No. 19-6413

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

REPLY OF PETITIONER

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I. There is an important conflict between the decision entered by the circuit court and the decisions of other circuit courts pre- and post-AEDPA as well as state courts of last resort, including the Louisiana Supreme Court itself

A. Respondent seeks to ignore an important conflict between the decision of a circuit court and the decision of a state court of last resort with overlapping jurisdiction

Respondent argues that state court decisions cannot form part of a conflict of decisions.[1] Respondent then wholly ignores Louisiana's longstanding jurisprudence that, as a matter of federal constitutional law, collateral estoppel applies to Louisiana's system of responsive verdicts. *State v. Jackson*, 332 So.2d 755, 757 (La. 1976) citing *Ashe v. Swenson*, 397 U.S. 436 (1970) and *Green v. United States*, 355 U.S. 184 (1957).

Contrary to this holding, the circuit court held that federal constitutional law is unclear on whether *Ashe* applies to implied acquittals and that, in any event, *Ashe* cannot be meaningfully applied to Louisiana's system of responsive verdicts.[2]

This is a particularly important conflict in understanding of federal constitutional law given the overlapping jurisdictions of the two courts.[3]

We now have a situation in which the Louisiana Supreme Court has held that the *Ashe* test applies to implied acquittals arising from responsive verdicts in Louisiana but the circuit court holding eliminates access to federal habeas relief in

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[1] *Opposition* at 19.

[2] *Langley v. Prince*, 926 F.3d 145, 158, 159, 166 (5th Cir. 2019).

[3] See, e.g., *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 762 (1994) (certiorari granted to resolve conflict between Florida Supreme Court and Eleventh Circuit).

such cases by making the relitigation bar of 28 U.S.C.S. § 2254(d) insuperable. Nor will the situation be resolved other than by intervention of this Court in this case - - - no relevant case will reach this court from Louisiana on certiorari from direct appeal as Louisiana already agrees that *Ashe* applies.

B. The circuit court's decision conflicts with decisions of other circuit courts and state courts of last resort applying this Court's jurisprudence and holding that the Ashe rule applies to implied acquittals

Respondent seeks to narrow out of existence the possibility of a conflict among decisions of circuit courts and state courts of last resort by arguing that only the decision of another circuit applying the "clearly established" language of § 2254(d) can be relevant to such a conflict and only in a case where the petitioner was granted relief on the merits.[4]

This is incorrect.

The holdings of this Court represent clearly established law for the purposes of § 2254(d). At least four circuit courts and three state courts of last resort have decided, applying the holdings of this Court, that the *Ashe* test applies to implied acquittals.[5]

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[4] *Opposition* at 18-9.

[5] *Neal v. Cain*, 141 F.3d 207, 211 (5th Cir. 1998); *Green v. Estelle*, 601 F.2d 877 (5th Cir. 1979); *Pugliese v. Perrin*, 731 F.2d 85, 88 (1st Cir. 1984); *Cole v. Branker*, 328 F. App'x 149, 160-61 (4th Cir. 2008); *Lemke v. Ryan*, 719 F.3d 1093 (9th Cir. 2013); *State v. Jackson*, 332 So.2d 755, 757 (La. 1976); *State v. Thompson*, 285 S.W.3d 840, 852 (Tenn. 2009); *State v. Handley*, 585 S.W.2d 458, 463 (Mo. 1979). *See also Lemke v. Rayes*, 213 Ariz. 232, 240-41, 141 P.3d 407, 415-16 (Ct. App. 2006); *Tudor v. State*, 2002 Tex. App. LEXIS 490, at *4-5 (Tex. App.—Tyler Jan. 23, 2002).

The circuit court in Mr. Langley's case entered a decision in conflict with those other courts when it held that there is no clearly established federal law explaining whether and to what extent issue preclusion should apply to implied acquittals.

None of the judgments of other circuit and state courts relied upon by Mr. Langley in his Petition involve cases where the circuit or state courts have: purported to extend a decision of this court; purported to make their own *res nova* judgment as to the appropriate test to be applied; or, resolved the matter by reference to state law. In each case, the circuit courts and state courts of last resort rested upon the decisions of this Court, concluding that *Ashe* applied to implied acquittals and the circuit court below has entered a decision in conflict with their collective judgment.

C. *The circuit court decision conflicts with other circuit courts applying Ashe to implied acquittals in post-AEDPA cases*

Respondent rejects the existence of post-AEDPA conflicting decisions by arguing that decisions where the petitioner ultimately lost on the merits after application of the *Ashe* rule to his implied acquittal cannot represent conflicting decisions. *Opposition* at 18-9. This is incorrect.

Where other circuit courts have determined that the relevant clearly established federal law requires application of the *Ashe* test to implied acquittals, there is clearly a direct conflict between these decisions and the decision of the circuit court below.

In addition to the authorities previously cited in his Petition and this reply, Mr. Langley calls attention to a further post-AEDPA, circuit court case holding that *Ashe* and *Schiro v. Farley*, 510 U.S. 222, 236 (1994) apply to implied acquittals.

In *Lemke v. Ryan*, 719 F.3d 1093,1104 (9th Cir. 2013), (**a case not cited in the original Petition**) the Ninth Circuit squarely determined that *Ashe* and *Schiro* represented clearly established federal law requiring application of the *Ashe* test to an implied acquittal of armed robbery. *Lemke* was a post-AEDPA §2254 application where, as here, the state court had applied *Ashe* to the implied acquittal.[6] However, in *Lemke*, the circuit court determined that the application of the *Ashe* test to an implied acquittal was clearly established federal law. The circuit court's decision in the present case directly conflicts with that decision.

As previously briefed, the Fourth Circuit in a post-AEDPA §2254 case similarly applied the *Ashe* test to an implied acquittal in *Cole v. Branker*, 328 F. App'x 149 (4th Cir. 2008), albeit as an alternative basis for denying relief. The circuit court's decision in the present case directly conflicts with that decision also.

D. Uniform application of the Ashe test to implied acquittals in all other circuit courts and state courts of last resort to have considered the question confirms that the application of the Ashe test to implied acquittals has been clearly established

Mr. Langley has already pointed out that prior to the decision below, circuit courts and state courts of last resort faced with the question had uniformly applied *Ashe's* collateral estoppel test to implied acquittals. *Petition* at 25-7. In its *Opposition*, Respondent is unable to point to any cases heading in the other direction. Instead, Respondent joins the circuit court in pointing solely to *Owens v. Trammel*,

[6] *Lemke v. Rayes*, 213 Ariz. 232, 240-41, 141 P.3d 407, 415-16 (Ct. App. 2006).

792 F.3d 1234, 1248-9 (10th Cir. 2015), but in that case the question of law not clearly established was how to determine whether verdicts were truly inconsistent.

While it is ultimately for this Court alone to determine what is clearly established, this is not a case like *Musladin*[7] where lower courts had diverged widely in the test to be applied, thus reflecting a lack of clear guidance from this Court. To the contrary, circuit courts and state courts of last resort have readily understood that *Ashe* applies to implied acquittals.

Respondent's argument, and the circuit court's decision are belied by the fact that every other court to consider the matter, including the Louisiana Supreme Court and the appellate court that rendered the decision in Mr. Langley's case, uniformly concluded that the *Ashe* test does apply to implied acquittals.

No new rule is required and no extension of this Court's existing jurisprudence as already understood throughout the rest of the country is needed. Simply a resolution of the conflict that has emerged in the caselaw that will confirm that principles of issue preclusion apply to implied acquittals such as that in Mr. Langley's case.

[7] *Carey v. Musladin*, 549 U.S. 70, 76-77 (2006).

II. The circuit court has decided an important question in a way that conflicts with relevant decisions of this Court

A. Respondent errs in narrowing the holding of Schiro to its result

Respondent argues that the circuit court opinion does not conflict with this Court's prior decision in *Schiro* because "[t]he holding of *Schiro* is simply that the *Ashe* doctrine did not apply under the facts of the case." *Opposition* at 17.

This is incorrect and unduly narrows the understanding of the scope of a holding in a case.[8]

In *Abdul-Kabir*,[9] this Court held that its prior decision in *Johnson*[10] represented clearly established law even though the petitioner in *Johnson* lost on the merits before this Court. In *Abdul-Kabir*, this Court noted that the relevance of the *Johnson* line of cases lay not in their results, but in their identification of the basic legal principle that governed such cases.[11] Such is true also of *Schiro*.

B. Respondent errs in arguing that Mr. Langley's case, like Schiro, turns on confusing jury instructions

Mr. Langley's trial did not involve jury instructions that were confusing in the manner of those delivered in *Schiro* and the instruction on responsive verdicts did not actually invite the jury to convict Mr. Langley of a lesser offense, even if convinced of guilt of the charged offense.

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[8] *Petition* at 24.

[9] *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 259 (2007).

[10] *Johnson v. Texas*, 509 U.S. 350 (1993).

[11] *Abdul-Kabir*, 550 U.S. at 258-9.

Importantly, Respondent's *Opposition* contains an incomplete quotation of the circuit court's description of the instruction to the jury regarding responsive verdicts that may prove confusing for this Court.[12]

The circuit majority twice described the instruction given to the jury upon which Respondent relies, first directly quoting part of the instruction as follows:

> 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."[13]

Later, after citing the *legal effect* of Louisiana's responsive verdict system, the circuit court paraphrased a combination of the actual jury instruction and its own understanding of Louisiana law as follows:

> 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.[14]

The circuit court was describing the same part of the instructions on both occasions but Respondent has quoted only the second reference by the circuit court. The danger is created that this Court may misunderstand the actual content of the jury instructions.

Mr. Langley's jury was never actually told that they could return a verdict of guilty of a lesser offense even if satisfied of guilt beyond reasonable doubt of the greater offense.

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[12] *Opposition* at 26.

[13] *Langley* at 161.

[14] *Langley* at 166.

As previously described,[15] such an instruction would have violated Louisiana law. Respondent has offered no rebuttal to Petitioner's recitation of the body of Louisiana law holding such an instruction to be improper.

As this Court will see, should it have the opportunity to review the record, Mr. Langley's jury was, in fact, told that if they were not convinced beyond a reasonable doubt that Mr. Langley was guilty of the offense charged, that they could find him guilty of a lesser offense.[16] This instruction was given both orally and in writing.

This is an important distinction from the case presented to the Ninth Circuit in *Lemke* (*supra*). There, the circuit court found that Lemke had not established that the jury decided that Lemke did not commit armed robbery. This was because the jury had been explicitly given a *"LeBlanc* instruction"; an instruction "which allowed the jurors to consider a lesser included offense if, after reasonable effort, they could not agree on the greater charged offense."[17] In those circumstances, *Lemke* could not establish that the jury had necessarily entered an implied acquittal, as opposed to having been unable to reach a unanimous decision on the greater charge.[18]

In the present case, Mr. Langley's jury was never given an instruction that they could convict of a lesser offense even if convinced of guilt of the greater offense and such an instruction is prohibited by Louisiana law.

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[15] *Petition* at 27-9.

[16] *See Petition* at 9-10.

[17] *Id.* at 1095.

[18] *Id.* at 1104.

As pointed out by the dissent below, the jury instructions in the present case did not cause the type of confusion present in *Schiro* or cast doubt on what the jury had necessarily found by its verdict.[19]

CONCLUSION

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

Respectfully submitted,

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Attorney for Petitioner
Dated: March 23, 2020.

[19] *Langley*, 926 F.3d at 182.