24-6805

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES



ANITA HOLLINS, PETITIONER

*v.*

WARDEN SHELBIE SMITH, RESPONDENT

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

# PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1.) Whether *Dunn v. United States*, 284 U.S. 390 (1932), overturned by *United States v. Powell*, 469 U.S. 57 (1984), and *United States v. Powell,* self-restricted to this Court's supervisory power over federal courts, are authority to detain Petitioner on an action for habeas corpus based on inconsistent verdicts, as found below.

2.) Whether under the United States Constitution and Supreme Court rulings on inconsistent verdicts, a verdict of acquittal as to an essential factual element precludes a verdict of guilt requiring the same essential factual element where the inconsistent verdicts were reached in the same trial.

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PARTIES TO THE PROCEEDING

The case caption contains the parties' names. The name of the Respondent has changed by resignation of Warden Shelbie Smith. The present Warden is Shannon Olds and she is automatically substituted.

## RELATED PROCEEDINGS

Ohio Court of Appeals:

*State v. Hollins*, No. 107642, 2020 WL 5250391 (Ohio Ct. App. 8th Dist., Sept.3, 2020) Perm app. Denied, 159 N.E. 3d 287 (Ohio 2020)

United States District Court:

*Hollins v. Smith*, Case No. 1:21-CV-02338, Magistrate Report and Recommendation 10-27-2022

*Hollins v. Smith*, Case No. 1:21-cv-2338, Opinion and Order, 12-12-2023

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**IN THE SUPREME COURT OF THE UNITED STATES**

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No.

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*ON PETITION FOR A WRIT OF CERTIORARI*
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## CITATIONS OF THE OPINIONS BELOW

The name of the Respondent has changed by resignation of Warden Shelbie Smith. The present Warden is Shannon Olds. Smith is continued because that is the caption name on the documents.

United States Court of Appeals, Sixth Circuit, set forth at Appendix A:
*Hollins v. Smith*, No. 24-3023 , 09-05-2024, ( 6th Circuit), 2024 U.S. App.Lexis 22718.

United States District Court, N.D. Ohio, set forth at Appendix B, *Hollins v. Smith*, Case No. 1:21-cv-2338, Opinion and Order, 12-12-2023; available as 2022 U.S. Dist. LEXIS 247441

United States District Court Magistrate's Report, set forth as Appendix C, *Hollins v. Smith*, Case No. 1:21-CV-02338, Magistrate Report and Recommendation 10-27-2022; available as 2022 U.S. Dist. LEXIS 247441

## JURISDICTION

Petitioner seeks review of the order of the United States Sixth Circuit Court of Appeals entered on September 5, 2024, in case No. 24-3023, rehearing denied on October 25, 2024, Appendix A. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) to review federal denial of habeas relief. Petition for cert was timely mailed priority November 26, received December 4, rejected December 6 because the Clerk found two versions of the Opinions Below and Statement of Jurisdiction were filed. Appendix G. Petitioner was granted 60 days from February 14, 2025 to submit a corrected filing, here provided.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

These provisions of the 4th, 5th, 6th and 14th Amendments are set forth in Appendix D.

## STATEMENT OF THE CASE

As set forth in the Report and Recommendation of the Magistrate of October 27, 2022, pp. 4 ff.: "On April 25, 2017, the Cuyahoga County Grand Jury indicted Petitioner on the following charges: one count of aggravated murder in violation of O.R.C. 2903.01(A), (Count 1); three counts of aggravated murder in violation of O.R.C. 2903.01(B) (Counts 2, 3, and 4); six counts of aggravated robbery in violation of O.R.C. 2911.01(A)(1) (Counts 5, 12, 15, 18, 21, and 24; one count of aggravated robbery in violation of O.R.C. 2911.01(A)(3) (Count 6); kidnapping in violation of O.R.C. 2905.01(A)(3) (count7); six counts of kidnapping in violation of O.R.C. 2905.01(A)(2). (Counts 8, 13, 16, 19, 22, and 25); aggravated burglary in violation of O.R.C. 2911.11(A)(1) Count 9); aggravated burglary in violation of O.R.C. 2911.11(A)(2) (Count 10);

felonious assault in violation of O.R.C. 2903.11(A)(1) (Count 11); five counts of felonious assault in violation of O.R.C. 2903.11(A)(2) (Counts 14, 17, 20, 23, and 26); and one count of murder in violation of O.R.C. 2903.02(B) (Count 27), all with one-year and three-year firearm specifications. Hollins entered pleas of not guilty to the charges. The case proceeded to jury trial on June 12, 2018. On July 3, 2018, the jury returned its verdict, finding Hollins guilty on Counts 2-19, 21, 22, 25, and 27, not guilty on Counts 1 and 24, and not guilty on all firearm specifications. Counts 20, 23, and 26 were nolled. On August 24, 2018 ... [t]he state trial court found Counts 2, 3, 4, 7-11, and 27 merged for sentencing purposes and the State elected to proceed with sentencing on Count 2 (Aggravated Murder). The trial court sentenced Hollins to life in prison without parole on Count 2. The trial court sentenced Hollins to seven years in prison on Court 5, seven years in prison on Count 12, six years in prison on Count 14, seven years in prison on Count 15, two years in prison on Count 17, seven years in prison on Count 18, seven years in prison on Count 21, and seven years in prison on Count 25, all to run concurrent with the sentence on Count 2.

"[Petitioner], through counsel, filed a timely notice of appeal to the [Ohio] Eighth District Court of Appeals. In her appellate brief, [Petitioner] raised the following assignment[ ] of error:

> The trial court erred when it accepted jury verdicts with internal inconsistencies within the same counts for complicity requiring that this renewing court must enter an acquittal for inconstant verdicts in each count of the indictment where [Petitioner] was found guilty of aiding and abetting the underlying offense but not guilty of aiding and abetting the firearm specifications. This Court must reconsider its prior holdings regarding inconsistent verdicts based upon applicable changes to the law and also upon the issue of a complicity conviction. ***

"On September 3, 2020, the state appellate court affirmed [Petitioner's] conviction. ["T]he acquittal is not inconsistent with the jury's finding that [Petitioner] aided and abetted the

commission of the aggravated murder and other offenses. It is entirely consistent for the jury to conclude both that [Petitioner] aided and abetted in the murder but did not possess the firearm."]... On October 8, 2020, Hollins, through counsel, filed a timely Notice of Appeal with the Supreme Court of Ohio. In her Memorandum in Support of Jurisdiction, Hollins raised the following Proposition[ ] of Law:

> Where defendant is convicted of an offense resulting in the death or injury of another by gunshot or requiring as an element of the offense the use or possession of a firearm/ deadly weapon a finding of not guilty on an accompanying one and three year firearm specification results in a jury verdict that when read in its entirety failed to prove an essential element of the charge/offense beyond a reasonable doubt and requires an acquittal be entered on the predicate offense due to inconsistent verdicts. ***

"On December 15, 2020, The Supreme Court of Ohio declined to accept jurisdiction of the appeal.

"On December 13, 2021, Hollins, through counsel, filed a Petition for Writ of habeas corpus in this Court and asserted the following ground[ ] for relief:

GROUND ONE: Internal inconsistent verdicts (same count), Found not guilty of firearm specification but guilty of underlying offenses which were committed via shooting from firearm, complicit; violations of due process, jury finding guilt beyond a reasonable doubt on all elements (sufficiency), double jeopardy/collateral estoppel, Fifth, Sixth and Fourteenth Amendments. Right to be acquitted where jury special verdict finding negates an essential element of an offense charged.

*Hollins v. Smith*, Case No. 1:21-CV-02338, Magistrate Report and Recommendation 10-27-2022; available as 2022 U.S. Dist. LEXIS 247441 pp. 4-7.

"The Opinion and Order of the District Court was "[Petitioner] has not identified any principle of clearly established federal law that prohibits inconsistent verdicts. .... On the contrary, the Supreme Court has repeatedly made clear that 'inconsistency in a verdict is not a sufficient reason for setting it aside.' *Harris v. Rivera*, 454 U.S. 339, 35 (1981). This notion has

become known as *Dunn-Powell*." P. 10. "At bottom, clearly established federal law does not impose a duty on a state court to vacate a conviction that is arguably inconsistent with an acquittal on an attached firearm specification. [Petitioner], then, cannot show that the state court's decision to affirm the jury's verdicts was contrary to or an unreasonable application of the federal law."

Here ends the verbatim citation from *Hollins v. Smith*, Case No. 1:21-cv-2338, Opinion and Order, 12-12-2023, p. 15; available as 2022 U.S. Dist. LEXIS 247441.

The court issued a certificate of appeal for the issue, Opinion, p. 16.

The Sixth Circuit stated the issue:

> "On appeal, [Petitioner] raises only her inconsistent-verdict claim concerning her three aggravated felony-murder convictions under Ohio Revised Code 2903.01(B), which were premised on her aggravated robbery, aggravated burglary, and kidnapping offenses. She agues that the Supreme Court's decision in *Dunn v. United States*, 284 U.S. 390, 393 (1932), holding that inconsistent verdicts are permissible, was wrongly decided, and that the Supreme Court's decision in *United States v. Powell,* 469 U.S. 57, 64-65 (1984), though seemingly affirming the principle that inconsistent verdicts are permissible, actually recognized the flawed reasoning of *Dunn* and instead allowed the inconsistent verdicts to stand based solely on its 'supervisory power' over federal criminal procedure. Thus, according to [Petitioner], *Dunn* and *Powell* do not apply in habeas review or to her convictions and, because her convictions are inconsistent with the jury's decision to acquit her of the firearm specifications, they must be vacated as violating double-jeopardy principles." *Hollins v. Smith*, No. 24-3023 , 09-05-2024, ( 6th Circuit) unpublished Order, pp. 2-3.

The Circuit noted "The Supreme Court again considered the question of inconsistent verdicts in *Powell*, noting that, in the case of separately tried indictments, an acquittal on one could not be res judicata in the other, could 'no longer be accepted' in light of cases thereafter." And the Circuit acknowledged that *Powell* was a supervisory power case, p. 4, but ultimately

held "Hollins was never put twice in jeopardy, as the inconsistent verdicts here all occurred in the same trial". Pp. 4-5.

Thus, the issue whether there were impermissible inconsistent rulings in a state criminal trial has been raised and preserved from state direct appeal through a habeas petition brought in the first instance in the federal district court under 28 U.S.C. 2254, on appeal to the federal Sixth Circuit under 28 U.S.C. 1291, and present appeal to this Court under 28 U.S.C. 1254(1).

## ARGUMENT

This is a criminal inconsistent verdict case brought on petition for habeas corpus. In the past fifty years, the increasing use of indictments charging many offenses for a single action has lead to an increased risk of inconsistent verdicts where many of the offenses share identical essential elements. In the present case Petitioner was convicted of three counts of felony murder as an aider and abettor, which requires for conviction, inter alia, that Petitioner have conspired with the principal actors to use firearms in commission of the sixteen predicate crimes which resulted in killing. The Petitioner was separately charged 44 times with aiding and abetting the commission of the crimes either while possessing firearms, or while using firearms, which requires for conviction only that Petitioner have conspired with the principal actors to possess or use firearms. Petitioner was acquitted as to all 44 firearm charges.

There are at least five well-established mutually supporting doctrines this Court has developed, founded on Articles 4, 5, 6 and 14 of the Constitution, and set forth in over 40 Court cases over two and a half centuries, which apply to inconsistent verdicts: that a jury speaks only through its verdict and a verdict of acquittal is unimpeachable, that an acquittal is claim preclusive where it constitutes an essential element of another offense, that redetermination of

an essential element of an offense that was determined on acquittal is or would be double jeopardy and finally, that a State jury can find guilt only upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which defendant is charged.

The federal courts below instead relied on the only two inconsistent Court cases contra, *Dunn v. United States*, 284 U.S. 390 (1932) and *United States v. Powell*, 469 U.S. 57 (1984). *Dunn* had held "consistency in a verdict is not required", Holding 2, and "where offenses are charged in the counts of a single indictment, although the evidence is the same in support of each, an acquittal on one may not be pleaded as res judicata of the other." Holding, 3. But *Powell* 52 years later unanimously overturned these two *Dunn* holdings: "The latter statement, if not incorrect at the time, see *United States v. Oppenheimer*, 242 U.S. 85, 87 (1916), can no longer be accepted in light of cases such as *Sealfon v. United States*, 332 U.S. 575 (1948), and *Ashe v. Swenson,* 397 U.S. 436 (1970), which hold that the doctrine of collateral estoppel would apply under those circumstances." *Powell* itself thought that while *Dunn* was wrong about claim preclusion, it was a good solution. "We believe that the *Dunn* rule rests on a sound rationale that is independent of its theories of res judicata, and that it therefore survives an attack based on its presently erroneous reliance on such theories." At U.S. page 64. *Powell* proceeds to cite a number of these "rationales", all of which appeared in *Powell*'s holdings, but all rationales and holdings were going to face the great weight of constitutional authority as cited by the Supreme Court in its many other holdings. *Powell* was aware of the problem of constitutional constructions that contradict each of the rationales, for it was *Powell* that authoritatively pointed out the constitutional error in *Dunn* regarding criminal collateral estoppel. *Powell* therefore prefaced its rationales concerning inconsistent verdicts with a most-important caveat: "[W]e

therefore address the problem only under our supervisory powers over the federal criminal process." At U.S. page 65, underline added. *Powell*, on direct appeal, was a holding on the Court's supervisory powers, not its constitutional power under *Marbury v Madison*, and does not apply on habeas: habeas corpus is a challenge to a State courts' actions, over which the Court has no supervisory power, and an habeas petition challenging State violation of federal constitutional rights is sine que non a *Marbury v. Madison* constitutional determination, not a supervisory act.

*Dunn* and *Powell* have no authority over a petition for habeas corpus relief.

Under the Constitutional principles set forth by this Court over centuries, especially criminal claim preclusion, there cannot be inconsistent verdicts. The trial court erred in accepting guilty verdicts that clearly contradicted the 44 acquittals in the case. The Ohio Court of Appeals decision upholding the inconsistent convictions contradicted clearly expressed Court determinations, as does the District and Sixth Circuit's Order.

**Inconsistent Verdicts**

As set forth at **STATEMENT OF THE CASE,** supra, Petitioner was charged with aiding and abetting 27 Counts and 54 gun specifications. Three counts and their gun specifications were nolled, Petitioner was found not guilty of two counts, and acquitted as to every remaining gun specification, being 44. With merger, Petitioner was sentenced to life without parole on three felony murder counts, 2-4. The remainder of the sentences were for 7 years or less, to be served concurrently with the sentence of life without parole. Petitioner was jailed April 4, 2017. Petitioner's sentences have run except for the three convictions for aggravated felony murder, the sole counts now under consideration.

The inconsistent verdicts alleged were the acquittals of the 44 gun specifications tried to the jury, which acquittals established that the jury did not find beyond a reasonable doubt that Petitioner conspired with the principal actors to possess or use firearms in the commission of felonies; and the convictions of aiding and abetting three counts of felony murder while committing robbery, kidnapping and burglary, which required that the jury did find Petitioner conspired with the principal actors to commit the predicate crimes while possessing or using firearms.

**Jury Instructions**

As summarized at **STATEMENT OF THE CASE**, supra, while the Ohio court of appeals did not believe there was an inconsistency, the District Court assumed there was, and focused on the treatment of inconsistent verdicts, using *Dunn-Powell*, as did the Sixth Circuit. Common sense, the jury instructions and Ohio case law confirm the jury came to opposite conclusions concerning the same determinative fact, whether Petitioner conspired with others to use or possess firearms in the commission of crimes: the 44 written acquittals definitively answer no, the 3 written convictions definitively answer yes.

Petitioner was tried on a theory of aiding and abetting. The jury instruction read "It is the contention of the State that the defendant either committed the offenses charged in the indictment or that [s]he aided and abetted the person who did directly or personally commit the offense. *** Whoever aid and abets or assists in procuring with another to commit an offense may be prosecuted as if [s]he were the principal offender." Transcript Page ID # 6686-87.

Per the jury instructions, guilt for aiding and abetting a crime required two sets of culpable mental states, two sets of essential facts. First, the jury must have found beyond a

reasonable doubt that the charged crime was committed. Transcript Page ID # 6687. Therefore the jury instructions for each count set forth the required mental state of a perpetrator and other essential elements of the commission of the crime. Every count of aggravated murder required Petitioner to act "purposely". Transcript Page ID # 6689. Second, where the jury determined the crime was committed, the jury must have determined as to Petitioner whether she intended to aid and abet, i.e., had a prior formed purpose to aid and abet, so that she partakes in the culpability for criminal acts she did not herself perform. Transcript Page ID # 6687-89.

Therefore, the elements of "aiding and abetting" were also defined in the instructions. Putting the Instruction's terms of art in italics: first, the jury is instructed that *aiding and abetting* requires two or more persons with a common *purpose*, a joint design and *purpose*, a previously formed common design and *purpose*, which must precede the commission of the crime. Transcript Page ID # 6687 . *Purpose* is therefore an essential element of *aiding and abetting*.

Because *purpose* also "is an essential element of the crime of aggravated murder", Transcript Page ID # 6689, *purpose* is defined in the jury instructions for premeditated murder. "A person acts purposely when it is the person's specific intention to cause a certain result or engage in conduct of a certain nature." Transcript Page ID # 6691-92. "*Purpose* and *intent* mean the same thing." Transcript Page ID# 6690. A person's *purpose* "is determined from the manner in which it is done, the means, or weapon used, and all other facts and circumstances in evidence." Transcript Page ID # 6690-91.

Where aiding and abetting requires a "previously formed common design and *purpose*", it necessarily requires *prior calculation and design. Prior calculation and design* is also defined in the jury instructions for premeditated murder. Eliding references to premeditated murder,

*prior calculation and design* "means that the *purpose* to [commit the crime] was reached by a definite process of reasoning in advance of the [crime], which process of reasoning must have included a mental plan involving studied consideration of the method and the means and/or instrument with which to [commit the crime.] Transcript Page ID # 6691-92.

Again, the *prior calculation and design* necessary to *aiding and abetting* and the *purpose* necessary to *aiding and abetting* both require a premeditated determination of "means and weapons". Thus, aiding and abetting requires as an essential element, inter alia, a prior calculation of the means and weapon for committing the crime.

Thirteen of the 16 predicate offenses under the Aggravated Murder Counts require the use of a deadly weapon, "to-wit: a firearm" as the indictment read, in those counts. Three of the offenses require acts of violence by any means, Counts Six, Seven and Nine, but the State had "specified" the crimes were committed by firearm. The jury was instructed "A specification is an additional finding made by the grand jury arising out of the facts of the offense charged in the indictment." Transcript Page ID# 6693. Petitioner's aiding and abetting again required a prior agreement as to the use of firearms for each of the 16 predicate offenses.

**Law of the Case**

Ohio law of the case supports the jury instructions. In this case, the elements required in the jury instructions were required also by the Ohio court of appeals on review: "where a defendant enters into a common design with others to commit armed robbery by the use of force, violence, and a deadly weapon, and all the participants are aware that an inherently dangerous instrumentality is to be employed to accomplish the felonious purpose, a homicide that occurs during the commission of the felony is a natural and probable consequence of the common plan

that is presumed to be intended." *State of Ohio v. Hollins*, 2020 WL 5250391 at *8, collecting Ohio cases, cited at Hollins v. Smith, Case No. 1:21-cv-2338, Opinion and Order, 12-12-2023; available as 2022 U.S. Dist. LEXIS 247441, also cited as District Court Opinion and Order, R.13, Transcript Page ID # 3696. Ohio law requires that "all the participants are aware that an inherently dangerous instrumentality is to be employed to accomplish the felonious purpose."

The State was required to prove that Petitioner entered into a conspiracy to use firearms as the "means and weapons" to commit the three crimes charged.

Use of a firearm in the commission of a crime is a punishable offense in Ohio requiring a separate jury finding or plea of guilt. *State v. Chapman* (1986), 21 Ohio St. 3d 41 -- Syllabus: "An individual indicted for and convicted of R.C. 2911.01, aggravated robbery, and R.C. 2941.141, a firearm specification, is subject to a mandatory three-year term of actual incarceration under R.C. 2929.71, regardless of whether he was the principle offender or an unarmed accomplice. ( *State v. Moore* [1985], 16 Ohio St. 3d 30, followed.). In *State v. Tyson* (1984), 19 Ohio App. 3d 90 it was held "-- Before an additional term may be imposed for a firearm specification, there must be a separate guilty plea or conviction entered on the specification."

Therefore, the jury's acquittals on the firearm specifications attached to all 16 of the predicate offenses and the three charges of aggravated felony murder determined that the State failed to prove beyond a reasonable doubt Petitioner conspired to use firearms, while the jury's 16 convictions on predicate offenses and three convictions on aggravated felony murder determined that beyond a reasonable doubt Petitioner conspired with the principal actors to possess and or use firearms in the commission of robbery, burglary and kidnapping ending in

death. These are inconsistent verdicts. Thirty-two acquittals held Petitioner did not conspire to use or possess firearms in the commission of 16 predicate acts, and 16 times found Petitioner conspired to use or possess firearms in the commission of the 16 felony counts. Six acquittals held Petitioner did not conspire to use or possess firearms in the commission of aggravated felony murder, and 3 convictions of aggravated felony murder determined that Petitioner conspired to use or possess firearms in the commission of those crimes. Those are a large number of inconsistent verdicts for one trial. It certainly belies the assertion of the Ohio court of appeals that there was nothing inconsistent in the verdicts.

**Inconsistent State verdicts violated Petitioner's federal constitutional rights.**

The criminal defendant's primary due process right in a jury trial is that a jury must find guilt only upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which defendant is charged. The only admissible evidence of a criminal jury's intent is its verdict, that verdict, when an acquittal, cannot be impeached, that verdict is claim preclusive where it determines an essential fact shared by other charges, so that a defendant cannot be tried twice as to an essential fact, which is also explicitly forbidden by the Constitution. The problem with an inconsistent verdict presents variously. While any given verdict is assumed by law to be based on a jury determination satisfying due process, some verdicts can facially contradict each other. Here, for instance, the gun charges under aiding and abetting have only a single essential element, did or did not Petitioner conspire in the use or possession of the firearms used to commit a series of crimes. The acquittal establishes as fact Petitioner did not, beyond a reasonable doubt, so conspire. But the verdicts finding guilt of the crimes themselves required as an essential fact that Petitioner did so conspire. Thus, using only the evidence of the verdicts, it

is impossible that the acquittal was given preclusive effect, impossible that the jury found beyond a reasonable doubt every essential fact of the crime, impossible that the defendant was only tried once as to the essential fact constituting the crime, impossible that the acquittal was not impeached.

**A jury acquittal is unassailable under the Fifth Amendment**

This was expressed in *Powell* , p. U.S. 63. as "This Court noted that *Dunn* and *Dotterweich* [320 U.S. 277, (1943)] establish 'The unreviewable power of a jury to return a verdict of not guilty for impermissible reasons.' *Harris v. Rivera*, [454 U.S. 339 (1981)] supra, at 346. See also *Standefer v. United States*, 447 U.S. 10, 22-23 (1980)." And *Powell* again at U.S. p. 67 stated: "[O]nce the jury has heard the evidence and the case has been submitted, the litigants must accept the jury's collective judgment. *** [T]hrough this deference the jury brings to the criminal process, in addition to the collective judgment of the community, an element of needed finality." Even the dissent of Justice Butler in *Dunn* is consonant with *Dunn* and *Powell*: "The finding of not guilty is a final determination ..." *Dunn*, at U.S. p. 407.

The not-infrequent verdicts implying court error rather than jury error are equally unreviewable. After *Dunn* but prior to *Powell* the Court found in *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571, (1977):

> "Perhaps the most fundamental rule in the history of double jeopardy jurisprudence has been that '[a] verdict of acquittal . . . could not be reviewed, on error or otherwise, without putting [a defendant] twice in jeopardy, and thereby violating the Constitution.' *United States v. Ball*, 163 U. S. 662, 671 (1896). In *Fong Foo v. United States*, [369 U.S. 141 (1962)] supra, for example, a District Court directed jury verdicts of acquittal and subsequently entered formal judgments of acquittal. The Court of Appeals entertained the appeal of the United States and reversed the District Court's ruling on the ground that the trial judge was without power to direct

> acquittals under the circumstances disclosed by the record. We reversed, holding that, although the Court of Appeals may correctly have believed 'that the acquittal was based upon an egregiously erroneous foundation, . . . [n]evertheless, "[t]he verdict of acquittal was final, and could not be reviewed... without putting [the defendants] twice in jeopardy, and thereby violating the Constitution." ' 369 U. S., at 143.

Even obvious judicial errors of acquittal cannot be reviewed.

Subsequent to *Dunn* and *Powell* the Supreme Court cases and holdings developing the concept of criminal collateral estoppel have often cited to *Dunn* and *Powell* for the proposition that acquittals are always given effect:

- As set forth at *Yeager v. United States*, 557 US 110, 111, holding, (2009). "The Court's refusal in *Powell* and in *Dunn v. United States*, 284 U.S. 390, 52 S. Ct. 189, 76 L. Ed. 356, to impugn the legitimacy of jury verdicts that, on their face, were logically inconsistent shows, a fortiori, that a potentially inconsistent hung count could not command a different result";

-As set forth at *Smith v. United States*, 599 U.S. 236, 252 (2023) "When a jury returns a general verdict of not guilty, its decision 'cannot be upset by speculation or inquiry into such matters' by courts. *Dunn v. United States*, 284 U.S. 390, 393-394, 52 S. Ct. 189, 76 L. Ed. 356 (1932); see *United States v. Powell,* 469 U. S. 57, 66-67, 105 S. Ct. 471, 83 L. Ed. 2d 461 (1984). To conclude otherwise would impermissibly authorize judges to usurp the jury right. See ibid.; cf. *United States v. Martin Linen Supply Co.*, 430 U. S. 564, 572-573, 97 S. Ct. 1349, 51 L. Ed. 2d 642 (1977). And because it is impossible for a court to be certain about the ground for the verdict without improperly delving into the jurors' deliberations, the jury holds an 'unreviewable power . . . to return a verdict of not guilty' even 'for impermissible reasons.' *Powell*, 469 U. S., at

63, 66-67, 105 S. Ct. 471, 83 L. Ed. 2d 461; see *Dunn,* 284 U. S., at 393-394, 52 S. Ct. 189, 76 L. Ed. 356";

- As set forth most recently in *McElrath v. Georgia,* 217 L. Ed. 2d 419 (2024), wherein the Georgia Supreme Court voided an acquittal on malice murder, which the Court re-instated, wherein, by this date, *Powell* is only one of a list of concurring authorities:

> " '[I]t has long been settled under the Fifth Amendment that a verdict of acquittal is final, ending a defendant's jeopardy, and . . . is a bar to a subsequent prosecution for the same offence.' *Green v. United States*, 355 U.S. 184, 188, 78 S. Ct. 221, 2 L. Ed. 2d 199 [1957], 77 Ohio Law Abs. 202 (internal quotation marks omitted). The Court's 'cases have defined an acquittal to encompass any ruling that the prosecution's proof is insufficient to establish criminal liability for an offense.' *Evans v. Michigan*, 568 U. S. 313, 318, 133 S. Ct. 1069, 185 L. Ed. 2d 124. Once rendered, a jury's verdict of acquittal is inviolate. The principle "that '[a] verdict of acquittal .... could not be reviewed, on error or otherwise,' is "[p]erhaps the most fundamental rule in the history of double jeopardy jurisprudence." *United States v. Martin Linen Supply Co.*, 430 U. S. 564, 571, 97 S. Ct. 1349, 51 L. Ed. 2d 642. Whatever the basis for a jury's verdict, see *Bravo-Fernandez v . United States,* 580 U. S. 5, 10, 137 S. Ct. 352, 196 L. Ed. 2d 242 [2016], the Double Jeopardy Clause prohibits second-guessing the reason for a jury's acquittal." *McElrath v. Georgia,* Holding, p. 419.

And further:

> "We have long recognized that, while an acquittal might reflect a jury's determination that the defendant is innocent of the crime charged, such a verdict might also be 'the result of compromise, compassion, lenity, or misunderstanding of the governing law.' *Bravo-Fernandez v. United States* 580 U. S. 5, 10, 196 L. Ed. 2d 242 (2016); see also *United States v. Powell*, 469 U. S. 57, 65, 105 S. Ct. 471, 83 L. Ed. 2d 461 (1984). Whatever the basis, the Double Jeopardy Clause prohibits second-guessing the reason for a jury's acquittal. As a result, 'the jury holds an unreviewable power to return a verdict of not guilty even for impermissible reasons.' *Smith v. United States,* 599 U. S. 236, 253, 143 S. Ct. 1594, 216 L. Ed. 2d 238 (2023) (internal quotation marks and alterations omitted)." *McElrath v. Georgia*, page 424.

From the 1893 *Ball* through the 2024 *McElrath*, an acquittal is an unassailable final determination.

**Due Process, the Fifth, Sixth and Fourteenth Amendments**

"The Fifth and Sixth Amendments require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged. *Sullivan v. Louisiana*, 508 U.S. 275, 277-278, 124 L. Ed. 2d 182, 113 S. Ct. 2078 [1993]." *United States v. Gaudin*, 515 U.S. 506, 506 (1995).

In the context of a habeas corpus petition, the holding of *Jackson v. Virginia*, et al., 443 U.S. 307, 307 (1979) stated:

> "1. A federal habeas corpus court must consider not whether there was any evidence to support a state-court conviction, but whether there was sufficient evidence to justify a rational trier of fact to find guilt beyond a reasonable doubt. *In re Winship*, 397 U.S. 358 [1970].
> *In re Winship* presupposes as an essential of the due process guaranteed by the Fourteenth Amendment that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof -- defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense."

*In re Winship* in 1970 stated that courts had always assumed that standard of proof, citing cases from the founding onward, but *Winship* was the first Court case to explicitly hold that the standard was constitutionally required. "Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." At U.S. page 364.

The Court found again in *Fiore v. White*, 531 U.S. 225, 228-229 (2001) "We have held that the Due Process Clause of the Fourteenth Amendment forbids a state to convict a person of a crime without proving the elements of that crime beyond a reasonable doubt."

Where the jury had already determined that an essential fact of all her crimes under a theory of aiding and abetting did not exist as a matter of unassailable acquittal, a contrary finding of guilt shows the jury had not proved every elements of the offense beyond a reasonable doubt. The right to conviction by proof beyond a reasonable doubt of every essential fact of a charge is "clearly established" by holdings of the United States Supreme Court so as to qualify Petitioner for habeas corpus relief.

**Collateral Estoppel is a constitutional requirement; *Dunn* was wrong and was overturned by *Powell***

*Powell*'s great contribution to a long and otherwise consistent line of Supreme Court cases on criminal res judicata was to point out in a unanimous opinion *Dunn*'s obvious res judicata error, relieving reviewers of an incorrect stare decisis impediment. *Dunn* included two holdings which were incorrect at the time and have been repudiated since: " (2). Consistency in the verdict was not required" and "3. Where offenses are separately charged in the counts of a single indictment, though the evidence is the same in support of each, an acquittal on one may not be pleaded as res judicata of the other." However, *Powell* noted, at U.S. p. 64: "The latter statement, if not incorrect at the time, see *United States v. Oppenheimer*, 242 U.S. 85, 87 (1916), can no longer be accepted in light of cases such as *Sealfon v. United States*, 332 U.S. 575 (1948), and *Ashe v. Swenson*, 397 U.S. 436 (1970), which hold that the doctrine of collateral estoppel would apply under those circumstances."

In the prior 1916 case of *Oppenheimer,* the Court held that an incorrect dismissal of a criminal bankruptcy offense, based on a judge's (mis)understanding of the statute of limitation, found incorrect on appeal, could not be the basis of another indictment where the prosecution argued the defendant was not put in double jeopardy because the case had been dismissed before trial on the statute of limitation. While the main issue was whether a dismissal on the statute of limitation was an "adjudication", the Opinion set forth the preclusive res judicata effect of a determination under the Fifth Amendment as being greater than double jeopardy. The Court held that res judicata applied to the criminal case.

> "Res Judicata applies even where double jeopardy does not. Upon the merits the proposition of the Government is that the doctrine of res judicata does not exist for criminal cases except in the modified form of the Fifth Amendment that a person shall not be subject for the same offence to be twice put in jeopardy of life or limb; and the conclusion is drawn that a decision upon a plea in bar cannot prevent a second trial when the defendant never has been in jeopardy in the sense of being before a jury upon the facts of the offence charged. It seems that the mere statement of the position should be its own answer. It cannot be that the safeguards of the person, so often and so rightly mentioned with solemn reverence, are less than those that protect from a liability in debt. It cannot be that a judgment of acquittal on the ground of the statute of limitations is less a protection against a second trial than a judgment upon the ground of innocence, or that such a judgment is any more effective when entered after a verdict than if entered by the Government's consent before a jury is empaneled; or that it is conclusive if entered upon the general issue, *United States v. Kissel*, 218 U.S. 601, 610, but if upon a special plea of the statute, permits the defendant to be prosecuted again. We do not suppose that it would be doubted that a judgment upon a demurrer to the merits would be a bar to a second indictment in the same words. *Iowa v. Fields*, 106 Iowa, 406. Wharton, Crim. Pl. & Pr., 9th ed., § 406. Of course the quashing of a bad indictment is no bar to a prosecution upon a good one, but a judgment for the defendant upon the ground that the prosecution is barred goes to his liability as matter of substantive law and one judgment that he is free as matter of substantive law is as good as another. A plea of the statute of limitations is a plea to the merits, *United States v. Barber*, 219 U.S. 72, 78, and however the issue was raised in the former case, after judgment upon

it, it could not be reopened in a later prosecution. We may adopt in its application to this case the statement of a judge of great experience in the criminal law: 'Where a criminal charge has been adjudicated upon by a court having jurisdiction to hear and determine it, that adjudication, whether it takes the form of an acquittal or conviction, is final as to the matter so adjudicated upon, and may be pleaded in bar to any subsequent prosecution for the same offence. . . . In this respect the criminal law is in unison with that which prevails in civil proceedings.' Hawkins, J., in *The Queen v. Miles*, 24 Q.B.D. 423, 431. The finality of a previous adjudication as to the matters determined by it, is the ground of decision in *Commonwealth v. Evans*, 101 Massachusetts, 25, the criminal and the civil law agreeing, as Mr. Justice Hawkins says. *Commonwealth v. Ellis*, 160 Massachusetts, 165. *Brittain v. Kinnaird*, 1 Brod. & B. 432. Seemingly the same view was taken in *Frank v. Mangum,* 237 U.S. 309, 334, as it was also in *Coffey v. United States*, 116 U.S. 436, 445 [1886].

"The safeguard provided by the Constitution against the gravest abuses has tended to give the impression that when it did not apply in terms, there was no other principle that could. But the Fifth Amendment was not intended to do away with what in the civil law is a fundamental principle of justice (*Jeter v. Hewitt,* 22 How. 352, 364)[63 U.S. 352, 364], in order, when a man once has been acquitted on the merits, to enable the Government to prosecute him a second time."

The cited Supreme Court case of *Coffey v. United States* also indicated *Dunn* was in error of then-extant law as to res judicata:

"The judgment of acquittal in the criminal proceeding ascertained that the facts which were the basis of that proceeding, and are the basis of this one, and which are made by the statute the foundation of any punishment, personal or pecuniary, did not exist. This was ascertained once for all, between the United States and the claimant, in the criminal proceeding, so that the facts cannot be again litigated between them, as the basis of any statutory punishment denounced as a consequence of the existence of the facts. This is a necessary result of the rules laid down in the unanimous opinion of the judges in the case of *Rex v. Duchess of Kingston*, 20 Howell's State Trials, 355, 538, and which were formulated thus: The judgment of a court of concurrent jurisdiction, directly upon the point, is, as a plea, a bar, or, as evidence, conclusive, between the same parties, upon the same matter, directly in question in another court; and the judgment of a court of exclusive jurisdiction, directly upon the point, is, in like manner, conclusive upon the same matter, between the same parties, coming incidentally in question in another court for a different purpose. In the

present case, the court is the same court, and had jurisdiction, and the judgment was directly on the point now involved, and between the same parties." At U.S page 445-445.

In the *Mangum* case, U.S. pages 333-334 the Court stated:

> "It is a fundamental principle of jurisprudence, arising from the very nature of courts of justice and the objects for which they are established, that a question of fact or of law distinctly put in issue and directly determined by a court of competent jurisdiction cannot afterwards be disputed between the same parties. *Southern Pacific Railroad v. United States*, 168 U.S. 1, 48. The principle is as applicable to the decisions of criminal courts as to those of civil jurisdiction. As to its application in habeas corpus cases, with respect to decisions by such courts of the facts pertaining to the jurisdiction ever the prisoner, see *Ex parte Terry*, 128 U.S. 289, 305, 310; *Ex parte Columbia George*, 144 Fed. Rep. 985, 986.

Based on these numerous precedential cases, therefore, *Powell,* at U.S. 64, had suggested that at the time of *Dunn* res judicata probably did apply to an acquittal in a criminal trial and had, under the double jeopardy clause, a res judicata effect on other counts in the same indictment tried simultaneously, and *Dunn* was then in error.[1] A jury cannot twice determine the same facts, and this would apply to the fact of a firearm in the present case.

In *Jeter* at U.S. 363-364, supra, the Court had pronounced the famous effect of res judicata on future judgments, 'facit excurvo rectum, ex albo nigrum':

> "The authority of res judicata as a medium of proof is acknowledged in the civil code of Louisiana; and its precise effect in the particular case under consideration is ascertained in the statute that allows the proceeding by monition. Under the system of that State, the maintenance of public order, the repose of society, and the quiet of families, require that what has been definitely determined by competent tribunals shall be accepted as irrefragable legal truth. So deeply is this principle implanted in her jurisprudence, that commentators upon it have said, the res judicata renders white that which is black, and straight that which is crooked. Facit excurvo

[1] Oddly, Justice O. Holmes authored both the multi-citation *Oppenheimer* in 1916 and the contradictory, and spare, *Dunn* in 1932, his last written opinion, at the age of 92. See, *Harris v. Rivera*, fn 15.

> rectum, ex albo nigrum. No other evidence can afford strength to the presumption of truth it creates, and no argument can detract from its legal efficacy."

Therefore, *Powell* had no difficulty in finding *Dunn* incorrect about the res judicata effect of the acquittal in *Dunn:* the facts the jury found in the acquittal, no liquor and no liquor establishment, would have bound the charges of which defendant was improperly found guilty, which required liquor and a liquor establishment. Res judicata: facit excurvo rectum, ex albo nigrum.

*Powell,* at U.S. page 64, found *Dunn* was certainly wrong after *Sealfon v. United States*, 332 U.S. 575 (1948) , which held "2. The doctrine of res judicata is applicable to criminal as well as civil proceedings, and operates to conclude those matters in issue which have been determined by a previous verdict, even though the offenses be different." *Sealfon* at U.S. p. 578. [2]

*Powell* also found *Dunn* was wrong after the holding in *Ashe v. Swenson*, 397 U.S. 436 (1970), which held, in a criminal trial, consonant with *Oppenheimer-Sealfon:* " 1. The Fifth Amendment guarantee against double jeopardy, applicable here through the Fourteenth Amendment by virtue of *Benton v. Maryland,* [395 U.S. 784, (1969)] supra, embodies collateral estoppel as a constitutional requirement."

The recognition of the collateral estoppel effect under the Fifth Amendment progressed from *Coffey* in 1886, *Oppenheimer* in 1916, through *Sealfon* in 1948, to *Ashe v. Swenson* in 1970 to *United States v. Martin Linen Supply Co* in 1977, through *Powell* in 1984, although the principle predated the Republic: *Rex v. Duchess of Kingston, The Queen v. Miles,* quoted at *Oppenheimer* supra.

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[2] Opinion joined by Judge Burton, the dissenter in *Dunn.*

Post-*Powell* was *Yeager v. United States*, 557 U.S. 110 (2009) which specifically rejected a reading of *Powell* as allowing even the possibility of an inconsistent verdict. Any notion that *Powell* allowed inconsistent verdicts based on jury irrationality was specifically repudiated in favor of viewing *Powell* as upholding all acquittals without qualification. *Yeager* was a criminal case where a verdict of acquittal on one count at trial was accompanied by a hung jury as to another count. *Yeager* declined any reading of *Powell* that would have allowed retrial and possibly an inconsistent verdict. The holding in *Yeager* was that where an essential issue, an essential fact, on acquittal was the same as on the hung count, double jeopardy prevented retrial of the hung charge.

> " (a) This case is controlled by the reasoning in *Ashe* v. *Swenson*, 397 U.S. 436, 90 S. Ct. 1189, 25 L. Ed. 2d 469, [1970], where the Court squarely held that the Double Jeopardy Clause precludes the Government from relitigating any issue that was necessarily decided by a jury's acquittal in a prior trial. ... if the possession of insider information was a critical issue of ultimate fact in all of the charges against Yeager, a jury verdict that necessarily decided that issue in his favor protects him from prosecution for any charge for which that is an essential element.
> " (b) Neither *Richardson* v. *United States*, 468 U.S. 317, 104 S. Ct. 3081, 82 L. Ed. 2d 242, nor *United States* v. *Powell*, 469 U.S. 57, 105 S. Ct. 471, 83 L. Ed. 2d 461, supports the Government's argument that it can retry Yeager for insider trading or money laundering. .... Also rejected is the contention that an acquittal can never preclude retrial on a hung count because it would impute irrationality to the jury in violation of *Powell*'s rule that issue preclusion is "predicated on the assumption that the jury acted rationally," 469 U.S., at 68, 105 S. Ct. 471, 83 L. Ed. 2d 461. The Court's refusal in *Powell* and in *Dunn* v. *United States*, 284 U.S. 390, 52 S. Ct. 189, 76 L. Ed. 356, to impugn the legitimacy of jury verdicts that, on their face, were logically inconsistent shows, *a fortiori*, that a potentially inconsistent hung count could not command a different result."

In *McElrath* the thread continues:

> "The principle 'that '[a] verdict of acquittal . . . could not be reviewed, on error or otherwise,' is "'[p]erhaps the most fundamental rule in the history of

> double jeopardy jurisprudence.' *United States v. Martin Linen Supply Co.*, 430 U. S. 564, 571, 97 S. Ct. 1349, 51 L. Ed. 2d 642. Whatever the basis for a jury's verdict, see *Bravo-Fernandez v. United States*, 580 U. S. 5, 10, 137 S. Ct. 352, 196 L. Ed. 2d 242, the Double Jeopardy Clause prohibits second-guessing the reason for a jury's acquittal." *McElrath v. Georgia*, Holding, p. 419.

Ultimately, from the colonial period, to *Coffey* in 1886, progressing through *Ball*, *Oppenheimer, Ashe v. Swinton, Powell, Martin Linen Supply, Yeager* and *McElrath* in 2024, an acquittal is res judicata as to all its findings of fact where such facts are required in other counts within the same indictment or subsequent indictments.

And that would include the present case where the jury found as fact Petitioner had nothing to do with firearms, where the fact of such involvement was a requirement of aiding and abetting aggravated murder and where complicity for firearms was also a requirement of each and every one of the predicate offenses of aggravated murder as charged.

***Powell* does not apply in habeas**

As noted above, *Powell*'s major contribution was to recognize that *Oppenheimer*, *Ashe v Swenson* and *Sealfon* corrected the great error of *Dunn*, where *Dunn* had held res judicata does not apply to an acquittal that conflicts with a conviction in the same trial under the same indictment. Once an acquittal is acknowledged to have a preclusive effect in the same trial, under the same indictment, it eliminates inconsistency and *Dunn*'s holding that "(2) Consistency in the verdict is not required" is also overthrown. Inconsistency becomes impossible where there is res judicata since there can be no longer a contrary finding as to the same facts comprising an essential element. Thirty-six years before *Powell* in *Sealfon,* the Court held "The doctrine of res judicata is applicable to criminal as well as civil proceedings, and operates to conclude those

matters in issue which have been determined by a previous verdict, even though the offenses be different." Twenty-five years after *Powell*, *Yeager* held identically "[I]f the possession of insider information was a critical issue of ultimate fact in all of the charges against Yeager, a jury verdict that necessarily decided that issue in his favor protects him from prosecution for any charge for which that is an essential element." *Yeager*, U.S. page 111.

Oddly, *Powell* did not prefer the constitutional resolution. "We believe that the *Dunn* rule rests on a sound rationale that is independent of its theories of res judicata, and that it therefore survives an attack based on its presently erroneous reliance on such theories." At U.S. page 64, [underline added]. *Powell* proceeds to cite a number of these "rationales", all of which appeared in the holding, but all rationales and holdings are going to face the great weight of constitutional authority as cited by the Supreme Court in its holdings already cited in this brief. *Powell* is aware of the problem of constitutional constructions that contradict each of the rationales, for it was *Powell* that authoritatively pointed out the constitutional error in *Dunn*. *Powell* therefore prefaced its rationales concerning inconsistent verdicts with a most important caveat: "[W]e therefore address the problem only under our supervisory powers over the federal criminal process." At U.S. page 65, [underline added]. Because this limitation finds little notice and no discussion in subsequent state or federal treatments of *Powell*, it needs emphasizing.

There is a significant corpus of cases citing the supervisory powers of the federal courts arising from their inherent powers over federal criminal proceedings. But Petitioner is not before the court protesting federal violations of federal rights, as in *Powell*. Petitioner was tried criminally in a state court under state law and is before the federal courts on a petition for habeas corpus, a judicial review of whether a State criminal proceeding violated Petitioner's federal

constitutional rights under the Fourteenth, Fifth and Sixth Amendments. The federal courts have no inherent "supervisory powers" over the state courts. *Powell*, issued under the Court's supervisory power over federal criminal procedures, is not applicable in a habeas proceeding. As set forth at *McNabb v. United States*, 318 U.S. 332,340 (1943):

> In the view we take of the case, however, it becomes unnecessary to reach the Constitutional issue pressed upon us. For, while the power of this Court to undo convictions in state courts is limited to the enforcement of those "fundamental principles of liberty and justice," *Hebert v. Louisiana*, 272 U.S. 312, 316, which are secured by the Fourteenth Amendment[3], the scope of our reviewing power over convictions brought here from the federal courts is not confined to ascertainment of Constitutional validity. Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards for securing trial by reason which are summarized as "due process of law" ..."

Petitioner's case seeks to "undo convictions in state courts," not challenge federal misconduct. The supervisory powers of *Powell* do not apply to Ohio's conduct of Petitioner's trial since it lacks federal conduct.

Even if the holdings of *Powell* applied, the "supervisory power" cases hold the supervisory power of the federal courts must yield to constitutional principles. See below. Habeas corpus is instead brought under a statute which has as a primary requirement allegations of State violations of federal constitutional rights authoritatively established by holdings of the United States Supreme Court. Those holdings have been set forth above. Habeas corpus is sine qua non a constitutional inquiry, not a "supervisory power" adjudication.

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[3] Subsequent Supreme Court cases allowed review of State holdings under the Fifth and Sixth Amendments also.

Most often, the supervisory powers are invoked to address procedural abnormalities by the Government that are not on all fours with procedural or constitutional prohibitions but which nevertheless impugn the federal courts. In the criminal context, the rights of defendants are usually at issue. Thus, in *McNabb* three defendants were held incommunicado by federal officers and questioned for over thirty hours without first being presented to a magistrate as required. The Court addressed the matter under its supervisory power rather than make a constitutional analysis. In *Elkins v. United States*, 364 U.S. 206 (1960) it was a matter of supervisory powers rather than constitutional adjudication where :

> "Evidence obtained by state officers during a search which, if conducted by federal officers, would have violated the defendant's immunity from unreasonable searches and seizures under the Fourth Amendment is inadmissible over the defendant's timely objection in a federal criminal trial, even when there was no participation by federal officers in the search and seizure". Holding, at U.S. page 206.

*Elkins* was a federal case treating federal lapses, and so supervisory powers potentially applied.

In *Rea v. United States*, 350 U.S. 214 (1956):

> "On the basis of evidence seized under an invalid federal search warrant, petitioner was indicted in a federal court for unlawful acquisition of marihuana. On his motion under Rule 41(e) of the Federal Rules of Criminal Procedure, this evidence was suppressed. Thereafter he was charged in a state court with possession of marihuana in violation of state law. Alleging that the evidence suppressed in the federal court was the basis of the state charge, petitioner moved in a federal court for an order enjoining the federal agent who had seized the evidence from transferring it to state authorities or testifying with respect thereto in the state courts. Held: The motion should have been granted. At U.S. page 214.

*Rea* was a federal case treating federal lapses, and so supervisory powers applied.

In *United States v. Payner*, 447 U.S. 727 (1980), federal agents were found responsible for theft of a briefcase from a third party to obtain evidence against unknown persons attempting

to conceal taxable funds. This was considered under the Court's supervisory powers rather than constitutionally. *Payner* was a federal case treating federal lapses, and so supervisory powers potentially applied.

There are limitations on using the supervisory powers, especially where constitutional values are clearly implicated. In *United States v. Hasting,* 461 U.S. 499, 499 (1983) it was said:

> "At respondents' trial in Federal District Court on charges of kidnaping and transporting women across state lines for immoral purposes, and conspiracy to commit such offenses, the victims' testimony included recitals concerning multiple incidents of rape and sodomy by respondents. The defense relied on a theory of consent and -- inconsistently -- on the possibility that the victims' identification of respondents was mistaken. None of the respondents testified. During the prosecutor's summation to the jury, defense counsel objected when the prosecutor began to comment on the defense evidence, particularly that respondents never challenged the kidnaping, the interstate transportation of the victims, and the sexual acts. A motion for a mistrial was denied, and the jury returned a guilty verdict as to each respondent on all counts. The Court of Appeals reversed the convictions and remanded for retrial, concluding that the summation violated respondents' Fifth Amendment rights under *Griffin v. California*, 380 U.S. 609. The court declined to rely on the harmless-error doctrine, stating that application of the doctrine 'would impermissibly compromise the clear constitutional violation of the defendants' Fifth Amendment rights.'
> "Held:
> 1. The Court of Appeals erred in reversing the convictions apparently on the basis that it had the supervisory power to discipline prosecutors for continuing violations of *Griffin*, supra, regardless of whether the prosecutor's arguments constituted harmless error."

*Hasting* was a federal case treating federal lapses, and so supervisory powers potentially applied, but were trumped by constitutional consideration.

And returning to *Payner* at U.S. 727, the Court had held:

> "[T]he values assigned to the competing interests of deterring illegal searches and of furnishing the trier of fact with all relevant evidence do not change because a court has elected to analyze the question under the supervisory power instead of the Fourth Amendment. Such power does not

> extend so far as to confer on the judiciary discretionary power to disregard the considered limitations of the law it is charged with enforcing."

At U.S. page 735, in support of the holding, the Court had reasoned "We conclude that the supervisory power does not authorize a federal court to suppress otherwise admissible evidence." And at U.S. page 737 the Court added:

> "This reasoning, which the Court of Appeals affirmed, amounts to a substitution of individual judgment for the controlling decisions of this Court. Were we to accept this use of the supervisory power, we would confer on the judiciary discretionary power to disregard the considered limitations of the law it is charged with enforcing. We hold that the supervisory power does not extend so far."

And J. Marshall in dissent cited "*Elkins v. United States*, supra, at 223 (federal courts should not be 'accomplices in the willful disobedience of a Constitution they are sworn to uphold')". This echoed the earlier voice of J. Reed in dissent in *Upshaw v. United States*, 335 U.S. 410, (1948) "When not inconsistent with a statute, or the Constitution, there is no doubt of the power of this Court to institute, on its own initiative, reforms in the federal practice [*415] as to the admissibility of evidence in criminal trials in federal courts. 118 U. S. C. § 687." At U.S. pp. 414-415.

The limitations imposed on the supervisory powers by constitutional principles are relevant to Petitioner's case. Unlike the usual criminal law exercise of the supervisory powers on behalf of defendants alleging oppression by Government wrongdoing, *Powell* is unique in exercising the supervisory power to protect the Government's interest rather than the citizen's interest. At base, *Powell* sees the problem as unfair unilateral issue preclusion: verdicts of acquittal are untouchable while the Government must abide challenges to verdicts of guilty. In the context of "inconsistent verdicts", it is only fair, *Powell* concludes, that if the Government

cannot attack an acquittal that may or may not have been in error, it is only reasonable that the defendant should have to abide a conviction that may or may not have been in error. Thus, a holding of *Powell* is "(e) Here, respondent was given the benefit of her acquittal on the conspiracy count, and it is neither irrational nor illogical to require her to accept the burden of conviction on the telephone facilitation counts." P. 69.

Perhaps not illogical or irrational, but in some circumstances, unconstitutional, as where Fifth Amendment claim preclusion applies. The Fifth Amendment is the great protection of the citizen against government abuse. That *Powell* uses this shield as a sword against the citizen's Fifth Amendment protection against double jeopardy is notable. "Were we to accept this use of the supervisory power, we would confer on the judiciary discretionary power to disregard the considered limitations of the law it is charged with enforcing." *Payner* at U.S. 72. And this *Powell* holding proceeds from the same logic in *Powell* that held

> " (a) The *Dunn* rule embodies a prudent acknowledgment of a number of factors. First, inconsistent verdicts -- even verdicts that acquit on a predicate offense while convicting on the compound offense -- should not necessarily be interpreted as a windfall to the Government at the defendant's expense. It is equally possible that the jury, convinced of guilt, properly reached its conclusion on the compound offense, and then through mistake, compromise, or lenity arrived at an inconsistent conclusion on the lesser offense. But in such situations the Government has no recourse if it wishes to correct the jury's error. The fact that the inconsistency may be the result of lenity, coupled with the Government's inability to invoke review, suggests that inconsistent verdicts should not be reviewable at the defendant's behest." U.S. page 57

But it would be unconstitutional where the predicate offense is an essential element of the compound offense and under the federal constitution the State must prove every element of a

State offense beyond a reasonable doubt, and unconstitutional where it did not give preclusive effect over a fact litigated to acquittal.

Another problem these holdings present to *Powell* as an exercise of supervisory power is that even viewing Petitioner's habeas petition as a federal criminal case, *Powell* would not apply to Petitioner who has cited to constitutional bases for her writ as a requisite of habeas corpus standing where a supervisory opinion is always subject to constitutional rights. If the State points to *Powell* as relieving it of a challenge to Petitioner's inconsistent guilty verdict, Petitioner has pointed to *Coffey*, *Oppenheimer, Dunn, Sealfon, Ashe, Martin Linen Supply, Yeager and McElrath* for constitutionally required preclusion, and *Jackson, Winship* and *Gaudin* as to the constitutional necessity of sufficient proof of every element of the offenses.

**The Sixth Circuit is in error**

The Sixth Circuit ultimately ruled "Hollins was never put twice in jeopardy, as the inconsistent verdicts here all occurred in the same trial. Put simply, Hollins does not establish that the Ohio Court of Appeal's decision was contrary to or an unreasonable application of federal law." P. 5. The Circuit depended on *Dunn* and *Powell* as authority, where *Dunn*'s holding that an acquittal of a charge in the same trial was not res judicata was actually overturned by *Powell* as not correct when *Dunn* was issued, contradicting the prior *Oppenheimer* case, and was not correct subsequently in *Sealfon* and *Ashe v.Swenson*. *Powell* overturning *Dunn* is authority for the proposition that an acquittal has a res judicata effect in the same trial.

As for double jeopardy, Petitioner was tried 44 times for aiding and abetting the possession or use of firearms punishable by 1 or 3 years in prison for each, and although acquitted, tried again whether she aided and abetted the possession or use of firearms and was

imprisoned for convictions. That is being put to jeopardy twice where there was a constitutionally unimpeachable acquittal. The Court allowed the practice only once, in *Powell,* under a supervisory power that does not exist on habeas. No Court case has ever again cited *Powell* to jail someone acquitted of an essential fact necessary to conviction on another crime, whether in the same proceeding or another, on direct appeal or on habeas. It is a distinction not made by the Court since *Powell* overturned *Dunn.*

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Anita Hollins

Date: 11-25-2024