 0

[ ] Motor Vehicle #2
Year, make & model none
Value 0

[ ] Other assets
Description none
Value 0

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse
none	$ 0	$ 0
	$	$
	$	$

7. State the persons who rely on you and your spouse for support.

Name	Relationship	Age
none	NA	NA

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, or annually to show the monthly rate.

	You	Your Spouse
Rent or home-mortgage payment (include lot rented for mobile home) Are real estate taxes included? [ ] Yes [ ] No Is property insurance included? [ ] Yes [ ] No	$ 0	$ 0
Utilities (electricity, heating fuel, water, sewer, and telephone)	$ 0	$ 0
Home maintenance (repairs and upkeep)	$ 0	$ 0
Food	$ 0	$ 0
Clothing	$ 0	$ 0
Laundry and dry-cleaning	$ 0	$ 0
Medical and dental expenses	$ 0	$ 0

	You	Your spouse
Transportation (not including motor vehicle payments)	$ 0	$ 0
Recreation, entertainment, newspaper, magazines, etc.	$ 0	$ 0

Insurance (not deducted from wages or included in mortgage payments)

Homeowner's or renter's	$ 0	$ 0
Life	$ 0	$ 0
Health	$ 0	$ 0
Motor Vehicle	$ 0	$ 0
Other: none	$ 0	$ 0

Taxes (not deducted from wages or included in mortgage payments)

(specify): none	$ 0	$ 0

Installment payments

Motor Vehicle	$ 0	$ 0
Credit card(s)	$ 0	$ 0
Department store(s)	$ 0	$ 0
Other: none	$ 0	$ 0
Alimony, maintenance, and support paid to others	$ 0	$ 0
Regular expenses for operation of business, profession, or farm (attach detail statement)	$ 0	$ 0
Other (specify): none	$ 0	$ 0
Total monthly expenses:	$ 0	$ 0

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

[ ] Yes [X] No If yes, describe on an attached sheet.

10. Have you paid - or will you be paying - an attorney any money for services in connection with this case, including the completion of this form? [ ] Yes [X] No
If yes, how much?_____

If yes, state the attorney's name, address, and telephone number:

11. Have you paid--or will you be paying--anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

[ ] Yes [X] No

If yes, how much?_____

If yes, state the person's name, address, and telephone number:

12. Provide any other information that will help explain why you cannot pay the costs of this case.

Because I'm incarcerated and without any means or funds.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: September 17 2018.

Anthony Thomas
(Signature)

Docket No._____

IN THE

SUPREME COURT OF THE UNITED STATES

ANTHONY THOMAS, *Petitioner*

v.

DARRELL VANNOY, WARDEN, LOUISIANA STATE PENITENTIARY, *Respondent*

ON PETITION FOR WRIT
TO THE UNITED STATES COURT OF APPEALS FOR THE 5TH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

COUNSEL FOR PETITIONER
JAMES G. KNIPE III

MANASSEH, GILL, KNIPE &
BELANGER, P.L.C.
8075 Jefferson Highway
Baton Rouge, Louisiana 70809
Telephone: 225-383-9703
Facsimile: 225-383-9704
Email: jim@manassehandgill.com

QUESTIONS PRESENTED FOR REVIEW

1. Whether the undisputed violation of double jeopardy following deficient performance by trial counsel requires the reversal of petitioner's conviction adhering to jurisprudence that includes that of *Price v. Georgia*, 398 U.S. 323 (1970).

2. Whether the United States Court of Appeals for the Fifth Circuit was correct in reversing the district court's granting of federal habeas corpus on the grounds of double jeopardy and ineffective assistance of counsel; and specifically, whether the Fifth Circuit correctly determined that *Price v. Georgia* was not materially indistinguishable from petitioner's case.

3. Whether trial counsel's performance in failing to safeguard petitioner from undisputed double jeopardy caused prejudice to petitioner in that the outcome of the case (conviction) is unreliable under *Strickland v. Washington*, 466 U.S. 668 (1984).

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

DOCKET NO._____

IN THE SUPREME COURT OF THE UNITED STATES

ANTHONY THOMAS, *Petitioner*

v.

DARRELL VANNOY, WARDEN, LOUISIANA STATE PENITENTIARY, *Respondent*

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS FOR THE 5TH CIRCUIT

Petitioner respectfully prays that a writ of certiorari issue to review the judgement below.

OPINIONS BELOW

The ruling and opinion of the United States Court of Appeals Fifth Circuit appears at Appendix A and B to the petition and is reported at 898 F.3d 561.

Other relevant opinions include:

- Ruling Granting Federal Habeas (Appendix C);
- Magistrate Judge Richard Bourgeois' Recommendation (Appendix D);
- *State of Louisiana v. Anthony Thomas,* Louisiana Supreme Court, (9/4/13) reported at 124 So.3d 1049 (Appendix E); and
- *State of Louisiana v. Anthony Thomas,* Louisiana Supreme Court, (4/17/06) reported at 926 So.2d 490 (Appendix F).

JURISDICTION

The United States Court of Appeals Fifth Circuit filed a written ruling in Mr. Anthony Thomas' case on August 2, 2018. A copy of that decision appears at Appendix A and B.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

CONSITITUTIONAL & STATUTORY PROVISIONS INVOLVED

This matter concerns Constitutional guarantees of assistance of counsel under the Sixth Amendment and the protection against double jeopardy provided in the Fifth Amendment.

Other relevant statutes provisions include 28 U.S.C. § 2254 and Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA").

STATEMENT OF THE CASE

In 1998, Anthony Thomas was indicted with Aggravated Burglary in the 19th Judicial District Court in and for the Parish of East Baton Rouge, State of Louisiana. On November 19, 1998, following a trial by a jury of his peers, Mr. Thomas was acquitted (statutorily) of Aggravated Burglary but found guilty of the lesser included offense of Attempted Aggravated Burglary. Then, on March 12, 1999, petitioner was sentenced to the mandatory term of life imprisonment following the State's institution of habitual offender proceedings.

Mr. Thomas' conviction was reversed (first time) by the Louisiana Court of Appeal, First Circuit on June 23, 2000. The Louisiana First Circuit found that the trial court committed reversible error in refusing to grant a mistrial based on improper statements made in the State's closing and remanded the case for a new trial. *State v. Thomas*, 99-1500 (La. App. 1st Cir. 6/23/00) (unpublished). The jury's conviction of the lesser included offense of attempted aggravated burglary served as an acquittal to the charge of aggravated burglary under Louisiana Code of Criminal Procedure article 598(A).

Proceedings resumed under the same indictment that already been presented to a jury charging aggravated burglary. Mr. Ronald R. Johnson was appointed as indigent conflict counsel. Despite having been acquitted by jury of Aggravated Burglary three years prior, Mr.

Thomas' counsel, the State, and the trial court all allowed Mr. Thomas, somehow, to be retried for the identical offense, Aggravated Burglary.

On May 10, 2002, the Honorable Todd W. Hernandez found Mr. Thomas guilty of the lesser-included offense of Unauthorized Entry of an Inhabited Dwelling. On October 10, 2002, Mr. Thomas was once again adjudicated a third felony offender and sentenced to life.

Mr. Thomas' conviction was once again reversed (second time) on appeal when the Louisiana Court of Appeal, First Circuit found patent error, determining "[t]he record in this case reflects a double jeopardy violation apparent to this court of the face of the record." *State v. Thomas*, 04-2746 (La. 1st Cir. 9/23/05) (unpublished). Citing Louisiana Code of Criminal Procedure article 598(A), the Louisiana First Circuit correctly recognized that the 1998 jury verdict acts as an acquittal to the charge of Aggravated Burglary and that "the defendant could not be retried on this charge". *Id.* The Louisiana First Circuit further determined that "a second prosecution for aggravated burglary, after an acquittal on that charge, violated the prohibition against double jeopardy". *Id.*

The Louisiana Supreme Court, reviewing the matter pursuant to writs filed by the State, recognized the blatant double jeopardy issue and that, by allowing the jeopardy barred trial to occur, significant mistakes were made by the State, the trial court, and, most of all, Mr. Thomas' counsel. Nevertheless, the Louisiana Supreme Court reversed the First Circuit's decision and found that, because Mr. Thomas was convicted after the second trial of an offense not barred by jeopardy, there was no double jeopardy violation. *State v. Thomas*, 05-2373 (La. 4/17/06); 926 So.2d 490. The Louisiana Supreme Court, in the same breath, reinstated Mr. Thomas' life sentence and acknowledges the injustice inflicted on Mr. Thomas and noting trial counsel's performance:

> **While the state erred in reindicting defendant and retrying him for the crime of aggravated burglary, the defendant did not move to quash the proceedings before trial**, and the trial judge, sitting as fact finder in the case after defendant waived a jury, returned a verdict of guilt on the non-barred offense of unauthorized entry of inhabited dwelling, a lesser included offense and a responsive verdict to the charged offense as a matter of La. C.Cr.P. art. 814(A)(42).
> *Id.* at 491 (emphasis added).

On May 18, 2007, Mr. Thomas applied for post-conviction relief on the grounds of ineffective assistance of counsel for failure to file a pretrial motion to quash, double jeopardy, and due process violation. On May 18, 2009, the State filed a response arguing that, since the Supreme Court found the conviction was for a non-barred offense, the assistance of Mr. Thomas' trial counsel was not ineffective.

Former 19th Judicial District Court Commissioner, Rachel P. Morgan, reviewed Mr. Thomas' application and the State's response and issued a Recommendation stating:

> The Mandatory [sic] granting of a motion to quash would have necessarily resulted in a different verdict than the one rendered because unauthorized entry into an inhabited dwelling is not a responsive verdict to attempted aggravated burglary – which is the greatest charge for which the defendant could have been properly placed in jeopardy on retrial. **Thus, there is a showing of both error in failing to file the motion to quash and prejudice in the outcome of the case.**

The trial Judge, Todd W. Hernandez, ordered an evidentiary hearing as recommended by Commissioner Morgan "to determine whether trial counsel was constitutionally ineffective for failure to properly raise the issue of double jeopardy prior to trial." Petitioner's trial counsel, Mr. Johnson, testified at this hearing that he failed to file a motion to quash the jeopardy barred indictment. To provide context for his mistake, Mr. Johnson admitted: "Very little time was spent on procedural issues. The concern was to investigate facts, witnesses, review of the testimony of previous witnesses and then the preparation for trial." Mr. Johnson then testified:

> But I say this as defense counsel, it is always my responsibility to prepared [sic] all necessary motions to protect the interest of the client. **And a motion to quash on the ground of double jeopardy should have been filed based on my reading of the record. An error was made.**

Mr. Johnson confirmed that there was no strategic or tactical reason for his failure to file a motion to quash or, in any way, assert double jeopardy and that his failure to do so was an "oversight."

Mr. Thomas' conviction was once again overturned / set aside (third time) on November 28, 2011 when Judge Hernandez (the same judge who found Mr. Thomas guilty in the second trial) granted Mr. Thomas' Petition for Post-Conviction Relief.

The First Circuit Court of Appeal denied the State's subsequent writ application. *State v. Thomas,* 12–0477 (La. App. 1 Cir. 5/21/12) (unpublished). The State once again took a writ and the Louisiana Supreme Court elected to hear the case. In a split decision rendered on September 4, 2013, the Louisiana Supreme Court again reinstated Mr. Thomas' conviction and sentence. *State v. Thomas*, 12-1410 (La. 9/4/13); 124 So.3d 1049. Rehearing was denied on October 11, 2013. The Louisiana Supreme Court opinion contains a strong dissent by Chief Justice Barnette Johnson who was joined in dissent by Justice Jeanette Knoll. Chief Justice Johnson gave the following in conclusion of her dissent:

> While the majority relies heavily on *Morris,* in considering prejudice under *Strickland,* I find the facts of this case more in line with *Price*, and thus find its reasoning instructive. Defendant was tried for the jeopardy-barred offense of aggravated burglary, but found guilty of the lesser-included offense of unauthorized entry of an inhabited dwelling. **As in *Price*, the fact that defendant was subjected to trial on a more serious charge inherently influenced the factfinder's verdict. Counsel's error also had consequences for defendant in terms of his sentencing exposure. Defendant was placed on trial for the more serious crime of aggravated burglary, which provides a sentence range of one to thirty years. Had Mr. Thomas been properly brought to trial on a charge of attempted aggravated burglary, he would have faced a much shorter sentence range of one to fifteen years.** Had the state charged defendant with the offense of unauthorized entry of an inhabited dwelling, he would only have faced

> a sentence of one to six years. I recognize defendant was tried by the court, not a jury, thus theoretically reducing the risk that the verdict was influenced by the trial on a more serious charge or the exposure to a greater sentence. However, I also note it was the same trial judge who granted defendant relief and found he was prejudiced by ineffective assistance of counsel under *Strickland.* **Under these circumstances, I find counsel's error, which subjected defendant to retrial on a more serious charge than was allowed, undermines confidence in the verdict.**
> *Id.* at 1059. (emphasis added)

On March 11, 2014, Mr. Thomas filed his Petition for Writ of Habeas Corpus with the United States District Court for the Middle District of Louisiana. On February 9, 2017, Magistrate Judge Richard L. Bourgeois, Jr. issued a Report and Recommendation, determining:

> Petitioner's second trial for aggravated burglary was an indisputable violation of the Double Jeopardy Clause of the Fifth Amendment. Additionally, the failure of the Petitioner's trial counsel to file a meritorious motion to quash the jeopardy-barred indictment fell below in objective standard of reasonableness, and, as explained above, said error was sufficient to undermine confidence in the outcome of the proceedings. (See Appendix D)

On March 6, 2017, Judge James J. Brady issued a written ruling approving and adopting the Magistrate Judge's Report and Recommendation as the Court's opinion.

Once again, Mr. Thomas' conviction was overturned (fourth time). Judge Brady ordered, "[Anthony Thomas'] conviction and sentence is VACATED and this matter is REMANDED to the state court to determine what non-jeopardy barred retrial, if any, is to be had". (See Appendix C)

The State filed an appeal to the United States Court of Appeals Fifth Circuit which subsequently reversed the District Court and denied Thomas petition for habeas. It is from the United States Fifth Circuit Ruling that petitioner files this writ.

ARGUMENT

It is well-settled in the Supreme Court jurisprudence that the constitutional protection against double jeopardy provided by the Fifth Amendment acts as a bar against re-prosecution after acquittal on the same offense. However, the United States Fifth Circuit has radically departed from these well-settled principles by conditioning the effect of this fundamental constitutional protection on whether or not the second trial was conducted before a judge or a jury, an issue that has little bearing on the application of double jeopardy protections to the facts of this case.

Specifically, the Fifth Circuit failed to follow this Court's jurisprudence in *Price v. Georgia*, 398 U.S. 323 (1970), a case which petitioner respectfully asserts is materially indistinguishable from Mr. Thomas' case. Further, the Fifth Circuit improperly applied the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") in a decision which described Mr. Thomas' case as, "knotty terrain at the intersection of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), double jeopardy and ineffective assistance of counsel." *Id.* at 564.

Mr. Thomas was subjected to both double jeopardy **and** ineffective assistance of counsel. The State of Louisiana declares this to be an ineffective assistance of counsel case, **not** a double jeopardy case.[1] It is both. The violation of Anthony Thomas' Fifth Amendment right to be free from being twice put in jeopardy of life or limb for the same offense is a fundamental right which can be neither diminished nor overlooked by speculation that Mr. Thomas would have been convicted regardless of the original charge in his second trial.

---

[1] *See* Appellant's Brief, 19.

Anthony Thomas asserts that the United States Court of Appeal for the Fifth Circuit has decided an important federal question relative to double jeopardy and ineffective assistance of counsel in a way that conflicts with relevant decisions of this Court.

I. MR. THOMAS' CONVICTION SHOULD BE OVERTURNED ON DOUBLE JEOPARDY GROUNDS IN ACCORDANCE WITH *PRICE V. GEORGIA*.

A. THE FIFTH CIRCUIT FAILED TO PROPERLY APPLY *PRICE V. GEORGIA* TO THE INSTANT CASE.

In *Price v. Georgia*, Defendant Price was tried for murder and convicted of the lesser included offense of manslaughter. After the manslaughter conviction was reversed on appeal, Price was put on trial once again for murder and was again convicted of the lesser crime of manslaughter. The Court held that the second conviction could not stand because Price had been impliedly acquitted of murder at the first trial and could not be tried again on that charge.

The non-application of *Price v. Georgia*, 398 U.S. 323 (1970) by the United States Fifth Circuit, is unreasonable in light of the following factual/procedural parallels between Defendant Price and Petitioner Anthony Thomas:

Price charged with murder	Thomas charged with Aggravated Burglary
Price put on trial for murder	Thomas put on trial for Aggravated Burglary
Price convicted by jury of Manslaughter	Thomas convicted by jury of Attempted Aggravated Burglary
Price's conviction reversed due to erroneous jury instruction	Thomas' conviction reversed due to prosecutorial statements during closing
Price again placed on trial for murder under the original indictment	Thomas again placed on trial for Aggravated Burglary under the original indictment

Price convicted again of manslaughter	Thomas convicted of Unauthorized Entry of an Inhabited Dwelling

The only distinction is that Price's second trial was before a jury and Thomas' second trial was before a judge only. The United States Fifth Circuit noted, "At first blush, the facts seems to align: both Thomas and the defendant in *Price* were charged with a greater offense and convicted of a lesser included offense, and then were then charged with the same greater offense and again convicted of a lesser included offense." *Thomas at 567.*

The Fifth Circuit erroneously distinguishes Mr. Thomas' case from *Price* on the singular fact that Mr. Thomas' second trial was before a judge alone and not a jury and in doing so, relied upon the apparently illustrative language contained in *Price*, "we cannot determine whether or not the murder charge against petitioner induced the jury to find him guilty of the less serious offense of voluntary manslaughter rather than to continue to debate his innocence" *Id.* at 1762. It must be noted that the relevant content of The Court's opinion in *Price* is:

> One further consideration remains. Because the petitioner was convicted of the same crime at both the first and second trials, and because he suffered no greater punishment on the subsequent conviction, Georgia submits that the second jeopardy was harmless error when judged by the criteria of *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), and *Harrington v. California*, 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969).
>
> We must reject this contention. **The Double Jeopardy Clause, as we have noted, is cast in terms of the risk or hazard of trial and conviction, not of the ultimate legal consequences of the verdict. To be charged and to be subjected to a second trial for first-degree murder is an ordeal not to be viewed lightly.** Further, and perhaps of more importance, we cannot determine whether or not the murder charge against petitioner induced the jury to find him guilty of the less serious offense of voluntary manslaughter rather than to continue to debate his innocence.
> *Id.* at 1762

The Fifth Circuit ultimately based their decision to depart from settled Supreme Court jurisprudence on the improper assumption that the Trial Judge (also same judge who granted

post-conviction relief) would not have been induced by the more serious offense to find Mr. Thomas guilty of a lesser offense rather than to continue to contemplate his innocence. With the Trial Judge knowing that Aggravated Burglary carried a prison sentence of between 1 and 30 years (La. R.S. 14:60) whereas Unauthorized Entry of an Inhabited Dwelling, the offense for which Judge Hernandez convicted Mr. Thomas carries a prison sentence of between 0 and 6 years (La. R.S. 14:62.3).

Again, *Price* warns of double jeopardy in terms of risk or hazard of trial and conviction, not of the ultimate legal consequences of the verdict. The language in *Price* relative to the jury possibly being induced to find him guilty of a lesser offense rather than to continue to debate his innocence is simply illustrative as to potential risks or hazards in such a trial and is in no way a full list of said risks and hazards.

In sum, the Fifth Circuit failed to correctly apply *Price*, a case that remains substantively / materially indistinguishable from Mr. Thomas' case.

1. ***Mr. Thomas' retrial for Aggravated Burglary was clear Double Jeopardy violation.***

The District Court determined that regardless of whether the Louisiana Supreme Court applied *Morris v. Mathews*, 475 U.S. 237 (1986), or *Price v. Georgia*, 398 U.S. 323 (1970), the double jeopardy violation was "*indisputable*." As Louisiana Supreme Court Chief Justice Johnson stated in her dissent, "[t]his case involves a clear double jeopardy violation." *State v. Thomas*, 2012-1410 (La. 9/4/13), 124 So.3d 1049, 1058. The Double Jeopardy Clause of the Fifth Amendment provides that no person shall "be twice put in jeopardy of life or limb" for the same offense. Under *Brown v. Ohio*, 432 U.S. 161 (1977), the Double Jeopardy Clause protects against (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction and (3) multiple punishments for the same offense. *Brown v.*

Ohio at 165 (internal citations omitted). The double jeopardy violation at issue is essentially undisputed and was expressly recognized by the lower courts.

2. ***Whether Mr. Thomas' jeopardy barred retrial was before a jury or a judge should have no bearing on this Court's review.***

We already know that trial counsel's performance was deficient in his failure to file a motion to quash raising double jeopardy. The reasoning as to why Thomas, with appointed felony conflict counsel, elected to be tried by a Judge alone for the second trial is unknown. We know that jury trial for Aggravated Burglary requires a 12 person jury under Louisiana Code of Criminal Procedure article 782.

Mr. Thomas waived his right to trial by jury one day prior to the start of the second trial. However, when Mr. Thomas waived his right to be tried by a jury, he, in no way, waived his right against double jeopardy.

The *Price* Court ruled:

> Accordingly, no aspect on the bar on double jeopardy prevented his retrial for that crime. However, **the first verdict, limited as it was to the lesser included offense, required that the retrial be limited to that lesser included offense.**
> *Id.* at 327 (emphasis added).

Chief Justice Johnson noted the apparent prejudice in both *Price* and Mr. Thomas' case:

> Thus, in *Price*, prejudice to the defendant was presumed because of the likelihood that the conviction for manslaughter had been influenced by the trial on more serious murder charge. The same holds true in petitioner's case. Prejudice is presumed because of the likelihood that petitioner's conviction was influenced by trial on the more serious charge.
> *State v. Thomas*, 124 So.3d 1049, 1060.

The United States District Court, in its adopted Report and Recommendation, held:

> Given the differences between the petitioner's second trial and the challenged proceedings in *Mathews*, **the analysis in the factually similar Price case controls**." (See Appendix C & D)

In her 2013 dissent, Louisiana Supreme Court Chief Justice Johnson found that the facts of Mr. Thomas' case are "more in line" with the United States Supreme Court's review of a double jeopardy violation in *Price v. Georgia*, 398 U.S. 323 (1970). *State v. Thomas*, 124 So.3d at 1061.

Although Mr. Thomas' second trial was conducted as a judge only trial, this fact does not diminish the increased risk and hazard faced by Mr. Thomas in the second trial. Judges are not immune from the very human considerations shared by anyone sitting as triers of fact in a case where an individual's liberty and freedom are on the line. Here, there is little doubt that the judge was aware of the first conviction (information that would **not** have been known by a jury) and that the Defendant was being retried on the same facts for the same charge. This is supported by the fact that Mr. Thomas was never reindicted or rebilled after the first trial as the State simply (and erroneously) reset his case for trial under the same indictment, bearing the original docket number.[2]

In fact, it was the second trial judge (who found Mr. Thomas guilty of unauthorized entry), Judge Todd. W. Hernandez, who granted Mr. Thomas' application post-conviction relief, setting the conviction aside. In agreeing with Commissioner Rachel P. Morgan's recommendation, Judge Hernandez, opined that should Mr. Thomas have been properly tried for a non-jeopardy barred offense, then the result would have been different.[3] What Judge Hernandez observed during the second trial supported his decision that if the case was properly tried, the result would have been different.

---

[2] La. Sup. Ct Record Vol. I, 38. No other indictment was filed prior to the second trial.

[3] *See* SCR. Vol. II, 391-97, 405.

This is an even more powerful and direct consideration than *Price*, where one of the considerations was whether the jury would have further deliberated Price's innocence. The fact that Judge Hernandez granted Mr. Thomas' application for post-conviction relief, finding ineffective assistance of counsel and the fact that Judge Hernandez himself conceded that the result of the trial over which he sat as the trier of fact would have been different, is directly indicative of prejudicial influence.

B. IF MR. THOMAS FACED INCREASED RISK OR HAZARD AT HIS RETRIAL FOR AGGRAVATED BURGLARY, THEN HIS CONVICTION SHOULD BE OVERTURNED EVEN THOUGH HE WAS NOT CONVICTED OF A JEOPARDY-BARRED OFFENSE.

1. Even if Mathews controls, the Court must consider whether Mr. Thomas' second trial exposed him to "serious dangers of another sort"

A full discussion of the misapplication of *Morris v. Mathews*, 475 U.S. 237 (1986), is addressed further below. Mr. Thomas directs the Court's attention to prejudice in serious dangers of another sort, as described by Justice Marshall in his dissent of the *Morris v. Mathews*, *supra*, opinion:

> "There [can] never be any certainty as to whether the jury was actually influenced by the unconstitutionally broad scope of the reprosecution or whether the accused's defense strategy was impaired by this scope of the charge, even if there were a most sensitive examination of the entire trial record and a more suspect and controversial inquest of the jurors still alive and available." *United States ex rel. Hetenyi v. Wilkins,* 348 F.2d844, 864 (CA2 1965), cert. denied *sub nom. Mancusi v. Hetenyi,* 383 U.S. 913, 86 S.Ct. 896, 15 L.Ed.2d 667 (1966).
>
> The mere absence of any danger in a particular case that the bringing of a jeopardy-barred charge resulted in a compromise verdict, see, *e.g., Price v. Georgia,* 398 U.S. 323, 90 S.Ct. 1757, 26 L.Ed.2d 300 (1970); *Hetenyi, supra,* is no reason for adopting a different standard for determining whether a defendant is entitled to a new trial. **By impermissibly expanding the scope of the prosecution, the double jeopardy violation may have exposed defendant to serious dangers of another sort.**
> *Mathews* at 258-59 (emphasis added).

By standing trial a second time for aggravated burglary, a crime of which he had been acquitted by jury, Mr. Thomas was exposed to a far greater number of potential guilty verdicts, serious dangers of another sort.

2. ***Both standards are satisfied because Mr. Thomas' retrial for Aggravated Burglary exposed him to both an "increased risk or hazard" at trial and "serious dangers of another sort" at trial.***

Aggravated Burglary, the offense to which Mr. Thomas was improperly tried twice, of all the various burglary and illegal entry crimes, has the most possible responsive guilty verdicts:

1) Guilty;
2) Guilty of attempted aggravated burglary;
3) Guilty of simple burglary;
4) Guilty of attempted simple burglary;
5) Guilty of simple burglary of an inhabited dwelling;
6) Guilty of attempted simple burglary of an inhabited dwelling;
7) Guilty of unauthorized entry of an inhabited dwelling; and
8) Guilty of attempted unauthorized entry of an inhabited dwelling.

La. C.Cr. P. Art. 814.

The next greatest and the proper charge, attempted aggravated burglary, has only four (4) possible guilty verdicts, as does simple burglary and simple burglary of an inhabited dwelling. The charge for which Mr. Thomas was convicted after the second trial, unauthorized entry of an inhabited dwelling, has only three possible guilty verdicts: guilty; guilty of the attempt; and guilty of misdemeanour trespass. *See State v. Simmons,* 2001-0293 (La. 05/15/02), 817 So.2d 16, *infra.*

If given the choice to go to trial in which there were eight possible guilty verdicts (aggravated burglary) versus going to trial on a charge in which there are only four possible guilty verdicts (attempted aggravated burglary) or three possible guilty verdicts (unauthorized entry), in this situation, no competent defense counsel would choose to go to trial with ***eight*** possible guilty verdicts. There can be little doubt that Mr. Thomas was prejudiced by the greatly

increased number of possible guilty verdicts, verdicts which would not have been available without trial counsel's deficient performance, and regardless of whether the trial is before a judge or jury.

Prejudice is also apparent in the sentence exposure. A conviction of aggravated burglary carries not less than 1 not more than 30 years at hard labor. Aggravated burglary carries the longest possible sentence for any burglary/illegal entry charge, as outlined below:

Simple Burglary (La. R.S. 14:62)	0 to 12 years
Simple Burglary Inhabited Dwelling (La. R.S. 14:62.2)	1 to 12 years
Unauthorized Entry Inhabited Dwelling (La. R.S. 14:62.3)	0 to 6 years

By contrast, the next greatest offense for which Mr. Thomas should have been tried is attempted aggravated burglary, which carries 6 months to 15 years. La. R.S. 14:60, La. R.S. 14:27.

The State of Louisiana has repeatedly asserted that it could have simply billed (formally charged) Mr. Thomas with a non-jeopardy barred offense and if he was convicted of a felony, the result would have been the same. Respectfully, (could have, should have, would have) the State did not bill Mr. Thomas with a non-jeopardy barred offense, thus subjecting him to double jeopardy and Mr. Thomas has now been convicted after a prejudicially influenced trial.

The United States Fifth Circuit has also erroneously grasped this concept, that, "even assuming a reasonable probability of a conviction for a different offense in the absence of the aggravated burglary charge, Thomas fails to show a reasonable probability that his final sentence would be any different due to his status as a habitual offender." *Thomas* at 573. (emphasis added)

The Fifth Circuit's reasoning is expressly in opposition to the *Price* Court's holding that double jeopardy analysis must look at the risk or hazard of trial and conviction faced by the defendant rather than focus solely on the "ultimate legal consequences of the verdict". *Id.* at 1762.

This reasoning is best addressed Louisiana Supreme Court Chief Justice Johnson chastised the majority in her dissent, stating:

> This is purely speculative. I find it offensive to the criminal justice system to assume that the defendant would have been convicted had he been tried on the proper charge under different circumstances, or that the state would have undoubtedly instituted habitual offender proceedings after a third trial. To conclude otherwise would essentially preconvict the defendant and deprive him of a trial on a proper charge. It is inappropriate to engage in such pure conjecture
> *State v. Thomas*, No. 2012-KP-1410 (La. 9/04/13), 124 So.3d 1049 at 1060.

The State's speculative contention Mr. Thomas would have been multi-billed for any felony conviction has never been supported by testimony or evidence. The State could have called former District Attorney Doug Moreau or present District Attorney Hillar Moore during the September 15, 2015 hearing on Mr. Thomas' Application for Post-Conviction Relief to testify that Mr. Thomas would have been multi-billed if convicted of any felony, but the State did not do so.

In fact, Mr. Thomas questions whether the Louisiana Attorney General's Office now has standing to assert that a separate entity, the East Baton Rouge District Attorney's Office, would have multi-billed Mr. Thomas should he have been convicted of any felony. The Attorney General's Office has asked, without any evidence or testimony, to assume that a separate prosecuting entity may or may not have multi-billed Mr. Thomas. The assertion that the result would have been the same should not be considered.

Regarding the same, the District Court recognized the fact that the Louisiana Supreme Court did not consider that if Mr. Thomas were charged with unauthorized entry of an inhabited dwelling, then under *State v. Simmons*, 2001-0293 (La. 05/15/02), 817 So.2d 16, the trial judge could have found Mr. Thomas guilty of trespass, a misdemeanor, that would have not subjected him to multi-bill prosecution.

In *Simmons*, the Louisiana Supreme Court established:

> We cannot imagine a situation in which a person can be guilty of unauthorized entry of an inhabited dwelling without also being guilty of criminal trespass. We therefore find that criminal trespass is a lesser included offense and a responsive verdict to a charge of unauthorized entry of an inhabited dwelling.
> *Id.* at 21.

Should Mr. Thomas have been tried for unauthorized entry of an inhabited dwelling, the second trial judge (the same judge who agreed that if Mr. Thomas was properly tried then the result would have been different), could have found Mr. Thomas guilty of trespass, a misdemeanor, which would not have resulted in a subsequent multi-bill prosecution.

C. THE FIFTH CIRCUIT IMPROPERLY RELIED ON MORRIS V MATTHEWS TO SUPPORT ITS ERRONEOUS APPLICATION OF HARMLESS ERROR ANALYSIS TO REVIEW A DOUBLE JEOPARDY VIOLATION.

1. Morris is materially distinguishable from the facts and procedural background of Mr. Thomas' case and should not be applied.

Morris v. Mathews, 475 U.S. 237 (1986), involves an appellate court's modification of the defendant's sentence following a double jeopardy violation. The violation, the prejudice and the outcome of Mathews' case all differ greatly from the instant case. Further, the Court treated the modification of Mathews' conviction as remedial to the double jeopardy violation. Mr. Thomas contends his double jeopardy violation **was not and cannot be cured**.

The factual disparities between *Mathews* and Mr. Thomas' case must be addressed in order to demonstrate why it does not apply herein. In *Morris v. Mathews*, the defendant was

charged with aggravated robbery. The facts of the robbery involved the defendant's intentional killing of his co-conspirator. Mathews insisted and a coroner initially ruled that the co-conspirator died of a self-inflicted gunshot. A jury subsequently convicted Mathews of aggravated robbery. Following his conviction for aggravated robbery, Mathews admitted to police to killing his co-conspirator by shooting him in the chest. Mathews was then charged with aggravated murder, which required proving the elements of aggravated robbery beyond a reasonable doubt. Mathews' trial counsel filed a motion to quash the jeopardy barred indictment, which the trial court denied. Because he had already been convicted of aggravated robbery and should have been tried with murder instead of aggravated murder, Mathews' trial for aggravated murder violated the Double Jeopardy Clause. *Id.* at 244-45.

The United States Supreme Court determined that the Ohio appellate court's modification of Mathews' conviction from aggravated murder to murder was a sufficient remedy to the double jeopardy violation, because all of the elements required to satisfy a murder conviction had been proven beyond a reasonable doubt in the aggravated murder trial. *Id.* at 244-47. In other words, had Mathews been tried for murder, he would have been convicted, and thus no prejudice occurred. *Id.* at 247. Additionally, the question presented in *Mathews* diverts greatly from those presented to this Court now. In *Mathews*, the Court considered only "whether reducing [Mathews'] conviction for aggravated murder to a conviction for murder is an adequate remedy for the double jeopardy violation." *Id.* at 245.

Mr. Thomas' case is so diverse from *Mathews* that the Louisiana Supreme Court's application thereof was an unreasonable application of clearly established federal law. Mr. Thomas was tried for aggravated burglary, convicted of a lesser included offense and then reversed on appeal for improper closing remarks by the prosecutor. He was then retried for

aggravated burglary. His trial counsel **never** attacked the jeopardy barred indictment, unlike defense counsel in *Mathews*, who attacked the jeopardy barred indictment and lost that motion before the trial court. Mr. Thomas' second trial resulted in a conviction for the lesser included offense of unauthorized entry of an inhabited dwelling, and the Louisiana Supreme Court deemed this conviction "curative" of the double jeopardy violation. *See State v. Thomas*, 2012-1410 (La. 9/4/13), 124 So.3d 1049, 1056. Contrary to the Louisiana Supreme Court's ruling in post-conviction, the double jeopardy violation had not been "cured," because the Double Jeopardy Clause completely prohibits the State from trying Mr. Thomas twice for the exact same offense. Thus, we are not dealing with whether Mr. Thomas' double jeopardy violation was cured but rather whether Mr. Thomas successfully met his burden of demonstrating (1) he suffered a double jeopardy violation, and that (2) but-for his counsel's deficient performance, (3) he would not have been convicted of unauthorized entry. Mr. Thomas met this burden in his habeas proceedings; the District Court agreed and ordered vacation of the conviction and sentence. (See Appendix C & D)

2. ***Harmless error analysis should not be used to review Double Jeopardy violations.***

The Louisiana Supreme Court applied what is in effect a harmless error analysis to Anthony Thomas' blatant double jeopardy violation. No such analysis exists under federal law or U.S. Supreme Court jurisprudence in the context of a clear double jeopardy violation such as this; it cannot stand. The Court in *Mathews* briefly considered whether the harmless error standard can apply to a double jeopardy violation and held: "[T]his is not a 'harmless error' case: allowing respondent to be tried for aggravated murder was error, and **it was not in *any sense* harmless**." *Id.* at 244-45 (emphasis added). Likewise, the failure of trial counsel to quash the

jeopardy barred indictment **directly resulted** in Mr. Thomas' retrial for aggravated burglary, which was **not in *any sense* harmless**.

The State urges this Court to deem Mr. Thomas' conviction constitutional in light of the fact that it is responsive to the original indictment. As previously stated, the controlling law in this case is *Price v. Georgia*, 398 U.S. 323 (1970), which the *Mathews* Court reviewed in its decision as follows:

> We held that the second conviction could not stand because Price had been impliedly acquitted of murder at the first trial and **could not** be tried again on that charge.
> *Id.* at 245 (emphasis added, internal citations omitted).

Without calling it such, the Louisiana Supreme Court determined the double jeopardy violation Anthony Thomas experienced was harmless error. *See State v. Thomas*, 124 So.3d at 1056-58. The result of this apparent harmless error analysis is absurd: Anthony Thomas spends the rest of his life in Angola because the Louisiana Supreme Court **presumed** he would have been convicted, regardless of the offense charged in the second trial. Furthermore, the Louisiana Supreme Court presumed that the offense for which a person is charged and goes to trial has no bearing on the ultimate decision as to which offense for which the person should be found guilty.

3. ***Even using harmless error analysis, Mr. Thomas' conviction should be overturned as the error was anything but harmless.***

We need not address whether Mr. Thomas was prejudiced under *Morris v. Mathews*, because this case is inapplicable. However, for the purpose of combatting the State's erroneous application of *Mathews*, we urge this Court to consider the Magistrate Judge's Report and Recommendations as adopted by the District Court's ruling, finding *Mathews* inapplicable **and** that Mr. Thomas satisfied the *Mathews* standard requiring the defendant to demonstrate a

reasonable probability that he would have been convicted of a non-jeopardy-barred offense absent the presence of the jeopardy-barred offense. *See Mathews* at 246-47.

Citing *Mathews,* the Louisiana Supreme Court concluded that the return of a guilty verdict of unauthorized entry of an inhabited dwelling meant that the petitioner's retrial on the barred charge of aggravated burglary ultimately did not deprive him of his substantive right not to be prosecuted and convicted twice for the same offense as a matter of the Double Jeopardy Clauses of the federal and state constitutions.

This position is most eloquently detailed by Magistrate Judge Bourgeois:

> The Louisiana Supreme Court's application of *Mathews* is unreasonable in the instant matter. A jury did not find that the petitioner was guilty of aggravated burglary which would mean that his conduct also satisfied the elements of the lesser included offense of unauthorized entry of an inhabited dwelling. The jury found the petitioner guilty of attempted aggravated burglary, for which unauthorized entry of an inhabited dwelling is not a responsive verdict. As such, **it *cannot* be said that the jury necessarily found that the petitioner's conduct satisfied the elements of unauthorized entry of an inhabited dwelling. Accordingly, the petitioner's ultimate conviction for unauthorized entry of an inhabited dwelling cannot be deemed curative of the double jeopardy violation. Given the differences between the petitioner's second trial and the challenged proceedings in *Mathews,* the analysis in the factually similar *Price* case controls.** (See Appendix D) (Emphasis added)

II. MR. THOMAS' CONVICTION SHOULD BE OVERTURNED ON GROUNDS OF INEFFECTIVE ASSISTANCE OF COUNSEL IN ACCORDANCE WITH STRICKLAND.

Ineffective assistance of counsel claims presented in applications for habeas corpus are evaluated under *Strickland v. Washington,* 466 U.S. 668 (1984). Under *Strickland*, ineffective assistance of counsel is determined by whether (1) counsel's performance fell below an objective standard of reasonableness and (2) that deficient performance prejudiced the defense such that confidence in the outcome of the trial is undermined. *Id.* at 686.

The Court has recognized generally that criminal defendants are entitled to expect their counsel to understand applicable constitutional law. *See, e.g. Connick v. Thompson*, ____U.S.____, 131 S. Ct. 1350, 1362-63, 179 L. Ed. 2d 417 (2011). It follows that failure to pursue meritorious claims and defenses, owing not to strategic considerations but to a misapprehension of controlling law or relevant facts generally, will be found deficient. *See, e.g. Kimmelman v. Morrison*, 477 U.S. 365, 385, 106. S. Ct. 2574, 91 L. Ed. 2d 305 (1986); *Nero v. Blackburn*, 597 F. 2d 991, 993-94 (5th Cir. 1979); *Commonwealth v. Lynn*, 815 A.2d 1053 (Pa. Super. Ct. 2003); *State v. Allah*, 170 N.J. 269, 787 A. 2d 887, 897 (2002).

A. MR. THOMAS' TRIAL COUNSEL DID NOT PROVIDE COMPETENT REPRESENTATION TO MR. THOMAS AS GUARANTEED BY THE SIXTH AMENDMENT.

Mr. Thomas satisfied the first prong of *Strickland*, as noted by every reviewing court. Under the *Strickland* two-part test, trial counsel's performance, in not filing a meritorious motion to quash the jeopardy barred indictment before Mr. Thomas' second trial for aggravated burglary, fell below an objective standard of reasonableness.

In applying *Strickland*, the District Court evaluated the reasonableness of counsel's actions (or inaction, in this case) under *Martin v. McCotter*, 796 F.2d 813 (5th Cir. 1986) and *Bridge v. Lynaugh*, 838 F.2d 770 (5th Cir. 1988). Giving great deference *and* benefit of the doubt to trial counsel while considering counsel's performance in light of prevailing professional standards, the District Court concluded counsel's actions were fell below an objective standard of reasonableness and were thus deficient for the purpose of satisfying the first prong of *Strickland.*

B. MR. THOMAS WAS PREJUDICED BY HIS COUNSEL'S DEFICIENT REPRESENTATION AS THE RESULT OF HIS CASE WOULD HAVE BEEN DRASTICALLY DIFFERENT WITH PROPER REPRESENTATION.

Prejudice was established by the mere fact that, had trial counsel filed a motion to quash the jeopardy-barred indictment, there could have been no conviction for the offense of unauthorized entry of an inhabited dwelling. Thus, the convicted offense itself ***is*** the prejudice he suffered by the ineffective assistance of counsel and, more importantly, the direct result of a blatant double jeopardy violation. Due to the double jeopardy violation, the outcome of Mr. Thomas' case is unreliable.

Mr. Thomas was originally charged and tried for aggravated burglary.[4] He was found guilty of the lesser-included offense of attempted aggravated burglary, effectively acquitting him of aggravated burglary.[5] The State retried him for the exact same charge.[6] After a bench trial, the court found him guilty of unauthorized entry of an inhabited dwelling.[7] The ***same judge*** who sat as trier of fact in 2002 then granted Mr. Thomas' application for post-conviction relief in 2011, agreeing with the commissioner's finding that, if Mr. Thomas was properly tried, the result would have been different.[8]

The *Mathews* Court defined a "reasonable probability" as a probability "sufficient to undermine confidence in the outcome," as required by *Strickland*. *Mathews* at 247. This Court

---

[4] La. Sup Ct. Record Vol. I, 38.

[5] La. Sup Ct. Record Vol. I, 100.

[6] *See* La. Sup Ct. Record Vol. VI, 969; Vol. I, 10-11.

[7] La. Sup Ct. Record Vol. I, 10-11; Vol. V, 928.

[8] La. Sup Ct. Record Vol. II, 388.

can consider the outcome in this case as prejudice, and the District Court concluded it was. The conviction itself is unreliable.

As most succinctly presented by Louisiana Supreme Court Chief Justice Johnson:

> *Strickland* instructs that to prove prejudice, a defendant must show there is a reasonable probability that but for counsel's errors, the result of the proceeding would have been different. In this case, when the defendant was found guilty after the first trial of attempted aggravated burglary, that verdict served as an acquittal of the offense of aggravated burglary. Thus, the state trying defendant again for aggravated burglary unquestionably constituted double jeopardy. Had counsel filed a motion to quash, we ***must*** assume the trial court would have granted it since defendant was clearly entitled to relief, and the state could not have tried defendant for aggravated burglary. **If defendant had been tried for the next most serious offense of attempted aggravated burglary, he could not have been convicted for unauthorized entry of an inhabited dwelling because it is not a proper responsive verdict for an attempted aggravated burglary charge.** Therefore, had defense counsel filed a motion to quash, raising what was clearly a meritorious double jeopardy defense, **there is *no doubt* the outcome of the second trial would have been different**.
> *State v. Thomas* at 1059 (emphasis added).

State Court Commissioner Rachel P. Morgan noted in her Recommendation, later agreed upon by trial judge:

> Based on the fact that the verdict actually rendered in this case was one that would not have been available as a verdict if the State had properly charge the next greatest offense (attempted aggravated burglary), I find that is more likely than not that the Petitioner was prejudiced by Counsel's omission, and thus, a valid claim of ineffectiveness has been shown.[9]

And

> In other words, if the proper and next greatest offense of attempted aggravated burglary had been forced by a timely motion to quash the aggravated burglary bill, the Petitioner could not possibly have been found guilty of the crime for which he stands now convicted because it was not then responsive to attempted aggravated burglary.[10]

---

[9] La. Sup Ct. Record Vol. II, 394-95.

[10] La. Sup Ct. Record Vol. II, 395-96.

And

> In my opinion, such a mistake by counsel was not only deficient conduct (because the motion would have been valid) but it resulted in prejudice in the verdict because the verdict rendered when not have been available to the Court if the motion had been filed.[11]

Mr. Thomas respectfully asserts that in its most simple analysis, the result of his 2002 trial would have been different as the verdict was non-responsive to attempted aggravated burglary, the greatest offense for which he could have been tried. Under La. C. Cr. P. art. 814(A)(43), responsive verdicts for a charge of attempted aggravated burglary are:

- Guilty of Attempted Aggravated Burglary;
- Guilty of Attempted Simple Burglary;
- Guilty of Attempted Simple Burglary of an Inhabited Dwelling; or
- Not Guilty.

In *Murphy v. Puckett*, 893 F.2d 94 (5th Cir. 1990), the defendant was charged, tried and convicted of capital murder, with burglary and armed robbery being the underlying felonies. After the conviction and on a separate indictment, Murphy was charged and convicted of armed robbery, arising out of the same incident as his capital murder conviction. *Murphy* at 95. Murphy then filed for federal habeas corpus relief, asserting ineffective assistance of counsel for his counsel's failure to raise double jeopardy. The *Murphy* Court applied *Strickland* and reasoned:

> The facts of this case demonstrate that Murphy was prejudiced in the *Strickland* sense when counsel did not raise the double jeopardy defense. **If counsel had asserted the double jeopardy defense, the state court could not have tried Murphy for armed robbery.** If Murphy had not been tried, he obviously could not of been convicted. Thus, the outcome of the trial was vitally affected by counsel dereliction.
> *Murphy* at 96 (emphasis added).

---

[11] La. Sup Ct. Record Vol. II, 396.

The *Murphy* court further reasoned:

> The state, in defending against the defendant's contention that his counsel's deficient representation was prejudicial, has every opportunity to show that counsel's inadequacies did not affect the outcome. **Once the issue is litigated and determined, it makes *no sense* to give the state yet another opportunity to show that the deficient representation was immaterial.** We agree with the commentator's explanation of why inquiry should be made only once:
>
> "[N]o constitutional violation exists without finding that the challenged behavior presented a 'reasonable probability' of having affected the outcome of the proceeding. Where a court has made such a finding in concluding that there was a constitutional violation (as where it concludes counsel's representation was ineffective under *Strickland* standard...) **then there is no reason to superimpose the Chapman standard...**"
> *Ibid* (emphasis added; emphasis original to opinion).

In Mr. Thomas' case, an application for post-conviction relief asserting ineffective assistance of counsel was reviewed by 19th Judicial District Court Commissioner Rachel P. Morgan who recommended a hearing. The State filed a traversal to Commissioner's Recommendation.[12] The State then filed a Response to Application for PCR.[13] A hearing was conducted on September 15, 2011 in which trial counsel, Mr. Ronald Johnson, was placed under examination by both the State and defense counsel. In a September 27, 2011 Recommendation, Commissioner Morgan recommended the granting of post-conviction relief, stating:

> Based on the facts of the case, the admissions by trial counsel of his error, and the legal conclusion by the Supreme Court confirming that aggravated burglary was jeopardy barred offense, **I find that Petitioner has shown both prongs of the *Strickland* test for ineffectiveness and reversal is warranted.**[14]

---

[12] *See* La. Sup Ct. Record Vol. II, 314-325.

[13] *See* La. Sup Ct. Record Vol. II, 359-366.

[14] La. Sup Ct. Record Vol. II, 396.

On October 10, 2011, the State of Louisiana filed another Traversal to Commissioner Morgan's Recommendation.[15] On November 28, 2011, Judge Todd W. Hernandez, agreed with Commissioner Morgan's recommendation, granting Mr. Thomas' Petition for Post-Conviction Relief and reversing Mr. Thomas' conviction and sentence.[16] The trial court determined that trial counsel's representation was ineffective under the *Strickland* standard.

Petitioner has proven that he was prejudiced by his trial counsel's deficient performance. The issue of ineffective assistance of counsel (including performance and prejudice) was **fully litigated at the trial court level**, yet the State has been allowed not one, not two, but now four chances, to attempt to show that the deficient representation was immaterial.[17]

The *Murphy* Court also determined that *Morris v. Mathews* was inapplicable in that double jeopardy prevents the State from trying the defendant for the same offense twice. Thus, under the *Murphy* rationale, the violation of Anthony Thomas' constitutional rights has **not** been cured. *See Murphy v. Puckett* at 97.

---

[15] *See* La. Sup Ct. Record Vol. II, 398-404.

[16] *See* V La. Sup Ct. Record Vol. II, 405.

[17] The State has had one chance with Louisiana First Circuit (writ denied), a second chance with the Louisiana Supreme Court, a third chance at the District Court and a fourth chance with United States Court of Appeal, Fifth Circuit.

III. THE DISTRICT COURT GAVE PROPER DEFERENCE UNDER AEDPA TO THE STATE COURT'S DECISION AND, IN GRANTING HABEAS RELIEF, DETERMINED THE LOUISIANA SUPREME COURT UNREASONABLY APPLIED CLEARLY ESTABLISHED FEDERAL LAW UNDER *MORRIS V. MATHEWS*, 475 U.S. 237 (1986).

The Magistrate Judge's Report and Recommendation, as adopted by the District Court in its ruling granting habeas relief, carefully and deliberately considered the high burdens Mr. Thomas had to overcome in claiming ineffective assistance of counsel in a habeas proceeding, stating:

> Both the *Strickland* standard for ineffective assistance of counsel and the standard for federal habeas review of state court decisions under 28 U.S.C. § 2254(d)(1) are highly deferential, and when the two apply in tandem, the review by federal courts is "doubly deferential." *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009) (See Appendix D)

The District Court knew what standard to apply in evaluating this case and did so after painstakingly detailing the standards controlling its decision at great length ultimately finding that the Louisiana Supreme Court unreasonably applied *Morris v. Mathews*, 475 U.S. 237 (1986).

The Louisiana Supreme Court's reliance on and application of *Morris v. Mathews* was an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States. Mr. Thomas argued in habeas and maintains herein that *Morris v. Mathews* does not control. The Magistrate Judge concurred and conducted an analysis of Mr. Thomas' case under *Price v. Georgia* in addition to *Morris v. Mathews*, and still concluded Mr. Thomas' conviction warranted reversal.

While *Price* is more closely analogous to the circumstances of Mr. Thomas' case than *Mathews*, the correct analysis should have been and is now a straightforward application of *Strickland*. As Louisiana Supreme Court Chief Justice Johnson aptly noted in her 2013 dissent, the cases cited by the majority, under which the court deviated from a **straightforward**

application of *Strickland*, are the ***exception*** to *Strickland*. *State v. Thomas*, 124 So.3d at 1058. The United States Supreme Court, in *Williams v. Taylor*, held:

> Although there are a few situations in which the overriding focus on fundamental fairness may affect the analysis, see *Strickland,* 466 U.S., at 692, 104 S.Ct. 2052, cases such as *Lockhart* and *Nix v. Whiteside,* 475 U.S. 157, 106 S.Ct. 988, 89 L.Ed.2d 123, do ***not*** justify a departure from a ***straightforward*** application of *Strickland* when counsel's ineffectiveness deprives the defendant of a substantive or procedural right to which the law entitles him.
> *Williams v. Taylor*, 529 U.S. 362, 363, 120 S. Ct. 1495, 1497, 146 L. Ed. 2d 389 (2000) (emphasis added).

Mr. Thomas was entitled, by United States and Louisiana Constitutional guarantees, to be free from double jeopardy. He was deprived that fundamental protection.

Due to the Louisiana Supreme Court's complication of Mr. Thomas' case by failing to utilize a straightforward application of *Strickland*, its decision, reinstating Mr. Thomas' conviction and sentence in 2013, was founded in an unreasonable application of clearly established federal law, as interpreted by the United States Supreme Court.

Had trial counsel filed a motion to quash, the resulting verdict of Unauthorized Entry of an Inhabited Dwelling would not have been possible; even the burden established by the split court in *Morris v. Mathews*, requiring the defendant to show that "the result of the proceeding probably would have been different" is met by Mr. Thomas. *Mathews* at 247. Thus, the State Court's reinstatement of Mr. Thomas' conviction after reversal due to double jeopardy and then reinstatement of Mr. Thomas' conviction after trial court's granting of post-conviction relief is incorrect and unreasonable even in light of an application of *Morris v. Mathews*.

The post-conviction court, Louisiana First Circuit Court of Appeal and District Court all agreed: Mr. Thomas ***met his burden***, demonstrating his trial counsel was ineffective and his trial's outcome is unreliable; the granting of habeas relief by the District Court reflects that accomplishment.

The Magistrate Judge's Report and Recommendations, adopted by the District Court in its ruling, stated Mr. Thomas' position impeccably:

> [W]hat is clear is that had the indictment for aggravated burglary been quashed based on a properly filed motion, petitioner would not have the conviction currently imposed nor would he have been sentenced under that conviction.
>
> Petitioner's second trial for aggravated burglary was an ***indisputable*** violation of the Double Jeopardy Clause of the Fifth Amendment. Additionally, the failure of the petitioner's trial counsel to file a meritorious motion to quash the jeopardy-barred indictment fell below an objective standard of reasonableness, and, as explained above, said error was sufficient to undermine confidence in the outcome of the proceedings. (See Appendix D)

CONCLUSION

For all reasons set forth above, the Petition for Writ of Certiorari should be granted.

Respectfully Submitted on October 30, 2018 by:

MANASSEH. GILL, KNIPE & BELANGER, P.L.C.

JAMES G. KNIPE III
Attorney for Petitioner, Mr. Anthony Thomas
8075 Jefferson Highway
Baton Rouge, Louisiana 70809
Telephone: 225-383-9703
Facsimile: 225-383-9704
Email: jim@manassehandgill.com

DOCKET NO._____

IN THE SUPREME COURT OF THE UNITED STATES

ANTHONY THOMAS, *Petitioner*

v.

DARRELL VANNOY, WARDEN, LOUISIANA STATE PENITENTIARY, *Respondent*

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS FOR THE 5TH CIRCUIT

CERTIFICATE OF SERVICE

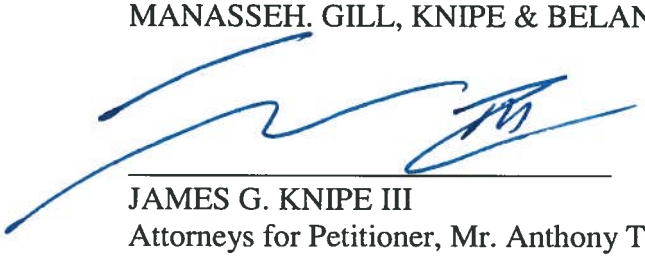
I, James G. Knipe III, a member of the Bar of this Court, hereby certify that on this 30th day of October, 2018, one copy of the Petition for Writ of Certiorari, and one copy of the Motion to Leave to Proceed In Forma Pauperis, with Petitioner's Affidavit in Support of Motion to Proceed in Forma Pauperis attached, in the above-entitled case were mailed, first class postage prepaid and forwarded via electronic copy to the following:

Mr. Jeff Landry, Attorney General for the State of Louisiana, care of Mr. Colin Clark, Assistant Solicitor General, 1885 N. 3rd Street, Baton Rouge, Louisiana, 70802, ClarkC@ag.louisiana.gov, telephone no. 225-326-6200, attorneys representing Darrell Vannoy, Warden, Louisiana State Penitentiary.

I further certify that all parties required to be served have been served.

Respectfully Submitted:

MANASSEH. GILL, KNIPE & BELANGER, P.L.C.



JAMES G. KNIPE III
Attorneys for Petitioner, Mr. Anthony Thomas
8075 Jefferson Highway
Baton Rouge, Louisiana 70809
Telephone: 225-383-9703
Facsimile: 225-383-9704
Email: jim@manassehandgill.com

Docket No._____

IN THE

SUPREME COURT OF THE UNITED STATES

ANTHONY THOMAS, *Petitioner*

v.

DARRELL VANNOY, WARDEN, LOUISIANA STATE PENITENTIARY, *Respondent*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE 5TH CIRCUIT

APPENDIX
TO
PETITION FOR WRIT OF CERTIORARI

COUNSEL FOR PETITIONER
JAMES G. KNIPE III

MANASSEH, GILL, KNIPE &
BELANGER, P.L.C.
8075 Jefferson Highway
Baton Rouge, Louisiana 70809
Telephone: 225-383-9703
Facsimile: 225-383-9704
Email: jim@manassehandgill.com

INDEX TO APPENDICES

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
August 2, 2018
Lyle W. Cayce
Clerk

No. 17-30178

D.C. Docket No. 3:14-CV-147

ANTHONY THOMAS,

Petitioner - Appellee

v.

DARREL VANNOY, WARDEN, LOUISIANA STATE PENITENTIARY,

Respondent - Appellant

Appeal from the United States District Court for the
Middle District of Louisiana

Before HIGGINBOTHAM, SMITH, and CLEMENT, Circuit Judges.

J U D G M E N T

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is reversed.

A.

Certified as a true copy and issued as the mandate on Aug 02, 2018

Attest: Lyle W. Cayce
Clerk, U.S. Court of Appeals, Fifth Circuit

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
August 2, 2018
Lyle W. Cayce
Clerk

No. 17-30178

ANTHONY THOMAS,

Petitioner - Appellee

v.

DARREL VANNOY, WARDEN, LOUISIANA STATE PENITENTIARY,

Respondent - Appellant

Appeal from the United States District Court
for the Middle District of Louisiana

Before HIGGINBOTHAM, SMITH, and CLEMENT, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

This case asks us to traverse the knotty terrain at the intersection of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), double jeopardy, and ineffective assistance of counsel. We are called upon to review the lower court's decision to grant habeas relief; we will reverse that decision and deny the petitioner's request for relief.

I.

Charged with aggravated burglary in Louisiana state court in 1998, Anthony Thomas was only convicted of *attempted* aggravated burglary, an implied acquittal of aggravated burglary. With the conviction for attempted aggravated burglary, the state initiated habitual offender proceedings, seeking

B.

Thomas's life imprisonment without the possibility of parole.[1] But the reviewing court found that the prosecutor had committed an error in his closing statement, and remanded for a new trial. Instead of charging him with attempted aggravated burglary—or some other non-barred offense—the state charged Thomas with aggravated burglary once again, an undisputed double jeopardy violation.

In the second proceeding, Thomas waived a jury, and in a bench trial before a Louisiana state court judge, he was convicted of a different lesser included offense: unauthorized entry of an inhabited dwelling. Louisiana once again initiated habitual offender proceedings, but the state intermediate court again vacated the conviction. Upon Louisiana's appeal to the Louisiana Supreme Court, however, the conviction for unauthorized entry was reinstated. The Louisiana Supreme Court reasoned that while a double jeopardy violation had doubtless occurred, the final conviction was for a nonjeopardy-barred offense, and that conviction was not necessarily tainted by the wrongful prosecution.

Turning to state collateral review, Thomas argued that his counsel had been ineffective for failing to move to quash the jeopardy-barred indictment for aggravated burglary. The state judge who had presided over Thomas's bench trial conducted hearings and determined that Thomas was entitled to relief. The Louisiana Supreme Court reversed once more. Disagreeing with the trial

[1] Importantly, *any* new felony conviction would result in life in prison without the possibility of parole for Thomas. In determining the applicability of a habitual offender statute, Louisiana courts apply the version in effect at the time of the crime's commission. *See State v. Evans*, 998 So.2d 197, 205 (La. Ct. App. 2008). For Thomas, that means the version in effect in 1998, which said, "[i]f the third felony or either of the two prior felonies is a felony defined as a crime of violence . . . , the person shall be imprisoned without benefit of parole, probation, or suspension of sentence." La. R.S. 15:529.1.A.(1)(ii) (1998). Thomas has two previous felony convictions—one for armed robbery, one for attempted manslaughter—and both are crimes of violence under Louisiana law.

court—and over a dissent—it held that Thomas had not been prejudiced by his lawyer's failure to quash the invalid charge.

Thomas then turned to the federal courts. His petition for habeas relief urges two flaws in the state court proceedings. First, he claims that the Louisiana Supreme Court incorrectly resolved the Fifth Amendment double jeopardy argument that he raised on direct appeal. Second, he claims that the Louisiana Supreme Court incorrectly resolved the Sixth Amendment ineffective assistance of counsel argument that he raised on state collateral review. The magistrate judge recommended granting relief on both grounds, and the district court below relied on this recommendation to once again reverse Thomas's conviction; that decision is now before us.

II.

We review a district court's decision to grant habeas relief for clear error in factual determinations and de novo for legal ones.[2] Because the Louisiana Supreme Court has adjudicated Thomas's claims on the merits, our review is subject to AEDPA's so-called "relitigation bar."[3] And because that relitigation bar applies, we may not grant habeas relief unless "the [state court's] adjudication of the claim resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."[4] AEDPA's reference to clearly established law encompasses "the holdings, as opposed to the dicta," of Supreme Court decisions.[5] For a Supreme Court decision to clearly establish law, it must "confront 'the specific question presented by [another] case'"—it is not enough for a subsequent case to involve "circumstances . . . [that] are only

[2] *See Richards v. Quarterman*, 566 F.3d 553, 561 (5th Cir. 2009).
[3] *See* 28 U.S.C. § 2254(d)(1).
[4] *Id.*
[5] *Williams v. Taylor*, 529 U.S. 362, 412 (2000).

'similar to'" earlier Supreme Court decisions.[6] Thus, we cannot simply "fram[e] [Supreme Court] precedents at . . . a high level of generality" and declare a principle to be clearly established when the Court has yet to squarely consider it.[7]

To overcome the relitigation bar, a petitioner must show that a state court acted "contrary to" or engaged in an "unreasonable application of" the Supreme Court's clearly established law.[8] These are distinct errors.[9] A state court decision is "contrary to" clearly established law if it entails "a conclusion opposite to that reached by th[e] Court on a question of law or if the state court decides a case differently than th[e] Court has on a set of materially indistinguishable facts."[10] A state court decision is an "unreasonable application of" clearly established law, on the other hand, "if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case."[11] The Court has explained that a state court opinion cannot comprise an unreasonable application of Supreme Court precedent so long as "'fairminded jurists could disagree' on the correctness of the state court's decision."[12] Thus, for a state decision to amount to an unreasonable application of federal law, a petitioner must point to an error so "well understood and comprehended in existing law" it is "beyond any possibility for fairminded disagreement."[13]

---

[6] *Woods v. Donald*, 135 S. Ct. 1372, 1377 (2015) (per curiam).
[7] *Nevada v. Jackson*, 133 S. Ct. 1990, 1994 (2013) (per curiam).
[8] *See* 28 U.S.C. § 2254(d)(1).
[9] *See Williams*, 529 U.S. at 412.
[10] *Id.* at 413.
[11] *Id.*
[12] *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)).
[13] *Metrish v. Lancaster*, 133 S. Ct. 1781, 1786–87 (2013) (quoting *Richter*, 562 U.S. at 103) (quotations omitted).

III.

We begin by deciding whether the Louisiana Supreme Court's resolution of Thomas's Fifth Amendment double jeopardy claim on direct appeal was contrary to, or reflected an unreasonable application of, clearly established law.

A.

First, according to Thomas, the Louisiana Supreme Court's decision was contrary to *Price v. Georgia*,[14] a case that he declares to be "materially indistinguishable" from this one.[15] If that were true, his argument would naturally be on strong footing. But it is not.

Price v. Georgia involved a defendant who was twice charged with murder in state court.[16] The first time, the jury returned a verdict for a lesser included offense, thereby implicitly acquitting him of the murder charge.[17] But as with Thomas, the state proceeded to charge him with murder once more.[18] And as with Thomas, the defendant was again convicted of a lesser included offense.[19] On direct appeal, the *Price* Court held that the second prosecution violated the Double Jeopardy Clause and reversed the conviction.[20] At first blush, the facts seem to align: both Thomas and the defendant in *Price* were charged with a greater offense and convicted of a lesser included offense, and were then charged with the same greater offense and again convicted of a lesser included offense.

But an important difference marks *Price* out from this case. In *Price*, the second trial was before a jury. When it opined on the harm of the double

---

[14] 398 U.S. 323 (1970).
[15] **Blue Br. at 13.**
[16] *Id.* at 324.
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.* at 331.

jeopardy violation, therefore, the *Price* Court credibly worried about the "risk or hazard of trial and conviction" stemming from the improper second charge.[21] In particular, it registered concern that the jeopardy-barred charge "induced the jury to find [the defendant] guilty of the less serious offense . . . rather than to continue to debate his innocence."[22] However, Thomas's second trial was a bench trial, so it is at least plausible that "the primary evil addressed in *Price*—the risk of jury prejudice—is not present" here.[23]

It is certainly true, as the magistrate judge concluded, that *Price* is "factually similar" to this case. But for the Louisiana Supreme Court's double jeopardy decision to be contrary to *Price*, *Price* must be more than just similar to Thomas's situation: it must contain a set of "facts that are materially indistinguishable" from this case.[24] Yet we have often said that judges, unlike juries, are presumptively insulated from any undue trial influence.[25] It does not matter that the Louisiana Supreme Court did not explicitly distinguish *Price* on these grounds—or address *Price* at all, for that matter.[26] In fact, state courts may avoid issuing decisions contrary to clearly established federal law even without "*awareness* of [the Supreme Court's] cases, so long as neither the reasoning nor the result of the state-court decision contradicts them."[27] We must then conclude that the Louisiana Supreme Court, in not applying *Price*

---

[21] *Id.*

[22] *Id.*

[23] *Renteria v. Adams*, No. C 08-5325 CRB, 2011 WL 89412, at *11 (N.D. Cal. Jan. 11, 2011).

[24] *Williams*, 529 U.S. at 405.

[25] *See, e.g., United States v. Cardenas*, 9 F.3d 1139, 1156 (5th Cir. 1993) ("The prejudicial impact of erroneously admitted evidence in a bench trial is presumed to be substantially less than it might have been in a jury trial.").

[26] *See State v. Thomas*, 926 So.2d 490, 491 (La. 2006) (per curiam).

[27] *Early v. Packer*, 537 U.S. 3, 8 (2002) (per curiam); *Evans v. Davis*, 875 F.3d 210, 216 (5th Cir. 2017) ("In fact, [to survive review under the 'contrary to' clause,] the state habeas court need not even display awareness of the Supreme Court's cases . . . .").

in review of Thomas's Fifth Amendment claim, did not contravene clearly established federal law under AEDPA's relitigation bar.

B.

Even though the Louisiana Supreme Court's rejection of Thomas's Fifth Amendment claim was not contrary to *Price*, Thomas is still entitled to relief if he can show an unreasonable application of clearly established law. He claims that the Louisiana Supreme Court's analysis contains just that: by his reckoning, the Louisiana Supreme Court misapplied the framework established by *Price* and *Morris v. Mathews*.[28]

i.

The Louisiana Supreme Court's decision on Thomas's Fifth Amendment claim was laconic. It did not pause to explain why *Mathews* applies to Thomas's claim and, in light of that application, why he did not meet the standard *Mathews* sets out.[29] Our approach has been to look "not just [at] the arguments and legal theories the state court's opinion actually gave, but also any arguments or legal theories the state court reasonably *could have* given."[30] The continued viability of this approach after the Supreme Court's decision in *Wilson v. Sellers* is uncertain, however.[31] In *Wilson*, the Court explained that when the most recent state court to consider a constitutional issue provides a "reasoned opinion," we are to "review[] the specific reasons given by the state court and defer[] to those reasons if they are reasonable."[32] If the opinion "does

---

[28] 475 U.S. 237 (1986).

[29] In its Fifth Amendment opinion, the Louisiana Supreme Court only cited *Mathews* once, and the court never explained why it believed that case to have been more relevant than *Price*. The Louisiana Supreme Court also only declared that *Mathews* denied Thomas relief "because the verdict was not inherently tainted by virtue of its return in the trial of a jeopardy-barred offense." 926 So.2d at 491.

[30] *Langley v. Price*, 890 F.3d 504, 515 (5th Cir. 2018).

[31] 138 S. Ct. 1188 (2018).

[32] *Id.* at 1192.

not come accompanied with those reasons," however, we are to "look through" the decision to an earlier state court opinion and presume that the earlier one provides the relevant rationale.[33]

It is not entirely clear whether *Wilson* demands that we look to an earlier state opinion when the latest state court to consider the issue *did* provide an opinion, but only a vague or terse one—the *Wilson* Court was only directly concerned with a state court order "that was made without any explanatory opinion" whatsoever.[34] However, we need not reach that question here, because we cannot "look through" the Louisana Supreme Court's Fifth Amendment opinion: the Louisiana Supreme Court was the only state court to consider and reject Thomas's Fifth Amendment double jeopardy claim. Nor is it an answer that the Louisiana Supreme Court did not actually adjudicate the Fifth Amendment claim on the merits, and that it is therefore not entitled to AEDPA deference. That would be a misstep. While the Louisiana Supreme Court's opinion said little, it did adjudicate Thomas's Fifth Amendment claim on the merits under the standard that the Court has laid out;[35] and that leaves us at *Richter*'s door.[36]

Richter, confronted with a summary decision, a claim of unreasonable application, and no other state court opinion to look to, held that the appropriate course of action was to decide "what arguments or theories supports or . . . *could have supported*[] the state court's decision."[37] Thus, to

---

[33] *See id.*

[34] *Id.* at 1193.

[35] *See, e.g.*, *Richter*, 562 U.S. at 99 ("When a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary.").

[36] *See Wilson*, 138 S. Ct. at 1195 ("*Richter* did not directly concern the issue before [the Court] . . . . [I]n *Richter*, there was no lower court opinion to look to.").

[37] *Richter*, 562 U.S. at 102 (emphasis added).

determine whether the Louisiana Supreme Court engaged in an unreasonable application of *Mathews*, we must "gather[] the arguments and theories that could support the state court's ultimate decision" and "ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent" with Supreme Court precedent.[38]

ii.

First of all, Thomas argues that the Louisiana Supreme Court's decision to apply *Mathews* represented an unreasonable application of clearly established law; *Price* is "the controlling ruling" here, according to him, and any invocation of *Mathews* was errant. We disagree. The extent to which this case is governed by *Mathews* or *Price* is subject to the kind of "fairminded disagreement" that AEDPA shields from our intervention.[39]

Morris v. Mathews is a double jeopardy case postdating *Price*.[40] In *Mathews*, the defendant pled guilty to aggravated robbery and was subsequently charged and convicted with aggravated murder.[41] But the aggravated murder conviction was premised on aggravated robbery as the predicate offense—a double jeopardy violation.[42] The state court of appeals modified the conviction to ordinary murder and correspondingly lowered the defendant's sentence.[43] The Supreme Court then held that habeas relief was inappropriate.[44]

By *Mathews*, "*Price* did not impose an automatic retrial rule whenever a defendant is tried for a jeopardy-barred crime and is convicted of a lesser included offense. Rather, the Court relied on the likelihood that the conviction

---

[38] *Evans*, 875 F.3d at 217 (internal quotation marks omitted).
[39] *Richter*, 562 U.S. at 103.
[40] *Morris v. Mathews*, 475 U.S. 237 (1986).
[41] *Id.* at 242.
[42] *Id.* at 243.
[43] *Id.*
[44] *Id.* at 248.

for manslaughter had been influenced by the trial on the murder charge—that the charge of the greater offense for which the jury was unwilling to convict also made the jury less willing to consider the defendant's innocence on the lesser charge."[45] Furthermore, according to the *Mathews* Court, "*Price* [does not] suggest[] that a conviction for an unbarred offense is inherently tainted if tried with a jeopardy-barred charge. Instead, [it] suggest[s] that a new trial is required *only when the defendant shows a reliable inference of prejudice*."[46]

Under *Mathews*, the rule is that defendants like Thomas must show "a reliable inference of prejudice" to warrant reversal on the basis of the Fifth Amendment. Again, a plausible way to read this rule alongside *Price* hinges on the identity of the factfinder and the accompanying likelihood that the greater offense charge induced it to convict the defendant. On that reading, it is not unreasonable to conclude that Thomas would have to do something more than the defendant in *Price* did to "show[] a reliable inference of prejudice" in his situation, since it is less likely that the issuance of a jeopardy-barred charge alone would unduly influence a judge—or make him "less willing to consider the defendant's innocence"—than a jury. Given the murky boundaries of *Price* and *Mathews*, we cannot say that the Louisiana Supreme Court unreasonably applied *Mathews*.

iii.

Thomas argues that even if *Mathews* does apply, and even if it does require him to make an additional showing of "a reliable inference of prejudice" before his conviction may be reversed, the Louisiana Supreme Court unreasonably applied that standard. Under *Mathews*, a reliable inference of

[45] *Id.* at 245.
[46] *Id.* (emphasis added).

prejudice is tantamount to "a probability [of prejudice] sufficient to undermine confidence in the outcome."[47]

The Louisiana Supreme Court misapplied this standard, Thomas's argument goes, because he has shown prejudice in multiple ways. First, the greatest offense for which he could have been tried after the aggravated burglary acquittal was attempted aggravated burglary—the very offense that he was convicted of in his first trial. But if he were actually charged with attempted aggravated burglary, he could not have received the same conviction for unauthorized entry of an inhabited dwelling, since it is not a responsive verdict to attempted aggravated burglary. Thus, there is a reasonable probability that Thomas would not have been convicted of unauthorized entry of an inhabited dwelling but for the double jeopardy violation. Thomas also claims that the jeopardy-barred conviction exposed him to a greater number of responsive guilty verdicts and the possibility of higher sentencing ranges.

Louisiana responds by pointing out that no matter what felony Thomas were convicted of, he would be eligible for habitual offender proceedings, which, if successfully pursued, would result in a life sentence in prison without the possibility of parole. And Louisiana argues that there is little doubt that even in the absence of the jeopardy-barred charge, Thomas would have been charged and convicted of *some* felony, as he ultimately was after both trials.[48]

The dispute turns, then, on *what kind of prejudice* a defendant must show to a degree of reasonable probability under *Mathews*. Thomas claims that

---

[47] *Id.* at 475.

[48] At one point, Thomas argues that a charge of unauthorized entry of an inhabited dwelling could have yielded a conviction for a lesser included offense of misdemeanor trespass, but he provides no argument about how this is probable beyond mere theoretical possibility. The only difference between misdemeanor trespass and unauthorized entry of an inhabited dwelling is that criminal trespass covers uninhabited dwellings, and a judge already found the site of Thomas's trespass—an apartment—to be inhabited. *See State v. Simmons*, 817 So.2d 16, 20–21 (La. 2002).

it is enough to show that his particular conviction may not have obtained without the jeopardy-barred charge; Louisiana claims that more is required, and that the sentence or ultimate result must be meaningfully different in some way.

Mathews itself is here uncertain. At one point, it speaks of the defendant's need to show a reasonable probability "that he would not have been convicted of the nonjeopardy-barred offense absent the presence of the jeopardy-barred offense."[49] At another, it speaks more generally of a defendant's need to show a reasonable probability that "the result of the proceeding" would have been different without the jeopardy-barred offense.[50] At still another point, it suggests that a defendant must show a reasonable probability that the outcome of a trial on the convicted lesser included offense—here, unauthorized entry of an inhabited dwelling—would have been different.[51]

We cannot say that the choice among these alternatives is beyond the scope of "fairminded disagreement." It is possible to read *Mathews* for the proposition that a court must mechanically reverse Thomas's conviction since but for the state's decision to charge a jeopardy-barred offense there is a reasonable probability that he would have been convicted of some felony other than unauthorized entry of an inhabited dwelling, such as attempted aggravated burglary. But *Mathews* may also stand for the proposition that Thomas must show a reasonable probability that his sentence—the more practical "result" of the trial—would be meaningfully different. Or that the

---

[49] *Mathews*, 475 U.S. at 247.

[50] *Id.*

[51] *See id.* at 248 ("[T]he court's observation that the admission of questionable evidence 'may have prejudiced the jury' falls far short of a considered conclusion that if the evidence at issue was not before the jury *in a separate trial for murder*, there is a reasonable probability that respondent would not have been convicted." (emphasis added)).

result of a trial specifically for unauthorized entry of an inhabited dwelling would end in no conviction.

We must assume that the Louisiana Supreme Court had one of these latter interpretations of *Mathews* in mind; even if they do not reflect the interpretations that we would adopt in the first instance, we cannot say that they are unreasonable. So we must conclude that Thomas failed to meet his burden of showing a reasonable probability that a different result would have obtained without the jeopardy-barred aggravated burglary charge. Thomas has made no non-speculative showing that without the aggravated burglary charge, he would not have been convicted of a felony. And in the event of such a conviction, he has also made no showing that the state would not move to pursue habitual offender proceedings as it has twice before, putting him in precisely the same place as he is right now. If the proper reference point is taken to be a fresh trial specifically for unauthorized entry of an inhabited dwelling, Thomas has also made no showing that such a trial would end in anything other than his conviction—again, leaving him where he is now.

We therefore conclude that the Louisiana Supreme Court did not unreasonably apply *Mathews* in denying Thomas his requested relief upon his Fifth Amendment double jeopardy claim.

IV.

Thomas also raises a Sixth Amendment ineffective assistance of counsel argument; he claims that his counsel was ineffective for failing to quash the jeopardy-barred aggravated burglary charge, a claim adjudicated on the merits and rejected by the Louisiana Supreme Court on state collateral review. Thus, as with Thomas's Fifth Amendment double jeopardy claim, we are bound by the strictures of AEDPA in reviewing it.

The underlying constitutional standard governing Thomas's Sixth Amendment argument is the familiar one derived from *Strickland*: the petitioner must show both that his "counsel's representation fell below an objective standard of reasonableness" and that this deficiency prejudiced him.[52] An error is prejudicial if it results in "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[53] The burden rests on the petitioner to show that a *Strickland* error was prejudicial.[54] Additionally, when *Strickland* arises in the context of AEDPA's relitigation bar—as it does here—we are confronted with two overlapping standards that are each "highly deferential."[55] "[W]hen the two [standards] apply in tandem, [our] review is 'doubly' so."[56]

A.

Unlike its opinion on direct review of Thomas's Fifth Amendment double jeopardy claim, the Louisiana Supreme Court's opinion on collateral review explains why it denied Thomas's ineffective assistance of counsel claim. It did so because it did not believe that Thomas had met his burden of showing prejudice under *Strickland*—"[d]efendant's prejudice argument is [] wanting," the Louisiana Supreme Court explained, "in light of the almost certain chance that he would have received the same habitual offender sentence, notwithstanding the filing of a timely motion to quash."[57] As in the Fifth Amendment context, this reflects an interpretation of prejudice pegged to what the court saw as the likely practical outcome of the proceedings and the sentence Thomas would receive even in the absence of a double jeopardy

---

[52] *Strickland v. Washington*, 466 U.S. 668, 688 (1984).
[53] *Id.* at 694.
[54] *See Richter*, 562 U.S. at 104.
[55] *See id.* at 105 (quoting *Strickland*, 466 U.S. at 689).
[56] *Id.* (quoting *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009)).
[57] *State v. Thomas*, 124 So.3d 1049, 1057 (La. 2013).

violation: life in prison without the possibility of parole under Louisiana's habitual offender statute.

Thomas levels a preliminary charge at the form of the Louisiana Supreme Court's reasoning: the Louisiana Supreme Court's analysis took the wrong tack because it variously cited *Lockhart v. Fretwell* for the proposition that a *Strickland* prejudice analysis must provide due attention "to whether the result of the proceeding was fundamentally unfair or unreliable."[58] *Lockhart*'s prescription, however, "do[es] not justify a departure from a straightforward application of *Strickland* when counsel's ineffectiveness deprives the defendant of a substantive or procedural right to which the law entitles him."[59] Fixing on these citations, Thomas argues that the Louisiana Supreme Court unreasonably applied the law. But while the Louisiana Supreme Court's citations to *Lockhart* were indeed inapt, the court went on to engage in a "straightforward application of *Strickland*" that ended in the determination that Thomas had not been prejudiced, and that he therefore was not deprived of any Sixth Amendment right.[60] Because "a state court need not cite or even be aware of [the operative Supreme Court] cases under § 2254(d),"[61] the only question is whether the "reasoning []or the result of the state-court decision contradicts them."[62] We now ask whether the Louisiana Supreme Court unreasonably applied clearly established law in its *Strickland* analysis.

B.

No party disputes—and all tribunals to this litigation have so far concluded—that Thomas's counsel was deficient in failing to move to quash the

---

[58] 506 U.S. 364, 369 (1993); *see Thomas*, 124 So.3d at 1054.
[59] *Williams v. Taylor*, 529 U.S. 362, 363 (2000).
[60] *See Thomas*, 124 So.3d at 1056–57.
[61] *Richter*, 562 U.S. at 98.
[62] *Early*, 537 U.S. at 8.

jeopardy-barred charge. The sole disagreement spins on *Strickland*'s prejudice prong. As with his Fifth Amendment argument, Thomas relies principally on the fact that the aggravated burglary charge resulted in a conviction for a specific offense that he may not have otherwise received. Yet the Louisiana Supreme Court responded to this argument, and it mirrors the response we have outlined above: even assuming a reasonable probability of a conviction for a different offense in the absence of the aggravated burglary charge, Thomas fails to show a reasonable probability that his final sentence would be any different, due to his status as a habitual offender.[63]

The operative question is largely a repeat of the one we confronted in the Fifth Amendment context: is the Louisiana Supreme Court's interpretation of the necessary prejudice showing an unreasonable application of Supreme Court precedent? The only difference is that for his Sixth Amendment claim, that Supreme Court precedent includes *Strickland*.

Thomas claims that a showing of a reasonable probability that a defendant would not have been convicted of precisely the same offense but for his counsel's error amounts to prejudice, pointing to *Murphy v. Puckett*.[64] But *Murphy* cannot bear the weight of Thomas's argument for at least two reasons. First, it is Fifth Circuit precedent and not Supreme Court precedent. For the purposes of AEDPA, only the latter counts as "clearly established" law.[65] Second, and more to the point, *Murphy* sweeps more narrowly than Thomas suggests. In *Murphy*, we did say that a defendant could show *Strickland* prejudice when his lawyer failed to "raise what was clearly a valid double

---

[63] *See Thomas*, 124 So.3d at 1057 ("Defendant's prejudice argument is thus wanting in light of the almost certain chance that he would have received the same habitual offender sentence, notwithstanding the filing of a timely motion to quash.").

[64] 893 F.2d 94 (1990).

[65] *See, e.g.*, *Renico v. Lett*, 559 U.S. 766, 778–79 (2010).

jeopardy defense."[66] But importantly, in *Murphy*, the defendant had been convicted in his initial trial, not implicitly acquitted like Thomas. That means when the state charged him a second time, all lesser included offenses were jeopardy-barred—there was nothing available for the state to cure the violation.[67] *Murphy* specifically distinguished *Mathews* on that ground;[68] it does not speak to a situation in which the state secured a conviction for a non-barred offense after charging a barred one.

Beyond *Murphy*—and *Mathews*—Thomas points to no law suggesting that the Louisiana Supreme Court's interpretation of *Strickland* prejudice is unreasonable. Once again, AEDPA demands that we overturn a state court's decision only if it is beyond the pale of fairminded dispute. The Louisiana Supreme Court's decision is not. The Louisiana Supreme Court did not here unreasonably apply *Strickland* in holding that Thomas was not prejudiced by his counsel's failure to quash his jeopardy-barred charge.

V.

We reverse the judgment of the district court and deny Thomas's petition for habeas relief. Appellant's Unopposed Second Motion to Expedite Appeal is denied as moot. The mandate shall issue forthwith.

---

[66] 893 F.2d at 95.
[67] *See id.* at 97.
[68] *See id.*

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

ANTHONY THOMAS

VERSUS

BURL CAIN, ET AL.

CIVIL ACTION

NO 14-147-JJB-RLB

ORDER

For the written reasons assigned and filed herein:

IT IS ORDERED that the petitioner's application for habeas corpus relief is GRANTED. Further, the petitioner's conviction and sentence is VACATED and this matter is REMANDED to the state court to determine what non-jeopardy barred retrial, if any, is to be had.

Baton Rouge, Louisiana, this 16 day of March, 2017.

JAMES J. BRADY
UNITED STATES DISTRICT JUDGE

C.

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

ANTHONY THOMAS **CIVIL ACTION**

VERSUS

BURL CAIN, ET AL. **NO. 14-147-JJB-RLB**

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

This matter is before the Court on the petitioner's application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The petitioner, Anthony Thomas, challenges his conviction, entered in the Nineteenth Judicial District Court for the Parish of East Baton Rouge, State of Louisiana, of one count of unauthorized entry of an inhabited dwelling. The petitioner contends that he was subjected to double jeopardy when he was retried on the same charge of aggravated burglary after his initial conviction for attempted aggravated burglary was reversed. The petitioner also contends that his trial counsel was ineffective for failing to file a motion to quash on the grounds of double jeopardy.

Factual Background

The facts, as taken from the decision of the Louisiana Supreme Court, are as follows: In early 1998, petitioner, Anthony Thomas, began dating a young woman whom he met after repairing her car. Shortly thereafter, petitioner began exhibiting violent behavior and the relationship began to deteriorate. Petitioner had episodes during which he kicked holes in his girlfriend's walls, ripped holes in her clothes, poured sugar on her carpet, and threw food at her. By mid-year 1998, petitioner's girlfriend had become fearful, telling family members that she was afraid for her safety, and eventually leaving her apartment and taking up residence at her mother's house. Despite her efforts to avoid the petitioner, he continued to stalk her. When his

D.

girlfriend returned to her apartment with her son, petitioner was waiting there and forced his way into the home. Petitioner told his girlfriend that he was going to have sex with her, pushed her to the floor and struck her. Out of fear she acquiesced to his demands. Petitioner then instructed his girlfriend to remain in place while he went outside to turn his truck off. However, as soon as petitioner was out of sight, she ran to a neighbor's home and called police. When the police arrived, petitioner's girlfriend identified him as the perpetrator and he was arrested. *See State v. Thomas,* 12-1410 (La. 9/4/13), 124 So.2d 1049.

Procedural History

Following his arrest, petitioner was charged with aggravated burglary. A jury found him guilty of the lesser and included offense of attempted aggravated burglary. Petitioner was subsequently adjudicated a third felony offender and sentenced to mandatory life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence. On appeal, the appellate court found that the prosecutor made an indirect reference to petitioner's failure to testify, in violation of La.C.Cr.P. art. 770(3). Finding a mistrial should have been granted, the court of appeal reversed petitioner's conviction, vacated the sentence, and remanded the case to the trial court for a new trial. *State v. Thomas,* 99–1500 (La. App. 1 Cir. 6/23/00) (unpublished). In 2002, the State retried petitioner on the original charge of aggravated burglary. Petitioner waived his right to trial by jury and, after a bench trial, the court found him guilty of the lesser and included offense of unauthorized entry of an inhabited dwelling. The State again instituted habitual offender proceedings. The court adjudged petitioner a third felony offender, and he was again sentenced to life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence.

Petitioner appealed. The court of appeal once more reversed the conviction and remanded the case for a new trial upon finding the State's prosecution of petitioner for

aggravated burglary was jeopardy-barred. *State v. Thomas,* 04–2746 (La. App. 1 Cir. 9/23/05), 912 So.2d 111 (unpublished). The court of appeal reasoned that the jury's guilty verdict of attempted aggravated burglary at the first trial acted as an acquittal on the charge of aggravated burglary. Thus, on remand, petitioner should not have been tried again for aggravated burglary. The appellate court found the second trial was required to be on the next most serious offense, attempted aggravated burglary. Further, based on La.C.Cr.P. art. 814(A)(43), the court of appeal found the verdict rendered by the trial court, unauthorized entry of an inhabited dwelling, was invalid because it was not an acceptable responsive verdict for the charge of attempted aggravated burglary. *Thomas,* 04–2746, p. 1, 912 So.2d at 111.

The Louisiana Supreme Court granted the State's writ application, reversed the decision of the court of appeal, and reinstated petitioner's conviction and sentence. *State v. Thomas,* 05–2373 (La.4/17/06), 926 So.2d 490. The Court reasoned, in relevant part:

> [R]eversal of defendant's first conviction and sentence did not preclude the state from holding a second trial, only from seeking a conviction for aggravated burglary. *United States v. Ball,* 163 U.S. 662, 16 S.Ct. 1192, 41 L.Ed. 300 (1896). While the state erred in reindicting defendant and retrying him for the crime of aggravated burglary, the defendant did not move to quash the proceedings before trial, and the trial court, sitting as the fact finder in the case after defendant waived a jury, returned a verdict of guilt on the non-barred offense of unauthorized entry of an inhabited dwelling, a lesser included offense and a responsive verdict to the charged offense as a matter of La.C.Cr.P. art. 814(A)(42). The court of appeal therefore had no basis for vacating that verdict as unresponsive to the charge that it believed *should have* been brought, *i.e.,* attempted aggravated burglary, because the verdict was not inherently tainted by virtue of its return in the trial of a jeopardy-barred offense. *See Morris v. Mathews,* 475 U.S. 237, 245, 106 S.Ct. 1032, 1037, 89 L.Ed.2d 187 (1986).

Thereafter, petitioner filed an application for post-conviction relief, including a claim that his counsel at the second trial was ineffective for failing to file a motion to quash the jeopardy-barred charge of aggravated burglary. The trial court ordered an evidentiary hearing, which was held before a commissioner. An attorney was appointed to represent petitioner during the

proceeding. At the evidentiary hearing, trial counsel testified he was aware that petitioner's case was being tried a second time for the 1998 offense. Counsel testified generally that, given four months to prepare for trial, he spent very little time on procedural issues, and his objectives were to adequately investigate facts and witnesses, review the testimony of previous witnesses, and prepare for trial. Finally, counsel emphasized that he was responsible for raising the motion to quash on jeopardy grounds and that his failure to do so was an error.

Following the hearing, the commissioner recommended the trial court grant post-conviction relief based on trial counsel's ineffectiveness. The commissioner reasoned that petitioner had shown deficient performance because counsel had admitted that his failure to pursue this claim was a simple oversight and the omitted motion to quash based on double jeopardy grounds had undeniable merit. Further, the commissioner concluded that petitioner had shown prejudice because counsel's failure to file the meritorious motion to quash resulted in respondent being convicted of unauthorized entry of an inhabited dwelling, a responsive verdict that would not have been available had the State prosecuted petitioner for attempted aggravated burglary, the "next most serious" charge below aggravated burglary. The trial court adopted the commissioner's recommendation and entered an order accordingly.

The court of appeal denied the State's writ application. *State v. Thomas,* 12–0477 (La. App. 1 Cir. 5/21/12) (unpublished). The State then sought further review in the Louisiana Supreme Court. Again relying upon *Morris v. Mathews,* 475 U.S. 237 (1986), the Louisiana Supreme Court reversed the appellate court's judgment, and the petitioner's conviction and sentence were reinstated after deciding that the double jeopardy violation was cured by the petitioner's conviction on a nonjeopardy-barred offense, and finding that the petitioner could not satisfy the prejudice prong of his ineffective assistance of counsel claim.

On March 1, 2014, the petitioner filed the instant application. The state contends that the application is untimely or, alternatively, that the petitioner's claims are without merit.

Timeliness

The State first asserts that the petitioner's application is untimely. In this regard, pursuant to 28 U.S.C. § 2244(d), there is a one-year statute of limitations applicable to federal habeas corpus claims brought by prisoners in state custody. This limitations period begins to run on the date that the judgment becomes final through the conclusion of direct review or through the expiration of time for seeking such review. 28 U.S.C. § 2244(d)(1)(A). As provided by the referenced statute, the time during which a properly filed application for state post-conviction or other collateral review is thereafter pending before the state courts with respect to the pertinent judgment or claim shall not be counted toward any part of the one-year limitations period. 28 U.S.C. § 2244(d)(2). However, the time during which there are no properly filed post-conviction or other collateral review proceedings pending does count toward calculation of the one-year period. To be considered "properly filed" for purposes of § 2244(d)(2), an application's delivery and acceptance must be in compliance with the applicable laws and rules governing filings. *Pace v. DiGuglielmo*, 544 U.S. 408, 413 (2005), *citing Artuz v. Bennett*, 531 U.S. 4, 8 (2000). Further, a properly-filed state application is considered to be "pending" both while it is before a state court for review and also during the interval after a state court's disposition while the petitioner is procedurally authorized under state law to proceed to the next level of state court consideration. *See Melancon v. Kaylo*, 259 F.3d 401, 406 (5th Cir. 2001).

In the instant case, the petitioner's conviction became final on December 14, 2006, ninety days after the Louisiana Supreme Court upheld his conviction and denied rehearing on September 15, 2006, because the petitioner did not file a request for a writ of certiorari with the

United States Supreme Court. The petitioner's application for post-conviction relief was filed 155 days later on May 18, 2007. The State sought review in the intermediate appellate court. The court of appeal denied the State's writ application, and the State sought further review in the Louisiana Supreme Court. The State's writ was granted and the Louisiana Supreme Court, denied rehearing on October 11, 2013. The petitioner's instant application was filed 151 days later on March 11, 2014. As such, the petitioner's application is timely. The Court now turns to the merits of the petitioner's claims.

Standard of Review

The standard of review in this Court is that set forth in 28 U.S.C. § 2254(d). Pursuant to that statute, an application for a writ of habeas corpus shall not be granted with respect to any claim that a state court has adjudicated on the merits unless the adjudication has "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." Relief is authorized if a state court has arrived at a conclusion contrary to that reached by the Supreme Court on a question of law or if the state court has decided a case differently than the Supreme Court on a set of materially indistinguishable facts. *Williams v. Taylor*, 529 U.S. 362, 413 (2000).

Relief is also available if the state court has identified the correct legal principle but has unreasonably applied that principle to the facts of the petitioner's case or has reached a decision based on an unreasonable factual determination. *See Montoya v. Johnson*, 226 F.3d 399, 404 (5th Cir. 2000). Mere error by the state court or mere disagreement on the part of this Court with the state court determination is not enough; the standard is one of objective reasonableness. *Id.*

See also Williams v. Taylor, *supra*, 529 U.S. at 409 ("[A] federal habeas court making the 'unreasonable application' inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable"). State court determinations of underlying factual issues are presumed to be correct, and the petitioner has the burden to rebut that presumption with clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

The State contends that, applying this standard to the petitioner's claims, there is no basis for the granting of habeas relief.

Substantive Review

The petitioner asserts that a double jeopardy violation occurred when his conviction was reversed on appeal, and the State retried him on the same charge, under the same indictment, and bearing the same docket number. The petitioner additionally asserts that his trial counsel was ineffective for failing to move to quash the jeopardy-barred indictment.

The Double Jeopardy Clause of the Fifth Amendment provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." This clause protects against (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense. *Brown v. Ohio,* 432 U.S. 161 (1977). A habeas petitioner who asserts that he was provided with ineffective assistance of counsel must affirmatively demonstrate (1) that his counsel's performance was "deficient", *i.e.*, that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment; and (2) that the deficient performance prejudiced his defense, *i.e.*, that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial in which the result is reliable. *Strickland v.*

Washington, 466 U.S. 668, 687 (1984). The petitioner must make both showings in order to obtain habeas relief based upon the alleged ineffective assistance of counsel. *Id.*

To satisfy the deficiency prong of the *Strickland* standard, the petitioner must demonstrate that his counsel's representation fell below an objective standard of reasonableness as measured by prevailing professional standards. *See,* e.g., *Martin v. McCotter*, 796 F.2d 813, 816 (5th Cir. 1986). The reviewing court must indulge a strong presumption that counsel's conduct fell within the wide range of reasonable professional competence and that, under the circumstances, the challenged action might be considered sound trial strategy. *See,* e.g., *Bridge v. Lynaugh*, 838 F.2d 770, 773 (5th Cir. 1988). This Court, therefore, must make every effort to eliminate the distorting effects of hindsight and to evaluate the conduct from counsel's perspective at the time of trial. *Martin v. McCotter*, *supra*, 796 F.2d at 817. Great deference is given to counsel's exercise of professional judgment. *Bridge v. Lynaugh*, *supra*, 838 F.2d at 773; *Martin v. McCotter*, *supra*, 796 F.2d at 816.

It is undisputed that petitioner's second trial for aggravated burglary, after having previously been acquitted of that charge, violated the Double Jeopardy Clause of the Fifth Amendment. Petitioner's trial counsel's failure to file a meritorious motion to quash that indictment after acquittal fell below an objective standard of reasonableness and was therefore deficient.

If the petitioner satisfies the first prong of the *Strickland* test, however, his petition nonetheless must affirmatively demonstrate prejudice resulting from the alleged errors. *Earvin v. Lynaugh*, 860 F.2d 623, 627 (5th Cir. 1988). To satisfy the prejudice prong of the *Strickland* test, it is not sufficient for the petitioner to show that the alleged errors had some conceivable effect on the outcome of the proceeding. *Strickland v. Washington*, *supra*, 466 U.S. at 693.

Rather, the petitioner must show a reasonable probability that, but for counsel's alleged errors, the result of the proceeding would have been different. *Martin v. McCotter*, *supra*, 796 F.2d at 816. The habeas petitioner need not show that his counsel's alleged errors "more likely than not" altered the outcome of the case; he must instead show a probability that the errors are "sufficient to undermine confidence in the outcome." *Id.* at 816-17. Both the *Strickland* standard for ineffective assistance of counsel and the standard for federal habeas review of state court decisions under 28 U.S.C. § 2254(d)(1) are highly deferential, and when the two apply in tandem, the review by federal courts is "doubly deferential." *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009).

In *Price v. Georgia*, 398 U.S. 323 (1970), Price was charged with murder and the jury returned a verdict of guilty to the lesser included crime of voluntary manslaughter. Price's conviction was reversed on appeal due to an erroneous jury instruction, and a new trial was ordered. Price was subsequently retried on the charge of murder, and the jury again found him guilty of voluntary manslaughter. Price was denied relief by the Georgia Court of Appeals and the Georgia Supreme Court. The United States Supreme Court granted certiorari and reversed.

Citing to *United States v. Ball,* 163 U.S. 662 (1896), the Court noted, "The 'twice put in jeopardy' language of the Constitution thus relates to a potential, i.e., the risk that an accused for a second time will be convicted of the 'same offense' for which he was initially tried." *Price*, 398 U.S. at 326. The Court found that because Price was tried on the same charge, the risk of conviction on the greater charge or murder was the same in both cases, and the second trial violated the Double Jeopardy Clause of the Fifth Amendment because it is written in terms of potential or risk of trial and conviction, not punishment. The Court rejected the State's contention that the double jeopardy violation was harmless because Price suffered no greater

punishment on the subsequent conviction. The Court again noted that the Double Jeopardy Clause is cast in terms of the risk or hazard of trial and conviction, not of the ultimate legal consequences of the verdict. The Court further noted that it could not determine whether or not the murder charge against Price induced the jury to find him guilty of the less serious offense of voluntary manslaughter rather than to continue to debate his innocence. *Id.* at 229 and 331. For these reasons, the Court reversed Price's conviction and remanded the case to the Georgia courts to resolve the issues pertaining to a potential retrial.

In *Morris v. Matthews*, 475 U.S. 237 (1986), the United States Supreme Court later distinguished *Price* from proceedings in which the jury did not acquit the defendant of the greater offense, but found the defendant guilty of the greater offense, and thereby guilty of the alternative lesser offense. The Louisiana Supreme Court twice relied upon *Matthews*, to conclude that although the State erred in retrying the petitioner for the crime of aggravated burglary, the jeopardy-barred prosecution was remedied due to the petitioner ultimately being convicted of unauthorized entry of an inhabited dwelling, which is a lesser-included, nonjeopardy-barred offense.

In *Matthews,* James Matthews was initially charged with aggravated robbery to which he pled guilty. Matthews then made additional incriminating statements, leading to him being tried for and found guilty of aggravated murder. He was sentenced to a term of life imprisonment. On remand, the Ohio appellate court determined that the Double Jeopardy clause barred Matthews's conviction for aggravated murder, and, in accordance with Ohio state law, modified the conviction of aggravated murder to murder and reduced Matthews's sentence.

Matthews then sought a writ of habeas corpus in the federal district court. His petition was denied, and Matthews sought review in the Court of Appeals for the Sixth Circuit. The

appellate court reversed the decision of the district court and found that Matthews was entitled to a new trial. The United States Supreme Court granted certiorari and reversed the judgment of the appellate court.

As noted by the United States Supreme Court, the only issued before it was "whether reducing respondent's conviction for aggravated murder to a conviction for murder is an adequate remedy for the double jeopardy violation." *Id.* at 245. The Court held that, "when a jeopardy-barred conviction is reduced to a conviction for a lesser included offense which is not jeopardy-barred, the burden shifts to the defendant to demonstrate a reasonable probability that he would not have been convicted of the nonjeopardy-barred offense absent the presence of the jeopardy-barred offense." The Court noted that the basis for finding or presuming prejudice present in *Price* (the possibility that the murder charge against Price induced the jury to find him guilty of the less serious offense of voluntary manslaughter rather than to continue to debate his innocence), was not present since the jury did not acquit Matthews, but rather found him guilty of the greater offense of aggravated murder, and *a fortiori*, the lesser offense of murder. The Court found that Matthews failed to show that but for the improper inclusion of the jeopardy-barred charge, the result of the proceeding would have been different.

In reviewing the trial court's grant of post-conviction relief to the petitioner herein, the Louisiana Supreme Court stated:

> "*Morris v. Matthews* holds that absent some showing that the fact-finder's factual determinations were skewed by the jeopardy-barred prosecution, conviction on a lesser-included, nonjeopardy-barred offense suffices to remedy any double jeopardy violation inherent in the jeopardy-barred prosecution…Thus, because the Constitution does not prohibit subjecting respondent to a second trial on a different offense, the only deprivation he suffered as a result of counsel's omissions was deprivation of the right to challenge the constitutionality of his charging document." *State* v. *Thomas,* 12-1410 (La. 9/4/13), 124 So.3d 1049, 1056-1057.

Citing *Matthews,* the Louisiana Supreme Court concluded that the return of a guilty verdict of unauthorized entry of an inhabited dwelling meant that the petitioner's retrial on the barred charge of aggravated burglary ultimately did not deprive him of his substantive right not to be prosecuted and convicted twice for the same offense as a matter of the Double Jeopardy Clauses of the federal and state constitutions.

The Louisiana Supreme Court's application of *Matthews* is unreasonable in the instant matter. A jury did not find that the petitioner was guilty of aggravated burglary which would mean that his conduct also satisfied the elements of the lesser included offense of unauthorized entry of an inhabited dwelling. The jury found the petitioner guilty of attempted aggravated burglary, for which unauthorized entry of an inhabited dwelling is not a responsive verdict. As such, it cannot be said that the jury necessarily found that the petitioner's conduct satisfied the elements of unauthorized entry of an inhabited dwelling. Accordingly, the petitioner's ultimate conviction for unauthorized entry of an inhabited dwelling cannot be deemed curative of the double jeopardy violation. Given the differences between the petitioner's second trial and the challenged proceedings in *Matthews,* the analysis in the factually similar *Price* case controls.

Even if *Matthews* applies, the standard has been met. As noted by Justice Johnson in her dissent, the Louisiana Supreme Court's conclusion that there was an "almost certain chance" that the petitioner would have received the same habitual offender sentence is purely speculative. The court reasoned that had a motion to quash been filed, the State could have simply amended the aggravated burglary charge downward to another felony, like unauthorized entry of an inhabited dwelling, for which the court deemed the evidence to be sufficient. The court then assumed the petitioner would have been convicted of unauthorized entry, that the State would

have sought habitual offender sentencing, and that the petitioner would have ended up with the same life sentence as a third offender.

The Louisiana Supreme Court did not consider that if charged with unauthorized entry of an inhabited dwelling, it is possible that the trial court may have found the petitioner guilty of criminal trespass, a misdemeanor, which would not have triggered habitual offender proceedings. *See State v. Simmons*, 01-0293 (La. 5/14/02), 817 So.2d 16 (Defendant's conviction of unauthorized entry of an inhabited dwelling reversed due to trial court's failure to give an instruction on the responsive verdict of criminal trespass, which, if convicted of, would have allowed the defendant to escape sentencing as a multiple offender). That court likewise failed to account for the fact that the trial judge agreed with the commissioner's recommendation finding that "[w]e cannot speculate what might happen if the Petitioner is properly retried." The trial judge found that retrial was appropriate. Regardless, what is clear is that had the indictment for aggravated burglary been quashed based on a properly filed motion, petitioner would not have the conviction currently imposed nor would he have been sentenced under that conviction.

Petitioner's second trial for aggravated burglary was an indisputable violation of the Double Jeopardy Clause of the Fifth Amendment. Additionally, the failure of the petitioner's trial counsel to file a meritorious motion to quash the jeopardy-barred indictment fell below an objective standard of reasonableness, and, as explained above, said error was sufficient to undermine confidence in the outcome of the proceedings.

RECOMMENDATION

It is recommended that the petitioner's application for habeas corpus relief be granted. It is further recommended that the petitioner's conviction and sentence be vacated, and that this

matter be remanded to the state court to determine what non-jeopardy barred retrial, if any, is to be had.

Signed in Baton Rouge, Louisiana, on February 9, 2017.

RICHARD L. BOURGEOIS, JR.
UNITED STATES MAGISTRATE JUDGE

124 So.3d 1049
Supreme Court of Louisiana.

STATE of Louisiana
v.
Anthony THOMAS.

No. 2012–KP–1410.
|
Sept. 4, 2013.
|
Rehearing Denied Oct. 11, 2013.

Synopsis

Background: Defendant was convicted of attempted aggravated burglary as lesser included offense of aggravated burglary and sentenced as habitual offender. Defendant appealed. The Court of Appeal reversed and remanded for new trial. On remand, defendant was again tried on charge for aggravated burglary, but was convicted of unauthorized entry into dwelling, and was again sentenced as habitual offender. Defendant appealed. The Court of Appeal, 912 So.2d 111, again reversed, based on determination that defendant had been retried on charge for aggravated burglary, in violation of prohibition against double jeopardy, for which jury in original trial had essentially acquitted him when it returned verdict on lesser attempt charge. State applied for and was granted review. The Supreme Court, 926 So.2d 490, reversed judgment of Court of Appeal and reinstated conviction and sentence. Defendant then filed application for post-conviction relief, based on claim that trial counsel on remand was ineffective for failing to move to quash jeopardy-barred charge. The 19th Judicial District Court, Parish of East Baton Rouge, granted relief. The Court of Appeal denied State's application for supervisory writs. State's application for supervisory writ was granted by the Supreme Court.

Holdings: The Supreme Court, Guidry, J., held that:

[1] counsel's failure to file motion to quash-jeopardy barred charge for aggravated burglary on remand for retrial fell below objective standard of reasonableness, and

[2] defendant was not prejudiced by such failure.

Reversed; conviction and sentence reinstated.

Johnson, C.J., dissented and assigned reasons.

Knoll, J., dissented for the reasons assigned by Johnson, C.J.

West Headnotes (13)

[1] **Constitutional Law**
Sixth Amendment

Criminal Law
Right of Defendant to Counsel

The Sixth Amendment, applicable to the States by the terms of the Fourteenth Amendment, provides that the accused shall have the assistance of counsel in all criminal prosecutions. U.S.C.A. Const.Amends. 6, 14.

3 Cases that cite this headnote

[2] **Criminal Law**
Standard of Effective Assistance in General

Claims of ineffective assistance of counsel are generally governed by the standard set forth by the Supreme Court in *Strickland v. Washington*. U.S.C.A. Const.Amend. 6.

1 Cases that cite this headnote

[3] **Criminal Law**
Deficient representation in general

To prevail on a claim of ineffective assistance of counsel, a defendant must first show that counsel's representation fell below an objective standard of reasonableness. U.S.C.A. Const.Amend. 6.

5 Cases that cite this headnote

[4] **Criminal Law**
Prejudice in general

E.

Any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Sixth Amendment to the Constitution. U.S.C.A. Const.Amend. 6.

8 Cases that cite this headnote

[5] **Criminal Law**
Former jeopardy

Trial counsel's failure to file motion to quash charge for aggravated burglary on remand for retrial after conviction for lesser included offense of attempted aggravated burglary was reversed on appeal fell below objective standard of reasonableness, and thus, constituted deficient performance, as required to support claim for ineffective assistance of counsel, where, by finding defendant guilty of lesser attempt offense, jury in first trial necessarily acquitted defendant of aggravated burglary, and therefore, retrial on charge for aggravated burglary was barred by prohibition against double jeopardy. U.S.C.A. Const.Amends. 5, 6.

1 Cases that cite this headnote

[6] **Criminal Law**
Deficient representation in general
Criminal Law
Strategy and tactics in general

Defense counsel's failure to pursue meritorious claims and defenses, owing not to strategic considerations but to a misapprehension of controlling law or relevant facts generally, will be found deficient, as required to support a claim of ineffective assistance of counsel. U.S.C.A. Const.Amend. 6.

1 Cases that cite this headnote

[7] **Double Jeopardy**
Double Jeopardy

Double jeopardy exists in a second trial when the charge in that trial is for the same offense for which defendant was in jeopardy in the first trial and acquitted. U.S.C.A. Const.Amend. 5.

Cases that cite this headnote

[8] **Criminal Law**
Adequacy of Representation

Counsel's duty under the Sixth Amendment to act as advocate is not qualified or lessened by the obligations of others to ensure orderly and fair proceedings. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[9] **Criminal Law**
Former jeopardy

Defendant was not prejudiced by trial counsel's failure to file motion to quash jeopardy-barred charge for aggravated burglary on remand for retrial after conviction on lesser included offense of attempted aggravated burglary was reversed on direct appeal, as required to support claim of ineffective assistance of counsel; return of verdict on retrial to non-barred charge for unauthorized entry of inhabited dwelling cured double jeopardy concern of retrying defendant on aggravated burglary charge for which jury in original trial had essentially acquitted him of by finding him guilty of lesser offense of attempted aggravated burglary, verdict for lesser offense of unauthorized entry following retrial was not inherently tainted by virtue of its return in trial of jeopardy-barred offense, prosecution could have amended indictment to cure defect by alleging non-barred offense, even if counsel had preserved issue by motion to quash, and, as habitual offender, defendant faced same habitual offender sentence of life without benefit of parole, probation, or suspension of sentence. U.S.C.A. Const.Amends. 5, 6.

1 Cases that cite this headnote

[10] **Criminal Law**
Prejudice in general

The prejudice prong of the *Strickland*'s test governing a claim of ineffective assistance of counsel requires the court to determine if there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. U.S.C.A. Const.Amend. 6.

4 Cases that cite this headnote

[11] **Criminal Law**
Indictment or information in general

Absent some showing that the fact-finder's factual determinations were skewed by a jeopardy-barred prosecution, conviction on a lesser-included, nonjeopardy-barred offense suffices to remedy any double jeopardy violation inherent in a jeopardy-barred prosecution. U.S.C.A. Const.Amend. 5.

1 Cases that cite this headnote

[12] **Criminal Law**
Organization and proceedings of grand jury
Criminal Law
Indictment or information in general
Criminal Law
Grand jury
Criminal Law
Indictment and information

Indictment defects, such as improper selection of grand jury forepersons, can lead to reversal if properly preserved, but the failure by counsel to raise them is insufficient to establish Sixth Amendment prejudice necessary to establish a claim of ineffective assistance of counsel. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[13] **Criminal Law**
Presumptions and burden of proof in general

Strickland places the burden on the defendant, not the State, to show a reasonable probability that the result would have been different but for counsel's deficient performance. U.S.C.A. Const.Amend. 6.

5 Cases that cite this headnote

Attorneys and Law Firms

***1051** Louisiana Department of Justice, James D. Caldwell, Attorney General, Terri Russo Lacy, Assistant Attorney General, East Baton Rouge District Attorney's Office, Hillar Clement Moore, III, District Attorney, for Applicant.

Manasseh, Gill, Knipe & Belanger, PLC, James Gordon Knipe, III, Baton Rouge, LA, for Respondent.

Opinion

GUIDRY, J. *

****1** We granted this writ application to review whether the trial court erred in granting defendant's application for post-conviction relief on grounds trial counsel rendered ineffective assistance. Finding defendant, Anthony Thomas, did not satisfy the standard for ineffective assistance of counsel set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), we reverse.

FACTS AND PROCEDURAL HISTORY

In early 1998, defendant, Anthony Thomas, began dating a young woman whom he met after repairing her car. Shortly thereafter, defendant began exhibiting violent behavior and the relationship began to deteriorate. Defendant had episodes during which he kicked holes in his girlfriend's walls, ripped holes in her clothes, poured sugar on her carpet, and threw food at her. By mid-year 1998, defendant's girlfriend had become fearful, telling family members that she was afraid for her safety, and eventually leaving her apartment and taking up residence at her mother's house. However, despite her efforts to avoid defendant, he continued to stalk her. When his girlfriend returned to her apartment with her son, defendant was waiting there and forced his way into the home. Defendant told his girlfriend that he was going to have sex with her, pushed her to the floor and struck ****2** her. Out of fear she acquiesced to his demands. Defendant

then instructed his girlfriend to remain in place while he went outside to turn his truck off. However, as soon as defendant was out of sight, she ran to a neighbor's home and called police. When the police arrived, defendant's girlfriend identified him as the perpetrator and he was arrested.

Following his arrest, defendant was charged with aggravated burglary. A jury found him guilty of the lesser and included offense of attempted aggravated burglary. Defendant was subsequently adjudicated a third felony offender and sentenced to mandatory life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence.

On appeal, the appellate court found that the prosecutor made an indirect reference to defendant's failure to testify, in violation of La.C.Cr.P. art. 770(3).[1] Finding a mistrial should have been granted, the court of appeal reversed defendant's conviction, vacated the sentence, and remanded the case to the trial court for a new trial. *State v. Thomas,* 99–1500 (La.App. 1 Cir. 6/23/00) (unpublished).

In 2002, the State retried defendant on the original charge of aggravated burglary.[2] Defendant waived his right to trial by ***1052** jury and, after a bench trial, the court found him guilty of the lesser and included offense of unauthorized entry of an inhabited dwelling. The State again instituted habitual offender proceedings. The court adjudged defendant a third felony offender, and he was again sentenced ****3** to life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence.

Defendant appealed. The court of appeal once more reversed the conviction and remanded the case for a new trial upon finding the State's prosecution of defendant for aggravated burglary was jeopardy-barred. *State v. Thomas,* 04–2746 (La.App. 1 Cir. 9/23/05), 912 So.2d 111 (unpublished). The court of appeal reasoned that the jury's guilty verdict of attempted aggravated burglary at the first trial acted as an acquittal on the charge of aggravated burglary. Thus, on remand, defendant should not have been tried again for aggravated burglary. The appellate court found the second trial was required to be on the next most serious offense, attempted aggravated burglary. Further, based on La.C.Cr.P. art. 814(A)(43),[3] the court of appeal found the verdict rendered by the trial court, unauthorized entry of an inhabited dwelling, was invalid because it was not an acceptable responsive verdict for the charge of attempted aggravated burglary. *Thomas,* 04–2746, p. 1, 912 So.2d at 111.

This Court granted the State's writ application, reversed the decision of the court of appeal, and reinstated defendant's conviction and sentence. *State v. Thomas,* 05–2373 (La.4/17/06), 926 So.2d 490. We reasoned, in relevant part:

> [R]eversal of defendant's first conviction and sentence did not preclude the state from holding a second trial, only from seeking a conviction for aggravated burglary.... The court of appeal therefore had no basis for vacating that verdict as unresponsive to the charge that it believed should have been brought, i.e., attempted aggravated burglary, because the verdict was not inherently tainted by virtue of its return in the trial of a jeopardy-barred offense.

Id. at 2, 926 So.2d at 491 (internal citations removed).

****4** Thereafter, defendant filed an application for post-conviction relief, including a claim that his counsel at the second trial was ineffective for failing to file a motion to quash the jeopardy-barred charge of aggravated burglary. The trial court ordered an evidentiary hearing, which was held before a commissioner. An attorney was appointed to represent defendant during the proceeding. At the evidentiary hearing, trial counsel testified he was aware that defendant's case was being tried a second time for the 1998 offense. Counsel testified generally that, given four months to prepare for trial, he spent very little time on procedural issues, and his objectives were to adequately investigate facts and witnesses, review the testimony of previous witnesses, and prepare for trial. Finally, counsel emphasized that he was responsible for raising the motion to quash on jeopardy grounds and that his failure to do so was an error.

Following the hearing, the commissioner recommended the trial court grant post-conviction relief based on trial counsel's ineffectiveness. The commissioner, reasoned ***1053** that defendant had shown deficient performance

because counsel had admitted that his failure to pursue this claim was a simple oversight and the omitted motion to quash based on double jeopardy grounds had undeniable merit. Further, the commissioner concluded that defendant had shown prejudice because counsel's failure to file the meritorious motion to quash resulted in respondent being convicted of unauthorized entry of an inhabited dwelling, a responsive verdict that would not have been available had the State prosecuted defendant for attempted aggravated burglary, the "next most serious" charge below aggravated burglary. The trial court adopted the commissioner's recommendation and entered an order accordingly.

The court of appeal denied the State's writ application. *State v. Thomas,* 12–0477 (La.App. 1 Cir. 5/21/12) (unpublished). The State filed the instant writ ****5** application, which we granted. *State v. Thomas,* 12–1410 (La.3/1/13), 108 So.3d 781.

DISCUSSION

[1] [2] "The Sixth Amendment, applicable to the States by the terms of the Fourteenth Amendment, provides that the accused shall have the assistance of counsel in all criminal prosecutions." *Missouri v. Frye,* — U.S. —, 132 S.Ct. 1399, 1404, 182 L.Ed.2d 379 (2012); *State v. Messiah,* 85–1659 (La.12/12/88), 538 So.2d 175, 185. The United States Supreme Court has long recognized that the right to counsel is the right to the effective assistance of counsel. *See McMann v. Richardson,* 397 U.S. 759, 771, n. 14, 90 S.Ct. 1441, 1449, n. 14, 25 L.Ed.2d 763 (1970) (citing *Reece v. Georgia,* 350 U.S. 85, 90, 76 S.Ct. 167, 170, 100 L.Ed. 77 (1955); *Glasser v. United States,* 315 U.S. 60, 69–70, 62 S.Ct. 457, 464–65, 86 L.Ed. 680 (1942); *Avery v. Alabama,* 308 U.S. 444, 446, 60 S.Ct. 321, 322, 84 L.Ed. 377 (1940); *Powell v. Alabama,* 287 U.S. 45, 57, 53 S.Ct. 55, 59–60, 77 L.Ed. 158 (1932)). Claims of ineffective assistance of counsel are generally governed by the standard set forth by the Supreme Court in *Strickland v. Washington,* and adopted by this Court in *State v. Washington,* 85–2339 (La.7/18/86), 491 So.2d 1337, 1339.

[3] [4] To prevail on such a claim, a defendant must first show that "counsel's representation fell below an objective standard of reasonableness." *Strickland,* 466 U.S. at 687–88, 104 S.Ct. 2052. The Supreme Court further noted that "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error has no effect on the judgment." *Id.* at 691, 104 S.Ct. 2052. Additionally, the Court reasoned "[t]he purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Accordingly, any deficiencies in ****6** counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution." *Id.* at 691–92, 104 S.Ct. 2052. Thus, the *Strickland* Court held that the "defendant must [also] show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694, 104 S.Ct. 2052. The Court further explained that in making a determination of ineffectiveness of counsel, "the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts ***1054** on to produce just results." *Id.* at 696, 104 S.Ct. 2052.

Regarding the "fundamental fairness of the proceeding," the Supreme Court has held that in some circumstances a mere difference in outcome will not suffice to establish the required prejudice. In *Lockhart v. Fretwell,* the Court stated:

> [A]n analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective. To set aside a conviction or sentence solely because the outcome would have been different but for counsel's error may grant the defendant a windfall to which the law does not entitle him.

Lockhart v. Fretwell, 506 U.S. 364, 369–70, 113 S.Ct. 838, 842–43, 122 L.Ed.2d 180 (1993).

In the present case, the issue raised by the State is whether the trial court erred in granting defendant's application for post-conviction relief on his claim of ineffective assistance of counsel, that is, was counsel's performance deficient and was the defendant prejudiced as a result.

7 **Performance

[5] First, we consider whether trial counsel's performance fell below the standard set out by the Supreme Court in *Strickland.* Applying the relevant precedent to the facts of this case, we find counsel's performance was below the objective standard of *Strickland,* thus constituting ineffective assistance of counsel.

The State contends trial counsel's performance was not so deficient that it fell below an objective standard of reasonableness. The State points out that a motion to quash could have been filed by any of the eight previous attorneys who represented defendant after his first conviction was reversed, or noted by the district attorney, or the trial court itself. Thus, the State argues because everyone missed the issue, failing to raise it was not unreasonable. Further, the State asserts trial counsel correctly prioritized fact investigation over research into procedural issues of this nature.

In contrast, defendant argues trial counsel's failure to file a motion to quash asserting double jeopardy was unreasonable in light of the obvious merit of the issue. Further, defendant argues the State's reliance on the failure of others to raise this issue is misplaced because such conduct is irrelevant in determining trial counsel's duties under an objective standard of reasonableness.

[6] We find no merit in the State's argument. The Supreme Court has recognized generally that criminal defendants are entitled to expect that their counsel understand applicable constitutional law. *See, e.g., Connick v. Thompson,* — U.S. —, 131 S.Ct. 1350, 1362–63, 179 L.Ed.2d 417 (2011). It follows that failure to pursue meritorious claims and defenses, owing not to strategic considerations but to a misapprehension of controlling law or relevant facts generally, will be found deficient. *See, e.g., Kimmelman v. Morrison,* 477 U.S. 365, 385, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986); **8 *Nero v. Blackburn,* 597 F.2d 991, 993–94 (5th Cir.1979); *Commonwealth v. Lynn,* 815 A.2d 1053, 1056 (Pa.Super.Ct.2003); *State v. Allah,* 170 N.J. 269, 285, 787 A.2d 887, 897 (2002).

[7] There is no doubt the double jeopardy issue had merit. Both the Fifth Amendment to the United States Constitution and Article 1, § 15 of the Louisiana Constitution guarantee that no person shall be twice placed in jeopardy for the same offense.[4] In addition to the constitutional *1055 prohibition, the Louisiana Code of Criminal Procedure provides statutory protections from double jeopardy.[5] Double jeopardy exists in a second trial when the charge in that trial is for the same offense for which defendant was in jeopardy in the first trial and acquitted.[6] In this case, when defendant was found guilty of attempted aggravated burglary in the first trial, that verdict served as an acquittal for the offense of aggravated burglary.[7] Thus, defendant was put in jeopardy a second time for the same offense when he was tried again for aggravated burglary.

Although the State attempts to justify counsel's omission by arguing he made a reasonable choice to prioritize trial preparation, this argument overlooks **9 the corollary that reasonable trial preparation steps would have led competent counsel to file a motion to quash based on double jeopardy grounds. Trial counsel testified that his failure to file a motion to quash was simply an oversight or omission. No assertion of strategy complicated this analysis. There is no question that failure to raise this defense was due to attorney error.

[8] We also reject the State's argument that deficient performance was not established in this case because counsel was only one of many who could have raised the double jeopardy issue. Counsel's duty under the Sixth Amendment to act as advocate is not qualified or lessened by the obligations of others to ensure orderly and fair proceedings. A defendant need only show that his attorney, appointed to satisfy the State's Sixth Amendment obligation, rendered performance that fell below an objective standard of reasonableness. *See, e.g., Kimmelman,* 477 U.S. at 379, 106 S.Ct. 2574.

Thus, we find the trial court did not err in concluding that counsel's performance fell outside the wide range of reasonable professional assistance as set out in *Strickland.*

Prejudice

[9] [10] Having found that counsel's representation fell below an objective standard of reasonableness, we

must determine if there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. To that end, defendant argues counsel's error of allowing him to be twice placed in jeopardy for aggravated burglary was itself prejudicial. Defendant asserts he suffered prejudice because there is a reasonable probability he would not have been convicted of unauthorized entry of an inhabited dwelling had counsel pursued a ***1056** motion to quash. He argues the State would have charged him with attempted aggravated burglary, the next most severe available charge, and it would have ****10** precluded the verdict entered because it was not responsive to that charge. Moreover, defendant asserts, whether or not the State would seek habitual offender adjudication after a third trial is speculative and irrelevant. According to defendant, prejudice exists because he was twice placed on trial for the same offense.

Conversely, the State argues defendant cannot prove prejudice under *Strickland.* The State asserts the guilty verdict for unauthorized entry of an inhabited dwelling was a nonjeopardy-barred offense. The State contends it has sole authority in charging decisions, and there is no requirement that the second or subsequent charge must be responsive to the original charge or conviction in order to avoid double jeopardy. Thus, the State explains, it could have rebilled or reindicted defendant for unauthorized entry of an inhabited dwelling and the result would have been the same. Further, the State argues that regardless of which felony the defendant was ultimately convicted, whether it was a responsive verdict to attempted aggravated burglary or a different felony, defendant would have received the same life imprisonment sentence as a third offender under the habitual offender law. Accordingly, the State contends, the trial court erred in concluding defendant suffered prejudice because the outcome of this case would not have been different.

For reasons set out below, we find defendant's argument unpersuasive given the circumstances of this case. Thus, we hold the trial court erred in finding defendant satisfied the prejudice prong of *Strickland.*

We previously determined in *State v. Thomas* that the return of a nonjeopardy-barred responsive verdict of unauthorized entry of an inhabited dwelling cured the double jeopardy implications of retrying defendant for aggravated burglary following his acquittal on that charge when the jury returned a ****11** responsive verdict of attempted aggravated burglary, subsequently reversed on appeal for trial error. *See* La.C.Cr.P. art. 598(A). We noted that the verdict for the lesser offense of unauthorized entry "was not inherently tainted by virtue of its return in the trial of a jeopardy-barred offense." *Thomas,* 05–2373 at 2, 926 So.2d at 491 (citing *Morris v. Mathews,* 475 U.S. 237, 245, 106 S.Ct. 1032, 1037, 89 L.Ed.2d 187 (1986)). Defendant contends that, reframed as an issue of ineffective assistance of counsel, his claim satisfies in post-conviction proceedings the burden he did not carry on direct review of "demonstrate[ing] a reasonable probability that he would not have been convicted of the nonjeopardy-barred offense absent the presence of the jeopardy-barred offense." *Mathews,* 475 U.S. at 247, 106 S.Ct. at 1038. We disagree.

[11] **[12]** While defendant was entitled to be free from the jeopardy-barred prosecution (and also entitled to vindicate that freedom through a pretrial motion to quash), *Morris v. Mathews* holds that absent some showing that the fact-finder's factual determinations were skewed by the jeopardy-barred prosecution, conviction on a lesser-included, nonjeopardy-barred offense suffices to remedy any double jeopardy violation inherent in a jeopardy-barred prosecution. *Morris,* 475 U.S. at 246–47, 106 S.Ct. at 1038. Thus, because the Constitution does not prohibit subjecting respondent to a second trial on a different offense, the only deprivation he suffered as a result of counsel's omissions was deprivation of the right to challenge the constitutionality of his charging document. It is fatal to defendant's claim that preservation of this issue would not have entitled him to the relief he seeks for counsel's failure to preserve it. That is, if counsel ***1057** had preserved the issue by an unsuccessful motion to quash in the trial court and the issue had been appealed, defendant would have found himself exactly where he did when his case was appealed, without relief. In contrast, where Sixth Amendment prejudice has ****12** been recognized from the failure to raise substantial double jeopardy issues, preservation of the meritorious claim leads to reversal. *Allah,* 170 N.J. at 286, 787 A.2d at 897. Indictment defects, such as improper selection of grand jury forepersons, can lead to reversal if properly preserved, but the failure to raise them has been deemed insufficient to establish Sixth Amendment prejudice. *Pickney v. Cain,* 337 F.3d 542, 545 (5th Cir.2003). *A fortiori,* this double jeopardy issue, which could not lead to reversal when raised *sua sponte,* need not lead to reversal on a claim of ineffective assistance of counsel.

[13] When courts have recognized claims of ineffective counsel regarding jeopardy issues, they have involved total waiver of a claim that would have barred prosecution altogether for any crime related to the incident because they are uniquely incurable other than by reversal of conviction. *See Allah,* 170 N.J. at 287–90, 787 A.2d at 898–99 (waiver of jeopardy claim based on improper mistrial granted without manifest necessity was ineffective because it would bar prosecution totally and not merely halt prosecution). Significantly, the double jeopardy issue in this case has no potential to resolve defendant's criminal prosecution, as the State could have simply amended the charging document to cure the defect identified. Defendant's prejudice argument is thus wanting in light of the almost certain chance that he would have received the same habitual offender sentence, notwithstanding the filing of a timely motion to quash. To cure the double jeopardy defect in this case, the State could have simply amended the aggravated burglary charge downward to one that was responsive to the original indictment, or to another felony like unauthorized entry for which the evidence was sufficient. Additionally, given the prosecution's previous assessment that defendant's conduct on the night of the incident was "aggravated," logic renders it probable that the State would have sought habitual offender sentencing no matter **13 for what felony defendant was convicted. Thus, defendant cannot establish, as he must, that there is a reasonable probability that, but for counsel's errors, the end result of the proceedings against him, life in prison as a third offender, would have been different. La.C.Cr.P. art. 930.2. More to the point, it is not the State's burden to disprove conjectured theories of prejudice. *See* La.C.Cr.P. art. 930.2. *Strickland* places the burden on the defendant, not the State, to show a "reasonable probability" that the result would have been different. *Wong v. Belmontes,* 558 U.S. 15, 26–29, 130 S.Ct. 383, 390–91, 175 L.Ed.2d 328 (2009). Thus, it follows that the likelihood of the same sentence is relevant in this case.

The return of a guilty verdict of unauthorized entry of an inhabited dwelling meant that defendant's retrial on the barred charge of aggravated burglary ultimately did not deprive him of his substantive right not to be prosecuted and convicted twice for the same offense as a matter of the Double Jeopardy Clauses of the federal and state constitutions. *Mathews,* 475 U.S. at 247, 106 S.Ct. at 1038 ("[W]here it is clear that the jury necessarily found that the defendant's conduct satisfies the elements of the lesser included offense, it would be incongruous always to order yet another trial as a means of curing a violation of the Double Jeopardy Clause."). Nor did it deprive defendant of a fact finder's opportunity to consider under Louisiana's system of responsive verdicts "a less drastic alternative than the choice between conviction of the offense charged and acquittal." *1058 *Beck v. Alabama,* 447 U.S. 625, 633, 100 S.Ct. 2382, 2388, 65 L.Ed.2d 392 (1980). The defendant may have been entitled to a different set of responsive verdicts as a statutory matter if counsel had filed a motion to quash, but he has not shown as a constitutional matter that the proceedings were thereby rendered fundamentally unfair or the verdict unreliable by "a breakdown in the adversarial process that our **14 system counts on to produce just results." *Strickland,* 466 U.S. at 696, 104 S.Ct. at 2069.

Accordingly, we hold that defendant ultimately fails to satisfy the two-part *Strickland* standard for assessing claims of ineffective assistance of counsel and the district court erred in concluding otherwise. That judgment is accordingly reversed and defendant's conviction and sentence are reinstated.

REVERSED; CONVICTION AND SENTENCE REINSTATED.

JOHNSON, Chief Justice, dissents and assigns reasons.

KNOLL, Justice, dissents for the reasons assigned by Chief Justice JOHNSON.

Retired Judge ROBERT L. LOBRANO, assigned as Justice ad hoc, sitting for WEIMER J., recused.

JOHNSON, C.J., dissents and assigns reasons.

**1 I respectfully dissent. In my view, defendant, Anthony Thomas, satisfied the standard for ineffective assistance of counsel set forth by the United States Supreme Court in *Strickland v. Washington.* [1] I would affirm the ruling of the trial court granting defendant's application for post-conviction relief on his claim of ineffective assistance of counsel.

This case involves a clear double jeopardy violation. The majority concedes that defense counsel's failure to file a motion to quash based on the double jeopardy

violation was due to attorney error and constituted deficient performance. The majority then goes on to find that defendant was not prejudiced by counsel's failure to raise the double jeopardy issue because it concludes the result of the trial would not have been different, absent this error. I disagree.

In making a determination of ineffectiveness of counsel, we are required to apply the straightforward outcome-determinative analysis set forth in *Strickland.* Citing *Lockhart v. Fretwell,* the majority states that the ultimate focus of our inquiry must be on the fundamental fairness of the proceeding, and that a mere difference in **2 outcome will not suffice to establish the required prejudice in some circumstances. However, the Supreme Court has made clear that cases such as *Lockhart* are exceptions to the rule of *Strickland.* In *Lockhart,* the defendant was sentenced to death based on an aggravating circumstance that duplicated an element of the underlying felony. Before defendant's trial, a federal appellate court held that such "double counting" was impermissible, but defendant's counsel was not aware of the decision and failed to object. However, before defendant's federal habeas corpus relief claim reached the Supreme Court, that appellate court case was overruled. Because the ineffectiveness of counsel had not deprived defendant of any substantive or procedural right to which the law entitled him, the Court concluded that, given the overriding interest in fundamental fairness, the likelihood of a different outcome attributable to an incorrect interpretation of the law should be regarded as potential windfall to the defendant, rather than the legitimate prejudice contemplated by *Strickland.* [2]

*1059 Another example is demonstrated by *Nix v. Whiteside,* which involved a claim that counsel was ineffective because he refused to present a defense based on perjured testimony. The Court concluded that the defendant could not rely on any outcome-determinative effects of perjury to make his claim. The Court explained that even if a defendant's false testimony might have persuaded the jury to acquit him, it is not fundamentally unfair to conclude that he was not prejudiced by counsel's interference with his intended perjury. [3]

In *Williams v. Taylor,* [4] the Supreme Court clarified that such cases do not justify a departure from the straightforward application of *Strickland* and do not **3 require a separate inquiry into fundamental fairness when a defendant can show their counsel was ineffective and that his ineffectiveness probably affected the outcome of the proceeding. [5] More recently, in *Lafler v. Cooper,* [6] the Court found an outcome determinative analysis appropriate to determine whether a defendant was prejudiced in plea negotiations, notwithstanding the fact that the defendant had no baseline entitlement to receive a plea bargain. It further rejected the argument that the failure to convey a plea offer does not introduce reasonable doubt as to the verdict of guilty reached in a subsequent trial. The Court stated that "a reliable trial may not foreclose relief when counsel has failed to assert rights that may have altered the outcome." [7] The Court found that "prejudice can be shown if loss of the plea opportunity led to a trial resulting in a conviction on more serious charges or the imposition of a more severe sentence." [8]

In this case, defendant seeks relief from counsel's failure to meet a valid legal standard, not from counsel's refusal to violate it as in *Nix.* Nor would counsel's assertion of the double jeopardy defense have resulted in an undeserved windfall for defendant, as in *Lockhart.* Thus, I find a straightforward application of *Strickland* is proper. Applying that standard to the facts of this case, it is clear defendant has satisfied the prejudice prong of *Strickland.*

Strickland instructs that to prove prejudice, a defendant must show there is a reasonable probability that but for counsel's errors, the result of the proceeding would have been different. In this case, when the defendant was found guilty after the first trial of attempted aggravated burglary, that verdict served as an acquittal of the **4 offense of aggravated burglary. Thus, the state trying defendant again for aggravated burglary unquestionably constituted double jeopardy. Had counsel filed a motion to quash, we must assume the trial court would have granted it since defendant was clearly entitled to relief, and the state could not have tried defendant for aggravated burglary. If defendant had been tried for the next most serious offense of attempted aggravated burglary, he could not have been convicted for unauthorized entry of an inhabited dwelling because it is not a proper responsive verdict for an attempted aggravated burglary charge. Therefore, had defense counsel filed a motion to quash, raising what was clearly a meritorious double jeopardy

defense, there is no doubt the **1060 outcome of the second trial would have been different.

The majority finds defendant's prejudice argument wanting because of "the almost certain chance" defendant would have received the same habitual offender sentence of life in prison as a third offender, even if a motion to quash had been filed. This is purely speculative. I find it offensive to the criminal justice system to assume that defendant would have been convicted had he been tried on a proper charge under different circumstances, or that the state would have undoubtedly instituted habitual offender proceedings after a third trial. To conclude otherwise would essentially preconvict the defendant and deprive him of a trial on a proper charge. It is inappropriate to engage in such pure conjecture.

I also find prejudice is demonstrated by the unreliability of the outcome of the proceeding. In *Price v. Georgia,* [9] the Supreme Court addressed the proper remedy when a defendant is retried for a jeopardy-barred offense. Price was tried for murder and convicted of the lesser included offense of manslaughter. After that conviction was reversed on appeal, there was another trial for murder and another conviction of **5 the lesser crime of manslaughter. The Court held that the second conviction could not stand because Price had been impliedly acquitted of murder at the first trial and could not be tried again on that charge. In so doing, the Court rejected the state's contention that Price's conviction on the lesser offense constituted harmless error:

> The Double Jeopardy Clause, as we have noted, is cast in terms of the risk or hazard of trial and conviction, not of the ultimate legal consequences of the verdict. To be charged and to be subjected to a second trial for first-degree murder is an ordeal not to be viewed lightly. Further, and perhaps of more importance, we cannot determine whether or not the murder charge against petitioner induced the jury to find him guilty of the less serious offense of voluntary manslaughter rather than to continue to debate his innocence. [10]

Thus, in *Price*, prejudice to the defendant was presumed because of the likelihood that the conviction for manslaughter had been influenced by the trial on the more serious murder charge. The same holds true in this case. Prejudice is presumed because of the likelihood that defendant's conviction was influenced by trial on the more serious charge.

In previously reinstating defendant's conviction, this court recognized the state's error in retrying defendant for aggravated burglary, but considering defendant did not file a motion to quash that proceeding, we found the verdict of unauthorized entry of an inhabited dwelling was not inherently tainted by virtue of its return in the trial of a jeopardy-barred offense. In so doing, we relied in part on *Morris v. Mathews.* [11] In *Morris,* the Supreme Court distinguished and limited *Price* in cases where a defendant is charged with and convicted of a jeopardy-barred offense which is later reduced on appeal. In such cases, the Court held that the proper remedy is not always to order a new trial. The Court held that when a jeopardy-barred conviction is reduced to a conviction for a lesser included offense which is not jeopardy barred, **6 the burden shifts to the defendant to demonstrate a reasonable probability that he would not have been convicted of the nonjeopardy-barred offense absent *1061 the presence of the jeopardy-barred offense. The rationale for this distinction is that when a defendant is convicted of the greater charged offense, the jury necessarily finds all the elements of the lesser-included offense. Thus, it would be incongruous always to order yet another trial as a means of curing a double jeopardy violation. [12]

While the majority relies heavily on *Morris,* in considering prejudice under *Strickland,* I find the facts of this case more in line with *Price*, and thus find its reasoning instructive. Defendant was tried for the jeopardy-barred offense of aggravated burglary, but found guilty of the lesser-included offense of unauthorized entry of an inhabited dwelling. As in *Price*, the fact that defendant was subjected to trial on a more serious charge inherently influenced the factfinder's verdict. Counsel's error also had consequences for defendant in terms of his sentencing exposure. Defendant was placed on trial for the more serious crime of aggravated burglary, which provides a sentence range of one to thirty years. [13] Had Mr. Thomas been properly brought to trial on a charge of attempted aggravated burglary, he would have faced a much shorter sentence range of one to fifteen years. [14] Had the state charged defendant with the offense of unauthorized entry of an inhabited dwelling, he would only have faced a sentence of one to six years. [15] I recognize defendant was tried by the court, not a jury, thus theoretically

reducing the risk that the verdict was influenced by the trial on a more serious charge or the exposure to a greater sentence. However, I also note it was the same trial judge who granted defendant relief and **7 found he was prejudiced by ineffective assistance of counsel under *Strickland*. Under these circumstances, I find counsel's error, which subjected defendant to retrial on a more serious charge than was allowed, undermines confidence in the verdict.

For these reasons, I would affirm the ruling of the trial court.

All Citations

124 So.3d 1049, 2012-1410 (La. 9/4/13)

Footnotes

* Retired Judge Robert L. Lobrano, assigned as Justice ad hoc, sitting for Weimer, J., recused.

1 La.C.Cr.P. art 770 provides, in pertinent part:

> Upon motion of a defendant, a mistrial shall be ordered when a remark or comment, made within the hearing of the jury by the judge, district attorney, or a court official, during the trial or in argument, refers directly or indirectly to: ... (3) The failure of the defendant to testify in his own defense.

2 Defendant was not reindicted, nor was a new bill of information filed.

3 La.C.Cr.P. art. 814(A)(43) provides:

> The only responsive verdicts which may be rendered when the indictment charges [Attempted Aggravated Burglary] are: guilty; guilty of attempted simple burglary; guilty of attempted simple burglary of an inhabited dwelling; guilty of attempted unauthorized entry of an inhabited dwelling; not guilty.

4 U.S. Const. amend. V provides, in pertinent part:

> nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb....

Article 1, § 15 of the Louisiana Constitution provides, in pertinent part:

> No person shall be twice placed in jeopardy for the same offense, except on his application for a new trial, when a mistrial is declared, or when a motion in arrest of judgment is sustained.

5 La.C.Cr.P. art. 591 provides:

> No person shall be twice put in jeopardy of life or liberty for the same offense, except, when on his own motion, a new trial has been granted or judgment has been arrested, or where there has been a mistrial legally ordered under the provisions of Article 775 or ordered with the express consent of the defendant.

6 La.C.Cr.P. art. 596 provides, in pertinent part:

> Double jeopardy exists in a second trial only when the charge in that trial is: (1) Identical with or a different grade of the same offense for which the defendant was in jeopardy in the first trial, whether or not a responsive verdict could have been rendered in the first trial as to the charge in the second trial.

7 La.C.Cr.P. art. 598(A) provides:

> When a person is found guilty of a lesser degree of the offense charges, the verdict or judgment of the court is an acquittal of all greater offenses charges in the indictment and the defendant cannot thereafter be tried for those offenses on a new trial.

1 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

2 506 U.S. 364, 372, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993).

3 475 U.S. 157, 175–76, 106 S.Ct. 988, 89 L.Ed.2d 123 (1986).

4 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000).

5 *Id.* at 393, 120 S.Ct. 1495.

6 —— U.S. ——, 132 S.Ct. 1376, 182 L.Ed.2d 398 (2012).

7 132 S.Ct. at 1381.

8 *Id.* at 1387.

9 398 U.S. 323, 90 S.Ct. 1757, 26 L.Ed.2d 300 (1970).

10 398 U.S. at 331, 90 S.Ct. 1757.

11 475 U.S. 237, 245, 106 S.Ct. 1032, 1037, 89 L.Ed.2d 187 (1986).

12 475 U.S. at 247, 106 S.Ct. 1032.

13 La. R.S. 14:60.
14 La. R.S. 14:27(D)(3).
15 La. R.S. 14:62.3(B).

End of Document

KeyCite Yellow Flag - Negative Treatment
Habeas Corpus Granted by Thomas v. Cain, M.D.La., March 7, 2017

926 So.2d 490
Supreme Court of Louisiana.

STATE of Louisiana
v.
Anthony THOMAS.

No. 2005-K-2373.
|
April 17, 2006.

Synopsis

Background: Defendant was convicted in the trial court of attempted aggravated burglary as lesser included offense of aggravated burglary. Defendant appealed, and the Court of Appeal reversed. On remand, defendant was charged again with aggravated burglary. Following bench trial, he was convicted of unlawful entry into inhabited dwelling as lesser included offense. On appeal, the Court of Appeal vacated verdict as unresponsive to charge for attempted aggravated burglary it believed should have been charged.

Holdings: On certiorari review, The Supreme Court held that:

[1] comment on defendant's right to silence was trial error subject to harmless error analysis;

[2] retrial for aggravated burglary violated prohibition against double jeopardy; and

[3] guilty verdict for unlawful entry into inhabited dwelling on retrial was not inherently tainted by prosecution on jeopardy-barred charge for aggravated burglary.

Judgment on Court of Appeal reversed; conviction and sentence reinstated; remanded.

West Headnotes (3)

[1] Double Jeopardy

Particular Grounds for Relief

Comment on the defendant's failure to take the stand at trial for aggravated burglary was not structural defect that nullified jury's verdict to lesser-included offense of attempted aggravated burglary, such that retrial for aggravated burglary would not be barred by prohibition against double jeopardy; rather, comment constituted trial error that was subject to harmless-error analysis.

12 Cases that cite this headnote

[2] Double Jeopardy

Ruling on Lesser as Bar to Prosecution for Greater Offense

Guilty verdict to attempted aggravated burglary as lesser included offense of aggravated burglary constituted acquittal of latter offense, and thus, prohibition against double jeopardy barred retrial for latter offense on remand after conviction was reversed on direct appeal. U.S.C.A. Const. Amend. 5.

1 Cases that cite this headnote

[3] Double Jeopardy

Ruling on Lesser as Bar to Prosecution for Greater Offense

The Court of Appeal had no basis for vacating guilty verdict to unauthorized entry into inhabited dwelling entered following retrial for aggravated burglary as unresponsive to charge for attempted aggravated burglary, which latter offense Court of Appeal believed should have been charged based on determination that prohibition against double jeopardy barred prosecution for aggravated burglary after jury in first trial had entered guilty verdict to lesser included offense of attempted aggravated burglary; verdict was not inherently tainted by virtue of its return in trial of jeopardy-barred offense. U.S.C.A. Const. Amend. 5; LSA-C.Cr.P. art. 814(A)(42).

2 Cases that cite this headnote

F.

Opinion

490 PER CURIAM.

**1 Granted. The decision of the court of appeal is reversed, defendant's conviction and sentence are reinstated and this case is remanded to the district court for execution of sentence.

*491 [1] [2] We do not subscribe to the state's view that the grounds for reversing defendant's conviction and sentence for attempted aggravated burglary, that the prosecutor commented indirectly on defendant's failure to take the stand, *see State v. Thomas,* 99-1500 (La.App. 1st Cir.6/23/00), ---So.2d ---- (unpub'd) constituted a structural defect in the proceedings which nullified the jury's verdict and permitted it to reindict defendant for the charged offense of aggravated burglary. Comment on the defendant's failure to take the stand at trial is a trial error, not a structural defect in the proceedings, that has been subject to harmless-error analysis at the federal level since *Chapman v. California,* 388 U.S. 263, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). Moreover, we have clarified that as a matter of Louisiana law, the mandatory mistrial provisions of La.C.Cr.P. art. 770, which encompass a prosecutor's direct or indirect comment on the defendant's failure to **2 testify, are directives to the trial judge and do not preclude an appellate court from conducting harmless-error analysis. *State v. Johnson,* 94-1379 (La.11/27/95, 664 So.2d 94). The jury's return of a lesser verdict of attempted aggravated burglary at his first trial thereby acquitted him of the charged offense of aggravated burglary. *Green v. United States,* 355 U.S. 184, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957)(conviction of lesser offense bars retrial for greater offense); La.C.Cr.P. art. 598(A)(same).

[3] Nevertheless, reversal of defendant's first conviction and sentence did not preclude the state from holding a second trial, only from seeking a conviction for aggravated burglary. *United States v. Ball,* 163 U.S. 662, 16 S.Ct. 1192, 41 L.Ed. 300 (1896). While the state erred in reindicting defendant and retrying him for the crime of aggravated burglary, the defendant did not move to quash the proceedings before trial, and the trial court, sitting as the fact finder in the case after defendant waived a jury, returned a verdict of guilt on the non-barred offense of unauthorized entry of an inhabited dwelling, a lesser included offense and a responsive verdict to the charged offense as a matter of La.C.Cr.P. art. 814(A)(42). The court of appeal therefore had no basis for vacating that verdict as unresponsive to the charge that it believed *should have* been brought, *i.e.,* attempted aggravated burglary, because the verdict was not inherently tainted by virtue of its return in the trial of a jeopardy-barred offense. *See Morris v. Mathews,* 475 U.S. 237, 245, 106 S.Ct. 1032, 1037, 89 L.Ed.2d 187 (1986). Nor was it precluded by any factual finding necessarily resolved by the jury against the state at defendant's first trial when it returned a verdict of attempted aggravated burglary because a factfinder in Louisiana may return a verdict of attempt "although it appears on the trial that the crime intended or attempted was actually perpetrated by such person in pursuance of such attempt." R.S. 14:27(C).

WEIMER, J., recused.

All Citations

926 So.2d 490, 2005-2373 (La. 4/17/06)

Footnotes

* Associate Justice John L. Weimer recused.

End of Document