RECORD NO. _____

IN THE
Supreme Court of the United States

DALIYL RAAID MUHAMMAD,

Petitioner,

v.

SUPERINTENDENT FAYETTE SCI;
ATTORNEY GENERAL PENNSYLVANIA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

J. Scott Ballenger
APPELLATE LITIGATION CLINIC
UNIVERSITY OF VIRGINIA
SCHOOL OF LAW
580 Massie Road
Charlottesville, VA 22903
202-701-4925
sballenger@law.virginia.edu

Counsel of Record for Petitioner

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (804) 644-0477

QUESTIONS PRESENTED

1. Whether the Third Circuit erred, in conflict with decisions of the Second and Ninth Circuits, when it held that this Court's decision in *United States v. Powell*, 469 U.S. 57 (1984), precludes consideration of the jury's other verdicts when conducting harmless error review.

2. Whether the Third Circuit erred, in conflict with decisions of other circuits, in holding that AEDPA requires factual deference to a state court no-prejudice finding that did not apply federal prejudice standards.

3. Whether this case should, at a minimum, be held for this Court's decision in No. 20-826, *Brown v. Davenport*, which presents related issues concerning the interaction between AEDPA and federal prejudice standards on collateral review.

LIST OF RELATED PROCEEDINGS

Pursuant to Supreme Court Rule 14.1(b)(iii), petitioner states that there are no proceedings directly related to this case in this Court.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Daliyl Raaid Muhammad respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS AND ORDERS BELOW

The decision of the Third Circuit (Pet. App. 1-11) and its order denying rehearing and rehearing *en banc* (Pet. App. 49-50) are unpublished. The district court's opinion (Pet. App. 12-46) also is unpublished.

JURISDICTION

The district court had jurisdiction over this habeas corpus petition presented by a state prisoner pursuant to 28 U.S.C. §§ 2241, 2254. The Third Circuit had appellate jurisdiction pursuant to 28 U.S.C. §§ 1291, 2253. The Third Circuit denied a petition for rehearing or rehearing *en banc* on October 19, 2021. Pet. App. 49. This Court has jurisdiction over this timely petition for certiorari pursuant to 28 U.S.C. §§ 1254(1), 2254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2254 provides that:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e) (1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

INTRODUCTION

Petitioner Daliyl Raaid Muhammad was charged with attempted murder after a drug transaction turned into a shooting. The central issue at trial was whether the victim was shot by Muhammad or by his acquaintance James Cameron. The trial court wrongly told the jury that they could convict if "the Defendant *or an accomplice or a co-conspirator* did [an] act or acts with a specific intent to kill James Nickol." Pet. App. 4. Following those unlawful instructions, the jury convicted Muhammad of attempted murder. But the jury acquitted him of unlawful possession of a firearm, indicating that they believed either that Cameron shot the victim or that the prosecution failed to prove the matter either way.

On federal habeas review, the Third Circuit recognized that the jury instructions violated due process and that trial counsel was ineffective. Pet. App. 6. The court of appeals held, however, that a state court "finding" that Muhammad suffered no prejudice was entitled to AEDPA deference because "[t]here was a quantum of strong evidence presented at trial from which a jury could conclude that Muhammad possessed an intent to kill, and from which a court could reasonably find that no different result would have occurred." Pet. App. 9. The panel also held that the jury's acquittal on the firearms possession charge does not "undermine[] the intent to kill," relying on this Court's holding in *United States v. Powell*, 469 U.S. 57 (1984), that factually inconsistent verdicts do not require a new trial.

Those holdings merit review for several reasons. First, *Powell* holds that the jury's acquittal on one count does not demonstrate that a conviction on a different

count is unsupported or require a new trial, even if the two outcomes are factually irreconcilable. This Court's point was that an inconsistency could just as well reflect an error (or jury grace) in the acquitted counts as any error infecting the counts of conviction. The Third Circuit understood *Powell* to hold that a jury's acquittal on one count *also* cannot support an inference that independent constitutional error affecting another count was prejudicial. There is language in *Powell* that appears to support that reading, but it is fundamentally at war with this Court's broader jurisprudence of prejudice and harmless error. In a case like this one, the prejudice question is whether the error "actually had an adverse effect on the defense," *Strickland v. Washington*, 466 U.S. 668, 693 (1984), or a "substantial and injurious effect or influence in determining the jury's verdict," *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993). Prejudice review looks to the basis on which "the jury actually rested its verdict, … because to hypothesize a guilty verdict that was never in fact rendered—no matter how inescapable the findings to support that verdict might be—would violate the jury trial guarantee." *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993). There is no better guide to how the jury actually saw the evidence than the verdicts it reached. And the underlying reasoning of *Powell*—that "it is unclear whose ox has been gored" when verdicts are simply inconsistent, 469 U.S. at 65—does not apply when there is constitutional error affecting a different count.

The Second and Ninth Circuits have recognized that a verdict of acquittal on other counts can be powerful evidence of how the jury actually viewed the evidence, and that considering the jury's other verdicts in a prejudice analysis does not violate

the *Powell* holding. Muhammad clearly would have been entitled to a new trial in those circuits, since the jury's acquittal on the firearms possession charge establishes *at least* a "reasonable probability" that the jury thought Muhammad was not the shooter. *Strickland*, 466 U.S. at 694. The Second and Ninth Circuit view on this issue is correct, the issue is extremely important, and only this Court can correct the overbroad language in *Powell* that led the Third Circuit astray.

Second, the Third Circuit deferred under AEDPA to purported state court "finding[s]" crediting the prosecution's evidence that would support an inference of intent to kill. Pet. App. 9. But a state court's determination that the strength of the prosecution's case renders a trial error harmless is not a factual "finding" entitled to the extraordinary deference that AEDPA gives to genuine findings of fact. *See* 28 U.S.C. 2254(e)(1). It is a *legal* conclusion—and one often made under state law harmless error standards that bear no resemblance to their federal counterparts. When federal courts treat state court no-prejudice conclusions as factual findings and defer to them under AEDPA, the constitutionally tainted verdict never receives, from any court, the scrutiny that this Court's prejudice precedents demand.

Finally, this Court has granted review in *Brown v. Davenport*, No. 20-826, to consider how AEDPA and the *Brecht* standard interact in cases where the state courts have made a harmless error finding. Although that case presents a different aspect of the problem, it will require this Court to explain how federal review of state court harmless error conclusions works under AEDPA—and there is at least a good chance that this Court's explanation of the governing principles will be

inconsistent with what the Third Circuit did here. This Court therefore should, at a minimum, hold this case as a potential GVR in light of *Brown*.

STATEMENT OF THE CASE

Factual Background

On January 13, 2002, James Nickol arranged to meet Muhammad to purchase marijuana from him. Nickol had previously lived in Harrisburg with Muhammad and the two were friends. Joint Appendix in No. 19-1905 (3d Cir.), Court of Appeals Dkt. 41 ("App") 78-79. When Nickol moved from Harrisburg to York, Nickol kept in contact with Muhammad. On January 13, Nickol called Muhammad's mother and she gave him Muhammad's cell phone number. App-79.

Nickol, who did not have a car, asked his friend Derrick Kleugel to drive him to Harrisburg for the drug transaction. App-82. Once there, Nickol and Kleugel met Muhammad and his companion Cameron. App-86, 132, 147-48. After they arrived in Harrisburg, Nickol and Kleugel began to walk with Muhammad and Cameron to another location to pick up the marijuana. App-85. While they were walking down the street, Nickol and Muhammad walked as a pair and Kleugel and Cameron walked as a pair. App-133, 135. Nickol testified that Muhammad was on his right, Kleugel was on his left, and Cameron was on Kleugel's left. App-86. Nickol testified that during this walk he did not know who Cameron was and that Cameron "was always looking down." *Id.*

Kleugel testified that when the group turned onto Fifteenth Street from Berryhill Street, Cameron essentially stopped at the corner. App-133, 143-44. He

started walking again, but he was substantially behind Kleugel. App-133. This made Kleugel nervous and concerned because he did not know what Cameron was doing. *Id*. Shortly thereafter, Nickol and Kleugel were shot multiple times. App-93, 137.

Before the shots were fired, Nickol was talking with Muhammad. App-87. While they were on Berryhill Street, Muhammad told Nickol that "you can't trust no one." *Id*. Once they were on Fifteenth, Muhammad told Nickol that "the block is hot and … they have cameras on the telephone poles." *Id*. Kleugel testified that Muhammad and Nickol were in front of him (and Cameron was behind him) when the shots were fired. App-143-44. The Commonwealth never recovered a weapon from Muhammad. App-152. There was no scientific or physical evidence to identify Muhammad as the shooter. And Nickol repeatedly testified that he did not see Muhammad with a gun. App-89-90, 118.

A prosecution expert testified that there probably was more than one gun because ten shots were fired and only two shell casings were recovered at the scene and they appeared to have been outside "for a period of time." Supplemental Appendix in No. 19-1905 (3d Cir.), Court of Appeals Dkt. 54 ("SA") 5. The theory was that revolvers usually hold no more than six shots before reloading, and a larger-capacity handgun would have expelled its brass. But the prosecution had no way to prove that the police found every shell casing that might have been ejected from a weapon, that the shooter (or someone else) did not carry casings away, or

that a single shooter did not have two guns. Furthermore, the expert acknowledged that while six shots is "standard" there are many varieties of revolver. SA-4.

The trial court told the jury that a defendant needed to have a specific intent to kill to be found guilty of attempted homicide under state law, and that "a person cannot be guilty of an attempt to commit a crime unless he has…a firm intent to commit that crime." App-156-58. But the court also told the jury that it should convict for attempted homicide if "the Defendant or an accomplice or a co-conspirator did the act or acts with a specific intent to kill James Nickol." App-157.

During their deliberations, the jury asked the trial court for clarification on the elements of attempted homicide. App-176-77. In response, the court repeated its earlier recitation of the elements, including "that the Defendant, an accomplice or a co-conspirator" must have the specific intent to kill James Nickol. App-178. The court then explained that for conviction:

> Two things must come together in time. Some act which you the jury find to be a substantial step toward attempting to kill someone. In this case, Mr. Nickol. And that at the same time, *whoever the person is that's doing the act is either the Defendant, an accomplice or a co-conspirator, and that person has in their mind the intention to kill Mr. Nickol.*

Id. (emphasis added). The jury also asked whether "we have to believe that [Muhammad] had a firearm in order to determine guilt or not guilty on [the] charge of person to possess a firearm," and the court instructed them "[y]es, you must decide that he indeed had on or about his person or under his custody and control a firearm in order to be guilty of this offense." Case No. 1:08-cv-01287, District Court Dkt. 14-5 at 70-71 (Tr. 290-91). This was the last communication the jury had with

the court before it rendered its verdict. App-179. Muhammad's trial counsel never objected to the instructions.

The jury convicted Muhammad of the attempted murder, robbery, and conspiracy to commit robbery counts, but acquitted him of the charge of unlawful possession of a firearm. App-189-90; SA-21.

Proceedings Below

State collateral review

On state collateral review, Muhammad argued that the intent instructions misstated Pennsylvania law by failing to clearly require proof of "shared intent" to kill, and violated due process by relieving the state of its burden to prove every fact necessary to conviction beyond a reasonable doubt. App-223-24 (citing *In re Winship*, 397 U.S. 358 (1970)). Muhammad also argued that counsel was constitutionally ineffective for failing to object to the instructions. App-224.

The state trial court acknowledged that attempted murder requires proof of intent to kill under Pennsylvania law, and that the Pennsylvania Supreme Court had ordered a new trial in a similar case, *Commonwealth v. Wayne*, 720 A.2d 456 (Pa. 1998), where the jury had been instructed that conviction could be based on a co-conspirator's intent to kill. Pet. App. 59-60. The court nonetheless reasoned that "the Court's definitions of an accomplice and co-conspirator" told the jury that conspiracy requires "'a firm, common understanding that a crime will be committed'" and that an accomplice is a person who "'solicits or commands or encourages or requests the other person to commit it [a crime] or aid[s] or agrees to

aid or attempts to aid the other person in planning or committing it.'" Pet. App. 60-61. The court thought those instructions made "clear … that a conspirator and an accomplice must have the same intent to commit the crime as their partner," and "[t]herefore when we stated that an accomplice or co-conspirator must have had the intent to kill, that by definition, means that the Defendant had that same intent." Pet. App. 61. "Otherwise, the person committing the act could not be considered an accomplice or a co-conspirator." *Id.*

The state court also held in the alternative that Muhammad suffered no prejudice because he was, in the court's opinion, guilty. The court reasoned that in its opinion "[t]he only reason the Defendant would require Mr. Kleugel [sic]" to leave the car with Nickol "was because Mr. Kleugel was a potential witness and needed to be silenced." Pet. App. 62. The court also opined that "[t]he Defendant and Mr. Cameron led the victims to an isolated street and shot them a total of ten times," which the court viewed as "circumstantial evidence of the Defendant's intent to not only commit a robbery, but to commit murder." *Id.* "We find that the Defendant and Mr. Cameron intended to kill Mr. Nickol before Mr. Nickol ever arrived in Harrisburg." *Id.*

The state court's opinion cited no federal cases, never mentioned due process or any federal prejudice precedents, and did not analyze whether there was a reasonable probability that any error in the instructions affected the verdict.

The Pennsylvania Superior Court affirmed the denial of relief without further addressing the merits of Muhammad's jury instruction claim. Pet. App. 87.

Muhammad filed a petition for allowance of appeal to the Pennsylvania Supreme Court, which was denied on June 4, 2008. App-313.

Federal habeas review

Muhammad filed a federal habeas petition, which was stayed by the district court pending exhaustion of his state court remedies. App-42-43. Muhammad filed five additional state court petitions to ensure that he exhausted additional federal claims. Each was denied by both the PCRA court and the Superior Court.

Following these state court proceedings, Muhammad filed an amended petition for federal habeas corpus relief pursuant to 28 U.S.C. § 2254, again arguing that the intent instructions violated due process and that counsel was ineffective for failing to object. App-314, 321.

The district court held that Muhammad had preserved his objections to the intent instructions "on direct appeal and on collateral review" in the state courts. Pet. App. 25. The court nonetheless denied relief. It quoted at length from the reasoning of the state court's 2006 memorandum supporting the dismissal of Muhammad's first petition for collateral review. Pet. App. 28-29. It concluded that "the trial court provided proper instructions" because they told the jury that "all of the elements of the crime had to be proven beyond a reasonable doubt, including "that Muhammad or an accomplice or a co-conspirator did the act or acts with a specific intent to kill James Nickol," which the state court held "were proper statements of Pennsylvania law." Pet. App. 30.

The Third Circuit granted a certificate of appealability on the questions of whether "the jury instructions violated his right to due process because they relieved the Commonwealth of proving his specific intent to kill" and whether "trial counsel was ineffective for failing to object to the instructions." Pet. App. 47. The Third Circuit also appointed undersigned counsel, the director of the Appellate Litigation Clinic at the University of Virginia School of Law.

On the merits of Muhammad's challenge to the jury instructions, the Third Circuit rejected the reasoning of the state courts and the district court and held that the instructions "d[id] not comply with federal due process requirements" and that "counsel's failure to object fell below the standard of competent representation." Pet. App. 6-7.

The Third Circuit concluded, however, that Muhammad suffered no prejudice. The court of appeals reasoned that "because the [State] Court adjudicated Muhammad's ineffective assistance claim on the merits, we owe AEDPA deference to its finding that the jury instruction did not prejudice Muhammad." Pet. App. 8-9. It then held that "we cannot conclude that the [state] court's prejudice finding was constitutionally unreasonable or based on an unreasonable determination of the facts," because "[t]here was a quantum of strong evidence presented at trial from which a jury could conclude that Muhammad possessed an intent to kill, and from which a court could reasonably find that no different result would have occurred." Pet. App. 9.

Specifically, the Third Circuit reasoned that "Muhammad conceded there was sufficient evidence in the record placing him at the scene, and Nickol testified that Muhammad was one of the two individuals walking directly behind the victims when the shots were fired." Pet. App. 9. "[E]xpert testimony suggested that more than one gun was fired because of the nature of the casings and the number of shots fired." *Id.* "'Nickol specifically identified [Muhammad] kneeling over him, demanding money, and holding what was likely a shiny firearm.'" Pet. App. 9-10 (quoting App-195-96). The court of appeals concluded that "[t]hese facts, together with the cajoling of both individuals to go to an isolated area upon their arrival to Harrisburg, are the type of evidence from which a jury could conclude that there was intent to kill." Pet. App. 10. The Third Circuit stressed that "Pennsylvania courts have held that repeated use of a deadly weapon on a vital part of a victim's body is enough to infer intent to kill," citing several state cases holding that proof that the defendant repeatedly shot the victim is sufficient to infer intent to kill. *Id.*

Muhammad had argued that the jury's acquittal on the firearms possession charge showed that the jury *did not* think Muhammad personally shot Nickol, or at least that the prosecution had not proved that point. The Third Circuit rejected that argument, citing this Court's decision in *Powell* and reasoning that "[t]here is no basis in case law suggesting that we should conclude that Muhammad's acquittal on the gun possession charge would necessarily raise an inference that he is not guilty on the separate charge of attempted murder." Pet. App. 9-10 n.2 (citing *Powell*, 469 U.S. at 67-68).

REASONS FOR GRANTING THE WRIT

The Third Circuit correctly held that the jury instructions violated Muhammad's due process rights, and that counsel's failure to object deprived him of his Sixth Amendment right to effective assistance of counsel. The instructions wrongly told the jury that they should convict if Muhammad *or an accomplice or co-conspirator* had the *mens rea* required. Since Muhammad's defense was that Cameron had shot Nickol—a contention strongly supported by the trial evidence—these instructions deprived Muhammad of his right to proof beyond a reasonable doubt and effectively directed a verdict for the prosecution.

The Third Circuit nonetheless held that these errors were harmless because a reasonable jury could have found that Muhammad shot Nickol, and because AEDPA requires deference to the state court's "finding" that Muhammad intended Nickol's death. This Court should review, summarily reverse, or (at a minimum) hold the petition for its decision in *Brown v. Davenport*.

First, the Third Circuit's harmless error reasoning depends on the premise that Muhammad personally shot Nickol, and the jury obviously rejected that premise by acquitting Muhammad of possessing a firearm. It is not logically possible for Muhammad to have shot Nickol without possessing a firearm. Nonetheless, the Third Circuit read this Court's decision in *Powell* as precluding it from drawing, in the prejudice analysis, any inferences from the jury's acquittal on other counts. But as the Second and Ninth Circuit have recognized, *Powell* holds only that factually inconsistent verdicts are not themselves a constitutional error.

Powell does not erect a barrier to considering the jury's other verdicts when assessing whether a different constitutional error likely prejudiced the defendant. Overbroad language in *Powell* invites this misconception, and can only be remedied by this Court.

Second, the Third Circuit's prejudice analysis wrongly deferred to a purported state court "finding" that any error in the instructions was harmless because the evidence establishes Muhammad's guilt. AEDPA requires deference to a state court's reasonable "determination of the facts in light of the evidence," 28 U.S.C. § 2254(d)(2), or its "determination of a factual issue," 28 U.S.C. § 2254(e)(1). But when a state court applies harmless error standards that are substantially less rigorous than what *Brecht* and *Strickland* require, a federal court cannot just treat the state court's conclusions as factual and defer to them. The state court has not genuinely addressed the questions that federal law requires the federal court to answer.

Finally, this Court has granted review in *Brown v. Davenport* to consider how the *Brecht* standard and AEDPA deference interact, in cases where a federal habeas court is reviewing a state court finding that trial error was harmless. It is very likely that this Court's decision in *Brown* will provide guidance relevant to the disposition of this case, and that may justify a GVR. At a minimum, this petition should be held pending the disposition of that case.

I. THE THIRD CIRCUIT'S HOLDING THAT *POWELL* PRECLUDES INFERENCES FROM THE JURY'S OTHER VERDICTS CONFLICTS WITH DECISIONS OF THE SECOND AND NINTH CIRCUITS

Under the *Brecht* prejudice standard that governs the violation of Muhammad's due process rights, a federal court must grant habeas relief when an error "had a substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 623. Even if a habeas court "is in grave doubt as to the harmlessness of an error," habeas relief must be granted. *O'Neal v. McAninch*, 513 U.S. 432, 437 (1995). That prejudice review looks to the basis on which "the jury actually rested its verdict, … because to hypothesize a guilty verdict that was never in fact rendered—no matter how inescapable the findings to support that verdict might be—would violate the jury trial guarantee." *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993). The *Strickland* prejudice standard that applies to Muhammad's Sixth Amendment ineffective assistance of counsel claim similarly asks whether there is a "reasonable probability," "sufficient to undermine confidence in the outcome," that but for counsel's errors the result would have been different. *Strickland*, 466 U.S. at 693-94. Both inquiries ask whether there is any reasonable chance that the actual jury in petitioner's trial would have reached a different result with correct instructions and competent defense counsel.

"The determinative consideration under the *Brecht*/*Kotteakos* standard thus is not the strength of the evidence or the probability of conviction at a hypothetical retrial absent the error," but rather "whether the error substantially affected the actual thinking of the jurors or the deliberative processes by which they reached their verdict." Hertz & Liebman, *Federal Habeas Corpus Practice and Procedure* §

31.4(d) (7th ed. 2015). The court must consider the likely effect of the error "in the total setting … pondering all that happened." *Kotteakos v. United States*, 328 U.S. 750, 764-65 (1946). That "total setting" obviously includes the jury's verdict or verdicts. "To weigh the error's effect against the entire setting of the record *without* relation to the verdict or judgment would be almost to work in a vacuum." *Id.* at 764 (emphasis added).

It could not be more clear in this case that the constitutional error substantially affected the actual thinking of the jurors. Muhammad's jury *actually acquitted him* of a distinct charge of possession of a firearm, so we know for a certainty that this jury did not think the prosecution proved that Muhammad personally shot Nickol. The jury obviously thought the evidence pointed to Cameron or was at least inconclusive, but accepted the invitation extended by the (unconstitutional) jury instructions to convict Muhammad anyway based on a finding that either Muhammad or "an accomplice or a co-conspirator did the act or acts with a specific intent to kill James Nickol." App-157.

The Third Circuit dismissed that reasoning as inconsistent with *Powell*, in which this Court held that factually inconsistent jury verdicts do not provide defendants with a basis for overturning their convictions. The defendant in *Powell* was charged with conspiring to violate the drug laws and with using the telephone in furtherance of that conspiracy. The jury convicted her of the telephone facilitation charges but acquitted her of the underlying conspiracy. 469 U.S. at 60. This Court acknowledged that the inconsistent verdicts certainly demonstrated

"'error,' in the sense that the jury has not followed the court's instructions," but noted that "it is unclear whose ox has been gored." *Id.* at 65. Inconsistent verdicts "should not necessarily be interpreted as a windfall to the Government at the defendant's expense," but instead might reflect that the jury, "convinced of guilt, properly reached its conclusion" on the counts of conviction but "then through mistake, compromise, or lenity, arrived at an inconsistent conclusion" on other counts. *Id.* And since the government cannot use the inconsistency as a reason to appeal the acquitted counts, allowing defendants to challenge inconsistent counts of conviction would be an arbitrary one-way ratchet favoring the defense. *Id.* at 65-66.

If this Court had stopped there, it would be fairly clear that *Powell*'s holding is confined to the proposition that inconsistent verdicts do not, by themselves, establish any error that a court can correct. But this Court also went on to "reject, as imprudent and unworkable, a rule that would allow criminal defendants to challenge inconsistent verdicts on the ground that in their case the verdict was not the product of lenity but of some error that worked against them." *Id.* at 66. "Such an individualized assessment of the reason for the inconsistency would be based either on pure speculation, or would require inquiries into the jury's deliberations that courts generally will not undertake." *Id.* "Courts have always resisted inquiring into a jury's thought processes," this Court explained, and "through this deference the jury brings to the criminal process, in addition to the collective judgment of the community, an element of needed finality." *Id.* at 67. This Court went on to reject a proposed "exception" for cases in which the jury acquits the

defendant of a crime that is a predicate for another count on which the jury convicted. *Id.* at 67-68. The Third Circuit cited those passages in concluding that there is no "basis in case law suggesting that we should conclude that Muhammad's acquittal . . . would necessarily raise an inference that he is not guilty on the separate charge of attempted murder." Pet. App. 9-10 n.2.

In fairness to the Third Circuit, that language in *Powell* does indicate that courts should not "inquir[e] into a jury's thought processes" underlying a verdict of acquittal even when an inconsistency appears to be the result of "some error that worked against" the defendant in the case. 469 U.S. at 66-67. It may seem like a short step from there to the Third Circuit's conclusion that courts should not examine what an acquitted count suggests about the jury's "thought processes" when reviewing whether an independent "error" prejudiced the defendant.

In fact, however, the Third Circuit's reasoning extends *Powell* in a manner inconsistent with the rest of this Court's jurisprudence about prejudice on collateral review. This Court's cases make clear that when there has been constitutional error at trial the prejudice question on collateral review is whether the court can be confident that the error did not taint the jury's verdict. That inquiry is not focused on "the strength of the evidence or the probability of conviction at a hypothetical retrial absent the error," but instead on "whether the error substantially affected the actual thinking of the jurors or the deliberative processes by which they reached their verdict." Hertz & Liebman, *supra* § 31.4(d). That distinction is frequently subtle, but it is critically important "because to hypothesize a guilty verdict that

was never in fact rendered—no matter how inescapable the findings to support that verdict might be—would violate the jury trial guarantee." *Sullivan,* 508 U.S. at 279. The Third Circuit's reading of *Powell* effectively forbids a reviewing court from looking at the best available evidence of the actual thinking of the jurors: the verdicts that they reached. That cannot be the law.

Other circuits have rejected this overbroad reading of *Powell*. In a recent published decision, the Second Circuit considered a case in which a district court incorrectly instructed the jury that RICO conspiracy is a crime of violence for purposes of 18 U.S.C. § 924(j). *United States v. Capers*, 20 F.4th 105 (2d Cir. 2021). Narcotics conspiracy *is* a crime of violence, and the jury found Capers guilty of a narcotics conspiracy. But the jury's verdict was "general" and "did not delineate whether it based its Count Five conviction on the RICO conspiracy, the narcotics conspiracy, or both." *Id.* at *122. Capers argued that the jury's acquittal on another (murder) charge made it "'far from speculative' to conclude that the jury might have reached a different verdict" on the § 924(j) charge if it had been properly instructed. *Id.* at *126. The Second Circuit explained that it "often look[s] to verdicts on other counts" and that *Powell* does not foreclose that analysis:

> Of course, we are not in the business of policing verdicts for the consistency of the jury's findings of guilty and not guilty on various counts. But that is not what Capers is asking us to do…. [H]e has identified an independent error, and to receive relief, he bears the burden of showing that the error is sufficiently great such that there is a reasonable probability that the jury would not have convicted him absent the error. A defendant may attempt to meet that high burden by pointing to the jury's verdicts on other counts as evidence of what the jury might have done if the error were not present. That is what

Capers has done here.

Id. at *126 (internal quotations omitted).

The Ninth Circuit has drawn the same distinction. In *Evanchyk v. Stewart*, the Ninth Circuit considered a case, like this one, where homicide instructions failed to require intent to kill. 340 F.3d 933, 941-42 (9th Cir. 2003). In assessing whether that instructional error prejudiced the defendant, the Ninth Circuit looked to the jury's verdicts on related charges against co-conspirators for clues to how the jury viewed the evidence. *Id*. The Ninth Circuit acknowledged that the other verdicts "do[] not necessarily mean that the jurors affirmatively concluded that there was no intent to kill." *Id.* at 941. The Ninth Circuit also was fully aware of *Powell*, and cited it in rejecting the defendant's separate argument that the jury's other verdicts should preclude retrial. *Id.* at 942. But it held that the jury's other verdicts nonetheless supported a "grave doubt" about whether that jury would have convicted the appellant under appropriate instructions. *Id.* at 941-42. The Ninth Circuit has looked to the jury's other verdicts for clues about how it viewed the evidence in several other harmless error cases.[1] And in a civil case, the Ninth Circuit rejected a proposed analogy to *Powell* when concluding that is not

[1] *See also, e.g.*, *Clark v. Brown*, 442 F.3d 708, 726 (9th Cir. 2006) (relying on jury's verdict of second-degree murder to determine that it likely would have found a required arson charge incidental to the crime, rather than a core component, if instructed properly); *Ardoin v. Arnold*, 653 Fed. Appx. 532, 537 (9th Cir. 2016) (relying on the jury's shift from an impasse to a verdict after receiving a new instruction to find error not harmless); *Bradley v. Duncan*, 315 F.3d 1091, 1099-1100 (9th Cir. 2002) (looking "at the differing results of the two trials" to find instructional error prejudicial).

"impossible to draw logical inferences from the jury verdicts" when assessing the harm from an erroneous instruction. *Westinghouse Elec. Corp. v. Gen. Cir. Breaker & Elec. Supply Inc.*, 106 F.3d 894, 902 (9th Cir. 1997). Instead "it is possible to examine the pattern of jury verdicts and logically determine what facts a rational juror must have found in order to reach those verdicts." *Id.*

Muhammad clearly would have been entitled to relief under these Second and Ninth Circuit precedents. And although the panel's decision is unpublished, this is not the first time the Third Circuit has read *Powell* as precluding any consideration of the jury's other verdicts when conducting a prejudice analysis. *See United States v. Thompson*, 310 F. App'x 485, 485 n.2 (3d Cir. 2008) (citing *Powell* for the proposition that the panel would "not attempt to discern from the inconsistent verdicts either prejudice suffered by Thompson or lenity by the jury.").

In a petition for rehearing and rehearing *en banc*, Muhammad pointed out that in at least one prior case the Third Circuit had—without recognizing the *Powell* issue—considered the jury's other verdicts to see if they might *negate* harmlessness, by supplying findings that were missing because of an instructional error. *See, e.g., Bronshtein v. Horn*, 404 F.3d 700, 712-13 (3d Cir. 2005) (looking to jury's separate verdict of guilt on conspiracy to commit murder to establish that error in co-conspirator liability instructions was harmless). Muhammad argued that what is good for the goose is good for the gander. If the jury's other verdicts can demonstrate that an error was harmless then surely they also can be considered to show that an error *was not* harmless. But the Third Circuit denied Muhammad's

petition. Pet. App. 49. The *en banc* court therefore stands behind the panel's reasoning, and the Third Circuit's decision not to publish its decisions misconstruing *Powell* should not be regarded as insulating those decisions from this Court's review. As explained above the Third Circuit's holding, while in error, also is clearly invited by the language in *Powell* that appears to forbid consideration of the jury's thought process underlying an acquittal even as it bears on unrelated "error" at trial. 469 U.S. at 66-67. Only this Court can correct the erroneous impression fostered by those statements, and lower courts will be led astray until this Court does so.

We believe that this issue merits full briefing and argument, but if the Court believes that the Third Circuit's misunderstanding of *Powell* is clear it should also consider summary reversal.

II. THE THIRD CIRCUIT'S HARMLESS ERROR ANALYSIS ILLUSTRATES A COMMON MISAPPLICATION OF AEDPA

More broadly, the Third Circuit's approach to prejudice review in this case reflects important errors concerning the interaction between federal prejudice standards and AEDPA that require this Court's guidance.

The Third Circuit held that under AEDPA it could not "conclude that the PCRA court's prejudice finding was constitutionally unreasonable or based on an unreasonable determination of the facts," because "[t]here was a quantum of strong evidence presented at trial from which a jury could conclude that Muhammad possessed an intent to kill, and from which a court could reasonably find that no different result would have occured." Pet. App. 9. The "quantum of strong evidence"

in question was, in the Third Circuit's view, the evidence consistent with Muhammad being the shooter. The Third Circuit pointed to the state court's characterization of Nickol's testimony that shortly after the shooting Muhammad was "kneeling over him, demanding money, and holding what was likely a shiny firearm," Pet. App. 9-10.[2] And it cited four Pennyslvania cases, with nearly a full page of parentheticals, for the proposition that "repeated use of a deadly weapon … is enough to infer intent to kill." Pet. App. 10.

But of course the *Brecht* and *Strickland* prejudice question is not whether a reasonable jury *could have* convicted under proper instructions, or even whether a later court thinks that the result would have been the same. When there has been constitutional error at trial, the question on collateral review is whether there is a reasonable probability that the error affected the verdict. The state courts never genuinely addressed or answered that question in this case.

On state collateral review, the state court did purport to "find that the Defendant and Mr. Cameron intended to kill Mr. Nickol before Mr. Nickol ever arrived in Harrisburg," based on its own independent (and deeply flawed) characterization of the trial evidence. Pet. App. 62. The court reasoned that in its opinion "[t]he only reason the Defendant would require Mr. Kleugel [sic]" to leave the car with Nickol "was because Mr. Kleugel was a potential witness and needed to be silenced." *Id.* It opined that "[t]he Defendant and Mr. Cameron led the victims to

[2] The quoted state court passage mischaracterizes the actual testimony. Nickol repeatedly confirmed that he never saw Muhammad with a gun. The "shiny" object he saw could have been anything. App-89-90, 118.

an isolated street and shot them a total of ten times," which the court viewed as "circumstantial evidence of the Defendant's intent to not only commit a robbery, but to commit murder." *Id.* And from that evidence the court purported to "find that the Defendant and Mr. Cameron intended to kill Mr. Nickol before Mr. Nickol ever arrived in Harrisburg." *Id.*

A *post hoc* judicial "finding" that the defendant was guilty or the evidence sufficient for conviction may suffice, under Pennsylvania law, to declare that a simple instructional error was harmless. But that sort of finding certainly is not sufficient, under federal law, to establish a lack of prejudice from a violation of important constitutional rights. The state court's opinion cited no federal cases, recognized no constitutional violations, and never recited or applied anything remotely resembling the *Brecht* and *Strickland* prejudice standards. Pet. App. 61-62. If the state court had conducted an actual federal prejudice analysis under the *Brecht* or *Strickland* standard, then AEDPA would require a federal court to defer if the state court's application of that standard was reasonable. But when the state court applied a very different and more lenient harmless error standard, treating its conclusions as *factual* and deferring to them guarantees that no court will ever conduct the prejudice review that federal law demands. As applied here, that deference eviscerated this Court's holding that prejudice review has to focus on the jury's actual decision, rather than a court's independent evaluation of the evidence.

Other circuits have recognized that a state court harmless error analysis is not entitled to AEDPA deference when the state court did not apply the correct

federal harmless error standard. *See, e.g., Cudjo v. Ayers*, 698 F.3d 752, 768-69 (9th Cir. 2012) (refusing AEDPA deference because the state court had not recognized constitutional error and "the harmless error analysis that the court applied was only a less demanding state law test"); *Turrentine v. Mullin*, 390 F.3d 1181, 1190 (10th Cir. 2004) (refusing deference because state court harmless error analysis "was contrary to clearly established federal law" of harmless error). But the correct analysis is easily corrupted when, as here, a federal court treats a state court's characterizations of the evidence as subsidiary *factual* findings entitled to deference under AEDPA.

This problem also presents a set of issues that this Court has repeatedly recognized and reserved. Section 2254(d) permits a federal court to grant relief if a state court decision *either* "was contrary to, or involved an unreasonable application of, clearly established Federal law" *or* "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." But § 2254(e)(1) provides that "a determination of a factual issue made by a State court shall be presumed to be correct" unless that presumption is rebutted "by clear and convincing evidence." How do those provisions interact? This Court has repeatedly recognized the problem, and even once granted certiorari to resolve it, but thus far has reserved decision. *See, e.g., Burt v. Titlow*, 571 U.S. 12, 18 (2013) ("We have not defined the precise relationship between § 2254(d)(2) and § 2254(e)(1), and we need not do so here"); *Wood v. Allen*, 558 U.S. 290, 293 (2010) (acknowledging that "[w]e granted certiorari to address the relationship between §§ 2254(d)(2) and (e)(1)" but

concluding that "we need not address" that question). When, as here, a state court has pronounced its own assessment of the evidence in the context of a harmless error analysis that flouts basic *Brecht / Strickland* principles, its conclusions should be treated as *legal* holdings subject to review under § 2254(d)(1). Sections (d)(2) and/or (e)(1) cannot be understood as preventing application of the appropriate federal standards simply because any harmless error discussion (under any standard) inherently will involve a characterization of the trial record.

III. THIS CASE IS AN IDEAL VEHICLE FOR THIS COURT TO PROVIDE NEEDED GUIDANCE ON THESE ISSUES

This case is an ideal vehicle to provide needed guidance on these questions. The Commonwealth conceded at oral argument that Muhammad presented both an ineffective assistance of counsel claim and a due process claim to the state courts, and the district court correctly found that Muhammad satisfied all exhaustion requirements. There is no procedural or justiciability bar that would impede this Court's ability to reach the merits. The Third Circuit also agreed that the instructions violated Muhammad's due process rights, and that counsel's performance fell below what *Strickland* requires—so the prejudice question is crisply presented. The fact that the case presents both the Fifth and Sixth Amendment errors also would give this Court an opportunity to consider the Third Circuit's assumption, shared by some other courts of appeals, that *Brecht* and *Strickland* prejudice "are essentially the same standard." *Breakiron v. Horn*, 642 F.3d 126, 147 n. 18 (3d Cir. 2011).

The facts and procedural history of this case present a uniquely crisp opportunity to clarify the holding of *Powell* and to explain the difference between the prejudice inquiry required by *Brecht* and *Strickland* and a reviewing court's own evaluation of the strength of the evidence. The jury's acquittal of Muhammad on the gun charge strongly indicates its belief that the prosecution did not prove that Muhammad personally had a gun. The state courts and the Third Circuit obviously saw the evidence differently. But privileging a judicial evaluation of the evidence over the best evidence of what the jury believed presents exactly the danger this Court warned against in *Sullivan*.

This case also presents an excellent opportunity for this Court to clarify the deference that AEDPA does, and does not, require when a federal habeas court is reviewing a no-prejudice holding from collateral review in state court. The state courts' no-prejudice holding in this case clearly did not apply federal prejudice law, and cannot be regarded as a reasonable application of federal prejudice law. But the state court declared its views about the evidence in a way that could easily be understood as factual findings. *See* Pet. App. 62 ("We find that the Defendant and Mr. Cameron intended to kill Mr. Nickol before Mr. Nickol ever arrived in Harrisburg."). The case therefore crisply presents the question of whether such pseudo-findings are entitled to factual deference under §§ 2254(d)(2) or (e)(1).

IV. AT A MINIMUM, THIS COURT SHOULD HOLD THIS PETITION FOR A POTENTIAL GVR IN LIGHT OF *BROWN V. DAVENPORT*

This Court's recent grant of certiorari in *Brown v. Davenport* underscores the confusion about how federal prejudice analysis and AEDPA interact. The issue

presented in that case is whether federal courts can grant habeas relief purely on the basis that the *Brecht* prejudice standard is satisfied, or whether AEDPA demands that the federal court *also* hold that any harmless error review undertaken by the state courts on direct review was unreasonable. However this Court answers that question, it will need to explain what AEDPA deference to a state court harmless error conclusion looks like. We respectfully submit that there is at least a strong chance that it will be appropriate to GVR this case in light of *Brown* when that decision issues. At a bare minimum, therefore, this case should be held for *Brown*.

CONCLUSION

The petition for a writ of certiorari should be granted, or the petition should be held for *Brown v. Davenport*.

/s/ J. Scott Ballenger
J. Scott Ballenger
APPELLATE LITIGATION CLINIC
UNIVERSITY OF VIRGINIA
SCHOOL OF LAW
580 Massie Road
Charlottesville, VA 22903
202-701-4925
sballenger@law.virginia.edu
Counsel of Record for Petitioner