APPENDICES

APPENDIX A

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 17-6157

ANTONIO L. SAULSBERRY,
Petitioner-Appellant,
v.

RANDY LEE, Warden,
Respondent-Appellee.

Appeal from the United States District Court for the Western District of Tennessee at Memphis.
No. 2:07-cv-02751—Jon Phipps McCalla, District Judge.

Argued: March 14, 2019
Decided and Filed: August 30, 2019

Before: SUTTON, WHITE, and DONALD, Circuit Judges.

SUTTON, J., delivered an opinion and the judgment of the court. WHITE, J. (pg. 10), delivered a separate opinion concurring in the judgment. DONALD, J. (pp. 11–14), delivered a separate dissenting opinion.

OPINION

SUTTON, Circuit Judge. This tale of two trials began when Tennessee charged Antonio Saulsberry with (1) premeditated murder and (2) two counts of felony murder. The first jury convicted him of premeditated murder and did not return a verdict on the two felony murder counts, all consistent with the court's instructions to consider the felony murder counts *only* if it acquitted Saulsberry of premeditated murder. The state appellate court reversed Saulsberry's premeditated murder conviction and remanded for a second trial solely on the two felony murder counts. The second jury convicted Saulsberry on both felony murder counts, and he received a life sentence. He filed a federal habeas petition challenging his retrial on double jeopardy grounds. The district court denied the petition, and we affirm.

I.

In 1995, the manager of a Memphis restaurant was murdered during a closing-time robbery. Saulsberry worked at the restaurant and helped to plan the robbery. But he was not there during the robbery or when the restaurant's manager was shot and killed.

In 1997, Saulsberry went to trial in state court. In addition to a robbery count and a conspiracy count, he faced three counts of first-degree murder—premeditated murder, murder during a robbery, and murder during a burglary—all distinct offenses in Tennessee. The trial court forbade the jury from considering the murder counts together. Only if the jury found Saulsberry *not* guilty of premeditated murder could it "proceed to inquire whether [he is] guilty of [either count of felony murder]." R. 68-13 at 43.

The jury convicted Saulsberry of premeditated murder as well as robbery and conspiracy. He received

a life sentence for the first conviction plus fifty years for the others. In line with the court's instructions, the jury did not return a verdict on the two felony murder counts.

The Tennessee Court of Criminal Appeals affirmed Saulsberry's robbery and conspiracy convictions. But it reversed the murder conviction for insufficient evidence. The court remanded the case for a retrial on the two felony murder counts. *State v. Saulsberry*, No. 02C01- 9710-CR-00406, 1998 WL 892281, at *6 (Tenn. Crim. App. Dec. 21, 1998). Saulsberry moved to dismiss the new prosecution on double jeopardy grounds, but the state courts rejected the argument. In 2010, a new jury convicted him of both counts of felony murder, and the trial court sentenced him to life in prison. *State v. Saulsberry*, No. W2010-01326-CCA-R3-CD, 2011 WL 1327664, at *1 (Tenn. Crim. App. Apr. 7, 2011). Saulsberry's direct appeal and applications for state postconviction relief failed.

In 2007, Saulsberry filed an uncounseled § 2254 petition while awaiting retrial in Tennessee, arguing that the second trial for felony murder would violate the Double Jeopardy Clause. After more twists and turns, none relevant here, the district court denied Saulsberry's amended, counseled petition in 2017. We gave him permission to appeal and appointed new counsel.

II.

Standard of review. Acting pro se, Saulsberry in 2007 filed a § 2254 petition seeking to halt the second trial for the two felony murder counts on double jeopardy grounds. That petition creates two modest complications when it comes to our standard of review. The first is that we review *pre-judgment* petitions under the more general provisions of § 2241. The second is

that a jury subsequently convicted him of two counts of felony murder, and we review *post-judgment* petitions under § 2254. That means he was right all along, and his original § 2254 petition must be treated like any other § 2254 petition. A brief refresher on a state prisoner's two roads to habeas relief confirms that Saulsberry's petition has come full circle.

The broader form of habeas relief is § 2241, which authorizes federal intervention for state prisoners who are "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c)(3). The narrower form of relief is § 2254, which applies to a subset of state prisoners. Out of respect for the final decisions of state courts, *see Williams v. Taylor*, 529 U.S. 420, 436 (2000), Congress bars federal courts from granting habeas relief to state prisoners who are "in custody pursuant to the judgment of a State court," 28 U.S.C. § 2254(b)(1), unless the inmate clears several additional obstacles, such as a more rigorous standard of review, *Felker v. Turpin*, 518 U.S. 651, 662 (1996).

Inmates with final state court judgments thus must travel down the § 2254 road, while pretrial detainees must travel down the § 2241 path. *Phillips v. Court of Common Pleas*, 668 F.3d 804, 809 (6th Cir. 2012). In reviewing habeas applications, substance trumps form. If the applicant is a pretrial detainee, we apply the § 2241 rules even if he brings a § 2254 application. *Christian v. Wellington*, 739 F.3d 294, 297-98 (6th Cir. 2014). And the reverse is true. We apply the § 2254 rules to an individual's post—judgment application even if he brings a § 2241 application. All of this explains the numerical gymnastics of this case. At first, Saulsberry was a beneficiary of the substance-trumps-form doctrine. That's why we could think of his inaccu-

rately characterized § 2254 petition initially as a § 2241 petition. But what can be beneficial in one direction can be less so in the other. The same doctrine requires us to think about his current application as a § 2254 petition because his arguments all seek to remove him from "custody pursuant to the judgment of a State court." 28 U.S.C. § 2254(b)(1); see *Christian*, 739 F.3d at 297-98; *Dominguez v. Kernan*, 906 F.3d 1127, 1137-38 (9th Cir. 2018).

The reality is that § 2254 is the "exclusive vehicle" of habeas relief for prisoners in custody under a state judgment. *Walker v. O'Brien*, 216 F.3d 626, 633 (7th Cir. 2000); *Dominguez*, 906 F.3d at 1135 ("Because § 2254 limits the general grant of habeas relief under § 2241 it is the exclusive vehicle for a habeas petition by a state prisoner in custody pursuant to a state court judgment." (quotation omitted)); *see* Bryan R. Means, *Postconviction Remedies* § 5:2 (2019) (concluding that the weight of authority identifies "§ 2254 [as] the exclusive avenue" for state prisoners in this setting). It offers no exception for a prisoner who filed a petition still pending at the time of his conviction. *Dominguez*, 906 F.3d at 1137 ("Courts and commentators have recognized that, if the petition is filed by a pre—trial detainee under § 2241 who is subsequently convicted, the federal court may convert the § 2241 petition to a § 2254 petition." (quotation omitted)); Means, *supra* (noting this means AEDPA applies to such a petitioner's claims). Any other approach would not make sense. Saulsberry's requested relief targets his *state judgment* in just the same way as if it preceded his petition. Every circuit that has considered the question agrees that it follows from the text of § 2254 and this practical reality of prisoners' challenges that § 2254 governs a pending § 2241 petition in the event of a conviction.

See, e.g., *Hartfield v. Osborne*, 808 F.3d 1066, 1071-72 (5th Cir. 2015); *Yellowbear v. Wyo. Att'y Gen.*, 525 F.3d 921, 924 (10th Cir. 2008); *see also Jackson v. Coalter*, 337 F.3d 74, 78-79 (1st Cir. 2003); *Dominguez*, 906 F.3d at 1137-38.

As a result, we must apply the deferential standard of review established by the Antiterrorism and Effective Death Penalty Act. We thus measure the state court's decision against holdings of the United States Supreme Court. *White v. Woodall*, 572 U.S. 415, 419 (2014). And we thus may grant relief only if the decision was "contrary to, or involved an unreasonable application of" those rules. 28 U.S.C. § 2254(d)(1). That doesn't mean "merely wrong" or even "clear error." *White*, 572 U.S. at 419. Only an "objectively unreasonable" mistake, *id.*, one "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement," slips through the needle's eye of § 2254, *Harrington v. Richter*, 562 U.S. 86, 103 (2011).

Saulsberry nonetheless maintains that we should treat his petition as a § 2241 challenge. In support, he offers an unpublished decision of this court that did not apply § 2254 rules to a pretrial petition despite the petitioner's intervening conviction. *See Smith v. Coleman*, 521 F. App'x 444, 447 & n.2 (6th Cir. 2013). But the cases on which *Smith* briefly relied, *see Dickerson v. Louisiana*, 816 F.2d 220 (5th Cir. 1987); *Stow v. Murashige*, 389 F.3d 880 (9th Cir. 2004), "do not address" that point. *Smith*, 521 F. App'x at 452 (White, J., concurring). Further, they arose in circuits that have since reached the opposite conclusion, *see Hartfield*, 808 F.3d at 1071-72 (holding that § 2254 governs a pending § 2241 petition in the event of a conviction); *Dominguez*, 906 F.3d at 1137-38 (holding that § 2241

governs a pending § 2254 petition in the event of a *vacated* judgment).

Carafas v. LaVallee does not alter this conclusion either. 391 U.S. 234 (1968). It stands for the idea that a prisoner's release does not moot a pending habeas petition. But Saulsberry remains in custody. No question of mootness exists. And *Carafas* does not remotely say (or hold) that we should treat a petition attacking a final state judgment as though it challenged pretrial detention.

Double jeopardy. Saulsberry contends that, by convicting him of premeditated murder and remaining silent on the two counts of felony murder, the first jury impliedly acquitted him of those counts. In rejecting this argument, the state court reasoned that a jury's silence on counts that the jury instructions precluded it from reaching does not amount to acquittal, implied or otherwise. *See, e.g.*, *State v. Madkins*, 989 S.W.2d 697, 699 (Tenn. 1999).

That conclusion is objectively reasonable. Here's what we know about the clearly established law. The Double Jeopardy Clause forbids the State from twice putting a person "in jeopardy" for the same offense. U.S. Const. amend. V. A person is "in jeopardy" as to each charged offense when the trial court empanels and swears the jury. *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 569 (1977). Once a defendant's first stint in jeopardy ends, the Constitution bars a second stint for the same crimes.

Jeopardy ends in many ways. It ends when the jury convicts a defendant and his appeal fails. *Price v. Georgia*, 398 U.S. 323, 326 (1970). It ends after an acquittal. *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969). And it ends when, after a mistrial, "a trial is

aborted before it is completed"—unless "manifest necessity" justifies stopping the proceedings or the defendant consents. *Arizona v. Washington*, 434 U.S. 497, 503-05 (1978). In each case, the Double Jeopardy Clause bars the State from a do—over for the same crime.

Those are the general principles. Here are the specific principles about implied acquittals.

Acquittals that a jury does not render through a formal verdict generally turn on form and substance. *Blueford v. Arkansas*, 566 U.S. 599, 606-08 (2012). Form: An acquittal is "a final resolution" of deliberations. *Id.* at 606. Substance: An acquittal in essence is a "ruling" by the factfinder that, "whatever its label, actually represents a resolution … of some or all of the factual elements of the offense charged." *Martin Linen Supply Co.*, 430 U.S. at 571.

Several breeds of implied acquittals exist under these principles. One type stems from a conviction on "lesser included offenses" when the court charges the jury to consider all of the offenses. *Ohio v. Johnson*, 467 U.S. 493, 501-02 (1984). When a jury passes over the greater offense and selects its lesser incidents, it impliedly acquits the defendant of the greater offense. *Price*, 398 U.S. at 329.

An implied acquittal likewise arises when a jury charged to consider several counts is instructed it may convict on only one. *Jolly v. United States*, 170 U.S. 402, 408 (1898). The jury's choice of one count over the other, it's "legitimate" to assume, *Green v. United States*, 355 U.S. 184, 191 (1957), amounts to a "resolution" in the defendant's favor on the alternative count, *Blueford*, 566 U.S. at 606.

Gauged by this rule and these precedents, Saulsberry's first jury did not grant an implied acquittal with respect to the two felony murder counts. This was not a case in which the jury remained silent in the face of a free choice to convict on the felony murder counts. The court's instructions *forbade* the jury from considering these other counts. We must presume juries follow instructions, *Richardson v. Marsh*, 481 U.S. 200, 211 (1987), and Saulsberry has not argued that his jury failed to do so. In a case in which the jury never considered whether the government had proven its case as to the two other felony murder counts, no cognizable double jeopardy claim arises.

Saulsberry's case is at least one material step removed from each of the Supreme Court's implied-acquittal cases. In the greater-lesser-offense cases, the Court infers a favorable "resolution" on one count from the jury's verdict on others, based on the counts' relationship to each other and the fact that the jury considered them alongside each other. *Price*, 398 U.S. at 329. In the cases in which the jury must consider all of the counts but may convict on only one, its silence on the alternative counts implies a resolution in the defendant's favor. *Jolly*, 170 U.S. at 408. Neither set of cases applies here. In this instance, a case in which the jury could not consider anything but the first count, it's not possible to infer a "final resolution" in Saulsberry's favor of the other counts. Saulsberry's jury did not implicitly or explicitly acquit him of felony murder.

Absent a justified mistrial, Saulsberry counters, jeopardy must terminate whenever the trial court sends the jury home without rendering a verdict on a count—regardless of whether the jury considered the count, could consider the count, or resolved it in the defendant's favor. He points to *Green v. United States* as

supporting this rule. 355 U.S. 184. There, the Court inferred an acquittal from the jury's silence on a count, pointing to the fact that the jury convicted on the lesser included count. Under these circumstances, the Court first reasoned, it is "legitimate" to assume that "for one reason or another" the jury "refused" to convict Green on the greater offense. *Id.* at 190-91.

On top of that, the Court offered a second reason, on which Saulsberry hangs his hat and most of his case. The jury had "a full opportunity to return a verdict" on the greater offense, the Court said, and yet was discharged without rendering one, all without Green's consent or any "extraordinary circumstances" to justify that ending. *Id.* at 191. Saulsberry takes that language and turns it into this rule: Absent a permissible mistrial, jeopardy terminates with a jury's silence, no matter what. As an example of this rule in action, Saulsberry offers *Dealy v. United States*, in which the Court found the jury's silence on a count was "doubtless equivalent to a verdict of not guilty" despite the possibility that the jury simply "overlooked" the count. 152 U.S. 539, 542 (1894).

Saulsberry reads too much into *Green and Dealy*. They confirm only what we already know: that a jury's silence can equal acquittal when the circumstances make it fair to infer the jury as a matter of intent "refused" to convict, *Green*, 355 U.S. at 191, *and* "when the first jury 'was given a full opportunity to return a verdict' on that charge and instead reached a verdict on the lesser charge," whatever it intended, *Price*, 398 U.S. at 329 (quoting *Green*, 355 U.S. at 191). But there is a considerable difference in altitude between this point and the rule that Saulsberry insists *Green* "squarely hold[s]"—that silence always equals acquittal even where the jury did not have any opportunity to

consider a count at all. Reply Br. 9. Every time the Supreme Court has deemed the jury's silence to constitute an acquittal, including *Green* and *Dealy*, the jury was directed to and had the "full opportunity" to make a choice. *Green*, 355 U.S. at 191. That choice gives the jury's silence meaning. But Saulsberry's jury had no choice as to the felony murder counts. All in all, the Tennessee court's refusal to find an implied acquittal in this circumstance hardly constituted "an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Richter*, 562 U.S. at 103.

Saulsberry adds that two of *our* cases support him. It is of course U.S. Supreme Court case law that matters in the "existing law" inquiry. But he is mistaken anyway. *Saylor v. Cornelius*, 845 F.2d 1401 (6th Cir. 1988), is a pre-AEDPA case that, we said at the time, fell in between relevant principles from the Supreme Court and, we have said since, "is limited by the unusual situation we were addressing in that case." *United States v. Davis*, 873 F.2d 900, 906 (6th Cir. 1989). Saylor went to trial on a single count that encompassed several distinct legal theories. The prosecution did not object when the trial court inexplicably instructed the jury on just one theory. We did not allow retrial on one of the alternatives, troubled that the prosecution seemed to have it both ways: limiting the jury to one theory, and so avoiding any risk of acquittal on the alternatives, while retaining the ability to seek alternative instructions at any time, as well as the option of recycling the other theories for retrial. No "manipulation" of any kind was at work in Saulsberry's case, where the government simply went to the jury on every count, and the jury proceeded to consider them sequentially. *Saylor*, 845 F.2d at 1408.

Terry v. Potter, 111 F.3d 454 (6th Cir. 1997), in truth hurts Saulsberry's argument. It is a textbook implied-acquittal case in which the jury "had ample opportunity" to render a verdict on alternative, disjunctive counts, chose one, and (we said) impliedly acquitted on the alternative. *Id.* at 458. That takes us back to the key point: Saulsberry's jury had no chance to render a verdict on the felony murder counts.

When a trial court interrupts a trial and declares a mistrial, Saulsberry submits, the jury often does not have a chance to consider any charges, and yet the Supreme Court has recognized that jeopardy terminates absent manifest necessity for the mistrial. True enough. But there was no mistrial here. That jeopardy can end by another means in another setting does not show an implied acquittal here. It simply leaves the state court's decision as one reasonable way, even if not the only reasonable way, of applying these precedents. Under AEDPA, that's all that matters.

We affirm.

CONCURRING IN THE JUDGMENT

HELENE N. WHITE, Circuit Judge, concurring in the judgment. I agree that the weight of authority supports that after the entry of the state—court judgment against him on retrial, Saulsberry's petition is subject to AEDPA deference under 18 U.S.C. § 2254.[1]

There is no need to revisit or apply this court's decisions in *Saylor v. Cornelius*, 845 F.2d 1401 (6th Cir. 1988) and *Terry v. Potter*, 111 F.3d 454 (6th Cir. 1997) because, as the lead opinion acknowledges, AEDPA requires that we look only to decisions of the Supreme Court. That is particularly true here because Respondent has not attempted to distinguish either case.

I agree that given the trial court's instructions to the jury, the jury's failure to render a verdict on the two felony—murder charges does not imply that it acquitted Saulsberry of these charges. However, double—jeopardy concerns are raised in circumstances other than where there is an implied acquittal. A defendant has a recognized interest in having his fate decided by the jury first impaneled to try him, absent manifest necessity. *See, e.g.*, *Terry*, 111 F.3d at 458 (holding that "[r]etrying [the petitioner] would violate his 'valued right to have his trial completed by a particular tribunal'" (quoting *Crist v. Bretz*, 437 U.S. 28, 36 (1978))). Still, the Supreme Court has not clearly addressed the circumstances presented here. I therefore agree that AEDPA requires that we affirm.

[1] I note that there is no claim that Tennessee stalled the district-court proceedings and rushed the retrial to gain the advantage of AEDPA'S deference to state convictions.

DISSENT

BERNICE BOUIE DONALD, Circuit Judge, dissenting. Antonio Saulsberry was charged with felony murder; a jury was empaneled to hear his case; the prosecution, through the course of an entire trial, put on evidence in its attempt to prove that he committed felony murder; and the court asked the jury to review that evidence, deliberate, and determine whether he was guilty of felony murder. The jury returned a guilty verdict for a different crime, and then the court dismissed the jury. Because "the jury was dismissed without returning any express verdict on [felony murder] and without [Mr. Saulsberry's] consent[,]" *Green v. United States*, 355 U.S. 184, 190 (1957), Supreme Court precedent is clear that Mr. Saulsberry cannot be tried again on the same felony-murder charge. For that reason, I dissent.

As an initial matter, I do not agree that the state should receive AEDPA deference in this case. We provide AEDPA deference to state—court judgments because those judgments are presumed to be valid. Eric Johnson, *An Analysis of the Antiterrorism and Effective Death Penalty Act in Relation to State Administrative Orders: the State Court Judgment as the Genesis of Custody*, 29 New Eng. J. on Crim. & Civ. Confinement 153, 171-72 (2003). Such a presumption cannot exist where the conviction was obtained via a trial that was, itself, being challenged as a violation of the defendant's double-jeopardy rights. *See Christian v. Wellington*, 739 F.3d 294, 297 (6th Cir. 2014) ("A claim of double jeopardy is one such [habeas claim that may be filed by a pretrial detainee] because it is not only a de-

fense against being punished twice for the same offense, but also a defense against being subjected to a second trial—a right we cannot vindicate after a trial is complete, no matter the outcome."). Mr. Saulsberry did what he was supposed to do at the time he was supposed to do it: file a habeas petition as a pretrial detainee challenging his detention. *See id.* The fact that it took longer for this Court to adjudicate that petition than it took for the state to obtain a conviction does not diminish Mr. Saulsberry's rights. *Smith v. Coleman*, 521 F. App'x 444, 447 n.2 (6th Cir. 2013) ("What determines [the] standard of review is the nature of the claims raised and the time the petitioner filed his petition, not the present status of the case pending against him." (internal citations and quotation marks omitted)); *see also Glover v. Gillespie*, 502 F. App'x 661, 662 (9th Cir. 2012) ("Because Glover properly filed this petition under 28 U.S.C. § 2241 in the first instance, that section continues to apply notwithstanding his subsequent guilty plea.")

Nevertheless, even if we were to provide AEDPA deference to his claim, Mr. Saulsberry should still prevail. The Double Jeopardy Clause prohibits the state from "twice put[ting] [any person] in jeopardy of life or limb" for "the same offence." U.S. Const. amend. V; *see also Benton v. Maryland*, 395 U.S. 784, 794 (1969) (the Double Jeopardy Clause applies to states through the Fourteenth Amendment). It is a protection that stands on strong policy:

> [T]he underlying idea [of the Double Jeopardy Clause], one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged

> offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Id. at 795-96 (quotation marks and citation omitted).

To effectuate that policy, the Supreme Court has held—in categorical terms—that "a defendant is placed in jeopardy once he is put to trial before a jury so that if the jury is discharged without his consent he cannot be tried again." *Green*, 355 U.S. at 188 (citation omitted). The exception to this rule, as noted in *Green*, is when "unforeseeable circumstances arise during the first trial making its completion impossible, such as the failure of a jury to agree on a verdict." *Id.* (quotation marks and citation omitted). Applying *Green* to this case, sequential jury instructions do not amount to an extraordinary circumstance making the completion of Mr. Saulsberry's first trial impossible.[1] Mr. Saulsberry should not have been put through the ordeal of a second trial on the same charges.

The majority disagrees. It contends that applying *Green* in such a way "reads too much into *Green*" because that case really stands for the proposition that a jury must have rendered an acquittal, either implicitly or explicitly, for jeopardy to end. Maj. Op. at 9. The problem for the majority is that *Green* explicitly disavows its interpretation of the case:

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[1] This particularly true as the state supreme court had previously "urged" its trial courts not to use sequential jury instructions. *State v. Howard*, 30 S.W.3d 271, 275 n.4, 277-278 (Tenn. 2000).

> Green was in direct peril of being convicted and punished for first degree murder at his first trial. He was forced to run the gantlet once on that charge and the jury refused to convict him. When given the choice between finding him guilty of either first or second degree murder it chose the latter. In this situation the great majority of cases in this country have regarded the jury's verdict as an implicit acquittal on the charge of first degree murder. ***But the result in this case need not rest alone on the assumption, which we believe legitimate, that the jury for one reason or another acquitted Green of murder in the first degree.*** For here, the jury was dismissed without returning any express verdict on that charge and without Green's consent. Yet it was given a full opportunity to return a verdict and no extraordinary circumstances appeared which prevented it from doing so. Therefore it seems clear, under established principles of former jeopardy, that Green's jeopardy for first degree murder came to an end when the jury was discharged so that he could not be retried for that offense.

355 U.S. at 190-91. In the Supreme Court's *own* words, *Green* does not require an acquittal, implicit or otherwise, for jeopardy to end; rather, jeopardy ended when the jury "was given a full opportunity to return a verdict and no extraordinary circumstances appeared which prevented it from doing so." *Id.* The majority's take on *Green* is thus indefensible.

As for Mr. Saulsberry's specific case, the majority finds that jeopardy did not end because the jury "had no chance to render a verdict on the felony murder

counts." Maj. Opinion at 10. That finding is impossible to square with the facts of this case: the jury was empaneled; the prosecution marshaled its resources and presented its evidence to prove that Mr. Saulsberry had committed felony murder; and the jury was sent to deliberate whether Mr. Saulsberry was guilty of felony murder. Just because the jury was told not to announce a verdict on felony murder if they found Mr. Saulsberry guilty of a different charge does not mean that the jury did not have a "chance" to find Mr. Saulsberry guilty of felony murder. Indeed, the Supreme Court has been clear that jeopardy ends when the court dismisses the jury without sufficient reason after the jury was empaneled, *Arizona v. Washington*, 434 U.S. 497, 503-05 (1978), *a fortiori*, jeopardy must end after the jury actually deliberates the charge, see *Wade v. Hunter*, 336 U.S. 684, 688 (1949) (explaining that a defendant has a "valued *right* to have his trial completed by a particular tribunal" (emphasis added)).

The practical application of the majority's decision further illuminates its error. The Supreme Court has made clear that *any* retrial of an accused "increases the financial and emotional burden on the accused, prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing, and may even enhance the risk that an innocent defendant may be convicted." *Arizona*, 434 U.S. at 503-04 (footnotes omitted). "Consequently, … the prosecutor is entitled to one, and only one, opportunity to require an accused to stand trial." *Id.* at 505. Yet, under today's decision, prosecutors who wish to have a second, third, fourth, etc. bite at the apple may simply request sequential jury instructions. If they lose on the most serious alleged offense? No problem; they are free to try again and, possibly, again and again. The Constitution clearly demands more.

The jury was given a full opportunity to return a verdict against Mr. Saulsberry for felony murder, but they were dismissed without doing so. A sequential jury instruction given at the discretion of the trial judge is not an extraordinary circumstance that required such an outcome. The Constitution therefore prohibits the state from having put Mr. Saulsberry through another trial on the same charge. I dissent.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

No. 07-cv-2751-JPM-dkv

ANTONIO SAULSBERRY,
Plaintiff,

v.

RANDY LEE, Warden of Northeast Correctional Complex, Tennessee Department of Corrections,
Defendant.

Filed September 21, 2017

ORDER DENYING PETITION PURUSANT TO 28 U.S.C. § 2254, DENYING A CERTIFICATE OF APPEALABILITY, AND CERTIFYING THAT AN APPEAL WOULD NOT BE TAKEN IN GOOD FAITH

The instant case raises the issue of whether jury silence as to one alternative means of a state crime constitutes an implicit acquittal for double jeopardy purposes. Petitioner Antonio L. Saulsberry, Tennessee Department of Correction prisoner number 164034, an inmate at the West Tennessee State Penitentiary in Henning, Tennessee, filed a *pro se* petition pursuant to 28 U.S.C. § 2254 on November 5, 2007. (ECF No. 1.) With leave of Court, Saulsberry filed an amended Petition for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 on January 13, 2017. (ECF No. 69.) Respondent

filed a timely response in opposition on February 13, 2017. (ECF No. 70.) Saulsberry filed a timely reply on March 15, 2017. (ECF No. 73.) For the reasons stated below, the Court DENIES Saulsberry's § 2254 Petition, DENIES a certificate of appealability, and CERTIFIES that an appeal would not be taken in good faith.

I. BACKGROUND

A. State Court and Prior Habeas Corpus Procedural History

On February 14, 1997, after a jury trial in the Shelby County Criminal Court, Saulsberry and a codefendant, Franklin C. Howard, were convicted of premeditated first degree murder, especially aggravated robbery, and conspiracy to commit aggravated robbery. *State v. Saulsberry*, No. 02C019710CR00406, 1998 WL 892281 (Tenn. Crim. App. Dec. 21, 1998). The defendants were indicted for first degree murder, murder committed during the perpetration of a robbery, and murder committed during the perpetration of a burglary. *Id.* at *1. The jury was instructed to cease deliberating upon finding the defendants guilty of premeditated murder, so the jury did not render any verdict on the other homicide counts. *Id.* at *4 n.4. Saulsberry was sentenced to life imprisonment on the first degree murder count. Following a sentencing hearing, the trial court sentenced Saulsberry as a Range II offender to forty (40) years for especially aggravated robbery and ten (10) years for conspiracy, with all sentences, including the sentence of life imprisonment, to run consecutively. The Tennessee Court of Criminal Appeals affirmed Saulsberry's convictions and sentences for especially aggravated robbery and conspiracy to commit especially aggravated robbery, but reversed his first de-

gree murder conviction for insufficient evidence and remanded for a new trial on the charge of felony murder. *Id.* at *4. Saulsberry did not appeal to the Tennessee Supreme Court.

On April 6, 2000, before a new trial commenced on the felony murder charge, Saulsberry filed a state post-conviction petition attacking his robbery and conspiracy convictions. The trial court denied the post-conviction petition, and the Tennessee Court of Criminal Appeals dismissed the appeal for lack of jurisdiction, finding that the petition had been filed outside of the one-year state statute of limitations. *Saulsberry v. State*, No. W2002-02538-CCA-R3-PC, 2004 WL 239767 (Tenn. Crim. App. Feb. 6, 2004).

On September 17, 2004, Saulsberry filed a federal petition for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254, challenging his robbery and conspiracy convictions. The district court denied the petition as untimely. *Saulsberry v. Mills*, No. 2:04-cv-02736-SHM-tmp (W.D. Tenn.).

Meanwhile, in December 2004, Saulsberry filed a Motion to Dismiss Prosecution, arguing that a re-trial on felony murder charges would violate state and federal double jeopardy provisions. The trial court denied the motion, but granted an interlocutory appeal. The Tennessee Court of Criminal Appeals affirmed. *State v. Saulsberry*, No. W2005-00316-CCAR9CD, 2006 WL 2596771 (Tenn. Crim. App. Sept. 11, 2006). The Tennessee Supreme Court denied leave to appeal on January 29, 2007. *Id.*

On April 6, 2007, Saulsberry filed a pleading in the Sixth Circuit Court of Appeals titled "Motion for Permission to Appeal from Judgment Rendered September 11, 2006, Pursuant to Federal Rules of Civil Proce-

dure 60(b)." The pleading was construed as an application for permission to file a second or successive habeas petition, pursuant to 28 U.S.C. § 2244. The Sixth Circuit granted the application so that Saulsberry could raise an allegation that his re-trial for felony murder would violate the Double Jeopardy Clause. *In re Saulsberry*, No. 07-5570 (6th Cir. Nov. 1, 2007) (unpublished).

The action was transferred to the district court and counsel was appointed. *Saulsberry v. State of Tennessee*, No. 2:07-cv-02751-JPM-dkv (W.D. Tenn.).

B. Petitioner's Federal Habeas Corpus

Petitioner filed his petition on November 5, 2007. (ECF No. 1.) On May 7, 2009, Saulsberry moved to hold his habeas petition in abeyance, explaining that, on February 9, 2009, the Criminal Court of Tennessee held the first of several hearings regarding Saulsberry's retrial on the charge of felony murder and that, on April 30, 2009, the state trial court set the matter for trial on January 25, 2010. (ECF No. 18.) Saulsberry requested that the petition be held in abeyance until he could fully exhaust his state court remedies. (*Id.*) On May 20 and 27, 2009, the Court entered orders staying the case, staying the respondent's duty to respond, and directing counsel to provide status reports regarding exhaustion and to file a motion to proceed when the proceedings had concluded. (ECF No. 20.)

Because Saulsberry failed to file a Motion to Proceed by the Court's imposed deadline, on June 18, 2013, the Court dismissed Saulsberry's § 2254 petition for writ of habeas corpus for failure to prosecute. (ECF No. 36.) Judgment was entered the same day. (ECF No. 37.) Saulsberry filed a notice of appeal on June 24,

2013. (ECF No. 39.) On September 25, 2013, the Sixth Circuit asked for a judgment regarding a certificate of appealability. (See ECF No. 42.) The Court denied a certificate of appealability on September 30, 2013. (ECF No. 43.)

On April 22, 2014, the Sixth Circuit granted Saulsberry's application for a certificate of appealability "on the issue of whether the district court's dismissal of Saulsberry's petition was improper in light of the uncertainty of his exhaustion of state remedies and appointed counsel's failure to respond to the court's orders." (ECF No. 47 at 5.) On August 12, 2015, the Sixth Circuit reversed the judgment of the district court and remanded the instant case for further proceedings consisted with its opinion. (ECF No. 49.) The mandate issued on September 3, 2015. (ECF No. 50.)

On July 28, 2016, the Court appointed Robert Parris as counsel for Saulsberry. (ECF No. 55.)

On September 29, 2016, the Court held an in-person status conference. (Min. Entry, ECF No. 66.) The Court entered a Scheduling Order following the conference, setting out dates for the filing of state trial transcripts, Saulsberry's amended petition, and Respondent's response. (ECF No. 67.)

Saulsberry filed a timely amended Petition for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 on January 13, 2017. (ECF No. 69.) Respondent filed a timely response in opposition on February 13, 2017. (ECF No. 70.) Saulsberry filed a timely reply on March 15, 2017. (ECF No. 73.)

II. LEGAL STANDARD

A. 28 U.S.C. § 2254

The standard for reviewing applications for the writ of habeas corpus is set forth in the Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2254(d), which restricts federal court authority to remedy state-court errors to instances of "extreme malfunction[ ]" of the state process, as opposed to "ordinary error correction through appeal." *Harrington v. Richter*, 131 S.Ct. 770, 786 (2011). This section states:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (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.

28 U.S.C. § 2254(d). In other words, a federal court is bound by a state court's adjudication of a petitioner's claims unless the state court's decision was contrary to or involved an unreasonable application of clearly established federal law. *Harris v. Stovall*, 212 F.3d 940, 943 (6th Cir. 2000); *Franklin v. Francis*, 144 F.3d 429, 433 (6th Cir. 1998). The clause "clearly established Federal law" refers to "the holdings, as opposed to the dicta, of [the Supreme] Court's decisions as of the time

of the relevant state-court decision" *Williams v. Taylor*, 529 U.S. 362, 410 (2000). The holdings of circuit court cases interpreting Supreme Court precedent are not clearly established federal law for purposes of a § 2254 habeas petitions. *Renico v. Lett*, 130 S.Ct. 1855, 1865-66 (2010). Further, the reviewing federal court must presume the correctness of state court factual determinations, and the petitioner has the burden of rebutting that presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); *see also Cremeans v. Chapleau*, 62 F.3d 167, 169 (6th Cir. 1995) ("We give complete deference to state court findings unless they are clearly erroneous."), *abrogated on other grounds by Thompson v. Keohane*, 516 U.S. 99, 111 (1995).

The United States Supreme Court has explained the proper application of the "contrary to" clause as follows:

> A state-court decision will certainly be contrary to [the Supreme Court's] clearly established precedent if the state court applies a rule that contradicts the governing law set forth in our cases. . . . A state-court decision will also be contrary to this Court's clearly established precedent if the state court confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from [this Court's] precedent.

Williams, 529 U.S. at 405-06 (citation omitted).

With respect to the "unreasonable application" clause of § 2254(d)(1), the Supreme Court has held that a federal court should analyze a claim for habeas corpus relief under the "unreasonable application" clause when "a state-court decision unreasonably applies the law of

this Court to the facts of a prisoner's case." *Williams*, 529 U.S. at 409. The Court defined "unreasonable application" as follows:

> [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. . . .
>
> . . . . [A]n unreasonable application of federal law is different from an incorrect application of federal law. . . . Under § 2254(d)(1)'s "unreasonable application" clause, then, a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.

Id. at 409-11 (emphasis original).

In sum, the requirements of the AEDPA "create an independent, high standard to be met before a federal court may issue a writ of habeas corpus to set aside state-court rulings." *Uttecht v. Brown*, 551 U.S. 1, 10 (2007) (citations omitted). The standard, by design, "is difficult to meet," *Harrington v. Richter*, 131 S.Ct. 770 (2011), because the purpose of the habeas petition is to "'guard against extreme malfunctions in the state criminal justice systems,' not [to act as] a substitute for ordinary error correction" available by appeal. *Id.* (citation omitted). Thus, the AEDPA "imposes a 'highly deferential standard for evaluating state-court rulings' and 'demands that state court decisions be given the benefit of the doubt.'" *Renico v. Lett*, 130 S.Ct. 1855, 1862 (internal citations omitted).

B. Double Jeopardy

"The Double Jeopardy Clause of the Fifth Amendment protects a defendant in a criminal proceeding against multiple punishments or repeated prosecutions for the same offense." *United States v. Dinitz*, 424 U.S. 600, 606 (1976); *see also* U.S. Const. amend. V ("[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb."). Thus, the protections against double jeopardy bar a successive prosecution on the "same" offense of which a defendant has been previously acquitted or convicted as well as relitigation of an issue that has been resolved in the defendant's favor in a prior prosecution. *Brown v. Ohio*, 432 U.S. 161, 165–66 (1977); *Ashe v. Swenson*, 397 U.S. 436, 443 (1970); *Blockburger v. United States*, 284 U.S. 299, 304 (1932). However, "the protection of the Double Jeopardy Clause by its terms applies only if there has been some event, such as an acquittal, which terminates the original jeopardy." *Richardson v. United States*, 468 U.S. 317, 325 (1984).

C. Amending § 2254 Petition with Time-Barred Claims

The AEDPA created a new limitations period for petitions for the writ of habeas corpus brought pursuant to 28 U.S.C. § 2254:

> A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of . . . the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review. . . .

28 U.S.C. § 2244(d)(1)(A). Additionally, "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection." 28 U.S.C. § 2244(d)(2).

Although the one-year period of limitation is tolled during the time in which a properly filed application for state post-conviction relief is pending, *see Artuz v. Bennett*, 531 U.S. 4, 8-9 (2000) (defining when an application is "properly filed" under 28 U.S.C. § 2244(d)(2)), the time during which a federal habeas petition is pending does not toll the one-year limitation period. *See Duncan v. Walker*, 533 U.S. 167, 121 (2001) (holding that an application for federal habeas corpus review does not toll the one-year limitation period under § 2244(d)(2)). Alternatively, the statute may be equitably tolled upon a showing, among other things, that "some extraordinary circumstance stood in [petitioner's] way." *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005).

When amending a petition in a habeas proceeding, the amendment is subject to Federal Rule of Civil Procedure 15. *Mayle v. Felix*, 545 U.S. 644, 655 (2005). Accordingly, if the amended petition adds time-barred claims, "[s]o long as the original and amended petitions state claims that are tied to a common core of operative facts, relation back will be in order." *Id.*

III. ANALYSIS

A. Double Jeopardy

Saulsberry does not argue that retrial is barred because felony murder is the "same offense" as premeditated murder. *See Blockburger*, 284 U.S. at 304. The

Blockburger test asks "whether each offense contains an element not contained in the other; if not, they are the 'same offense' and double jeopardy bars additional punishment and successive prosecution." *United States v. Dixon*, 509 U.S. 688, 696 (1993).

Instead, Saulsberry asserts that his "convictions and sentences are invalid and should be vacated because he was in jeopardy of conviction for the two counts of [felony] murder for which he was tried on July 28th, 1997 yielding no verdicts as to those counts." (ECF No. 69 at PageID 3686.) Saulsberry specifically argues that "the jury's silence as to the second and third [felony] murder counts are implied acquittals and retrial of those counts violate Petitioner's Fifth Amendment right against double jeopardy." (*Id.* at PageIDs 3686-87.) Respondent argues "petitioner cannot demonstrate that the state court's rejection of his double-jeopardy claim involves an unreasonable application of clearly established federal law because there is no clearly established federal law, in the form of United States Supreme Court authority, governing the scenario presented." (ECF No. 72 at PageID 3710.) The Court agrees with Respondent.

An implied acquittal "results from a guilty verdict on lesser included offenses rendered by a jury charged to consider both greater and lesser included offenses." *Ohio v. Johnson*, 467 U.S. 493 (1984). More specifically, the Supreme Court has held that an implicit acquittal can be determined by jury silence; for example, when a jury is instructed to find a defendant guilty of either first or second-degree murder, a defendant will be implicitly acquitted of first degree murder upon a finding of guilt for second-degree murder. *Green v. United States*, 355 U.S. 184, 190 (1957); *Price v. Georgia*, 398 U.S. 323 (1970). But there is no Supreme Court author-

ity and little clear federal authority concerning the question at bar: whether jury silence as to an alternative means constitutes an implicit acquittal for double jeopardy purposes. *Compare Terry v. Potter*, 111 F.3d 454, 458 (6th Cir. 1997) (holding that the Double Jeopardy Clause prohibited a second trial against defendant for intentional murder, after the appellate court reversed his conviction on wanton murder of the same victim and the jury had left blank the verdict form on the issue of intentional murder); *with United States v. Ham*, 58 F.3d 78, 85 (4th Cir. 1995) (holding that "jury's failure to check a predicate act does not constitute an implied acquittal of that act" for double jeopardy purposes); *United States ex rel. Jackson v. Follette*, 462 F.2d 1041, 1045–46 (2d Cir.), *cert. denied sub nom. Jackson v. Follette*, 409 U.S. 1045 (1972) (finding defendant at first trial was charged with both felony-murder and premeditated murder, where jury was instructed to return a verdict on only one of the charges, where it found defendant guilty of premeditated murder, and where, following an appeal and reversal on habeas corpus, defendant was retried, he was not subjected to double jeopardy by being retried on the felony-murder charge because jury's silence on felony-murder charge in first trial did not constitute implied acquittal). Nor is there clarity among state courts. *Com. v. Carlino*, 449 Mass. 71, 79, 865 N.E.2d 767, 774 (2007) (collecting cases).

In the instant case, it is undisputed that the jury received a sequential jury instruction. The instruction explained to the jury members to first determine if Saulsberry and co-defendants were guilty of premeditated murder, and if they were not guilty of premeditated murder the jury was told to "proceed to inquire whether or not" the defendants were guilty of the felo-

ny murder charges. (Jury Charge, ECF No. 68-13 at PageID 1420.) The jury found Saulsberry guilty of premeditated murder and was silent as to the felony murder charges. Because felony murder is not a lesser included offense of premeditated murder in Tennessee, *see State v. Burns*, 979 S.W.2d 276, 291 (Tenn. 1998); *State v. Cribbs*, No. 02C01-9508-CR-00211, 1997 WL 61507, at *18 (Tenn. Crim. App. 1997), *aff'd by State v. Cribbs*, 967 S.W.2d 773 (Tenn.), the Supreme Court's decisions regarding jury silence as to lesser included offenses are not directly on point. In this case, the Court is faced with a situation where the Supreme Court has not clearly established a rule that a defendant may not be retried for an alternative means if the jury was silent as to that means in a prior trial. The disagreement between federal and state courts exemplifies the lack of clarity on this issue. *See supra* (comparison of federal and state cases). As such, the Court cannot conclude that the Tennessee Supreme Court unreasonably applied or acted contrary to clearly established law regarding principles of double jeopardy.

As the Supreme Court has instructed, a federal court is unable to establish a new rule where the Supreme Court "has not broken sufficient legal ground to establish an asked-for constitutional principle." *Williams*, 529 U.S. at 381. Accordingly, the Court finds the Supreme Court of Tennessee neither unreasonably applied nor acted contrary to clearly established law regarding principles of double jeopardy. Saulsberry's § 2254 Petition as to his double jeopardy claim is DENIED.

B. Time-Barred Insufficient Evidence Claim

Saulsberry's Amended Petition also claims that there is insufficient evidence to support a felony mur-

der conviction. (ECF No. 69 at PageID 3689.) Respondent contends this new claim is time-barred. The Court agrees. Petitioner originally sought review of the Tennessee Supreme Court's ruling on September 11, 2006. (ECF No. 1 (referring to *State v. Saulsberry*, Nos. 95-07823 & 95-07824, 2006 WL 2596771 (Tenn.).) The Sixth Circuit construed the document as an application for permission to file a successive 28 U.S.C. § 2254 petition. *In re Saulsberry*, No. 07-5570, (6th Cir. May 8, 2007). The Supreme Court of Tennessee declined further review of the double jeopardy issue on January 29, 2007. *State v. Saulsberry*, No. W2005-00316-SC-R11-CD, 2007 Tenn. LEXIS 101 (Jan. 29, 2007). In March 2010, a jury convicted Saulsberry of first-degree felony murder during the perpetration of a robbery and first-degree felony murder during the perpetration of a burglary. *State v. Saulsberry*, W2010-01326-CCA-R3-CD, 2011 Tenn. Crim. App. LEXIS 253, at *1 (April 7, 2011). The Tennessee Court of Criminal Appeals affirmed the judgment on April 7, 2011. *Id.* at *16. The Supreme Court of Tennessee declined further review on August 25, 2011. *State v. Saulsberry*, No. W2010-01326-SC-R11-CD, 2011 Tenn. LEXIS 802 (Aug. 25, 2011). Petitioner's conviction became final 90 days later, on November 23, 2011. AEDPA's one-year statute of limitations, therefore, expired on November 23, 2012. Thus, Petitioner's January 13, 2017 amended claim is over four years late.

Saulsberry's insufficient evidence claim is also not saved because it does not relate back to the original petition pursuant to Rule 15 and because he makes no argument that his time-barred claim should be equitably tolled. Saulsberry's original petition sought relief under the Double Jeopardy Clause based on the multiple charges against him. (See ECF No. 1.) The petition

did not contend the evidence for any of these convictions was insufficient. The operative facts of the original petition, therefore, only concerned the procedure between Petitioner's first trial and upcoming trial, but not evidence. Accordingly, the new claim for insufficient evidence does not relate to the original petition. Moreover, Saulsberry makes no argument that his time-barred claim should be equitably tolled. (*See* ECF Nos. 69 & 73.) Accordingly, the Court finds Saulsberry's insufficient evidence claim time-barred, and thus DISMISSES this claim with prejudice.

IV. APPEAL ISSUES

Twenty-eight U.S.C. § 2253(a) requires the district court to evaluate the appealability of its decision denying a § 2254 petition and to issue a certificate of appealability ("COA") "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also* Fed. R. App. P. 22(b). No § 2254 petitioner may appeal without this certificate.

The COA must indicate the specific issue(s) which satisfy the required showing. 28 U.S.C. §§ 2253(c)(2) & (3). A "substantial showing" is made when the movant demonstrates that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (citation and internal quotation marks omitted); *see also Henley v. Bell*, 308 F. App'x 989, 990 (6th Cir. 2009) (per curiam) (same). A COA does not require a showing that the appeal will succeed. *Miller-El*, 537 U.S. at 337; *Caldwell v. Lewis*, 414 F. App'x 809, 814-15 (6th Cir. 2011) (same). Courts should

not issue a COA as a matter of course. *Bradley v. Birkett*, 156 F. App'x 771, 773 (6th Cir. 2005).

There can be no question that the issues raised in Saulsberry's § 2254 Petition are meritless for the reasons previously stated. Because any appeal by Saulsberry on the issues raised in his § 2254 Petition does not merit review, the Court DENIES a certificate of appealability.

The Sixth Circuit has held that the Prison Litigation Reform Act of 1995, 28 U.S.C. §§ 1915(a)-(b), does not apply to appeals of orders denying § 2254 motions. *Kincade v. Sparkman*, 117 F.3d 949, 951 (6th Cir. 1997). Rather, to appeal *in forma pauperis* in a § 2254 case, and thereby avoid the appellate filing fee required by 28 U.S.C. §§ 1913 and 1917, the prisoner must obtain pauper status pursuant to Federal Rule of Appellate Procedure 24(a). *Id.* at 952. Rule 24(a) provides that a party seeking pauper status on appeal must first file a motion in the district court, along with a supporting affidavit. Fed. R. App. P. 24(a)(1). However, Rule 24(a) also provides that if the district court certifies that an appeal would not be taken in good faith, or otherwise denies leave to appeal *in forma pauperis*, the prisoner must file his motion to proceed *in forma pauperis* in the appellate court. *See* Fed. R. App. P. 24(a) (4)-(5).

In this case, for the same reasons the Court denies a certificate of appealability, the Court determines that any appeal would not be taken in good faith. It is therefore CERTIFIED, pursuant to Federal Rule of Appellate Procedure 24(a), that any appeal in this matter

would not be taken in good faith. Leave to appeal *in forma pauperis* is DENIED.[1]

IT IS SO ORDERED, this 21st day of September, 2017.

/s/ Jon P. McCalla
JON P. McCALLA
UNITED STATES DISTRICT COURT JUDGE

[1] If Saulsberry files a notice of appeal, he must also pay the full $505 appellate filing fee or file a motion to proceed *in forma pauperis* and supporting affidavit in the Sixth Circuit Court of Appeals within thirty days.

APPENDIX C

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

Criminal Court for Shelby County
Nos. 95-07823 & 95-07824
No. W2005-00316-SC-R11-CD

STATE OF TENNESSEE

v.

ANTONIO SAULSBERRY

Filed January 29, 2007

ORDER

Upon consideration of the application for permission to appeal filed on behalf of Antonio Saulsberry and the record before us, the application is denied.

PER CURIAM

APPENDIX D

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
Assigned on Briefs October 4, 2005

STATE OF TENNESSEE

v.

ANTONIO SAULSBERRY

Appeal from the Criminal Court for Shelby County
No. 95-07823 & 95-07824 Joseph B. Dailey, Judge

No. W2005-00316-CCA-R9-CD
Filed September 11, 2006

A Shelby County jury convicted the defendant of first degree premeditated murder, especially aggravated robbery and conspiracy to commit aggravated robbery. This Court reversed the defendant's conviction for first degree premeditated murder on direct appeal and remanded for a retrial on the defendant's two charges of felony murder. Prior to his retrial, the defendant filed a motion stating that his prosecution for the felony murder charges is a violation of the principles of double jeopardy. The trial court denied the defendant's motion. The defendant now brings an interlocutory appeal to determine whether the principles of double jeopardy bar a trial on the two felony murder charges. We find that a retrial on the felony murder charges would not constitute double jeopardy and affirm the decision of the trial court.

Tenn. R. App. P. 9 Interlocutory Appeal;
Judgment of the Trial Court Affirmed.

JERRY L. SMITH, J., delivered the opinion of the court, in which DAVID H. WELLES and ALAN E. GLENN, JJ., joined.

* * *

OPINION

We repeat the underlying facts as recited by this Court on the defendant's direct appeal:

> The record in this case reveals a cast of five criminal actors: Claude Sharkey, Clashaun ("Shaun") Sharkey, Kevin Wilson, Defendant Franklin Howard, and Defendant Antonio Saulsberry. Defendant Saulsberry was employed at the restaurant prior to January 28, 1995, the date of this incident. According to the proof at trial, Claude, Shaun, Wilson, and Saulsberry discussed robbing T.G.I. Friday's restaurant ("Friday's") the day before the crime. In the early morning hours of January 28, 1995, after the restaurant closed business for the prior night, Claude, Shaun, Wilson, and Howard drove to Friday's and waited in the back parking lot.
>
> Friday's dishwasher John Wong exited the restaurant through its back door to dispose of the night's garbage, and the perpetrators used this opportunity to enter the building. Wong heard one man say, "Shoot the mother …," referring to Wong. He was pushed from behind

with a gun and ordered to lie down on the ground, and he complied.

Claude, Shaun, Wilson, and Howard continued through the back area of the restaurant toward the manager's office, where they encountered bartender Preston Shea. Shea saw four armed men with ski masks walking toward him and screaming. He was knocked to the ground by one perpetrator outside the manager's office. At least two men entered the office and screamed, "Give me the money," and "Where's the f_king money." Shea responded by holding up his wallet and pleading, "Please, God, take the money and go." He heard bags of money being passed from person to person above his head and heard one man say, "Shoot his ass." Shea then heard a shot from the manager's office, where the perpetrators had already taken the money from the victim, Gene Frieling.

Wong, remaining on the floor during the disturbance, also heard one of the perpetrators demand, "Give me the money—give me the money," and he heard Frieling say, "Take it, take it, take it." Wong heard "[o]ne explosion then two—the two that I heard, it was like two in one—the swiftness of it that followed behind—one behind the other." Then Frieling said, "Jesus Christ, he shot me, he shot me."

Shea had been repeatedly kicked during this episode, and as the men left the office, he was shot three times—twice in the leg and once in his lower back, through his bladder and intestines. He then crawled into the office and

> called 911, but he was too injured to stay with the telephone. As he fell back to the floor, Wong took the telephone and finished the 911 call.
>
> Jessica Hoard, a server at Friday's, also testified for the State. Hoard was the only other employee still present on the morning of January 28, and she was in the dining room of the restaurant when the perpetrators arrived. One of the men ordered her to walk into the kitchen and commanded, "Get on the floor before I shoot you." She heard one person say, "Where's the money," a couple of times, and she then heard at least two gunshots. When she believed the perpetrators were gone and she could safely stand up, Hoard helped John Wong attend to the wounded Frieling and Shea. Because Frieling was only barely breathing, the two uninjured employees decided to lift him from a prone position to an upright position. Frieling remained in this sitting, slumped posture until he was found by police and determined dead. An autopsy revealed that the cause of death was a gunshot wound to the heart.

State v. Antonio L. Saulsberry, No. 02C01-9710-CR-00406, 1998 WL 892281, at *2-3 (Tenn. Crim. App., at Jackson, Dec. 21, 1998), *Rev'd by State v. Howard*, 30 s.W.3d 271 (Tenn. 2000).

The Shelby County Grand Jury indicted the defendant and his co-defendant, Franklin Howard, in July of 1995 on premeditated murder, murder committed in the perpetration of a robbery, murder committed in the perpetration of a burglary, especially aggravated rob-

bery, and conspiracy to commit a felony. At the conclusion of a jury trial, they were convicted of first degree premeditated murder, especially aggravated robbery and conspiracy to commit aggravated robbery. The jury sentenced the defendants to life imprisonment for the premeditated murder convictions and the trial court sentenced the defendant as a Range II offender to forty years for especially aggravated robbery and ten years for conspiracy. The trial court sentenced Howard as a Range I offender to twenty-five years for especially aggravated robbery and six years for conspiracy. In both cases the trial court ordered that all sentences, including the life imprisonment, be served consecutively.

Both the defendant and Howard then appealed their convictions and sentences to this Court. A panel reversed the defendant's conviction for premeditated murder stating, "Defendant Saulsberry's conviction for first degree murder is not supported by sufficient evidence, and such conviction is therefore reversed and his case is remanded for a new trial on the charge of felony murder as alleged in Counts 2 and 3 of the indictment." *Antonio L. Saulsberry*, 1998 WL 892281 at *18. The panel affirmed the especially aggravated robbery and conspiracy convictions for both defendants, as well as, Howard's murder conviction. *Id.*

The defendant did not appeal this Court's decision to the Tennessee Supreme Court. Instead, he filed a post-conviction petition attacking his robbery and conspiracy convictions. *Antonio L. Saulsberry v. State*, No. W2002-02538-CCA-R3-PC, 2004 WL 239767, at *1 (Tenn. Crim. App., at Jackson, Feb. 6, 2004), *perm. app. denied*, (Tenn. June 1, 2004). The defendant argued that his counsel at trial was ineffective and he had been denied second-tier review. *Id.* The post-conviction

court denied the defendant's petition, and he appealed to this Court. *Id.* We dismissed the defendant's appeal because his petition was filed outside the one year statute of limitations. *Id.* at *4.

In the meantime, Howard appealed this Court's affirmance of his convictions to our supreme court. On appeal, our supreme court reversed Howard's conviction of first degree premeditated murder because the jury had not been instructed on "the natural and probable consequences rule." *State v. Howard*, 30 S.W.3d 271, 277-78 (Tenn. 2000). Upon remand, Howard was convicted of first degree premeditated murder and two modes of felony murder. *State v. Franklin Howard*, No. W2002-01680-CCA-R3-CD, 2004 WL 2715346, at *4 (Tenn. Crim. App., at Jackson, Nov. 18, 2004), *perm. app. denied*, (Tenn. Mar. 21, 2005) (not for citation). The trial court merged all the murder verdicts into one and sentenced Howard to life in prison. *Id.* Howard then appealed his convictions from his trial on remand. On appeal, this Court vacated the felony murder convictions on the basis of double jeopardy. *Id.* at *11-12. We then affirmed Howard's conviction for premeditated murder and his consecutive sentences. *Id.* at *16.

Following this Court's decision on Howard's appeal from remand, on December 17, 2004, the defendant filed a Motion to Dismiss Prosecution Based on Double Jeopardy. The trial court conducted a hearing on January 10, 2005 and denied the motion. On January 21, 2005, the defendant filed a Motion for a Rule 9 Interlocutory Appeal. The trial court granted the motion, and this Court did as well and this is the case that is now on appeal.

ANALYSIS

The defendant argues on appeal that a retrial of the defendant on felony murder charges would violate the state and federal double jeopardy provisions. The Double Jeopardy Clause[s] of both the United States and Tennessee Constitutions state[ ] that no person shall be twice put in jeopardy of life or limb for the same offense. U.S. Const. amend. 5; Tenn. Const. art. I, § 10. The clause has been interpreted to include the following protections: "It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969); *State v. Phillips*, 924 S.W.2d 662, 664 (Tenn. 1996).

The defendant bases his argument on this Court's decision in *State v. Franklin Howard*, No. W2002-01680-CCA-R3-CD, 2004 WL 2715346 (Tenn. Crim. App., at Jackson, Nov. 18, 2004), *perm. app. denied*, (Tenn. March 21, 2005) (not for citation). In *Franklin Howard*, we addressed Howard's direct appeal from his trial upon remand. Upon remand, Howard was convicted of first degree premeditated murder and felony murder. *Franklin Howard*, 2004 WL 2715346, at *1. At his trial upon remand, Howard was tried for first-degree premeditated murder, felony murder committed in the perpetration of a robbery and felony murder in the perpetration of a burglary. *Id.* at *11. Howard was convicted for all three. *Id.* On this direct appeal from these convictions, one of his issues was whether the second trial should have been barred due to double jeopardy concerns. *Id.* at *1. We stated that jeopardy attached for the felony murder charges in the first trial and, therefore, Howard's subsequent convictions for

the two felony murder charges must be vacated because of a double jeopardy problem. *Id.* at *12.

The defendant argues that because he and Howard were originally tried together by the same jury and subject to the same jury instructions, the same analysis should apply to his trial upon remand. He argues that jeopardy also attached with regard to the two felony murder charges in his original trial. However, the Tennessee Supreme Court has designated *Franklin Howard*, as "Not for Citation." Rule 4(F)(1) of the Rules of the Supreme Court of Tennessee states, "If an application for permission to appeal is hereafter denied by this Court with a "Not for Citation" designation, the opinion of the intermediate appellate court has no precedential value." Therefore, we are unable to rely upon this Court's analysis with regard to the double jeopardy questions raised in *Franklin Howard*, even though the defendant was tried in the same original trial.

In the defendant's direct appeal, this Court included language in a footnote regarding whether he could be tried on the felony murder charges. The panel stated:

> Nor, however, can we agree that Saulsberry cannot be retried for felony murder, although this issue is not before us. The jury was strictly instructed to cease deliberations upon finding Defendants guilty of premeditated murder. When the jury found them guilty of premeditated murder, it did not render any further verdicts on homicide charges. This does not equate to an acquittal. *State v. Burns*, [979] S.W.2d [276] Appendix (Tenn. 1998).

Antonio L. Saulsberry, 1998 WL 892281, at *4 n.4. In Howard's direct appeal to our supreme court this issue of sequential jury instructions leading to potential double jeopardy issues was addressed in a footnote. Our supreme court stated:

> While it was not error for the trial court to deliver sequential jury instructions, *see Harris v. State*, 947 S.W.2d 156, 175 (Tenn. Crim. App. 1996), we have previously urged trial courts to allow juries to consider all theories of first-degree murder. *See State v. Cribbs*, 967 S.W.2d 773, 787-88 (Tenn. 1998[)]; *Carter v. State*, 958 S.W.2d 620, 624-25 n.6 (Tenn. 1997). We are compelled to emphasize this point again: a trial court should instruct a jury to render a verdict as to each count of a multiple count indictment which requires specific jury findings on different theories of first-degree murder. If the jury does return a verdict of guilt on more than one theory of first-degree murder, the court may merge the offenses and impose a single judgment of conviction. *See State v. Addison*, 973 S.W.2d 260, 267 (Tenn. Crim. App. 1997). The benefits of instructing the jury in this manner are important. First, the double jeopardy problem of retrying a defendant after a subsequent appellate opinion reverses a conviction as unsupported by evidence is precluded. Second, the State will have a basis to protect other convictions to which it may be entitled. Third, in light of our decision in *State v. Middlebrooks*, 840 S.W.2d 317 (1992), a jury verdict on each charged offense will allow the State to use the felony murder aggravator as an aggravating

> circumstance in sentencing. *See State v. Hall*, 958 S.W.2d 679, 692-93 (Tenn. 1997).

Howard, 30 S.W.3d at 274-75 n.4. This language in part led to this Court's analysis of Howard's felony murder conviction upon remand in *Franklin Howard.* This Court was attempting to solve the double jeopardy "problem." *Franklin Howard*, 2004 WL 2715346. at *12.

Despite the reference to the potential double jeopardy problem in this situation, our supreme court, as well as this Court, has allowed defendants to be retried on charges that were not reached by the jury when sequential instructions on the charges were given. *State v. Madkins*, 989 S.W.2d 697, 699 (Tenn. 1999); *State v. Burns*, 979 S.W.2d 276, 291 (Tenn. 1998) (attaching this Court's direct appeal opinion as an appendix); *State v. John E. Parnell*, No. W1999-00562-CCA-R3-CD, 2001 WL 124526, at *6 (Tenn. Crim. App. at Jackson, Feb. 6, 2001); *State v. David William Smith*, No. 03C01-9809-CR-00344, 2000 WL 210378, at *6 (Tenn. Crim. App. at Knoxville, Feb. 24, 2000).

In the defendant's original trial, the trial court instructed the jury to begin their consideration with first degree premeditated murder. If the jury did not find the defendant guilty of premeditated murder, they were then to move on to the felony murder charges. At the original trial, the jury found the defendant of first degree premeditated murder. Therefore, the presumption is that the jury never considered whether the defendant was guilty of either of the felony murder charges. As stated above, there are no double jeopardy concerns where the jury instructions are given sequentially and there is a presumption that the jury followed the instructions given by the trial court. *See Madkins*,

989 S.W.2d at 699; *Burns*, 979 S.W.2d at 291; *John E. Parnell*, 2001 WL 124526, at *6; *David William Smith*, 2000 WL 210378, at *6. Therefore, we conclude that there would be no double jeopardy concerns with a retrial of the defendant on the felony murder charges. For this reason, this issue is without merit.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the trial court.

JERRY L. SMITH, JUDGE

APPENDIX E

IN THE CRIMINAL COURT OF TENNESSEE
THIRTIETH JUDICIAL DISTRICT AT MEMPHIS
DIVISION 5

No. 95-07822

STATE OF TENNESSEE

v.

ANTONIO SAULSBERRY

MONDAY, JANUARY 10, 2005

Court met pursuant to adjournment, the Honorable **JOSEPH B. DAILEY**. Judge of Division X Presiding; whereupon the following proceedings were had to wit:

MURDER FIRST DEGREE, MURDER IN PERPETRATION OF A FELONY

Comes the Attorney General on the part of the State and the defendant in proper person and by counsel of record, **MR. CHARLES GILCHRIST**; whereupon there comes on to be heard the defendant's **MOTION TO DISMISS PROSECUTION BASED ON DOUBLE JEOPARDY**, which **MOTION**, having been heard and fully considered by the Court is **DENIED**.

JOSEPH B. DAILEY
JUDGE

IN THE CRIMINAL COURT OF TENNESSEE
THIRTIETH JUDICIAL DISTRICT AT MEMPHIS
DIVISION 5

No. 95-07822

STATE OF TENNESSEE

v.

ANTONIO SAULSBERRY

Filed January 18, 2005

ORDER DENYING DEFENDANT'S MOTION TO DISMISS PROSECUTION BASED ON DOUBLE JEOPARDY

This cause came to be heard on January 10, 2005 upon the Motion to Dismiss filed by the Defendant, the Response of the State of Tennessee, statements of council for Defendant and for the State and upon all of the record in this cause.

FROM ALL OF WHICH IT APPEARS TO THE COURT AS FOLLOWS:

The defendant in this cause, Antonio Saulsberry, was convicted by a jury of premeditated first-degree murder, especially aggravated robbery and conspiracy to commit aggravated robbery on February 14, 1997.

The defendant was also tried for the offense of murder fist degree during perpetration of a robbery (felony murder). As was customary at the time, the jury was instructed to cease deliberation upon reaching a

verdict in the first count of the murder indictment (pre - meditated murder), rather than returning verdicts in all murder counts, which would have been merged by the trial court.

On appeal, the court of Criminal Appeals, reversed the defendant's conviction for pre - meditated murder, affirmed the convictions for aggravated robbery and conspiracy, as well as their sentences, and remanded the felony murder counts for retrial. *State Vs. Saulsberry, 1998WL89228l.*

The Court specifically stated that Saulsberry could be retried for felony murder since the trial court's direction to the jury prevented either an acquittal or a conviction. *Saulsberry (supra) at FN4 on page 3, citing State Vs. Burns, 979SW2d 276 (appendix).*

The appendix of the *Burns* case, (above), which is a decision of the Tennessee Supreme Court contains the text of the Court of Criminal Appeals decision, *State vs. Burns, C. C. A. No. 02COI - 9605 - CR - 00170*, contains a thorough analysis of the question of double jeopardy applicability, to cases or counts that were terminated without either an acquittal, an implied acquittal or a conviction.

This opinion cites both the United States Supreme Court and the Supreme Court of Tennessee for the proposition that matters returned for trial due to "errors in the proceedings" do not invoke double jeopardy prohibitions. *Burk Vs. United States, 437 US 1 (1978). State Vs. Hutcherson, 790 SW2d 532 (Tenn. 1990).*

In analyzing the matter, the Burns Court of Criminal Appeals opinion likened the Court's instructions to statutory prohibitions against the return of verdicts in counts which are alternative theories of guilt, rather

than separate crimes. Again, this is clearly not the intention of the Fifth Amendment of the Constitution.

The United States Supreme Court spoke on implied acquittals, stating that there is a double jeopardy bar to the retrial of proceedings in which no verdict was returned, but where the jury had been given "a full opportunity to return a verdict" *Price Vs. Georgia, 398 U. S. 323 (1920)*.

In the case at hand, the jury clearly did not have the opportunity to return a verdict as a result of the Court's instructions.

The case at hand is not a matter wherein the State attempted to "reserve" or "hold back" a charge for later use against the defendant. The *Saulsberry Court (supra at p. 5)* mentions that the record contains evidence, which if accredited by the jury, would support a felony murder conviction.

This Court is of the opinion that the decision in *Saulsberry*, and the analysis on which it was based *(Burns et al)*, more correctly describes the situation in the case at hand. In essence, manifest necessity exists for the retrial of defendant Saulsberry, on the Felony murder charge.

IT IS THEREFORE ORDERED ADJUDGED AND DECREED:

1) That Defendant's Motion to Dismiss Prosecution Based on Double Jeopardy (12-17-04) is hereby denied.

/s/ Joseph B. Dailey
Judge, Division 5

Approved:

/s/ J. R. Carter Jr.
Assistant District Attorney

/s/ [illegible]
Attorney of Defendant [as to form]