NO. 20-_____

In the Supreme Court of the United States

SUPERINTENDENT HOUTZDALE SCI AND THE ATTORNEY GENERAL PENNSYLVANIA,

Petitioners,

v.

AARON EDMONDS TYSON,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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DECEMBER 17, 2020 *COUNSEL FOR PETITIONERS*

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QUESTIONS PRESENTED

Under Pennsylvania law it is well-settled that to be found guilty of First Degree Murder as an accomplice, a defendant must have the specific intent to kill and to aid, attempt to aid, or agree to the aid the principal in the commission of the crime charged. The trial court's jury instructions tracked Pennsylvania accomplice liability law and informed the jury of the required elements of the offense, and in no way relieved the burden to prove each element of the crime charge beyond a reasonable doubt. The Third Circuit Court of Appeals reversed the Pennsylvania appellate courts and U.S. District Court, laboring to find a due process violation by characterizing the jury instructions as ambiguous and leaping to conclude that counsel committed error, which were reasonably likely to cause the jury to misapply the law and relax the burden of proof.

1. Whether the review required under AEDPA § 2254 and *Cullen v. Pinholster*, 563 U.S. 170 (2011) is violated by reliance upon a "some ambiguity" standard utilized by the Court of Appeals to find a due process violation without affording the required benefit of the doubt to both defense counsel and the trial court?

2. Does the Court of Appeals decision granting habeas relief on the basis of alleged erroneous jury instructions in a state accomplice murder trial err by failing to apply this court's own precedent in *Waddington v. Sarasaud*, 129 S.Ct. 823 (2009)?

3. By ignoring whole sections of the trial court's charge to the jury with respect to accomplice liability and failing to view it in the context of the trial record did the Court of Appeals err in concluding that there exists a substantial and not just a conceivable likelihood of a different result?

PARTIES TO THE PROCEEDINGS

Petitioners

- Superintendent of the State Correctional Institute Houtzdale, and
- The Pennsylvania Attorney General through the Office of District Attorney Monroe County Pennsylvania.

Respondent

- Aaron Edmonds Tyson

LIST OF PROCEEDINGS

United States Court of Appeals for the Third Circuit

No. 19-1391

Aaron Edmonds Tyson, *Appellant,*
v. Superintendent Houtzdale SCI;
Attorney General Pennsylvania

Date of Final Opinion: September 24, 2020

United States District Court for the Middle District of Pennsylvania

Civil No. 3:13-cv-2609

Aaron Edmonds Tyson, *Petitioner,*
v. Barry Smith, et al., *Respondents*

Date of Opinion: February 6, 2019

Superior Court of Pennsylvania

No. 730 EDA 2007

Commonwealth of Pennsylvania, *Appellee,*
v. Aaron Tyson, *Appellant*

Date of Opinion: January 11, 2008

Court of Common Pleas of Monroe County

No. 817 Criminal 2003

Commonwealth of Pennsylvania, *v.*
Aaron Tyson, *Defendant*

Date of Verdict: May 9, 2006

Date of Sentencing: July 17, 2006

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Superintendent Houtzdale SCI and the Commonwealth of Pennsylvania respectfully petitions this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The Order and Opinion of the Third Circuit Court of Appeals, dated September 24, 2020, written by Judge Restrepo, is reported at *Tyson v. Superintendent, SCI Houtzdale*, ___ F.3d ___ (3d Cir. 2020) and included below at App.1a. The Third Circuit reversed the opinion of the District Court for the Middle District, dated February 6, 2019 and included below at App.31a, which denied Habeas Corpus Relief. The Third Circuit remanded with instructions to grant a Conditional Writ of Habeas Corpus regarding Tyson's conviction for accomplice to First Degree Murder so that the matter may be remanded to state court for further proceedings.

JURISDICTION

The United States Court of Appeals for the Third Circuit's Order reversing the District Court was issued on September 24, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. amend. XIV, § 1

The due process clause of the Fourteenth Amendment to the United States Constitution states

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

INTRODUCTION

Aaron Edmonds Tyson was tried before a jury for his role in the murders of the brothers Keith and Daniel Fotiathis. The prosecution's case was based upon the testimony of Tyson's accomplice Kasine George, who testified that he, along with Otis Powell and Tyson, each played a role in the double murder. Tyson identified the victims to Powell and George, instructed them to follow their vehicle, provided the murder weapon to Powell and operated the getaway car. George's role was disabling the victim's vehicle, by puncturing a tire. Powell actually killed the victims. The actions of Tyson, George and Powell were in concert with each other, designed to effectuate the shooting, and clearly laid out to the jury.

The defense at trial employed the strategy of challenging George's credibility, maintaining that his testimony was suspect and should not be believed regarding Tyson's involvement. In attacking George's credibility the defense fought for and obtained a jury instruction known as the "Corrupt and Polluted Source" instruction, which cautions a jury to treat accomplice testimony with great caution and disfavor "as though coming from a corrupt and polluted source."

On May 9, 2006, following due deliberation and after being fully instructed on the status of the law with the respect to accomplice liability, the jury convicted Tyson of two counts of Murder in the First Degree as an accomplice and acquitted him of two counts of Murder in the Third Degree as an accomplice. Now, over fourteen years later the Third Circuit has reversed that conviction by second guessing the strategies of defense counsel and cherry picking the trial court's instructions to the jury. The ruling is in violation of the AEDPA and case law. This case provides an ideal vehicle to reconcile the conflict between the standard courts must utilize to determine actions under AEDPA and the deference-ignoring standard employed by the Third Circuit.

STATEMENT OF THE CASE

A. The Murders

In its unpublished Memorandum Opinion in *Commonwealth v. Tyson*, the Pennsylvania Superior Court summarized the factual background underlying Tyson's two convictions for First Degree Murder as follows:

> On April 24th, 2002 [Tyson], [Powell] and Kasine George, drove to a Stroudsburg, Pennsylvania crack house that they controlled. [Tyson] left the car in order to resupply the house with drugs. When [Tyson] returned to the vehicle, [Tyson] stated that two white boys had just pulled a gun on him. George described [Tyson] as angry at that time. [Tyson], who was at that point a passenger in the car, took a 9mm handgun from the center console. [Tyson] racked the slide of the gun, thus arming it. [Tyson] told Powell, who was driving, to pull from the location where the vehicle was parked.
>
> [Tyson] pointed to a van and indicated that it was being driven by the two who had pulled a gun on him. With Powell driving, the three followed the van to a club. When the two white men entered that club, Powell gave George a knife and directed him to puncture the tires of the van. George did so to at least one of the tires. When George returned to the car, [Tyson] was in the

driver's seat. Powell was now a passenger and he asked [Tyson] for the gun. After five or ten minutes the two white men exited the bar, entered the van and left the location.

With [Tyson] now driving, the three again followed the van. It eventually stopped due to the flat tire. At that point, [Tyson] and his two companions were going to exit the car, but Powell told the other two to wait. Powell then walked to the van. As he did so, [Tyson] backed the car to a point where he and George could see what was transpiring around the van. At that point, Powell shot the two occupants of the van, Daniel and Keith Fotiathis. . . . [Powell] then ran back to the car. Powell, George, and [Tyson] left the scene. [Tyson] drove the vehicle. The three discussed whether they should go to New York, but eventually decided to return to their nearby home. [Daniel Fotiathis] was shot in the neck, the lower right chest, and the lower right back. Gunshots struck [Keith Fotiathis] in the lower right back, the right elbow and the right wrist. Trial testimony established multiple gunshot wounds as the causes of death for the victims. The manner of each death was homicide. Police found eight shell casings from a 9mm at the scene.

George was later arrested on drug charges. Thereafter, [George] provided information to the authorities regarding the case. [Tyson] was eventually arrested and charged with the homicide of both victims.

Commonwealth v. Tyson, 947 A.2d 834 (Pa. Super 2008) (unpublished table decision), *appeal denied*, 989 A.2d 917 (Pa. Super 2009).

B. The Trial

At trial the Commonwealth's theory was simple, direct and unwavering. Tyson was part of a plan to kill the Fotiathis brothers after they threatened him with a gun while he was in the parking lot of the gas station adjacent to the drug house that he and Kasine George were dealing from. The Commonwealth articulated clearly throughout the trial that Tyson's role in the killing was as that of a helper, a facilitator, in other words, an accomplice.

It was Tyson who had the dispute with the victims, who pointed them out to his two compatriots George and Powell and who directed that they be followed. Tyson introduced the murder weapon, his 9mm handgun, which he retrieved from the center console of the vehicle and armed it by racking the slide. After the brothers stopped at the club known as the 'Outer Limits,' George was sent to deflate one or more of the tires of the vehicle. When George returned to Tyson's vehicle, Tyson was now driving and Powell was in the front passenger seat. The trio began to follow the victims who had reentered their minivan. Once the van pulled over so the victims could repair the flat, it was Tyson who maneuvered his vehicle back and secreted it at a distance from the target. Powell then exited the car with the handgun that Tyson had given him and promptly shot the two victims. He then ran back to the car and Tyson sped away, leaving the area and eventually the state. The case was built entirely on the testimony of the accomplice Kasine

George. If George was deemed not credible by the jury then the Commonwealth's case would disintegrate. George was the glue that connected Tyson to the crime.

The task for the defense was therefore plain: to discredit George so that the jury would not believe him. But the defense knew that it could not attack George through the entire breadth of his testimony. Rather, the defense would have to make certain concessions. For instance, the Commonwealth had established that George and Tyson knew each other since both were children growing up in New York. The two had for years been involved in the distribution of illegal narcotics in New York, Allentown, Pennsylvania, and the Poconos. George himself had been sentenced by federal authorities for drug trafficking to a term of imprisonment of approximately 12½ years. Tyson, too, had been charged with drug trafficking and had entered a guilty plea to one count of conspiracy to distribute more than 50 grams of crack cocaine and received a sentence of approximately 16 years and 8 months. So, the defense knew it would be fruitless to contest the role of Tyson as a drug dealer working with George.

Similarly, the Commonwealth introduced evidence that Tyson owned the black Nissan Maxima with dark tinted windows that was used to follow the victims and flee the crime scene. Tyson had been stopped in that vehicle two days before the murders by a local police officer. Additionally, the car was titled to Tyson. So the defense could not deny that the black Nissan Maxima with dark tinted windows observed by some bystanders was in fact Tyson's vehicle. Instead, the defense tried to establish through cross examination that the vehicle was not exclusive to

Tyson but that other members of the drug ring, including Kasine George, regularly used that vehicle.

It is within the context of these and other facts that the actions of Tyson, Powell and George were analyzed by the jury and formed the basis for the instructions given by the trial judge. The dangerous world of drug dealers, turf wars, threats from robbers, and of course heat from the police was vividly described by George and other members of Tyson's drug ring. At the close of evidence, the defense moved for a judgment of acquittal arguing that there was no evidence of an agreement, no discussion to kill, that at best it was merely a plan to confront the victims. The trial court denied the motion, noting that it was Tyson who gave the gun to Powell, adding, in the folksy manner of the late learned trial judge, the Honorable Ronald Vican, that the circumstances, including the high degree of action in concert between the defendant and his friends, showed they were not out deer hunting; there was more than circumstantial evidence that would allow the case to go to the jury. App.160a.

Following up with the strategy of discrediting George by all means possible, the defense attorney during closing argument told the jury not to accept the word of Kasine George; that the mere hesitation to accept the word of Kasine George was confirmation of reasonable doubt. *Id.* at 167a. The defense attorney likened any reliance on the word of Kasine George as tantamount to hiring him as the would-be babysitter of one's own children, again equating any hesitation with such a decision as proof of reasonable doubt. *Id.* at 166a. The defense maintained that it was equally plausible that George committed the crime not with Tyson, but other members of the ring: only fingering

Tyson out of animosity. To make its point the defense reminded the jury that there was nothing that put Tyson at the scene except the word of a 'corrupt and polluted source,' *i.e.*, George.

The acts leading to the murder of the victims were never contested by the defense. It was obvious that the victim's vehicle had been disabled when its tires were slashed. It was obvious the victims were killed by multiple gunshots from a 9mm handgun. It was obvious and that a black Nissan Maxima with dark tinted windows was involved. The fact that George had admitted to slashing the tires and was part of the group that killed the victims was also not challenged by the defense. It was only George's fingering of Tyson that was attacked by the defense. In other words, the acts that would be sufficient to make one an accomplice to murder were never in dispute, only the identity of Tyson as one of those involved was challenged.

C. The Jury Instructions

The trial court began jury instructions by going over the criminal information with the jury. The criminal information specified precisely what Tyson's role was as an accomplice. App.224a. Reading from the criminal information, the charging document, the court instructed the jury that Tyson was alleged to be an accomplice in the murder of Daniel and Keith Fotiathis; that the Commonwealth alleged that Tyson agreed with Otis Powell and Kasine George to kill Daniel and Keith Fotiathis, that he allegedly supplied the firearm to Otis Powell who did the actual shooting, and that Tyson allegedly operated the vehicle which drove from the scene. *Id.* The court made it clear that

Tyson was being charged as an accomplice not as a shooter. *Id.*

The trial court explained to the jury that there were four possible verdicts to consider: guilty or not guilty with respect to First Degree Murder, one for Daniel and one for Keith Fotiathis, and guilty or not guilty with respect to Third Degree Murder, one for Daniel Fotiathis and one for Keith Fotiathis. All four possible verdicts alleged that Tyson was an accomplice in the taking of the lives of Keith and Daniel Fotiathis. App.225a. Explaining the concept of accomplice lability in more detail the trial court stated: "Mr. Tyson is not charged with being the one who did the killing. He is charged with being an accomplice . . . in other words Kasine George testified here and tells you that that he and the defendant and Otis Powell acted in concert in this matter which has been laid out to the police about the killings of Keith and Daniel Fotiathis." *Id.* at App.227a. The trial court explained the required mental state of an accomplice for murder, taking much of the instruction from Pennsylvania Standard Instruction 8.306(a) 'Liability for Conduct of Another.' For instance, the trial court instructed the jury:

> [Y]ou may find the defendant guilty of the crime without finding that he personally performed the acts required for the commission of that crime. The defendant is guilty of a crime if he is an accomplice of another person who commits the crime. He is an accomplice if with the intent to promote or facilitate the commission of a crime he encourages, requests or commands the other person to commit it or agrees to aid or attempts to aid the other person in planning, organizing and

> committing it. You may find the defendant guilty of a crime on the theory that he was an accomplice as long as you are satisfied beyond a reasonable doubt that the crime was committed and that the defendant was an accomplice of the person who actually committed the crime.

Id. at 229a.

The trial court also read the requested defense instruction, the special cautionary instruction known as the "Corrupt and Polluted Source."

> In deciding whether or not you are going to believe Kasine George, you should be guided by these principles which you should use to view his testimony. The testimony of Kasine as an accomplice, because of what he admitted to having done, should be looked upon with disfavor because it comes from a corrupt and polluted source. Examine Kasine George's testimony closely, accept it only with caution and care. You should consider whether with Kasine George's testimony that the defendant committed this crime in such a manner as I have described to you and the information by the Commonwealth whether that is supported by, in whole or in part or contradicted by other evidence in whole or in part anything you heard during the course of the trial. Because if this is supported by independent evidence than this becomes more dependable. You have the right to, if you choose, find the defendant guilty as an accomplice based on Kasine George's testimony alone even though you choose to find maybe it is not supported

> by any independent evidence. Even though you decide that Aaron Tyson is an accomplice and Kasine George has given you testimony to that effect, that testimony standing alone is sufficient evidence on which to find the defendant guilty, if, after the foregoing principles, you are convinced beyond a reasonable doubt that Kasine George testified truthfully and the defendant committed the crime as an accomplice.

Id. at 227-228a.

Only the charges of First Degree and Third Degree Murder, under a theory of accomplice liability were considered by the jury. The trial court carefully instructed the jury on the elements for those offenses, including *mens rea*. With respect to First Degree Murder, the jury was instructed that specific intent to kill was the requisite mental state, while Third Degree Murder could be shown with various mental states which can make up 'malice,' the necessary baseline turning a killing into a murder. These various mental states were also defined for the jury. Of course, with each mental state to consider, the jury was repeatedly reminded that the defendant was charged as an accomplice and that he had to have actually agreed with the principal in the commission of the crime and to aid or attempt to aid him.

The jury carefully considered the evidence and eventually entered a verdict. With respect to the two counts of Murder in the First Degree as an accomplice, the jury found Tyson guilty. However, with the two counts of Murder in the Third Degree as an accomplice, those which required only the general mental state of malice and not the specific intent to kill, the jury found

Tyson not guilty. Therefore, the jury had to conclude that by agreeing to aid Powell in the killing of the victims, Tyson himself had the specific intent to kill.

D. Appeals in the State Courts

On direct appeal the Pennsylvania Superior Court affirmed Tyson's conviction in an unpublished Memorandum Opinion filed on January 11, 2008. One of the issues in direct appeal was whether the evidence was sufficient to convict Tyson of two counts of Murder in the First Degree as an accomplice. In affirming Tyson's conviction the Superior Court identified the elements of First Degree Murder found at 18 Pa. C.S § 2502 and defined accomplice liability under 18 Pa. C.S. § 306. In particular, the Superior Court noted that a person is legally accountable for the conduct of another when " . . . with the intent of promoting or facilitating the commission of the offense he: (i) solicits such other person to commit it; or (ii) aids or agrees or attempts to aid such other person in planning or committing it." Citing *Com. v. Schoff*, 911 A.2d 147, 161 (Pa. Super. 2006), the Superior Court noted that "two prongs must be satisfied for defendant to be found guilty as an accomplice. First, there must be evidence that the defendant intended to aid or promote the underlying offense. Second, there must be evidence that the defendant actively participated in the crime by soliciting, aiding, or agreeing to aid the principal. While these two requirements may be established by circumstantial evidence, a defendant cannot be an accomplice simply based on evidence that he knew about the crime or is present at the crime scene. There must be some additional evidence that the defendant intended to aid in the commission of the underlying crime and then did or attempted to do so. With regard to the amount of aid,

it need not be substantial so long as it was offered to the principal to assist him in committing or attempting to commit the crime."

The Superior Court on direct appeal concluded that the evidence was sufficient to satisfy the above-quoted test for accomplice liability regarding First Degree Murder. "The evidence showed that [Tyson], who was angry because two men had pulled a gun on him, identified the van carrying those men. He then directed Powell to drive and later drove the car himself, thus pursuing the victims. [Tyson] produced a murder weapon and supplied it to the shooter. The shooter then intentionally fired the gun at both victims striking them in vital areas and causing their deaths. [Tyson] drove his companions from the scene, the three of them discussing where they should go. We cannot say that the foregoing evidence is so weak and inconclusive that no probability of fact can be drawn therefrom. To the contrary, when viewed most favorably to the Commonwealth, this evidence and its reasonable inferences could lead a fact finder to conclude beyond a reasonable doubt that [Tyson] intended to promote the murder of the victims and that he actively participated in that murder by aiding the principal (*i.e.*, the shooter) when he identified the intended victims, told the principal to drive, drove himself in pursuit of the victims, introduced the murder weapon, supplied it to the principal, and then helped the principal flee the scene. Thus, there was evidence that [Tyson] intended to cause the shooting death of the victims and that he aided in the commission of the crime". *Com. v. Tyson*, 947 A.2d 834 (Pa. Super 2008) (unpublished table decision), *appeal denied*, 989 A.2d 917 (Pa. 2009).

Tyson, through counsel, filed a Petition for Allowance of Appeal with the Pennsylvania Supreme Court. After the Pennsylvania Supreme Court denied the Petition for Allowance of Appeal, Tyson filed a Pro Se Petition for Relief under the Pennsylvania Post-Conviction Relief Act (PCRA). That petition was filed on November 19, 2010. An amended PCRA petition was also filed on Tyson's behalf through counsel. One of the issues raised in the amended PCRA petition was the alleged failure of trial counsel to request an instruction regarding accomplice liability and the specific intent to kill.

On February 1, 2012, the trial court entered an Order and 62-page Opinion denying the PCRA petition. When that decision was appealed to the Superior Court, the trial court also filed an opinion in support of its order consisting of an additional 18 pages.

The Pennsylvania Superior Court affirmed the decision of the PCRA court and denied Tyson's PCRA petition. In affirming the denial of the PCRA petition, it is clear that the Pennsylvania Superior Court viewed the jury instructions as a whole and, importantly, analyzed the issue in conjunction with the evidence at trial and the particular positions of both the defense and the prosecution. For instance, in affirming the admission into evidence of the proof of Tyson's drug dealing, the Superior Court discussed how the relevance of that evidence went toward the motive for the shooting itself. Since the circumstances showed that Tyson was threatened by an apparent gun in the possession of one of the victims during the very time period that

he was resupplying his drug house.[1] Agreeing with the trial court that this evidence of motive helped explain the sequence of events and informed the jury of the natural development of the case, the court further stated:

> [W]e agree with the above analysis and further add that evidence of [Tyson's] drug dealing was also highly relevant to explain the motive behind the shootings. Indeed at trial, the evidence demonstrated that the impetus for the shootings was when Keith Fotiathis pulled a gun on [Tyson] within [Tyson's] own drug distribution turf . . . as Mr. George testified, this action was particularly egregious to a drug dealer such as [Tyson] because, 'in the drug trade, it is necessary to convey an appearance to others that you are a tough guy not to be screwed with . . . it keeps the wolves at bay, and they are less likely to try you. . . . given that it was necessary for [Tyson], as a drug dealer, to appear strong—and given that Mr. Fotiathis made Appellant appear weak within his own drug distribution turf—it became readily apparent that [Tyson's] drug dealing was highly relevant in this case to explain the motive behind the murders. Certainly, the evidence of [Tyson's] drug dealing was essential to explain why [Tyson] might have viewed the murder of the Fotiathis brothers to be an occupational necessity.

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[1] No gun was ever recovered from the victims or their minivan. Instead, the police recovered a BB gun on the floor of the van.

Commonwealth v. Tyson, 947 A.2d 834 (Pa. Super 2008) unpublished, *appeal denied*, 989 A.2d 917 (Pa. 2010).

The denial of Tyson's PCRA petition was affirmed on appeal by the Pennsylvania Superior Court at *Commonwealth v. Tyson*, 2013 WL11283845 (Pa. Super 2013). Reliance by the Superior Court in affirming the denial of the PCRA petition was made on well-settled state authority, which requires that jury instructions be viewed as a whole. *See Com. v. Maisonet*, 31 A.3d 689, 694 n. 2 (Pa. 2011); *Com. v. Daniels*, 963 A.2d 409, 429 (Pa. 2009).

E. Federal Habeas Review

On October 22, 2013, Tyson filed a Pro Se Petition for Relief under 28 U.S.C. § 2254. Tyson also obtained an Order holding the petition in abeyance pending exhaustion of claims presented in a second PCRA petition relevant here. On October 27, 2017, Tyson reactivated the previously stayed habeas proceeding and filed a brief in support of the petition.

On February 6, 2019, the District Court for the Middle District of Pennsylvania issued a Memorandum and Order denying the petition. App.31a. The district court correctly framed the analysis under the AEDPA, including the higher threshold required for a petitioner to prevail:

> [B]ecause the purpose of the AEDPA is to ensure that federal habeas relief functions as a guard against extreme malfunctions in the state's criminal justice systems and not as a means of error correction, *Green v. Fisher*, 565 U.S. 34, 38, (2011) (internal quotations

> and citations omitted), this is a difficult to meet and highly deferential standard . . . which demands that state-court decisions be given the benefit of the doubt. *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (internal quotations and citations omitted). The burden is on Tyson to prove entitlement to the writ.

App.51a. The decision is contrary to federal law if "the state court applies a rule that contradicts the governing law set forth in Supreme Court cases or if the state court confronts a set of facts that are materially indistinguishable from a decision of the Supreme Court and nevertheless arrives at a result different from Supreme Court precedent." *Williams v. Taylor,* 529 U.S 362, 405-06 (2000). A state-court decision reflects an unreasonable application of such law only where there is no possibility a fair-minded jurist could disagree that the state court's decision conflicts with the Supreme Court's precedence, a standard the Supreme Court has advised is difficult to meet because it was meant to be. *Harrison v. Richter*, 562 U.S. 86, 131 S.Ct. 770 (2011). As the Supreme Court has cautioned, "an unreasonable application of federal law is different from an incorrect application of federal law." *Id.* at 101; App.51a.

The district court began an in-depth analysis of the reasoning behind the state court's decisions affirming the conviction and denying the relief with regard to the appropriateness of the jury's charge.

After citing at length from the thorough opinions of the PCRA court Opinion and the Superior Court Opinion, the district court reviewed federal law with respect to a due process challenge to a jury instruction, one that was alleged to have relieved the Common-

wealth of proving every element of the crime charged beyond a reasonable doubt.

> Even if there's some ambiguity, inconsistency or deficiency in the instructions such an error does not necessarily constitute a due process violation. (Citation omitted.) Rather, the defendant must show both that the instruction was ambiguous and that there was a reasonable likelihood that the jury applied the instruction in a way that relieved the state of its burden of proving every element of the crime beyond a reasonable doubt . . . in making this determination the jury instruction may not be judged in artificial isolation but must be considered in the context of the instructions as a whole and the trial record.

App.57-58a (quoting *Waddington v. Sarausad*, 555 U.S. 179, at 190-191 (2009)) (further noting that *Waddington* rejected a habeas petitioner's claim that an accomplice liability instruction violated due process.)

F. The Court of Appeals Opinion

On September 23, 2020, the United States Court of Appeals for the Third Circuit issued an Opinion through the Honorable Judge Restrepo reversing the District Court's Order denying habeas corpus relief and remanding with instructions to grant a conditional Writ of Habeas Corpus regarding Tyson's conviction for accomplice to First Degree Murder. *Tyson v. Superintendent Houtzdale SCI*, 976 F.3d 382 (3d Cir. 2020); App.1a. A careful review of the Court of Appeals Opinion demonstrates that it failed to view the jury instruction as a whole and actually ignores the factual context of the trial record. The Court of Appeals inquiry

begins with a mischaracterization of the Commonwealth's theory of the case claiming that the Commonwealth's theory was that Tyson was guilty because he assisted the principal. *Tyson*, 976 F.3d at 387; App.4a. However, a review of the record as demonstrated above shows that the Commonwealth consistently brought to the fore the fact that the defendant, along with his accomplices, Kasine George and Otis Powell, all acted in concert in bringing about the deaths of the Fotiathis brothers. The concerted action consisted of Tyson's identifying the victims as the man who pulled the gun on him, pointing out their van to Powell and instructing him to follow it, waiting while the victims came back to their vehicle from a bar near a Kentucky Fried Chicken and continuing to follow the vehicle to a second nightclub. Then, while the victims were in that nightclub, George crept up to their van, looked inside it for the sign of a weapon and punctured at least one of the vehicle's tires so that it would become disabled. Thereafter, when the victims returned to their vehicle and drove away, Tyson followed them. When the victims pulled over Tyson passed them by, making a turn and parking at a discreet distance from them on an adjacent street. By that time, Tyson had given the murder weapon to Powell. Once Tyson parked, Powell got out of the vehicle, approached the victims, shot them at close range, and ran back to the waiting getaway vehicle with Tyson behind the wheel. So the Commonwealth's theory that this high degree of coordination was, in and of itself, proof that Tyson, too, possessed the specific intent to kill. The Court of Appeals Opinion ignores the facts at trial and the strategies of counsel.

Additionally, there is a degree of cherry picking with respect to the jury instructions themselves. For

example, the Court of Appeals stated, "the absence of an objection to the court's explanation of the *mens rea* element of First Degree Murder however is indefensible. The court inadvertently identified the actual shooter as an accomplice, and then informed the jury that the facts of record established the killings were intentional." *Tyson*, 976 F.3d at 393; App.18a. The trial court did no such thing. Rather, and in keeping with the defense position at trial, the Commonwealth's position, and the facts at trial, the late trial judge merely summarized the testimony of Kasine George, the only eyewitness to the murder who testified. The trial court carefully explained to the jury that there were specific instructions regarding George's credibility, and that if he were to be believed the action would show that the men acted in concert to bring about the killings.

Also on page 18 of the Opinion, the Court of Appeals states: " . . . we could find no language in the instruction that would lead the jury to connect the requisite intent to kill to the role of an accomplice." *Tyson*, 976 F.3d at 392; App.17a. But that, too, is simply not the case. For instance, as previously discussed, the trial court instructed as follows: "now, Mr. Tyson is not charged with being the one who did the killing. He is charged with being an accomplice. And that, in other words, Kasine George testified here and tells you that he and the defendant and Otis Powell acted in concert in this matter which has been laid out to the police about the killing of Keith and Daniel Fotiathis." App.227a. After instructing the jury that George's testimony should be treated with great caution and "looked upon with disfavor because it comes from and corrupt and polluted source," properly identifying George as an accomplice with Tyson, the

court instructed the jury that "the defendant is guilty of a crime if he is an accomplice of another person who commits the crime. He is an accomplice if with the intent to promote or facilitate the commission of a crime he encourages, requests or commands the other person to commit it or agrees or aids or agrees to aid or attempts to aid the other person in planning, organizing, committing it." *Id.* at 228-29a. There was clear evidence, if believed, that the defendant agreed with the others in the planning, organizing, and commission of the shooting deaths, *i.e.*, the murders of the victims. The instructions connect the requisite intent to kill to the role of an accomplice because the jury would have had to have found beyond a reasonable doubt that Tyson agreed with Powell, the slayer, to help him kill the victims. That concept itself requires proof that Tyson himself manifested the same specific intent to kill. Certainly, the District Court Opinion, the Superior Court Opinion, and the PCRA Court Opinion have all so found, were not unreasonable in their findings, and should have been afforded deference by the Court of Appeals.

Compounding its error, the Third Circuit went on to find that the defense counsel actions constituted error so serious as to deprive the defendant of a fair trial. Correctly noting that the standard to establish prejudice requires a more comprehensive analysis to determine whether it would be unreasonable to find the instruction did not render Tyson's conviction unfair, citing *Harrington*, the Court of Appeals indicated it needed to look to the instruction and whether it interfered with the jury's assessment of the evidence to the extent that but for the incorrect statements of law there is a substantial likelihood that a different

verdict would have been reached. *Tyson*, 976 F.3d at 397; App.26-27a. However, despite correctly stating the standard, it is clear that the Third Circuit did not conduct a thorough review of the record to determine whether the instruction interfered with the jury's assessment. In reaching a decision to the contrary the Third Circuit made several inaccurate conclusions from the record. For instance, with regard to the counts of Murder of the Third Degree, the Third Circuit incorrectly stated that the instruction was given after the court suggested to defense counsel that such an instruction would be appropriate. *Tyson*, 976 F.3d at 387; App.6a. However, a review of the record reveals the following interaction between defense counsel, the court, and the defendant prior to the instruction:

> MR. GAGLIONE: Your Honor, there was some discussion at the close of the evidence yesterday regarding whether or not we would agree to allow the court to charge the jury on accomplice liability with respect to Murder Of The Third Degree. After discussion with my client we would ask the court not to include an instruction on Murder in the Third Degree. Not only does it logically not flow from the evidence, I think legally speaking accomplice liability cannot flow toward Murder in the Third Degree. It has to be a specific intent crime. I have explained to my client that without that charge this is essentially an all or nothing proposition. And he understands that if the jury were to come back with a conviction that the court would have no option in this matter but to impose a sentence of life imprisonment . . .
>
> THE COURT: Mr. Tyson, I want to say this to you. I agree with your analysis that certainly—in fact, I

explained to the lawyers yesterday I don't think Third Degree Murder is a part of this case; however, I have been trying—a defense lawyer will always ask for the lesser charge, include the lesser charge because the prospect of the chance of a jury coming and finding a conviction of the First Degree they need something imposed to be lesser. And a lawyer would be remiss if he did not ask the court to have a Third Degree charge in a case like this. I don't think it fits. Frankly, I agree with you. But from a defense standpoint it is a wise thing to do . . .

MR. GAGLIONE: I explained yesterday, Judge, that I thought it should be in there and I still think it should be in there. Mr. Tyson do you think it should be?

THE DEFENDANT: If this is what you want to do.

THE COURT: I mean you say it is tactical but I said you would be remiss if you did not ask for it; he would have been criticized if he didn't ask for that. And if he were convicted of Third Degree or First Degree he would have been remiss. . . .

MR. GAGLIONE: Judge, we prefer to have it as per my conversation yesterday. And Mr. Tyson, are you okay with that.

THE DEFENDANT: Yes

MR. GAGLIONE: We prefer to have it in.

THE COURT: I know that the defense lawyer wanted it, but I don't want him to feel he has to after he agreed. It is his choice. I will take it out if he wants that.

MR. GAGLIONE: We prefer to have it in.

THE COURT: He does not want it. It is his choice. We will take it out.

MR. GAGLIONE: We would like to have it in.

THE COURT: Are you sure.

THE DEFENDANT: Yes.

THE COURT: Alright.

> . . . it does not fit in the evidence once you do it you cannot change your mind. If it goes in it is in. Do you understand that?

The Defendant: Yes.

THE COURT: That is what is going to be in.

MR. GAGLIONE: Yes.

THE COURT: Bring in the jury.

App.217-219a.

The inclusion of two counts of accomplice liability Murder in the Third Degree allows for the proper context of the jury's verdict. It is important to remember that the jury acquitted Tyson of the two counts of Murder in the Third Degree. However the jury convicted him of two counts of Murder in the First Degree. Both murder charges were given as based upon accomplice liability. The only difference between the elements of Third and First Degree was that First Degree required the specific intent to kill, while Third Degree Murder does not. By acquitting the defendant of Third Degree and convicting him of First Degree Murder, the jury clearly found that Tyson had the requisite specific intent to kill.

The Third Circuit also goes out on a limb when it concludes that Tyson could have had merely an intent to cause a confrontation with the victims. Such a conclusion flies in the face of the facts. A confrontation with the victims had already occurred. Based upon that confrontation, Tyson produced the murder weapon, arming it, and giving it to his accomplice, and thereafter engaging in all the other actions in concert, designed to disable the victims' vehicle and facilitate the shooting. Further, there is no crime charged of an intent to cause a confrontation. The jury instruction required that the jury find that an accomplice agrees to aid the principal in the planning or the commission of the offense charged. The only offenses charged were for the murder of the victims.

REASONS FOR GRANTING THE PETITION

This court should grant the Writ of Certiorari and reverse the decision of the Third Circuit for several reasons. First, the Third Circuit disregarded the state court's determination of state law. Namely, that the instructions given in trial properly instructed the jury as to accomplice liability under Pennsylvania law. The state court's determination that the jury instructions sufficiently instructed the jury as to the requirements of accomplice liability First Degree Murder should have been awarded proper deference by the Court of Appeals. However, through an erroneous view of the trial record and the failure to view the jury instructions as a whole, the Third Circuit found defects that do not exist.

The required doubly deferential standard of review required under AEDPA § 2254 and *Cullen v. Pinholster*, 563 U.S. 170 (2011) and other well established precedent have been violated as a result of the Third Circuit Court of Appeals determination. A substantial conflict therefore exists between the state court decisions and the Court of Appeals. The Third Circuit compounded its error by finding a substantial likelihood of a different result premised upon its faulty reasoning with respect to the jury instructions in the first instance. Once again, it ignored the proper level of deference owed to the state court and defense counsel under the AEDPA.

The Court of Appeals decision is in direct opposition to numerous precedent of the Pennsylvania Supreme Court. For instance, in *Daniels*, the Pennsyl-

vania Supreme Court upheld an accomplice liability instruction for First Degree Murder by reviewing similar instructions to those at bar. In *Daniels*, the contested jury instruction read as follows:

> [U]nder the law of Pennsylvania you may find a defendant guilty of a crime without finding that he personally engaged in the conduct required for commission of that crime or even that he was personally present when the crime was committed. A person is guilty of a crime if he is an accomplice of another person who commits that crime . . . he is an accomplice if, with the intent of promoting or facilitating commission of the crime, he solicits, commands, encourages requests the other person to commit it, or aids, agrees to aid, or attempts to aid the other person in planning or committing it . . . if an intent to kill exists, or if a killing was consciously done with knowledge of such consequences, or if the killer consciously decided to kill the victim, the killing was willful. If this intent to kill is accompanied by such circumstances as evidence or demonstrate a mind fully conscious of its own purpose and design to kill, it is deliberate . . .

963 A.2d at 430. In *Daniels*, the court concluded that the charge when read as a whole sufficiently instructed the jury regarding the requirement that an individual must possess the specific intent to kill in order to be convicted of First Degree Murder.

Similarly, in *Com. v. Thompson*, 543 Pa. 634, 674 A.2d 217 (1996) the Pennsylvania Supreme Court approved of the following instruction:

> You may find a defendant is guilty of a crime without finding that he personally performed the act or engaged in the conduct that is required to commit to the crime. The defendant is guilty of a crime if he's an accomplice of another person who commits the crime. He's an accomplice if with the intent to promote or facilitate the commission of a crime he either solicits, encourages, commands or requests the other person to commit it or he aids or agrees to aid or attempts to aid the other person in planning or committing it. You may find the defendant guilty of the crime on the theory that he was an accomplice as long as you're satisfied beyond a reasonable doubt that the crime was committed and that the defendant was an accomplice of the person who committed it.

Id. at 218. Since the accomplice liability instruction was preceded by the definition of the different degrees of murder, including the definition of the specific intent to kill, the court in *Thompson* upheld the charge. The challenged jury instruction here, when viewed as a whole, is entirely consistent and in accordance with *Thompson* and *Daniels*.

Not only is the Third Circuit's decision in stark contrast to well-established precedent of the Pennsylvania Supreme Court, it is also at odds with this honorable court's own precedent in *Waddington v. Sarausad*, 129 S.Ct. 823 (2009). At issue in *Waddington* was the Ninth Circuit's reversal of a Washington State murder conviction upheld by that state's Court of Appeals. The accomplice language in Washington State is substantially similar to that of the Commonwealth of Pennsyl-

vania. The Supreme Court, in an Opinion written by Justice Thomas, concluded that the Ninth Circuit erred in finding that the jury instruction violated the defendant's due process rights. Indeed, utilizing language very similar to the case at bar, Justice Thomas writing for the majority noted that the inquiry should have ended upon proper review of the entire charge because it would have resulted in a finding that the charge adequately instructed the jury and no further analysis was needed. While the Third Circuit cites *Waddington* in its opinion here, it does so obliquely for the conclusory proposition that a deficient instruction creates a reasonable likelihood the jury misapplied the law and relieves the government of its burden of proving each element of the crime charged beyond a reasonable doubt the resulting criminal conviction violates the defendant's constitutional right to due process. The Third Circuit should have applied *Waddington* for its main proposition, *i.e.*, that where an accomplice liability criminal homicide jury instruction parrots the language of that state's accomplice liability law and couples it with the elements needed for murder, no defect exists.

The requested Petition for Writ of Certiorari is necessary to resolve the conflict existing as a result of the Third Circuit's upending established state precedent and failing to apply the precedent of this Honorable Court as well.

CONCLUSION

For the reasons stated herein, the Petition should be granted and the decision below should be reversed.

Respectfully submitted,

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DECEMBER 17, 2020