No. 19-6413

In the Supreme Court of the United States

RICKY LANGLEY,

Petitioner,

v.

HOWARD PRINCE, WARDEN, ELAYN HUNT CORRECTIONAL CENTER,

Respondent.

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

BRIEF IN OPPOSITION

JEFF LANDRY
Attorney General
ELIZABETH BAKER MURRILL*
Solicitor General
SHAE MCPHEE
Assistant Solicitor General
Office of the Attorney General
Louisiana Department of Justice
909 Poydras St. Ste. 1850
New Orleans, LA 70112
(225) 938-0779

Counsel of Record

JOHN F. DEROSIER
District Attorney
KAREN C. MCLELLAN
Assistant District Attorney
Calcasieu Parish District
Attorney's Office
901 Lakeshore Drive, Suite 800
Lake Charles, LA 70601
(337) 437-3400

JEFFREY M. HARRIS
Consovoy McCarthy PLLC
1600 Wilson Blvd., Suite 700
Arlington, VA 22209
(202) 321-4120

QUESTIONS PRESENTED

(1) Under *Ashe v. Swenson*, issue preclusion prevents further litigation on anything "actually determined" by a jury's general verdict of *acquittal*. But here the jury *convicted* Ricky Langley of second-degree murder. Did the state court unreasonably apply clearly established federal law by refusing to extend *Ashe* and by allowing the State to retry Langley for second-degree murder?

(2) Did the state court's decision to allow the State to retry Langley for second-degree specific-intent murder violate clearly established federal law even though the jury instructions were unclear and, as required by Louisiana law, the trial court instructed the jury that it could return a verdict of second-degree specific-intent murder?

(3) Even assuming the state court decision unreasonably applied clearly established federal law, can Langley's issue preclusion claim survive *de novo* review?

(4) If *Ashe v. Swenson* actually requires granting Langley's habeas petition, should *Ashe* be overruled?

TABLE OF CONTENTS

QUESTIONS PRESENTED ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

INTRODUCTION 1

STATEMENT OF THE CASE 4

The Murder 4

Procedural History 5

REASONS FOR DENYING THE PETITION 11

I. The Fifth Circuit correctly applied this Court's issue preclusion jurisprudence in light of AEDPA's highly deferential standard of review. 11

A. AEDPA's "highly deferential" review heightens the "demanding" standard for establishing issue preclusion in the criminal context. 11

B. No clearly established law prevented the State from retrying Langley. 14

C. There is no split between the circuit courts or state courts over the application of AEDPA in the circumstances at issue here. 18

II. This Court's precedent shows that Langley *cannot* benefit from issue preclusion. 20

III. Even assuming the state court issued an unreasonable decision, Langley's issue preclusion claim cannot survive *de novo* review. 25

IV. If *Ashe* Actually Requires Granting Langley's Habeas Petition, *Ashe* Should Be Reconsidered and Overruled. 28

CONCLUSION 29

TABLE OF AUTHORITIES

CASES

Ashe v. Swenson,
397 U.S. 443 (1970) .... passim

Berghuis v. Thompkins,
560 U.S. 370 (2010) 25

Boyde v. California,
494 U.S. 370 (1990) 20

Bravo-Fernandez v. United States,
137 S. Ct. 352 (2016) 14, 26, 29

Carey v. Musladin,
549 U.S. 70 (2006) 15

Cole v. Branker,
328 F. App'x 149 (4th Cir. 2008) 18, 19

Cullen v. Pinholster,
563 U.S. 170 (2011) 2, 3, 12

Currier v. Virginia,
138 S. Ct. 2144 (2018) 2, 13, 14, 19, 28

Dowling v. United States,
493 U.S. 342 (1990) 9, 13, 14

Estelle v. McGuire,
502 U.S. 62 (1991) 20

Green v. Estelle,
601 F.2d 877 (5th Cir. 1979) 18, 19

Green v. United States,
355 U.S. 184 (1957) 28

Harrington v. Richter,
562 U.S. 86 (2011) 12, 18

Harris v. Washington,
404 U.S. 55 (1971) 15

Kremer v. Chem. Constr. Corp.,
456 U.S. 461 (1982) 14

Langley v. Prince,
890 F.3d 504 (5th Cir. 2018) 10

Langley v. Prince,
No. 2:13-cv-2780, 2016 WL 1383466 (W.D. La. Apr. 6, 2016) 10

Martin v. Blessing,
134 S. Ct. 402 (2013) 28

Metrish v. Lancaster,
569 U.S. 351 (2013) 12

Mitchell v. Esparza,
540 U.S. 12 (2003) 12

Montana v. United States,
440 U.S. 147 (1979) 14

Mullenix v. Luna,
136 S. Ct. 305 (2015) 15

Neal v. Cain,
141 F.3d 207 (5th Cir. 1998) 18, 19

Owens v. Trammell,
792 F.3d 1234 (10th Cir. 2015) 19

Pugliese v. Perrin,
731 F.2d 85 (1st Cir. 1984) 18, 19

Schiro v. Farley,
510 U.S. 222 (1994) .... passim

Simpson v. Florida,
403 U.S. 384 (1971) 15

Standefer v. United States,
447 U.S. 10 (1980) 14

State v. Handley,
585 S.W.2d 458 (Mo. 1979) 18, 19

State v. Langley,
711 So. 2d 651 (La. 1998) 6, 7, 8

State v. Langley,
813 So. 2d 356 (La. 2002) 6

State v. Langley,
896 So. 2d 200 (La. Ct. App. 2004) 7

State v. Langley,
958 So. 2d 1160 (La. 2007) 8

State v. Porter,
639 So. 2d 1137 (La. 1994) 3, 23

State v. Thompson,
285 S.W.3d 840 (Tenn. 2009) 18, 19

Turner v. Arkansas,
407 U.S. 366 (1972) 15

United States v. Powell,
469 U.S. 57 (1984) 13

White v. Woodall,
572 U.S. 415 (2014) 12, 15, 17

Williams v. Taylor,
529 U.S. 362 (2000) 12

Wilson v. Sellers,
138 S. Ct. 1188 (2018) 17

Woodford v. Visciotti,
537 U.S. 19 (2002) 12

Yeager v. United States,
557 U.S. 110 (2009) 13, 26

STATUTES

28 U.S.C. § 2254 .... passim

La. R.S. 14:30 .... 6, 7

La. R.S. 14:31 10

OTHER AUTHORITIES

18A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4432 (3d ed. 2018) 3, 27

RESTATEMENT (SECOND) OF JUDGMENTS § 27 .... 3, 26, 27

RULES

La. C. Cr. P. art. 801 6

La. C. Cr. P. art. 808 6

La. C. Cr. P. art. 817 7

INTRODUCTION

Ricky Langley confessed repeatedly to molesting and brutally murdering six-year-old Jeremy Guillory. The State tried Langley three times for this crime and Langley was convicted three times. At the second trial, the State sought to convict Langley of first-degree murder, but a jury returned a general second-degree murder conviction. After that conviction was overturned on appeal for reasons not relevant here, the State sought to retry Langley for second-degree specific-intent murder. Langley moved to quash the State's indictment, arguing that the issue preclusion component of the Double Jeopardy Clause that this Court endorsed in *Ashe v. Swenson* prevented the State from retrying him for *any* offense with specific intent to kill as an element. 397 U.S. 443 (1970). Langley reasoned that the jury's second-degree murder conviction necessarily implied that he did not have specific intent to kill. The state district court denied his motion, and after a bench trial, convicted Langley of second-degree specific-intent murder.

After the Louisiana Third Circuit Court of Appeal rejected his issue preclusion argument and affirmed his conviction and life sentence, Langley sought federal habeas relief. The district court denied his issue preclusion claim, but a panel of the Fifth Circuit reversed. The panel reasoned that, to win a first-degree murder conviction, the State was required to prove (1) Langley killed Jeremy; (2) Jeremy was under 12 years old; and (3) Langley had specific intent to kill. Because Langley conceded he killed Jeremy and Jeremy was six, the panel concluded that the jury must have determined that he did not have specific intent to kill. The panel held that

Ashe required reversing Langley's second-degree specific-intent murder conviction. The Fifth Circuit granted the State's motion to rehear the case *en banc* and affirmed the district court's denial of habeas relief.

This Court has emphasized that the standard to establish issue preclusion is "demanding," especially in the criminal context. *Currier v. Virginia*, 138 S. Ct. 2144, 2146 (2018). And that "demanding" standard grows even more difficult to meet under the Antiterrorism and Effective Death Penalty Act's "highly deferential" review of state court decisions. *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011).

After carefully surveying this Court's case law that applies *Ashe*'s issue preclusion doctrine in the criminal context, the *en banc* Fifth Circuit concluded that, for the purposes of AEDPA, it was not clearly established that *Ashe*'s rule applied when a jury returned a general *conviction* rather than a general *acquittal*. *See* 28 U.S.C. § 2254. For this reason, the Fifth Circuit held that the Louisiana intermediate appeal court's rejection of Langley's *Ashe* argument on those grounds was not an unreasonable application of this Court's precedent.

The Fifth Circuit further concluded that extending *Ashe* in Langley's case would conflict with this Court's decision in *Schiro v. Farley*, 510 U.S. 222 (1994), which specifically addressed circumstances similar to this case. *Schiro* holds that when the jury does not have sufficiently clear instructions about the order in which it should consider the charged offenses, a court cannot then draw inferences about what was *necessarily decided* by that jury for purposes of collateral estoppel. *See id.* at 791. That holding applies with full force here, and when viewed through the lens

of AEDPA the issue is not close. *Schiro* is the most factually analogous precedent of this Court and it *denied* a double jeopardy defense in similar circumstances.

Finally, the Fifth Circuit held that, even if the Louisiana state court issued an unreasonable decision for purposes of AEDPA, Langley's claim could not survive *de novo* review. 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). That law, along with the confusing jury instructions the trial court gave the jury, makes it impossible to determine what the jury actually decided or necessarily determined by its conviction. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 27; 18A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4432 (3d ed. 2018).

At bottom, Langley misunderstands the nature of the AEDPA inquiry when he contends that the Fifth Circuit "carved out an exception" to this Court's issue preclusion jurisprudence. Pet. at 21. This Court has "said time and again that an *unreasonable* application of federal law is different from an *incorrect* application of federal law." *Pinholster*, 563 U.S. at 202. Deciding that the state court's decision was not an unreasonable application of the Court's precedent created no conflicts with the Court's issue preclusion jurisprudence. For the same reason, the Fifth Circuit's opinion does not create any splits with other federal circuits or state courts. In sum, Langley is simply asking this Court to review the *en banc* Fifth Circuit's careful and comprehensive application of settled legal principles to the unique facts of this case.

The decision below was correct and does not implicate any broader issues that warrant this Court's intervention. The Court should deny the petition.

STATEMENT OF THE CASE

The Murder

Ricky Langley, a convicted child molester in violation of his parole conditions, was living as a tenant in a house in Louisiana with a family when six-year-old Jeremy stopped by to visit his friends.[1] The family had left to visit a relative, but Langley invited Jeremy inside anyway. Jeremy went upstairs and began playing by himself in his friend's room, awaiting the family's return.

Langley later confessed to authorities that he grabbed Jeremy around the neck from behind and strangled him.[2] Jeremy kicked his boots off in the struggle. Langley admitted "he felt enjoyment while he was choking Jeremy."[3] When Jeremy stopped moving, Langley took Jeremy into his room and placed him on the bed. Langley molested the boy.[4] When Langley later heard Jeremy making "heavy breathing noises," Langley placed a ligature around Jeremy's neck and pulled it as tightly as possible.[5] Because Jeremy continued making noises, Langley stuffed a dirty sock into his mouth.

When Jeremy failed to return home, his mother stopped by the house, looking

---

[1] Pet. App. A-38–39.

[2] *Id.* at A-39.

[3] *Id.*

[4] *Id.*

[5] *Id.* at A-40.

for him. She asked Langley if he had seen Jeremy, but Langley lied and said no.[6] Jeremy's mother asked if she could use the telephone to call the police. Langley said yes and even pretended to help look for Jeremy. Later Langley stuffed Jeremy's body in a closet and covered it with blankets.

After the police began searching for Jeremy, authorities discovered an outstanding parole violation warrant for Langley related to the molestation of a child in Georgia.[7] They found Jeremey's body hidden in the closet. His shirt was "soaked" in semen.[8] Langley repeatedly confessed to molesting and murdering the boy.[9]

Procedural History

Despite the gruesomeness of the crime and the fact of Langley's repeated confessions, the procedural history of this case is long and convoluted.

Here's the short story. The State tried and convicted Langley three times. He ultimately received a life sentence for second-degree murder. After exhausting his appeals in state court, Langley sought federal habeas relief. The district court denied his petition. But a panel of the Fifth Circuit reversed, adopting Langley's argument that a state appellate court unreasonably applied the issue preclusion doctrine from *Ashe v. Swenson*, 397 U.S. 436 (1970). *En banc*, the Fifth Circuit vacated the panel opinion and denied Langley's habeas petition.[10] Langley now petitions this Court for

---

[6] *Id.* at A-39.

[7] *Id.* at A-38.

[8] *Id.* at A-40; *see id.* at A-5.

[9] *See id.* at A-5.

[10] *See id.* at A-4–6.

a writ of certiorari.

Here's the long story. The State initially charged Langley with first-degree murder. After a jury trial, Langley was unanimously convicted of that charge and sentenced to death.[11] For reasons not relevant here, Langley's conviction was reversed on appeal.[12]

The State retried Langley for first-degree murder. The dispute between the parties arises principally from the details of the second trial. To obtain a first-degree murder conviction, the State had the burden to prove that Langley: (1) killed Jeremy; (2) with specific intent to kill or to inflict great bodily harm; and (3) Jeremy was under the age of twelve.[13] Langley did not dispute that he killed Jeremy or that Jeremy was six years old. *See* Pet. at 7. So the state needed to prove only that Langley acted with specific intent to obtain a first-degree murder conviction. Langley pleaded not guilty and raised an insanity defense. *See id.*

After the parties presented their evidence, the trial court issued oral[14] instructions to the jury. And, although there was no dispute about Jeremy's age, in accordance with Louisiana law,[15] the trial court instructed the jury that it could

---

[11] *See id.* at A-5.

[12] *See id.* (citing *State v. Langley*, 711 So. 2d 651, 675 (La. 1998) (per curiam) (granting rehearing); *State v. Langley*, 813 So. 2d 356, 358 (La. 2002) (quashing the indictment because of improper selection of the grand jury foreperson)).

[13] *See* La. R.S. 14:30(A)(1), (5).

[14] In Louisiana, juries are not provided with a written copy of the instructions unless the jury requests it. *See* La. C.Cr. P. arts. 801, 808.

[15] *See* Pet. App. at A-13.

return the lesser-included verdict of second-degree specific-intent murder.[16] To commit second-degree specific-intent murder in Louisiana, a person must (1) kill the victim; (2) with specific intent to kill or cause great bodily harm. When orally instructing the jury about second-degree specific-intent murder, the judge incorrectly told the jury that it could convict Langley under this count by finding that Langley "acted with *or without specific intent* to kill or to inflict great bodily harm."[17]

The trial court also instructed the jury that it could return a verdict of second-degree felony murder. To commit second-degree felony murder, a person must (1) kill the victim; (2) while the defendant was engaged in the perpetration or attempted perpetration of a felony.[18] The State did not need to prove that Langley had specific intent to kill or inflict great bodily harm. Any second-degree murder conviction—either specific intent or felony murder—carries an automatic life sentence.[19] Consistent with Louisiana law, the jury returned a general verdict of second-degree murder, which did not specify either felony murder or specific-intent murder.[20]

Langley's second conviction was also overturned on appeal for reasons not relevant here.[21] And so the State sought to retry Langley for first-degree murder for

---

[16] *See* La. R.S. 14:30.1(a)(1).

[17] *See* Pet. App. A-24 n.8 (Higginson, J., dissenting).

[18] *See* La. R.S. 14:30.1(A)(2).

[19] La. R.S. 14:30.1(B). The Court also instructed the jury that it could return a guilty manslaughter verdict, but that is not relevant to this appeal.

[20] La. C.Cr. P. art. 817.

[21] *See* Pet. App. at A-5 (citing *State v. Langley*, 896 So. 2d 200, 201 (La. Ct. App. 2004) (holding that the trial judge's actions constituted structural errors requiring reversal of defendant's conviction)).

the third time.[22] Before the third trial began, however, Langley moved to quash on double-jeopardy grounds. The Louisiana Supreme Court ultimately held that Langley's conviction on the lesser-included offense of second-degree murder during the second trial precluded the State from retrying Langley for first-degree murder.[23] That court remanded to allow the State to retry Langley for second-degree murder.[24] At no point in that appeal did Langley argue that a second-degree murder prosecution would have been barred on double jeopardy grounds.

The third time that the State prosecuted Langley, he elected a bench trial. Before the trial began, the State realized that it could not proceed on a felony murder theory,[25] and so it advanced only a theory of second-degree specific-intent murder. Langley moved to quash, arguing that, under the issue preclusion doctrine, his conviction of second-degree murder during second trial precluded charging him with any crime that required the State to prove that Langley had specific intent to kill Jeremy. Langley reasoned that, because it was undisputed that he killed Jeremy and Jeremy was under 12, the jury's acquittal on a first-degree murder charge necessarily implied that he did not have specific intent to kill. Thus, according to Langley, the

---

[22] The State sought to retry Langley for first-degree murder—despite his earlier conviction for second-degree murder—because the jury's verdict had been overturned on appeal as *structural* error. *Langley*, 896 So. 2d at 201. The state intermediate appellate court expressly held that the State could retry Langley for first-degree murder because the second trial was a "nullity." *Id.* at 208. Eventually, the Louisiana Supreme Court recharacterized the structural error as "trial error" and held that the State could not retry Langley for first-degree murder. *See State v. Langley*, 958 So. 2d 1160, 1168–70 (La. 2007).

[23] *See* Pet. App. at A-5 (citing *State v. Langley*, 958 So. 2d 1160, 1170 (La. 2007)).

[24] *See* Pet. App. at A-42–43.

[25] The State determined that cruelty to juveniles was not a proper predicate felony for felony second-degree murder in 1992 at the time of the crime. *See* Pet. at 13.

State could not retry him even for the lesser-grade offense of second-degree murder if specific intent was an element of that offense.

The state district court rejected Langley's issue preclusion argument and, after a bench trial, convicted Langley of second-degree specific intent murder.[26] Langley then raised his collateral estoppel argument on appeal, and the Louisiana Third Circuit rejected it.[27] The court reasoned that Langley failed to meet his heavy burden under *Ashe* to show that the specific intent issue had been "necessarily determined" or "actually decided" by his conviction during the second trial.[28] The court also reasoned that it was "equally plausible that, given the nature of the case, the verdict was, in fact, a compromise verdict."[29] The court concluded that, "[r]egardless of the jury's thought process in this particular case, clearly the argument that the issue of specific intent was 'necessarily determined' is unsupported."[30]

The Third Circuit's opinion is the last reasoned state court decision on the issue. Langley sought review from the Louisiana Supreme Court, but it denied his writ application in a summary opinion.

Langley elected to forgo his right to pursue state post-conviction relief and

---

[26] *See* Pet. App. at A-5.

[27] *See* Pet. App. at A-42–43.

[28] *See id.* at A-43 (citing *Ashe v. Swenson*, 397 U.S. 443 (1970); *Dowling v. United States*, 493 U.S. 342, 250 (1990)).

[29] *Id.*

[30] *Id.*

instead petitioned for habeas relief in federal district court—which was denied.[31] Langley appealed to the Fifth Circuit, and a panel of the court reversed and granted habeas relief—agreeing that a rational jury convicting Langley of second-degree murder necessarily concluded that Langley did not have specific intent to kill Jeremy.[32]

The Fifth Circuit granted the State's motion to rehear the case *en banc*,[33] vacated the panel opinion, and affirmed the denial of Langley's habeas petition by a 12-5 vote. The majority *en banc* panel opinion (joined by nine judges) held that, for the purposes of AEDPA, "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." Pet. App. at A-10 (quoting § 2254). The Court further held that granting Langley's habeas petition would contravene this Court's precedent. *Id.* at A-12–13 (citing *Schiro*, 510 U.S. at 222). And, for good measure, the *en banc* majority alternatively held that, even if the state court's opinion were unreasonable under AEDPA, Langley's issue preclusion claim could not survive *de novo* review. *Id.* at A-14–17. Three judges concurred on the ground that the case could be resolved based solely on AEDPA, *Ashe*, and "the nuances of Louisiana law."

---

[31] *See id.* at A-6 (citing *Langley v. Prince*, No. 2:13-cv-2780, 2016 WL 1383466, at *1 (W.D. La. Apr. 6, 2016))).

[32] *See id.* (citing *Langley v. Prince*, 890 F.3d 504, 508 (5th Cir. 2018)).

[33] After the Fifth Circuit panel issued its opinion, the most serious crime the State could charge Langley with was manslaughter, and that had a maximum punishment of 21 years in prison at the time of the crime. La. R.S. 14:31. Langley has already served more than 25 years. Langley's counsel has repeatedly stated—and at trial his own psychiatric expert testified—that he should never leave a secure facility. ROA.31–115; ROA.16304; ROA.17546. The State, for obvious reasons, was and remains deeply concerned about his potential for unsupervised release from prison and the clear and present danger that would pose based on Langley's own frank admissions regarding his pedophilia.

Id. at A-19 (Elrod, J., concurring). Five judges dissented, arguing that Langley's conviction was contrary to clearly established law as set forth in *Ashe*.

Langley now seeks a writ of certiorari from this Court.

REASONS FOR DENYING THE PETITION

I. The Fifth Circuit correctly applied this Court's issue preclusion jurisprudence in light of AEDPA's highly deferential standard of review.

Langley contends that, by denying his habeas petition, the Fifth Circuit "carved out an exception" to this Court's issue preclusion jurisprudence. Pet. at 21. He accuses the Fifth Circuit of "deciding an important federal question" in a way that conflicts with the decisions of this Court and the decisions of other courts throughout the country. *See id.* at 21–27. The Fifth Circuit did no such thing. Langley's argument largely ignores the fact that he is a habeas petitioner and argues the case as if it arose on direct appeal. But because Langley was convicted in state court and now seeks federal habeas relief, the only question before the Fifth Circuit was whether, under AEDPA, the Louisiana Third Circuit Court of Appeal issued "a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." § 2254. The *en banc* Fifth Circuit's careful determination that the state court's opinion was not an unreasonable application of the Court's precedent created no conflicts with this Court's jurisprudence and does not warrant this Court's intervention.

A. AEDPA's "highly deferential" review heightens the "demanding" standard for establishing issue preclusion in the criminal context.

Under AEDPA, state court decisions are contrary to clearly established law

only when they apply "a rule that contradicts the governing law set forth" in this Court's cases or when they "confront[] a set of facts that are materially indistinguishable from" a Supreme Court decision and fail to derive the same result. *Mitchell v. Esparza*, 540 U.S. 12, 15–16 (2003) (quotation omitted). A federal habeas court may "not overrule a state court for simply holding a view different from its own, when the precedent from [this Court] is, at best, ambiguous." *Id.* at 17. Federal habeas review is "highly deferential" and gives a state court decision "the benefit of the doubt." *Pinholster*, 563 U.S. at 181 (quoting *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002)). "[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." *White v. Woodall*, 572 U.S. 415, 426 (2014) (internal quotation marks omitted).

This Court has "said time and again that an *unreasonable* application of federal law is different from an *incorrect* application of federal law." *Pinholster*, 563 U.S. at 202 (internal quotation marks omitted); *accord Metrish v. Lancaster*, 569 U.S. 351, 367 (2013); *Harrington v. Richter*, 562 U.S. 86, 101 (2011); *Williams v. Taylor*, 529 U.S. 362, 410 (2000). An unreasonable application of Supreme Court holdings "must be objectively unreasonable, not merely wrong; even clear error will not suffice." *Woodall*, 572 U.S. at 419–20 (cleaned up). A state court's determination that a claim lacks merit precludes federal habeas relief so long as "fairminded jurists could disagree" on the correctness of the state court's decision. *Richter*, 562 U.S. at 101. "If this standard is difficult to meet, that is because it was meant to be." *Id.* at 102.

AEDPA's highly deferential review heightens the already "demanding" standard for establishing issue preclusion. *Currier*, 138 S. Ct. at 2146. In *Ashe v. Swenson*, this Court imported the doctrine of collateral estoppel—also called issue preclusion—into the criminal context. 397 U.S. at 443. Under this doctrine, "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Id.* So, for example, when a jury acquits a defendant on a charge, the defendant's jeopardy as to that charge is "unquestionably terminated." *Yeager v. United States*, 557 U.S. 110, 119 (2009).

Collateral estoppel is "predicated on the assumption that [juries act] rationally" and follow the court's instructions. *See United States v. Powell*, 469 U.S. 57, 65–68 (1984). And rational juries are assumed to believe 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). To determine whether a jury could have grounded its verdict on any issue other than the one that the defendant seeks to preclude when the acquittal was based on a general verdict, "courts must examine the record of [the] prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter." *Dowling v. United States*, 493 U.S. 342, 350 (1990) (quoting *Ashe*, 397 U.S. at 444).

This Court has described the standard *Ashe* erected as "demanding." *Currier*, 138 S. Ct. at 2150. In the criminal context, a defendant bears the burden "to demonstrate that the issue whose relitigation he seeks to foreclose was actually

decided." *Schiro*, 510 U.S. at 233 (internal quotation marks omitted); *accord Dowling*, 493 U.S. at 350–51. Collateral estoppel does not apply "if there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation." *Montana v. United States*, 440 U.S. 147, 163–64 & n.11 (1979); *accord Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 481 (1982).

Since recognizing the doctrine in *Ashe*, this Court has narrowed its scope. The Court has cautioned that a "guarded application of the preclusion doctrine in criminal cases" is called for, "[p]articularly where it appears that a jury's verdict is the result of compromise, compassion, lenity, or misunderstanding of the governing law." *Bravo-Fernandez v. United States*, 137 S. Ct. 352, 358 (2016) (citing *Standefer v. United States*, 447 U.S. 10, 22–23 & n.18) (1980). This is because "the Government's inability to gain [appellate] review [of an acquittal] 'strongly militates against giving an acquittal [issue] preclusive effect.'" *Id.*

In *Currier v. Virginia*, the Court recently reaffirmed the importance of narrowly applying the issue preclusion doctrine, especially given that "[s]ome have argued that [*Ashe*] sits uneasily with this Court's double jeopardy precedent and the Constitution's original meaning." 138 S. Ct. at 2150.

B. No clearly established law prevented the State from retrying Langley.

Langley misunderstands the nature of the AEDPA inquiry when he contends that the Fifth Circuit "carved out an exception to the *Ashe* test." Pet. at 21. By determining that the state court did not issue an *unreasonable* decision, the Fifth Circuit did not carve out any exceptions. Instead, the Fifth Circuit correctly concluded

that there was no clearly established law requiring the state court to reach a different result. Those are two separate inquires. The sole question here—which is case-specific and manifestly unworthy of this Court's review—is whether the state court issued an unreasonable decision in light of the law clearly established at the time.

The *en banc* Fifth Circuit correctly explained that, under this Court's precedent, clearly established law should not be articulated at a high level of generality. Pet. App. at A-9–10 (citing *Carey v. Musladin*, 549 U.S. 70 (2006); *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015)). In light of that teaching, when determining the relevant clearly established law, the Fifth Circuit examined the three cases where this Court "has found issue preclusion under *Ashe*." *Id.* at A-10. (citing *Turner v. Arkansas*, 407 U.S. 366, 369–70 (1972); *Harris v. Washington*, 404 U.S. 55, 57 (1971); *Simpson v. Florida*, 403 U.S. 384, 386 (1971)). Here, Langley is arguing that his previous *conviction* for second-degree murder somehow operated through issue preclusion principles to bar a retrial for second-degree murder. But this Court has never applied *Ashe* to bar a retrial in those circumstances. As the Fifth Circuit explained, in *Ashe*, *Turner*, *Harris*, and *Simpson*, "[n]one of the four juries convicted the defendant of the charged crime. Therefore, none of these cases held issue-preclusion principles apply to a conviction." *Id.*

After identifying the relevant clearly established law, the Fifth Circuit next considered whether the Louisiana appellate court's decision "involved an unreasonable application of" that law. Id. at A-10–11 (quoting § 2254(d)(1)). The Fifth Circuit concluded that "Langley loses at this step" because *Ashe* did not apply to the

"set of facts" at hand. *Id.* (citing *Woodall*, 572 U.S. at 427). According to the court, a "fairminded jurist could conclude the rule clearly established in *Ashe* does not apply to a conviction rather than a general acquittal." *Id.* at A-11. The court reasoned that "[w]hen 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." *Id.* But "[t]hat 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 not clear which issues *if any* the jury determined in the defendant's favor on that same count." *Id.*

Importantly, the Fifth Circuit did not necessarily adopt the state court's view of *Ashe*. *Id.* ("We may or may not find [the state court's] distinction persuasive.'). But the Fifth Circuit appropriately deferred to the state court's interpretation of *Ashe* in light of the clearly established law at the time it issued its decision. *Id.* ("What matters is the last reasoned *state court* decision found it persuasive."). Thus, the Fifth Circuit simply determined that the state court's decision was not *unreasonable* under clearly established law. And so Langley is wrong when he argues that the Fifth Circuit "carved out an exception to the *Ashe* test." Pet. at 21.

Langley's petition points to only one case from this Court that he claims clearly establishes that *Ashe* applies to a conviction rather than a general acquittal—*Schiro v. Farley*, 510 U.S. 222, 232 (1994). *Langley*'s reliance on that case as a source of clearly established law is surprising given that *Schiro rejected* application of the *Ashe* doctrine. Langley contends that "[t]his Court, in *Schiro*, applied the *Ashe* test where

there was a verdict of guilty of one offense and no verdict returned on another." Pet. at 23. As discussed in detail below, the Fifth Circuit expressly held that granting Langley habeas relief under the *Ashe* doctrine would not only violate AEDPA's relitigation bar, but would also conflict with the Court's decision in *Schiro*. Pet. App. at A-12.

In all events, Langley's reliance on *Schiro* is misplaced. In that case, the defendant—Thomas Schiro—cited *Ashe* and argued "that principles of constitutional collateral estoppel require vacation of his death sentence." 510 U.S. at 232. The Court ultimately held that "Schiro has not met his burden of establishing the factual predicate for the application of the [issue preclusion] doctrine" because he failed to prove the jury had necessarily decided anything in his favor. *Schiro*, 510 U.S. at 232. As this Court has explained, "[c]learly established Federal law for purposes of § 2254(d)(1) includes only the holdings, as opposed to the dicta, of this Court's decisions." *Woodall*, 572 U.S. at 419 (cleaned up). The holding of *Schiro* is simply that the *Ashe* doctrine did not apply under the facts of that case. For the purposes of AEDPA, that holding is insufficient to establish with the requisite clarity that *Ashe* issue preclusion applies when a jury returns a conviction—especially given that, as noted, *Schiro* ultimately *rejected* the defendant's *Ashe* defense.

Because Langley can point to no clearly established law from this Court applying issue preclusion to a conviction rather than a general acquittal, the state court opinion is entitled to deference. *See Wilson v. Sellers*, 138 S. Ct. 1188, 1191–92 (2018). And so Langley's issue preclusion claim cannot survive AEDPA's relitigation

bar. The federal district court and twelve federal circuit judges who reviewed Langley's issue preclusion claim concluded that Langley's habeas petition should be denied. Only five of the seventeen circuit judges disagreed. Those figures suggest, at the very least, that "fairminded jurists could disagree" on the correctness of the state court's decision. *Richter*, 562 U.S. at 101. In any event, whether the state court's decision is within the realm of reasonable disagreement is not "an important federal question," Pet. at 21, for purposes of whether this Court's intervention is needed.

C. There is no split between the circuit courts or state courts over the application of AEDPA in the circumstances at issue here.

Perhaps recognizing that *Schiro* cannot provide the traction he needs, Langley attempts to "bolster[]" his claim that *Ashe* applies to his case by pointing to decisions from other federal circuit courts and state courts that he claims conflict with the Fifth Circuit's *en banc* opinion. Pet. at 24–27 ("In contrast to the *en banc* decision, other circuit courts and state courts of last resort have applied *Ashe* directly to implied acquittals arising from convictions on lesser included offenses." (citing *Pugliese v. Perrin*, 731 F.2d 85, 88 (1st Cir. 1984); *State v. Thompson*, 285 S.W.3d 840, 852 (Tenn. 2009); *State v. Handley*, 585 S.W.2d 458, 463 (Mo. 1979); *Cole v. Branker*, 328 F. App'x 149, 160–61 (4th Cir. 2008); *Neal v. Cain*, 141 F.3d 207, 211 (5th Cir. 1998); *Green v. Estelle*, 601 F.2d 877 (5th Cir. 1979)). Once again, Langley misunderstands the nature of the AEDPA inquiry. For purposes of AEDPA, all that matters is that *this Court* has never extended *Ashe* as far as Langley would like to expand it. And so the state court's decision to limit *Ashe* was not unreasonable.

Tellingly, not one of the opinions that Langley cites in support of an alleged

split found issue preclusion in a federal habeas case after AEDPA was enacted. And so not one of those opinions could be the basis of a split. Indeed, several of the cited cases *denied* relief. *See Branker*, 328 F. App'x at 160–61 (denying habeas relief after concluding that petitioner had "*not* met his burden of establishing the factual predicate for applying collateral estoppel" (emphasis added)); *Neal*, 141 F.3d at 211 (denying habeas relief because the petitioner *was not completely exonerated by his first jury*" (emphasis added)). *Pugliese v. Perrin* and *Green v. Estelle* are both federal habeas cases that were decided before AEDPA was enacted. 731 F.2d 85; 601 F.2d 877. And *State v. Thompson* and *State v. Handley* are both state cases and did not address *Ashe* claims in the federal habeas context. 285 S.W.3d 840; 585 S.W.2d 458.

It is not surprising that the Fifth Circuit's denial of Langley's habeas claim created no splits with other courts. As this Court explained, *Ashe* erected a "demanding" standard. *Currier*, 138 S. Ct. at 2150. And that "demanding" standard is heightened further in the habeas context because a petitioner seeking relief under § 2254(d)(1) must not only show that the state court's decision was incorrect, but also that it was unreasonable.

Regardless, as the Fifth Circuit correctly explained, there appears to be agreement among the federal circuits about the difficulty of demonstrating issue preclusion in the habeas context. *See* Pet. App. at A-12. ("As far as we can tell, the only other court of appeals to address this question agrees with us." (citing *Owens v. Trammell*, 792 F.3d 1234, 1246–50 (10th Cir. 2015)).

II. This Court's precedent shows that Langley *cannot* benefit from issue preclusion.

As discussed above, Langley relies on this Court's decision in *Schiro* for the proposition that the rule clearly established in *Ashe* also applies to convictions—and not only general acquittals. But *Schiro* actually cuts strongly in favor of the State. As the Fifth Circuit explained, rather than helping Langley clear AEDPA's religiation bar, *Schiro* shows that *Ashe* does not apply here. *See* Pet. App. at A-12. ("Extending *Ashe* in [Langley's case] would also conflict with other clearly established law. That's because the Supreme Court has confronted similar facts before and rejected the prisoner's Double Jeopardy claim." (citing *Shiro*, 510 U.S. 222)).

Under *Ashe*, when determining whether a jury actually determined an issue of fact, a court examines the entire record of the state court proceeding, including the jury instructions. *Ashe*, 397 U.S. at 442, 444 (requiring courts to examine "the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter." (internal quotations omitted)). Jury instructions are not always perfect, which can lead even a rational jury to return a verdict that it could not or would not return if it had been properly instructed. *See Schiro*, 510 U.S. at 233–35; *see also Estelle v. McGuire*, 502 U.S. 62, 72–73 (1991); *Boyde v. California*, 494 U.S. 370, 380–81 (1990).

Schiro shows that confusing jury instructions can prevent a defendant from proving that an issue was actually determined in a previous litigation. 510 U.S. at 233–35. Thomas Schiro admitted to killing Laura Luebbehusen, but he claimed he was insane at the time of crime. The jury was presented with ten possible verdicts.

Count one charged him with "knowingly" killing Luebbehusen and count two charged him with killing her while committing the crime of rape. *Id.* at 225. A jury found him guilty on count two, but did not find him guilty of killing Luebbehusen "knowingly"—the first count. *Id.* at 234. Schiro argued that collateral estoppel precluded any future consideration of the issue of his intent to kill Luebbehusen.

To determine whether the jury had actually determined the issue of Schiro's intent to kill, this Court looked at the jury instructions. Finding them ambiguous, it concluded that the jury could have grounded its verdict on a different issue. *Id.* at 233–34. Specifically, the Court observed that "[t]he jury was not instructed to return verdicts on all the counts listed on the verdict sheets." *Id.* at 233. And because "it was not clear to the jury that it needed to consider each count independently," the Court refused to "draw any particular conclusion" from the jury's failure to return a guilty verdict on count one. *Id.* That is, when the jury instructions are unclear about the order in which the jury is supposed to deliberate on the offenses, a court cannot draw any inferences from the verdict about which issues were or were not necessarily decided in the course of reaching the verdict. *Id.* The Court also found it relevant that the jury was given confusing instructions from defense counsel suggesting that it could return a verdict of felony murder even if it found the defendant had specific intent to kill Luebbehusen. *Id.* The Court concluded that, "in light of the jury instructions, . . . as a matter of law the jury verdict did not necessarily depend on a finding that Schiro lacked an intent to kill." *Id.* at 235.

The parallels between *Schiro* and Langley's case are striking; indeed, *Schiro* is

(by far) the most analogous precedent of this Court, and it squarely rejected the defendant's double jeopardy arguments. Like Langley, Schiro admitted to killing his victim and claimed that he did not intend to kill. And like Langley, "[t]he principal issue at trial was Schiro's mental condition." *Id.* at 240, 114 S. Ct. 783. The jury returned a general verdict of second-degree murder against Langley—which means it did not explicitly choose between specific intent murder and felony murder. Schiro's jury was, if anything, even more explicit about its belief that Schiro had not intended to kill. The jury convicted Schiro of felony murder under count 2, but it did not return a verdict on the first count—intentional murder. *Id.* at 225–26. In a separate sentencing hearing, the jury unanimously concluded that Schiro did not deserve the death penalty, presumably because he had not intended to kill." Id. at 239, 114 S. Ct. 783 (Stevens, J., dissenting) (footnote omitted).

As the Fifth Circuit explained, to the extent that Schiro's jury instructions were ambiguous, "Langley's were even more so." Pet. App. A-13. Thus, if Schiro's prior trial could not give rise to issue preclusion, it follows a fortiori that Langley's prior trial cannot do so either. As Langley argued to the Louisiana Third Circuit when appealing his second-degree murder conviction after the second trial, "significant irregularities plagued the jury charge,"[34] and the jury instructions were "utterly unfair, improper, and incomplete."[35] For example, when orally instructing the jury about second-degree specific intent murder during the second trial, the judge told the

[34] ROA.18267.

[35] ROA.12456.

jury that to convict Langley under this count it must find (1) that Langley killed Jeremy and (2) "that the defendant acted w*ith or without* specific intent to kill or to inflict great bodily harm." After retiring to deliberate, the jury—apparently confused—sought clarification from the court regarding the requirements of first-degree and second-degree murder.[36] In response, the trial court gave the jury a printed, amended, and abridged version of the oral instructions it had read to them. The amended instructions reaffirmed that the jury could return a second-degree specific-intent murder verdict. *See* Pet. App. at A-16. And Langley's counsel made statements during closing arguments that a jury could have interpreted to mean that it could return any verdict it believed was appropriate: "[I]f you come back with any verdict other than first degree, this is the last time that [we] will get to speak to you."[37]

Moreover, as the Fifth Circuit correctly explained, "Louisiana law makes this case easier than *Schiro*." Pet. App. at A-13. In Louisiana, "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." *Porter*, 639 So. 2d at 1140. And, in Langley' case, the jury was given the option to convict Langley of second-degree specific-intent murder even though, under Langley's view, no rational jury could have picked that option after declining to convict him of first-degree murder. Overwhelming evidence supported the State's theory that Langley

[36] *See* Pet. App. A-24 n.8 (Higginson, J., dissenting).

[37] ROA.17511.

specifically intended to kill Jeremy. And, as the Fifth Circuit noted, "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." Pet. App. at A-13.

Langley argues at length why he believes that both the majority and concurring opinions of the Fifth Circuit applied an "erroneous understanding of Louisiana law" on this point. Pet. at 27–30. First, he is wrong about the law, as the Fifth Circuit majority and concurring opinions carefully explained. *See* Pet. App. at A-18, A-20. And, regardless, this Court does not grant certiorari to resolve disputed questions of state law. But, even assuming Langley is correct that Louisiana juries are not free to jump to a responsive, lesser-included offense, his argument ignores the unique facts of the second trial. After the jury requested clarification about the elements of the offenses, the trial judge issued written, amended, and abridged instructions. The abridged jury instructions stated merely that "if you are not convinced that a defendant is guilty of the offense charged, you may find a defendant guilty of a lesser offense."[38] This instruction is hardly free from ambiguity about the order in which the jury was to deliberate about the offenses, which places Langley's case squarely within the ambit of *Schiro*. For this reason, the concurring opinion issued by the Fifth Circuit explained that the "failure to consider the jury instructions as a whole leads [the dissenting opinion] to draw inferences about the jury's verdict that do not logically follow from the totality of the circumstances." Pet. App. at A-20

[38] ROA.147.

(Elrod, J., concurring).

Finally, when this Court decided *Schiro*, AEDPA had not yet become the law of the land. The defendant in *Schiro* was not obliged to contend with AEDPA's relitigation bar, but his habeas claim failed anyway. If Schiro lost, "then Louisiana must prevail on easier facts and a much more favorable legal standard." *Id.* at A-13.

At bottom, for purposes of AEDPA, there was no clearly established law supporting Langley's view that the issue preclusion doctrine prevented the state from retrying him for second-degree specific-intent murder. On the contrary, this Court's decision in *Schiro*—which is, by far, the most pertinent decision of this Court—establishes exactly the opposite. For these reasons, the Fifth Circuit was correct to defer to the state court's decision, as AEDPA requires.

III. Even assuming the state court issued an unreasonable decision, Langley's issue preclusion claim cannot survive *de novo* review.

As the Fifth Circuit observed, "[o]vercoming AEDPA's relitigation bar is necessary but not sufficient to win habeas relief." Pet. App. at A-9. Even if Langley could show that the Louisiana Third Circuit Court of Appeal issued an unreasonable decision under AEDPA, Langley's issue preclusion claim must also survive *de novo* review. *Id.*; *see Berghuis v. Thompkins*, 560 U.S. 370, 390 (2010) ("Courts can, however, deny writs of habeas corpus under § 2254 by engaging in *de novo* review when it is unclear whether AEDPA deference applies, because a habeas petitioner will not be entitled to a writ of habeas corpus if his or her claim is rejected on *de novo* review." (citing § 2254(a))).

The Fifth Circuit correctly held that Langley's issue preclusion claim could not

survive even *de novo* review, for several independent reasons.

First, Langley cannot prove that the jury "actually determined" the issue of specific intent in his favor when it found him guilty of second-degree murder. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 27 (issue preclusion will not attach unless an issue was "actually . . . determined" in a previous action); *Bravo-Fernandez*, 137 S. Ct. at 359 ("We have also made clear that the burden is on the defendant to demonstrate that the issue whose relitigation he seeks to foreclose *was actually decided* by a prior jury's verdict of acquittal." (emphasis added) (cleaned up)). This Court has explained that a defendant must meet a "demanding" standard to show issue preclusion in the criminal context. In accordance with Louisiana law, Langley's jury was given the option to convict him of second-degree specific-intent murder. As the Fifth Circuit pointedly observed: "[W]e 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." Pet. App. at A-16. But that is what Langley argues here.

Second, Langley cannot prove that the issue of specific intent was "necessary" or "essential to the judgment" even under the broader civil rules of issue preclusion. *Id.* This is true because, consistent with Louisiana 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." *Id.* Determining why the jury chose second-degree murder would require a federal court to speculate about what transpired in the jury room—something this Court has said is inappropriate. *Id.* (citing *Yeager*, 557 U.S. at 122). Even if the Court had an appetite

to speculate about the jury's motivations, it could conclude from the jury instructions that the jury had a rational reason not to decide the specific-intent issue: "[I]f 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." *Id.* Langley's lawyer expressly made that argument to the jury.[39] The jury knew that a second-degree murder conviction carried an automatic life sentence. Thus, the jury could have chosen—and had a rational reason to choose—second-degree murder without deciding the specific-intent issue.

Finally, the Louisiana Supreme Court expressly held that, although the State could not retry Langley for *first-degree* murder at the third trial in light of his acquittal of that charge at the second trial, it could retry Langley for second-degree murder; indeed, Langley never argued in that appeal that a prosecution for second-degree murder would have been barred as well. *See id.* at A-17; *See Langley*, 958 So. 2d at 1171. There was no "valid and final" judgment deciding the issue of specific intent. *See id.* (citing RESTATEMENT (SECOND) OF JUDGMENTS § 27). When determining the scope of issue preclusion it is "the actual appellate disposition" that matters. 18A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4432 (3d ed. 2018)). "There is no preclusion as to the matters vacated or reversed." *Id.*

It bears emphasis that *offense* preclusion and *issue* preclusion are different doctrines. 138 S. Ct. at 2149–50. The Louisiana Supreme Court was of course correct

[39] ROA.17511. ("[I]f you come back with any verdict other than first degree, this is the last time that [we] will get to speak to you.").

that the jury's conviction of Langley of second-degree murder in the second trial precluded retrying Langley for the *offense* of first-degree murder. *See Langley*, 958 So. 2d at 1169–70 ("In *Green*, the Supreme Court held 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." (citing *Green v. United States*, 355 U.S. 184, 193 (1957))). But that decision did not preclude the State from retrying Langley for the *offense* of second-degree specific-intent murder.

In sum, even if the Court thought that the state court got it wrong, Langley's issue preclusion claim cannot survive *de novo* review. Granting certiorari to correct the state court's reasoning would amount to nothing more than error correction. But this Court is "not a court of error correction." *Martin v. Blessing*, 134 S. Ct. 402, 405 (2013) (Statement of Alito, J., respecting the denial of certiorari).

IV. If *Ashe* Actually Requires Granting Langley's Habeas Petition, *Ashe* Should Be Reconsidered and Overruled.

For all the reasons set forth above and in the Fifth Circuit's comprehensive opinion, Langley's petition should be denied under a straightforward application of *Ashe* and *Schiro*, especially when viewed through the lens of AEDPA. Langley's theory would represent an unprecedented *expansion* of the *Ashe* doctrine and would flout this Court's decision addressing similar circumstances in *Schiro*.

But if *Ashe* does, in fact, require the extraordinary result of granting Langley's habeas petition, this would show that the *Ashe* doctrine has become entirely unmoored from the text and history of the Double Jeopardy Clause and should be

reconsidered from first principles. *See Currier*, 138 S. Ct. at 2149–50 ("Some have argued that [*Ashe*] sits uneasily with this Court's double jeopardy precedent and the Constitution's original meaning."); *Bravo-Fernandez*, 137 S. Ct. at 366 (Thomas, J., concurring) (arguing that "[a]s originally understood, the Double Jeopardy Clause does not have an issue-preclusion prong"). Although the best course is simply to deny the certiorari petition, if the Court does find these issues worthy of review, it should add a question presented to address the ongoing validity of the *Ashe* doctrine more generally.

CONCLUSION

The State of Louisiana respectfully asks the Court to deny Langley's petition for a writ of certiorari.

Respectfully submitted,

/s/ Elizabeth Baker Murrill

JEFF LANDRY
Attorney General

ELIZABETH BAKER MURRILL*
Solicitor General

SHAE MCPHEE
Assistant Solicitor General

**Counsel of Record*
Louisiana Department of Justice
1885 N. 3rd St.
Baton Rouge, LA 70804
(504) 556 9907
McPheeS@ag.louisiana.gov

JOHN F. DEROSIER
District Attorney
KAREN C. MCLELLAN
Assistant District Attorney
Calcasieu Parish District Attorney's Office
901 Lakeshore Drive, Suite 800

Lake Charles, Louisiana 70601
(337) 437-3400
csigler@cpdao.org

JEFFREY M. HARRIS
Consovoy McCarthy PLLC
1600 Wilson Blvd., Suite 700
Arlington, VA 22209
(202) 321-4120
jeff@consovoymccarthy.com