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

APPENDICES

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Langley v. Prince

United States Court of Appeals for the Fifth Circuit

June 6, 2019, Filed

No. 16-30486

Reporter
926 F.3d 145 *; 2019 U.S. App. LEXIS 17082 **

RICKY LANGLEY, Petitioner-Appellant, v. HOWARD PRINCE, WARDEN, ELAYN HUNT CORRECTIONAL CENTER, Respondent-Appellee.

Prior History: [1]** Appeal from the United States District Court for the Western District of Louisiana.

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

Core Terms

state court, murder, specific intent, convicted, Jeopardy, second degree murder, specific-intent, Double, second-degree, first degree murder, instructions, acquitted, issue preclusion, relitigation, retrying, jury instructions, sentence, retrial, cases, dissenters, preclusion, federal court, specific intent to kill, court's decision, habeas relief, reasons, collateral estoppel, court of appeals, rational jury, per curiam

Case Summary

Overview

HOLDINGS: [1]-Where the state court overturned defendant's conviction for second degree murder on appeal, he was not entitled to federal habeas relief based on his claim that Double Jeopardy barred his retrial because he could not overcome *AEDPA's* relitigation bar under *28 U.S.C.S. § 2254(d)(1)* as there was no clearly established federal law explaining issue preclusion following a conviction. The last-reasoned state court decision held defendant failed to prove the jury necessarily determined the specific-intent issue in his favor.

Outcome

Judgment affirmed.

LexisNexis® Headnotes

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Double Jeopardy

HN1 **Double Jeopardy**

The historic core of the *Double Jeopardy Clause* generally bars re-trial of the same offense after a conviction or acquittal.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Double Jeopardy

Criminal Law & Procedure > Trials > Verdicts

Criminal Law & Procedure > Postconviction Proceedings > Motions for New Trial

Criminal Law & Procedure > Juries & Jurors > Jury Deliberations

HN2 **Double Jeopardy**

If the jury has been discharged without giving any verdict; or, if, having given a verdict, judgment has been arrested upon it, or a new trial has been granted in his favour; for, in such a case, his life or limb cannot judicially be said to have been put in jeopardy.

Constitutional Law > Congressional Duties & Powers > Bills of Attainder & Ex Post Facto

Clause > Bills of Attainder

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Double Jeopardy

Criminal Law & Procedure > Commencement of Criminal Proceedings > Accusatory Instruments > Indictments

HN3 **Bills of Attainder**

When an attainder be reversed in a court of error, the defendant may certainly be indicted again for the same offence, and the rule would be held to apply, that he had never been in jeopardy under the former indictment.

Criminal Law & Procedure > Appeals

Criminal Law & Procedure > Commencement of Criminal Proceedings > Double Jeopardy > Appeals

HN4 **Appeals**

A defendant can be retried after he successfully appeals his first conviction.

Criminal Law & Procedure > Commencement of Criminal Proceedings > Double Jeopardy > Appeals

HN5 **Appeals**

The *Double Jeopardy Clause* does not bar reprosecution of a defendant whose conviction is overturned on appeal.

Criminal Law & Procedure > Habeas Corpus > Review > Antiterrorism & Effective Death Penalty Act

Criminal Law & Procedure > Habeas Corpus > Procedural Defenses > Exhaustion of Remedies

HN6 **Antiterrorism & Effective Death Penalty Act**

AEDPA prohibits a prisoner from raising any claim in federal court unless it was first exhausted in state court. *28 U.S.C.S. § 2254(b)*. After the state court adjudicates the claim, the prisoner must overcome the relitigation bar imposed by *AEDPA*.

Criminal Law & Procedure > Habeas Corpus > Review > Antiterrorism & Effective Death Penalty Act

Criminal Law & Procedure > ... > Procedural Defenses > Successive Petitions > Exceptions

Criminal Law & Procedure > ... > Review > Standards of Review > Contrary & Unreasonable Standard

HN7 **Antiterrorism & Effective Death Penalty Act**

To overcome *AEDPA's* relitigation bar, a state prisoner must shoehorn his claim into one of its narrow exceptions. He must show the state court's adjudication of the claim resulted in a decision that was: (1) contrary to, or (2) involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States. *28 U.S.C.S. § 2254(d)(1)*.

Criminal Law & Procedure > Habeas Corpus > Review > Antiterrorism & Effective Death Penalty Act

Criminal Law & Procedure > ... > Review > Standards of Review > Contrary & Unreasonable Standard

HN8 **Antiterrorism & Effective Death Penalty Act**

The first exception to the *AEDPA's* relitigation bar—the "contrary to" prong—is generally regarded as the narrower of the two. A state-court decision is "contrary to" clearly established federal law only if it arrives at a conclusion opposite to that reached by the U.S. Supreme Court on a question of law or if it resolves a case differently than the U.S. Supreme Court has on a set of materially indistinguishable facts.

Criminal Law & Procedure > ... > Standards of Review > Contrary & Unreasonable Standard > Unreasonable Application

HN9 **Unreasonable Application**

The second exception to 28 U.S.C.S. § 2254(d)(1)'s relitigation bar—the "unreasonable application" prong—is unforgiving. It is not enough to show the state court was wrong. Rather, the relitigation bar forecloses relief unless the prisoner can show the state court was so wrong that the error was well understood and comprehended in existing law beyond any possibility for fairminded disagreement. In other words, the unreasonable-application exception asks whether it is beyond the realm of possibility that a fairminded jurist could agree with the state court.

Criminal Law & Procedure > Habeas Corpus > Review > Antiterrorism & Effective Death Penalty Act

Criminal Law & Procedure > ... > Procedural Defenses > Successive Petitions > Bars to Relief

Criminal Law & Procedure > ... > Appeals > Standards of Review > De Novo Review

Criminal Law & Procedure > Habeas Corpus > Jurisdiction > Custody Requirement

HN10 **Antiterrorism & Effective Death Penalty Act**

Overcoming AEDPA's relitigation bar is necessary but not sufficient to win habeas relief. Even after overcoming the bar, the prisoner still must show, on de novo review, that he is in custody in violation of the Constitution or laws or treaties of the United States. 28 U.S.C.S. § 2254(a).

Criminal Law & Procedure > ... > Double Jeopardy > Double Jeopardy Protection > Acquittals

HN11 **Acquittals**

The Ashe Court held that the Double Jeopardy Clause precludes the Government from relitigating any issue that was necessarily decided by a jury's acquittal in a prior trial.

Criminal Law & Procedure > Habeas Corpus > Review > Antiterrorism & Effective Death Penalty Act

Criminal Law & Procedure > ... > Review > Standards of Review > Contrary & Unreasonable Standard

HN12 **Antiterrorism & Effective Death Penalty Act**

To overcome AEDPA's relitigation bar, after identifying the clearly established law, the court moves to step two—determining whether the state court decision "involved an unreasonable application of" that law. 28 U.S.C.S. § 2254(d)(1). To make this determination, the court must ask whether any fairminded jurist could believe the "clearly established rule" does not apply to the "set of facts" at hand. If such disagreement is possible, then the petitioner's claim must be denied.

Criminal Law & Procedure > Commencement of Criminal Proceedings > Double Jeopardy > Collateral Estoppel

Criminal Law & Procedure > Criminal Offenses > Lesser Included Offenses

HN13 **Collateral Estoppel**

Neither Ashe nor any other U.S. Supreme Court precedent mandates that a lesser-included-offense conviction or an "implicit acquittal"—be given issue-preclusive effect.

Criminal Law & Procedure > Criminal Offenses > Lesser Included Offenses

Criminal Law & Procedure > ... > Jury Instructions > Particular Instructions > Lesser Included Offenses

HN14 **Lesser Included Offenses**

Under Louisiana law, the jury must be given the option to convict the defendant of the lesser offense, even though the evidence clearly and overwhelmingly supported a conviction of the charged offense.

Criminal Law & Procedure > ... > Standards of Review > Contrary & Unreasonable Standard > Clearly Established Federal Law

HN15[] **Clearly Established Federal Law**

Federal courts must apply 28 U.S.C.S. § 2254(d) in light of controlling U.S. Supreme Court holdings regardless of whether the state court or the state's lawyer cites them.

Criminal Law & Procedure > ... > Standards of Review > Contrary & Unreasonable Standard > Contrary to Clearly Established Federal Law

HN16[] **Contrary to Clearly Established Federal Law**

Avoiding a state judgment in federal court does not require citation of U.S. Supreme Court cases—indeed, it does not even require awareness of Supreme Court cases, so long as neither the reasoning nor the result of the state-court decision contradicts them.

Criminal Law & Procedure > ... > Review > Standards of Review > Contrary & Unreasonable Standard

HN17[] **Contrary & Unreasonable Standard**

A State's lawyers cannot waive or forfeit 28 U.S.C.S. § 2254(d)'s standard. That likewise means a State's lawyers cannot waive or forfeit the applicable clearly established law.

Criminal Law & Procedure > ... > Standards of Review > Contrary & Unreasonable Standard > Clearly Established Federal Law

HN18[] **Clearly Established Federal Law**

The United States Court of Appeals for the Fifth Circuit is not prohibited from considering U.S. Supreme Court cases not cited when evaluating the reasonableness of the state court's reasoning. Indeed, it is often compelled to do so to determine clearly established federal law. 28 U.S.C.S. § 2254(d)(1).

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Judges: Before STEWART, Chief Judge, JONES, SMITH, WIENER, DENNIS, OWEN, ELROD, SOUTHWICK, HAYNES, GRAVES, HIGGINSON, COSTA, WILLETT, HO, DUNCAN, ENGELHARDT, and OLDHAM, **[**2]** Circuit Judges. ANDREW S. OLDHAM, Circuit Judge, joined by JONES, SMITH, OWEN, SOUTHWICK, WILLETT, HO, DUNCAN, and ENGELHARDT, Circuit Judges. JENNIFER WALKER ELROD and CATHARINA HAYNES, Circuit Judges, joined by CARL E. STEWART, Chief Judge, concurring. STEPHEN A. HIGGINSON, Circuit Judge, joined by WIENER, DENNIS, GRAVES, and COSTA, Circuit Judges, dissenting. GREGG COSTA, Circuit Judge, joined by WIENER and HIGGINSON, Circuit Judges, dissenting.

Opinion by: ANDREW S. OLDHAM

Opinion

[*149] ANDREW S. OLDHAM, Circuit Judge, joined by JONES, SMITH, OWEN, SOUTHWICK, WILLETT, HO, DUNCAN, and ENGELHARDT, Circuit Judges:

A Louisiana jury convicted Ricky Langley of second-degree murder. The state court overturned that conviction on direct appeal. So the State retried Langley and re-convicted him. Langley now seeks federal habeas relief. He argues his prior *conviction* should be construed as an implicit *acquittal* that bars the re-conviction and allows him to walk free. We disagree.

I.

While on parole for a prior child-molestation conviction, Ricky Langley choked a **[*150]** six-year-old boy into unconsciousness and then, to ensure the child was dead, strangled him with a ligature and shoved a sock into the child's mouth. Langley stuffed **[**3]** the boy's corpse in a bedroom closet and lied to the child's mother when she came looking for her son. Langley then waived his *Miranda* rights and repeatedly confessed on video to molesting and killing the boy. Police found the child's body, wearing a t-shirt soaked in Langley's semen, in the closet where Langley left him.

The State of Louisiana thrice tried and thrice convicted Langley for his heinous crime. The second and third trials lie at the heart of this case. But we explain all three for the sake of completeness.

Langley I. A Louisiana jury unanimously convicted Langley of first-degree murder and sentenced him to death. For reasons unrelated to this case, Langley's first conviction was remanded on direct appeal in state court. *See* State v. Langley (Langley I), 711 So. 2d 651, 675 (La. 1998) (per curiam) (granting rehearing in part and remanding); *see also* State v. Langley, 813 So. 2d 356, 358 (La. 2002) (quashing the indictment due to improper selection of the grand jury foreperson). So the State retried him for murder.

Langley II. At the second trial, the jury unanimously convicted Langley of murder once again. This time, however, the jury issued a verdict of second-degree murder. For reasons again unrelated to the appeal before us today, the second jury's verdict was also overturned **[**4]** on direct appeal in state court. *See* State v. Langley (Langley II), 896 So. 2d 200, 201 (La. Ct. App. 2004). So the State again retried Langley for murder.

Langley III. Before the third trial, however, the Louisiana Supreme Court held the second-degree murder conviction precluded the State from retrying Langley for first-degree murder. *See* State v. Langley (Langley III), 958 So. 2d 1160, 1170 (La. 2007). The court based its holding on state law. *Ibid.* (citing La. Const. art. I, § 17(A); La. Stat. Ann. § 14:30.1; La. Code Crim. Proc. Ann. arts. 598(A), 782(A), 841(A)). But its holding accords with longstanding double jeopardy law because, "[h]istorically, courts have treated greater and lesser-included offenses as the same offense for double jeopardy purposes, so a conviction on one normally precludes a later trial on the other." Currier v. Virginia, 138 S. Ct. 2144, 2150, 201 L. Ed. 2d 650 (2018).

Therefore, at Langley's third trial, the State charged him only with second-degree murder. Having lost before two juries, Langley decided to try his luck with a bench trial the third time around. Given the facts and his repeated videotaped confessions, however, the trial judge convicted him of second-degree murder. The court found as a matter of fact that Langley had specific intent to kill because, after their "sexual encounter," Langley thought death would "do this little boy a favor." The court again sentenced Langley to life in prison.

Langley again appealed. This time **[**5]** he argued the Double Jeopardy Clause should have prohibited the State from retrying him for second-degree specific-intent murder. That result is compelled, Langley said, by Ashe v. Swenson, 397 U.S. 436, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970). *Ashe* identified a "collateral estoppel" "ingredient" in the Double Jeopardy Clause and held it precludes a retrial for any issue necessarily determined by a jury's general verdict of acquittal. *See* id. at 442-45. Of course, Langley was not *acquitted* of second-degree murder in *Langley II*; he was *convicted*. Langley nonetheless argued *Ashe* should be extended to his facts. Langley reasoned **[*151]** the jury—which simply adjudged him "GUILTY," without specifying why—logically must have based its verdict on second-degree *felony* murder. If so, Langley hypothesized, the *Langley II* jury could've determined he lacked specific intent. And if all these hypotheses and deductions are true, Langley concluded, the State should be barred from retrying him for any offense that has specific intent as an element—including second-degree specific-intent murder.

The state courts rejected Langley's effort to extend *Ashe*. *See* State v. Langley (Langley IV), 61 So. 3d 747, 756-58 (La. Ct. App. 2011), *cert. denied*, *78 So. 3d 139 (La. 2012)*. The state appellate court first evaluated the record "to discern which facts were 'necessarily determined'" by the jury's guilty verdict in Langley II. 61 So. 3d at 757. The only way to determine **[**6]** what the jury actually and necessarily determined is to evaluate what the jury actually and necessarily did—namely, convict Langley of second-degree murder. Although the state court recognized it was "possible that the jury verdict was based on a jury finding under the felony-murder rule," the court noted it was equally likely the jury based its verdict on second-degree specific-intent murder as an alternative to first-degree murder. *Ibid.* It was also possible the jury convicted Langley of second-degree murder as a "compromise verdict"—that is, a verdict that did not reflect the jury's actual findings, but instead represented a compromise punishment of life in prison that was palatable to all jurors. *Ibid.* Because the

jury could have reached its second-degree murder conviction without *necessarily* finding Langley lacked specific intent to kill, the Louisiana court held Langley "ha[d] not carried his burden of proving that the element of specific intent was actually decided [in his favor] in the previous trial" to preclude the relitigation of that issue in the third trial. *Id. at 758*.

Langley filed a federal habeas petition. The district court denied it. *See* **[**7]** *Langley v. Prince, No. 2:13-cv-2780, 2016 U.S. Dist. LEXIS 47094, 2016 WL 1383466, at *1 (W.D. La. Apr. 6, 2016)*. A panel of our Court, however, reversed and concluded not only that the state court's opinion was wrong, but that it was "objectively unreasonable." *Langley v. Prince, 890 F.3d 504, 521-23 (5th Cir. 2018)*. That decision would've allowed Langley to walk free. But we vacated it upon granting rehearing *en banc*.

II.

This case implicates constitutional law, the equitable doctrine of estoppel, and statutory text. We address each in turn. We first explain the common-law and constitutional background of the *Double Jeopardy Clause*. Then we explain how *Ashe* and collateral estoppel fit into that background. Lastly, we explain how our application of *Ashe* is affected by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), *Pub. L. No. 104-132, 110 Stat. 1214*.

A.

The *Double Jeopardy Clause* originates in the common-law plea *autrefois acquit*, meaning "prior acquittal," and the related plea *autrefois convict*. As Sir Edward Coke described it, "the maxim of the common law is, that the life of a man shall not be twice . . . put in jeopardy for one and the same offence, and that is the reason and cause that *auterfoits* acquitted or convicted of the same offence is a good plea." *Vaux's Case* (1591), 76 Eng. Rep. 992, 993; 4 Co. Rep. 44a, 45a (K.B.). But as far back as *Vaux's Case*, the plea of prior acquittal was not always a get-out-of-jail-free card. Only some verdicts **[**8]** of acquittal in the first trial would effectively bar a second. *See* ***[*152]*** *ibid.* (discussing some qualifications to the plea); EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 214 (1st ed. 1644) (same); 2 MATTHEW HALE, HISTORIA PLACITORUM CORONÆ 393-95 (1st ed. 1736) (same).

Our *Double Jeopardy Clause* was framed against this background. James Madison's first draft of that Clause stated: "No person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offence." 1 ANNALS OF CONG. 451-52 (1789) (Joseph Gales ed., 1834). Representative Egbert Benson objected because the draft varied from "the right heretofore established" by the common law. *Id.* at 781. To cure the defect, Benson suggested striking the phrase regarding "one trial." *Id.* at 782. Representative Roger Sherman agreed. He reasoned, "if [the defendant] was convicted on the first [trial], and any thing should appear to set the judgment aside, he was entitled to a second, which was certainly favorable to him." *Ibid.* The House revised it accordingly, and the Senate concurred in the revision. *See* S. JOURNAL, 1st Cong., 1st Sess. 71 (1789).

As ratified, the *Double Jeopardy Clause* provides: "No person shall . . . be subject for the same **[**9]** offence to be twice put in jeopardy of life or limb." *U.S. Const. amend. V*. Madison's initial phrasing ("more than one punishment or one trial") was thus replaced with a prohibition on putting a person in "jeopardy" more than once. Credit for that phrasing belongs to Blackstone. *See United States v. Wilson, 420 U.S. 332, 341-42, 95 S. Ct. 1013, 43 L. Ed. 2d 232 (1975)* (noting the *Fifth Amendment* uses "language that tracked Blackstone's statement of the principles of *autrefois acquit* and *autrefois convict*"); 4 WILLIAM BLACKSTONE, COMMENTARIES *335 ("[T]he plea of *auterfoits acquit*, or a former acquittal, is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life, more than once, for the same offence."). Thus,***HN1***[] the historic core of the *Double Jeopardy Clause* generally bars re-trial of the "same offense" after a conviction or acquittal. *See Currier, 138 S. Ct. at 2150*.

The Framers adopted not only Blackstone's language but also some English common-law exceptions to the pleas of prior acquittal and prior conviction. Most relevant here, the plea did not bar *all* attempts to retry a criminal defendant. The defendant could be retried, for example:

> ***HN2***[] if the jury have been discharged without giving any verdict; or, if, having given a verdict, judgment has been arrested upon it,[1] or a new trial

[1] "An arrest of judgment was the technical term describing the act of a trial judge refusing to enter judgment on the verdict because of an error appearing on the face of the record that rendered the judgment invalid." *United States v. Sisson, 399 U.S. 267, 280-81, 90 S. Ct. 2117, 26 L. Ed. 2d 608 (1970)* (plurality opinion). It bore some semblance to a motion for

> has been **[**10]** granted in his favour; for, in such a case, his life or limb cannot judicially be said to have been put in jeopardy.

3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 1781 (1st ed. 1833). Likewise, ***HN3***[⬆] when an "attainder be reversed in a Court of Error,"[2] the defendant "may certainly be indicted again for the same offence, and **[*153]** the rule would be held to apply, that he had never been in jeopardy under the former indictment." *Regina v. Drury* (1849), 175 Eng. Rep. 516, 520; 2 Car. & K. 190, 199 (N.P.).

That is why it has long been true that ***HN4***[⬆] a defendant can be retried after he successfully appeals his first conviction. *See, e.g.*, *Ball v. United States, 163 U.S. 662, 672, 16 S. Ct. 1192, 41 L. Ed. 300 (1896)* (citing *Drury*). As the Supreme Court has explained:

> While different theories have been advanced to support the permissibility of retrial, of greater importance than the conceptual abstractions employed to explain the *Ball* principle are the implications of that principle for the sound administration of justice. Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial. It would be a high price indeed for society to pay were every accused granted **[**11]** immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction.

United States v. Tateo, 377 U.S. 463, 466, 84 S. Ct. 1587, 12 L. Ed. 2d 448 (1964); *accord* *Justices of Boston Mun. Court v. Lydon, 466 U.S. 294, 308, 104 S. Ct. 1805, 80 L. Ed. 2d 311 (1984)* ("The general rule is that ***HN5***[⬆] the [Double Jeopardy] Clause does not bar reprosecution of a defendant whose conviction is overturned on appeal.").

B.

The Supreme Court recently reminded us the line from *Vaux's Case* to *Ashe* is a crooked one. *See* *Currier, 138 S. Ct. at 2149-50* (noting *Ashe* "represented a significant innovation in our jurisprudence" that some say "sits uneasily with this Court's double jeopardy precedent and the Constitution's original meaning"). One reason why is, for the first 164 years of our Nation's history, the prohibition on double jeopardy could not be vindicated in habeas proceedings by state prisoners.

From the Founding until after the Civil War, there was no such thing as federal habeas for individuals in state custody (with one limited exception). *See* Judiciary Act of 1789, *ch. 20, § 14, 1 Stat. 73, 81-82* (providing federal habeas only for federal prisoners); *Ex Parte Bollman, 8 U.S. (4 Cranch) 75, 98-99, 2 L. Ed. 554 (1807)* (suggesting federal courts could issue only writs of *habeas corpus ad testificandum* for state prisoners). And although a federal prisoner had greater federal habeas privileges than a state prisoner, even the former could **[**12]** not use habeas proceedings to collaterally attack a conviction. During that time, a judgment in a criminal case was just like a judgment in any other case: It was *res judicata*. As Chief Justice Marshall put it:

> The judgment of a court of record whose jurisdiction is final, is as conclusive on all the world as the judgment of this court would be. It is as conclusive on this court as it is on other courts. It puts an end to inquiry concerning the fact, by deciding it.

Ex parte Watkins, 28 U.S. (3 Pet.) 193, 202-03, 7 L. Ed. 650 (1830).[3]

[*154] In 1867, Congress extended the scope of federal habeas jurisdiction to state prisoners. *See* Habeas Corpus Act of 1867, *ch. 28, § 1, 14 Stat. 385*

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judgment notwithstanding the verdict, but the analogy is not precise. *See Arrest of Judgment*, GILES JACOB, A NEW LAW-DICTIONARY (1st ed. 1729). The important point for present purposes is arrest of judgment was a post-conviction motion by the defendant challenging his conviction.

[2] Attainder "[i]s when a Man hath committed Treason or Felony, and after Conviction[,] Sentence is passed on him." *Attainder*, GILES JACOB, A NEW LAW-DICTIONARY (1st ed. 1729).

[3] That made sense based on how the Great Writ developed at common law. King Charles I thought he could jail English subjects for any reason, or no reason at all. *See Darnell's Case* (1627) (K.B.), *in* 3 T.B. HOWELL, A COMPLETE COLLECTION OF STATE TRIALS 1-59 (5th ed. 1816); The Petition of Right, 3 Car. 1 c. 1, § 5 (1628). In response, the habeas writ became a tool for forcing the jailer to provide a lawful *reason* for the confinement. *See* An Act for the Better Secureing the Liberty of the Subject and for Prevention of Imprisonments Beyond the Seas, 31 Car. 2 c. 2 (1679). If he could not, the court could force the jailer to provide a trial or some other kind of process. *See* *Hamdi v. Rumsfeld, 542 U.S. 507, 555, 124 S. Ct. 2633, 159 L. Ed. 2d 578 (2004)* (Scalia, J., dissenting). The habeas remedy (what we call the "privilege") did not apply to *post-trial* confinement because a criminal judgment, pursuant to a full-fledged criminal trial, was always a lawful basis for jailing a prisoner. *See Bushell's Case* (1670), 124 Eng. Rep. 1006, 1009-10; Vaugh. 135, 142-43 (C.P.).

(empowering federal courts "to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the constitution, or any treaty or law of the United States"). Even then, however, the Supreme Court continued to interpret the scope of its habeas authority in a very limited way. If a prisoner was in jail under a state court judgment of conviction, the Court asked only whether that state court had jurisdiction over the defendant. *See, e.g.,* Pettibone v. Nichols, 203 U.S. 192, 206, 215-16, 27 S. Ct. 111, 51 L. Ed. 148 (1906); Harkrader v. Wadley, 172 U.S. 148, 168-70, 19 S. Ct. 119, 43 L. Ed. 399 (1898); *see also* Wright v. West, 505 U.S. 277, 285, 112 S. Ct. 2482, 120 L. Ed. 2d 225 (1992) **[**13]** (plurality opinion) (describing this practice).

For almost a century following the 1867 Act, no prisoner (state or federal) could collaterally attack his conviction under the Double Jeopardy Clause. Take for example Ex parte Lange, 85 U.S. 163, 21 L. Ed. 872 (1873). In that case, a federal court sentenced the prisoner twice for one criminal offense of stealing mail bags. The government conceded the sentence violated the Double Jeopardy Clause. And the Court agreed: "For of what avail is the constitutional protection against more than one trial if there can be any number of sentences pronounced on the same verdict?" Id. at 173. Still, the Court held, that did not justify habeas relief. That's because "[t]he judgment first rendered, though erroneous, was not absolutely void. It was rendered by a court which had jurisdiction of the party and of the offence." Id. at 174. And that was sufficient to deny relief.

It was not until 1953 that state prisoners could use federal habeas proceedings to relitigate free-standing constitutional claims after pressing and losing them in state court. *See* Brown v. Allen, 344 U.S. 443, 460-65, 73 S. Ct. 397, 97 L. Ed. 469 (1953); id. at 506-08 (opinion of Frankfurter, J.); *see also* Fay v. Noia, 372 U.S. 391, 460, 83 S. Ct. 822, 9 L. Ed. 2d 837 (1963) (Harlan, J., dissenting) (describing *Brown v. Allen* as a "landmark decision[]" that "substantially expanded the scope of inquiry on an application for federal habeas corpus"); **[**14]** BRANDON L. GARRETT & LEE KOVARSKY, FEDERAL HABEAS CORPUS: EXECUTIVE DETENTION AND POST-CONVICTION LITIGATION 3 (Robert C. Clark et al. eds., 2013) (referring to *Brown v. Allen* as the "big bang"). And it was not until 1969 that the Supreme Court incorporated the Double Jeopardy Clause against the States. *See* Benton v. Maryland, 395 U.S. 784, 794, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969). On the same day it announced *Benton*, the Court held for the first time that state prisoners could raise Double Jeopardy claims in federal habeas. *See* North Carolina v. Pearce, 395 U.S. 711, 717-19, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969).

This is the backdrop for *Ashe*, which came the very next year. In *Ashe*, a group of masked men allegedly robbed six players at a poker game. 397 U.S. at 437. Under the relevant state law, Ashe was guilty of robbery if he was one of the masked robbers, even if the State could not prove Ashe robbed any one particular poker player. Id. at 439. **[*155]** The State tried Ashe for robbing the first player, but the jury acquitted him. *Ibid.* On their verdict form, the jury found Ashe "not guilty due to insufficient evidence." *Ibid.* Then the State attempted to try Ashe for robbing a second player. *Ibid.* The question was whether the Double Jeopardy Clause barred the second trial. Id. at 440-41.

The Supreme Court held yes. Id. at 447. The Court, however, did not base that holding on *autrefois acquit*, the common-law qualifications to that plea, **[**15]** or the original meaning of the Double Jeopardy Clause. Instead, the Court identified a collateral estoppel "ingredient" in that Clause. Id. at 442-44. The Court then held the State was collaterally estopped from alleging Ashe was one of the robbers because the first jury (1) returned an acquittal and (2) necessarily determined there was insufficient evidence to prove Ashe was one of the robbers. Id. at 445-47.

The Supreme Court therefore has made clear that *Ashe* has a different scope than the traditional protections of the Double Jeopardy Clause. "While . . . *Ashe*'s protections apply only to trials following acquittals, as a general rule, the Double Jeopardy Clause protects against a second prosecution for the same offense after conviction as well as against a second prosecution for the same offense after acquittal." Currier, 138 S. Ct. at 2150 (quotation omitted). That's why the Court called *Ashe* "a significant innovation." Id. at 2149. Indeed, *Ashe* itself recognized the distinction between its collateral-estoppel rule and the rules that applied "at common law." 397 U.S. at 445 n.10.

C.

In response to *Brown v. Allen*—along with its progeny such as *Ashe*—Congress enacted AEDPA. *See* Schriro v. Landrigan, 550 U.S. 465, 473, 127 S. Ct. 1933, 167 L. Ed. 2d 836 (2007) (noting AEDPA "changed the standards for granting federal habeas relief" from those in *Brown v. Allen*). As relevant here, **HN6**[↑] AEDPA

prohibits a prisoner from **[**16]** raising any claim in federal court unless it was first exhausted in state court. *See* 28 U.S.C. § 2254(b); O'Sullivan v. Boerckel, 526 U.S. 838, 839-40, 119 S. Ct. 1728, 144 L. Ed. 2d 1 (1999). After the state court adjudicates the claim, the prisoner must overcome "the relitigation bar imposed by AEDPA." Greene v. Fisher, 565 U.S. 34, 39, 132 S. Ct. 38, 181 L. Ed. 2d 336 (2011) (citing 28 U.S.C. § 2254(d)(1)). The statute thereby restores the *res judicata* rule Chief Justice Marshall recited in *Ex parte Watkins* and then modifies it. *See* Felker v. Turpin, 518 U.S. 651, 663-64, 116 S. Ct. 2333, 135 L. Ed. 2d 827 (1996) (comparing AEDPA's "modified res judicata rule" to *Watkins*).

HN7[] To overcome AEDPA's relitigation bar, a state prisoner must shoehorn his claim into one of its narrow exceptions. As relevant here, he must show the state court's adjudication of the claim "resulted in a decision that was [1] contrary to, or [2] involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).

HN8[] The first exception to the relitigation bar—the "contrary to" prong—is generally regarded as the narrower of the two. A state-court decision is "contrary to" clearly established federal law only if it "arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if" it resolves "a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." Terry Williams v. Taylor, 529 U.S. 362, 413, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000). Langley **[**17]** identifies no Supreme **[*156]** Court precedent that is "opposite to" or "materially indistinguishable" from this case. So here, as in most AEDPA cases, the "contrary to" prong does not apply.

HN9[] The only other exception to § 2254(d)(1)'s relitigation bar—the "unreasonable application" prong—is almost equally unforgiving. The Supreme Court has repeatedly held that it is not enough to show the state court was wrong. *See, e.g.*, Renico v. Lett, 559 U.S. 766, 773, 130 S. Ct. 1855, 176 L. Ed. 2d 678 (2010) ("[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." (quotation omitted)); Landrigan, 550 U.S. at 473 ("The question under AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable—a substantially higher threshold."). Rather, the relitigation bar forecloses relief unless the prisoner can show the state court was *so* wrong that the error was "well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Shoop v. Hill, 139 S. Ct. 504, 506, 202 L. Ed. 2d 461 (2019) (per curiam) (quotation omitted). In other words, the unreasonable-application exception asks whether it is "beyond the realm **[**18]** of possibility that a fairminded jurist could" agree with the state court. Woods v. Etherton, 136 S. Ct. 1149, 1152, 194 L. Ed. 2d 333 (2016) (per curiam); *see also* Sexton v. Beaudreaux, 138 S. Ct. 2555, 2558, 201 L. Ed. 2d 986 (2018) (per curiam) (asking "whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court" (quotation omitted)).

HN10[] Overcoming AEDPA's relitigation bar is necessary but not sufficient to win habeas relief. Even after overcoming the bar, the prisoner still must "show, on de novo review, that [he is] 'in custody in violation of the Constitution or laws or treaties of the United States.'" Salts v. Epps, 676 F.3d 468, 480 (5th Cir. 2012) (quoting 28 U.S.C. § 2254(a)); *see also* Berghuis v. Thompkins, 560 U.S. 370, 390, 130 S. Ct. 2250, 176 L. Ed. 2d 1098 (2010) ("[A] habeas petitioner will not be entitled to a writ of habeas corpus if his or her claim is rejected on *de novo* review [under] § 2254(a)."); Oral Argument at 13:30-13:59 (Langley's acknowledgement that overcoming AEDPA's relitigation bar is necessary but not sufficient to obtain habeas relief).

III.

Langley's claim fails under these demanding standards. We first explain that Langley cannot surmount AEDPA's relitigation bar. Then we explain that the most-on-point Supreme Court precedent supports the State, not Langley. Lastly, even if we set aside AEDPA's relitigation bar and review the claim *de novo*, Langley still cannot prove **[**19]** his second jury necessarily determined anything regarding his specific intent.

A.

1.

The first step in any case under AEDPA's relitigation bar is to determine the "clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). It is not enough to say, as the panel did, that the "*Ashe* doctrine" forms the relevant clearly established law, or that *Ashe* established the "governing principles." Langley, 890 F.3d at 516-18. The

Supreme Court has **[*157]** repeatedly reversed the courts of appeals for identifying the relevant clearly established law at that level of generality.

Take for example Carey v. Musladin, 549 U.S. 70, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006). In that case, the Ninth Circuit held California deprived the defendant of a fair trial by allowing a murder victim's family members to sit in the front row of a jury trial wearing buttons with the victim's photo. Musladin v. Lamarque, 427 F.3d 653, 654-55 (9th Cir. 2005). The Ninth Circuit identified the clearly established law as "the *Williams* test." Id. at 658. "The *Williams* test" referred to Estelle v. Williams, 425 U.S. 501, 503-06, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976), in which the Supreme Court held it would violate the defendant's fair trial rights to compel him to appear at trial in prison garb. In reversing the Ninth Circuit, the Supreme Court held the clearly established law relevant under AEDPA's relitigation bar is only the Supreme Court's **[**20]** holdings, not its dicta. Musladin, 549 U.S. at 74. Therefore, *Williams* clearly established the law *only* as applied to prison garb—it could not be extended under AEDPA to vitiate state judgments for spectators' buttons. Id. at 75-77. As the Supreme Court put it in a different but related context:

> We have repeatedly told courts . . . not to define clearly established law at a high level of generality. The dispositive question is whether the violative nature of particular conduct is clearly established. This inquiry must be undertaken in light of the specific context of the case, not as a broad general proposition.

Mullenix v. Luna, 136 S. Ct. 305, 308, 193 L. Ed. 2d 255 (2015) (per curiam) (quotations and emphasis omitted).

In this case, our now-vacated panel opinion conflated the Supreme Court's holding with its dicta in much the same way the Ninth Circuit did in *Musladin*. The *Ashe* Court had much to say about how or why collateral estoppel should apply in the criminal context—just as the *Williams* Court had much to say about how or why the State should not allow jurors to see unduly prejudicial things in the courtroom. But the holding in *Ashe*, like the holding in *Williams*, was narrower. **HN11**[] The *Ashe* Court held only that a general verdict of acquittal for insufficient evidence that "petitioner **[**21]** was . . . one of the robbers" precluded the State from "hal[ing] him before a new jury to litigate that issue again." 397 U.S. at 446; *see* Yeager v. United States, 557 U.S. 110, 119, 129 S. Ct. 2360, 174 L. Ed. 2d 78 (2009) (stating *Ashe* "held that the Double Jeopardy Clause precludes the Government from relitigating any issue that was necessarily decided by a jury's acquittal in a prior trial").

The Supreme Court has found issue preclusion under *Ashe* only three other times. *See* Turner v. Arkansas, 407 U.S. 366, 369-70, 92 S. Ct. 2096, 32 L. Ed. 2d 798 (1972) (per curiam); Harris v. Washington, 404 U.S. 55, 57, 92 S. Ct. 183, 30 L. Ed. 2d 212 (1971) (per curiam); Simpson v. Florida, 403 U.S. 384, 386, 91 S. Ct. 1801, 29 L. Ed. 2d 549 (1971) (per curiam).[4] *Turner, Harris*, *Simpson*, and *Ashe* all involved blanket acquittals. *See* Turner, 407 U.S. at 367 (noting jury returned "a general verdict of acquittal"); Harris, 404 U.S. at 55 (noting defendant "was acquitted by a jury" on a single **[*158]** charge); Simpson, 403 U.S. at 384-85 (noting jury returned a "general" verdict of acquittal); Ashe, 397 U.S. at 439 (noting jury returned one general verdict of acquittal: "not guilty due to insufficient evidence"). None of the four juries convicted the defendant of the charged crime.

Therefore, none of these cases held issue-preclusion principles apply to a conviction. We asked the parties to identify any case extending *Ashe* to cases involving a conviction. The parties could not find a single Supreme Court case even hinting at that result. That's unsurprising. As the Supreme Court recently acknowledged, "*Ashe*'s protections apply *only* to **[**22]** trials following *acquittals*." Currier, 138 S. Ct. at 2150 (emphases added). Thus, 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.

2.

HN12[] After identifying the clearly established law, we move to step two—determining whether the state court decision "involved an unreasonable application of" that law. 28 U.S.C. § 2254(d)(1). To make this determination, we must ask whether any fairminded jurist could believe the "clearly established rule" does not apply to the "set of facts" at hand. White v. Woodall, 572 U.S. 415, 427, 134 S. Ct. 1697, 188 L. Ed. 2d 698 (2014). "If such disagreement is possible, then the petitioner's claim must be denied." Beaudreaux, 138 S. Ct. at 2558.

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[4] In *Yeager*, the Court concluded "that acquittals can preclude retrial on counts on which the same jury hangs." 557 U.S. at 125. The Court, however, did not find *Ashe* issue preclusion because it remanded the issue of "what the jury necessarily decided in its acquittals." Id. at 125-26.

Langley loses at this step. A fairminded jurist could conclude the rule clearly established in *Ashe* does not apply to a conviction rather than a general acquittal. When a jury issues a general acquittal, it necessarily determines *at least something* in the defendant's favor. It might be possible to identify that something and preclude the government from submitting it to a second jury. That task is obviously different—and more difficult—when the jury convicts the defendant on at least one count. In the face of a conviction on one count, it is **[**23]** not clear which issues *if any* the jury determined in the defendant's favor on that same count.[5]

[*159] We may or may not find this distinction persuasive. That's irrelevant. What matters is the last reasoned *state court* decision found it persuasive. *See* Langley IV, 61 So. 3d at 757-58 (last reasoned state court decision); Wilson v. Sellers, 138 S. Ct. 1188, 1192, 200 L. Ed. 2d 530 (2018) (requiring deference to that decision if reasonable). The state court recognized *Ashe*'s applicability to a "general acquittal." Langley IV, 61 So. 3d at 757 (citing Ashe, 397 U.S. at 444). By contrast, where the jury returns a *conviction* on "a lesser included offense," the state court found it's "not always possible to determine" which issues if any should be precluded under *Ashe. Ibid.* The state court found it "possible" the jury made one of three determinations: (1) Langley was guilty of specific-intent murder, (2) Langley was guilty of something less than specific-intent murder, or (3) the jury avoided the specific-intent issue by rendering a "compromise verdict." *Ibid.* In the state court's view, Langley's argument that the jury found (2) to the exclusion of (1) and (3) was "clearly . . . unsupported." Id. at 758.

Even if we thought the state court committed "clear error" by so holding, we still could not grant relief. Woodall, 572 U.S. at 419. After all, **[**24]** HN13[↑] 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. And Supreme Court precedent *does* mandate caution in finding *Ashe* issue preclusion where the jury could have rendered a "compromise" or "lenity" verdict. *See* United States v. Powell, 469 U.S. 57, 65-66, 105 S. Ct. 471, 83 L. Ed. 2d 461 (1984); Standefer v. United States, 447 U.S. 10, 22-23, 100 S. Ct. 1999, 64 L. Ed. 2d 689 (1980); *accord* Bravo-Fernandez v. United States, 137 S. Ct. 352, 363-64, 196 L. Ed. 2d 242 (2016) (noting "the jurors in this case might not have acquitted on [certain] counts absent their belief that the . . . convictions [on other counts] would stand"). Therefore, a fairminded jurist could find that *Ashe*'s rule regarding general acquittals does not require issue preclusion for Langley's conviction. Under AEDPA, that's the end of the matter. *See* Woodall, 572 U.S. at 419-20.

In the past, some federal courts mistakenly thought it was only the beginning. The Sixth Circuit, for example, faulted a state court for "unreasonably refus[ing] to extend" a Supreme Court precedent "to a new context where [the Sixth Circuit thought] it should apply." Woodall v. Simpson, 685 F.3d 574, 579 (6th Cir. 2012) (quoting Terry Williams, 529 U.S. at 407). The Supreme Court emphatically reversed. The Court emphasized it "has never adopted the unreasonable-refusal-to-extend rule . . . . It has not been so much as endorsed in a majority opinion, **[**25]** let alone relied on as a basis for granting habeas relief." Woodall, 572 U.S. at 426; *see also ibid.* (holding "we reject it"). That result is compelled by the text of the relitigation bar itself: "Section 2254(d)(1) provides a remedy for instances in which a state court unreasonably *applies* [the Supreme] Court's

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[5] The dissenters dispute this by confusing it. Imagine a two-count indictment (X and Y), where Y is a lesser-included offense of X. It is well settled that a conviction on Y bars retrial on X. *See* Price v. Georgia, 398 U.S. 323, 329, 90 S. Ct. 1757, 26 L. Ed. 2d 300 (1970) (explaining the petitioner could be retried "for voluntary manslaughter after his first conviction for that offense had been reversed," but the Double Jeopardy Clause precluded retrial on the greater charge of murder regardless of "whether that acquittal is express or implied by a conviction on a lesser included offense when the jury was given a full opportunity to return a verdict on the greater charge" (footnote omitted)); Green v. United States, 355 U.S. 184, 190-91, 78 S. Ct. 221, 2 L. Ed. 2d 199, 77 Ohio Law Abs. 202 (1957) (concluding petitioner could not be retried for first-degree murder after jury convicted him of second-degree murder). The Supreme Court has held this result is commanded by the Double Jeopardy Clause's "historic core" protection, which applies to offenses, not issues. *See* Currier, 138 S. Ct. at 2150. It is undisputed the Louisiana Supreme Court correctly applied this principle here by holding the second jury's conviction on the lesser-included offense (Y, second-degree murder) barred Louisiana from retrying Langley for the greater offense (X, first-degree murder). *See* Langley III, 958 So. 2d at 1170 (so holding). The dispute in this case is whether a conviction on *Y* can create *issue* preclusion on *Y*. The dissenters' steadfast focus on X—which no one disputes and which has never been a part of this federal habeas proceeding—is tantamount to tilting at a windmill. *See post* at 61 (Higginson, J., dissenting) (arguing it's "dangerous[]" to suggest Langley could be retried on X, even though everyone agrees Langley cannot be retried on X).

precedent; it does not require state courts to *extend* that precedent or license federal courts to treat the failure to do so as error." *Ibid.* To the contrary:

> "[I]f a habeas court must extend a rationale before it can apply to the facts at hand," then by definition the rationale was not "clearly established at the time of the state-court decision." AEDPA's carefully constructed framework "would be undermined if habeas courts introduced rules not clearly established under the guise of extensions to existing law."

[*160] *Ibid.* (quoting Yarborough v. Alvarado, 541 U.S. 652, 666, 124 S. Ct. 2140, 158 L. Ed. 2d 938 (2004)).

Because a fairminded jurist could decide the clearly established rule does not cover this case, we'd have to extend *Ashe* to grant relief here. That is something AEDPA says we cannot do. *See, e.g.,* Woods v. Donald, 135 S. Ct. 1372, 1377, 191 L. Ed. 2d 464 (2015) (per curiam) ("Because none of our cases confront the specific question presented by this case, the state court's decision could not be 'contrary to' any holding from this Court," nor an "unreasonable **[**26]** application" thereof. (quotation omitted)); Woodall, 572 U.S. at 427 ("Perhaps the logical next step from [three previous Supreme Court cases] would be to hold that the Fifth Amendment requires a penalty-phase no-adverse-inference instruction in a case like this one; perhaps not. Either way, we have not yet taken that step, and there are reasonable arguments on both sides—which is all Kentucky needs to prevail in this AEDPA case."); Knowles v. Mirzayance, 556 U.S. 111, 122, 129 S. Ct. 1411, 173 L. Ed. 2d 251 (2009) ("[T]his Court has held on numerous occasions that it is not 'an unreasonable application of' 'clearly established Federal law' for a state court to decline to apply a specific legal rule that has not been squarely established by this Court."); *accord* Teague v. Lane, 489 U.S. 288, 299-310, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989) (plurality opinion) (holding federal courts may not develop—and habeas petitioners may not seek—new legal rules on collateral review). As far as we can tell, the only other court of appeals to address this question agrees with us. *See* Owens v. Trammell, 792 F.3d 1234, 1246-50 (10th Cir. 2015) (holding AEDPA precluded awarding habeas relief based on *Ashe* following a conviction).[6]

B.

1.

Extending *Ashe* in these circumstances would also conflict with other clearly established law. That's because the Supreme Court has confronted similar facts before and rejected **[**27]** the prisoner's Double Jeopardy claim. *See* Schiro v. Farley, 510 U.S. 222, 114 S. Ct. 783, 127 L. Ed. 2d 47 (1994). If anything, *Schiro* was a harder case.

The jury convicted Schiro of felony murder (count II) but did not return a verdict on intentional murder (count I). *Id.* at 225-26. "Thereafter, in a separate sentencing hearing, the same jury unanimously concluded that Schiro did not deserve the death penalty, presumably because he had not intended to kill." *Id.* at 239 (Stevens, J., dissenting) (footnote omitted). And that presumption appeared well grounded because "[t]he principal issue at trial was Schiro's mental condition." *Id.* at 240; *see also ibid.* ("No one disputed that he had **[*161]** caused his victim's death, but intent remained at issue in other ways. Five expert witnesses—two employed by the State, one selected by the court, and two called by the defense—testified at length about Schiro's unusual personality, his drug and alcohol addiction, and his history of mental illness." (citations omitted)). Moreover, both the jury instructions and Indiana state law permitted the jurors to return a guilty verdict on every count on which they had unanimity—which could imply the jury intended to acquit the defendant on each count they failed to return (like count I, intentional murder). *See* *id.* at 233-34 (majority **[**28]** opinion); *id.* at 246-47 (Stevens, J., dissenting) (arguing jury's failure to return a verdict on intentional murder implicitly acquitted on that count). Nonetheless, the State argued Schiro's intent was an aggravating factor that justified the court in sentencing him to death. The Supreme Court held the jurors' failure to return a verdict on intentional murder did *not* collaterally estop the State

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[6] The dissenters appear to recognize that Louisiana's courts have no obligation to *extend* Supreme Court precedent but paradoxically fault the state court for *following* that precedent. *See post* at 63-64 (Costa, J., dissenting). They suggest Louisiana violated the Constitution by allowing Langley to waive his right to a third jury trial after losing the first two. That is obviously wrong: The Supreme Court "hold[s] no constitutional doubts about the practice[], common in both federal and state courts, of accepting waivers of jury trial[s]." Duncan v. Louisiana, 391 U.S. 145, 158, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968). But even if *arguendo* the dissenters were right about the jury-trial right, AEDPA still would foreclose relief. If AEDPA protects a state court decision refusing to *extend* Supreme Court precedent, it certainly protects a state court decision refusing to *contradict* that precedent.

from so arguing. *Id. at 232-36* (majority opinion); *see also Sattazahn v. Pennsylvania, 537 U.S. 101, 113-15, 123 S. Ct. 732, 154 L. Ed. 2d 588 (2003)* (holding the *Double Jeopardy Clause* does not bar reprosecution for capital murder after prisoner successfully appeals judgment for life sentence).[7]

Louisiana law makes this case easier than *Schiro*. ***HN14***[↑] Under Louisiana law, "the jury must be given the option to convict the defendant of the lesser offense, even though the evidence clearly and overwhelmingly supported a conviction of the charged offense." *State v. Porter, 639 So. 2d 1137, 1140 (La. 1994)*. And the jury was given that option. The *Langley II* jury was repeatedly told—orally and in writing—that "[t]he responsive lesser offenses to the charge of First Degree Murder are Second Degree Murder and Manslaughter." Neither the dissenters nor Langley's able appellate attorney has ever disputed that the evidence supported every element of the first-degree **[**29]** murder count against Langley, including specific intent. And a rational jury could have credited that overwhelming evidence and *still*—in accordance with the instructions and the law—returned a verdict for the lesser-included offense of second-degree specific-intent murder.

As far as the *Schiro* opinion reveals, the jury in that case received no such option. To the contrary, Indiana law at least arguably required Schiro's jury to return a verdict on count I (intentional murder) if they agreed the State proved it. *See 510 U.S. at 240-42* (Stevens, J., dissenting). And to the extent Schiro's jury instructions were ambiguous on that score, Langley's were even more so. *See infra* at 35-36. If the jury's failure to return a verdict on intentional murder did not trigger collateral estoppel in *Schiro*, it certainly does not do so here.

Finally, it bears emphasis that *Schiro* was a pre-*AEDPA* death-penalty case. Even after Schiro's jury potentially acquitted him of intentional murder by returning only a verdict of felony murder, the trial judge rejected the jury's recommended sentence and held the State proved intent beyond a reasonable doubt for purposes of sentencing the defendant to death. *Id. at 226-27* (majority opinion). **[*162]** The Supreme Court **[**30]** upheld that result even without *AEDPA's* relitigation bar.

In contrast, Langley's jury did not return a verdict of felony murder. It returned a verdict of "second-degree murder," which could mean Langley was convicted of specific-intent murder *or* felony murder. Langley also faces the additional burden of *AEDPA*. If Indiana could prevail in *Schiro*, then Louisiana must prevail on easier facts and a much more favorable legal standard. *See Alvarado, 541 U.S. at 664*.

2.

At the *en banc* argument, Langley suggested it matters whether the state court (or the state's lawyer at the panel stage) cited *Schiro*. It doesn't. ***HN15***[↑] Federal courts must apply *§ 2254(d)* in light of controlling Supreme Court holdings regardless of whether the state court or the state's lawyer cites them.

First, it doesn't matter whether the state court cited *Schiro*. The Ninth Circuit once refused to apply *AEDPA's* relitigation bar because "the state court 'failed to cite . . . any federal law, much less the controlling Supreme Court precedents.'" *Early v. Packer, 537 U.S. 3, 8, 123 S. Ct. 362, 154 L. Ed. 2d 263 (2002)* (per curiam) (alteration in original) (quoting *Packer v. Hill, 291 F.3d 569, 578 (9th Cir. 2002)*). The Supreme Court unanimously and summarily reversed: ***HN16***[↑] "Avoiding [vitiation of a state judgment in federal court] does not require citation of our cases—indeed, it does not **[**31]** even require *awareness* of our cases, so long as neither the reasoning nor the result of the state-court decision contradicts them." *Ibid.; see also Mitchell v. Esparza, 540 U.S. 12, 16, 124 S. Ct. 7, 157 L. Ed. 2d 263 (2003)* (per curiam).

Second, it also doesn't matter whether the State's panel-stage appellate lawyer cited *Schiro*. The relitigation bar constrains our ability to award habeas relief regardless of what counsel cites or does not cite. *See 28 U.S.C. § 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 [unless statutory exceptions are satisfied]." (emphasis added)). Every court of appeals to consider the question—including ours—has held ***HN17***[↑] a State's lawyers cannot waive or forfeit *§ 2254(d)*'s standard.[8] That likewise **[*163]** means a

[7] The principal dissent says *Schiro* is distinguishable because it involved a single (albeit bifurcated) trial as opposed to two successive trials. *Post* at 58 (Higginson, J., dissenting). That's irrelevant. The Supreme Court assumed *Ashe* applied identically in both circumstances and then held Schiro's *Ashe* claim failed. *See Schiro, 510 U.S. at 232*. The *Schiro* Court's pure *Ashe* holding is fully applicable here.

[8] *See Winfield v. Dorethy, 871 F.3d 555, 560-63 (7th Cir. 2017)* (holding State's lawyer cannot waive applicability of

State's lawyers cannot waive or forfeit the applicable "clearly established law." *See, e.g.,* Thompson v. Runnels, 705 F.3d 1089, 1097-1100 (9th Cir. 2013); BRYAN R. MEANS, FEDERAL HABEAS MANUAL § 3:97 (2019). *Schiro* rejected a stronger Double Jeopardy claim under harder facts and without the added hurdle of § 2254(d)'s relitigation bar. *Schiro* thus provides an independent basis for denying Langley's claim.

Wilson v. Sellers is not to the contrary. *Wilson* requires us to "look through" to the last reasoned state court decision and apply AEDPA's relitigation bar to it. 138 S. Ct. at 1192; *see* supra Part III.A.2 (doing so). But *Wilson* does not purport to overrule *Packer* or *Esparza*. Nor does *Wilson* say the state court must cite a Supreme Court decision to trigger AEDPA's strictures. *See* Meders v. Warden, Ga. Diagnostic Prison, 911 F.3d 1335, 1350 (11th Cir. 2019) (explaining *Wilson* "was not about the specificity or thoroughness with which state courts must spell out their reasoning to be entitled to AEDPA deference"); Hebert v. Rogers, 890 F.3d 213, 221 (5th Cir. 2018) (explaining "the brevity of a state court's opinion is immaterial" and noting "a state court's decision does not need to be thorough or directly address [the] Supreme Court's cases").

Here, as in Schiro, the last-reasoned state court decision held the prisoner failed to prove the jury necessarily determined the specific-intent issue in his favor. *Compare* Schiro, 510 U.S. at 232-36, *with* Langley IV, 61 So. 3d at 757-58. *Schiro* thus illustrates that the last-reasoned state court decision was a reasonable application of Supreme Court precedent, including some holdings the state court did not cite. Nothing in AEDPA, *Wilson*, or any other relevant authority requires the state court to cite *Schiro*—or any other specific **[**33]** Supreme Court case—to insulate its decision from vitiation in federal court. **HN18**[↑] *Wilson* likewise does not prohibit this Court from considering Supreme Court cases not cited when evaluating the reasonableness of the state court's reasoning. Indeed, we are often compelled to do so to determine "clearly established Federal law." 28 U.S.C. § 2254(d)(1).

C.

The principal dissent takes issue with our application of AEDPA. Even if the dissent's arguments were well taken and AEDPA's relitigation bar did not apply, Langley would not automatically be entitled to habeas relief. Instead, he would still need to show—under a *de novo* review standard—"that he is in custody in violation of the Constitution . . . of the United States." 28 U.S.C. § 2254(a); *see* Thompkins, 560 U.S. at 390; Salts, 676 F.3d at 480. Langley cannot do so because he cannot prove the *Langley II* judgment triggered collateral estoppel of the specific-intent issue.

1.

Collateral estoppel—or, as we call it today, issue preclusion—originates in the law of civil judgments. *See, e.g.,* Cromwell v. County of Sac, 94 U.S. 351, 354, 24 L. Ed. 195 (1876). As with other preclusion doctrines (like *res judicata*), the idea is that an issue definitively settled once is "forever settled as between the parties." Baldwin v. Iowa State Traveling Men's Ass'n, 283 U.S. 522, 525, 51 S. Ct. 517, 75 L. Ed. 1244 (1931); *see also* DAVID L. SHAPIRO, CIVIL PROCEDURE: PRECLUSION IN CIVIL ACTIONS 48 (2001) ("[A]n **[**34]** issue once decided is settled, at least as between the parties.").

[*164] In civil cases, the Supreme Court "regularly turns to the Restatement (Second) of Judgments for a statement of the ordinary elements of issue preclusion." B&B Hardware, Inc. v. Hargis Indus., Inc., 135 S. Ct. 1293, 1303, 191 L. Ed. 2d 222 (2015). Under the Restatement, in turn, a civil judgment can generate issue preclusion if *and only if* it meets certain essential prerequisites. *See* Restatement (Second) of Judgments

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AEDPA and emphasizing "the general principle that waiver does not apply to arguments regarding the applicable standard of review"), *cert. denied*, ***138 S. Ct. 2003, 201 L. Ed. 2d 262 (2018)***; Wilson v. Mazzuca, 570 F.3d 490, 500 (2d Cir. 2009) ("The standard of review set forth in AEDPA is not conditional. It is stated in mandatory terms—habeas relief 'shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings.'" (emphases omitted) (quoting 28 U.S.C. § 2254(d))); Gardner v. Galetka, 568 F.3d 862, 879 (10th Cir. 2009) ("[T]he correct standard of review under AEDPA is not waivable. It is, unlike exhaustion, an unavoidable legal question we must ask, and answer, in every case."); Brown v. Smith, 551 F.3d 424, 428 n.2 (6th Cir. 2008) (holding "a party cannot 'waive' the proper standard of review [under AEDPA] by failing to argue it"), *abrogated on other grounds,* Cullen v. Pinholster, 563 U.S. 170, 131 S. Ct. 1388, 179 L. Ed. 2d 557 (2011); Valdez v. Cockrell, 274 F.3d 941, 950 (5th Cir. 2001) ("The word 'shall' is mandatory in meaning. Thus, we lack discretion as to the operation of this section." (citation omitted)). One court—the Ninth Circuit—stepped out of line, and it was GVR'd by the Supreme Court. *See* James v. Ryan, 679 F.3d 780, 802 (9th Cir. 2012) (finding waiver of argument that state courts adjudicated the ineffective assistance of counsel claims on the merits and that AEDPA's relitigation bar thus applied to them), *cert. granted,* ***[**32]*** *judgment vacated, and remanded by* ***Ryan v. James, 568 U.S. 1224, 133 S. Ct. 1579, 185 L. Ed. 2d 572 (2013)***.

§ 27 (Am. Law Inst. 1982). Three of those prerequisites are relevant here: (a) The issue must be "actually . . . determined" by the judgment, (b) the issue must be "essential to the judgment," and (c) the judgment must be "valid and final." *Ibid.*

In civil cases, the availability of appellate review of the judgment in the first case is particularly important to its issue-preclusive effect in a second case. *See id.* § 28. That's because, as noted above, a civil judgment generates issue preclusion only when it's "valid and final." And the "valid[ity]" of a judgment is suspect if it cannot be reviewed. Therefore, the Restatement concludes, "the availability of review for the correction of errors has become critical to the application of preclusion doctrine." *Id.* § 28 cmt. a; *see also* Bravo-Fernandez, 137 S. Ct. at 358 ("In civil litigation, where issue preclusion and its ramifications **[**35]** first developed, the availability of appellate review is a key factor."). Correlatively, once a civil judgment is reversed on appeal, it's obviously no longer "valid" and retains *zero* preclusive effect. *See* Restatement (Second) of Judgments § 27 cmt. o; 18A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4432 (3d ed. 2018) [hereinafter WRIGHT & MILLER] ("Reversal and remand for further proceedings on the entire case defeats preclusion entirely until a new final judgment is entered by the trial court or the initial judgment is restored by further appellate proceedings.").

The principal reason issue preclusion is narrower in criminal cases than in civil ones is the limited availability of appellate review for the former. Criminal issue preclusion attaches to a general verdict of acquittal, and "the Government is precluded from appealing or otherwise upsetting such an acquittal by the Constitution's Double Jeopardy Clause." Powell, 469 U.S. at 65. This "absence of appellate review of acquittals . . . calls for guarded application of preclusion doctrine in criminal cases." Bravo-Fernandez, 137 S. Ct. at 358; *see also* Currier, 138 S. Ct. at 2152 (plurality opinion) ("We think that caution remains sound.").

Take for example *Standefer*. In that case, the defendant was indicted for bribing an IRS official. 447 U.S. at 11. While that indictment was pending, the **[**36]** IRS official was acquitted of accepting three bribes from Standefer. Id. at 12-13. Standefer argued the IRS official's acquittal should trigger nonmutual collateral estoppel against the government's prosecution of Standefer. Id. at 13-14, 21-22. The Supreme Court rejected that argument because the government did not have a full and fair opportunity to litigate the acquittal of the IRS agent. Id. at 22. For example, the government could not seek a new trial because the acquittal is contrary to the evidence, nor could it appeal the acquittal. The Supreme Court explained:

> The absence of these remedial procedures in criminal cases permits juries to acquit out of compassion or compromise or because of their assumption of a power which they had no right to exercise, but to which they were disposed through lenity. It is of course true that verdicts induced by passion and prejudice are not **[*165]** unknown in civil suits. But in civil cases, post-trial motions and appellate review provide an aggrieved litigant a remedy; in a criminal case the Government has no similar avenue to correct errors. Under contemporary principles of collateral estoppel, this factor strongly militates against giving an acquittal preclusive effect.

Id. at 22-23 (quotations and **[**37]** citations omitted). Time and again—from Powell and Standefer to Currier and Bravo-Fernandez—the Supreme Court has repeatedly admonished lower courts to carefully apply issue preclusion in criminal cases.

2.

Our now-vacated panel opinion misapplied these principles. It ignored the Supreme Court's admonition regarding "guarded application of preclusion doctrine in criminal cases." Bravo-Fernandez, 137 S. Ct. at 358. In its place, the panel substituted a rigid logic game, complete with numbered "conditions" that could be "fulfilled" or negated according to "the rules of logic." 890 F.3d at 519-20. That not only contravenes the Supreme Court's warnings in cases like *Currier, Bravo-Fernandez*, *Standefer*, and *Powell*, but it also contravenes *Ashe* itself. *Ashe* emphasized "the rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality." 397 U.S. at 444.

Under a proper understanding of collateral estoppel principles, Langley cannot demonstrate *Langley II* precluded the specific-intent issue. That's for three reasons.

First, Langley cannot prove the jury "actually determined" the issue of specific intent even under the (broader) rules of civil judgments. **[**38]** *See* Restatement (Second) of Judgments § 27 (one prerequisite of preclusion is the issue was "actually . . .

determined" in the first civil action); SHAPIRO, *supra*, at 48 ("[T]he first precondition for the application of issue preclusion [is] that the issue have been 'actually litigated and determined' . . . in the prior action."). Here is what the *Langley II* jury actually determined:

> 2. MAY 16, 2003
> 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.
> [TEXT REDACTED BY THE COURT]
> REPRESENTATIVE

We presume the jury followed its instructions in rendering this verdict. *See, e.g.,* Turner, 407 U.S. at 369.

We turn then to the jury instructions. The judge orally instructed the jury it *could* premise its second-degree murder conviction on a finding of specific intent. During its deliberations, the jury sent a note asking for "the instruction sheet" on "specific intent" (among other things). The judge provided the jury with written instructions that again told the jury it *could* convict Langley of second-degree murder based on specific intent. Langley never objected to any of this at trial. To the contrary, counsel for the State and the **[*166]** defense had a colloquy with the trial judge over **[**39]** this exact instruction. And everyone agreed the jury should be instructed on second-degree specific-intent murder. Then at oral argument before our *en banc* Court, Langley's counsel conceded the jury was given the option of returning a legally valid conviction of second-degree specific-intent murder. *See* Oral Argument at 9:08-9:29.

We are aware of no case from any court that would allow us to infer a jury "irrationally" chose a concededly valid option offered in the instructions. It was therefore wrong to hold, as the panel did, that no "rational jury could have convicted Langley of specific intent second degree murder." Langley, 890 F.3d at 521 (quotation and alteration omitted). Under *de novo* review, we hold the state court was objectively correct to find "[i]t is possible that the jury convicted the defendant of specific intent second degree murder." Langley IV, 61 So. 3d at 757. Langley therefore cannot prove the jury "actually determined" the issue of specific intent in his favor.

Second, and for similar reasons, Langley cannot prove the issue of specific intent was "necessary" or "essential to the judgment" even under the (broader) civil preclusion rules. *See* Restatement (Second) of Judgments § 27 (one prerequisite of preclusion is the issue was "essential to the judgment"); **[**40]** SHAPIRO, *supra*, at 50 (same). Under Louisiana law, a jury can find a defendant overwhelmingly guilty of first-degree murder and *still* choose to convict of second-degree murder. *See* Porter, 639 So. 2d at 1140; La. Code Crim. Proc. Ann. art. 814(A)(1) (responsive verdicts to "First Degree Murder" include "Guilty of second degree murder"). In accordance with this law, the jury was repeatedly instructed it could find every element of first-degree murder—including specific intent—and still choose to return a verdict of second-degree murder. The jury also was instructed it could convict of second-degree murder without finding specific intent. That means the jury could return its lawful second-degree murder conviction after (a) finding specific intent, (b) finding no specific intent, or (c) declining to consider the question of specific intent. To infer why the *Langley II* jury convicted him only on second-degree murder "would require speculation into what transpired in the jury room," and would require us to "scrutinize" the jury's "failures to decide" rather than its actual decision. Yeager, 557 U.S. at 122. We cannot do that. The existence of three possibilities for the actual verdict means the issue of specific intent was not essential to the judgment. And since there could be no preclusion even **[**41]** under the broader civil preclusion rules, there certainly can be no issue preclusion under *Ashe*. Again, the state court's judgment would survive *de novo* review. *See* Langley IV, 61 So. 3d at 758.

Moreover, the instructions gave the jury a rational reason not to decide the issue. If the jury wanted to reconvene for a punishment hearing to sentence Langley to death, it would have to confront the specific-intent issue, find it, and convict him of first-degree murder. But if the jury chose second-degree murder, it could convict without deciding the specific-intent issue, avoid a separate sentencing hearing, and ensure Langley would spend the rest of his life behind bars. The jury instructions were explicit to that effect: "Whoever commits the crime of Second Degree Murder shall be punished by life imprisonment at hard labor without the benefit of probation, parole, or suspension of sentence." And Langley's lawyer used these instructions to plead for the jury's mercy. The record suggests the jury might've chosen **[*167]** second-degree murder for precisely this reason. *See Langley II* Sentencing Tr. at 15-16 (May 22, 2003). The state court therefore was objectively correct to conclude the jury could have avoided deciding the specific-intent **[**42]** issue by

reaching a "compromise verdict" that sentenced Langley to life in prison. *Langley IV, 61 So. 3d at 757*.[9]

Third and finally, Langley cannot prove the issue of specific intent was decided in a "valid and final" judgment even under the (broader) civil preclusion rules. *See* *Restatement (Second) of Judgments § 27* (one prerequisite of preclusion is the issue was decided in a "valid and final" civil judgment); SHAPIRO, *supra*, at 29 ("In addition to the requirement of 'validity,' a judgment must be 'final' to be entitled to recognition."). When a judgment is partially reversed on appeal, "[t]here is no preclusion as to the matters vacated or reversed." 18A WRIGHT & MILLER, *supra*, § 4432; *cf.* *Aguillard v. McGowen, 207 F.3d 226, 229 (5th Cir. 2000)* ("A conviction overturned on appeal cannot constitute a final judgment for purposes of collateral estoppel."). And the preclusive effect of the remainder of the judgment "is controlled by the actual appellate disposition." 18A WRIGHT & MILLER, *supra*, § 4432.

Here, the Louisiana intermediate appellate court reversed the *Langley II* judgment and remanded for retrial on everything. *See* *Langley II, 896 So. 2d at 212*. The Louisiana Supreme Court agreed the "trial error require[d] a reversal of Langley's conviction and sentence," but held, under Louisiana law, the jury's conviction for the lesser-included offense of second-degree murder precluded retrying Langley for the **[**43]** greater offense of first-degree murder. *See* *Langley III, 958 So. 2d at 1170* (citing *La. Code Crim. Proc. Ann. art. 598(A)*). That was the entirety of its preclusion decision; it remanded everything else for retrial. *See* *id. at 1171*. This "actual appellate disposition" means, even under the ordinary rules applicable to civil judgments, the State would not be issue-precluded from retrying Langley for second-degree specific-intent murder. 18A WRIGHT & MILLER, *supra*, § 4432. And we know one thing with confidence: The *Double Jeopardy Clause*'s issue-preclusion ingredient cannot sweep more broadly than the equitable doctrine that has governed civil cases for centuries. *See* *Bravo-Fernandez, 137 S. Ct. at 357-58*.[10]

[*168] 3.

The dissenters offer four responses to our *de novo* rejection of Langley's claim. The first is confusing. The second is imaginary. The third is irrelevant. And the fourth is unfortunate.

First, the confusion: The dissenters excoriate our reliance on the Restatement (Second) of Judgments as somehow constituting a "doctrinal innovation" in issue-preclusion law. *See, e.g., post* at 45, 59 (Higginson, J., dissenting). But as noted above, the Supreme Court itself "regularly turns to the Restatement (Second) of Judgments **[**44]** for a statement of the ordinary elements of issue preclusion." *B&B Hardware, 135 S. Ct. at 1303*; *see also, e.g., Herrera v. Wyoming, 139 S. Ct. 1686, 203 L. Ed. 2d 846, 2019 WL 2166394, at *7 (2019)*; *203 L. Ed. 2d 846, id. at *16-20* (Alito, J., dissenting); *Kircher v. Putnam Funds Tr., 547 U.S. 633, 646-47, 126 S. Ct. 2145, 165 L. Ed. 2d 92 (2006)*; *New Hampshire v. Maine, 532 U.S. 742, 748-49, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001)*; *Arizona v. California, 530 U.S. 392, 414, 120 S. Ct. 2304, 147 L. Ed. 2d 374*

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[9] This possibility makes the panel's grant of habeas relief all the more untenable. The point of the preclusion doctrines is to protect verdicts against collateral attacks by "multiple lawsuits" and to enforce "repose." *Montana v. United States, 440 U.S. 147, 153-54, 163, 99 S. Ct. 970, 59 L. Ed. 2d 210 (1979)*. That means "a losing litigant deserves no rematch after a defeat fairly suffered." *Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 107, 111 S. Ct. 2166, 115 L. Ed. 2d 96 (1991)*. It would be the height of irony for Langley to convince the jury to choose second-degree murder so he could spend the rest of his life in jail—only to demand a rematch on the basis of issue preclusion, collaterally attack the conviction, and walk free. And whatever else might be said about treating the jury like a pawn in this way, it hardly respects "the fundamental role of juries." *Post* at 63 (Costa, J., dissenting).

[10] This is not to say the *Langley II* judgment "could have no preclusive effect on the [*Langley III* trial]." *Post* at 61 (Higginson, J., dissenting); *see also id.* at 46 (arguing our "Restatement-based analysis sows doubt that any part of the [*Langley II*] verdict was a valid final judgment"); *post* at 64-65 (Costa, J., dissenting) (similar). The Louisiana Supreme Court held the *Langley II* conviction for second-degree murder barred retrial for the greater offense of first-degree murder. *See* *Langley III, 958 So. 2d at 1169-70* (citing, *inter alia, Green, 355 U.S. at 188, 193)*. We sow no doubt about that, as we've already explained. *See supra* n.5. The U.S. Supreme Court has repeatedly reminded us, however, that offense preclusion under *Green* and issue preclusion under *Ashe* are different. *See, e.g., Currier, 138 S. Ct. at 2150*. We agree with the state court that *Langley II* does not trigger *Ashe* issue preclusion. This case no more threatens the "unassailable" finality of *Langley II* than do other cases to which *Ashe* does not apply. *See, e.g., Sattazahn, 537 U.S. at 113-15* (holding finality concerns do not bar second prosecution for capital murder even after first trial yielded judgment of life imprisonment).

(2000); Baker v. Gen. Motors Corp., 522 U.S. 222, 233 n.5, 118 S. Ct. 657, 139 L. Ed. 2d 580 (1998); United States v. Stauffer Chem. Co., 464 U.S. 165, 171, 104 S. Ct. 575, 78 L. Ed. 2d 388 (1984); Montana v. United States, 440 U.S. 147, 153-54, 99 S. Ct. 970, 59 L. Ed. 2d 210 (1979). Unsurprisingly, the Supreme Court also relies on the Restatement to determine the bounds of *Ashe* issue preclusion. *See, e.g.,* Bravo-Fernandez, 137 S. Ct. at 357-58; Bobby v. Bies, 556 U.S. 825, 834, 837, 129 S. Ct. 2145, 173 L. Ed. 2d 1173 (2009). There is nothing remotely "innovati[ve]" about our reliance on the Restatement here. *Post* at 59 (Higginson, J., dissenting).[11]

Equally baffling is the dissenters' concern over whether the state courts relied on the Restatement. *E.g., post* at 45 (Higginson, J., dissenting). Under AEDPA's relitigation bar, the state court's reasoning can matter. *See, e.g.,* Wilson, 138 S. Ct. at 1191-92. But we're not discussing the Restatement to determine whether the relitigation bar protects the state court's judgment. We're discussing it to hold that—even without the bar—the state court was correct under *de novo* review to find no issue preclusion. Supreme Court precedents (and our own) specifically authorize us to deny a state prisoner's habeas claim under either the relitigation bar or *de novo* review. *See* Thompkins, 560 U.S. at 390; Mirzayance, 556 U.S. at 123-24; Salts, 676 F.3d at 480. We previously discussed the former; here we're discussing the latter. The dissenters appear confused over which standard applies where.

Their second response **[**45]** is imaginary. The dissenters posit a hypothetical jury trial **[*169]** with instructions that were never actually given. It's simply not true the judge instructed the jurors "to begin with the single charge of first degree murder and . . . work their way down through the list of responsive verdicts." *Post* at 58 (Higginson, J., dissenting). Nor did the court instruct the *Langley II* jury that it could consider second-degree murder "only if it were not . . . convinced" of specific intent. *Id.* at 48. The actual jury instructions said the exact opposite: The court instructed the jury it *could* find Langley guilty of "SECOND DEGREE MURDER" based on a finding "THAT THE DEFENDANT ACTED WITH SPECIFIC INTENT TO KILL." The dissenters cannot find issue preclusion by ignoring the instructions given to the jury and imagining others that were not.

Their third response is irrelevant. The dissenters make much of the jury instruction that said, "[i]f you are convinced beyond a reasonable doubt that [Langley] is guilty of first degree murder, your verdict should be 'guilty.'" *Post* at 48 (Higginson, J., dissenting) (second alteration in original). The dissenters say this instruction prohibited the jury from returning a verdict for second-degree **[**46]** specific-intent murder. Of course, that ignores the other instructions that empowered the jury to return a "SECOND DEGREE MURDER" verdict based on a finding "THAT THE DEFENDANT ACTED WITH SPECIFIC INTENT TO KILL." It ignores Langley's agreement—at trial and here—that the jury could return a verdict for second-degree specific-intent murder. *See supra* at 29. And it would require holding the jury instructions violated Louisiana law. *See supra* at 30-31 (noting, under *Porter* and Article 814(A)(1), the jury could find specific intent and choose second-degree murder). "We do not think that a federal court can presume so lightly that a state court failed to apply its own law." Bell v. Cone, 543 U.S. 447, 455, 125 S. Ct. 847, 160 L. Ed. 2d 881 (2005) (per curiam).

But even if Langley could misconstrue the instructions as violating state law, it would still be irrelevant. *Schiro* holds that issue preclusion does not attach where "[t]he jury instructions on the issue of intent to kill were . . . ambiguous." 510 U.S. at 234. If we agree with the dissenters on anything, it's that one instruction very clearly told the *Langley II* jury it *could* convict of second-degree specific-intent murder. And if we spot the dissenters all of their points *arguendo*, the absolute most they can prove is that a second jury instruction told the jury **[**47]** it could *not* convict of second-degree specific-intent murder. That ambiguity would put the case on all fours with *Schiro*. And it would compel the denial of habeas relief—with AEDPA or without it.

Fourth and finally, the unfortunate: The dissenters accuse us of "dangerously disregard[ing] Supreme Court precedent," "eras[ing] constitutional protections," and tearing "many pages . . . from the United States and Federal Reporters." *Post* at 47, 61 (Higginson, J., dissenting). Worse, they question whether our real

[11] The dissenters say these cases are irrelevant because they rejected *Ashe* claims by deciding *Ashe* did not "apply in a given situation" rather than "actually adjudicating" the claims. *Post* at 59 n.19 (Higginson, J., dissenting); *see also id.* at 55. This purported distinction—between *Ashe*'s applicability and *Ashe*'s application—has no substance. If a doctrine does not "apply in a given situation," then a claim based on that doctrine fails. And a court so holding has "actually adjudicat[ed]" the claim. Whatever the dissent means, it cannot dispute that in both cases the Court considered an *Ashe* claim, relied on the Restatement to analyze that claim, and then rejected the claim on the merits.

motivation is to underrule *Ashe* because we "disagree strongly with [its] foundations." *Id.* at 46 n.5. Worse still, they say we have bartered away our legal principles "wholesale" to reach a preferred policy result. *Id.* at 45-46. This sort of rhetoric is regrettable.

We will not respond in kind. But we will make our motivation patently clear: It is the law. *Ashe*, *Turner*, and every other Supreme Court case finding issue-preclusion under the *Double Jeopardy Clause* involved a general acquittal. This one does not. If we were state judges, we'd obviously still disagree with the dissenters about whether issue preclusion attaches to Langley's conviction. That much is obvious from our *de novo* review of the issue-preclusion **[*170]** question and the dissenters' very different **[**48]** approach to it.

But of course, we are not state judges. And we are bound by *AEDPA*. Under *AEDPA's* relitigation bar, the very existence of reasonable disagreement forecloses relief. *See, e.g., Musladin, 549 U.S. at 76-77*. Yet the dissenters do not acknowledge this standard, let alone explain how their analysis would be any different with or without it. *See Harrington v. Richter, 562 U.S. 86, 101, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011)* (reversing the Ninth Circuit because "it is not apparent how the Court of Appeals' analysis would have been any different without *AEDPA*").

* * *

The principal Founding-era concern regarding the scope of Article III was that it could empower federal judges to run roughshod over state courts. *See, e.g.*, Brutus, Essay I (Oct. 18, 1787), *in* 2 THE COMPLETE ANTI-FEDERALIST 363, 366-67 (Herbert J. Storing ed. 1981). Few things bring this concern into sharper relief than using logic games in federal habeas to set free from state custody a thrice-convicted child-murderer.[12]

[12] The dissenters suggest we should not care about the Anti-Federalists because they "lost." *Post* at 63 (Costa, J., dissenting). But Judge Costa's "winners" cared about the Anti-Federalists—so much so they wrote an entire book to respond to the Anti-Federalists' views. *See generally* THE FEDERALIST (Clinton Rossiter ed. 1961); *see specifically id.* NO. 81, at 486 (responding to Brutus I); *see also* THE ESSENTIAL ANTIFEDERALIST xiv (W.B. Allen & G. Lloyd eds., 2d ed. 2002) ("*The Federalist* should be read in light of the Antifederalist critique and not the other way around. As [George] Washington himself implied, if it were not for the Antifederalists, *The Federalist* would not be as good as it is."). And many of the reasons that compelled Madison, Jay, and Hamilton to care about the Anti-Federalists are still valid today. *See* Andrew S. Oldham, *The Anti-Federalists: Past as Prologue*, 12 N.Y.U. J. L. & LIBERTY (forthcoming 2019).

Judgment AFFIRMED. Habeas DENIED.

Concur by: JENNIFER WALKER ELROD; CATHARINA HAYNES

Concur

JENNIFER WALKER ELROD and CATHARINA HAYNES, Circuit Judges, joined by CARL E. STEWART, **[**49]** Chief Judge, concurring:

We concur in the judgment of the en banc court in this case. We write separately because we conclude that this case is resolvable based solely on the limitations on federal court habeas review as a result of *AEDPA* and the narrowness of *Ashe v. Swenson, 397 U.S. 436, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970)*, as well as the nuances of Louisiana law.

As is well established, and as the majority opinion explains, our review of legal decisions by state courts in this context is limited to decisions "contrary to" or involving "an unreasonable application of . . . clearly established Federal law, *as determined by the Supreme Court of the United States*." Majority Op. at 12 (emphasis added) (quoting *28 U.S.C. § 2254(d)(1)*). The Supreme Court, as recently as a few months ago, emphasized these limitations in *Shoop v. Hill*, where it *vacated* a Sixth Circuit decision that relied on Supreme Court precedent to conclude that habeas relief was warranted. *139 S. Ct. 504, 507, 509, 202 L. Ed. 2d 461 (2019)* (per curiam). The problem was that the Supreme Court authority on which the Sixth Circuit relied postdated the state court's decision. *Id. at 507*. The Supreme Court rejected the Sixth Circuit's reasoning that the subsequent precedent was "merely an application of what was clearly established" by earlier Supreme Court case law. **[**50]** *Id. at 508*. So, even an extension the Supreme Court itself has made is out of bounds if that extension came after the state court decision.

[*171] As the majority opinion points out, the original panel opinion in this case did and would have to extend *Ashe*, something we cannot do. Majority Op. at 14-16. *Ashe* involved different facts—namely, an explicit acquittal instead of an implied acquittal based on a conviction for a lesser offense. *See Ashe, 397 U.S. at*

439, 445-46. Thus, the AEDPA analysis ends there. The principal dissenting opinion's suggestion that the state court cited the right cases and perhaps reached a debatable result but applied the wrong reasoning is contrary to our limited AEDPA review particularly where, as here, the state court was examining state law and ruling on whether the jury's determinations in *Langley II* precluded Langley's conviction in *Langley III*. *See* Majority Op. at 24-25.

Although the above is enough, another straightforward basis supports affirmance: Even if, as the dissenting opinions argue, we were to accept that applying *Ashe* to an implied acquittal when there was an actual conviction is somehow not an extension of precedent, the Louisiana court's conclusion under *Ashe* was objectively correct. **[**51]** *See* State v. Langley, 61 So. 3d 747, 757-58 (La. Ct. App. 2011) (holding that Langley had "not carried his burden of proving that the element of specific intent was actually decided" because "[i]t is possible that the jury convicted [Langley] of specific intent second degree murder"). Under Louisiana law, it is not only *possible* but also entirely *permissible* that the *Langley II* jury convicted Langley of second degree specific intent murder. After all, in a Louisiana criminal trial, "the jury must be given the option to convict the defendant of the lesser offense, even though the evidence clearly and overwhelmingly supported a conviction of the charged offense." State v. Porter, 639 So. 2d 1137, 1140 (La. 1994). While perhaps unique, this statutory "responsive verdict" right has existed in Louisiana law "[s]ince before the turn of the century[.]" *Id.*

The principal dissenting opinion overlooks this critical anomaly in Louisiana law when it concludes that the jury necessarily decided the issue of specific intent in Langley's favor. *See* Principal Dissenting Op. at 53. As the majority opinion observes, the trial court explicitly instructed the *Langley II* jury that it could convict Langley of second degree murder based on a finding of "SPECIFIC INTENT TO KILL." Majority Op. at 35. The jury was **[**52]** further instructed, in line with Louisiana's responsive verdict rule, that second degree murder was a "responsive lesser offense[]" to first degree murder. Majority Op. at 21. Thus, under Louisiana law as explained in the jury instructions, even if the jury found that the evidence *supported* a conviction for first degree murder, it could nonetheless vote to convict Langley of second degree specific intent murder. This, then, is the logical flaw in the principal dissenting opinion: it assumes that, in returning a verdict of second degree murder, the jury *must* have determined that the evidence was insufficient for a first degree murder conviction. But Louisiana law tells us that is simply not so.[1]

[*172] In sum, while the principal dissenting opinion emphasizes that we must "focus on 'the actual instructions given the jury' and assume the jury 'would have been obligated' to follow [them,]" it fails to assess the totality of those instructions, particularly the instruction that the jury was not required to answer Question 1 on the verdict form before proceeding to Question 2. Principal Dissenting Op. at 42 (quoting Turner v. Arkansas, 407 U.S. 366, 369, 92 S. Ct. 2096, 32 L. Ed. 2d 798 (1972)). The dissenting opinion's conclusion that the jury failed **[**53]** to find specific intent was based on the trial judge's oral instruction that the jury's "verdict should be 'guilty'" if it was "convinced beyond a reasonable doubt that [Langley was] guilty of first degree murder[.]" Principal Dissent at 48. But this ignores the *written* jury instructions stating that second degree murder was a proper responsive verdict as well. The dissenting opinion's failure to consider the jury instructions as a whole leads it to draw inferences about the jury's verdict that do not logically follow from the totality of the circumstances. Taken as a whole, the jury instructions actually *undercut* those inferences.

The principal dissenting opinion construes the Louisiana court's jury instructions like ordinary *federal* jury instructions and in doing so disregards a significant nuance in Louisiana law. This runs counter to AEDPA's goal of advancing "comity, finality, and federalism" and threatens the "mutual respect and common purpose existing between the States and the federal courts." Williams v. Taylor, 529 U.S. 420, 436, 120 S. Ct. 1479, 146 L. Ed. 2d 435 (2000). To preserve that careful balance, we should adhere to Louisiana's long-established responsive verdict rule and afford the *Langley II* jury's verdict the high level of respect that it is

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[1] This is not the same thing as jury nullification. True, both concepts involve a jury declining to convict the defendant of an offense that the evidence supports, which is perhaps the reason for the Louisiana Supreme Court's observation that they are "similar." Porter, 639 So. 2d at 1140. But similarity is not "equivalence." Principal Dissent at 60 n.21. While a nullifying jury acts outside the bounds of the law, a jury convicting of a lesser offense under the Louisiana rule provides a *lawful* responsive verdict. *Compare id.* (noting that responsive verdicts are a "statutory right"), *with* 75A Am. Jur. 2d Trial § 667 (2019 update) ("Jury nullification refers to the jury's power to disregard the rules of law and evidence in order to acquit the defendant[.]").

due.

Simply put, Louisiana's **[**54]** Third Circuit Court of Appeal did not unreasonably apply clearly established federal law and, based on its superior understanding of the way responsive verdicts work in Louisiana, its conclusion was objectively correct. Accordingly, the district court correctly denied relief. We therefore join in the judgment of affirmance of the district court's denial of habeas relief.

Dissent by: STEPHEN A. HIGGINSON; GREGG COSTA

Dissent

STEPHEN A. HIGGINSON, Circuit Judge, joined by WIENER, DENNIS, GRAVES, and COSTA, Circuit Judges, dissenting:

The majority concludes that the Louisiana Third Circuit Court of Appeal reasonably rejected Ricky Langley's argument that *Ashe v. Swenson, 397 U.S. 436, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970)*, precluded the State of Louisiana retrying the issue of Langley's specific intent to kill. The majority says that the panel, in its now-vacated decision granting relief, enforced an unduly rigid conception of *Ashe* and impermissibly faulted the state court for not extending *Ashe*. But the majority's opinion, ostensibly an effort to set Supreme Court precedent straight, never explains that precedent. It does not, because it cannot. To say what the governing law actually requires is to pull a thread that unravels the majority's analysis.

Ashe preclusion operates **[**55]** at the level of *issues*—that is, elements of an offense, rather than offenses *in toto*. Ashe requires reviewing courts to decide "whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." *397 U.S. at 444*. We are to decide that question by "examin[ing] the record of a prior proceeding, taking into account the pleadings, evidence, **[*173]** charge, and other relevant matter." *Id.* In identifying what the jury "necessarily determined," we are to assume a rational jury, not to speculate about "what transpired in the jury room." *Yeager v. United States, 557 U.S. 110, 122, 129 S. Ct. 2360, 174 L. Ed. 2d 78 (2009)*. We are to focus on "the actual instructions given the jury" and assume the jury "would have been obligated" to follow those instructions where they lead. *Turner v. Arkansas, 407 U.S. 366, 369, 92 S. Ct. 2096, 32 L. Ed. 2d 798 (1972)*. When the "only logical conclusion" is that the jury necessarily decided the issue in the defendant's favor, the *Double Jeopardy Clause* precludes retrying the defendant on that issue. *Id. at 369-70*. What the majority derides as "logic games" is thus no more, and no less, than the test that the Supreme Court has directed us to apply.

Langley faced three possible offenses of conviction at his 2003 trial that are relevant here: the charged offense, first degree specific-intent murder; and **[**56]** two responsive verdicts, second degree specific-intent murder and second degree felony murder.[1] The jury's verdict, in accordance with state law,[2] was "guilty of second degree murder," not specifying the type.[3]

The Louisiana Court of Appeal suggested three explanations for the jury's verdict, concluding that it could not say whether the jury had necessarily decided the issue of Langley's specific intent. *State v. Langley, 61 So. 3d 747, 757-58 (La. Ct. App. 2011)*. Properly applied, *Ashe*'s principles foreclose two of the three explanations, just as they compel the remaining one: Langley's specific intent to kill was the only element of murder disputed in 2003; his lawyers successfully disputed it; the jury acquitted him of first degree specific-intent murder; hence the jury convicted him of second degree felony murder.

The Louisiana Court of Appeal's other explanations, avoiding *Ashe* protection, were that the jury may have chosen second degree specific-intent murder or may simply have reached a "compromise verdict" regardless of specific intent. *Langley, 61 So. 3d at 757-58*. Both contravene *Ashe* and *Turner*'s directions to assume a rational jury that follows the facts where its instructions lead. If the State had proved Langley's specific intent, a rational jury following **[**57]** the instructions given here would have convicted him of first degree specific-intent murder.

Thus, to say what *Ashe* requires is to see that it leaves

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[1] Second degree felony murder is the offense that the majority obscures with the paraphrase "something less than specific intent murder" in its explanation of the Louisiana Court of Appeal's decision.

[2] *See La. Code Crim. Proc. Ann. art. 814(A)(1)*.

[3] The majority uses a stylized X & Y illustration in describing the issue, but it erases the difficulty by cutting the number of possible offenses from three to two.

just one explanation for Langley's 2003 conviction: acquittal on the issue of specific intent. In 2007, the Louisiana Supreme Court, relying on both state and federal law, ruled that Langley's 2003 verdict acquitted him of first degree murder, barring retrial on that charge. State v. Langley, 958 So. 2d 1160, 1170 (La. 2007). The Louisiana Code of Criminal Procedure operated to make the jury's verdict of second degree murder an acquittal of first degree murder. *Id.* (citing La. Code Crim. Proc. Ann. art. 598(A)). As the Louisiana Supreme Court recognized, this was also in keeping with long-standing United States Supreme Court precedent recognizing implied acquittals. *Id. at 1169* (citing **[*174]** Green v. United States, 355 U.S. 184, 193, 78 S. Ct. 221, 2 L. Ed. 2d 199, 77 Ohio Law Abs. 202 (1957)).

It is this acquittal to which *Ashe* issue preclusion attaches. Langley's argument is straightforward and grounded in Supreme Court precedent: *Ashe*, which is a half-century old, and *Green*, which is even older. This Supreme Court precedent entitles Langley to habeas relief.[4]

If the majority dealt squarely with Langley's argument, we could perhaps have avoided much length and complication in our combined opinions. The majority does acknowledge that Langley **[**58]** was acquitted of first degree specific-intent murder in 2003. But the majority is unable to explain why that acquittal can bar retrial on the charge, yet not on the charge's elements. And so the majority attempts to rationalize the state court's decision in other ways.

In Part III(A)(2), the majority suggests that the Louisiana Court of Appeal refused to extend *Ashe* to implied acquittals on the theory that the law did not clearly establish that it was required to do so. But no extension was required, and the state court plainly believed that *Ashe* applied. It explained that the "Double Jeopardy Clause protects against successive prosecutions following acquittal or conviction" and stated the correct *Ashe* standard. *61 So. 3d at 757*.

Next, in Part III(B)(1), the majority rationalizes the Louisiana Court of Appeal's decision with reference to Schiro v. Farley, 510 U.S. 222, 114 S. Ct. 783, 127 L. Ed. 2d 47 (1994). But *Schiro* simply had different facts than this case. Moreover, *Schiro* never appeared in the state court's decision, in name or in substance, and it has never played a part in the State's opposition to Langley's habeas petition.

By relying on post hoc rationalizations that cannot be squared with what the state court actually said, the majority departs from the Supreme Court's recent direction **[**59]** on review of reasoned state-court decisions: "a federal habeas court simply reviews the specific reasons given by the state court and *defers to those reasons if they are reasonable*." Wilson v. Sellers, 138 S. Ct. 1188, 1192, 200 L. Ed. 2d 530 (2018) (emphasis added). The obligation to search for supportive reasoning obtains only when a state court issues a decision unaccompanied by any reasoning from itself or a lower state court. *Id. at 1195*; *see* Harrington v. Richter, 562 U.S. 86, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011). *Richter*'s "could have supported" framework does not apply otherwise. *Wilson, 138 S. Ct. at 1195*.

The majority also departs from the Supreme Court's constitutional command in *Ashe*. The majority imports extended discussion, far more than of *Ashe* itself, from the Second Restatement of Judgments, which the Supreme Court has never used to adjudicate an *Ashe* claim. In place of the straightforward *Ashe* inquiry explained above, the majority develops a novel set of "essential prerequisites," analyzing Langley's claim under a framework that played no part in the Louisiana Court of Appeal's decision or in the State's arguments at any stage in this litigation.

In turn, the majority's wholesale substitution of principles, embraced without either district court or adversary treatment, broadly threatens double jeopardy doctrine. Rather than dealing squarely **[**60]** with Langley's argument that *Ashe* preclusion flows from Langley's acquittal of first degree **[*175]** murder in 2003, the majority's Restatement-based analysis sows doubt that any part of the 2003 verdict was a valid final judgment. In the process, the majority threatens a double jeopardy pillar: the "unassailable" finality of acquittals, even when "based upon an egregiously erroneous foundation." *Yeager, 557 U.S. at 122-23* (quoting Fong Foo v. United States, 369 U.S. 141, 143, 82 S. Ct. 671, 7 L. Ed. 2d 629 (1962)). Perhaps the majority's clash with basic doctrine is inadvertent, but the risk of such clashes is why we follow precedent, rather than developing novel bodies of law without adversary treatment, in the face of contrary Supreme Court commands.

[4] As the panel stated, the State may re-prosecute Langley for second degree murder under La. R.S. 14:30.1—or for any other crime—on a theory that does not have as an essential element proof of Langley's specific intent to kill or harm.

Why this avoidance of Supreme Court precedent, both old and new? Perhaps because its correct application yields an unthinkable result due to the horror of Langley's crime.[5] The majority accurately describes the gruesome details, which shock and disgust. As it happens, Langley's 2003 jury had been instructed on predicate offenses for felony murder that were not enumerated in the felony murder statute at the time of Langley's offense. The State discovered this error on the eve of the 2009 trial, which appeared to close off the felony murder route to a new **[**61]** second degree murder conviction. That left the State in a bind: charge lesser offenses or retry the specific intent issue decided in Langley's favor in 2003. The State chose the latter, and here we are.

Though rejecting the State's choice may seem unthinkable, the monstrosity of Langley's crime does not put him beyond constitutional protection. The Constitution protects all, including the least and worst among us. Indeed, its safeguards against the profound deficiencies that marred Langley's first two trials are the reason that the majority is able to call Langley "thrice-convicted." If commission of serious crime suffices to erase constitutional protections, many pages must be torn from the United States and Federal Reporters. But it is not in our power to abrogate constitutional law announced by the Supreme Court, nor should we do so indirectly.

I

The vacated panel opinion recounts this case's long history in detail, *Langley v. Prince, 890 F.3d 504, 508-14 (5th Cir. 2018)*, and the majority's opinion notes the relevant points. A brief review is sufficient here. Committing the offense in 1992, Langley first stood trial in 1994, and his conviction of first degree murder was then set aside due to a flaw that, while substantial, is **[**62]** not significant here. *See State v. Langley, 813 So. 2d 356 (La. 2002)*.

In 2003, the trial relevant to our *Ashe* inquiry took place. The State charged Langley again with first degree murder, and Langley pleaded not guilty as well as not guilty by reason of insanity. His counsel conceded that Langley had killed the victim, a boy six years old. The defense focused instead on Langley's state of mind. Contrary to the majority's assertion that evidence of Langley's specific intent was overwhelming, defense counsel argued that Langley could not form the specific intent to kill because his mental illness, history of trauma, and exposure to a toxic prenatal environment had rendered him unable to **[*176]** understand or intend the consequences of his actions.[6]

The trial judge—whose misconduct would cause this conviction to be set aside[7]—instructed the jury on first degree murder, which consisted of (1) killing a human being (2) with specific intent to kill or to inflict great bodily harm (3) with one or more aggravating factors. *See La. R.S. 14:30(A)*. The State pursued two possible aggravators—either that Langley was committing second degree kidnapping or that the victim was under the age of twelve. *See id. 14:30(A)(5)*. Because the fact of the killing and the age of **[**63]** the victim were not contested, the State needed only to prove that Langley had the requisite specific intent.

Crucially for our *Ashe* inquiry, the trial judge instructed the jury to begin with first degree murder, the charged offense: "[I]f you are convinced beyond a reasonable doubt that [Langley] is guilty of first degree murder, your verdict should be 'guilty.'" The jury could then proceed to considering a lesser offense only if it were not so convinced. The judge then instructed the jury on the lesser offenses that Louisiana has deemed responsive to a charge of murder. The judge explained that second degree murder consists of either: (1) killing a human being (2) with specific intent to kill or inflict great bodily harm ("specific-intent second degree murder"), *see La.*

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[5] Or perhaps because several Justices have recently intimated doubts about *Ashe. See Currier v. Virginia, 138 S. Ct. 2144, 2149-50, 201 L. Ed. 2d 650 (2018)*. But it remains the Supreme Court's "prerogative alone to overrule one of its precedents," even when circuit judges disagree strongly with their foundations. *State Oil Co. v. Khan, 522 U.S. 3, 20, 118 S. Ct. 275, 139 L. Ed. 2d 199 (2001)*.

[6] For example, the jury heard testimony regarding Langley's history of mental breakdowns; his family trauma; his significant pre-natal exposure to medical drugs, alcohol, and x-rays (because months of his early gestation occurred while his mother was hospitalized after a car accident, put in a body cast, and treated intensively by doctors who did not know of the pregnancy); expert opinion on the permanent brain damage Langley may have incurred from his toxic pre-natal environment; and expert opinion on Langley's mental illness and state of mind at the time of the killing.

[7] The judge left the courtroom for significant portions of the proceedings, cut off the defense's closing argument, refused to entertain certain objections, and generally "failed to maintain order and decorum" in the courtroom. *See State v. Langley, 896 So. 2d 200, 203-07 (La. Ct. App. 2004)*.

R.S. 14:30.1(A)(1), or (1) killing a human being (2) while committing or attempting certain enumerated felonies ("second degree felony murder"), *see id.* 14:30.1(A)(2).[8] As to second degree felony murder, the judge instructed the jury that the relevant felonies were second degree kidnapping, *see id.* 14:44.1, and cruelty to juveniles, *see id.* 14:93. The judge then told the jury: "If you are not convinced that [Langley] is guilty of first **[**64]** degree murder, but you *are* convinced beyond a reasonable doubt that [he] is guilty of second degree murder, the form of your verdict should be 'guilty of second degree murder.'" Thus, under these instructions, and as the Louisiana Supreme Court would later determine,[9] a second degree murder verdict was an acquittal of first degree murder.

Consistent with state law,[10] the verdict form listed the possible responsive verdicts—"guilty," "guilty of second degree murder," "guilty of manslaughter," "not guilty by reason of insanity," and "not **[*177]** guilty"—and instructed the jury to return one and only one of them. The jury returned a verdict finding Langley guilty of second degree murder and, by operation of state law,[11] acquitting him of first degree murder.

The Louisiana Court of Appeal then reversed and remanded for a new trial due to the trial judge's misconduct. *See* State v. Langley, 896 So. 2d 200, 212 (La. Ct. App. 2004). Significantly, the court believed that the judge's misconduct was structural error, rendering the verdict "an absolute nullity" and permitting the State to re-try Langley for first degree murder. *Id.* at 210-12. The State attempted to do just that, and Langley's motion to quash the new indictment brought the issue to the Louisiana **[**65]** Supreme Court, which ruled:

> The instructions admonished jurors that if they were not convinced beyond a reasonable doubt "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." Jurors then returned a lawful, unanimous verdict convicting Langley of second degree murder. Second degree murder is a crime under the laws of Louisiana and is a responsive verdict to a charge of first degree murder.
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> [...]
>
> Under these circumstance[s], and by operation of longstanding double jeopardy law, we hold that the unanimous verdict of guilty of second degree murder returned by Langley's jury in [Langley's second trial] implicitly acquitted him of first degree murder.

State v. Langley, 958 So. 2d 1160, 1170 (La. 2007) (citations omitted). This ruling relied on both state and federal law. The Louisiana Supreme Court read the jury instructions as requiring the jury to acquit on first degree murder before considering second, and Louisiana law provides that "[w]hen a person is found guilty of a lesser degree of the offense charged, the verdict . . . is an acquittal of all greater offenses charged **[**66]** in the indictment." *Id.* at 1169-70 (quoting La. Code Crim. Proc. Ann. art. 598(A)). The court also cited United States Supreme Court precedent that, "when a defendant is convicted of a lesser included offense and that conviction is overturned on appeal, the conviction operates as an implied acquittal of the charged crime, prohibiting the State from retrying the defendant on the original charge." *Id.* at 1169 (citing *Green*, 355 U.S. at 193).

A bench trial followed in 2009, with first degree murder removed from the indictment. Raising the *Ashe* issue, Langley's counsel argued that specific-intent second degree murder should also be removed, because the 2003 verdict could be rationally explained only as an acquittal on the issue of Langley's specific intent. Second degree felony murder would be left as the most serious charge. But the trial judge rejected Langley's argument, so the indictment contained both varieties of second degree murder. The next day, however, the State orally withdrew the felony murder charge, having realized that its preferred predicate offenses, second degree kidnapping and cruelty to juveniles, were not enumerated in the felony murder statute at the time of Langley's offense. Specific-intent second degree murder, already under the cloud of *Ashe* **[**67]**,

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[8] The judge's oral instructions erroneously defined specific-intent second degree murder as the killing of a human being "with *or without* specific intent to kill or to inflict great bodily harm." (emphasis added). During deliberations, the jury received a written corrected instruction, with the consent of both parties.

[9] The just-quoted instruction was the basis for the Louisiana Supreme Court's conclusion that the jury acquitted Langley of first degree specific-intent murder. *Langley*, 958 So. 2d at 1170.

[10] *See* La. Code Crim. Proc. Ann. art. 814(A)(1).

[11] *See* La. Code Crim. Proc. Ann. art. 598(A).

became the State's only route to a murder conviction.

The judge ultimately found Langley guilty of second degree murder. The ruling **[*178]** explicitly stated that "[t]he issue of specific intent . . . is necessary for the determination of guilt," and found that the requisite specific intent was present. Langley's counsel renewed the *Ashe* objection in a post-trial motion, but the judge stood by his earlier ruling. The judge then imposed the mandatory sentence of life imprisonment without parole.

On appeal, the Louisiana Third Circuit Court of Appeal issued the ruling in question here. It recognized that the Double Jeopardy Clause applied "following acquittal or conviction." Langley, 61 So. 3d at 757 (quotation omitted). It acknowledged *Ashe* "prohibits the state from relitigating an issue of ultimate fact that has been determined by a valid and final judgment." *Id.* (citing Ashe, 397 U.S. at 443). It then correctly quoted the *Ashe* standard. *Id.* ("[T]o determine which facts were 'necessarily decided' by the general acquittal in the first trial, it is necessary to examine the record of the prior proceeding in order to determine 'whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.'") **[**68]** (quoting Ashe, 397 U.S. at 444). The court's *Ashe* analysis, in full, is as follows:

> 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 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.

Id. at 757-58. The Louisiana Supreme Court then declined discretionary review, *78 So. 3d 139 (La. 2012)*, leading Langley to federal habeas and ultimately to our court.

II

Ashe tells courts how to identify the issues that a jury necessarily determined, and its method is directed squarely at deciphering general verdicts:

> Where a previous judgment of acquittal was based upon a general **[**69]** verdict, as is usually the case, this approach requires a court to examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.

397 U.S. at 444. We are to assume a rational jury, not to speculate about "what transpired in the jury room." Yeager, 557 U.S. at 122. Indeed, relief under *Ashe* depends on the assumption that the jury acted rationally. When the jury's verdict is "irreconcilably inconsistent"—for instance, convicting on a compound offense but acquitting on one of its predicates—the verdict has no preclusive effect. *See* Bravo-Fernandez v. United States, 137 S. Ct. 352, 356-57, 196 L. Ed. 2d 242 (2016). A court applying *Ashe* also assumes that the jury believed any "substantial and uncontradicted evidence of the prosecution on a point the defendant did not contest." Ashe, 397 U.S. at 444 n.9 (quotation omitted). **[*179]** Finally, a court applying *Ashe* assumes that the jury followed its instructions. This principle is implicit in *Ashe*'s concept of a rational jury, and it is explicit in Turner v. Arkansas, 407 U.S. 366, 92 S. Ct. 2096, 32 L. Ed. 2d 798 (1972). There, the Supreme Court focused on "the actual instructions given to the jury" and assumed that the jury "would have been obligated" **[**70]** to follow them where the facts in evidence led. Id. at 369.

When there is just a "single rationally conceivable issue in dispute before the jury," Ashe, 397 U.S. at 444, as there is here, this can be a straightforward inquiry. 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.[12] 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.

As noted at the outset, the *Ashe* analysis **[**71]** forecloses the two other possibilities suggested by the Louisiana Court of Appeal: that the jury convicted Langley of specific-intent second degree murder, or that the jury reached a compromise verdict. *61 So. 3d at 757-58*. The jury instructions, if rationally followed, rule out both. The jury was told to start with first degree murder, two elements of which were uncontested. If the State had proved specific intent, the remaining element, the jury would have been obligated to convict Langley of first degree murder, not second degree murder. Likewise, the jury instructions did not suggest or permit a compromise verdict on a lesser offense despite convincing evidence of a greater offense. The Louisiana Court of Appeal's speculation about a compromise cannot be squared with *Turner*'s teaching to treat juries as "obligated" to follow their instructions. Consequently, the Louisiana Court of Appeal's alternative explanations were objectively unreasonable applications of *Ashe* and its progeny.

There is thus only one rational explanation of the jury verdict's acquittal of first degree murder and conviction of second degree murder: the jury acquitted on the issue of specific intent, hence convicted Langley of felony **[**72]** murder. Langley's retrial in 2009 should not have been allowed to proceed on the charge of second degree specific-intent murder. The resulting conviction therefore violates the *Double Jeopardy Clause*, entitling Langley to habeas relief.

[*180] III

[12] As noted, the Louisiana Code of Criminal Procedure undergirds these instructions. A responsive verdict of "guilty of second degree murder" operates to acquit a defendant charged with first degree murder of that offense while also convicting him of second degree murder. *See La. Code Crim. Proc. Ann. arts. 598(A), 814(A)(1)*. That verdict is also the only mechanism by which a jury can achieve that result. If the jury had returned a verdict of "not guilty of first degree murder," the judge would have been required to reject it. *Id. art. 813*. By following this state law in interpreting the 2003 verdict, I do only what the Louisiana Supreme Court did in 2007. I thus cannot agree with the concurring opinion's view of the jury instructions.

The majority's reasons for not disturbing the Louisiana Court of Appeal's decision depend either on new rationales not employed by the state court or on avoidance of what *Ashe* requires. Each move the majority makes is therefore a wrong step on the landscape of Supreme Court precedent.

A

The majority begins by framing the panel's ruling as requiring an extension of *Ashe*: "A fairminded jurist could conclude the rule clearly established in *Ashe* does not apply to a conviction rather than a general acquittal." *Supra*, Part III(A)(2). This statement is puzzling at first glance, because the Louisiana Supreme Court ruled that Langley was *acquitted* of first degree specific-intent murder. *Langley, 958 So. 2d at 1170*. The 2009 trial proceeded on that ruling, and any possible preclusion would attach to that acquittal. The majority means to say that Langley received an implied acquittal of first degree murder alongside his conviction of second degree murder, and the law is not clearly established that *Ashe* preclusion **[**73]** may arise from such a verdict.

The majority is quite right to hedge that "[w]e may or may not find this distinction persuasive." But it is quite wrong to say that "the last reasoned *state court* decision found it persuasive." On the contrary, the Louisiana Court of Appeal plainly believed that *Ashe* applied. *61 So. 3d at 757*. It cited *Ashe*, quoted the standard, and asked the right question—albeit a question it answered unreasonably. If the state court had any doubt that *Ashe* applied, it did not say so. Consequently, the majority has contrived a rationale for the state court's decision that is incompatible with the reasoning that the state court actually gave.

The Supreme Court's decisions give us no license to conduct *AEDPA* review this way. Following *Wilson v. Sellers*, the mode of our analysis under the "unreasonable application" prong of *28 U.S.C. § 2254(d)(1)* depends on whether the state-court decision is accompanied by any reasoning. *138 S. Ct. at 1191-92*. If no reasoning accompanies the decision, we are to "determine what arguments or theories . . . could have supported[] the state court's decision." *Richter, 562 U.S. at 102*. But if any reasoning does, whether from the issuing court or a lower state court, the "federal habeas court simply reviews the specific reasons **[**74]** given by the state court and *defers to those reasons if they are reasonable*." *Wilson, 138 S. Ct. at 1192* (emphasis

added).[13]

Wilson bears on two issues that had divided the circuits. The first issue is the proper object of a federal habeas court's focus when the last state court to adjudicate the merits of a post-conviction claim did not explain its reasoning but a lower state court did. *Wilson* squarely answers the question: "the federal court should 'look through' the unexplained decision to the last related state-court decision that does provide a relevant rationale." *138 S. Ct. at 1192*. The second issue is the method of reviewing reasoned state-court decisions under the "unreasonable application" **[*181]** prong of *AEDPA*.[14] *Wilson* brought clarity to this second issue.[15] As noted, *Wilson* tells us that *AEDPA* review of reasoned decisions is a "straightforward inquiry when the last state court to decide a prisoner's federal claim"—as here—"explains its decision on the merits in a reasoned opinion." *Id.* "[The] federal habeas court simply reviews the specific reasons given by the state court and *defers to those reasons if they are reasonable*." *Id.* (emphasis added).[16]

That direction governs us here. The Louisiana Court of Appeal explained its reasoning for denying relief. That reasoning unreasonably applied *Ashe* and its progeny. Our analysis should then proceed to de novo review of the petitioner's claim. *See Salts v. Epps, 676 F.3d 468, 480 (5th Cir. 2012)*. By instead interposing a new rationale not given by the state court and not compatible with the reasons it did give, the majority runs afoul of *Wilson*'s direction.

B

The majority's lengthy discussion of *Schiro v. Farley, 510 U.S. 222, 114 S. Ct. 783, 127 L. Ed. 2d 47 (1994)*, is likewise out of place. The Louisiana Court of Appeal never employed any reasoning that could be said to flow from *Schiro*. The State did not brief *Schiro* below or to the panel, and at oral argument before the panel, counsel for the State made no use of *Schiro* when given the chance.[17] The majority's discussion is thus another effort to supply novel reasoning, contra *Wilson*, in support of the state court's decision.[18]

[*182] Under de novo review of Langley's claim, the

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[13] A nuance not relevant here is the possibility that an unexplained merits decision by a higher state court rested on reasoning different from that expressed by a lower state court. *Wilson* addresses this possibility through a rebuttable-presumption framework. *138 S. Ct. at 1196-97*. That nuance does not arise in this case. The Louisiana Supreme Court's decision was a discretionary denial of review, so the Louisiana Court of Appeal's decision was the last decision on the merits in the state system.

[14] *Compare, e.g., Dennis v. Sec., Pa. Dept. of Corr., 834 F.3d 263, 281-82 (3rd Cir. 2016)* (en banc) ("[F]ederal habeas review does not entail speculating as to what other theories could have supported the state court ruling when reasoning has been provided, or buttressing a state court's scant analysis with arguments not fairly presented to it."), *with, e.g., Evans v. Davis, 875 F.3d 210, 216 (5th Cir. 2017)* ("[We consider] not only the arguments and theories the state habeas court actually relied upon to reach its ultimate decision but also all the arguments and theories it could have relied upon.").

[15] The Supreme Court issued *Wilson* in April 2018, after the panel heard oral argument in this case but before publishing its opinion. The panel acknowledged *Wilson*'s likely impact on *AEDPA* review but applied *Richter*'s "could have supported" framework in an abundance of caution. *Langley, 890 F.3d at 515* & n.15. The full court subsequently requested and received supplemental briefing on *Wilson*.

[16] Another panel of this court has also recognized *Wilson*'s significance. *See Thomas v. Vannoy, 898 F.3d 561, 568 (5th Cir. 2018)* (acknowledging that the "continued viability" of the Fifth Circuit's approach was "uncertain" after *Wilson*). *See also* ***[**75]*** *Meders v. Warden, Ga. Diagnostic Prison, 911 F.3d 1335, 1349 (11th Cir. 2019)* ("What [*Wilson*] means is we are to focus not merely on the bottom line ruling of the decision but *on the reasons*, if any, given for it.") (emphasis added). Commentators have recognized its significance as well. *See* BRIAN R. MEANS, FEDERAL HABEAS MANUAL § 3:70 (2018) ("[T]he Supreme Court [has] apparently settled the matter: the 'fill the gaps' aspect of *Richter*—considering grounds that *could have* supported the state court's decision—does not extend beyond unexplained rulings to reasoned state court decisions."); Leading Case, *Antiterrorism and Effective Death Penalty Act—Habeas Corpus—Scope of Review of State Proceedings*—Wilson v. Sellers, *132 Harv. L. Rev. 407, 412-13 (2018)* ("[T]he *Wilson* Court limited one of the harshest pieces of *Richter*'s legacy—the practice of courts imagining all possible bases for denying relief—to *Richter*'s specific procedural posture, thus sparing habeas petitioners from a burden that *AEDPA* need never have imposed on them.").

[17] *See* Oral Argument at 30:54, *Langley v. Prince, 890 F.3d 504 (5th Cir. 2018)* (No. 16-30486), http://www.ca5.uscourts.gov/OralArgRecordings/16/16-30486_10-4-2017.mp3.

[18] The majority says its use of *Schiro* to uphold the state court's decision does not contravene *Wilson* because state courts are not required to cite the correct case names. That is hardly the issue here.

majority's reliance on *Schiro* also fails to provide meaningful support to the **[**76]** state court's decision. In part, this is because *Schiro*'s facts simply differ in determinative ways. For one, this case concerns issue preclusion between successive trials; *Schiro* concerned issue preclusion between the guilt and sentencing phases of a single trial. *510 U.S. at 225-26*. For another, the jury instructions in this case directed jurors to begin with the single charge of first degree murder and, as described above, work their way down through the list of responsive verdicts. In *Schiro*, three counts of murder were charged, and the instructions did not clearly direct jurors to proceed from greater to lesser offenses as the instructions did here. *Id. at 233-34*. Finally, the jury instructions in this case were clear that the jury could convict Langley for second degree murder without finding specific intent, via the felony murder option. The jury instructions in *Schiro* were ambiguous on that very point. *Id. at 234*.

Schiro also creates trouble for the majority's other post hoc rationalization of the state court's decision. As noted, the majority rests its holding on the idea, never espoused by the state court, that *Ashe*'s application to implied acquittals accompanying convictions is not clearly established. But *Schiro* ***[**77]*** suggests that *Ashe* does apply. In its discussion, the Court first cited long-standing precedent on implied acquittals. *510 U.S. at 236* ("We have in some circumstances considered jury silence as tantamount to an acquittal for double jeopardy purposes.") (citing *Green, 355 U.S. at 190-91*; *Price v. Georgia, 398 U.S. 323, 329, 90 S. Ct. 1757, 26 L. Ed. 2d 300 (1970)*). It then added that "[t]he 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." *Id.* Indeed, the Court conducted an *Ashe* analysis in *Schiro. Id. at 234-36*. It simply ruled that Schiro had failed to carry his burden. *Id. at 236*. Consequently, if *Schiro* adds anything here, its weight belongs on Langley's side of the scale.

C

Finally, there is the majority's issue-preclusion analysis. *Supra*, Part III(C). It is here that the majority's refusal to explain the *Ashe* analysis required by Supreme Court precedent is most glaring. Rather than look to *Ashe, Yeager*, or other Supreme Court law, the majority instead imports the Second Restatement of Judgments. From the Restatement, the majority derives new "essential prerequisites" for issue preclusion to obtain, which debut in the majority's opinion without any adversarial treatment at any stage in this **[**78]** litigation. While the Supreme Court has cited the Restatement's issue-preclusion principles in various contexts, it has *never* employed the novel framework advanced by the majority to adjudicate an *Ashe* claim.[19] **[*183]** The majority's misbegotten doctrinal innovation cloaks the majority's departure from governing law, disrupts settled double jeopardy doctrine, and is likely to confuse the state and federal judges of this circuit as they adjudicate *Ashe* claims in the future.

To start, the majority misstates the fundamental question as being what the jury "actually determined," citing the Restatement, rather than as what it "necessarily decided." *See Yeager, 557 U.S. at 119-20*. This difference is subtle but significant, because the latter formulation trains the reviewing court's attention on a rational jury adhering to its instructions, and not on speculation about "what transpired in the jury room." *Id. at 122*. The majority makes the very error condemned by the Supreme Court in *Yeager* when it speculates that Langley's jury chose second degree murder because it heard defense counsel's plea for mercy and because it wanted to avoid a capital punishment hearing.

Similarly, choosing novel Restatement-based standards **[**79]** permits the majority to deploy a misrepresentation of Louisiana responsive verdict law without acknowledging the Supreme Court precedent that would rule it out. The majority describes the specific-intent second degree murder instruction as a "concededly valid option." Indeed, like many states,[20]

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[19] To justify its creation of a novel Restatement-based framework, the majority cites *Bravo-Fernandez v. United States, 137 S. Ct. 352, 196 L. Ed. 2d 242 (2016)*. There, the Restatement appeared in the Court's discussion of general principles, but the Court concluded *Ashe* did *not* apply, so there was no *Ashe* claim to adjudicate. *Id. at 357-58, 362-63*. The majority also cites *Bobby v. Bies, 556 U.S. 825, 129 S. Ct. 2145, 173 L. Ed. 2d 1173 (2009)*. That case concerned the effect of a change in the law on a single, concluded proceeding; double jeopardy protection did not arise. *Id.* The majority is blurring the distinction between Supreme Court decisions about whether *Ashe* should apply in a given situation and its decisions actually adjudicating an *Ashe* claim. The majority uses the former decisions to obscure what the latter decisions require us to do in this case.

[20] *See, e.g.*, *Tex. Code Crim. Proc. § 37.09* (lesser included offenses); *Wortham v. State, 412 S.W.3d 552, 557-58 (Tex. Crim. App. 2013)* (holding that "[a]nything more than a scintilla of [relevant] evidence entitles the defendant to [a jury instruction on] the lesser charge").

Louisiana recognizes "that a defendant, when charged with a crime for which the Legislature has provided a responsive verdict, has the statutory right to have the jury characterize his conduct as the lesser crime." State v. Porter, 639 So. 2d 1137, 1140 (La. 1994). Louisiana treats "the jury's prerogative to return a responsive verdict similar to the jury's power of nullification," available to the jury "even though the evidence clearly and overwhelmingly supported a conviction of the charged offense." *Id.*[21]

But the existence of responsive verdicts does not affect the *Ashe* analysis, which assumes a rational jury that follows its instructions. Given the secrecy of the jury room, the possibility of a nullification verdict is ever-present. Accounting for it in the *Ashe* analysis would make it impossible to say what a jury "necessarily determined," and so would effectively eliminate *Ashe*, as our court has long recognized. *See* United States v. Tran, 433 F. App'x 227, 231 (5th Cir. 2011) ("[I]f **[**80]** we consider jury nullification as a basis on which the jury might have acquitted . . . we would in effect be eliminating the entire doctrine of collateral estoppel and greatly weakening the protection against double jeopardy.") (quoting United States v. Leach, 632 F.2d 1337, 1341 n.12 (5th Cir. 1980)). The majority's indulgence of that possibility runs counter to *Ashe*'s rational-jury assumption, *Turner*'s assumption that juries adhere to instructions, and *Yeager*'s direction to avoid speculation about what transpired in the jury room.

The majority's use of the Restatement causes still more mischief. Avoiding Langley's argument that his first degree murder acquittal is the source of his relief under *Ashe*, the majority suggests that the reversal of Langley's 2003 second degree **[*184]** murder conviction, due to trial judge misconduct, rendered the result of the 2003 trial not a "valid and final" judgment. It is of course true that a conviction vacated due to trial error does not preclude retrial on the same offense. But the majority dangerously disregards Supreme Court precedent, old and new, by suggesting that the 2003 verdict could have no preclusive effect on the 2009 trial. It is a pillar of double jeopardy doctrine that the finality of an acquittal is "unassailable" **[**81]** even if it is "based upon an egregiously erroneous foundation." Yeager, 557 U.S. at 122-23 (quoting Fong Foo, 369 U.S. at 143). The Court's recent decision in *Bravo-Fernandez* drives the point home. 137 S. Ct. 352, 196 L. Ed. 2d 242 (2016). Defendants Bravo and Martinez were convicted of a bribery offense but acquitted of conspiring to commit and traveling to commit that bribery, a classic "irreconcilably inconsistent" verdict. Id. at 362-64. Instructional error infected the conviction, so it was reversed. Due to the inconsistency in the verdict, the Court rejected Bravo and Martinez's argument that their conspiracy and travel acquittals should preclude retrial for bribery. But the Court was clear that the Double Jeopardy Clause "forever bars" retrial on the acquitted charges, no matter the trial error. Id. at 365-66. The majority's doubts about the finality of the 2003 verdict cannot be reconciled with *Bravo-Fernandez* and the well-established law to which it adhered.

The majority does acknowledge what it cannot avoid: the Louisiana Supreme Court's ruling that the 2003 verdict impliedly acquitted Langley of first degree murder, barring retrial on that charge. But the majority is unable to explain why the implied acquittal can bar retrial on that charge but not the charge's elements. Langley's specific intent was the "single **[**82]** rationally conceivable issue in dispute before the jury," Ashe, 397 U.S. at 444, and so the jury's acquittal of first degree murder barred retrial on that element of the charge, just as it barred retrial on the charge itself. The majority cannot or will not say this, and the price of the majority's avoidance is a blow dealt to the edifice of Supreme Court law.

***

Under the Double Jeopardy Clause, the verdict rendered by the jury in 2003 prohibited the State of Louisiana retrying the issue of Langley's specific intent to kill or inflict great bodily harm. Langley's 2009 conviction for specific-intent second degree murder therefore should not stand. Accordingly, I would reverse the district court's judgment and remand this case with instructions to grant Langley's petition for a writ of habeas corpus, leaving the State free to retry Langley on charges that do not require proof of his specific intent. Because the majority sidesteps numerous Supreme Court precedents and clashes with others in order to avoid that result, I dissent.

GREGG COSTA, Circuit Judge, joined by WIENER and HIGGINSON, Circuit Judges, dissenting:

I had thought the Anti-Federalists lost. *But see* Maj. Op. at 37. What is more, it is ironic to invoke their rejected **[**83]** constitutional vision in defense of a

[21] This equivalence drawn by *Porter* between a jury's choice of a responsive verdict and jury nullification rebuts the concurring opinion's attempt to distinguish the two.

decision that undermines one of the Anti-Federalists' most fervent beliefs: the fundamental role of juries. MICHAEL J. KLARMAN, THE FRAMERS' COUP 350 (2016); HERBERT J. STORING, WHAT THE ANTI-FEDERALISTS WERE FOR 18-19 (1981). As a leading Anti-Federalist inveighed, "jury trials, which have so long been considered the surest barrier against arbitrary power, and the palladium of liberty, with the loss of which the loss of our freedom may be dated, are taken away by the proposed form of government." The **[*185]** Antifederalist No. 83 (Luther Martin), *in* THE ANTIFEDERALIST PAPERS 241, 241 (Morton Borden ed., 1965). One took it even further: "O! my fellow citizens, think of this while it is yet time, and never consent to part with the glorious privilege of trial by jury, but with your lives." Essay of A Democratic Federalist (Oct. 17, 1787), *in* 5 THE FOUNDERS' CONSTITUTION 354, 355 (Philip B. Kurland & Ralph Lerner eds., 1987). And in contrast to the Anti-Federalists' unsuccessful criticisms of the independence of federal judges and their power to review state court rulings, *see* Maj. Op. at 37 (citing Brutus Essay I), the Anti-Federalists' campaign for jury **[**84]** rights was a success: not in defeating the Constitution, but in amending it. *See* U.S. Const. amends. VI, VII.

So important was the jury right the Anti-Federalists fought for that, until the early twentieth century, a defendant charged with serious crimes could not be "tried in any other manner than by a jury of twelve men." Home Ins. Co. of New York v. Morse, 87 U.S. 445, 451, 22 L. Ed. 365, 49 How. Pr. 314 (1874) (citing Cancemi v. People, 18 N.Y. 128 (1858)); *see also* Patton v. United States, 281 U.S. 276, 298, 50 S. Ct. 253, 74 L. Ed. 854 (1930) (reversing course and allowing a defendant to waive the jury). As the first Justice Harlan explained in rejecting the view that a defendant could agree to waive the requirement of a full jury, "the wise men who framed the constitution of the United States and the people who approved it were of the opinion that life and liberty, when involved in criminal prosecutions, would not be adequately secured except through the unanimous verdict of twelve jurors." Thompson v. Utah, 170 U.S. 343, 353, 18 S. Ct. 620, 42 L. Ed. 1061 (1898). A leading modern scholar reaches the same conclusion about the original understanding: A jury had to decide felony trials; bench trials were not allowed. *See* AKHIL AMAR, THE BILL OF RIGHTS 104-08 & nn. 97, 102 (1998) (emphasizing the mandatory Article III language that "trial of all crimes . . . shall be by jury" as well as the writings of both Federalist and Anti-Federalists who viewed the jury guarantee as a structural provision **[**85]** and not just an individual right); *see also* Cancemi, 18 N.Y. at 138 (rejecting defendant's ability to waive 12-member jury because that would also allow a defendant to agree to "trial committed to the court alone," which the common law did not permit); Recent Development, *Accused in Multiple Prosecution Held to Have Absolute Right to Waive Jury Trial*, 59 COLUM. L. REV. 813, 814 (1959) ("Until shortly after the turn of the century, federal courts and most state courts applied the common law rule that a jury trial can not be waived in a felony case in which the defendant enters a plea of not guilty."); Note, *Waiver of Constitutional Right to Twelve Jurors*, 9 HARV. L. REV. 353 (1895) (similar).

Yet the majority opinion lets a judge's finding of specific intent override a jury's earlier determination that this required mens rea was not proven. That undermines both the right to a jury and the protection against double jeopardy. As the Anti-Federalists recognized, the latter is essential to the former. *See* Brutus Essay XIV (Feb. 28, 1788), *in* THE ANTIFEDERALIST PAPERS, *supra*, at 234, 235 (lamenting the possibility of "a second hearing" on appeal after acquittal by a jury); *see also* AMAR, *supra*, at 96 (explaining that the Double Jeopardy Clause "dovetails with the Sixth Amendment jury right" because it protects "the integrity of the initial petit jury's judgment"). If **[**86]** the state can keep retrying someone until it achieves its desired result, then the jury right that both the Federalists and Anti-Federalists cherished, *see* U.S. CONST. art. III (guaranteeing jury in criminal cases); Federalist **[*186]** No. 83, at 467 (Alexander Hamilton) (Clinton Rossiter ed., 1999) ("The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon trial by jury . . . ."), is no right at all.

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State v. Langley

Court of Appeal of Louisiana, Third Circuit

April 6, 2011, Decided

10-969

Reporter
61 So. 3d 747 *; 2011 La. App. LEXIS 404 **; 10-969 (La.App. 3 Cir. 04/06/11);

STATE OF LOUISIANA VERSUS RICKY JOSEPH LANGLEY

Subsequent History: Rehearing denied by *State v. Langley, 2011 La. App. LEXIS 555 (La.App. 3 Cir., May 11, 2011)*

Writ denied by *State v. Langley, 78 So. 3d 139, 2012 La. LEXIS 140 (La., 2012)*

US Supreme Court certiorari denied by *Langley v. Louisiana, 133 S. Ct. 148, 184 L. Ed. 2d 73, 2012 U.S. LEXIS 7263 (U.S., 2012)*

Magistrate's recommendation at, Habeas corpus proceeding at *Langley v. Prince, 2015 U.S. Dist. LEXIS 177476 (W.D. La., Dec. 14, 2015)*

Prior History: [1]** APPEAL FROM THE FOURTEENTH JUDICIAL DISTRICT COURT, PARISH OF CALCASIEU, NO. 10258-02. HONORABLE ROBERT LANE WYATT, DISTRICT JUDGE.

State v. Langley, 958 So. 2d 1160, 2007 La. LEXIS 1241 (La., May 22, 2007)

Disposition: CONVICTION AFFIRMED. REMANDED WITH INSTRUCTIONS.

Core Terms

arrest, trial court, parole violation, recused, parole, records, assigned error, confession, peace officer, killed, felony, pretrial, rights, motion to recuse, trial judge, sentence, suppress, second degree murder, authorities, waived, prescription, first degree murder, indictment, convicted, motion to suppress, proceedings, witnesses, parolee, days, pertinent part

Case Summary

Overview
Defendant's conviction for second-degree murder was proper because his double jeopardy rights were not violated and the filing of the motion to recuse the district attorney suspended the running of the prescription; thus, there was no violation of defendant's right to a speedy trial. Further, the trial court did not err by limiting defendant's cross-examination of a detective because the information simply was not relevant to the current case. The trial at issue was a new proceeding and not a subsequent stage of the earlier ones. Therefore, the law of the case doctrine did not apply.

Outcome
Judgment affirmed and remanded.

LexisNexis® Headnotes

Criminal Law & Procedure > Appeals > Reviewability > General Overview

Criminal Law & Procedure > Appeals > Procedural Matters > Records on Appeal

HN1[] In accordance with *La. Code Crim. Proc. Ann. art. 920*, all appeals are reviewed for errors patent on the face of the record.

Criminal Law & Procedure > Postconviction Proceedings > General Overview

HN2[] According to *La. Code Crim. Proc. Ann. art. 930.8*, the two year prescriptive period for filing an application for postconviction relief begins to run when a

defendant's conviction and sentence become final under the provisions of La. Code Crim. Proc. Ann. art. 914 or 922.

Criminal Law & Procedure > ... > Double Jeopardy > Double Jeopardy Protection > Convictions

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Double Jeopardy

HN3 **Convictions**

Re-prosecutions are allowed because second trials do not offend double jeopardy principles when they occur pursuant to judicial error.

Criminal Law & Procedure > ... > Double Jeopardy > Double Jeopardy Protection > Acquittals

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Double Jeopardy

Criminal Law & Procedure > Commencement of Criminal Proceedings > Double Jeopardy > Collateral Estoppel

Criminal Law & Procedure > ... > Double Jeopardy > Double Jeopardy Protection > Convictions

Criminal Law & Procedure > ... > Double Jeopardy > Double Jeopardy Protection > Multiple Punishments

HN4 **Acquittals**

The Double Jeopardy Clause, U.S. Const. amend. V, protects against successive prosecutions following acquittal or conviction, as well as multiple punishments for the same offense, La. Const. art. I, § 15; La. Code Crim. Proc. Ann. art. 591 et seq. The collateral estoppel component of the Double Jeopardy Clause prohibits the state from relitigating an issue of ultimate fact that has been determined by a valid and final judgment. A fact is considered "ultimate" if it is necessary to a determination of the defendant's criminal liability. Collateral estoppel bars relitigation of only those facts necessarily determined in the first trial. Where a fact is not necessarily determined in a previous trial, the State is not barred from reexamining the issue. Accordingly, the first step in resolving a collateral estoppel claim is to discern which facts were necessarily determined in the first trial.

Criminal Law & Procedure > ... > Double Jeopardy > Double Jeopardy Protection > Acquittals

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Double Jeopardy

Criminal Law & Procedure > Appeals > Procedural Matters > Records on Appeal

HN5 **Acquittals**

The courts have placed the burden on the defendant to demonstrate that the issue whose relitigation he seeks to foreclose was actually decided in the first proceeding. The application of this test to criminal cases is complicated by the fact that an acquittal by general verdict does not specify the facts necessarily decided by the jury. Therefore, to determine which facts were necessarily decided by the general acquittal in the first trial, it is necessary to examine the record of the prior proceeding in order to determine whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.

Criminal Law & Procedure > Criminal Offenses > Lesser Included Offenses > General Overview

Criminal Law & Procedure > Trials > Verdicts > General Overview

HN6 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.

Criminal Law & Procedure > Trials > Motions for Mistrial

Criminal Law & Procedure > Postconviction Proceedings > Motions for New Trial

Governments > Legislation > Statute of Limitations > Time Limitations

HN7 **Motions for Mistrial**

See La. Code Crim. Proc. Ann. art. 582.

Criminal Law & Procedure > Preliminary Proceedings > Pretrial Motions & Procedures > General Overview

Governments > Legislation > Statute of Limitations > Time Limitations

Governments > Legislation > Statute of Limitations > Tolling

HN8 See La. Code Crim. Proc. Ann. art. 580.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Speedy Trial

HN9 **Speedy Trial**

While it is elementary that legislative acts may not impair constitutional guarantees, an enactment is a recognition by the legislature that the time limitation thereby ordained is reasonable and acceptable under ordinary circumstances. Statutes of limitation are the primary guarantees against inordinate delays between accusation and trial, La. Code Crim. Proc. Ann. arts. 578 to 582; 18 U.S.C.S. §§ 3281 to 3282. These statutes represent a legislative assessment of relative interests of the State and defendant in administering and receiving justice, and they should be considered by the courts.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Speedy Trial

HN10 **Speedy Trial**

The constitutional right to a speedy trial is imposed upon the states by the Due Process Clause of U.S. Const. amend. XIV. The underlying purpose of this constitutional right is to protect a defendant's interest in preventing pretrial incarceration, limiting possible impairment of his defense, and minimizing his anxiety and concern. The following four Barker factors are for courts to consider in determining whether a defendant's right to a speedy trial has been violated: (1) the length of the delay; (2) the reasons for the delay; (3) the accused's assertion of his right to speedy trial; and (4) the prejudice to the accused resulting from the delay. The specific circumstances of a case will determine the weight to be ascribed to the length of and reason for the delay because the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Speedy Trial

HN11 **Speedy Trial**

There is some prejudice inherent in all accusations of crime, arrests and incarcerations. The anxiety and concern suffered by the accused and the disruption of his family life by the charge and incarceration are factors to be considered. Loss of his job is another. Deprivation of liberty which results from incarceration is always prejudicial. But this prejudice, like other, is a necessary consequence of any valid criminal charge, especially where the accusation involves first degree murder, a non-bailable offense. The amorphous quality of the right to a speedy trial leads to the unsatisfactorily severe remedy of dismissal of the indictment when the right has been deprived. This is indeed a serious consequence because, unlike the exclusionary rule or the reversal for a new trial, it means that a defendant who may be guilty of a serious crime, or two as in this case, will go free without having been tried. Overzealous application of this remedy would infringe 'the societal interest in trying people accused of crime, rather than granting them immunization because of legal error. Barring extraordinary circumstances, courts should be reluctant indeed to rule that a defendant has been denied a speedy trial.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Speedy Trial

HN12 **Speedy Trial**

Evidence that a defense had actually been impaired would weigh in favor of finding that a defendant's speedy trial rights had been violated.

Evidence > Admissibility > Scientific
Evidence > Standards for Admissibility

HN13 **Standards for Admissibility**

The Daubert standard has been adopted in Louisiana. It specifically rejects the "general acceptance" test and outlined the means for determining the reliability and answered many questions as to proper standards for the admissibility of expert scientific testimony. An inference or assertion of scientific knowledge must be derived by the scientific method. Proposed testimony must be supported by appropriate validation, i.e., "good grounds," based on what is known. Evidentiary reliability will be based on scientific validity. The trial court must determine whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. The trial court must make a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts at issue. Many factors will bear on the inquiry. "General acceptance" can have a bearing on the issue.

Criminal Law & Procedure > Appeals > Reviewability > General Overview

Evidence > Admissibility > Procedural Matters > General Overview

HN14 Under the doctrine of law of the case, an appellate court will generally refuse to reconsider its own rulings of law on a subsequent appeal in the same case.

Criminal Law & Procedure > Appeals > Reviewability > General Overview

Criminal Law & Procedure > Postconviction Proceedings > Motions for New Trial

Evidence > Admissibility > Procedural Matters > General Overview

HN15 *La. Code Crim. Proc. Ann. art. 857* states that the effect of granting a new trial is to set aside the verdict or judgment and to permit retrial of the case with as little prejudice to either party as if it had never been tried. This article continues the sound rule of *La. Code Crim. Proc. Ann. art. 515* of the 1928 Code of Criminal Procedure, that the slate is wiped clean when a new trial is granted. Thus in the absence of an independent constitutional or statutory ground requiring exclusion, the State may properly introduce evidence at a new trial which was not placed into evidence at the previous trial.

Criminal Law & Procedure > Trials > Bench Trials

HN16 **Bench Trials**

Bench trials are different than jury trials because judges are presumed to have the ability to respect the rules of evidence and the constitutional rights of the defendant.

Criminal Law & Procedure > Trials > Bench Trials

Evidence > Admissibility > Procedural Matters > General Overview

HN17 **Bench Trials**

The admissibility of evidence in a bench trial is different from the requirements in jury trials, because a judge by virtue of training and knowledge of the law is capable of disregarding any impropriety. When the proceeding is a bench trial, the possibility for prejudicial effect on the trial judge is far less than upon a jury.

Criminal Law & Procedure > Appeals > Prosecutorial Misconduct > Burdens of Proof

Criminal Law & Procedure > Counsel > Prosecutors

Criminal Law & Procedure > Trials > Closing Arguments > General Overview

Criminal Law & Procedure > Appeals > Prosecutorial Misconduct > Prohibition Against Improper Statements

Criminal Law & Procedure > Appeals > Reversible Error > Prosecutorial Misconduct

HN18 **Burdens of Proof**

Louisiana jurisprudence on prosecutorial misconduct allows prosecutors wide latitude in choosing closing argument tactics. In addition, La. Code Crim. Proc. Ann. art. 774 confines the scope of argument to evidence admitted, to the lack of evidence, to conclusion of fact that the state or defendant may draw therefrom, and to the law applicable to the case. The trial judge has broad discretion in controlling the scope of closing argument. Even if the prosecutor exceeds these bounds, a conviction will not be reversed unless the appellate court is thoroughly convinced that the argument influenced the jury and contributed to the verdict.

Criminal Law & Procedure > Preliminary Proceedings > Pretrial Motions & Procedures > Suppression of Evidence

HN19 **Suppression of Evidence**

See La. Code Crim. Proc. Ann. art. 703(A).

Criminal Law & Procedure > Preliminary Proceedings > Pretrial Motions & Procedures > General Overview

Criminal Law & Procedure > Preliminary Proceedings > Arraignments > General Overview

HN20 See La. Code Crim. Proc. Ann. art. 521.

Criminal Law & Procedure > ... > Sentencing Alternatives > Probation > General Overview

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Criminal Law & Procedure > Postconviction Proceedings > Parole

HN21 Parolees and probationers have due process rights concerning revocation of their paroles or probations. However, these due process rights are less than those involved in an ordinary criminal prosecution. An unreasonable delay in executing a parole violation warrant may violate a parolee's due process rights in some cases. Some courts have spoken in terms of "staleness" and "waiver" with regard to unreasonable delays in the execution of parole violation warrants. However, the underlying rationale of waiver or staleness concepts is the deprivation of the parolee's or probationer's constitutional rights to due process. To hold that a parole violation warrant becomes stale by the mere passage of time alone would be to reward an elusive parole violator for remaining unavailable. In addition, waiver alone is not the proper rationale for invalidating a warrant, because waiver implies both a knowing relinquishment of a right, and the authority of a parole officer to relinquish that right on behalf of the state. Mere inaction does not amount to waiver.

Criminal Law & Procedure > Postconviction Proceedings > Parole

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

HN22 **Parole**

Under a due process analysis, the length of time between the issuance and execution of a parole violation warrant is but one factor in determining its continuing validity. A delay in execution must be unreasonable before due process is affected. Factors in assessing reasonableness include (1) the State's diligence in attempting to serve the warrant; (2) the reason for the delay in serving the warrant; (3) the conduct of the parolee in frustrating service; and (4) actual prejudice suffered by the parolee as a result of the delay. The aim of the entire parole concept is to help individuals reintegrate into society as constructive individuals as soon as they are able, without being confined for the full term of the sentence imposed. In accordance with this aim, parole authorities have inherently broad discretion in the supervision of parolees. Parole authorities are not in a race against the clock to execute parole violation warrants. Nor must arrest and revocation be an automatic or reflexive reaction to every violation.

Criminal Law & Procedure > Postconviction Proceedings > Parole

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

HN23 **Parole**

A delay in execution of a parole violation warrant may frustrate the violator's due process rights if the delay undermines his ability to contest the violation, or to proffer mitigating evidence. Police may act on wanted bulletins issued by police departments possessing probable cause or reasonable suspicion to have the defendant seized.

Criminal Law & Procedure > Search & Seizure > Exclusionary Rule > General Overview

Criminal Law & Procedure > Commencement of Criminal Proceedings > Arrests > Probable Cause

Criminal Law & Procedure > Commencement of Criminal Proceedings > Arrests > Warrantless Arrests

Criminal Law & Procedure > Preliminary Proceedings > Pretrial Motions & Procedures > Suppression of Evidence

HN24[] Subjective intent alone does not make otherwise lawful conduct illegal or unconstitutional. As long as police do no more than they are objectively authorized and legally permitted to do, their motives in doing so are irrelevant and hence not subject to inquiry. The rule of suppression exists to deter unlawful actions by police. Where nothing has been done that is objectively unlawful, the exclusionary rule has no application. Pretextual warrantless arrests based on probable cause are allowed.

Criminal Law & Procedure > Commencement of Criminal Proceedings > Arrests > Warrantless Arrests

HN25[] **Warrantless Arrests**

La. Code Crim. Proc. Ann. art. 213 allows a peace officer to make an arrest without a Louisiana warrant in limited circumstances.

Criminal Law & Procedure > Commencement of Criminal Proceedings > Arrests > Warrantless Arrests

HN26[] **Warrantless Arrests**

See *La. Code Crim. Proc. Ann. art. 213(4)*.

Governments > Legislation > Interpretation

HN27[] **Interpretation**

The starting point in the interpretation of any statute is the language of the statute itself. The interpretation of the language of a criminal statute is governed by the rule that the articles of the criminal code cannot be extended by analogy so as to create crimes not provided for herein; however, in order to promote justice and to effect the objects of the law, all of its provisions shall be given a genuine construction, according to the fair import of their words, taken in their usual sense, in connection with the context, and with reference to the purpose of the provision, *La. Rev. Stat. Ann. § 14:3*. Further, although criminal statutes are subject to strict construction under the rule of lenity, the rule is not to be applied with such unreasonable technicality as to defeat the purpose of all rules of statutory construction, which purpose is to ascertain and enforce the true meaning and intent of the statute.

Governments > Legislation > Interpretation

HN28[] **Interpretation**

The general rule that ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity applies when the court is uncertain about the statute's meaning and is 'not to be used in complete disregard of the purpose of the legislature. Consequently, a criminal statute, like all other statutes, should be interpreted so as to be in harmony with and to preserve and effectuate the manifest intent of the legislature; an interpretation should be avoided which would operate to defeat the object and purpose of the statute. What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, where the words of a statute are clear and free from ambiguity, they are not to be ignored under the pretext of pursuing their spirit, *La. Rev. Stat. Ann. § 1:4*.

Criminal Law & Procedure > ... > Crimes Against Persons > False Imprisonment > Elements

Criminal Law & Procedure > Commencement of

Criminal Proceedings > Arrests > General Overview

HN29 **Elements**

False imprisonment occurs when one is arrested and restrained against his will by another who acts without a warrant or other statutory authority. It is restraint without color of legal authority. If a police officer acts pursuant to statutory authority in arresting and incarcerating a citizen, there is no false arrest or imprisonment.

Criminal Law & Procedure > Commencement of Criminal Proceedings > Arrests > Warrantless Arrests

HN30 **Warrantless Arrests**

See former La. Code Crim. Proc. Ann. art. 213.

Criminal Law & Procedure > Commencement of Criminal Proceedings > Arrests > Warrantless Arrests

HN31 **Warrantless Arrests**

The amendment to La. Code Crim. Proc. Ann. art. 213(4), which now provides "or a peace officer of another state", was merely intended to clarify the existing law, and was not intended to change the law.

Governments > Legislation > Interpretation

Criminal Law & Procedure > Commencement of Criminal Proceedings > Arrests > Warrants

Criminal Law & Procedure > Commencement of Criminal Proceedings > Arrests > Warrantless Arrests

Criminal Law & Procedure > Postconviction Proceedings > Parole

HN32 **Interpretation**

La. Code Crim. Proc. Ann. art. 213(4), when it refers to "a peace officer of another state or the United States holds an arrest warrant for a felony offense," includes warrants for parole violations. That provision of the statute is plain and straight forward. It reflects the legislative intent to allow the arrest of a person when an arrest warrant has been issued by another state for a felony offense. If the defendant's interpretation was given effect, it would result in an unjust and absurd result. Based on a warrant from another state, it allows peace officers to arrest persons accused of a felony offense in the other state (which is conceded by the defendant), but disallows a peace officer of Louisiana to arrest a person convicted of a felony from another state, who has violated a condition of parole imposed in the other state.

Governments > Legislation > Interpretation

Criminal Law & Procedure > Commencement of Criminal Proceedings > Arrests > Warrantless Arrests

Criminal Law & Procedure > Postconviction Proceedings > Parole

HN33 **Interpretation**

Louisiana courts have impliedly interpreted La. Code Crim. Proc. Ann. art. 213(4) to include parole warrants.

Criminal Law & Procedure > Postconviction Proceedings > Parole

Criminal Law & Procedure > Commencement of Criminal Proceedings > Arrests > Warrantless Arrests

HN34 **Parole**

A Louisiana judge and a Louisiana parole officer (who has been transferred supervision of the parolee from the foreign state) may issue a Louisiana arrest warrant for an out-of-state parole violation. La. Code Crim. Proc. Ann. art. 269 allows a Louisiana judge to issue a warrant for the arrest of a person in the state, prior to a demand for extradition in conformity with La. Code Crim. Proc. Ann. art. 263, when on the oath or affidavit of a credible person, taken before a judge or clerk of court, the person to be arrested is charged with having been convicted of a crime in another state, and having escaped from confinement or having broken the terms of his bail, probation, parole, furlough, or reprieve.

Criminal Law & Procedure > Postconviction Proceedings > Parole

Criminal Law & Procedure > Commencement of Criminal Proceedings > Arrests > Warrants

HN35 **Parole**

La. Rev. Stat. Ann. § 15:574.8 allows a parole officer who has been transferred supervision of the parolee from the foreign state to issue an arrest warrant.

Criminal Law & Procedure > Postconviction Proceedings > Parole

Criminal Law & Procedure > Commencement of Criminal Proceedings > Arrests > Warrants

HN36 **Parole**

See La. Rev. Stat. Ann. § 15:574.8(A).

Criminal Law & Procedure > Preliminary Proceedings > Pretrial Motions & Procedures > Suppression of Evidence

HN37 **Suppression of Evidence**

A motion to suppress should be filed pretrial, La. Code Crim. Proc. Ann. arts. 703 and 521.

Criminal Law & Procedure > ... > Reviewability > Preservation for Review > Requirements

Criminal Law & Procedure > Preliminary Proceedings > Pretrial Motions & Procedures > Suppression of Evidence

HN38 **Requirements**

A defendant seeking review of a motion to suppress on appeal is limited to the grounds articulated at trial.

Criminal Law & Procedure > Preliminary Proceedings > Pretrial Motions & Procedures > General Overview

Criminal Law & Procedure > ... > Standards of Review > Deferential Review > General Overview

HN39 A defendant may seek review of a pretrial ruling even after the denial of a pretrial supervisory writ application seeking review of the same issue. When a defendant does not present additional evidence on the issue after the pretrial ruling, however, the issue can be rejected on appeal. Judicial efficiency demands that great deference be accorded to a pretrial decision unless it is apparent that the determination was patently erroneous and produced unjust results.

Counsel: John Foster DeRosier, Assistant District Attorney, Carla Sue Sigler, Assistant District Attorney, Lake Charles, LA, Counsel for State of Louisiana.

Anna Van Cleave, Richard Bourke, Louisiana Capital Assistance Center, New Orleans, LA, Counsel for Defendant: Ricky Joseph Langley.

Judges: Court composed of Ulysses Gene Thibodeaux, Chief Judge, Sylvia R. Cooks, and Elizabeth A. Pickett, Judges.

Opinion by: ELIZABETH A. PICKETT

Opinion

[*751] [Pg 1] **PICKETT, Judge**.

FACTS

On Friday, February 7, 1992, the Calcasieu Sheriff's Office received a 911 call from the mother of six-year-old Jeremy Guillory reporting him missing. The call was placed from the home of Ricky and Rosie Lawrence, where they lived with their two small children. Ricky Langley, the defendant, rented a room in the house from the Lawrences and had been living there for approximately three weeks.

Deputies were dispatched to the scene. A massive search ensued and continued through the weekend. When it became apparent to law enforcement that Jeremy had not just wandered off, they began a criminal **[**2]** investigation. In the course of the investigation, it was discovered that there was an outstanding warrant for the defendant from the State of Georgia for a parole violation.

On Monday, February 10, 1992, the defendant was arrested on the Georgia warrant at his place of employment. He was taken into custody by Calcasieu Parish Detective Donald DeLouche and FBI Special Agent Donald D. Dixon. Detective DeLouche advised the defendant of his *Miranda* rights. After placing him in an FBI vehicle, Special Agent Dixon advised the defendant that in addition to being arrested for the Georgia parole violation, he was a suspect in the disappearance of Jeremy Guillory. Agent Dixon then asked the defendant if he had killed Jeremy Guillory, and the defendant admitted that he had killed Jeremy. The defendant advised Special Agent Dixon that Jeremy's body was in the closet of the bedroom that he rented from the Lawrences. He admitted that he had choked Jeremy.

The Lawrence home was secured as a crime scene. Both the defendant and Mrs. Lawrence executed volunteer search forms. The defendant accompanied the law [Pg 2] enforcement officials to the Lawrence home. The defendant was again advised of his *Miranda* **[**3]** rights, which he agreed he understood and which he waived. He voluntarily walked the officials through the crime scene, describing in detail how he had killed Jeremy. Jeremy's body was discovered in the closet of the defendant's bedroom, covered with blankets. Jeremy had a ligature around his neck and a sock stuffed into his mouth, consistent with the details the defendant had given the officers when describing how he had killed Jeremy. The cause of death was ultimately determined to be asphyxiation.

[*752] The defendant was then taken to the Calcasieu Parish Sheriff's Office, where he gave a videotaped statement. The defendant was again advised of his *Miranda* rights, and he expressly waived those rights. He told the officers he first met Jeremy Guillory approximately one week before the homicide when Jeremy was at the Lawrences' home playing with the Lawrence children. The defendant said when he first saw Jeremy, he "wanted him" and that he wanted to molest him. On the Friday that he killed Jeremy, Jeremy was at the house playing with the Lawrences' son, but Jeremy left when Mrs. Lawrence and her son left to visit a relative. Jeremy later returned with his BB gun while the defendant was at **[**4]** the house alone, and asked if his friend was there. The defendant said he could come in and visit. Jeremy came into the house and put his BB gun down in the front room. The defendant said he knew then that he would "mess" with the child unless the child left immediately or someone came home. The defendant related that he went upstairs and Jeremy followed him and went into one of the children's rooms to play. He stated that while Jeremy was playing he came up behind him, put his arm around his neck, lifted him off the floor, and choked him. The defendant said he knew he was going to kill him. He gave the officers detailed [Pg 3] information about the incident, including the fact that Jeremy was kicking and his boots came off. The defendant said he felt enjoyment while he was choking Jeremy. He said when Jeremy quit moving he carried him to the defendant's bedroom and laid him on the bed. He said he put his penis in the child's mouth and ejaculated. The defendant left Jeremy there and went about his task of doing laundry. He said at some point Jeremy was making noises and the defendant then put a ligature around his neck and choked him, pulling the ligature as hard as he could. He then **[**5]** tied the two ends of the cord together and stuffed a sock in Jeremy's mouth.

Jeremy's mother came to the house looking for him. The defendant told her he had not seen him. He offered to let her use the phone. While she was there he realized that Jeremy's BB gun was still in the front room. When she left, he picked up the gun and took it upstairs, where he put it in his bedroom closet. Jeremy's mother returned to the house. The defendant offered to help her search and allowed her to use the phone to call 911. He later called 911 himself to make sure they had the correct address.

The defendant stated that people started to arrive to help with the search. The defendant then took Jeremy's body and put it in the closet, and retrieved Jeremy's boots from the child's room where he had been choked and put them in the closet. At some point, he covered the body with blankets from his room. He said he mopped his room and the hallway. He changed the sheets on his bed and washed the blankets. He denied that he was trying to destroy evidence.

On March 26, 1992, at the defendant's request, a second videotaped statement was taken from the defendant. The defendant was again advised of his rights. He acknowledged **[**6]** that he was being represented by an attorney but stated he did not want his lawyer present and expressly waived his rights, including his right to counsel. He [Pg 4] told the officers that some of the details in his first statement were incorrect and he wanted to give them a correct account of the events of the day he killed Jeremy Guillory.

The defendant related that, on the day in question, Jeremy came back to the house to play with the

Lawrences' child. He said he told Jeremy the child was not **[*753]** home but invited him in. Jeremy declined and went off to shoot his BB gun. The defendant said he thought about the fact that no one else was at the house and that he could do what he wanted to do. He stated he went to the back door and called Jeremy, inviting him inside, and Jeremy then came inside. The defendant said he went straight upstairs and Jeremy followed him. He stated he then went back downstairs and Jeremy followed him. The defendant said he pulled the child's pants down to molest him — to sodomize him — to "go all the way" with him — but he couldn't do it. He pulled Jeremy's pants back up, turned him around, and forced his penis into Jeremy's mouth. The defendant said he ejaculated **[**7]** but didn't know if it went into Jeremy's mouth. The defendant said he knew what he was doing was wrong but that he had no control over it. He said he then carried Jeremy upstairs to his own bedroom, not the children's, and choked him like he told them in the first statement — with his arm around Jeremy's neck. When Jeremy went limp, he laid him on his bed. The defendant went downstairs, and when he came back Jeremy was making heavy breathing noises. The defendant said that is when he put the ligature around Jeremy's neck and pulled as tightly as he could, but that did not stop the child from trying to breathe. He then stuffed an old sock in Jeremy's mouth to make sure he stopped breathing. He told the officers the remainder of his first statement was accurate. He [Pg 5] agreed that he knew what he did was wrong. He stated that he had remorse for the fact that a child's life was lost, but that he felt no regret for "what's done."

A seminal stain was found on the seam of the underside of one of the sleeves of the t-shirt that Jeremy was wearing when his body was found. It was identified by DNA analysis as being semen from the defendant. The semen was soaked into the fabric.

The 1994 Trial

A **[**8]** review of the defendant's conviction for second degree murder and the issues in this appeal requires a review of the prior proceedings in this case. The defendant was indicted by a grand jury for the offense of first degree murder. In 1994, he was found guilty of that charge and sentenced to death. His conviction was appealed to the Louisiana Supreme Court, and both the conviction and sentence were affirmed. The supreme court, however, granted the defendant's application for rehearing and ultimately remanded the case to the trial court for an evidentiary hearing concerning the defendant's claim of intentional discrimination in the selection of the grand jury foreperson. State v. Langley, 95-1489 (La. 4/14/98), 711 So.2d 651, *rehearing granted in part* (6/19/98), 711 So.2d 651 (hereinafter *Langley I*). On remand, the trial court granted the defendant's motion to quash the indictment and vacated his conviction and sentence. The state appealed that judgment, and it was affirmed by the supreme court. State v. Langley, 95-1489 (La. 4/3/02), 813 So.2d 356.

The 2003 Trial

The defendant was re-indicted on a charge of first degree murder and pled not guilty and not guilty by reason of insanity. A change of venue **[**9]** was granted because of pretrial publicity. Although the case was tried in Calcasieu Parish, the jury was [Pg 6] selected from Orleans Parish. The jury rejected the defendant's insanity defense and returned a verdict of guilty of the lesser included offense of second degree murder. The defendant received the mandatory sentence of life imprisonment at hard labor. The defendant appealed the verdict and argued that the temporary absences of the trial judge from the courtroom during portions of the *voir dire* examination **[*754]** of prospective jurors and during closing arguments constituted a structural defect in the proceedings and required the reversal of his conviction. This court agreed that "the errors committed by the trial judge, in absenting himself from the proceedings and failing to maintain decorum, were structural errors requiring reversal of the defendant's conviction without a showing of actual prejudice." State v. Langley, 04-269, p. 15 (La.App. 3 Cir. 12/29/04), 896 So.2d 200, 210 (hereinafter *Langley II*). This court further concluded that the structural defects rendered the jury's verdict absolutely void and resulted in neither a conviction for second degree murder nor an acquittal **[**10]** of first degree murder. The majority of the court concluded that the state could exercise its plenary discretion over the subsequent conduct of the prosecution pursuant to La.Code Crim.P. art. 61, and could retry the defendant for the offense of first degree murder and seek the death penalty. *Id*.

The 2009 Trial: Pre-Trial Proceedings

The defendant was once again indicted for the offense of first degree murder. The defendant moved to quash the indictment. The trial court granted the motion to the extent that it limited the indictment to a charge of

second degree murder. The trial court reasoned that retrial for first degree murder would violate the defendant's constitutional protection against double jeopardy and penalize him for his success on appeal by once again exposing him to a possible death penalty. The state sought [Pg 7] review from this court. This court granted the state's writ and held that its earlier ruling regarding the issue of the trial being an absolute nullity was binding on the lower court and was the "law of the case." *State v. Langley, an unpublished opinion bearing docket number 05-1475 (La.App. 3 Cir. 4/5/06), 925 So.2d 778*. The defendant sought writs from the **[**11]** Louisiana Supreme Court. In a majority opinion, the supreme court reversed this court and held that the defendant could not be retried for first degree murder. *State v. Langley, 06-1041 (La. 5/22/07), 958 So.2d 1160* (hereinafter *Langley III*). The state applied for a writ of review with the United States Supreme Court. That petition was denied on October 29, 2007. *See Louisiana v. Langley, 552 U.S. 1007, 128 S.Ct. 493, 169 L. Ed. 2d 368 (2007)*.

The 2009 Trial

Numerous pre-trial motions were filed by both the state and the defendant following the supreme court's decision. On June 24, 2008, the defendant waived his right to a trial by jury. The state moved to recuse the trial judge. Ultimately, Judge Wilford Carter was recused by order of this court, and Judge Robert Wyatt was randomly chosen to replace him. The state amended the bill to a charge of second degree murder, and the defendant entered a plea of not guilty and not guilty by reason of insanity on November 2, 2009. The court began hearing evidence that same day. In addition to the statements of the defendant and the physical evidence, both parties presented expert testimony relating to the defendant's insanity defense.

The defense presented testimony **[**12]** from a forensic psychiatrist, Dr. Rahn Bailey. He testified at length regarding the defendant's history, drawing from various sources including medical records, collateral sources such as information from family members, a review of the defendant's actions and statements, and personal observations. He [Pg 8] ultimately concluded that the defendant is schizophrenic, was psychotic and delusional at the time he killed Jeremy Guillory, and was unable to distinguish between right and wrong at the time he killed Jeremy Guillory.

The state also offered testimony from a forensic psychiatrist, Dr. Dennis Clayton **[*755]** Kelly, Jr. He also testified at length regarding the defendant's history after having reviewed statements, records and reports prepared by various health care professionals and the reports of evaluations conducted subsequent to this crime. He also viewed the statements given by the defendant and the evidence regarding his actions and behavior associated with this crime, as had Dr. Bailey. He disagreed with Dr. Bailey's ultimate diagnosis and conclusion, pointing to the defendant's linear thought process, his ability to remember details of the offense that were substantiated by physical **[**13]** evidence, and his actions regarding the hiding of evidence, such as the BB gun, after the offense was committed. He also noted the lack of evidence in any of the records or history which would indicate any significant period of time where the defendant had suffered severe, incapacitating symptoms. Dr. Kelly found no evidence of psychosis at the time the murder was committed, and he opined that the defendant did not lose the ability to distinguish between right and wrong due to mental illness.

The state also presented a transcript of the testimony of Dr. Aretta Rathmelle, who had testified in the 2003 trial of the defendant. Dr. Rathmelle, who passed away before the 2009 trial, concluded that the defendant could form specific intent to commit murder and knew right from wrong when he killed Jeremy.

The trial court found that, beyond a reasonable doubt, Ricky Langley killed Jeremy Guillory. It found that there was specific intent to kill. He specifically rejected Dr. Bailey's diagnosis of schizophrenia and accepted the opinion of Dr. Kelly. The [Pg 9] trial court also made observations regarding the defendant's demeanor and conduct in recollecting the specifics of his acts. The trial court **[**14]** ultimately ruled that Ricky Langley was able to distinguish between right and wrong at the time of the offense. The trial court returned a verdict of guilty of the offense of second degree murder on November 6, 2009. The defendant filed motions for a new trial and arrest of judgment which were denied by the trial court.

It is from this conviction that the defendant appeals, assigning ten errors.

ASSIGNMENTS OF ERROR

1. Retrial of Mr. Langley for the intentional killing of Jeremy Guillory violated Mr. Langley's state and federal constitutional rights to be free from Double Jeopardy.

2. Trial of this case after prescription had elapsed violated Mr. Langley's state statutory and constitutional speedy trial rights.

3. Trial of this case seventeen years after the initial indictment and five years after a retrial was ordered violated Mr. Langley's state and federal constitutional speedy trial rights.

4. Excluding defense evidence from a psychologist expert in confessions and interrogation violated Mr. Langley's state and federal constitutional rights to Due Process, to present a defense, to confront witnesses and to compulsory process as well as his state statutory right to challenge the reliability **[**15]** of his confession at trial.

5. Barring the defense from eliciting evidence regarding the interrogating detective that was relevant to the weight and reliability to be attached to Mr. Langley's confessions violated Mr. Langley's state and federal constitutional rights to Due Process, to present a defense, to **[*756]** confront witnesses and to compulsory process as well as his state statutory right to challenge the reliability of his confession at trial.

6. Admitting evidence of the previously excluded Georgia Doc records violated Mr. Langley's state and federal constitutional rights to Due Process as well as *La. C. E. art. 404*.

[Pg 10] 7. Forcing Mr. Langley to choose between his right to plead not guilty by reason of insanity and his right to insist upon the protections of the Code of Evidence violated Mr. Langley's state and federal constitutional rights to Due Process.

8. Admitting into evidence the fruits of Mr. Langley's unlawful arrest violated Mr. Langley's state and federal constitutional rights to Due Process, to be free from an unreasonable search and seizure as well as his statutory right to the suppression of illegally obtained evidence.

9. Admitting into evidence the March 26, 1992 statement **[**16]** violated Mr. Langley's state and federal constitutional rights to Due Process, to the assistance of counsel and to be free from unreasonable search and seizure.

10. The recusal of Judge Carter violated Mr. Langley's state and federal constitutional rights to Due Process as well as his statutory right to proceed before the allotted judge in the absence of grounds for recusal.

ERRORS PATENT

HN1[] In accordance with *La. Code Crim. P. Art 920*, all appeals are reviewed by this court for errors patent on the face of the record. After reviewing the record, we find there is one error patent concerning the advice given regarding the time limitation for filing an application for post-conviction relief. After the court imposed the defendant's sentence, the prosecutor pointed out that the "defendant needs to be made aware of the two years post-conviction relief part of the sentencing." Immediately thereafter, the judge stated, "I'm sorry, you're very correct. Mr. Langley, Ms. Van Cleave, the law provides you have two years to appeal from the time of the rendition of judgment and conviction. You have that right. You're so notified of that right at this time."

HN2[] According to *La. Code Crim. P. art. 930.8*, the **[**17]** two year prescriptive period for filing an application for post-conviction relief begins to run when a defendant's conviction and sentence become final under the provisions of *La.Code Crim. P. art. 914* or *922*. The trial court is directed to inform the defendant of the correct prescriptive period by sending appropriate written notice to the defendant within ten [Pg 11] days of the rendition of this opinion and to file written proof in the record that the defendant received the notice.

ASSIGNMENT OF ERROR NUMBER ONE: DOUBLE JEOPARDY

In his first assignment of error, the defendant alleges that his retrial for the intentional killing of Jeremy Guillory violated his state and federal constitutional rights to be free from double jeopardy. He argues that the prosecution for second degree murder was barred by principles of double jeopardy and collateral estoppel. Specifically, he contends that the issue of whether or not he had specific intent to kill was litigated in his favor in the previous trial. The defendant argues that in the previous trial, he conceded that he killed Jeremy Guillory and that Jeremy was less than twelve years old. With these two elements of the offense conceded, he argues **[**18]** **[*757]** that the jury's verdict of second degree murder necessarily rejected the specific intent theory of the crime. He argues that he could not therefore, be re-prosecuted under a specific intent theory.

Although the defendant argues that he could not be re-

tried under double jeopardy principles, the supreme court, after conducting a double jeopardy analysis, determined that he could be re-tried for second degree murder. While it is true the supreme court did not discuss the issue regarding intent, HN3[] re-prosecutions such as the present one are allowed because second trials do not offend double jeopardy principles when they occur pursuant to judicial error. State v. Mayeux, 498 So. 2d 701 (La.1986).

Regarding the collateral estoppel argument, we note the following jurisprudence:

> HN4[] The Fifth Amendment's Double Jeopardy Clause protects against successive prosecutions following acquittal or conviction, as well as multiple punishments for the same offense. *See also*, LSA-Const. art. I, § 15; La.C.Cr.P. art. 591 et seq. The collateral estoppel component of the [Pg 12] Double Jeopardy Clause prohibits the state from relitigating an issue of ultimate fact that has been determined by a valid and final judgment. **[**19]** Ashe v. Swenson, 397 U.S. 436, 443, 90 S.Ct. 1189, 1194, 25 L.Ed.2d 469 (1970); State v. Cotton, 00-0850, pp. 5-6 (La.1/29/01), 778 So.2d 569, 574, *reh'g granted in part, on other grounds*, *00-0850 (La.4/20/01), 787 So.2d 278*. A fact is considered "ultimate" if it is necessary to a determination of the defendant's criminal liability. State v. Miller, 571 So.2d 603, 607 (La.1990).
>
> Collateral estoppel bars relitigation of only those facts necessarily determined in the first trial. United States v. Brackett, 113 F.3d 1396, 1398 (5th Cir.1997), *cert. denied*, *522 U.S. 934, 118 S. Ct. 341, 139 L. Ed. 2d 265 (1997)*. Where a fact is not necessarily determined in a previous trial, the state is not barred from reexamining the issue. *Id*. Accordingly, the first step in resolving a collateral estoppel claim is to discern which facts were "necessarily determined" in the first trial. *Id*.
>
> HN5[] The courts have placed the burden "on the defendant to demonstrate that the issue whose relitigation he seeks to foreclose was actually decided in the first proceeding." Dowling v. United States, 493 U.S. 342, 350, 110 S.Ct. 668, 673, 107 L.Ed.2d 708 (1990). The application of this test to criminal cases is complicated **[**20]** by the fact that an acquittal by general verdict does not specify the facts "necessarily decided" by the jury. Therefore, to determine which facts were "necessarily decided" by the general acquittal in the first trial, it is necessary to examine the record of the prior proceeding in order to determine " 'whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.' " Ashe v. Swenson, 397 U.S. at 444, 90 S.Ct. at 1194 (citations omitted).

State v. Ingram, 03-1246, pp. 3-4 (La.App. 5 Cir. 10/28/04), 885 So.2d 714, 716-17, *writ denied*, *04-3135 (La. 4/1/05), 897 So.2d 600*.

HN6[] 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 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. **[*758]** Regardless of the jury's thought process **[**21]** in this particular case, clearly the argument that the issue of [Pg 13] 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.

ASSIGNMENT OF ERROR NUMBER TWO: PRESCRIPTION

In this assignment of error the defendant argues the case against him has prescribed, as his retrial was not timely commenced. Louisiana Code of Criminal Procedure Article 582 provides:

> HN7[] When a defendant obtains a new trial or there is a mistrial, the state must commence the second trial within one year from the date the new trial is granted, or the mistrial is ordered, or within the period established by Article 578, whichever is longer.

The defendant argues that the judgment of this court reversing his earlier conviction became final on January 12, 2005. Langley II, 896 So.2d 200; La.Code Crim.P. art. 922. He concedes that certain events after January 12, 2005, suspended the prescriptive period. He argues that June 5, 2008 was the latest day that trial could legally commence.

We agree that the judgment reversing his conviction became final on January **[**22]** 12, 2005. On February 10, 2005, the defendant filed a Motion To Recuse the District Attorney. The court minutes reflect that a hearing was held on March 31, 2005, at which time the defendant's Motion To Recuse the District Attorney was set for hearing on May 11, 2005.

There is no evidence in the record of a May 11, 2005 hearing, but the minutes reflect that on May 12, 2005, the trial judge, in open court, refixed the Motion To Recuse for June 16, 2005. One week prior to this date, on June 9, 2005, the defendant filed a Motion For Court to Honor Its Earlier Order Continuing The Hearing on Defense Motion to Recuse District Attorney. The record does not reflect any court [Pg 14] proceedings on June 16, 2005. Subsequently, however, on August 23, 2005, a letter from defense attorney Phyllis Mann to the presiding judge was filed in the record. In that letter, defense counsel requested that the Motion to Recuse be set for hearing on the motion hearing dates set aside on October 5, 6, 14, and 18, 2005.

The minutes reflect that the next hearings were held October 31, 2005, at which time the Motion to Recuse the District Attorney was taken up. The minutes further reflect that defense counsel presented **[**23]** to the court three distinct reasons to recuse the district attorney's office: 1) the issue of conflict of interest regarding funding issues, 2) the issue regarding Assistant District Attorney Richard Oustalet's representation of a key witness in a personal matter, and 3) the issue of former District Attorney Rick Bryant's personal feelings toward the defendant. According to the minutes, the trial court denied the motion as to both the funding issue and the issue involving the former district attorney's personal feelings toward the defendant, but the court declined to rule on the last issue, granting the defendant additional time to investigate the matter and funding to conduct the investigation. The minutes specifically state, "The Court further orders that the defendant's prescription time will not begin until the Court has made a final ruling on the Motion to Recuse as a whole." A review of the transcript of the October 31, 2005, hearing, however, reflects that the court actually did not rule on any aspect of the motion.

> THE COURT:
>
> **[*759]** We left the conflict on the lawyer representing the witness; okay? We're going to give you more time to develop that a little more; okay? Once you're ready **[**24]** after thirty days, I will expect you to let me know if you want to have another hearing on that.
> MS. MANN:
> Thank you, Your Honor.
> [Pg 15] THE COURT:
> And I would think that you have more than you have now, because you don't have enough for me to make a ruling on it today. So, for right now, the D.A. is still in the case. I denied all grounds except leaving open the one conflict possibility because the Assistant District Attorney represents the key witness.
> MS. MANN:
> And obviously, Your Honor, we would object to the Court's ruling, but given that you allowed us thirty days to develop and funds with which to do that, thank you. To develop that evidence, just so that we don't get on any writ confusion grounds, here, okay? We consider this all to be one motion ----
> THE COURT:
>
> Yes, that's right. So, your time won't begin to run yet, until after the thirty days hearing. That's right. So everything will be consolidated into one ruling so that you can take writs on everything to include what I've done today. *I guess what I'm doing, is I'm telling you what I'm going to do on the other two areas of your motion , and I'm leaving one open. At which time I will make a ruling on all of them together*. But **[**25]** I'm telling you what the ruling will be on two of them, and one of them you have the opportunity to present more evidence.

(Emphasis added.)

Following this hearing there was a significant amount of activity reflected in the record by the defense regarding this motion as they issued numerous subpoenas *duces tecum* for various records held by individuals and organizations. On November 29, 2005, the defendant filed a Motion To Set Hearing Date For Motion to Recuse District Attorney, stating the investigation was complete. A review of the transcript of a hearing held January 4, 2006, reflects that the defense was actively preparing to present further evidence on this matter to the court. It is clear that at that time the motion was still pending. The motion was set for hearing on February 22, 2006.

[Pg 16] There is no evidence in the record, however, that the February 22, 2006 hearing was ever held. There are no further motions by the defendant to re-fix the motion for hearing. A careful review of the record leads this court to the conclusion that no hearing was

held, and the trial court never issued a ruling on this motion. Further, there is no indication in the record that this matter was **[**26]** withdrawn.

Louisiana Code of Criminal Procedure Article 580 provides:

> HN8[] When a defendant files a motion to quash or other preliminary plea, the running of the periods of limitation established by Article 578 shall be suspended *until the ruling of the court thereon*; but in no case shall the state have less than one year after the ruling to commence the trial.

(Emphasis added.)

At a hearing on the defendant's Motion to Quash the Indictment due to prescription on September 17, 2009, the defendant asserted that the third issue pertaining to the Motion to Recuse the District Attorney was resolved at a hearing held March 22, 2006. He argued that because he did not file any objections after that hearing for the failure of any person to produce subpoenaed **[*760]** records thought to include *Brady* material, he waived the right to pursue the Motion to Recuse. Defense counsel stated to the trial court at the September hearing:

> And the Court, in fact, said on March 22, if you've got any objection or anything to say about this, then you have until April 7th, 2006 to pursue this matter. The defense did not have any objection. The matter was resolved.

This argument is not consistent with the record of the March 22 **[**27]** hearing. The March 22 hearing was convened to discuss discovery requests related to the assistant district attorney's representation of Detective Delouche in a civil case. The trial court heard arguments about the discovery issues, and by the end of the hearing the parties had agreed on the parameters of the subpoenas. The trial court scheduled a hearing for [Pg 17] April 7 to hear arguments concerning the *discovery issues*, not about the Motion to Recuse. When the parties waived the April 7 hearing, it meant that the discovery issues were resolved, not that the Motion to Recuse the District Attorney was waived. The trial court never made a final ruling on the Motion to Recuse District Attorney, as required by La.Code Crim.P. art. 580, which the trial court specifically stated at the October 31, 2005 hearing was required for prescription to begin running again.

The filing by the defendant of the Motion To Recuse the District Attorney was a preliminary plea which suspended the running of the one-year limitation set forth in La.Code Crim.P. art. 578. State v. Vincent, 02-1452 (La.App. 3 Cir. 4/2/03), 843 So.2d 1174; State v. McDonald, 02-909 (La.App. 3 Cir. 2/5/03), 838 So.2d 128, *writ* ***[**28]*** *denied*, 03-807 (La. 10/17/03), 855 So.2d 758. The trial court never ruled on that motion, and it was never withdrawn by the defendant. Therefore, the time limitation was suspended until the trial began on November 2, 2009, when both the state and the defense announced that they were ready for trial, and the trial commenced. The defendant did not object to or raise the issue of the pending Motion to Recuse District Attorney. The motion was pending until the day the trial began, at which time it was considered abandoned by the defendant. State v. Craig, 32,209 (La.App. 2 Cir. 8/18/99), 747 So. 2d 604. His failure to object constitutes a waiver of the objection. State v. Woodfox, 291 So.2d 388 (La.1974); State v. Jennings, 07-150 (La.App. 3 Cir. 5/30/07), 958 So.2d 144, *writ denied*, *07-1460 (La. 1/7/08), 973 So.2d 731*; State v. Pratt, 32,302 (La.App. 3 Cir. 9/22/99), 748 So.2d 25.

The filing of the Motion To Recuse District Attorney suspended the running of the prescription. It remained suspended as it was neither withdrawn by the defendant nor ruled upon by the court before the trial commenced. Even if defense counsel's [Pg 18] arguments at the September 17, 2009 hearing amount to a waiver **[**29]** or withdrawal of the Motion to Recuse the District Attorney, the suspension of prescription from February 2005 until September 2009 makes the November 2009 trial date timely. There is no violation of the defendant's right to a speedy trial.

This assignment of error has no merit.

ASSIGNMENT OF ERROR NUMBER THREE: RIGHT TO A SPEEDY TRIAL

In his third assignment of error, the defendant alleges that trial of this case seventeen years after the initial indictment and five years after a retrial was ordered violated his state and federal constitutional speedy trial rights. The trial court denied his motion below in light of its ruling on **[*761]** prescription. Statutory prescription and constitutional speedy trial rights are, in fact, interrelated:

> HN9[] While it is elementary that legislative acts may not impair constitutional guarantees, ... [A]n enactment is a recognition by the legislature that the time limitation thereby ordained is reasonable

and acceptable under ordinary circumstances. Statutes of limitation are the primary guarantees against inordinate delays between accusation and trial. La.Code Crim.Pro. arts. 578--82; 18 U.S.C.A. s 3281--82; United States v. Ewell, 383 U.S. 116, 86 S.Ct. 773, 15 L.Ed.2d 627 (1966); **[**30]** *State v. Howard, 325 So.2d 812 (La.1976)*; State v. Stetson, 317 So.2d 172 (La.1975); State v. Gladden, 260 La. 735, 257 So.2d 388 (1972). There [sic] statutes represent a legislative assessment of relative interests of the State and defendant in administering and receiving justice, and they should be considered by the courts. United States v. Marion, 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971); State v. Theard, 203 La. 1026, 14 So.2d 824 (1943). Judged by this legislative criterion, the delay in the instant case is neither inordinate nor unreasonable.

State v. Alfred, 337 So.2d 1049, 1055-56 (La.1976).

The test for constitutional speedy trial claims is well-settled:

> HN10[↑] The constitutional right to a speedy trial is imposed upon the states by the Due Process Clause of the Fourteenth Amendment. Klopfer v. North Carolina, 386 U.S. 213, 223, 87 S.Ct. 988, 993, 18 L.Ed.2d 1 (1967). The underlying purpose of this constitutional right is to protect a defendant's interest in preventing pretrial incarceration, limiting possible [Pg 19] impairment of his defense, and minimizing his anxiety and concern. Barker v. Wingo, 407 U.S. 514, 515, 92 S.Ct. 2182, 2184, 33 L.Ed.2d 101 (1972). The Supreme **[**31]** Court has set forth the following four factors for courts to consider in determining whether a defendant's right to a speedy trial has been violated: (1) the length of the delay; (2) the reasons for the delay; (3) the accused's assertion of his right to speedy trial; and (4) the prejudice to the accused resulting from the delay. Id. at 531-532, 92 S.Ct. at 2192-93; *see also* State v. Reaves, 376 So.2d 136 (La.1979) (adopting *Barker* factors). The specific circumstances of a case will determine the weight to be ascribed to the length of and reason for the delay because "the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge." Reaves, 376 So.2d at 138 (quoting Barker, 407 U.S. at 531, 92 S.Ct. at 2192).

State v. Batiste, 05-1571, pp. 6-7 (La.10/17/06), 939 So.2d 1245, 1250.

The defendant is correct in asserting that the seventeen-year time span between the original action against him and the most recent trial is presumptively prejudicial. Therefore, we will analyze this matter under the factors mandated by Barker.

The first factor deals with the length of the delay. As previously noted, the most recent trial occurred **[**32]** approximately seventeen years after institution of the initial prosecution.

The second factor addresses the reasons for the delay. The defendant acknowledges that over the years there were valid delays, but he argues the major delays were not attributable to him. The procedural history of this case is set forth above. It is necessary, in determining whether the length of the delay results in a violation of the defendant's constitutional **[*762]** right to a speedy trial, to examine the peculiar circumstances in this case.

The defendant was convicted of first degree murder in 1994, and he received the death penalty for the homicide which occurred in 1992. The appellate process ran its normal course. Ultimately, that conviction was overturned by the Louisiana Supreme [Pg 20] Court because of a constitutional defect, racial discrimination in the grand jury foreman selection process, in 2002. Langley I, 711 So.2d 651; Langley, 813 So.2d 356.

The defendant was retried for first degree murder and ultimately convicted of the lesser included offense of second degree murder. That conviction was reversed by this court in December 2004 due to structural errors in the procedure related to the trial judge's **[**33]** improper absences from the courtroom during the proceedings. This court declared that proceeding to be a nullity. Langley II, 896 So.2d 200.

The defendant was re-indicted for the offense of first degree murder. The defendant filed a motion to quash the indictment since the previous trial had resulted in a conviction of a lesser included offense. The trial court agreed, and it limited the indictment to a charge of second degree murder. After appeal by the state, the trial court was reversed by this court. The defendant took a writ application to the Louisiana Supreme Court, which ultimately ruled in his favor, ordering the trial court's ruling reinstated. Langley III, 958 So.2d 1160. The issue was not resolved by the Louisiana Supreme Court until May 22, 2007. In the interim, there were numerous pretrial motions filed by the defendant in

preparation for trial, and numerous hearings associated with those motions as well as proceedings associated with the defendant's numerous requests for subpoenas *duces tecum*. One of the motions filed was the Motion to Recuse District Attorney, more fully discussed above, which was vigorously pursued but never resolved since the defendant made no request **[**34]** to set it for final hearing.

Subsequent to the ruling of the Louisiana Supreme Court, the state exercised its right to pursue a writ of review to the United States Supreme Court. The Supreme Court denied certiorari on October 29, 2007. Although the defense argues the delay [Pg 21] involved regarding this application for writ of review should have no bearing in this matter, the delay involved was beyond the control of the state, which was exercising its right to pursue a remedy provided to it by law.

A few months later, new defense counsel filed a Motion to Enroll, which was followed almost immediately by a written objection filed by the defendant as to her representation of him in this matter. Although the defense argues there was never any question as to who was representing the defendant, the trial court correctly noted, and a review of the record reflects, that there was. The record shows that the two attorneys who had been consistently making appearances and filings for the defendant stopped appearing, although there was no motion filed by either of them to withdraw.

Two months after new counsel filed a Motion to Enroll, the defendant waived his right to a trial by jury. This waiver **[**35]** was followed by a motion filed on behalf of the state to recuse the trial judge because of his personal bias toward key state witnesses. The motion was denied on its face by the trial court. This court reversed that ruling and remanded it for a hearing on the merits in front of a different judge. The motion was again denied. The state filed a writ application to this court, which reversed the trial court's ruling and ordered the trial judge recused in January 2009. The defendant filed a writ application **[*763]** to the Louisiana Supreme Court. That application was initially rejected as untimely, but, on reconsideration, was denied on May 19, 2009.

In the interim, a new judge was alloted to this case, and on February 11, 2009, the trial court ordered the matter fixed for trial on June 1, 2009. On June 1, 2009, the trial court ordered motions to be heard on August 4, 2009, because of the pending motion to quash based on prescription. On August 3, 2009, the court reset the motion hearing date for September 17, 2009, when it was ultimately heard.

[Pg 22] The trial court took the matter under advisement and set the trial date for November 2, 2009. On October 28, 2009, the court issued a denial of **[**36]** the motion to quash. Trial began on November 2, 2009.

There have been a significant number of delays in this matter. We have reviewed the history of the case and the seriousness of the offense charged, which involves the murder of a young child. We are mindful that this prosecution began as a capital case, and in its present posture carries a mandatory life sentence. The defendant has been afforded three trials because of judicial error recognized by the supreme court and this court. We find that the delays occurred while serious legal issues were under review, and we do not find these delays to be unjustified.

The third factor in *Barker* involves the accused's assertion of his right to a speedy trial. We note the defendant filed a motion to quash on August 5, 2008, based on prescription, just four days after the state filed a motion to recuse the trial judge. He filed a separate motion for speedy trial on August 4, 2009.

The fourth factor in *Barker* addresses the prejudice to the accused resulting from the delay. As to this factor, the state asserts that, "'Anxiety and concern' are not sufficient to let a confessed murderer walk free." In **[**37]** this context, we note the supreme court has stated:

> *HN11*[↑] There is, of course, some prejudice inherent in all accusations of crime, arrests and incarcerations. The anxiety and concern suffered by the accused and the disruption of his family life by the charge and incarceration are factors to be considered. Loss of his job is another. But defendant has not alleged disruption of his family life, and the record does not shed light on whether he had a job. Deprivation of liberty which results from incarceration is always prejudicial. But this prejudice, like other, is a necessary consequence of any valid criminal charge, especially where the accusation involves first degree murder, a non-bailable offense.
>
> The amorphous quality of the right to a speedy trial leads to the unsatisfactorily severe remedy of dismissal of the indictment when the [Pg 23] right has been deprived. This is indeed a serious consequence because, unlike the exclusionary rule

> or the reversal for a new trial, it means that a defendant who may be guilty of a serious crime, or two as in this case, will go free without having been tried. Overzealous application of this remedy would infringe 'the societal interest in trying people **[**38]** accused of crime, rather than granting them immunization because of legal error. . . .' *United States v. Ewell, 383 U.S. 116, 86 S.Ct. 773, 15 L.Ed.2d 627 (1966)*, White, J. Barring extraordinary circumstances, courts should be reluctant indeed to rule that a defendant has been denied a speedy trial."

Alfred, 337 So.2d at 1057. The *Alfred* court recognized that ***HN12***[⬆] evidence that a defense had actually been impaired would weigh in favor of finding that a defendant's speedy trial rights had been violated. **[*764]** However, our reading of the record indicates the defendant was able to put forth a vigorous defense. The difficulties and errors he alleges on the other assignments of error in this matter are not based upon allegations that witnesses were missing or dead. In his brief, he alleges that two witnesses were dead and another was too ill to travel from out of state for trial. He made similar contentions in his written motion below. He does not allege what evidence was lost to his case by the absence of these witnesses. Further, in regard to two of those witnesses, Ruth McClary and psychiatrist Aretta Rathmell, we note that transcripts of their testimonies in the prior proceedings were admitted **[**39]** into evidence.

Balancing all of the *Barker* factors, we find this assignment of error lacks merit. The total delay was long, but the great majority of it was due to the legitimate (albeit unique) course of this case. The defendant asserted the right to a speedy trial relatively late in the proceedings. He has not shown specific prejudice to his case.

ASSIGNMENTS OF ERROR NUMBERS FOUR AND FIVE: RELIABILITY OF LANGLEY'S CONFESSIONS

In his fourth and fifth assignments of error, the defendant argues the trial court erred by preventing him from introducing testimony to support his argument that he falsely confessed to molesting the victim. The defendant acknowledges that in his third [Pg 24] videotaped statement to Detective Delouche, he said he ejaculated in the victim's mouth. However, he claims this was a false assertion prompted in part by Detective Delouche's interrogation techniques and Detective Delouche's own background. For support, he refers to evidence filed under seal in the trial court.

The defendant also notes in support of his arguments below, that he sought to introduce the testimony of forensic psychologist Dr. Sol Fulero. The defendant argues the court should have heard Fulero's **[**40]** testimony, because it met the "*Daubert* criteria."

The supreme court has addressed *Daubert* in *State v. Manning, 03-1982, p. 44 (La. 10/19/04), 885 So.2d 1044, 1086-87*, *cert. denied*, *544 U.S. 967, 125 S.Ct. 1745, 161 L. Ed. 2d 612 (2005)*:

> ***HN13***[⬆] This Court has adopted the reasoning and observations set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993)*, which specifically rejected the "general acceptance" test and outlined the means for determining the reliability and answered many questions as to proper standards for the admissibility of expert scientific testimony. *State v. Foret, 628 So.2d 1116, 1122 (La.1993)*. In *Daubert*, the Supreme Court stated that an inference or assertion of scientific knowledge must be derived by the scientific method. Proposed testimony must be supported by appropriate validation, i.e., "good grounds," based on what is known. *Daubert, 509 U.S. at 590, 113 S.Ct. 2786*. In short, evidentiary reliability will be based on scientific validity. *Id., 509 U.S. at 590, 113 S.Ct. 2786, n9*. The trial court must determine whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand **[**41]** or [Pg 25] determine a fact in issue. The trial court must make "a ... preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can **[*765]** be applied to the facts at issue. Many factors will bear on the inquiry...." *Id., 509 U.S. at 592-93, 113 S.Ct. 2786* "General acceptance" can have a bearing on the issue. *Id., 509 U.S. at 594, 113 S.Ct. 2786*.

However, the reliability of Dr. Fulero's methodology was not the focus of the trial judge's ruling. Rather, the judge indicated that he did not think the testimony would assist him in reaching a decision regarding whether the defendant gave a false confession. Such decisions are reviewed under the "abuse of discretion" standard. *See, e.g., State v. Young, 09-1177 (La. 4/5/10), 35 So.3d 1042*, *cert. denied*, *__ U.S. __, 131 S.Ct. 597, 178 L. Ed.*

2d 434 (2010).

Having read the sealed materials, we find the trial court did not abuse its discretion. The material regarding Detective Delouche does not remotely suggest that anything in his background would have caused him to guide or influence the defendant to falsely confess to molesting the victim. Further, it is not **[**42]** clear how the lack of such evidence prejudiced the defendant's case. As noted in the first assignment of error, the state prosecuted him for specific intent second degree murder, and he has repeatedly admitted that he killed Jeremy Guillory. The defendant has sought to show he was insane, or at least to negate specific intent. The question of whether he performed a sex act would appear to be superfluous. It was not an element of the crime, there was no jury to be inflamed by the allegation, and its bearing on issues of sanity and intent are not explained by the defendant.

[Pg 26] In finding the defendant guilty, the trial judge noted that expert testimony indicated that it was unlikely a person in a psychotic state could have a sexual experience. This indicates how a sex act could have a bearing on the ultimate issue in the case. However, the trial judge indicated he did not believe the defendant ejaculated into the victim's mouth. Rather, the judge suggested the defendant may have ejaculated while strangling the boy from behind. Apparently, no semen was found in the victim's mouth, but some semen was found on a side seam of the boy's shirt, as the defendant acknowledges. Thus, the **[**43]** record indicates the trial judge rejected the specifics of the defendant's March 1992 confession to Detective Delouche. For the reasons discussed, we find the trial court did not abuse its discretion by electing not to hear Dr. Fulero's testimony. Even if the defendant sought more generalized testimony from Dr. Fulero regarding the allegedly false confession to the sex act, it is not clear how it would have been relevant, independent of the material regarding Detective Delouche. Therefore, this portion of the defendant's argument lacks merit. The arguments related to *Daubert* and to funding issues that appear in the parties' briefs need not be addressed, as our analysis renders them moot.

The defendant also argues the trial court erred by limiting his cross-examination of Detective Delouche. He was not allowed to delve into the matters that were introduced under seal. For the reasons already discussed, we find the court did not abuse its discretion by limiting the defendant's questioning of Detective Delouche. The information simply was not relevant to the current case. This assignment of error lacks merit.

ASSIGNMENT OF ERROR NUMBER SIX: ADMISSION OF GEORGIA RECORDS

[Pg 27] The defendant **[**44]** divides this argument into two parts. First, the defendant argues the trial court erred by allowing **[*766]** the state to refer to his criminal records from Georgia and his "dream diary" in violation of the "law of the case doctrine." This court has discussed "law of the case":

> ***HN14***[] "Under the doctrine of 'law of the case,' an appellate court will generally refuse to reconsider its own rulings of law on a subsequent appeal in the same case. *State v. Doussan, 05-586 (La.App. 5 Cir. 2/14/06), 924 So.2d 333, 339*, *writ denied*, *06-608 (La. 10/13/06), 939 So.2d 372*." *State v. Bozeman, 06-679, p. 6 (La.App. 5 Cir. 1/30/07), 951 So.2d 1171, 1174*.

State v. Quinn, 09-1382, pp. 2-3 (La.App. 3 Cir. 5/12/10), 38 So.3d 1102, 1104.

A review of the jurisprudence has found no case in which the doctrine has been applied to a trial judge's rulings on issues that were ruled upon by an earlier trial judge in a prior trial of the same case. The defendant cites two civil cases from the supreme court, *Pumphrey v. City of New Orleans, 05-979 (La. 4/4/06), 925 So.2d 1202* and *Carriere v. Bank of Louisiana, 95-3058, p. 9 (La. 12/13/96), 702 So.2d 648, 655*, for the principle that the law of the case doctrine includes "the binding **[**45]** force of trial court rulings during later stages of the trial."

The principle pronounced is inapplicable to the present case, as the trial at issue is not a "later stage" of the prior trials. Also, the doctrine manifests the appellate court's general practice of not relitigating decided matters. It is not a limit on judicial authority. *Pumphrey, 925 So.2d at 1207-08*. We note the supreme court's ruling in *State v. Graham, 375 So.2d 374 (La.1979)*:

> Defendant, Burlon Graham, was charged with driving while intoxicated as a second offender, *La.R.S. 14:98*. He was subsequently tried, convicted and sentenced to serve a period of sixty days in the parish prison and pay a fine of $350.00, in default of which he would be required to serve an additional one hundred and twenty days. Upon application by defendant, we granted writs,

reversed the conviction and sentence, and remanded the case for a new trial on the grounds that the trial court erred [Pg 28] in permitting the state to establish a presumption of defendant's intoxication through the introduction of a chemical analysis of his blood's alcoholic content without presenting prima facie proof of the standard quality of the test chemicals. *State v. Graham, 360 So.2d 853 (La.1978)*.

On **[**46]** May 1, 1979, defendant was again brought to trial for the same offense. During the trial, the prosecuting attorney attempted to question state witness Officer Russell Robinson concerning defendant's responses to questions outlined on an alcohol influence report form. Defense counsel interrupted this examination, objecting to the questions on the grounds that evidence as to whether an alcohol influence report form was used, and defendant's responses to any questioning from such a form, had not been introduced at the previous trial and that the state should not be permitted to now introduce new and different evidence. After the objection was sustained by the trial court, the state assigned error. The trial was then recessed to permit the state to apply to this Court for supervisory writs.

In its application to this Court, the state correctly argues that the trial court erred in ruling that at the new trial the state was limited to evidence introduced at the previous trial. ***HN15***[↑] *Article 857 of the Code of Criminal Procedure* states that "(t)he effect of granting a new trial is to set aside the verdict or judgment and to permit retrial of the case with as little prejudice to either **[*767]** party as if **[**47]** it had never been tried." Official Revision Comment (a) clarifies the intent of the provision by noting that "(t)his article continues the sound rule of Art. 515 of the 1928 Code of Criminal Procedure, that the state is wiped clean when a new trial is granted." Thus in the absence of an independent constitutional or statutory ground requiring exclusion, the state may properly introduce evidence at a new trial which was not placed into evidence at the previous trial. Cf. *State v. Reed, 324 So.2d 373 (La.1975)*.

State v. Graham, 375 So.2d at 374 (La.1979).

Thus, the trial at issue was a new proceeding and not a subsequent stage of the earlier ones. Therefore, the "law of the case" doctrine does not apply. This portion of the assignment lacks merit.

Further, the matter before us for review was a bench trial. As the defendant notes in the second part of his argument, the jurisprudence recognizes that ***HN16***[↑] bench trials are different than jury trials because judges are presumed to have the ability "to respect the rules of evidence and the constitutional rights of the defendant."

[Pg 29] The fifth circuit has explained:

> ***HN17***[↑] The admissibility of evidence in a bench trial is different from the requirements **[**48]** in jury trials, because a judge by virtue of training and knowledge of the law is capable of disregarding any impropriety. *State v. Anderson, 02-273 (La.App. 5 Cir. 7/30/02), 824 So.2d 517, 521*, *writ denied*, *02-2519 (La. 6/27/03), 847 So.2d 1254*.

State v. Hebert, 05-1004, p. 13 (La.App. 5 Cir. 4/25/06), 930 So.2d 1039, 1048.

Similarly, the supreme court has stated, "Because the proceeding was a bench trial, the possibility for prejudicial effect on the trial judge was far less than upon a jury." *State v. Walker, 394 So.2d 1181, 1185 (La.1981)*.

In his brief, the defendant raises concerns regarding the following statement by the trial judge:

> THE COURT:
>
> Let me assure everyone if I'm going to be put in a position someone's going to be asking me to find this young man not guilty by reason of insanity, let me assure you, I want to know everything there is to know.
>
> And I don't care what Judge said what about records not being available to any specialist. Until somebody shows me why I shouldn't be exposed to those records then somebody's got some -- like Desi says, somebody's got some 'splain' to do.

The court made earlier comments regarding the relevance of the Georgia records:

> THE COURT:
>
> Hold on, **[**49]** Mr. Bryant. Let me make sure I understand.
>
> I have not heard Mr. Bryant or Ms. Killingsworth contend that they want anyone to discuss or render any opinions regarding these Georgia DOC records.
>
> So I'm kinda at a loss. What I heard them say

was that nobody is going to rely on those. They're concerned that Dr. Bailey may have some reliance on them, but Mr. Bryant has already indicated that he would bring that out or discuss that in cross examination.
[Pg 30] I'm missing something here?

More specifically, one of the prosecutors made the following statements:

MR. BRYANT:
I don't know what she's talking about, Your Honor.

In the first trial they were opened up because their expert relied on the records **[*768]** and had read them. In this trial he's relying on the records.
I think the State is perfectly in its right to question about anything that's in those Georgia records that we think is relevant to Ricky Langley.
Obviously, there may be things that are irrelevant. It was allowed in the first trial. He just indicated that she's shown him the Georgia records. I don't think you can pick and choose which Georgia records we're gonna talk about. Either he reviewed them or he didn't review them.

If he didn't review **[**50]** then we won't ask any questions. If he did review them then we're entitled to ask any questions about it. And he just indicated he did.
. . . .

MR. BRYANT:
Again, Your Honor, if he reviewed medical records which concerned -- they are medical records, mental health records from the state of Georgia as part of his opinion that he's rendering then we're allowed to ask any questions from those medical records.
I mean, I don't know that Judge Gray ruled, but it's basically Hornbook Law, Your Honor. If he didn't review those records and didn't use those as the basis to form his opinion, perhaps we wouldn't be able to do so, but I still think that --

The material at issue was relevant to the case, and defense counsel's comments during argument indicate any references to the Georgia records were not unduly prejudicial. We note the following statement made by defense counsel: "We're not [Pg 31] scared of the Georgia records. Georgia records support our position. But they were ruled out in 2003." Shortly after these comments, the court recessed. When proceedings resumed, the defense continued its direct examination of one of its experts, forensic psychiatrist Dr. Rahn Bailey. No further objection **[**51]** was made regarding the admissibility of the Georgia records.

Regarding references to the "dream diary," the defendant did not specifically object to its admissibility. Instead, he referred generally to "material that was ruled out [in] 2003." Also, the defendant based his argument on the "law of the case" doctrine, rather than relevancy or prejudice. We find the defendant's present argument regarding prejudice was not preserved, pursuant to the "contemporaneous objection rule" codified in La.Code Crim.P. art. 841, and it was not precluded based on "law of the case," as has been discussed above.

The state made an apparent reference to the diary in its rebuttal argument at the close of the trial. However, as the state explained in response to the defendant's objection, it was responding to the defendant's closing argument, which emphasized the lack of an explanation for his conduct. The defendant's closing argument was focused on the issue of specific intent and on his own alleged insanity and specifically claimed the state's "theory of molestation makes no sense." The state's remarks in rebuttal argument formed a fair comment on a matter to which the defendant had "opened the door." The **[**52]** supreme court has held:

> ***HN18***[] Louisiana jurisprudence on prosecutorial misconduct allows prosecutors wide latitude in choosing closing argument tactics. In addition, La. C.Cr.P. art. 774 confines the scope of argument to "evidence admitted, to the lack of evidence, to conclusion of fact that the state or defendant may draw therefrom, and to the law applicable to the case." The trial judge has broad discretion in controlling the scope of closing argument. State v. Prestridge, 399 So.2d 564, 580 ***[*769]*** (La.1981). Even if the prosecutor exceeds these bounds, the Court will not reverse a [Pg 32] conviction if not "thoroughly convinced" that the argument influenced the jury and contributed to the verdict. *See* State v. Martin, 93-0285 (La. 10/17/95), 645 So.2d 190, 200; State v. Jarman, 445 So.2d 1184, 1188 (La.1984); State v. Dupre, 408 So.2d 1229, 1234 (1982).

State v. Legrand, 02-1462, p. 16 (La. 12/3/03), 864 So.2d 89, 101, *cert. denied*, *544 U.S. 947, 125 S.Ct.*

1692, 161 L. Ed. 2d 523 (2005). This assignment of error lacks merit.

ASSIGNMENT OF ERROR NUMBER EIGHT: LAWFULNESS OF THE ARREST

The defendant asserts the trial court erred "in refusing to suppress the fruits for the warrantless arrest of Mr. Langley and the Improperly **[**53]** Induced Confession of March 26, 1992."

Unlawful Arrest

On November 2, 2009, the defendant filed in the trial court a "Renewed Motion to Suppress Statements and Evidence as Products of Unlawful Arrest and Seizure." A hearing on the motion was held on that same date, and the trial court denied it in open court.

A. Timeliness of Motion

The state, in its response brief filed in the trial court, argued the defendant's motion was untimely urged. The state wrote, "There is absolutely no reason why the defendant, who has been filing motions for many months now even past that set deadline, had to wait to the day of trial to spring this suppression motion on this Court and the State." In support of its claim, the State cited *State v. Davis, 05-543 (La.App. 3 Cir. 12/30/05), 918 So.2d 1186*, *writ denied*, *06-587 (La. 10/13/06), 939 So.2d 372*, in which this court upheld the trial court's denial of a defendant's motion to suppress as untimely under *La.Code Crim.P. arts. 703(C)* and *521*.

Louisiana Code of Criminal Procedure Article 703 provides, in pertinent part:

> [Pg 33] ***HN19***[] A. A defendant adversely affected may move to suppress any evidence from use at the trial on the merits on the ground that it was unconstitutionally **[**54]** obtained.
> B. A defendant may move on any constitutional ground to suppress a confession or statement of any nature made by the defendant.
>
> C. A motion filed under the provisions of this Article must be filed in accordance with *Article 521*, unless opportunity therefor did not exist or neither the defendant nor his counsel was aware of the existence of the evidence or the ground of the motion, or unless the failure to file the motion was otherwise excusable. The court in its discretion may permit the filing of a motion to suppress at any time before or during the trial.

Louisiana Code of Criminal Procedure Article 521 provides:

> ***HN20***[] Pretrial motions shall be made or filed within fifteen days after arraignment, unless a different time is provided by law or fixed by the court at arraignment upon a showing of good cause why fifteen days is inadequate.
> Upon written motion at any time and a showing of good cause, the court shall allow additional time to file pretrial motions.

Following the quashing of the first indictment, the defendant was re-indicted for first degree murder on April 11, 2002. A second trial was held, and Langley was convicted of second degree murder. On **[*770]** appeal, this court reversed **[**55]** the conviction. *Langley II, 896 So.2d 200*. The pretrial process began again. On August 25, 2005, the defendant filed a motion to quash the indictment on the basis of double jeopardy. Specifically, the defendant was acquitted of first degree murder when the jury found him guilty of second degree murder. On October 31, 2005, a hearing was held, and the trial court granted the motion in that it limited the charge to second degree murder. The state sought writs in this court, and this court reversed the trial court's ruling. The defendant sought review by the supreme court, and the supreme court reversed this court's decision, reinstating the trial court's ruling. *Langley III, 958 So.2d 1160*.

[Pg 34] On November 2, 2009, at the beginning of the third trial, the defendant re-urged his motion to suppress, and the trial court denied the motion. On that same day, the state "amended" the bill to second degree murder, and the defendant entered a plea of not guilty/not guilty by reason of insanity. Consequently, we find that at the time the motion to suppress was re-urged, the time period under *Article 521* had not been triggered, and the motion was timely submitted.

B. Invalid Arrest Warrant

The **[**56]** defendant asserts that his arrest was invalid because the Georgia parole warrant was stale since Georgia waived its right to enforce the warrant. The defendant contends that the arrest, based on the stale

warrant, was pretextual, thus, unconstitutional. The defendant concedes these issues were addressed by this court in State v. Langley, 94-326 (La.App. 3 Cir. 4/14/94), 635 So.2d 784, and by the supreme court in Langley I, 711 So.2d 651, and "accepts this court is bound by the Supreme Court's earlier ruling . . . but reurges this assignment of error for record purposes."

In Langley, 635 So.2d 784, the defendant, pretrial, sought review of the trial court's denial of his motion to suppress. This court held, in pertinent part:

> The trial judge ruled that the Georgia parole violation warrant on which the Louisiana law enforcement authorities relied to arrest the defendant was valid. The parole violation warrant was not stale, and its execution was not unreasonably delayed. The delay in execution of the defendant's parole violation warrant was not seventeen months, as the defendant alleges, but much less; defendant's whereabouts were not known from September of 1990 until September of 1991, **[**57]** and from December 1, 1991 until his arrest on February 10, 1992. The Georgia and Louisiana authorities knew the defendant's location for three months, at most, and after he moved out of his parents' home in December of 1991, defendant never tried to contact any parole officer about his new address. Furthermore, the actions of the Georgia authorities, initiating the process for transfer of parole supervision to Louisiana, did not vitiate the warrant or establish a waiver of Georgia's right to enforce it, since Louisiana was investigating the defendant and the transfer had not been officially completed. Until the transfer of the defendant's parole supervision had [Pg 35] been completed, Georgia retained authority to execute the warrant. During this period, the defendant once again absconded from supervision, never informing anyone about his new residence, and exhibited his inability to conform to conditions of parole. The defendant's actions and inactions had frustrated the attempts by both Georgia and Louisiana parole authorities either to transfer parole supervision or to execute the parole violation warrant. **[*771]** Therefore, there is no error in the trial court's ruling that the parole **[**58]** violation warrant was valid. *See* Saunders v. Michigan Department of Corrections, 406 F.Supp. 1364 (E.D.Mich.S.D.1976); People ex rel. Flores v. Dalsheim, 66 A.D.2d 381, 413 N.Y.S.2d 188 (1979).
>
> Since the police arrested the defendant pursuant to a valid parole violation warrant, once the defendant was informed of his *Miranda* rights and waived them, the police legally questioned him about the disappearance of Jeremy Guillory. Colorado v. Spring, 479 U.S. 564, 107 S.Ct. 851, 93 L.Ed.2d 954 (1987). The policemen's actions in arresting the defendant were justified by an objective standard of probable cause to arrest arising from the parole violation warrant, and the subjective motive of the officers to question the defendant about a child's disappearance will not invalidate an otherwise legal arrest. State v. Wilkens, 364 So.2d 934 (1978); United States v. Causey, 834 F.2d 1179 (5th Cir. 1987).

Id. at 785.

Following his conviction of a capital offense, the defendant sought appellate review directly with the supreme court. One of the assignments of error was the denial of the motion to suppress. The supreme court held, in pertinent part:

> *A. The Validity of the Arrest Warrant*
>
> The Georgia parole **[**59]** violation warrant was validly issued in September of 1990, shortly after Langley left that state without permission. Defendant was arrested in Louisiana on the outstanding Georgia warrant in February 1992, about 14 months after the Georgia warrant was issued, and only a few days after the murder of Jeremy Guillory. The arresting officers told defendant that they were arresting him for the parole violation, but also that they wanted to question him about the missing child. They twice advised Langley of his *Miranda* rights, and he confessed almost immediately on simply being asked whether he killed the boy. After the officers again explained his rights, and after Langley again expressly waived them, he confessed in detail, and allowed police to videotape him as he confessed and led them to the boy's body. In all, Langley was advised of his rights no less than four times.
>
> [Pg 36] Langley argues that the parole violation warrant became invalid because Georgia waived its right to execute it. ***HN21***[⬆] Parolees and probationers have due process rights concerning revocation of their paroles or probations. Gagnon v. Scarpelli, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973). However, these due process

[60]** rights are less than those involved in an ordinary criminal prosecution. *Id., 411 U.S. at 788-89, 93 S.Ct. at 1762-63*; *Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972)*. An unreasonable delay in executing a parole violation warrant may violate a parolee's due process rights in some cases. *See State v. Savoy, 429 So.2d 542 (La.App. 2d Cir.1983)*. However, this is not such a case.

Some courts have spoken in terms of "staleness" and "waiver" with regard to unreasonable delays in the execution of parole violation warrants. *See, e.g., Greene v. Michigan Dept. of Corrections, 315 F.2d 546, 547-48 (6th Cir.1963)*; *United States v. Hamilton, 708 F.2d 1412, 1414 (9th Cir.1983)*. However, the underlying rationale of waiver or staleness concepts is the deprivation of the parolee's or probationer's constitutional rights to due process. *See People ex rel. Flores v. Dalsheim, 66 A.D.2d 381, 413 N.Y.S.2d 188, 192 (App.Div. **[*772]** 1979)*; *Barker v. State, 479 N.W.2d 275, 278-79 (Iowa 1991)*. To hold that a parole violation warrant becomes stale by the mere passage of time alone would be to reward an elusive parole violator for remaining unavailable. *Flores, 413 N.Y.S.2d at 192* (delay of almost **[**61]** three years not a violation of due process); *Barker, 479 N.W.2d 275* (four year delay not violation of due process); *Shelton v. United States Bd. of Parole, 388 F.2d 567, 128 U.S. App. D.C. 311 (D.C.Cir.1967)*. In addition, waiver alone is not the proper rationale for invalidating a warrant, because waiver implies both a knowing relinquishment of a right, and the authority of a parole officer to relinquish that right on behalf of the state. *Flores, 413 N.Y.S.2d at 192*. *See also Saunders v. Michigan Dept. of Corrections, 406 F.Supp. 1364, 1366-67 (E.D.Mich.1976)* (noting that mere inaction does not amount to waiver).

HN22[⬆] Under a due process analysis, the length of time between the issuance and execution of a parole violation warrant is but one factor in determining its continuing validity. *Barker v. State, 479 N.W.2d 275, 279 (Iowa 1991)*. A delay in execution must be unreasonable before due [Pg 37] process is affected. *United States v. Fisher, 895 F.2d 208, 210 (5th Cir. 1990)*; *United States v. Hill, 719 F.2d 1402, 1405 (9th Cir. 1983)*; *State v. Newman, 527 So.2d 1036, 1039 (La.App. 2d Cir. 1988)*. Factors in assessing reasonableness include (1) the state's diligence in attempting to serve the warrant; (2) the reason **[**62]** for the delay in serving the warrant; (3) the conduct of the parolee in frustrating service; and (4) actual prejudice suffered by the parolee as a result of the delay. *Fisher, 895 F.2d at 210*; *Barker, 479 N.W.2d at 278-79*.

We also note that the aim of the entire parole concept is "to help individuals reintegrate into society as constructive individuals as soon as they are able, without being confined for the full term of the sentence imposed." *Morrissey, 408 U.S. at 477-79, 92 S.Ct at 2598-98*. In accordance with this aim, parole authorities have inherently broad discretion in the supervision of parolees. *Id*. Parole authorities are not in a race against the clock to execute parole violation warrants. *United States v. Gernie, 228 F.Supp. 329, 338 (S.D.N.Y.1964)*. Nor must arrest and revocation be an automatic or reflexive reaction to every violation. *Hamilton, 708 F.2d at 1415*; *United States v. Tyler, 605 F.2d 851, 853 (5th Cir. 1979)*.

According to the record, including testimony adduced at two separate suppression hearings on this issue, in the time between the issuance of the warrant and its execution, Georgia authorities may have initiated a process which might eventually have led to **[**63]** transferring Langley's parole supervision to Louisiana authorities. Langley claims to have spoken with his Georgia parole officer, Ben Poole, who purportedly said they could "work something out." (However, the defendant did not subpoena Poole.) Also about this time, Elizabeth Clark, the Louisiana parole agent, was in communication with Georgia authorities through her office. At their request, she verified that Langley was residing at his parents' home in Louisiana. Though Clark had no official authority to supervise Langley, she attempted to maintain contact with him unofficially. However, in November of 1991, without any transfer having been accomplished, Langley stopped reporting to Clark. In December of 1991, he moved from his parents' house without informing Clark, who could not locate him. In fact, Langley was not finally located until after the murder, when **[*773]** Clark informed investigators of Langley's last known residence (his parents' house). The investigators matched Clark's description of Langley with the description given by the victim's mother and discovered he was living in the Lawrence house where the murder occurred.

Also in September of 1991, Langley asked Louisiana State **[**64]** Trooper Charles Jones to see if there was a Georgia warrant out for Langley. At a pre-trial hearing, Jones testified that he told Langley he would check for warrants, and that he advised Langley to get in touch with local parole authorities to see about getting his parole transferred to Louisiana. Jones [Pg 38] also testified that the first time he checked the computer for a warrant he found none, but a few days later he checked again and did find the Georgia warrant. Jones further testified that when [sic] discovered the warrant, he went out to arrest Langley at Langley's work place, but could not find him there. Finally, Jones testified that when he did see Langley some time later, he assumed that Langley had probably reached an arrangement with the Georgia parole authorities, based on Jones's discussion with Langley when they first spoke in September, as well as Jones's belief that Langley and his employer were attempting to contact Georgia authorities.

The court of appeal accurately summarized the matter when denying relief on Langley's motion to suppress:

> Louisiana was investigating the defendant and the transfer had not been officially completed. Until the transfer of the defendant's **[**65]** parole supervision had been completed, Georgia retained the authority to execute the warrant. During this period, the defendant once again absconded from supervision, never informing anyone about his new residence, and exhibited his inability to conform to conditions of parole. The defendant's actions had frustrated the attempts by both Georgia and Louisiana authorities either to transfer parole supervision or to execute the parole violation warrant.

State v. Langley, 94-00326 (La.App. 3d Cir. 1994); 635 So.2d 784, 785.

Under these circumstances, Langley's due process rights were not violated. First, law enforcement authorities were reasonably diligent in attempting to serve the warrant. Langley's whereabouts were simply not known or easily ascertainable from September 1990 to September 1991. Second, the Georgia authorities had a valid reason for delaying the execution of the warrant while attempting to transfer parole. Instead of having Langley arrested immediately in September of 1991, they exercised their discretion in attempting to fulfill the aims of the parole concept. They did not "waive" their right to execute the warrant, nor did they relieve Langley of his parole obligations. **[**66]** Any attempt at a transfer of parole was necessarily conditioned on Langley's cooperation. Third, Langley's own conduct frustrated service of the warrant. After no more than three months, and before any transfer of supervision could occur, Langley stopped his unofficial reports to Clark, and moved from his residence. Efforts to locate him had to begin anew. Fourth and finally, Langley cannot claim he was prejudiced by the delay in his arrest, partly because he was responsible for the delay, and also because he had no reasonable basis to expect that any parole transfer would proceed without adverse consequences to him if he did not do his part. ***HN23***[⬆] A delay in execution of a parole violation warrant may frustrate the violator's **[*774]** due [Pg 39] process rights if the delay undermines his ability to contest the violation, or to proffer mitigating evidence. *United States v. Tippens, 39 F.3d 88, 90 (5th Cir. 1994)*. These elements of prejudice are not present in this case.

In addition, we note that the defendant claims that only *Georgia* waived its right to execute the warrant. The Louisiana arresting authorities confirmed the existence of a facially and objectively valid warrant and relied in good faith **[**67]** upon on it. Even if we decided that there were problems with the warrant, which we do not, we would not be inclined to apply the exclusionary rule against those acting in good faith on a facially valid warrant. *See United States v. Leon, 468 U.S. 897, 918-19, 104 S.Ct. 3405, 3418, 82 L.Ed.2d 677 (1984)*. *Cf. also United States v. Hensley, 469 U.S. 221, 105 S.Ct. 675, 83 L.Ed.2d 604 (1985)* (police may act on wanted bulletins issued by police departments possessing probable cause or reasonable suspicion to have the defendant seized).

B. The "Pretextual" Arrest

The officers who arrested Langley did so under the authority of a valid warrant. Thus, their subjective intent to examine defendant about the murder is not significant. ***HN24***[⬆] "Subjective intent alone ... does not make otherwise lawful conduct illegal or unconstitutional." *Scott v. United States, 436 U.S. 128, 136, 98 S.Ct. 1717, 1723, 56 L.Ed.2d 168 (1978)*. The relevant principle of *Scott* is that "so

long as police do no more than they are objectively authorized and legally permitted to do, their motives in doing so are irrelevant and hence not subject to inquiry." *United States v. Causey, 834 F.2d 1179, 1184 (5th Cir. 1987)* (citing Scott **[**68]**). Like Langley, the defendant in *Causey* sought to have his confession suppressed because he was arrested under a warrant for one crime, but questioned about another. *Causey, 834 F.2d at 1180*. The Fifth Circuit noted that the rule of suppression exists "to deter *unlawful* actions by police. Where nothing has been done that is objectively unlawful, the exclusionary rule has no application." *Causey, 834 F.2d at 1185* (emphasis in original). Therefore, even though the police suspected that the defendant was involved in the disappearance of Jeremy Guillory, the arrest was nonetheless proper because they had an objective reason to arrest him for violation of his Georgia parole. *See also Whren v. United States, 517 U.S. 806, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996)* (allowing pretextual warrantless arrests based on probable cause).

Finally on the suppression issue, when the defendant was arrested, the officers properly explained his *Miranda* rights to him. He indicated he understood his rights and confessed to killing Jeremy Guillory. He was subsequently advised of his rights no fewer than three more times, and he waived his rights each time. His confession was voluntary and untainted by any form **[**69]** of coercion or undue influence. There is, therefore, [Pg 40] no basis for suppressing the confession or any other evidence seized pursuant to defendant's arrest.

Langley I, 711 So.2d at 669-671.

We are bound to determine if the warrant is valid based on a review of the particular facts of the case and the applicable law. As the circumstances surrounding the arrest and the admission of evidence obtained as a result of that arrest are no different now than when they were reviewed by the supreme court in *Langley I*, we must follow the supreme court's opinion which applied the same law to the same facts. The arrest was not illegal, **[*775]** and there was no basis to suppress the confession or any other evidence seized pursuant to that arrest.

C. Authority to arrest under La.Code Crim.P. art. 213(4)

The defendant argues the peace officers lacked authority under *La.Code Crim.P. art. 213(4)*, to arrest him. [1] ***HN25***[↑] *Article 213* allows a peace officer to make an arrest without a Louisiana warrant in limited circumstances. It states, in pertinent part:

> ***HN26***[↑] A peace officer may, without a warrant, arrest a person when:
> . . . .
> (4)The peace officer has received positive and reliable information that another peace officer **[**70]** from this state holds an arrest warrant, or a peace officer of another state or the United States holds an arrest warrant for a felony offense.

At the hearing on the motion to suppress, the defendant argued, in pertinent part:

> [T]hey weren't authorized to arrest him on a parole warrant. If it would have been a felony arrest out in Georgia, they would have been authorized to arrest him in Louisiana without a Louisiana warrant. . .
>
> [Pg 41] So the code [referring to *art. 213 section 4*] says you can arrest someone when you know there's an out of state warrant, as long as it's a warrant for felony arrest--felony offenses.
> And so the issue is, is a Georgia parole violation warrant . . . an arrest warrant for a felony offense.

In support of his assertion, the defendant cited *Green v. State, 283 Ga. App. 541, 642 S.E.2d 167 (Ga.App. 2/9)*, *cert. denied*, *2007 Ga. LEXIS 445 (Ga.2007)*. In *Green*, the defendant had been convicted of two felonies and sentenced to three years in prison. After being released on parole, he was arrested for violating his conditions of parole. While being held in jail awaiting his hearing on the parole violation, he attempted **[**71]** to escape. Green pled guilty to attempted escape. He was sentenced to a felony sentence of five years. On appeal, Green asserted that the trial court erred in imposing a felony sentence when he pled to a misdemeanor. Green argued that the trial court misconstrued the statute in finding that he escaped after he had been "'convicted of a felony.'" *Id. 168*. Green explained that when he attempted to escape he was being held in jail for an alleged parole violation. Green concluded that as result he should have been sentenced for misdemeanor attempted escape. The *Green* court agreed, holding, in pertinent part:

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[1] Defendant does not challenge that his parole violation stemmed from a felony conviction.

> [A]t the time of the escape in this case, Green was in jail following his arrest on an alleged parole violation. He had not been charged with any other crime. Moreover, it is undisputed that there had been no hearing on Green's alleged parole violation, no determination that Green had, in fact, violated his parole, and no revocation of his parole prior to his escape attempt. Therefore, Green was in custody due to an alleged parole violation, not because he had been convicted of a felony.
> . . . .
>
> [I]t seems clear that Green was entitled to a hearing to determine whether he had, in fact, **[**72]** violated his parole and whether his parole should be revoked. Because no such hearing had been conducted at the time [Pg 42] Green attempted to **[*776]** escape, Green's incarceration in the Screven County jail was based solely upon an *alleged* parole violation, not his prior felony convictions. See *Smith v. State, 154 Ga.App. at 609, 269 S.E.2d 100*. Accordingly, the trial court erred in imposing a felony sentence for Green's attempted escape.

Id at 169-170.

At the motion to suppress, the defendant in this case argued:

> [T]o the extent that the decision of the trial court or the appellate courts previously may have construed a Georgia pa[role] warrant as being a warrant for arrest for felony offense, we say that this makes it clear that is not the state of Georgia law.

The defendant's attorney clarified that neither this court nor the supreme court "explicitly use the words, 'we hold that a Georgia warrant is a felony arrest warrant' . . . But if it's not then [sic] there was no authority to arrest, so they must have found that." The defendant's attorney argued because the holding in *Green* created doubt as to the correctness of the earlier rulings, this was an exception to the "law of the case" doctrine. **[**73]** Additionally, he asserted *Green* was an intervening case.

At the hearing on the motion to suppress, the state responded, in pertinent part:

> I find it interesting that Georgia can issue a parole violation warrant on someone who has been convicted of felonies in another state and yet the officers of this state are powerless to act on it and allow him to go about his merry way.
> . . . .
> Well, they were acting in good faith, which has been ruled upon. The argument was that it was a pretextural arrest. And the Supreme Court has said not so, that they acted in good faith on the warrant that was there at the time, they did not take any action until they saw there was a warrant.
> [Pg 43] . . . .
> And Georgia law and -- Louisiana law is not the same as Georgia law. As I stated earlier there is an outstanding warrant for a parole violation of someone convicted of a felony in the State of Louisiana, law enforcement can do two things; ignore it or act. In this case they acted.
> And I think that no one can say that their actions were done in any other manner except what was required by law at the time and they did what they were supposed to do.
>
> As I indicated the Court did not find this pretextural, the Court **[**74]** found that this was -- the actions of the officers -- they supported both the Third Circuit and the Supreme Court in what they did.
> The fact that there is some case that comes up 14 years later that says in the State of Georgia -- 'cause this may or may not be. This parole violation may or may not be a felony, I think would affect that in any way, Your Honor.

After reviewing *Green*, the trial court in this case denied the motion to suppress, holding there was insufficient reason to overturn the court of appeal and the supreme court that had previously ruled the arrest was lawful. We find *Green* to be inapplicable to the issue before us.

We now address the issue of whether or not *La.Code Crim.P art. 213(4)* encompasses an arrest on a warrant for a parole violation. *State v. Shaw, 06-2467 (La. 11/27/07), 969 So.2d 1233*, sets forth the applicable law when interpreting a statute, explaining, in pertinent part:

> **[*777]** [W]e begin our analysis with the proposition that ***HN27***[⬆] the starting point in the interpretation of any statute is the language of the statute itself. *Johnson, 03-2993 at 11, 884 So.2d at 575*; *Theriot v. Midland Risk Insurance Company, 95-2895 (La. 5/20/97), 694 So.2d 184, 186*; [Pg 44] *Touchard v. Williams, 617 So.2d 885, 888 (La.1993)*. **[**75]** Our interpretation of the language of a criminal statute is governed by the rule that the articles of the criminal code "cannot be extended by analogy so as to create crimes not provided for herein; however, in order to promote justice and to effect the objects of

the law, all of its provisions shall be given a genuine construction, according to the fair import of their words, taken in their usual sense, in connection with the context, and with reference to the purpose of the provision." LSA-R.S. 14:3; *State v. Skipper, 04-2137, p. 3 (La. 6/29/05), 906 So.2d 399, 403*. Further, although criminal statutes are subject to strict construction under the rule of lenity, State v. Carr, 99-2209, p. 4 (La. 5/26/00), 761 So.2d 1271, 1274, the rule is not to be applied with "such unreasonable technicality as to defeat the purpose of all rules of statutory construction, which purpose is to ascertain and enforce the true meaning and intent of the statute." State v. Everett, 00-2998, p. 12 (La. 5/14/02), 816 So.2d 1272, 1279, *quoting* State v. Broussard, 213 La. 338, 342, 34 So. 2d 883, 884 (La.1948) *See* State v. Brown, 03-2788, pp. 5-6 (La. 7/6/04), 879 So.2d 1270, 1280, *quoting* Perrin v. United States, 444 U.S. 37, 49 n. 13, 100 S.Ct. 311, 317, 62 L.Ed.2d 199 (1979) **[**76]** (HN28[↑] "The general rule that ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity applies when the court is uncertain about the statute's meaning and is 'not to be used in complete disregard of the purpose of the legislature.' "). Consequently, a criminal statute, like all other statutes, should be interpreted so as to be in harmony with and to preserve and effectuate the manifest intent of the legislature; an [Pg 45] interpretation should be avoided which would operate to defeat the object and purpose of the statute. *Brown*, 03-2788 at 6, 879 So.2d at 1280; Broussard, 34 So.2d at 884. What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. State v. Williams, 00-1725, p. 13 (La. 11/28/01), 800 So.2d 790, 800. Therefore, where the words of a statute are clear and free from ambiguity, they are not to be ignored under the pretext of pursuing their spirit. LSA-R.S. 1:4; State v. Freeman, 411 So.2d 1068, 1073 (La.1982).

Id. at 1242.

Although not directly on point, Mitchell v. Windham, 469 So.2d 381 (La.App. 3 Cir. 1985), lends guidance in interpreting La.Code Crim.P. art. 213. In *Mitchell*, the plaintiff **[**77]** sought civil damages against the sheriff and his insurer for false imprisonment. The trial court granted the plaintiff's motion for summary judgment finding false imprisonment. On appeal, the summary judgment was one of the issues challenged by the defendant. This court reversed the summary judgment finding, in pertinent part:

> Concerning the facts of Mitchell's arrest, the extensive record contains considerable detail. Sheriff Windham testified at the March 1982 trial that on April 25, 1980, he received two phone calls from a sheriff in Oklahoma who advised him that the Oklahoma authorities had a felony warrant for Mitchell's arrest, that Mitchell was currently residing with his parents in Jena, Louisiana, and that the Oklahoma authorities wanted him to arrest Mitchell. Sheriff Windham told the **[*778]** Oklahoma authorities on each occasion that he would arrest Mitchell once he received a teletype from them. The teletype was received, confirming that the Oklahoma authorities had a felony warrant for Mitchell's arrest charging him with taking mortgaged property out of the state and disposing of it, a felony in Oklahoma, and Sheriff Windham then ordered deputies Smith and Ashley to arrest the **[**78]** plaintiff.
>
> Deputies Smith and Ashley testified that they arrested the plaintiff on April 25, 1980, on the instructions of Sheriff Windham. They stated that they advised plaintiff of his rights at arrest and that he was being arrested based on a felony warrant. Deputy Smith then further testified [Pg 46] that Mitchell was advised of his rights again when he was booked in jail at 11:05 A.M. on that date.
>
> Mitchell testified that when he was arrested the deputies advised him he was being arrested based on a warrant from Oklahoma, although they did not know the charge, and that Deputy Smith read him his rights. Plaintiff was informed of the charge the afternoon of his arrest.
>
> * * *
>
> As this court stated in Johnson v. State through Dept. of P. Safety, 451 So.2d 104 (La.App. 3 Cir.1984), *writ denied*, *457 So.2d 15 (La.1984)*:
>
> > HN29[↑] "False imprisonment occurs when one is arrested and restrained against his will by another who acts without a warrant or other statutory authority. It is restraint without color of legal authority. *Kyle v. City of New Orleans, 353 So.2d 969 (La.1977)*; Richard v. State, through Department of Public Safety, 436 So.2d 1265 (La.App. 1st Cir.1983), *writ denied*, *441 So.2d 1223 (La.1983)*. **[**79]** If a police officer acts pursuant to statutory authority in arresting and incarcerating a citizen, there is no false arrest or imprisonment. *Kyle v. City of*

New Orleans, supra."
* * *

In the instant case the authority relied on by the appellants for arresting the plaintiff is derived from former C.Cr.P. art. 213, which provided in pertinent part:

> HN30[] "A peace officer may, without a warrant, arrest a person when:
> * * *
> "(3) The peace officer has reasonable cause to believe that the person to be arrested has committed an offense although not in the presence of the officer; or
> "(4) The peace officer has received positive and reliable information that another peace officer holds a warrant for the arrest."

The trial court evidently concluded that former C.Cr.P. art. 213(4) was limited to peace officers holding a warrant from the State of Louisiana. Appellant argues that the language, "another peace officer", as used in former C.Cr.P. art. 213(4), included peace officers from other states holding warrants from other states for arrest. We agree.

[Pg 47] Our opinion is that HN31[] the amendment to Art. 213(4), which now provides "or a peace officer of another state", was merely intended to clarify the existing **[**80]** law, and was not intended to change the law.

Id. at 383-85.

Applying the principles for statutory interpretation set forth in Shaw, this court finds that HN32[] La.Code Crim.P. art. 213(4), when it refers to "a peace officer of another state or the United States holds an arrest warrant for a felony offense," includes warrants for parole violations. **[*779]** That provision of the statute is plain and straight forward. It reflects the legislative intent to allow the arrest of a person when an arrest warrant has been issued by another state for a felony offense. If the defendant's interpretation was given effect, it would result in an unjust and absurd result. Based on a warrant from another state, it allows peace officers of this state to arrest persons *accused* of a felony offense in the other state (which is conceded by the defendant), but disallows a peace officer of this state to arrest a person *convicted* of a felony from another state, who has violated a condition of parole imposed in the other state.

Moreover, although not explicitly addressed, HN33[] Louisiana courts have impliedly interpreted La.Code Crim.P. art. 213(4) to include parole warrants. As noted above, the defendant pointed out how this court **[**81]** and the supreme court must have done so in Langley, 635 So.2d 784 and Langley I, 711 So.2d 651. Additionally, in State v. Barrett, 408 So.2d 903 (La.1981), the defendant was arrested on a warrant for a federal parole violation. On appeal, the defendant challenged the seizure of the evidence, but did not challenge the authority to arrest him on a warrant for a federal parole violation. Furthermore, we find *no* statute or jurisprudence prohibiting a peace officer of this state [Pg 48] from arresting a defendant on the basis of a warrant issued by another state for a parole violation. [2]

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[2] HN34[] A Louisiana judge and a Louisiana parole officer (who has been [Pg 49] transferred supervision of the parolee from the foreign state) may issue a Louisiana arrest warrant for an out-of-state parole violation. La.Code Crim.P. art. 269 allows a Louisiana judge to:

> [I]ssue a warrant for the arrest of a person in this state, prior to a demand for extradition in conformity with Article 263, when on the oath or affidavit of a credible person, taken before a judge or clerk of court, the person to be arrested is charged with:
>
> . . . .
>
> (3) Having been convicted of a crime in another state, and having escaped from confinement **[**82]** or having broken the terms of his bail, probation, parole, furlough, or reprieve.

Additionally, HN35[] La.R.S. 15:574.8 allows a parole officer who has been transferred supervision of the parolee from the foreign state to issue an arrest warrant and provides in pertinent part:

> HN36[] A. Incidental to the supervision of parolees, parole officers shall be deemed to be peace officers and shall have the same powers with respect to criminal matters and the enforcement of the law relating thereto as sheriffs, constables and police officers have in their respective jurisdictions. They have all the immunities and matters of defense now available or hereafter made available to sheriffs, constables and police officers in any suit brought against them in consequence of acts done in the course of their employment.
>
> B. If a parole officer has reasonable cause to believe that a parolee has violated or is attempting to violate a condition of his parole and that an emergency exists, so that awaiting action by the board under R.S. 15:574.7 would create an undue risk to the public or to the parolee,

[Pg 50] Accordingly, we find this assignment of error lacks merit.

ASSIGNMENT OF ERROR NUMBER NINE: ADMISSIBILITY OF THE MARCH 26, 1992 STATEMENT

The defendant asserts the March 26, 1992, videotaped statement should have **[*780]** been suppressed because the statement was taken in violation of the defendant's *Fifth* and *Sixth Amendment* rights.

After being indicted by the grand jury on April 11, 2002, for first degree murder, the defendant filed a motion to suppress his March 26, 1992 statement. A hearing was held on April 7, 2003, at which the trial court denied the motion. The defendant sought pretrial review in this court, and this court held no error in the trial court's ruling. *State v. Langley*, an unpublished writ bearing docket number 03-463 (La.App. 3 Cir. 4/17/03).

In April 2003, **[**84]** the defendant was convicted of second degree murder. As noted above, on appeal, this court reversed the conviction, thus the issue was not addressed. *Langley II, 896 So.2d 200*.

When the pretrial process began again, the defendant did not re-urge the motion. As noted above, ***HN37***[⬆] a motion to suppress should be filed pre-trial. *La.Code Crim.P. arts. 703* and *521*.

During the November 2009 trial, the state sought to introduce and show the trial court the March 26, 1992 videotaped statement. The defendant's attorney responded, "No objection, subject to all previous objections that have been made." However, the defendant did not re-urge the motion to suppress or articulate a basis for suppression of the March 26, 1992 videotape. In *State v. Aymond, 08-1292, p. 14 (La.App. 3 Cir. 4/1/09), 8 So.3d 795, 803*, this court explained: ***HN38***[⬆] "A defendant seeking review of a motion to suppress on appeal is limited to the grounds articulated at trial. *State v. Johnson, 389 So.2d 372 (La.1980)*; *State v. Bass, 595 So.2d 820 (La.App. 2 Cir.)*, *writ [Pg 51] denied*, *598 So.2d 373 (La.1992)*." *See also*, *State v. Moore, 38,444 (La.App. 2 Cir. 6/23/04), 877 So.2d 1027*, *writ denied*, *04-2316 (La. 2/4/05), 893 So.2d 83*. Consequently, **[**85]** this court finds this issue was not properly preserved at trial, and the assignment of error is without merit.

ASSIGNMENT OF ERROR NUMBER TEN: RECUSAL OF JUDGE CARTER

The defendant asserts that his "state and federal constitutional rights were violated when the randomly allotted judge assigned to these proceedings was removed at the insistence of the state pursuant to a meritless recusal motion." Trial by jury was waived when the case was assigned to Judge Wilford Carter. The state filed a motion to recuse the judge due to what was alleged to have been public and harsh criticism by Judge Carter of key state witnesses and an expressed public unwillingness to accept or believe the testimony of either witness. Judge Carter denied the motion, and the state took a writ to this court. This court reversed Judge Carter's ruling and remanded the matter for consideration by a different judge. *State v. Langley*, an unpublished writ bearing docket number 08-1189 (La.App. 3 Cir. 10/8/08).

The matter went before Judge Todd Clemons, who also denied the motion to recuse Judge Carter from the case. The state then took a second writ to this court. This court granted and made peremptory the state's writ, **[**86]** as follows:

> The trial judge found: 1) that the judge sought to be recused made derogatory statements against two law enforcement officers who will potentially appear as witnesses; 2) one of the witnesses is critical to the State's case; 3) that the judge sought to be recused previously made a statement that if either of these two officers were to testify, he should recuse himself; 4) that the only issue as to this statement was whether it had been made on the record in a prior civil **[*781]** case or off the record in the judge's office, or by telephone; 5) that if Chief Dixon, Detective Cormier, or Detective Delouche were on trial, the judge would not be deemed fair and impartial; 6) that the judge sought to be recused and Chief Dixon had a disagreement; 7) that the judge sought to be recused had personal

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> such parole officer may arrest the parolee without a warrant or may authorize any peace officer to do so.

At the hearing **[**83]** on the motion to suppress held in 1992, the Louisiana parole officer who was informally supervising Defendant was asked by Officer DeLouche if she could "have Mr. Langley arrested or, could I arrest him for parole violation."(95-1489, p. 3752.) She responded she had "no authority over Mr. Langley because he was not actually under my supervision, that he would have to contact the State of Georgia." (95-1489, p. 3752.)

[Pg 52] animosity toward Detectives Cormier and Delouche; and 8) that the State had valid concerns as to the judge's ability to preside without bias or prejudice.

Detective Delouche and Chief Dixon are potentially critical witnesses to the State's case. Detective Cormier was involved in the investigation and handled significant evidence. Although he did not testify at the two prior trials, to **[**87]** conclude that his testimony will not prove indispensable to the State is to impose a chilling, pre-trial burden on the State to decide whether the witness should testify.

These facts, as stated by the trial judge, standing alone, meet the burden of proof necessary to require recusal pursuant to La.Code Crim.P. art. 671(A), regardless of whether the trial will be by jury or judge. However, the trial judge incorrectly held that the burden of proving bias or prejudice is the same, regardless of the nature of the trial. We previously recognized that the burden of proof relevant to recusal is different, dependant upon whether the trial is by jury or judge. State v. Willis, 05-218 (La.App. 3 Cir. 11/2/05), 915 So.2d 365, *writ denied*, *930 So.2d 973 (La. 6/23/06)*, *cert. denied*, *549 U.S. 1052, 127 S. Ct. 668, 166 L. Ed. 2d 514 (2006)*, citing State v. Littleton, 395 So.2d 730 (La.1981) and State v. Manning, 380 So.2d 54 (La.1980).

Additionally, if the judge sought to be recused would be presumed to be biased or prejudiced were Chief Dixon, Detective Delouche, and Detective Cormier on trial, he must be presumed to bear the same bias and prejudice when they could be key witnesses in a case to be tried before him. For the reasons **[**88]** stated, the State's writ application is granted, and it is hereby ordered that the judge presently scheduled to preside in the case before the court, is recused. The case is remanded for further proceedings consistent with this ruling.

Langley, 08-1413. The defendant then took a writ to the supreme court, which was denied. *State v. Langley, 09-386 (La. 5/15/09), 8 So.3d 571*.

The defendant points to a contemporary case wherein the state took a writ on Judge Clemons' denial of the state's motion to recuse Judge Carter based on similar allegations of bias as in the present case, including alleged animosity toward one of the officers discussed above. This court reversed Judge Clemons ruling and ordered the recusal of Judge Carter. The defendant points out that the supreme court reversed this court's ruling for the reason that the state failed to meet its burden of proving that recusal was warranted and remanded to this court for consideration of pretermitted [Pg 53] errors. *See State v. Wilkins*, an unpublished writ bearing docket number 08-1461 (La.App. 3 Cir. 4/24/09), and *State v. Wilkins, 09-1124 (La. 6/5/09), 9 So.3d 859*. The defendant asks this court to revisit the issue.

This court **[**89]** has explained that ***HN39***[⬆] a defendant may seek review of a pretrial ruling even after the denial of a pretrial supervisory writ application seeking review of the same issue. When a defendant does not present additional evidence on the issue after the pretrial ruling, however, the issue can be rejected on appeal. Judicial efficiency demands that this court accord great deference to its pretrial decision unless **[*782]** it is apparent that the determination was patently erroneous and produced unjust results. State v. Chambers, 99-678 (La.App. 3 Cir. 1/19/00), 758 So.2d 231, *writ denied*, *00-551 (La. 9/22/00), 768 So.2d 600*.

The defendant fails to offer sufficient additional evidence on the issue. The argument of why it was error to have recused Judge Carter remains the same. The defendant only points to the supreme court's remand of *Wilkins, 9 So.3d 859*, for consideration of pretermitted errors as a reason for this court to reconsider its ruling in this case. Ultimately, this court determined that Judge Clemons, whose denial of the motions to recuse Judge Carter was the issue in both the current case and in *Wilkins*, used the wrong standard for recusal in cases where the judge sits as the trier of fact **[**90]** (as he did in the current case) from that where he presides over a jury trial and remanded *Wilkins* to another judge for determination of whether Judge Carter should be recused. *Wilkins*, 08-1461.

Accordingly, the defendant does not show that this court's ruling in *Langley*, 08-1413, was patently erroneous and produced unjust results. This assignment of error is without merit.

[Pg 54] **CONCLUSION**

Ricky Langley's conviction for second degree murder is affirmed. The case is remanded for the trial court to inform the defendant of the correct prescriptive period for filing an application for post-conviction relief pursuant to La.Code Crim.P. art. 930.8 by sending the defendant written notice within ten days of the rendition of this opinion and to file written proof in the record that the

defendant received the notice.

CONVICTION AFFIRMED. REMANDED WITH INSTRUCTIONS.

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