No. 18-6550

In the Supreme Court of the United States

ANTHONY THOMAS,
Petitioner,
v.
DARREL VANNOY, WARDEN, LOUISIANA STATE PENITENTIARY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

JEFF LANDRY
ATTORNEY GENERAL
ELIZABETH BAKER MURRILL
Solicitor General
MICHELLE WARD GHETTI
Deputy Solicitor General
COLIN CLARK
Assistant Solicitor General
Counsel of Record
TERRI LACY
Assistant Attorney General
Louisiana Department of Justice
1885 N. Third Street
Baton Rouge, Louisiana 70802
(225) 326-6200
clarkc@ag.louisiana.gov

QUESTIONS PRESENTED

Whether the United States Court of Appeals for the Fifth Circuit erred when it denied the Petitioner's double jeopardy and ineffective assistance of counsel claims on the basis that the Louisiana Supreme Court's prior merits decision was neither contrary to, nor an unreasonable application of, the clearly established law of this Court.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

Federal Statutes and Rules

State Cases

State Statutes

INTRODUCTION

The decision below was correct and does not conflict with any decision of this Court. Petitioner does not contend a split exists in the circuits or that the Fifth Circuit's decision conflicts with a state court of last resort. Rather, Petitioner asks for error correction on a narrow issue that rarely arises. And even if this were a compelling reason to review the case, there is no error to correct. As the following shows, this is a complicated, fact-bound case that does not present the kind of issue of national importance worthy of certiorari.

STATEMENT OF THE CASE

Factual Background[1]

After serving two prior sentences for violent crimes, Petitioner Anthony Thomas began dating Lakeisha Davis, whom he met after repairing her car. SCR Vol. V, 702-703, 723-724, 726.[2] After a few months, however, the relationship turned violent. 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." Pet. App. 36; *see also* SCR Vol. V, 763-765, 768-769, 859. A week or two prior to the events that ultimately led to the conviction at issue, Petitioner

[1] Petitioner was tried twice. Because this Court is reviewing only Petitioner's second conviction, these facts are taken from the second trial. The evidence in both trials was very similar. *See* SCR Vol. II, 288-290 ("SCR" stands for the State Court Record sent to the State Supreme Court upon which it issued its September 4, 2013 decision).

[2] Petitioner had two prior felony convictions—one for armed robbery, for which he was sentenced in 1984 to fifteen years at hard labor and one for attempted manslaughter, for which he was sentenced in 1993 to ten years at hard labor. SCR Vol. V, 923; *see also* Pet. App. 3, n. 1.

threatened Davis's life. SCR Vol. V, 766.[3] Davis eventually ordered Petitioner to move out, told him not to come back, and changed her locks. SCR Vol. V, 703-704. SCR Vol. V, 761.

On May 18, 1998, between 1 and 2 a.m., Davis returned to her apartment from her mother's house where she had been staying. SCR Vol. V, 703, 714. She approached her apartment door with her toddler-age child on her hip and bags in her hand. SCR Vol. V, 714, 743. As she unlocked the door, Petitioner appeared, pushed her inside, and shut the door. SCR Vol. V, 714, 744, 747.

Petitioner then pushed Davis onto the floor and started choking and hitting her. SCR Vol. V, 715, 754. He forced her to have sex with him and Davis later stated that "If I would have told him no I would have probably been dead." SCR Vol. V, 715, 716, 742.

Petitioner then told Davis he was going to go to his truck to turn it off and threatened to harm her if she ran or called the police. SCR Vol. V, 715-716.[4] When he left, Davis ran to a neighbor's house and called the police. SCR Vol. V, 713-717, 735-736. Police arrived and, shortly thereafter, Petitioner was spotted walking around the building looking for Davis and was arrested. SCR Vol. V, 719, 747-748.[5]

---

[3] Davis believed that Petitioner had previously killed another woman after stalking her. SCR Vol. V, 783-784.

[4] Petitioner said, "yeah, I ought to do what I am fixing to do [to] you right now." SCR Vol. V, 715. At this point, Davis believed that Petitioner was going to kill her. SCR Vol. V, 718; *see also* SCR Vol. V, 726 ("[H]e tried to kill me.")

[5] After Petitioner was arrested, Davis reentered her apartment and found that her apartment key was gone. SCR Vol. V, 719-720. Police searched Petitioner and Davis's key was found in his pocket. SCR Vol. V, 720, 761, 800, 804.

Procedural Background

Petitioner was indicted pursuant to Louisiana Revised Statutes 14:60 (1998) for the aggravated burglary of Davis' home. SCR Vol. I, 38. The statute in effect at the time of the crime provided, in part, that:

> Aggravated burglary is the unauthorized entering of any inhabited dwelling, or of any structure, water craft, or movable where a person is present, with the intent to commit a felony or any theft therein, if the offender,
>
> (1) Is armed with a dangerous weapon; or
>
> (2) After entering arms himself with a dangerous weapon; or
>
> (3) Commits a battery upon any person while in such place, or in entering or leaving such place.

After a jury trial, Petitioner was found guilty of the lesser included offense of attempted aggravated burglary. SCR Vol. I, 100. The verdict sheet given to the jury listed the following responsive verdicts:

1. Guilty.
2. Guilty of attempted aggravated burglary.
3. Guilty of simple burglary of an inhabited dwelling.
4. Guilty of attempted simple burglary of an inhabited dwelling.
5. Guilty of simple burglary.
6. Guilty of attempted simple burglary.
7. Guilty of unauthorized entry of an inhabited dwelling.
8. Guilty of attempted unauthorized entry of an inhabited dwelling.
9. Not guilty.

SCR Vol. I, 99; *see also* La. Code Crim. Proc. art. 814(A)(42) (1998).

Given his two prior violent felony convictions, Petitioner was sentenced to life in prison as a third felony habitual offender pursuant to Louisiana Revised Statutes 15:529.1(A)(1)(b)(ii) (1998), which provided: "If the third felony or either of the two

prior felonies is a felony defined as a crime of violence under [La. Rev. Stat.] 14:2(13) … the person shall be imprisoned for the remainder of his natural life, without the benefit of parole, probation, or suspension of sentence." SCR Vol. I, 6, 146.

Petitioner appealed. An intermediate state appellate court reversed the conviction due to the prosecutor's reference to Petitioner's failure to testify, and remanded the case for a new trial. SCR Vol. I, 114-115, 145-155.

The State did not amend the indictment and his counsel did not move to quash. Petitioner was, therefore, tried a second time on the single count of aggravated burglary even though conviction on a lesser included offense barred retrial on the greater offense of aggravated burglary. *See* La. Code Crim. Proc. art. 598(A). Petitioner, who waived his right to a jury, proceeded with a bench trial in which the judge found him guilty of the lesser included offense of unauthorized entry of an inhabited dwelling. *See* La. Rev. Stat. 14:62.3; La. Code Crim. Proc. art. 814(A)(42) (1998); SCR Vol. I, 10-11, 38; SCR Vol. IV, 691-695; SCR Vol. V, 928.[6] The verdict was responsive to the crime for which Petitioner was tried. La. Code Crim. Proc. art. 814(A)(42) (1998). Although unauthorized entry of an inhabited dwelling is not responsive to attempted aggravated burglary, had the State hypothetically charged Petitioner with attempted aggravated burglary prior to the second trial, *attempted* unauthorized entry of an inhabited dwelling would have

[6] The unauthorized entry statute provided in part: "Unauthorized entry of an inhabited dwelling is the intentional entry by a person without authorization into any inhabited dwelling or other structure belonging to another and used in whole or in part as a home or place of abode by a person." La. Rev. Stat. 14:62.3(A) (1998).

been a responsive verdict. La. Code Crim. Proc. art. 814(A)(43) (1998). A conviction of attempted unauthorized entry of an inhabited dwelling (or, for that matter, any felony) would have also resulted in the same sentence: life without parole. La. Rev. Stat. 15:529.1(A)(1)(b)(ii) (1998); *see also* La. Rev. Stat. 14:27(C). Petitioner was again sentenced to a life in prison as a third felony habitual offender. SCR Vol. I, 184-185; SCR Vol. V, 901-925.

Petitioner appealed. The intermediate state appellate court again vacated Petitioner's conviction and sentence. SCR Vol. II, 236-239. Even though Petitioner did not raise the issue, the Court reversed his conviction on double jeopardy grounds as patent error. SCR Vol. II, 238. The court reasoned that the "jury's verdict [in the first trial] acts as an acquittal to the charge of aggravated burglary … [and, thus,] the second trial (the bench trial) was required to be on the offense of attempted aggravated burglary." SCR Vol. II, 238 (parentheses in original). The Court also held that "[t]he completed offense of unauthorized entry of an inhabited dwelling is not responsive to the offense of attempted aggravated burglary." SCR Vol. II, 239.

In a *per curiam* decision, the Louisiana Supreme Court reversed and reinstated Petitioner's conviction and sentence. Pet. App. 46-47. The Court agreed that the jury's return of a lesser verdict of attempted aggravated burglary in the first trial operated as an acquittal of the charged offense of aggravated burglary. *Id.* at 47. The Court noted, however, that in the second trial, the trial judge 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 aggravated burglary. *Id*. And because the second verdict was not barred by double jeopardy, it was not "inherently tainted by virtue of its return in the trial of a jeopardy barred offense." *Id*. (citing *Morris v. Mathews*, 475 U.S. 237, 245 (1986)). As the Court later characterized its own opinion, "the return of a nonjeopardy-barred responsive verdict … cured the double jeopardy implications of retrying defendant" on a jeopardy-barred charge. *Id*. at 40.

The State Supreme Court found that the jury in the first trial did not resolve any factual finding against the State that would have prevented the State from charging Petitioner with unauthorized entry of an inhabited dwelling. *Id*. Equally important, the State Supreme Court held the court of appeal had no basis for holding that the State could only have charged Petitioner with attempted aggravated burglary on the retrial of the offense. *Id*. at 47. Because as a matter of state law the State was not required to bring that particular charge, whether unauthorized entry of an inhabited dwelling was responsive to attempted aggravated burglary was irrelevant. *See Id*.

Petitioner subsequently filed an application for state post-conviction relief, alleging, among other things, that his trial lawyers provided ineffective assistance of counsel for failing to file a motion to quash his indictment on double jeopardy grounds. SCR Vol. II, 259-286.[7] An evidentiary hearing was held by the

[7] At this point, the post-conviction court granted a motion for recusal filed by the East Baton Rouge Parish District Attorney and the Louisiana Attorney General's Office handled the case going forward. SCR Vol. II, 347-349; *see also* ROA.185-188 ("ROA" stands for the federal record on appeal).

commissioner assigned to the case. One of Petitioner's trial counsel explained that failure to file a motion to quash on double jeopardy grounds was "an oversight;" because he had focused on trial preparation, he spent very little time on procedural issues. SCR Vol. VI, 962-1002; SCR Vol. II, 400-401.

The commissioner found the lawyer's conduct was deficient and that Petitioner was prejudiced because his attorney's failure to file the motion to quash resulted in a conviction for unauthorized entry of an inhabited dwelling, which the commissioner found was not a responsive verdict to what the Commissioner believed to be the proper charge—the next lesser grade offense of attempted aggravated burglary. SCR Vol. II, 391-397. The commissioner reasoned that the filing of a meritorious motion to quash "would have necessarily resulted in a different verdict." *See* SCR Vol. II, 371, 394-397. The post-conviction judge adopted the commissioner's recommendation and entered a judgment accordingly. SCR Vol. II, 388. The intermediate court of appeal denied discretionary review. SCR Vol. II, 407.

The Louisiana Supreme Court granted review and again reinstated Petitioner's conviction and sentence. *See, generally,* Pet. App. 34-45. The Court found Petitioner's lawyers' performance fell below the requirements of the Sixth Amendment and that "the double jeopardy issue had merit." *Id.* at 39. But the Court also held that "the trial court erred in finding defendant satisfied the prejudice prong of *Strickland*." *Id.* at 40. The Court cited its prior decision and disagreed with the Petitioner's contention that "reframed as an issue of ineffective

assistance of counsel, his claim satisfi[ed] in post-conviction proceedings the burden he did not carry on direct review." *Id*.

The Court cautioned Petitioner that it was "not the State's burden to disprove conjectured theories of prejudice. *Strickland* places the burden on the defendant, not the State, to show a 'reasonable probability' that the result would have been different." *Id*. at 41 (citing *Wong v. Belmontes,* 558 U.S. 15, 26-29 (2009); La. Code Crim. Proc. 930.2).

Relying on *Morris v. Mathews,* as it had before, the Court held 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." *Id*.

According to the Louisiana Supreme Court, "the only deprivation [Petitioner] suffered as a result of counsel's omissions was deprivation of the right to challenge the constitutionality of his charging document." *Id*. at 40. The Court reasoned that because "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," the result would have been the same—the conviction of a felony. Furthermore, Petitioner's prejudice argument was also "wanting in light of the almost certain chance that he would have received the same habitual offender sentence" and "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 for what felony defendant was convicted." *Id*. at 41.

Petitioner filed a petition for habeas corpus relief in the federal district court where he re-urged his double jeopardy and ineffective assistance of counsel arguments, albeit now subject to the deferential review required by 28 U.S.C. § 2254(d) and (e); ROA.5-176. The magistrate judge assigned to hear the case recommended relief, holding that the State Supreme Court's opinion was contrary to clearly established law, as set forth in *Price v. Georgia,* 398 U.S. 323 (1970). *See* ROA.226. The magistrate also wrote that the State Supreme Court unreasonably applied *Mathews* because "it cannot be said that the jury necessarily found that the petitioner's conduct satisfied the elements of unauthorized entry of an inhabited dwelling" and because the State Supreme Court's conclusion that Thomas would have been convicted of a felony had the proper motion been filed was "purely speculative." *Id*.

The State objected, but the district court adopted the recommendation, vacated Petitioner's conviction and sentence, and remanded "to the state court to determine what non-jeopardy barred retrial, if any, [was] to be had." ROA.229-245; ROA.246-247; Pet. App. 19.

The United States Fifth Circuit Court of Appeals, applying the deference to state court decisions required by 28 U.S.C. § 2254(d) and (e), reversed. The Fifth Circuit found:

First, the Louisiana Supreme Court's "rejection of Thomas's Fifth Amendment claim was not contrary to *Price*" and "did not contravene clearly established federal law under AEDPA's relitigation bar." Pet. App. 8. Although *Price* was "factually similar" to this case, that was not enough. *Id.* at 7. "[F]or 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." *Id.* (footnote omitted). But the decision in *Price was* distinguishable: "[T]he *Price* Court credibly worried … 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.'" *Id.* (footnote omitted). However, here "Petitioner'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." *Id.* (footnote and internal quotation marks omitted).

Second, the Louisiana Supreme Court's decision to apply *Mathews*, rather than *Price*, was not an unreasonable application of clearly established law because "[t]he 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." *Id.* at 10. *Mathews* is a more recent case regarding a double jeopardy error and is one in which the Court interpreted *Price*. *Id.* at 10. 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 suggests that a new trial is required

only when the defendant shows a reliable inference of prejudice." *Id*. at 11 (citing *Mathews*, 475 U.S. at 245) (brackets omitted and emphasis in original).

Third, it was not unreasonable to conclude that Petitioner needed to do something more than the defendant in *Price* to show a "reliable inference of prejudice" because it was "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*." *Id*. at 11.

Alternatively, Petitioner could not reliably show prejudice because he "made no non-speculative showing that without the aggravated burglary charge, he would not have been convicted of a felony" and any felony conviction would have resulted in a life without parole sentence. *Id*. at 14. In assessing prejudice, the Court questioned whether it should look at the specific *conviction* received by a defendant or whether it should consider the bottom-line resultant *sentence*. "The dispute turns, then, on *what kind of prejudice* a defendant must show to a degree of reasonable probability under *Mathews*." *Id*. at 12 (emphasis in original). Because "*Mathews* itself is here uncertain … [we] cannot say that the choice among these alternatives is beyond the scope of fairminded disagreement." *Id*. at 13 (internal quotation marks omitted).

Fourth, the Louisiana Supreme Court's decision regarding ineffective assistance of counsel was not an unreasonable application of *Strickland v.*

Washington, 466 U.S. 668 (1984). "The operative question is largely a repeat of the one we confronted in the Fifth Amendment context … [t]he only difference … [is] that the Supreme Court precedent includes *Strickland*." *Id.* at 17. And Petitioner "points to no law suggesting that the Louisiana Supreme Court's interpretation of *Strickland* prejudice is unreasonable." *Id.* at 18.

REASONS FOR DENYING THE PETITION

I. EVEN ASSUMING THE ALLEGED ERRORS HAVE MERIT, THE QUESTIONS PRESENTED REQUEST LITTLE MORE THAN ERROR CORRECTION IN A UNIQUE CASE.

Petitioner essentially asks for error correction on a narrow issue. Petitioner argues that the Fifth Circuit contradicted or misapplied three of this Court's cases: *Price*, *Mathews*, and *Strickland*. Moreover, as the uniqueness of the facts and the age of the precedent shows, this set of facts will not arise often. This case invites this Court to engage in little more than error correction, which is not the purpose of the Rule X.

II. THE LOUISIANA SUPREME COURT'S DECISION DENYING PETITIONER'S DOUBLE JEOPARDY CLAIM WAS NOT CONTRARY TO, OR AN UNREASONABLE APPLICATION OF CLEARLY ESTABLISHED LAW.

Petitioner is entitled to federal relief only if the state court's adjudication of his double jeopardy and ineffective assistance of counsel claims were "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by" this Court, or else were based upon "an unreasonable determination of the facts in light of the evidence presented in the State court proceedings." 28 U.S.C. § 2254(d). This standard is "difficult to meet because it was meant to be." *Sexton v. Beaudreaux*, 138 S. Ct. 2555, 2558 (2018) (*per curiam*) (citing *Burt v.*

Titlow, 571 U.S. 12 (2013)). A habeas petitioner meets this demanding standard only when he shows that the state court's decision was "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Dunn v. Madison*, 138 S. Ct. 9, 11 (2017) (*per curiam*) (citing *Harrington v. Richter*, 562 U.S. 86, 103 (2011)). Petitioner has not met this standard.

This case revolves around three straightforward questions. First, whether *Price* clearly applies to a case where Petitioner was tried on a jeopardy-barred offense in a bench trial instead of a jury trial. Second, which one of two precedents, *Price* or *Mathews*, apply to determine the remedy for a double jeopardy violation that comes before this court as a heavily reviewed petition for habeas corpus. And third, whether this Court has clearly established, under the various tests for prejudice, that a state court may not measure prejudice by looking to the ultimate sentence received by the Petitioner, rather than exclusively at the specific felony conviction he could receive.

The Fifth Circuit correctly denied Thomas' petition for habeas relief after concluding that (1) *Price* was not materially indistinguishable as it did not involve a bench trial (the *Price* Court was credibly concerned with jury prejudice) and because a judge, sitting as a trier of fact, is presumed to have rested his verdict only on the admissible evidence before him rather than the charge chosen by the prosecutor, (2) "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," and (3)

alternatively, this Court has never established that a court cannot look to the ultimate outcome of a case to determine prejudice, rather than looking at the specific conviction entered. Pet. App. 6-14.

A. *Price* is factually distinguishable.

In *Price v. Georgia*, this Court rejected Georgia's argument that the State proved that the double jeopardy error in that case was harmless. 398 U.S. at 331. The *Price* Court explained that it "cannot determine whether or not the [jeopardy-barred] 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*. (citation omitted).

The Fifth Circuit determined that *Price* was not materially indistinguishable from this case because Petitioner's second trial was a bench trial. Pet. App. 11. In particular, as the Fifth Circuit noted, because it was a bench trial the "risk of jury prejudice," the "primary evil addressed in *Price*," would not affect Petitioner. *Id*. [8] In *Price*, this Court was concerned that a jeopardy-barred charge might "induce the jury to find [the defendant] guilty of the less serious offense... rather than to continue to debate his innocence." 398 U.S. at 331 (citation omitted). A judge,

[8] The Fifth Circuit's reasoning that *Price* was distinguishable because the second trial was a bench trial relied upon a Northern District of California opinion which came to the same conclusion and which was later affirmed by the Ninth Circuit. *Renteria v. Adams*, 2011 U.S. Dist. LEXIS 4103, at *30-31 (N.D. Cal. 2011), *aff'd*, 2013 U.S. App. LEXIS 11225 (9th Cir. 2013) (unpub.). The Northern District of California reasoned that any double jeopardy "error was neutralized by the bench trial, and Petitioner received his remedy when the trial court acquitted him of" the jeopardy-barred charge." *Id*. at *31. The Ninth Circuit agreed, finding that the state court did not contradict or unreasonably apply clearly established law when it held that the "Petitioner failed to show that the trial court was swayed by the array of charges and tempted to reach a compromise verdict. It attributed this, in part, to the fact that a seasoned trial judge rather than a jury had been the finder of fact." *Renteria,* 2013 U.S. App. LEXIS 11225, at *1 (internal quotation marks omitted).

however, cannot debate with himself and a jury of one has no need to enter a compromise verdict. Moreover, a judge is a legal professional.

The real problem, according to *Price*, is that jurors might be swayed to enter into a conviction simply because of the charge chosen, irrespective of the evidence. Also, a trial upon a greater (jeopardy-barred) charge may allow the State to introduce evidence that would not otherwise be admissible in a trial on the lesser (non-barred) charge. Neither of these concerns apply to this case. The Fifth Circuit correctly noted that "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." Pet. App. 11.

This conclusion has a basis in both state and federal law. Under Louisiana law, judges are presumed to be able to "disregard irrelevant and possibly prejudicial matter." *State v. Crothers*, 278 So.2d 12, 14-15 (La. 1973). Under federal law, 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. Moreover, a judge, sitting as a trier of fact, is presumed to have rested his verdict only on the admissible evidence before him…." *United States v. Cardenas*, 9 F.3d 1139, 1156 (5th Cir. 1993) (citations omitted). This Court's opinions similarly presume that judges, unlike jurors, are presumed to be able to disregard prejudicial material. *Harris* v. *Rivera*, 454 U.S. 339, 346 (1981) (*per curiam*). And there is a "well-established presumption" that "the judge [has] adhered to basic rules of procedure" when the judge is acting as a factfinder. *Id.* at 346-347 (footnote omitted); *accord*,

Williams v. Illinois, 567 U.S. 50, 69 (2012) (plurality); *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1077 (1991) (Rehnquist, C.J., dissenting).

The *Price* Court was also concerned that Price was twice subjected to a first-degree murder trial. This Court explained that "[t]here is a significant difference to an accused whether he is being tried for murder or manslaughter. [Price] has reason for concern as to the consequences in terms of stigma as well as penalty. He must be prepared to meet not only the evidence of the prosecution and the verdict of the jury but the verdict of the community as well." *Id.* at 331, n. 10. There is no reason to think that this Petitioner's second trial for aggravated burglary carries any stigma akin to a capital murder charge.

The Louisiana Supreme Court's 2006 decision did not explicitly distinguish *Price* from the present case on these grounds, or address *Price* at all, for that matter. However, state courts may avoid issuing decisions contrary to clearly established federal law even without "awareness of [this Court's] cases, so long as neither the reasoning nor the result of the state-court decision contradicts them." *Early v. Packer*, 537 U.S. 3, 8 (2002) (*per curiam*) (emphasis deleted). In any event, the State raised this argument before the federal courts below and the Fifth Circuit adjudicated Petitioner's Fifth Amendment claim pursuant to *Richter*, asking "what arguments or theories supports or could have supported the state court's decision." Pet. App. 9-10 (citation, internal quotation marks, brackets, emphasis and ellipses omitted). Petitioner has not asserted that the Fifth Circuit erred by analyzing the case under the *Richter* standard.

B. The Louisiana Supreme Court appropriately applied *Mathews* rather than *Price*.

As the Fifth Circuit held, the extent to which the prejudice analysis in this case is governed by *Mathews* or *Price* is subject to the kind of "fairminded disagreement" that AEDPA shields from intervention. Pet. App. 11 (citing *Richter*, 562 U.S. at 103). Petitioner's argument that *Price*'s prejudice analysis clearly establishes the outcome of this case does not square with this Court's later decisions, including *Mathews*.

Price confronted an issue arising out of direct review, rather than through collateral review. Thus, *Price* applied the standard set forth in *Chapman v. California*, 386 U.S. 18 (1967), which does not apply here. Although direct review and collateral/habeas review operate very differently today, that was not always the case. *Price*, decided on direct review in 1970, applied the *Chapman* harmless error standard, which presumes prejudice that the State must rebut. 398 U.S. at 331-332.

In a habeas case, double jeopardy prejudice can no longer be presumed. *See Fry v. Pliler*, 551 U.S. 112, 114, 121-122 (2007) (applying *Brecht v. Abrahamson*, 507 U.S. 619, 637-638 (1993)). *Brecht* held that *Chapman* does not apply to habeas corpus review of trial errors. 507 U.S. at 637-638. This Court's decision in *Fry v. Pliler* clarified that a federal habeas court must apply the *Brecht* standard even when a state court (on direct review) allegedly fails to apply *Chapman*. 551 U.S. at 114, 121-122. Thus, "[t]he test for whether a federal constitutional error was harmless depends on the procedural posture of the case. On direct appeal, the harmlessness standard is the one prescribed in *Chapman* … In a collateral

proceeding, the test is different. For reasons of finality, comity, and federalism, habeas petitioners" must satisfy *Brecht*'s standard, where the petitioner has the burden of proof. *Davis v. Ayala,* 135 S. Ct. 2187, 2197 (2015) (citations omitted).

Moreover, the Louisiana Supreme Court's determination that *Mathews* controls the issue of prejudice, rather than *Price*, is correct because *Mathews,* a more recent decision, adopts a test for prejudice on collateral review. *Mathews*, 475 U.S. at 246-247. *Mathews* modified (or cabined) *Price* on the question of prejudice reasoning that "*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." *Id*. at 245. Under *Mathews*, presuming prejudice would only be warranted where the ultimate conviction was influenced by the trial upon the jeopardy-barred charge. According to *Mathews*, the *Price* Court did not suggest that "a conviction for an unbarred offense is inherently tainted if tried with a jeopardy-barred charge," but rather "a new trial is required only when the defendant shows a reliable inference of prejudice." *Id*. at 246.

The Louisiana Supreme Court's conclusion that *Mathews* was more applicable in this context does not stand alone. Since *Mathews* was decided, this Court has cited it favorably in at least four decisions. *See, Bravo-Fernandez v. United States,* 137 S. Ct. 352, 365, n. 7 (2016); *Strickler v. Greene,* 527 U.S. 263, 300 (1999); *Rutledge v. United States,* 517 U.S. 292, 306 (1996) (noting that in *Mathews* it approved the concept that a court may direct the entry of judgment for a lesser included offense when a conviction for a greater offense is reversed on grounds that

affect only the greater offense); *Jones v. Thomas,* 491 U.S. 376, 384-385 (1989). In fact, this Court has not cited *Price* with approval on this point since its decision in *Mathews*.

Additionally, a number of lower courts have held that either Mathews controls, or that *Price*'s prejudice analysis was limited by *Mathews* or, with respect to prejudice, *Mathews* overruled *Price* in part. *See, e.g., United States v. Coleman,* 887 F.2d 266, 1989 U.S. App. LEXIS 15552, at *12 (6th Cir. 1989) (unpub.) (The *Mathews* "Court made it clear that the reasonable probability test applies to all cases where 'a conviction for an unbarred offense is . . . tried with a jeopardy-barred charge.'") (citing *Mathews*, 475 U.S. at 246-247); *Renteria*, 2011 U.S. Dist. LEXIS 4103, at *25, *aff'd*, 2013 U.S. App. LEXIS 11225 ("[T]he United States Supreme Court later limited *Price*.") (quoting *People v. Renteria,* 2007 Cal. App. Unpub. LEXIS 7019, 2007 WL 2421774, at *8-11 (Cal. Ct. App. 2007)); *Gover v. Vasbinder,* 2009 U.S. Dist. LEXIS 129527, at *115-116 (E.D. Mich. 2009), *report and recommendation adopted*, 2010 U.S. Dist. LEXIS 83690 (E.D. Mich. 2010) (Because of *Mathews*, "the *Price* harmless error rule, which appears to establish a rule of *per se* harmfulness, is no longer controlling law even in the double jeopardy context.") *See also Damian v. Vaughn,* 186 Fed. Appx. 775, 777-778 (9th Cir. 2006) (unpub.). Three members of this Court took the same position in *Mathews*. Much of Justice Blackmun's concurring opinion complained that the majority was silently overruling

Price's prejudice analysis. *Mathews*, 475 U.S. at 250-253.[9] Justices Brennan and Marshall likewise found "no reason for adopting a different standard" than the one laid out in *Price*. *Id.* at 259 (Marshall, J., dissenting).

Although the Fifth Circuit was unwilling to take a firm position as to whether *Mathews* overruled *Price* in part, it nevertheless found the boundary between the two "murky." Pet. App. 11. At the very least, there is widespread disagreement regarding whether *Price*'s prejudice analysis is still good law and "[w]idespread disagreement among courts … supports a finding of no clearly established law." *Grim v. Fisher,* 816 F.3d 296, 309-310 (5th Cir. 2016) (citations omitted). AEDPA review is an inappropriate procedural posture within which to address the tension between *Mathews* and *Price* as to the proper test to determine prejudice for double jeopardy error.

C. The Louisiana Supreme Court did not unreasonably apply this Court's cases when it gauged prejudice by looking at the ultimate outcome of the proceedings.

Assuming the test for prejudice in this case is governed by *Mathews* rather than *Price*, *Mathews* does not clearly establish how prejudice is measured. Although *Mathews* was not an ineffective assistance of counsel case, this Court wrote that it

[9] Although Justice Blackmun criticized the majority in *Mathews* for failing to follow *Price*'s statement that "[t]he Double Jeopardy Clause … is cast in terms of the risk or hazard of trial and conviction, not of the ultimate legal consequence of the verdict," his view did not sway the majority. *Id*. at 253. Attempting to frame this vague phrase as requiring habeas relief, as Petitioner does, ignores *Mathews* and reads *Price* at "such a high level of generality" that it creates an "imaginative extension of existing case law" by both nullifying *Mathews* and reading specificity into *Price*'s words that are simply not there. *Nevada v. Jackson*, 569 U.S. 505, 512 (2013). This line simply does not "clearly establish" what a state court is supposed to do when assessing prejudice.

was applying something similar to the *Strickland* formula as the test for prejudice in a double-jeopardy case:

> [W]hen 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. In this situation, we believe that a "reasonable probability" is a probability sufficient to undermine confidence in the outcome.

Mathews, 475 U.S. at 246-247 (citing *Strickland,* 466 U.S. at 695). Thus, the focus under this rule is the ultimate outcome or end result of the proceeding; Petitioner has identified no opinion from this Court that would contradict this position, as is his burden.

According to the Fifth Circuit, the dispute between Petitioner and the State turns on what *kind* of prejudice a defendant must show under *Mathews*. As the Court describes it, "Thomas claims that 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." Pet. App. 12-13. No Supreme Court case answers this question clearly and, thus, under AEDPA, a writ of habeas corpus cannot be granted.

The Fifth Circuit explained that "*Mathews* itself is here uncertain." Pet. App. 13. Although *Mathews* states that a defendant would "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,'" the *Mathews* Court also spoke "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," and also stated "that a defendant must show a reasonable probability that the outcome of a trial on the convicted lesser included offense … would have been different." Pet. App. 13 (footnotes omitted).

Thus, given the uncertainty of the actual test in the *Mathews* opinion, it was correct for the Fifth Circuit to determine that the Louisiana Supreme Court's simple holding that "the verdict was not inherently tainted by virtue of its return in the trial of a jeopardy-barred offense"[10] reflected a "choice among these alternatives [that was not] beyond the scope of 'fairminded disagreement.'" Pet. App. 13. The Fifth Circuit correctly suggested that the Louisiana Supreme Court had one of the *Mathews* interpretations in mind and, therefore, its application of that interpretation, under AEDPA, was not unreasonable. Pet. App. 14.

III. THE LOUISIANA SUPREME COURT'S DECISION WAS NOT AN UNREASONABLE APPLICATION OF *STRICKLAND V. WASHINGTON*.

The petitioner also claims that his counsel was ineffective for failing to file a motion to quash the jeopardy-barred aggravated burglary charge and that he was prejudiced by this failure—a claim adjudicated on the merits and rejected by the Louisiana Supreme Court on state collateral review. Pet. App. 41. The underlying constitutional standard governing Petitioner's Sixth Amendment argument is the familiar one derived from *Strickland v. Washington*: the Petitioner must show both that his "counsel's representation fell below an objective standard of

[10] Pet. App. 47.

reasonableness" and that this deficient performance prejudiced him. 466 U.S. at 688. Louisiana no longer disputes that Petitioner's counsel should have objected to the double jeopardy violation; however, this lack of objection did not ultimately lead to any prejudice.

"An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Id.* at 691 (citation omitted). An error is prejudicial only if it results in "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. at 694. That requires a "substantial," not just "conceivable," likelihood of a different result. *Cullen v. Pinholster,* 563 U.S. 170, 189 (2011) (citing *Richter,* 562 U.S. at 112). As in *Mathews*, the burden rests on the petitioner to show that an error was prejudicial. *See Richter,* 562 U.S. at 104.

Although this Court has not decided a case involving ineffective assistance of counsel for failure to object to a double jeopardy violation, its cases suggest that it would permit a state court to view prejudice pragmatically. In *Weaver v. Massachusetts,* for example, the Court held "that the prejudice inquiry is not meant to be applied in a 'mechanical' fashion. For when a court is evaluating an ineffective-assistance claim, the ultimate inquiry must concentrate on 'the fundamental fairness of the proceeding.'" 137 S. Ct. 1899, 1911 (2017).[11] The

[11] The Louisiana Supreme Court's opinion in 2013 denied Thomas's ineffective assistance of counsel claim on two separate bases, one of them being the fundamental fairness analysis discussed in *Lockhart v. Fretwell,* 506 U.S. 364, 369 (1993). Pet App. 16, 38, 41. In its reply brief before the Fifth Circuit, the State disclaimed reliance on *Lockhart*, in light of *Lafler v. Cooper*, 566 U.S. 156, 167 (2012). *Weaver*, decided nine days after the State filed its reply brief, now makes the State Supreme

question "is not whether a federal court believes the state court's determination" under the *Strickland* standard "was incorrect but whether that determination was unreasonable—a substantially higher threshold. Because the *Strickland* standard is a general standard, a state court has even more latitude to reasonably determine that a defendant has not satisfied that standard." *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009) (citations omitted). And "[d]eference to the state court's prejudice determination is all the more significant in light of the uncertainty" in determining whether a defendant has "suffer[ed] prejudice." *See Premo v. Moore*, 562 U.S. 115, 129 (2011). From this perspective, the Louisiana Supreme Court's decision cannot be considered beyond the scope of fairminded debate. Should this Court determine that application of the *Strickland* prejudice standard to a double jeopardy error is not clearly established, habeas relief is unwarranted under AEDPA for that very reason.

Additionally, in *Clark v. Maggio*, the Fifth Circuit Court similarly found—in a straightforward application of *Strickland*—that a state court may refuse relief if the ultimate sentence would have been the same had defense counsel made an argument that would have resulted in the defendant being convicted of a different crime. 737 F. 2d 471, 474-476 (5th Cir. 1984) (Rubin, J.); *see also Allen v. Perry*, 2015 U.S. Dist. LEXIS 83192, at *7-11, *report and recommendation adopted*, 2015 U.S. Dist. LEXIS 114870 (S.D. Ga. 2015); *Craig v. Cain*, 2011 U.S. Dist. LEXIS

Court's decision on this basis debatable, making habeas relief unwarranted for this separate reason. *See* 137 S. Ct. at 1911.

142287, at *71-72, *report and recommendation adopted*, 2011 U.S. Dist. LEXIS 141184 (M.D. La. 2011).

The Petitioner claims a showing of prejudice, pointing to *Murphy v. Puckett*, 893 F.2d 94 (5th Cir. 1990) as authority. But *Murphy* cannot bear the weight of the petitioner's argument for at least two reasons. First, it is Fifth Circuit precedent and not Supreme Court precedent. As the Supreme Court has "repeatedly pointed out, 'circuit precedent does not constitute 'clearly established Federal law, as determined by the Supreme Court.'" *Kernan v. Cuero*, 138 S. Ct. 4, 9 (2017) (quoting *Glebe v. Frost*, 135 S. Ct. 429, 430 (2014) (*per curiam*) (quoting 28 U.S.C. § 2254(d)(1)). Second, *Murphy* sweeps more narrowly than Petitioner suggests. In *Murphy*, when the state tried petitioner a second time, *all* of the available verdicts were jeopardy-barred; *no* verdict was available for the state to cure the violation. *See Murphy*, 893 F.2d at 97. *Strickland* asks "whether it is 'reasonably likely' the *result* would have been different." *Richter*, 562 U.S. at 111 (citations omitted and emphasis added). In *Murphy* it was; here the very *opposite* is true.[12]

The Louisiana Supreme Court found that Petitioner cannot show prejudice because he "cannot establish, as he must, that there is a reasonable probability that … the end result of the proceedings against him, life in prison as a third offender, would have been different." Pet. App. 41; *see also id.* at 14. Petitioner points to no

[12] While the petitioner has also argued that a charge of unauthorized entry of an inhabited dwelling could have yielded a conviction for a lesser included offense of misdemeanor trespass, he provided no argument beyond mere theoretical possibility. There is absolutely no evidence to suggest that any reasonable factfinder could have found Petitioner guilty of criminal trespass, but not unauthorized entry of an inhabited dwelling. There is no question that the apartment that Petitioner entered was "inhabited."

law foreclosing the State Supreme Court's interpretation of *Strickland*. Thus, as the Fifth Circuit held, the state court's decision is not "beyond the pale of fairminded dispute." Pet. App. 18. The Louisiana Supreme Court did not "unreasonably apply *Strickland* in holding that Thomas was not prejudiced by his counsel's failure to quash his jeopardy-barred charge." Pet. App. 18. He has not proven a case for habeas relief.

CONCLUSION

The State of Louisiana respectfully submits that the petition for a writ of certiorari should be denied.

Respectfully Submitted,

Jeff Landry, Attorney General

/s/ Colin Clark
Elizabeth Baker Murrill
Solicitor General
Michelle Ward Ghetti
Deputy Solicitor General
Colin Clark*
Assistant Solicitor General
*Counsel of Record
Terri Lacy
Assistant Attorney General
Office of the Attorney General
Louisiana Department of Justice