No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

RICKY LANGLEY, *Plaintiff-Respondent,*

v.

HOWARD PRINCE, WARDEN, ELAYN HUNT CORRECTIONAL CENTER
Defendant-Petitioner.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether it is clearly established that a jury's failure to return a verdict, which is tantamount to an acquittal for double jeopardy purposes, will have collateral estoppel effect where the record establishes that the relevant issue was actually and necessarily decided in the defendant's favor applying the test in *Ashe v. Swenson*, 397 U.S. 436 (1970)?

LIST OF PRIOR PROCEEDINGS

The parties to the proceeding in the court below are contained in the caption of the case and this petition is not filed on behalf of a non-governmental corporation.

The following prior proceedings relate to the case in this court:

Federal habeas proceedings

- *Langley v. Prince*, 926 F.3d 145 (5th Cir. 2019) (*en banc*) (decision below)
- *Langley v. Prince*, 890 F.3d 504 (5th Cir. 2018) (vacated panel opinion)
- *Langley v. Prince*, 2016 U.S. Dist. LEXIS 47094 (W.D. La., Apr. 5, 2016) (district court opinion)

State direct appeal proceedings

- *State v. Langley*, 10-969 (La. App. 3 Cir. 04/06/11); 61 So. 3d 747, 757-8 writ denied 2011-1226 (La. 01/20/12); 78 So. 3d 139 cert denied 133 S. Ct. 148 (2012) (affirming conviction of second degree murder at third trial)

Proceedings from prior trial

- *State v. Langley*, 06-1041 (La. 05/22/07); 958 So.2d 1160 *cert denied* 552 U.S. 1007 (affirming that double jeopardy barred re-prosecution for first degree murder)
- *State v. Langley*, 2004-0269 (La. App. 3 Cir. 12/29/04), 896 So. 2d 200 (reversing conviction for second degree murder at second trial)
- *State v. Langley*, 95-1489 (La. 04/03/02); 813 So.2d 356 (reversing conviction for first degree murder at first trial)

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PETITION FOR WRIT OF CERTIORARI

Petitioner Ricky Langley respectfully requests that the Court grant a writ of certiorari to review the decision of the Fifth Circuit Court of Appeals sitting *en banc*, affirming the denial of habeas relief.

The petitioner is the petitioner and petitioner-appellant in the courts below. The respondent is Howard Prince, Warden, Elayn Hunt Correctional Center, the plaintiff and plaintiff-appellee in the courts below.

OPINIONS BELOW

The order of the Fifth Circuit Court of Appeals *en banc* affirming the denial of habeas relief is at *Langley v. Prince*, 926 F.3d 145 (5th Cir. 2019), and is reprinted in the Appendix. App. A.

The state court denial of direct appeal is at *State v. Langley*, 10-969 (La. App. 3 Cir. 04/06/11); 61 So. 3d 747, and is reprinted in the Appendix. App. B.

JURISDICTION

Petitioner invokes this Court's jurisdiction to grant the Petition for a Writ of Certiorari to the Fifth Circuit Court of Appeals on the basis of 28 U.S.C. § 1254. The Court of Appeals opinion was issued on June 6, 2019.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The question presented implicates the following provision of the United States Constitution and Code:

Fifth Amendment

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

28 U.S.C.S. § 2254

(d) 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;

SUMMARY OF THE CASE

Mr. Langley was tried before a jury on a single count of first degree murder with responsive lesser verdicts of second degree murder and manslaughter. The jury were instructed that second degree murder could be committed with specific intent to kill or, without specific intent but during the course of a felony (felony murder).

At trial, apart from a rejected insanity plea, the only issue before the jury was whether the state had proven specific intent beyond a reasonable doubt. The defense case was that it had not and so the proper verdict was second degree murder (felony murder). All other elements of first degree murder were conceded.

The jury were instructed that if they were convinced of guilt of first degree murder then their verdict should be guilty, that if they were not convinced of guilt of first degree murder that they could find the defendant guilty of a lesser offense if convinced of guilt of that lesser offense and that they could only return one verdict.

As had been urged by the defense, Mr. Langley was convicted of the lesser offense of second degree murder, a verdict representing an acquittal of first degree murder under state and federal law.

Following his successful appeal of his second degree murder conviction, the state retried Mr. Langley on a single count of second degree murder on a single theory of specific intent. Over timely objection that such a prosecution was barred by collateral estoppel, Mr. Langley was convicted of second degree murder at a bench trial, with an explicit finding of specific intent.

On direct appeal, Mr. Langley raised his federal constitutional challenge, complaining that the state was precluded from re-litigating the issue of specific intent, as no rational jury could have grounded its verdict in the prior trial upon an issue other than specific intent.

The state appellate court applied the *Ashe*[1] test but did so unreasonably, concluding, in effect, that the verdict could have represented jury nullification or compromise just as it could have represented a finding adverse to the state on specific intent.

Mr. Langley was granted habeas relief by a unanimous panel of the Fifth Circuit Court of Appeals.

However, on rehearing *en banc*, the majority of the circuit court denied habeas relief on a legal theory that had never before appeared in the case: that there is no clearly established law that collateral estoppel applies where the jury returns a verdict of guilty of a lesser included offense but does not return a verdict on the charged offense.

In 1970, in *Ashe*, this Court clearly established that the state is precluded from re-litigating an issue where the defendant can establish that a rational jury could not have grounded its verdict in a prior trial upon an issue other than that which the defendant seeks to foreclose from consideration. Since *Ashe*, and until the decision below, circuit courts and state courts of last resort, including the Fifth Circuit and

[1] *Ashe v. Swenson*, 397 U.S. 436 (1970).

Louisiana Supreme Court, have applied the *Ashe* test to verdicts of guilty of a lesser included offense without demurrer.

In 1994, this Court in *Schiro*[2] applied the *Ashe* test where the jury had returned a verdict of guilty on one count of murder but returned no verdict on another count alleging a different legal theory for the same murder. The Court held that the failure to return a verdict will attract collateral estoppel effect if the record establishes that the relevant issue was actually and necessarily decided in the defendant's favor. In the circumstances of his case, Mr. Schiro could not satisfy this test. The Court expressly framed its holding in light of its own jurisprudence recognizing the acquittal implicit in the conviction of a lesser included offense.

At the time of Mr. Langley's trial and appeal it was clearly established that the issue preclusion component of the double jeopardy protection applied to Mr. Langley's prior trial and that the question was to be resolved by application of the test announced in *Ashe*. Indeed, this is what the state court endeavored to do. The circuit court erred in holding otherwise.

The *en banc* majority went on to deny relief, in the alternative, on *de novo* review, but this review was infected by the same error: a refusal to credit the preclusive effect of a verdict of guilty of a lesser offense that carries with it an acquittal of the charged offense or to apply the *Ashe* test in the manner described by this Court. Instead of following the course laid out by this Court, the majority asked

[2] *Schiro v. Farley*, 510 U.S 222 (1994).

whether a verdict of specific intent second degree murder would have been a legally valid verdict and concluded that this foreclosed relief under *Ashe*.

The circuit court reached its conclusion despite the fact that the state court in Mr. Langley's case applied the *Ashe* test, albeit unreasonably, and that since 1976 the law of Louisiana has been that *Ashe* does apply to lesser included verdicts. Similarly, other circuits and state courts of last resort, including the Fifth Circuit itself, have applied *Ashe* to general verdicts of guilt of lesser included offenses. The *en banc* majority has created a conflict with other circuit courts and state courts of last resort and rests alone on its side of the split.

The preclusive effect of a verdict of guilty of a lesser included offense is an important question of federal law. Whether this Court's jurisprudence has clearly established that the *Ashe* test is to be applied to determine the preclusive effect of such a verdict is an important federal question.

This Court should grant certiorari in light of the circuit court's decision, which decides these questions in a way that conflicts with relevant decisions of this court as well as decisions of other circuit courts and state courts of last resort.

STATEMENT OF THE CASE

A. Mr. Langley's initial conviction of first degree murder was reversed due to an Equal Protection violation.

On July 9, 1994, Ricky Langley was convicted of first degree murder at his first trial for the killing of J.G., a six year-old, and sentenced to death. The Louisiana

Supreme Court later reversed this conviction due to racial discrimination in the selection of the grand jury foreperson.[3]

B. In his second trial, Mr. Langley was acquitted of first degree murder but convicted of second degree murder in accordance with the defense case, that Mr. Langley lacked specific intent at the time of the killing

On April 11, 2002, Ricky Langley was re-indicted on a charge of first degree murder under La. R.S. 14:30(A)(1) and (5) for the killing of J.G..[4] This indictment was filed under case number 10258-02, the same case number and indictment (amended) under which the conviction subject to the present petition was entered.

The first degree murder charge required a finding of specific intent to kill or cause great bodily harm along with at least one aggravator. At trial, the state proceeded on a theory of specific intent, coupled with two possible aggravating circumstances: that the victim was under twelve; and/or, that the killing was in the course of a second degree kidnapping.[5]

The defendant entered a dual plea of not guilty and not guilty by reason of insanity.[6]

It was expressly conceded at trial that Mr. Langley killed J.G., a child under twelve; the disputed questions at Mr. Langley's trial were whether Mr. Langley was sane and whether the killing was accompanied by specific intent.[7]

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[3] *State v. Langley*, 813 So.2d 356, 358 (La. 2002).

[4] *Bill of Indictment*. ROA.10306.

[5] *Notice of Aggravating Circumstances*. ROA.11694.

[6] *Formal Entry of Plea of "Not Guilty and Not Guilty by Reason of Insanity"*. ROA.11389.

[7] *Defense Closing Argument*. ROA. 17514.

Defense counsel, Ms. Mann and Mr. Smith, split the closing argument. Ms. Mann conceded in her argument that Mr. Langley had killed J.G., and that J.G. was under twelve, but argued that the elements of first degree murder had not been satisfied.[8] In particular, she argued that the state had failed to establish specific intent to kill or inflict great bodily harm but that second degree, felony murder, may be an appropriate verdict.[9] This argument was made independently of the insanity plea, which was addressed separately by Mr. Smith in his closing. Neither party ever argued or suggested that Mr. Langley should be found guilty of second degree murder based upon a theory of specific intent.

The jury was initially given its instructions orally. The jury was instructed on the elements of first degree murder, including the two aggravating factors.[10]

The jury was also instructed on the elements of the responsive verdict of second degree murder and the two ways in which second degree murder could be proven by the State:

- by killing with specific intent to kill or inflict great bodily harm (without either aggravator) (See La. R.S. 14:30.1(A)(1)); or
- by an unintentional killing during the course of either a second degree kidnapping or cruelty to a juvenile (felony murder) (See La. R.S. 14:30.1(A)(2)).[11]

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[8] *Defense Closing Argument*. ROA.17532-17540.

[9] *Defense Closing Argument*. ROA.17533, 17540.

[10] *Oral jury instructions*. ROA 17661-2.

[11] *Oral Jury Instructions*. ROA.17662-17664.

The court instructed the jury that if convinced of first degree murder, its verdict should be guilty of that count and, as to lesser verdicts, that if the jury were not convinced of guilt of first degree murder, it could find the defendant guilty of a lesser offense, if convinced of guilt of that lesser offense:

> **If you are not convinced that a defendant is guilty of the offense charged, you may find a defendant guilty of a lesser offense**, if you are convinced beyond a reasonable doubt that the defendant is guilty of a lesser offense.[12]
>
> * * * *
>
> **Thus, if you are convinced beyond a reasonable doubt that the defendant is guilty of First Degree Murder, your verdict should be guilty.**
> **If you are not convinced that the defendant is guilty of First Degree Murder, but you are convinced beyond a reasonable doubt that the defendant is guilty of Second Degree Murder the form of your verdict should be guilty of Second Degree Murder.[13]**

During deliberations the jury requested that it be provided with a copy of the instructions defining the elements of the principal offense and of the responsive verdicts.[14] By consent, some amendments were made to the written instructions. A written set of the portion of the instructions defining the elements of the offense and of the responsive verdicts was then provided to the jury.[15] The instructions provided to the jury in writing read in relevant part:

> Thus, in order to convict the defendant of first degree murder, you must find:

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[12] ROA 17662 (emphasis added).

[13] ROA 17680 (emphasis added).

[14] ROA.12356.

[15] *Written jury instructions*. ROA.12377-12382.

1) that the defendant killed [J.G.]; and

2) that the defendant acted with a specific intent to kill or to inflict great bodily harm; and

3) that the defendant was engaged in the perpetration or attempted perpetration of second degree kidnapping; and/or

4) that the victim was under the age of twelve years.

If you are not convinced that a defendant is guilty of the offense charged, you may find a defendant guilty of a lesser offense, if you are convinced beyond a reasonable doubt that the defendant is guilty of a lesser offense.

The responsive lesser offenses to the charge of first degree murder are second degree murder and manslaughter.

Second degree murder is the killing of a human being when the offender caused the death of the human being with specific intent to kill or inflict great bodily harm;

or

the killing of a human being while the defendant was engaged in the perpetration or attempted perpetration of cruelty to juveniles, or second degree kidnapping, even though he had no intent to kill or inflict great bodily harm.

Thus in order to convict the defendant of second degree murder, you must find:

1) that the defendant killed [J.G.] on or about February 7, 1992; and

2) that the defendant acted with a specific intent to kill or to inflict great bodily harm;
or

3) that the defendant killed [J.G.] on or about February 7, 1992; and

4) that the killing occurred while the defendant was, engaged in the perpetration or attempted perpetration of cruelty to juveniles,

> second degree kidnapping, or attempted second degree kidnapping, even though he had no intent to kill or inflict great bodily harm.[16]

The verdict form listed each of five possible verdicts[17] and instructed the jury that **only one verdict could be returned** and that the foreperson was to write the verdict on the back of each page of the verdict form and sign and date the verdict.[18]

On May 16, 2003, Mr. Langley was acquitted of first degree murder by a unanimous jury and convicted of second degree murder.[19] As required, the foreperson wrote out and signed the words of the verdict as follows:

> We, the jury in the above captioned matter, find the defendant, Ricky Joseph Langley, guilty of second degree murder on or about February 7, 1992.[20]

Subsequently, Mr. Langley successfully appealed his conviction for second degree murder[21] and the state sought to retry him for first degree murder.

The Louisiana Supreme Court unequivocally confirmed that the jury's verdict in the prior trial represented an acquittal of first degree murder and that Mr. Langley could not be retried on that charge. *State v. Langley*, 06-1041 (La. 05/22/07); 958 So.2d 1160, 1170 ("Under these circumstance, and by operation of longstanding double

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[16] ROA.12377-12382 (emphasis added).

[17] Guilty of first degree murder, guilty of second degree murder, guilty of manslaughter, not guilty or not guilty by reason of insanity.

[18] ROA.12383; La. C. Cr. P. art. 810. In Louisiana, juries return general verdicts and statements of jurors as to the basis of their verdict or any qualification or addition to the verdict are without effect and inadmissible in subsequent proceedings. La. C. Cr. P. art. 814-817, La. C.E. art. 606.

[19] *Verdict Form and Verdict* ROA.12383-12386.

[20] ROA.12383-12386; *Langley*, 926 F.3d at 165.

[21] *State v. Langley*, 2004-0269 (La. App. 3 Cir. 12/29/04), 896 So. 2d 200 (trial judge erred in absenting himself from parts of proceedings and failing to maintain decorum).

jeopardy law, we hold that the unanimous verdict of guilty of second degree murder returned by Langley's jury in *Langley II* implicitly acquitted him of first degree murder.")

Despite trial error in the prior trial, the state court held that "the verdict rendered by the jury was a legal verdict and should be given effect pursuant to La. C.Cr.P. art. 598(A)." *Id.* *See* La. C. Cr. P. art. 598(A) ("When a person is found guilty of a lesser degree of the offense charged, the verdict or judgment of the court is an acquittal of all greater offenses charged in the indictment and the defendant cannot thereafter be tried for those offenses on a new trial.")

C. In his third trial, Mr. Langley was convicted of a specific intent second degree murder, even though the issue of specific intent was necessarily decided in his favor in the second trial

On November 2, 2009, immediately prior to the commencement of the third trial, a bench trial, the state amended the indictment from one count of first degree murder to one count of second degree murder.[22]

The State orally advised that it was proceeding under two statutory theories of second degree murder, La. R.S. 14:30.1 (A)(1) (specific intent) and 14:30.1(A)(2) (felony murder).[23] The defense immediately entered an oral objection on double jeopardy grounds to re-prosecution on the issue of specific intent and stated it would supplement in writing (as required under Louisiana law).[24] The defense argued that

[22] *Amended Indictment*. ROA.17908.; *Transcript of Amendment of Indictment*. ROA.22119-22130.

[23] ROA.22126.

[24] ROA.22121-22130.

the only issue before the prior jury was specific intent and that a rational jury could not have acquitted of first degree murder and returned a verdict of second degree murder on any other basis.

Over defense objection, the trial court ruled that the jury in the second trial could have convicted Mr. Langley of second degree murder on the basis of a specific intent killing, and denied the motion. [25]

The next day the defense supplemented its oral objection with a written motion.[26] This motion was based on the principle that retrying Mr. Langley under a specific intent theory of second degree murder violated his state and federal constitutional double jeopardy protections. The motion specifically relied upon the doctrine of collateral estoppel and *Ashe v Swenson,* 397 U.S. 436 (1970). The motion was denied, with the trial court stating that it would stand by its earlier ruling.[27]

At that point, the state dismissed the felony murder charge,[28] leaving only a charge of second degree murder based upon a theory of specific intent to kill or cause great bodily harm.[29] Accordingly, the prosecution proceeded solely on the basis of specific intent murder, and not on a theory of unintentional felony murder or unintentional felony manslaughter (which does not require an enumerated felony).

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[25] ROA.22129.

[26] *Motion to quash the second degree murder charge predicated upon a showing of specific intent*, ROA.20876-20882.

[27] ROA.22441.

[28] ROA.22442-22443.

[29] The state announced that it had reviewed the murder statute as it existed at the time of the offense and that the predicate felonies it relied upon to support the felony murder charge were not legally available at the time of the offense. ROA.22442-22443.

The bench trial proceeded, and the trial judge convicted Mr. Langley of second degree murder, explicitly finding that specific intent was a necessary element and that it was present.[30]

Mr. Langley raised the double jeopardy violation once again in his *Motion in Arrest of Judgment*. ROA.21006-21007. This motion was denied, with the district court again indicating that it would stand by its earlier ruling. ROA.23540.

D. Louisiana's Third Circuit Court of Appeal denied Mr. Langley's collateral estoppel claim on the basis that Mr. Langley had not excluded the possibility of jury nullification or compromise in his earlier acquittal

Mr. Langley assigned the double jeopardy violation as his first assignment of error on direct appeal, relying directly upon the federal constitution's Double Jeopardy Clause, and in particular the doctrine of collateral estoppel, *Ashe v. Swenson*, 397 U.S. 436 (1970) and its progeny.[31]

Louisiana's Third Circuit Court of Appeal found *Ashe* to be applicable, reviewing relevant state and federal jurisprudence specifically citing *Ashe*.[32] However, applying *Ashe*, the state court denied Mr. Langley's claim on the basis that he had failed to exclude the possibility of jury nullification or a compromise verdict in his earlier acquittal:

> When a lesser included offense to the crime charged is returned by a jury it is not always possible to determine why that verdict was reached. It is possible that the jury convicted the defendant of specific intent second degree murder. It is possible that the jury verdict was based on a jury finding under the felony-murder rule, and the jury determined

[30] ROA.23484-23485.

[31] *State v. Langley*, 10-969 (La. App. 3 Cir. 04/06/11); 61 So. 3d 747, 756.

[32] *Langley*, 61 So. 3d at 757.

> there was no specific intent to kill. It is equally plausible that, given the nature of the case, the verdict was, in fact, a compromise verdict. Regardless of the jury's thought process in this particular case, clearly the argument that the issue of specific intent was "necessarily determined" is unsupported. The defendant has not carried his burden of proving that the element of specific intent was actually decided in the previous trial. This assignment of error lacks merit.[33]

As the defense conceded all elements of first-degree murder except specific intent, a finding of guilt of specific intent second-degree murder necessarily includes satisfaction of all elements of first-degree murder. The trial judge instructed the jury that if they were satisfied of guilt of first-degree murder then their verdict should be guilty of first-degree murder. To find otherwise and return a lesser verdict is no more than jury nullification – a possibility that holds no place in an *Ashe* analysis. The other possibility, that the jury experienced a doubt as to the uncontested issue of whether the victim was under 12, is foreclosed by the holding in *Ashe*.

Similarly, if the jury were convinced of guilt of first-degree murder and chose not to enter that verdict as instructed but instead to compromise, they would have acted in violation of their oaths and the instructions from the court. The possibility of compromise, rather than a rational determination of issues, has no place in the *Ashe* analysis.

It is because specific intent was the single rationally conceivable issue in dispute before the jury and because the alternatives suggested by the state court are foreclosed by consideration of a rational jury presumed to follow its instructions, that

[33] *Langley*, 61 So. 3d at 757-8.

the panel granted relief and the dissenting judges found the state court decision to be objectively unreasonable.[34]

E. Mr. Langley was denied habeas relief in the district court but granted relief by a panel of the Fifth Circuit before rehearing en banc was granted

Mr. Langley sought relief on his claim in federal court, was denied relief in the district court but granted a certificate of appealability.[35]

On appeal, as in the district court, Respondent did not argue that there was no clearly established law, instead arguing that the state court had correctly applied the *Ashe* test to the implied acquittal of first degree murder and conviction of second degree murder.[36]

The circuit panel unanimously reversed the denial of relief, finding both that Mr. Langley had satisfied the relitigation bar of 28 U.S.C.S. 2254(d) and that relief should be granted on his claim.[37]

Applying *Ashe* and its progeny, the panel held that "the verdict from Langley's second trial necessarily determined that the State failed to prove beyond a reasonable doubt that Langley acted with specific intent to kill or to inflict great bodily harm. Hence, the State is constitutionally barred from prosecuting Langley for any crime having that same issue as an essential element."[38]

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[34] *Langley*, 890 F.3d at 521-3; *Langley*, 926 F.3d at 178-9.

[35] *Langley v. Prince*, 2016 U.S. Dist. LEXIS 47094 (W.D. La., Apr. 5, 2016)

[36] Respondent also maintained that the prior trial was a nullity due to structural error and the prior verdict should have no preclusive effect.

[37] *Langley v. Prince*, 890 F.3d 504, 521-23 (5th Cir. 2018).

[38] *Langley*, 890 F.3d.

Rehearing *en banc* was sought by Respondent.[39] Rehearing was granted and the panel opinion was vacated.[40]

F. A majority of the Fifth Circuit en banc affirmed the denial of relief under §2254(d) and de novo review on related findings that it was neither clearly established, nor the law, that collateral estoppel should attach to Mr. Langley's acquittal of first degree murder

The parties submitted supplemental briefs before the *en banc*.

Respondent did not argue that there was no clearly established law requiring the application of the *Ashe* test to Mr. Langley's implied acquittal but instead argued that there was no clearly established law explaining how to determine whether a jury's verdicts truly conflict. Respondent argued that the conviction of second degree murder and the acquittal of first degree murder would be inconsistent if the conviction were based upon specific intent, rather than felony murder, and that in those circumstances, collateral estoppel would not apply. Respondent further argued that Mr. Langley had not met the *Ashe* test because the jury instructions were so ambiguous as to preclude a determination of what was necessarily decided.

The majority of the Fifth Circuit *en banc* affirmed denial of relief on a new basis: that Mr. Langley could not satisfy 28 U.S.C. 2254(d) because there was no clearly established Supreme Court law that issue preclusion applied where a verdict of guilt was returned on a lesser included offense:

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[39] Respondent sought *en banc* review on a theory that under Louisiana law it was valid verdict for the jury to acquit of the death penalty in the guilt phase of the prior trial. This erroneous description of Louisiana law formed no part of the state court decision, was not subsequently advanced before the *en banc* and was not the basis of the circuit majority's ultimate decision.

[40] *Langley v. Prince*, 905 F.3d 924 (5th Cir. La. 2018).

> there is no 'clearly established Federal law, as determined by the Supreme Court,' explaining whether and to what extent a state court should find issue preclusion following a conviction . . . neither *Ashe* nor any other Supreme Court precedent mandates that a lesser-included-offense conviction—or to use the dissent's preferred terminology, an 'implicit acquittal'—be given issue-preclusive effect[41]

As discussed below, and as held by the original panel and *en banc* dissent, it is, in fact, clearly established that issue preclusion applies to protect Mr. Langley from relitigation of any issue necessarily determined in his favor by the jury in the previous trial, including where the jury convicts of a lesser offense.

In the alternative, the majority purported to conduct *de novo* review but limited its consideration of what the jury "actually determined" to the jury verdict of guilty of second degree murder and whether second degree murder with specific intent was a legally valid verdict on the instructions.[42] The majority held that these facts alone foreclosed the operation of issue preclusion because a legally valid verdict cannot be an "irrational" choice. *Id.*[43]

Of course, under Louisiana law, a jury does not have the option of returning verdicts of both not guilty of the charged offense and guilty of a lesser included offense.[44] The jury may only return one verdict, guilty of the lesser offense, and this

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[41] *Langley*, 926 F.3d at 158, 159.

[42] *Langley*, 962 F.3d at 165-6.

[43] The majority also reasoned that under Louisiana law the jury could have reached specific intent second degree murder either without resolving first degree murder or despite believing Mr. Langley was guilty of first degree murder. As discussed below, such a course would have been contrary to the instructions and is not how Louisiana law operates. Finally, the majority opined that the state court appellate judgment did not preclude retrial on specific intent second degree murder. But, as this Court held in *Schiro*, the preclusive effect of a prior verdict is a question of federal law. In any event, the Louisiana Supreme Court explicitly held that the verdict in the prior trial was a legal verdict and should be given effect as an acquittal of first degree murder. *Langley*, 958 So.2d at 1170.

[44] ROA.12383; La. C. Cr. P. art. 810.

serves as a matter of statutory and constitutional law as an acquittal of the greater charge.[45]

In declining to acknowledge any preclusive effect from the jury's choice not to return a verdict of guilty of first degree murder, the majority failed to apply the *Ashe* test, which requires examining the record of the prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matters. Instead, the majority opinion elided the jury verdict's effect of acquitting Mr. Langley of first degree murder focusing instead on whether a verdict of specific intent second degree murder was technically valid under the law.

It is respectfully submitted, the circuit majority engaged in "the hypertechnical and archaic approach of a 19th century pleading book" prohibited by *Ashe*, 397 U.S. at 444. As this Court instructed in *Sealfon*, "the instructions under which the verdict was rendered . . . must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings. We look to them only for such light as they shed on the issues determined by the verdict."[46] Just as in *Sealfon* and *Ashe*, even if it was theoretically possible to confect a theory by which the verdict did not foreclose the disputed issue, such theories must yield to realism and rationality based upon the issues actually put to the jury for resolution.

A three-judge concurrence was satisfied that the case was answered simply by holding that *Ashe* dealt with an explicit acquittal and Mr. Langley's case involved an

[45] La. C. Cr. P. art. 598.

[46] *Sealfon v. United States*, 332 U.S. 575, 579 (1948).

implied acquittal and that this was enough to show that there was no clearly established federal law for the purposes of § 2254(d).[47] The concurrence also went on to erroneously conclude that the jury were instructed that they could return a verdict of guilty of second degree murder, even if convinced Mr. Langley was guilty of first degree murder.[48] *Id.*

A five judge dissent, opined that it was clearly established that the *Ashe* test applied to a verdict of guilty of a lesser included offense. The dissent concluded that a straightforward application of the *Ashe* test based upon the record, the instructions actually delivered to the jury and its verdict led to the conclusion that a rational jury could not have grounded its verdict upon an issue other than specific intent:

> At trial in 2003, the jury was instructed on three offenses relevant here: first degree specific-intent murder; second degree specific-intent murder; and second degree felony murder. The two degrees of specific-intent murder shared two elements: the killing of a human being and the specific intent to kill or inflict great bodily harm. First degree differed from second only by specifying the age of the victim—under twelve—an element not in dispute. The fact of the killing was not disputed either. Specific intent was thus the single rationally conceivable issue in dispute before the jury. If specific intent had been proven, a rational jury following the instructions given here would have been obligated to choose first degree murder. The jury did not, indicating that it had necessarily decided the issue of specific intent in Langley's favor. As such, the jury's choice of second degree murder can be rationally explained only as a felony murder verdict. [49]

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[47] *Langley*, 962 F.3d at 171-2.

[48] *Id.* This is factually and legally inaccurate (see i*nfra*).

[49] *Langley*, 926 F.3d at 179 (footnote omitted).

REASONS FOR GRANTING THE PETITION

I. The circuit majority has decided an important federal question in a way that conflicts with relevant decisions of this court

The preclusive effect of the jury's verdict is a question of federal law.[50]

This court in *Ashe* held that a defendant is protected from relitigation of an issue determined in his favor in a prior criminal proceeding by a general verdict. Based upon a practical and realistic examination of the record, the *Ashe* test asks "whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." *Ashe*, 397 U.S. at 444. It prohibits a technically restrictive approach, applying its test to an objective, rational jury and excluding the possibility that the jury reached its verdict by rejecting substantial and uncontradicted evidence on an uncontested issue. *Id.* A rational jury is presumed to follow its instructions. *Turner v. Arkansas*, 407 U.S. 366 (1972). This test applies seamlessly to a general verdict of conviction of a lesser included offense involving an implied acquittal.

Neither this Court, nor the state court in Mr. Langley's case, nor any other court, until the *en banc* decision in the present case, has carved out an exception to the *Ashe* test for general verdicts of guilty of a lesser included offense that carry an implicit acquittal. To the contrary, as discussed below, courts have applied the *Ashe* test in such cases.

[50] *Schiro*, 510 U.S. at 232.

In 1994, this Court in *Schiro* held that collateral estoppel could operate even where the jury failed to return a verdict, if the record establishes that the relevant issue was actually and necessarily decided in the defendant's favor:

> We have in some circumstances considered jury silence as tantamount to an acquittal for double jeopardy purposes. *Green* v. *United States*, 355 U.S. 184, 190-191, 2 L. Ed. 2d 199, 78 S. Ct. 221 (1957); *Price* v. *Georgia*, 398 U.S. at 329. The failure to return a verdict does not have collateral estoppel effect, however, unless the record establishes that the issue was actually and necessarily decided in the defendant's favor. As explained above, our cases require an examination of the entire record to determine whether the jury could have "grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." *Ashe*, 397 U.S. at 444 (internal quotation marks omitted). See also *Dowling*, 493 U.S. at 350. In view of Schiro's confession to the killing, the instruction requiring the jury to find intent to kill, and the uncertainty as to whether the jury believed it could return more than one verdict, we find that Schiro has not met his "burden . . . to demonstrate that the issue whose relitigation he seeks to foreclose was actually decided" in his favor. *Ibid.*

Schiro, 510 U.S. at 236.

In *Schiro*, the jury was presented with three counts of murder arising from the killing of one victim and ten possible verdicts. The three counts were separate legal theories for the same murder, not lesser included offenses. The jury entered a verdict of guilty as to only one of the three counts and Mr. Schiro argued that this represented an implied acquittal of the other counts, one of which required specific intent, and therefore prevented reliance upon specific intent as an aggravating factor at sentence.[51]

[51] *Schiro* expressly left open the question of whether collateral estoppel arising from a guilt phase acquittal would extend to a penalty phase aggravating circumstance in the same proceeding. *Schiro*, 51 U.S. at 232; *Cole v. Branker*, 328 F. App'x 149, 160 (4th Cir. 2008) (noting that *Schiro* left this question open). The Respondent in *Schiro* had explicitly argued that extending collateral estoppel

The state court had found that there was no implied acquittal and the circuit court considered itself bound by this finding of state law.

This Court held that the preclusive effect of a verdict is a question of federal law and so turned to consider the preclusive effect of the verdict and the failure to return a verdict in Mr. Schiro's case *de novo*.

Applying the *Ashe* test to the verdict of guilty on count two and the failure to return a verdict on count one, this Court expressly described how the question of what, if anything, had been necessarily determined was to be answered in this situation:

> We must first determine 'whether a rational jury could have grounded its verdict upon an issue other than' Schiro's intent to kill. To do so, we "examine the record of a prior proceeding taking into account the pleadings, evidence, charge, and other relevant matter . . . ."

Schiro, 510 U.S. at 223 (citations omitted). The Court then conducted an extensive review of the record, highlighting ambiguities and contra-indications to Schiro's argument. *Id.* at 233-6. This Court concluded that while collateral estoppel could be established in a case where the jury did not return a verdict, Mr. Schiro had failed to establish that intent was necessarily decided in his favor in the circumstances of his case. *Id.* at 236

This Court, in *Schiro*, applied the *Ashe* test where there was a verdict of guilty of one offense and no verdict returned on another. In doing so, it specifically framed its holding in light of its own cases establishing that a verdict of guilty of a lesser

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from a guilt phase acquittal to a sentencing judge's consideration of aggravating circumstances would be a new rule. *Brief of Respondent at *25; 1993 U.S. S. Ct. Briefs LEXIS 343.*

included offense represents an implicit acquittal of the charged offense even though no verdict is returned on the charged offense. *Id.*; *Price v. Georgia*, 398 U.S. 323, 328 (1970).

In *Schiro*, whether intent was necessarily decided by the verdict "was properly presented, fully argued and elaborately considered in the opinion. The decision on this question was as much a part of the judgment of the court as was that on any other of the several matters on which the case as a whole depended."[52] Like *Ashe* before it, *Schiro* clearly established that the *Ashe* test applies in a case like the present.

Thus, contrary to the *en banc* majority, it is clearly established that the protections of issue preclusion and the *Ashe* test extend to a defendant convicted of a lesser included offense and implicitly acquitted of the charged offense, even though no verdict is returned on the charged offense.

While only this Court can clearly establish law, as described below, numerous circuit courts and state courts of last resort have applied *Ashe* to such cases over the years, including the Louisiana Supreme Court. Neither of the parties, nor the circuit majority itself, have identified any caselaw suggesting that the applicability of *Ashe* to such cases has been doubted before now.[53] All of this bolsters the conclusion that the law was clearly established.

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[52] *R.R. Cos. v. Schutte*, 103 U.S. 118, 143 (1880) (defining the holding of a case); *see also Myers v. United States*, 272 U.S. 52, 220 (1926) ("Whenever a question fairly arises in the course of a trial, and there is a distinct decision of that question, the ruling of the court in respect thereto can, in no just sense, be called mere dictum.")

[53] The circuit majority cites *Owens v. Trammell*, 792 F.3d 1234, 1246-50 (10th Cir. 2015). However, that case involved a state court finding of inconsistent verdicts and the circuit court held that, in the

II. The circuit majority has decided an important federal question in a way that conflicts with decisions of other circuit courts of appeal and state courts of last resort

The circuit majority's conclusion that issue preclusion does not apply to acquittals arising from findings of guilt of lesser included offenses is at odds with the treatment of this issue by other circuits and state courts of last resort, including the Louisiana Supreme Court and the Fifth Circuit itself. Similarly, the circuit majority's miserly application of *Ashe* to the conviction of second degree murder, without reference to the acquittal of first degree murder is directly at odds with circuit courts, state courts of last resort and Louisiana law.

It is long settled law in Louisiana that *Ashe* applies to an implied acquittal arising from the return of a lesser included verdict under Louisiana's system of responsive verdicts:

> Although defendant appealed her conviction of simple kidnapping, the fact that the jury returned the lesser included verdict to the charge of aggravated kidnapping constitutes a final acquittal on the more serious charge. *Green v. United States*, 355 U.S. 184, 2 L. Ed. 2d 199, 78 S. Ct. 221 (1957); C.Cr.P. 598. Thus, the effects of collateral estoppel apply to those elements which differentiate aggravated kidnapping from simple kidnapping, aspects which are not essential to the crime of aggravated burglary.

State v. Jackson, 332 So.2d 755, 757 (La. 1976).

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circumstances, this Court had not yet established how to determine whether two verdicts were truly inconsistent. This is a completely different issue.

In Mr. Langley's own case, the state court explicitly applied *Ashe* but did so in an objectively unreasonable fashion, as found by the original circuit panel and the dissenters in the *en banc*.[54]

Indeed, until the *en banc* decision in the present case, the Fifth Circuit had applied *Ashe* to implied acquittals arising from convictions for lesser included offenses under Louisiana and Texas law. *Neal v. Cain*, 141 F.3d 207, 211 (5th Cir. 1998) (Collateral estoppel applied to implied acquittal of aggravated rape, following conviction of a lesser included offense, but on application of the *Ashe* test, the disputed issue was not necessarily determined by the acquittal); *Green v. Estelle*, 601 F.2d 877 (5th Cir. 1979) (Following conviction of lesser offense as to one victim, the State could not prosecute as to the second victim under the theory of malice rejected in the prior trial as to the other, simultaneously murdered, victim)

In contrast to the *en banc* decision, other circuit courts and state courts of last resort[55] have applied *Ashe* directly to implied acquittals arising from convictions on lesser included offenses. *See Pugliese v. Perrin*, 731 F.2d 85, 88 (1st Cir. 1984) (Collateral estoppel applied to implied acquittal of manslaughter, following conviction of a lesser included offense, thus precluding relitigation of the issue of purposeful, knowing or reckless conduct at retrial of the lesser offense); *State v. Thompson*, 285 S.W.3d 840, 852 (Tenn. 2009) (Collateral estoppel applied to the

[54] *Langley*, 926 F.3d at 179.

[55] *See also, Tudor v. State*, 2002 Tex. App. LEXIS 490, at *4-5 (Tex. App.—Tyler Jan. 23, 2002) (Holding, following remand from TCCA, *Ashe* applied to implied acquittal following conviction of lesser included offense to bar relitigation of issue necessarily decided).

implied acquittal of attempted first degree murder, following conviction of a lesser included offense, thus precluding relitigation of the issue of premeditation); *State v. Handley*, 585 S.W.2d 458, 463 (Mo. 1979) (Collateral estoppel applied to implied acquittal of felony murder, following conviction of a lesser included offense, thus precluding relitigation of the issue of aiding and abetting); *Cole v. Branker*, 328 F. App'x 149, 160-61 (4th Cir. 2008) (denying relief, in the alternative, after applying the *Ashe* test to the implied acquittal of second degree murder, following conviction of involuntary manslaughter after finding that there were several explanations for the acquittal verdict).[56]

III. The circuit majority has applied its erroneous understanding of Louisiana law in a manner that was not relied upon by the state court and is directly at odds with actual Louisiana law

The circuit majority and concurrence both hold in error that, in accordance with state law, the jury were instructed that they could return a verdict of guilty of second degree murder even if convinced of guilt of first degree murder.

They do this by connecting the trial court's instruction that that "[t]he responsive lesser offenses to the charge of First Degree Murder are Second Degree Murder and Manslaughter" with a proposition of Louisiana law, not shared with the jury, that "the jury must be given the option to convict the defendant of the lesser

[56] In a related vein, circuit courts and state courts of last resort have also applied collateral estoppel to a verdict of acquittal in order to limit the theories available at the retrial of a count on which the defendant was convicted. *United States v. Whitaker*, 702 F.2d 901 (11th Cir. 1983); *State v. Lavalleur*, 292 Neb. 424, 873 N.W.2d 155 (2016); *State v. Guyton*, 286 Ore. 815, 817-18, 596 P.2d 569, 570 (1979); *Gilbert v. People of the V.I.*, 52 V.I. 350 (2009)*; Commonwealth v. Cohen*, 529 Pa. 552, 605 A.2d 1212 (1992).

offense, even though the evidence clearly and overwhelmingly supported a conviction of the charged offense."[57]

According to the reasoning of the majority and the concurrence, because the instructions described second degree murder as a "responsive lesser offense," the jury were thereby being told that they could return a verdict of second degree murder even if satisfied of guilt of first degree murder. This is not what the instructions say at all, nor was any such argument made by either party. For the purposes of issue preclusion, instructions are looked at for the light they shed on the jury verdict,[58] not because of any unexpressed legal principle they may invoke.[59]

Further, attempting to give this expansive effect to the use of the word "responsive" ignores the fact that the jury were expressly instructed "if you are convinced beyond a reasonable doubt that the defendant is guilty of First Degree Murder, your verdict should be guilty" and twice instructed "if you are not convinced that a defendant is guilty of the offense charged, you may find a defendant guilty of a lesser offense."[60] The jury were clearly instructed that they were only to return a verdict of guilty of a lesser offense if not convinced of guilt of first degree murder. A

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[57] *Langley*, 926 F.3d at 161, 166, 171 citing *State v. Porter*, 639 So. 2d 1137, 1140 (La. 1994).

[58] *Sealfon*, 332 U.S. at 579.

[59] It must also be pointed out that Louisiana statutory law explicitly provides that a conviction of a lesser offense operates as an acquittal of the greater offense, a proposition of law reflected in the instruction that the jury were to reach the lesser offenses if not satisfied of guilt of the charged offense. La. C. Cr. P. art. 598. If the jury is to be charged with knowledge of a sentence in the Louisiana Supreme Court's *Porter* decision, it must surely also be ae charged with knowledge that its verdict was an acquittal of first degree murder.

[60] ROA 17662, 17680, 12378.

verdict of guilty of a lesser offense was conditional on not being convinced of guilt of the offense charged.

Finally, the majority and concurrence misunderstood Louisiana law. Under Louisiana law, a judge may not withdraw from the jury's consideration a responsive verdict supported by the evidence. *State v. Porter*, 639 So. 2d 1137, 1140 (La. 1994). This is what the *Porter* case, relied upon by the majority and concurrence, is about and all that it stands for. It is a misunderstanding of *Porter* to suggest that juries are to be instructed that they may return a verdict of guilty of a lesser included offense if satisfied of guilt of the charged offense.

Louisiana law is clear that a jury shall not be instructed that it can convict of a lesser offense if convinced of guilt of the greater offense and that any such instruction would be impermissibly instructing a jury that it could disobey the law and violate its oath to render a verdict according to the law and the evidence.[61]

[61] *State v. Sharp*, 35714 (La. App. 2 Cir 02/27/02), 810 So. 2d 1179, 1191-92 ("There is no Louisiana jurisprudence supporting an argument that it is proper to instruct a jury that it can disobey law and reach a verdict inconsistent with the evidence."); *State v. Thibodeaux*, 16-542 (La. App. 3 Cir 03/15/17), 216 So. 3d 73, 86 (accord); *State v. Jacob*s, 07-887 (La. App. 5 Cir. 05/24/11); 67 So. 3d 535, 575 (defendant not entitled to a charge that they may convict of a lesser offense even if the evidence overwhelmingly supports conviction of the charged crime and that such a charge "might have caused the jury to misunderstand or even disobey the law on responsive verdicts."); *State v. Williams*, 2012-305 (La. App. 5 Cir 05/16/13), 119 So. 3d 131, 139-42 (Defendant not entitled to instruction on jury's power to return conviction of lesser offense despite overwhelming evidence of charged crime and not permitted to voir dire on that power) citing *State v. Legrand*, 02-1462 (La. 12/3/03), 864 So.2d 89 (unpublished app. at pp.30-1) *(*rejecting the claim that the jury should have been instructed on its power to return a responsive verdict despite being convinced of guilt of the offense charged, approving the reasoning in *Sharp* (*supra*) and noting the conflict between such a charge and the jury's oath to render a verdict according to the law and the evidence.); *State v. Divers*, 38524 (La. App. 2 Cir 11/23/04), 889 So. 2d 335, 351-52 (Upholding refusal to instruct the jury on power to nullify by returning a responsive verdict and finding that the failure to do so did not constitute a miscarriage of justice, prejudiced the substantial rights of the defendant, or violated a constitutional or statutory right.); *State v. Seals*, 09-1089 (La. App. 5 Cir 12/29/2011), 83 So. 3d 285, 342-43 (accord).

The state court in Mr. Langley's case did not suggest or rely upon the proposition that the jury's instructions could have led it to return a verdict of second degree murder even if convinced of guilt of first degree murder because that was not the instruction and such an instruction would be barred by state law. The circuit majority and concurrence grievously erred.

CONCLUSION

It is respectfully submitted that this Court should grant certiorari.

Respectfully submitted,

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Dated: September 4, 2019.