

No.
IN THE
SUPREME COURT OF THE UNITED STATES

SPENCER RILEY, Petitioner,
-vs-

PEOPLE OF THE STATE OF ILLINOIS, Respondent.

On Petition For Writ Of *Certiorari*

To The United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF *CERTIORARI*

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QUESTION PRESENTED FOR REVIEW

Whether the United States Court of Appeals for the Seventh Circuit properly applied the collateral estoppel doctrine with “realism and rationality” as required by this Court in *Ashe v. Swenson*, 397 U.S. 436 (1970), where the Seventh Circuit found the State of Illinois was not collaterally estopped from attempting to prove Spencer Riley’s identity as the possessor of the murder weapon at the time of a shooting, even though a jury had already acquitted Riley of murder after rejecting the same eyewitness testimony identifying him as the only person who possessed that gun at that time.

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- Appendix B:** The decision of the United States District Court for the Northern District of Illinois denying *habeas* relief. *Riley v. Calloway*, 13 cv 02162 (N.D. Ill. 2017).
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The petitioner, Spencer Riley, respectfully prays that this Court issue a writ of *certiorari* to review the judgment below.

OPINION BELOW

The published opinion of the United States Court of Appeals for the Seventh Circuit is cited as *Riley v. Calloway*, 882 F. 3d 738 (7th Cir. 2018), and attached as **Appendix A**.

JURISDICTION

The United States Court of Appeals for the Seventh Circuit issued an opinion on February 20, 2018. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment to the United States Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment to the United States Constitution

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A Jury Acquits Spencer Riley of Murder

In March of 2008, the State prosecuted Spencer Riley for first-degree murder stemming from the shooting of Cedric Hudson. At the murder trial, the State presented the eyewitness identification testimony of three convicted felons, Kenneth Head, Frederick Brown, and Demetrice Allen, each of whom identified Riley as the person who shot Hudson. A police officer also testified that Riley made an ambiguous, unmemorialized statement that corroborated the eyewitness testimony. *Riley v. Calloway*, 882 F. 3d 738, 740-41 (7th Cir. 2018). During closing arguments, the prosecutor asserted that the eyewitness testimony established there was “[o]ne shooter, [o]ne killer,” and that “[t]he question [was] did [Riley] perform those acts?” (R. AA32). Defense counsel argued that the identification witnesses were “[a]bsolutely unreliable” and had motives to implicate Riley. (R. AA43-54). Counsel concluded, “If you believe those three guys, [the State has] done it, because that’s what they have, those three guys. If you believe them, you have done your duty.” (R. AA53-54). The jury acquitted Riley of murder and returned a special verdict finding he did not “personally discharge[] a firearm that proximately caused death to another person.” (C. 96-97; R. AA96-98); *Riley*, 882 F. 3d at 740.

Riley’s Bench Trial for Armed Habitual Criminal

After the jury acquitted Riley of shooting Hudson, the State prosecuted him for armed habitual criminal, which required proof of two prior qualifying convictions and possession of a firearm (720 ILCS 5/24-1.7(a)), based on the same incident, in front of the same judge. *Riley*, 882 F. 3d at 741. The parties stipulated to Riley’s prior convictions, and the State presented two of the three eyewitnesses from the murder

trial. *Id.* The testimony of the eyewitnesses was “nearly identical” to their testimony at the prior trial. *Id.* As at the murder trial, the eyewitnesses testified that Riley was the sole person who approached Hudson with a gun and shot him. (R. FF12-16, 30-50); *Id.* Like at the murder trial, the State argued in closing that Riley was the murderer, and defense counsel argued that the eyewitnesses were incredible. (R. AA62-63; GG28-32); *Id.* In convicting Riley of armed habitual criminal, the trial judge found that the eyewitnesses had placed Riley at the scene and testified he shot Hudson. *Id.*

State Appellate Review of Riley’s Armed Habitual Criminal Conviction

Riley argued that, pursuant to *Ashe v. Swenson*, 397 U.S. 436 (1970), the State was collaterally estopped from prosecuting him for armed habitual criminal where the ultimate issue of fact – Riley’s identity as the murderer and possessor of the murder weapon – had previously been resolved in his favor. The appellate court found that the State was not collaterally estopped from prosecuting Riley for armed habitual criminal because the State had to satisfy different elements to prove murder and armed habitual criminal. *People v. Riley*, 2012 IL App (1st) 101607-U, ¶20. The appellate court further found that the murder jury did not resolve the question of whether Riley possessed “a gun,” and that “merely possessing a weapon is sufficient to be convicted” of armed habitual criminal. *Riley*, 2012 IL App (1st) 101607-U at ¶¶25, 21.

The Illinois Supreme Court denied leave to appeal. *People v. Riley*, No. 114921 (petition for leave to appeal denied November 28, 2012).

Federal Review of The State Proceedings

In March of 2013, Riley filed a petition for writ of *habeas corpus*, alleging the state appellate decision was contrary to, and an unreasonable application of, the well-established doctrine of collateral estoppel as set forth by this Court in *Ashe v. Swenson*,

397 U.S. 436 (1970). The United States District Court for the Northern District of Illinois denied Riley *habeas* relief in March of 2017. *Riley v. Calloway*, 13 cv 02162 (N.D. Ill. 2017). The federal district court found that the evidence at the armed habitual criminal trial was “virtually the same” as the evidence at the murder trial, but that the murder jury did not decide the issue of whether Riley possessed “a gun,” which was the only issue at the armed habitual criminal trial. *Id.* at 25, 20-21. Finding that the circumstances of this case “appear[] to implicate language in *Ashe* prohibiting a prosecutor from using a first trial as a dry run for a second trial,” the district court granted a certificate of appealability. *Id.* at 25.

The United States Court of Appeals for the Seventh Circuit Court affirmed. *Riley v. Calloway*, 882 F. 3d 738 (7th Cir. 2018). The Seventh Circuit held, like the reviewing courts below, that the only issue at the armed habitual criminal trial was whether Riley “possessed a gun,” and that the murder jury’s acquittal verdicts did “not establish that ... Riley did not possess a gun at all that night.” *Riley*, 882 F. 3d at 743.

REASON FOR GRANTING *CERTIORARI*

This Court Should Grant Review To Address The Proper Application Of The Collateral Estoppel Doctrine As Set Forth In *Ashe v. Swenson*, In Particular, This Court’s Admonishment That The Doctrine Is To Be Applied With “Realism And Rationality.”

The United States Court of Appeals for The Seventh Circuit held that the State was not collaterally estopped from prosecuting Spencer Riley for armed habitual criminal based on possession of the murder weapon at the time of the shooting, after a jury had already acquitted him of being the person who possessed that gun at that time. *Riley v. Calloway*, 882 F. 3d 738 (7th Cir. 2018). The Seventh Circuit failed to apply the principle of collateral estoppel with “realism and rationality” as mandated by this Court in *Ashe v. Swenson*, 397 U.S. 436, 444 (1970). Instead of comparing the evidence introduced at each trial in a “practical frame” in order to determine what factual issues were necessarily resolved by the respective triers of fact, the federal appellate court engaged in labored mental gymnastics to avoid the application of collateral estoppel. *Ashe*, 397 U.S. at 444 (citing *Sealfon v. U.S.*, 332 U.S. 575, 579 (1948)). This Court should grant review to provide reviewing courts guidance on how to properly analyze collateral estoppel claims, and to correct the Seventh Circuit’s serious deviation from the dictates of *Ashe*.

Collateral estoppel bars the State from relitigating previously resolved issues arising from the same incident. *Ashe*, 397 U.S. at 444; U.S. Const. amends. V, XIV. In order to determine whether the initial trier of fact resolved the issue sought to be proven at the subsequent proceeding, a reviewing court must “examine the record of a prior proceeding, taking into account pleadings, evidence, charge, and other relevant matters, and 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, 397 U.S. at 444. “The inquiry ‘must be set in a practical frame and viewed with an eye toward all the circumstances of the proceedings.’” *Id.* (citing *Sealfon v. U.S.*, 332 U.S. 575, 579 (1948)). This Court warned that “[a]ny test more technically restrictive would, of course, simply amount to a rejection of the rule of collateral estoppel in criminal proceedings, at least in every case where the first judgment was based upon a general verdict of acquittal.” *Id.*; *Schiro v. Farley*, 510 U.S. 222, 248 (1998).

In this case, the Seventh Circuit applied the type of “technically restrictive” approach to collateral estoppel that *Ashe* forbids. *Ashe*, 397 U.S. at 444. The federal appellate court held that the murder verdicts did not foreclose the armed habitual criminal trial because the murder jury did not resolve the issue of whether Riley possessed “a gun” on the night in question. *Riley*, 882 F. 3d at 741. However, the question of whether Riley possessed any gun that night was not at issue at the armed habitual criminal trial. Any such conclusion only considers the elements of the offense while turning a blind eye to the evidence, instructions, and arguments, thus applying collateral estoppel “with the hypertechnical and archaic approach of a 19th century pleading book[.]” *Ashe*, 397 U.S. at 444.

A common sense examination of all of the relevant circumstances, including the State’s evidence and theory of prosecution, establishes that the question confronting the armed habitual criminal judge was whether the eyewitnesses were sufficiently credible to prove beyond a reasonable doubt that Riley was the person who possessed the gun used to shoot Hudson at the time of the murder. This is merely a different way to ask whether the witnesses were sufficiently credible to establish Riley’s identity as the murderer. A finding of guilt on possession necessarily implicated Riley as the murderer where the evidence at both trials showed that the murderer and possessor

of the gun were the same person, and that the shooting and possession simultaneously occurred. *Riley*, 882 F. 3d at 740-42. The State presented no evidence at the armed habitual criminal trial that Riley possessed some other gun, or that he possessed the murder weapon at some other time, and it did not proceed on either of those theories. The State presented the virtually the same eyewitness testimony previously rejected by the murder jury and argued that Riley was the murderer and sole possessor of the murder weapon. The substantial overlap in proof introduced at the different prosecutions supports the application of collateral estoppel. *See Ashe*, 397 U.S. at 439-40 (applying collateral estoppel where “the witnesses were for the most part the same”); *see also Sealton*, 332 U.S. at 580 (“The basic facts at each trial were identical.”).

The Seventh Circuit further found that collateral estoppel did not apply where the murder jury could rationally have based “its acquittal of [Riley’s] murder charges on an issue and conclusion apart from whether [Riley] possessed a gun.” *Riley*, 882 F. 3d at 744. Regarding the preclusive effect of the murder jury’s verdicts, the relevant question was: Could the murder jury have concluded that Riley was not the murderer, but rationally believed that he possessed the gun used by the murderer during the shooting? The answer to this question is no. The jury could not have *rationally* concluded that Riley possessed the gun used to shoot Hudson after finding that he did not shoot Hudson. *See Bravo-Fernandez v. U.S.*, 137 S. Ct. 352, 360 (2016) (holding that collateral estoppel is “predicated on the assumption that the jury acted rationally”). By acquitting Riley of murder and personal discharge, the jury necessarily resolved the issue of whether the eyewitnesses were sufficiently credible to prove Riley was the person who possessed and fired the gun used to shoot Hudson. *See Ashe*, 397 U.S. at 445 (“The single rationally conceivable issue in dispute before the jury was

whether the petitioner had been one of the robbers.”).

Where the only evidence at the murder trial linking Riley to the shooting was the eyewitness testimony identifying him as murderer, the jury could not have based its verdicts on some issue other than the credibility of the eyewitness identification testimony, such as lack of intent or failure to prove the *corpus delicti* of the offense. *See Ashe*, 397 U.S. at 445 (“[T]he record is utterly devoid of any indication that the first jury could rationally have found that an armed robbery had not occurred, or that [the complainant] had not been a victim of that robbery.”); *compare with Dowling v. U.S.*, 493 U.S. 342, 349-52 (1990) (finding the jury could have acquitted the defendant of robbery without resolving the issue of his identity as the robber where the defense did not contest identity, but argued that “no robbery had occurred”). Because the murder verdicts resolved the issue of whether the eyewitness identification testimony was sufficiently credible to prove Riley’s identity as the murderer, they foreclosed from relitigation the issue of whether that same identification testimony was sufficiently credible to prove Riley’s identity as the possessor of the murder weapon.

Further, the federal appellate court wrote, “[I]t is not surprising that the jury acquitted Riley of murder with the poor evidence presented. There was no physical evidence tying Riley to the crime. And the eyewitnesses were less than ideal given their inconsistent, sometimes shifting stories and their shared status as convicted felons.” *Riley*, 882 F. 3d at 743. The Seventh Circuit completely ignored that, in *Ashe*, the eyewitness identification testimony was also inconsistent, and there was no physical evidence linking the defendant to the charged offense. *See Ashe*, 397 U.S. at 438 (finding that, at the initial trial, the eyewitness testimony was the only evidence identifying the defendant as one of the robbers and that “the State’s evidence that the

petitioner had been one of the robbers was weak”). The Seventh Circuit failed to distinguish this case from *Ashe*.

Critically, this Court held, in *Ashe*, that “treat[ing] the first trial as no more than a dry run for the second prosecution ... is precisely what the constitutional guarantee [against double jeopardy] forbids.” *Ashe*, 397 U.S. at 447. Here, the State did not present its third eyewitness from the murder trial, Kenneth Head, as a witness at the armed habitual criminal trial. This omission allowed the State to avoid two of defense counsel’s strongest arguments from the first trial: that Head was the real killer and that his testimony was inconsistent with that of the other eyewitnesses, Frederick Brown and Demetrice Allen. The State also withheld any forensic or ballistic evidence at the second trial, which allowed it to shortcut any ambiguity about whether there was one gun or multiple guns.¹ The State’s refinement of its case here mirrored the government’s impermissible actions in *Ashe*. See *Ashe*, 397 U.S. at 440 (“The State further refined its case at the second trial by declining to call one of the participants in the poker game whose identification testimony at the first trial had been conspicuously negative.”).

The Seventh Circuit’s analysis was outside of the mainstream analysis applied in other states. In other jurisdictions, cases with essentially the same facts as Riley’s have been resolved in the defendant’s favor after applying *Ashe*. In *People v. Gordon*, 177 Cal. App. 4th 1550, 1554-60 (Cal. Ct. App. 2009), for example, the California Court

¹At the murder trial, a detective testified, inconsistent with a stipulation indicating the new bullets in Hudson’s body, and the casing from the lot, were all .380 caliber. (R. Z110-12), that the bullet found in Hudson’s shirt was of a different caliber, and that it was possible more than one gun was involved. (R. Z52-53). The detective’s testimony, albeit inaccurate, allowed counsel to argue that the ballistic evidence conflicted with the eyewitness identification testimony. (R. AA49-50)

of Appeal found that the State was collaterally estopped from prosecuting the defendant for gun possession where a jury had previously rejected the identification of the defendant as the man who committed a shooting resulting in death. In *Gordon*, as in this case, the State had to satisfy different elements to prove murder and gun possession. However, unlike the federal appellate court, *Gordon* examined the State's evidence and theory of prosecution at each trial, including the closing arguments of both parties. *Gordon*, 177 Cal. App. 4th at 1560. This was the analysis that should have been applied in this case.

Because Riley's conviction for armed habitual criminal is based on possessing the murder weapon at the time of the shooting, the ultimate question of fact for the armed habitual criminal judge was the same question previously resolved by the murder jury, *i.e.*, whether the eyewitnesses were sufficiently credible to prove Riley was the person who approached and shot Hudson with the murder weapon. In these circumstances, *Ashe* should have applied to bar the armed habitual criminal prosecution. Forcing Riley to "run the gauntlet a second time" was entirely unjustifiable under *Ashe*. See *Ashe*, 397 U.S. at 446 (holding that "a man who has been acquitted" should not have to "run the gauntlet a second time"). This Court should grant review, therefore, to correct the injustice resulting from the federal appellate court's ill-reasoned opinion, and to ensure the proper application of collateral estoppel to future cases.

CONCLUSION

For the foregoing reasons, Petitioner Spencer Riley, respectfully requests that this Honorable Court issue a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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