IN THE SUPREME COURT OF THE UNITED STATES

Docket Number 20-988

BARRY SMITH, Superintendent, State Correctional Institution at Houtzdale, et al.,

Petitioners,

v.

AARON EDMUND TYSON,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Michael Wiseman*
Counsel of Record for Respondent

Wiseman & Schwartz, LLP
718 Arch Street, Suite 702 North
Philadelphia, PA 19106
215-450-0903
wiseman@wisemanschwartz.com

*Admitted to the Bar of this Court

Dated: February 21, 2021
Philadelphia, Pennsylvania

CITATIONS

An *Appendix* was filed in the Court of Appeals. The *Appendix* is available from PACER. Entries from it are cited as "A" followed by the page number.

The precedential Opinion of a unanimous Panel of the Court of Appeals for the Third Circuit (Jordan, Restrepo and Greenberg, J) reversing the District Court and ordering that the Writ be granted, is published at *Tyson v. Superintendent*, 976 F.3d 382 (3d Cir. 2020). It will be cited as Pan.Op., with page references to the published version.

The District Court's *Memorandum Opinion* is published on Westlaw at *Tyson v. Smith*, 2019 WL 462137 (M.D. Pa. Feb. 6, 2019). It will be referred to as District Court Opinion and cited as DCO with page references to the Westlaw version contained in the *Appendix*.

Some documents filed in the District Court are not included in the *Appendix*. They will be referred to by their Electronic Case Filing (ECF) number available on PACER.

The Pennsylvania Superior issued two opinions, neither of which are published:

> *Commonwealth v. Tyson*, 730 EDA 2007 (Pa.Super.Ct. Jan. 11, 2008) (Direct Appeal); and,
>
> Commonwealth v. *Tyson*, 574 EDA 2012 (Pa.Super.Ct. Feb. 1, 2013) (PCRA appeal).

Each is contained in the *Appendix* and will be cited with page references to the slip copy contained in the *Appendix*.

The trial court issued three opinions relevant to this Questions Presented:

> *Commonwealth v. Tyson*, CP-45-CR-817-2003 (CCP Monroe, Feb. 15, 2007) (Trial Court Opinion, Vican, J., Direct Appeal);
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> *Commonwealth v. Tyson*, CP-45-CR-817-2003 (CCP Monroe, Mar. 22, 2012) (Trial Court Opinion, Vican, J., denying PCRA); and,
>
> *Commonwealth v. Tyson*, CP-45-CR-817-2003 (CCP Monroe, Apr. 17, 2012) (Trial Court 1925 Opinion PCRA (Worthington, J.)

Each is contained in the *Appendix* and will be cited with page references to the slip copy contained in the *Appendix*.

Transcripts of the state court proceedings will be referred to as Notes of Testimony and cited as NT followed by the date of the proceedings and a page number, along with a page reference to the *Appendix*.

Petitioners, the prison officials who have custody of Respondent, are represented by the District Attorney of Monroe County, Pennsylvania. They are referred to as the "Commonwealth." The Commonwealth's *Petition for a Writ of Certiorari* will be cited and referred to as *Pet*., followed by a page number.

Respondent, Aaron Tyson, is a prisoner in the custody of the Commonwealth. He was the habeas corpus Respondent below and is referred to by name or as Respondent.

All other citations are either self-explanatory or will be explained. Parallel citations are omitted. All emphasis is provided unless otherwise noted.

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COUNTER-STATEMENT OF THE CASE

A. Introduction

Aaron Tyson was convicted of two counts of first-degree murder as an accomplice. The prosecution never contended that he shot the victims. In Pennsylvania, an accomplice may only be guilty of first-degree murder if the prosecution proves beyond a reasonable doubt that he shared a specific intent to kill with the principle.

The jury instructions in this case relieved the prosecution of that burden in violation of due process of law. The instructions told the jury that Respondent is guilty as an accomplice if he had intent to commit "a" crime as opposed to "the" specific intent crime of first-degree murder. Further, the jury heard that Respondent may have committed a multitude of other criminal acts, including drug sales and weapons offenses. It may have also believed that Mr. Tyson handed the gun to his co-defendant to accomplish assaultive conduct but not murder. In short, absent an instruction that told the jury that it had to find a shared specific intent, there was a reasonable likelihood that the jury found Respondent guilty of first-degree murder without this requisite finding.

This error was exacerbated by a number of other related instructional errors and the prosecution's closing argument. In particular, the prosecutor told the jury

"if you help a shooter kill, you are as guilty as the shooter," which he supported with a lengthy example in which the "helper" did not have specific intent to kill.

Trial counsel ineffectively failed to object to the offending instructions or to the prosecutor's closing argument.

A unanimous panel of the Court of Appeals for the Third Circuit applied long standing authority from this Court holding that a jury instruction that reduces a prosecutor's burden of proof beyond a reasonable, violates due process. It applied this Court's precedents to the related claim of ineffective assistance of counsel for failing to object to the due-process-violating instruction. The Circuit Court also was guided by three decades of its application of this Court's due process precedents to the particulars of Pennsylvania's accomplice law in first-degree murder prosecutions. The Court also paid deference to the state court's merits ruling, pursuant to 28 U.S.C. § 2254(d)(1).

The Commonwealth of Pennsylvania seeks certiorari review presenting three questions. In the first and second, it contends that that Third Circuit ruling violated *Cullen v. Pinholster*, 563 U.S. 170 (2011) and *Waddington v. Sarasaud*, 555 U.S. 178 (2009). *Pet*., 2. The Commonwealth's briefs in the District Court and in the Court of Appeals **failed to cite or discuss either case**. The Commonwealth's *Petition* in this Court fails to explain how these decisions apply in this case, much less how they were violated. In its third question it contends that the Court of

Appeals "ignored" who sections of the trial court's jury charge. *Pet.*, 2. This is a fanciful assertion.

In sum, the Court of Appeals did not err in any respect and there is no basis for certiorari review.

B. Relevant Procedural History

1. State Court Proceedings. The Commonwealth charged Respondent with the April 24, 2002 shooting deaths of David and Keith Fothiathis in Stroudsburg, Pennsylvania.

He was tried four years later by jury under Monroe County Pennsylvania docket number CP-45-CR-817-2003 from May 2 through 9, 2006. He was convicted of first-degree murder in each of the deaths as an accomplice. On July 17, 2006, the trial court sentenced Respondent to life imprisonment without parole for each murder.

A direct appeal was filed. None of the claims presented on direct appeal are relevant here. The Pennsylvania Superior Court affirmed the convictions and sentences. *Commonwealth v. Tyson*, 730 EDA 2007 (Pa.Super.Ct. Jan. 11, 2008) A-24–41. A *Petition for Leave to Appeal* to the Pennsylvania Supreme Court was filed and denied. *Commonwealth v. Tyson*, 363 MAL 2009 (Pa. Feb. 23, 2010).

On November 19, 2010, Respondent filed a *pro se* petition for state post-conviction relief under the Pennsylvania Post-Conviction Relief Act (42 Pa.C.S. §

9541 *et seq*.) (hereafter, PCRA Petition), A-163–171 and an accompanying *pro se Brief in Support*; A-172–180 (excerpt).

Appointed counsel amended the PCRA on March 31, 2011; A-181–185, and incorporated Respondent's *pro se* filings. A-181.

A hearing was held on the PCRA Petition on October 4, 2011; A-957–1015.

Following the hearing, counsel filed a *Brief in Support of Defendant's PCRA*. This pleading again attached and incorporated Respondent's *pro se Brief* that had been filed with the *pro se Petition*. A-186–195.

The trial court denied relief. *Commonwealth v. Tyson*, CP-45-CR-817-2003 (CCP Monroe, Mar. 22, 2012) (Vican, J.); A-84–145.

A counseled appeal was taken to the Superior Court. *Commonwealth v. Tyson*, 574 EDA 2012 (Pa.Super.Ct. Feb. 1, 2013); A-42–57. This decision addressed the claims relevant to the instant *Petition*.

2. Federal Habeas Corpus Proceedings. On October 22, 2013 Respondent filed a form *pro se Petition* for relief under 28 U.S.C. § 2254.

The undersigned entered his appearance in the District Court for Respondent on October 27, 2017 (ECF # 33). Counsel filed a *Brief in Support* of the *Petition* (ECF # 39). Petitioners filed a *Response* (ECF # 45), and Respondent filed a counseled *Reply* (ECF # 47).

The District Court denied Respondent's counseled motion for an evidentiary hearing and oral argument (ECF # 48, 50) and issued a *Memorandum*, A-3–16, and *Order* (ECF # 52) denying the Petition for Habeas Corpus and denying a *Certificate of Appealability*.

Respondent filed a timely *Notice of Appeal* on February 15, 2019. A-1–2.

A counseled application for a certificate of Appealability was filed on March 11, 2019. A motions Panel of the Court of Appeals for the Third Circuit granted Respondent's application for a certificate of appealability on September 5, 2019.

Following the submission of briefs, the Court of Appeals heard telephonic argument on March 24, 2020.[1]

On September 24, 2020, the Court of Appeals issued it decision in *Tyson v. Superintendent*, 976 F.3d 382 (3d Cir. 2020).

On October 9, 2020 the District Court granted the Writ (ECF #60).[2]

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[1] A recording of the argument is available at, https://www2.ca3.uscourts.gov/oralargument/audio/191391_Tysonv.SuperintendentHoutzdaleSCI.mp3.

[2] Following the issuance of the Writ, Respondent's case was returned to the trial court for retrial proceedings. Those proceedings have been continued pending the disposition of the instant *Petition for Certiorari*.

C. Summary of Relevant Trial Facts[3]

The Commonwealth asserted that the principal, *i.e.*, the actual shooter of each of the two victims, was Otis Powell (Powell). NT 5/8/2006, 657; A-892. The Commonwealth prosecuted Respondent solely as an accomplice. NT 5/8/06, 678; A-913; NT 5/9/2006, 688–90; A-924-926.

The Commonwealth's case against Respondent rested on the testimony of one purported eyewitness, Kasine George (George), whom the Commonwealth also believed was an accomplice. NT 5/3/2006, 18-19, 24; A-247–48, 253; NT 5/4/2006, 172-269; A-274-353; NT 5/3/2006, 26-27; A-255-256; NT 5/8/2006, 677-678; A-912-914; NT 5/8/2006, 650-654; A-885-889.[4]

According to George, Respondent and Dimitrius Smith ran a crack-cocaine distribution operation in Monroe County, Pennsylvania beginning in late 1999 or

[3] Respondent has maintained that he was not even present when these murders occurred. We present these trial facts, but Respondent does not accede to their truth or accuracy.

[4] Before testifying, George secured a plea deal for his involvement in these murders and for federal drug charges stemming from the drug distribution operation described below. In exchange for his cooperation and testimony, George received a twelve-and-a-half-year sentence on his federal drug case and pled to third-degree murder to resolve this case. The third-degree murder sentence was ordered to run concurrently with, and not to exceed his federal sentence. NT 5/4/2006, 258, 261-263, 335-336, 338; A-489, 492–94, 566–67, 569. George had earlier testified against Powell at his jury trial. Powell presented an alibi and evidence that George admitted to others that he was the shooter. ECF # 39, at 59. A jury found Powell not guilty.

early 2000.[5] NT 5/4/2006, 202-203, 208, 221, 285; A-433–34, 439, 452, 516. After absconding from a halfway house in January 2002, George moved into a Monroe County townhome with Smith and Respondent and joined the operation. NT 5/4/2006, 214-215; A-430–33, 435–37.

Trouble with rival drug crews in Monroe County led Smith, Respondent, and George to carry firearms. NT 5/4/2006, 214-215; A-445–46. Respondent had a .9-millimeter semiautomatic handgun. NT 5/4/2006, 215; A-446. At first, Respondent kept the gun in their townhome, but he began carrying it in his car in response to this trouble. NT 5/4/2006, 215, 297; A-446, A-528.

In early 2002, Smith arranged for Powell to come to Monroe County to sell drugs to some of the operation's customers. NT 5/4/2006, 221; A-452. He helped George and Respondent supply street-level dealers. *Id.*; NT 5/4/2006, 210-213; A-441–44.

On April 24, 2002, Respondent, accompanied by George and Powell, drove his car to restock the drug supply and retrieve money from the operation's drug house on Second Street in Stroudsburg, Pennsylvania. NT 5/4/2006, 222-224; A-453–55. To avoid detection from a rival crew, Respondent parked the car behind

[5] Before moving their operation to Monroe County, George, Smith, and Respondent had sold crack-cocaine together in Brooklyn, New York, and Allentown, Pennsylvania. NT 5/4/2006, 176-177, 185-186, 190-191; A-407–08, 416–17, 421–22.

the house and went in through the back. *Id.* Respondent then left the house with a street-level dealer, Phenom, and they walked past Respondent's car. NT 5/4/2006, 339-340; A-570–71. Moments later, Phenom rushed past them, looking scared, and ran back into the house. *Id*. A few minutes passed, and Respondent ran up to the driver's side, saying that two men had just pulled a gun on him. NT 5/4/2006, 225; A-456. Respondent got into the car and pulled his gun from the center console. NT 5/4/2006, 226-227; A-457–58. He told Powell to pull out, and Powell began driving. *Id.* Respondent pointed to a blue van, saying the two men who pulled a gun on him were driving it. *Id*.

They followed the van to a bar and then to a club, which the two men entered. NT 5/4/2006, 227-230; A-458–61. On direction of either Powell or Respondent, George looked into the van to see if there was a gun inside. NT 5/4/2006, 229; A-460. There was not. *Id*. Powell then gave George a pocketknife—one that Powell always kept on him—and instructed him to slash the van's tire. *Id*. Powell did as told, and got back in the car. *Id*. 460, 463. Powell got in the front passenger seat and asked Respondent for his gun. *Id*. 463. Respondent handed it over. *Id*.

The two men got back into the van minutes later and began driving. *Id*. Respondent, George and Powell followed in Respondent's car, with Respondent now driving. NT 5/4/2006, 232-233; A-463-464. After its slashed tire began losing

air, the van turned into an alley. NT 5/4/2006, 233; A-464. Respondent took a few turns and stopped his car near the van. NT 5/4/2006, 234-235; A-465–66.

Powell got out the car by himself. *Id*. At this point, George believed a confrontation was imminent because the two men had pulled a gun on Respondent. *Id*. Powell walked past the van, walked back, and said something to the passenger, who was standing outside. *Id*. Powell walked past the passenger and shot him, then fired nine to ten shots on the van before running back to Respondent's car. NT 5/4/2006, 235-236; A-466–67. Respondent, Powell, and George drove off in Respondent's car. *Id*.

The Commonwealth did not charge Respondent with the substantive offense of conspiracy (18 Pa.C.S. § 903), and the court did not instruct on conspiratorial liability, NT 5/9/06, 683–711; A-919-947.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

I. The Commonwealth at Most Seeks Error Correction that is Not Worthy of an Exercise of Certiorari Review

Mr. Tyson submits that the decision of the Court of Appeals was free of any error. As discussed below, it correctly applied this Court's jurisprudence related to due process violations arising from infirm jury instructions; and ineffective assistance of counsel. It also correctly applied AEDPA deference per 42 U.S.C. § 2254(d).

However, even if the Commonwealth's claimed errors as set forth in its *Questions Presented*, did exist, none warrant this Court's exercise of certiorari review. Supreme Court Rule 10 ("A petition for a writ of certiorari will be granted only for compelling reasons."). This Court's certiorari jurisdiction is "exercised sparingly, and only in cases of peculiar gravity and general importance," *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916), not to correct purported error by a lower court. *See Watt v. Alaska*, 451 U.S. 259, 275 n.5 (1981) (Stevens, J., concurring) ("certiorari jurisdiction is designed to serve purposes broader than the correction of error in particular cases"); Stem, Gressman, Shapiro, Bishop & Arnett, SUPREME COURT PRACTICE (9th ed. 2007), at 238 ("Rule 10, like all its predecessor rules, warns at the outset that, since review on writ of certiorari is a matter of judicial discretion rather than of right, certiorari will be grant 'only for compelling reasons.'").

At most, the Commonwealth's *Petition* amounts to a request for error correction. The Commonwealth's arguments regarding the substantive instructional error; ineffectiveness of counsel; and AEDPA deference, also do not implicate a compelling question meriting review.

II. The Court of Appeals Decision Correctly Applied this Court's Precedents and Provided the Required Deference to the State Court's Ruling

In order to demonstrate the correctness of the Third Circuit's ruling in this case, Respondent reviews the relevant law; shows how that law applies to the issue in this case, and finally demonstrates that the is no merit to Petitioner's contentions that the ruling violated any holding of this Court.

A. The Due Process Clause of the Fourteenth Amendment Requires that Jury Instructions do not Reduce or Eliminate the Prosecutor's Burden of Proving Every Element of an Offense

The Due Process Clause of the Fourteenth Amendment requires that the state prove beyond a reasonable doubt every element of the offense charged in a criminal case. *In re Winship*, 397 U.S. 358, 364 (1970). A jury instruction that relieves or reduces the state's burden to prove any element of the offense beyond a reasonable doubt violates due process. *Waddington v. Sarausad*, 555 U.S. 179, 190–91 (2009); *Francis v. Franklin*, 471 U.S. 307, 314 (1985).

In reviewing a jury instruction to determine whether it reduced or eliminated the prosecution's burden, courts consider the jury charge as a whole and determine if it created a reasonable likelihood that a juror understood it in an unconstitutional manner. *Franklin*, 471 U.S. at 318–322. When there is a reasonable likelihood that the jury applied the instructions in a manner that undermined the prosecution's burden, due process is violated. *Laird v. Horn*, 414 F.3d 419, 428 (3d Cir. 2005);

see also Waddington, 559 U.S. at 190–191 (To show that a jury instruction violates due process, a habeas petitioner must demonstrate both (1) that the instruction contained "some ambiguity, inconsistency, or deficiency," and (2) 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." (internal quotation marks and citations omitted)); *Bennett v. Superintendent*, 886 F.3d 268, 284–285 (3d Cir. 2018) (same).

In Pennsylvania, first-degree murder requires as an element the specific intent to kill. 18 Pa.C.S. § 2502. Accomplice liability in Pennsylvania requires that the accomplice act with the same culpability required for the commission of the offense as a principal. 18 Pa.C.S. § 306(c), (d). Thus, accomplice liability for first-degree murder requires that the accomplice have the specific intent to kill. *Commonwealth v. Speight*, 854 A.2d 450, 460 (Pa. 2004) ("[I]n order to be found guilty of first degree murder as an accomplice, the defendant must have had the specific intent to kill."); *Commonwealth v. Huffman*, 638 A.2d 961, 962 (Pa. 1994) (accomplice liability instruction that "advised the jury that they may find an accomplice guilty of murder in the first degree even if he did not have the specific intent to kill" was "an outright misstatement of the law on a fundamental issue relating to culpability"); *Everett v. Beard*, 290 F.3d 500, 513 (3d Cir. 2002) (explaining that "since the legislature drafted the law on first-degree murder . . . Pennsylvania law has clearly

required that for an accomplice to be found guilty of first-degree murder, s/he must have intended that the victim be killed" (internal citations omitted)).

Pennsylvania also recognizes that when instructions fail to convey that an accomplice to first-degree murder must have his own specific intent to kill, due process—as articulated in *Winship*—is violated. *Huffman* concluded that an error in the accomplice liability instruction "improperly relieved [the Commonwealth] of its burden of proving beyond a reasonable doubt a critical element of the crime of first-degree murder[:] that the appellant possessed the specific intent to kill." *Huffman*, 638 A.2d at 963 (*citing In re Winship*, 397 U.S. 358 (1970)).

Huffman was applicable in 2006 at the time of Respondent's trial, and it remains good law. *See*, *e.g.*, *Commonwealth v. Koehler*, 36 A.3d 121, 153–154 (Pa. 2012) (reaffirming *Huffman*'s requirement that the Commonwealth prove beyond a reasonable doubt that the defendant, independent of any accomplice, possessed specific intent to kill).

B. The Instructions at Respondent's Trial Eliminated the Commonwealth's Burden of Proving Specific Intent

The jury instructions in Respondent's case violated due process because they failed to convey the required element of first-degree murder that he had to have a specific intent to kill. To the contrary, the instructions permitted a finding that Respondent had a specific intent to kill if he had an intent to commit "a" crime—any crime—and the alleged principal, Powell, had a specific intent to kill. This

violated due process because the jury in this case could reasonably have found Respondent had intent to commit multiple offenses other than first-degree murder.

Because the Court is required to view the charge as a whole, Respondent does the same.

The trial court instructed on the elements of murder. First, it covered "malice," correctly noting that it is an element of both first and third-degree murder. NT 5/9/2006, 690; A-926. In this section, however, the court focused on the intent of the **killer**, not the **accomplice**:

> The killing is with malice **if the killer** acts first with intent to kill or, secondly, with an intent to inflict serious bodily harm, or third . . . [with] wickedness of disposition, hardness of heart . . .

Id.

The court next appeared to be defining specific intent to kill as an element of first-degree murder. However, the instructions mistakenly substituted "third degree" for "first degree," so that the instructions read as follows:

> With **third degree murder** the elements of the offense that will be required that the Commonwealth must prove is that Daniel and Keith Fotiathis are dead -- and I think there's not any question that they are dead. And you see evidence to that, so there's not much of an issue to concern yourselves. Secondly, that in this case -- not this Defendant -- but Otis Powell killed them as an accomplice with the Defendant, Aaron Tyson. **And this was done with specific intent to kill**. Malice. Specifically, specific intent to kill is a fully-formed intent to kill. And one who does so is conscious of having that intention. But also a killing with specific intent is killing with malice. If someone kills in that manner that is willful, deliberate premeditated like in this case stalking or lying in wait or ambush, that would establish specific intent.

NT 5/9/2006, 691; A-927. The court, on the same transcript page, next purported to define murder in the third degree, again focusing on the "killer" and not Respondent's intent:

> In third degree murder **the killer** must again act in such a manner that there is malice that the person who is the victim must be dead. And, again, the connection with the person who did the killing is such that there has to be that direct connection.

Id.

The court next instructed on accomplice liability. It failed to instruct that to be guilty of first-degree murder, as an accomplice, Respondent had to have a specific intent to kill:

> You 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 or aids or agrees to aid or attempts to aid the other person in planning, organizing, 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; that the Defendant was an accomplice of the person who actually committed the crime. And it does not matter whether the person who you believe committed the crime has been convicted of a different crime or different degree of the crime or has immunity from prosecution or conviction.

NT 5/9/2006, 694; A-930. By stating that Respondent was subject to first-degree accomplice liability if he had the intent to promote or facilitate "**a crime**," the court

created a reasonable likelihood that the jury could have improperly found Respondent guilty as an accomplice if he had the intent to commit **any** crime, as opposed to the offense of first-degree murder.

Thus, assuming that the jury believed that Respondent was somehow involved in the events leading up to the killing, a reasonable jury could have easily thought that Respondent only intended to scare, menace, harass, warn, threaten or even assault the Fothiatis brothers—but not murder them. Still more, the jury may have thought Respondent guilty of possession of a handgun, either without a license, during a drug transaction, or as a person not entitled to carry. The jury might even have thought Respondent guilty of criminal mischief as an accomplice to George slashing the van's tires at Powell's direction. Further, the jury might have believed Respondent was guilty of aggravated assault for the beating he and George inflicted on Brown. Each of these potential crimes that the jury may reasonably have believed him guilty of are codified in Pennsylvania. *See* 18 Pa.C.S. § 2702 (aggravated assault) (intentional infliction of serious bodily injury); 18 Pa.C.S. § 2706 (terroristic threats) (intentional communication to a person of a threat to commit any crime of violence); 18 Pa.C.S. §§ 6103, 6105, 6106 (possession of a handgun by a felon, during a drug crime, or simple possession without a license); 18 Pa.C.S. § 3304 (criminal mischief) (intentionally or recklessly tampers with tangible property of another so as to endanger property or intentionally damages personal property of

another). Further, in this case, where the jury heard hours of testimony about Respondent's life as a drug dealer and about other crimes committed by Respondent and the drug gang of which he was alleged to be a member, there is a strong likelihood that it believed he was guilty of "a crime." In short, any of the above described offenses could well have constituted "a crime" in the eyes of the jury.

Significantly, the court's use of "a crime" as a predicate for the jury's finding of accomplice liability was not qualified by a statement that the crime referred to as "a crime" had to be the charged offense. This omission further permitted to jury to find accomplice liability based on a belief that Respondent had intent to commit any of the above-described offenses, even though they were not charged.

There was no objection to this portion of the instructions. *See Id.*, 707–708; A-943–944 (counsel objecting to a different portion of the instruction).

No other portion of the instructions addressed accomplice liability or any related concept.

C. Other Portions of the Instructions and the Prosecutor's Closing Exacerbated the Instructional Error

Respondent submits that the above-described error alone violated due process. However, the court's response to a jury question and consequent re-charging, as well as the prosecutor's closing argument, all but assured that the jury would apply the "a crime" instruction in an unconstitutional manner.

During deliberations, the jury returned with a question seeking "clarification on the difference between homicide in the first degree as opposed to homicide in the third degree." NT 5/9/2006, 712; A-948. The court answered this question by reviewing its prior instructions. In so doing, it again focused on the actions of the alleged shooter, as opposed to the accomplice. The court told the jury that "[i]n murder of the third degree there's three specific elements. And these refer **to the killer** who actually committed the crime . . . Respondent is not the shooter." *Id.*, 712. It then repeated its instructions regarding the elements of first and third-degree murder. *Id.*, 712-14; A-948-950. In so doing, it repeatedly focused on the intent of the "killing," "killer," or "shootings," and **made no mention of the element that Respondent had to share a specific intent to kill**:

> And these [instructions] refer to the **killer** who actually committed the . . . **shootings** that we are here about (*id*., 712; A-948);
>
> First degree murder is when a **killer** has a specific intent to kill (*id*);
>
> And the second [element] is that the **killer** actually killed them (*id.*);
>
> Respondent is an accomplice, is what the Commonwealth charges. And, thirdly, that these **killings** were accomplished with a specific intent to kill and with malice (*Id.*);
>
> If a **killer** acts with an intent to kill (*id.*, 713; A-949);
>
> Those are the three elements which must exist and how you find the **killing** to have occurred in order for there to be first degree murder (*id*.);
>
> Specific intent to kill including premeditation does not have to happen over a long period of time. It can actually be very quick . . . All that is

> necessary is they have enough time so the **killer** does actually form an intent to kill . . . (*id.*, 714; A-950); and
>
> Third degree murder is a lesser degree because it does not require proof . . . that the **killer** acted with specific intent. . . (*id*.).

Finally, at the end of answering the jury's question, the court effectively directed a verdict for first-degree, provided the jury found that Respondent was complicit as an accomplice to the killings:

> In this particular case because there is a charge of an accomplice almost by definition **it encompasses the concept of first degree murder by its very definition,** an accomplice with the planning and the coordination if you, in fact, found to be so indicate that was first degree murder. But third degree murder offered [sic] as another possibility even **does not fit as well within the confines of the explanation** because counsel agreed you may consider that as a possibility.[6]

Id., 714–715; A-950-951. Any chance that the jury would have given the erroneous instruction a constitutional construction was eviscerated when the court all but directed a verdict on first, over third, degree murder. There was no objection to this re-instruction.

The prosecutor's closing argument also ensured that the jury would apply the instructions in an unconstitutional manner. The prosecutor provided an example of accomplice liability that was every bit as incorrect as the trial court's instructions. Like the instructions, he told the jury that it could find that Respondent had a specific

[6] This last phrase may have related to the colloquy conducted on whether to instruct on third degree murder. *See* NT 5/9/2006, 680–83; A-916-919.

intent to kill based solely on the intent of the principal, even if Respondent had no intent to kill:

> You know **whoever was involved in this shooting is a murderer**. Either the shooter, **or any helper**, who under Pennsylvania law, is an accomplice. Because we have the system of justice for over 200 years. There's a rule for everything ladies and gentlemen, human nature refined over time. In all of the juries that have sat in Pennsylvania in over 200 plus years. They have given us rules for every situation. Common sense rules you even without the judge telling you when he gets a chance to tomorrow morning. And one of the those [sic] rules is **if you help a shooter kill, you are as guilty as the shooter**. So in a bank robbery, when there's a look out sitting outside the bank and he tells his friends who are armed now, **don't go shooting any bank guards**. Go and get the money and come back out. And I am going to stay in the car and we will drive off and live happily ever after. And the two friends go in and shoot a bank guard. Guess what? **He is as guilty as they are even though he told them not to shoot because the law can sometimes be sensible**, especially with a criminal. Over 200 years of evolution. **So anyone who is with the shooter on South 6th Street either helped to drive a vehicle, providing the vehicle, handing the gun over, slashing the tire, any of those acts make those people equally guilty of the criminal offense as a helper, as an accomplice**. That is beyond any doubt whatsoever.

NT 5/8/2006, 650–651; A-885-886. There was no objection to this argument.

This portion of the closing argument was particularly harmful to Respondent in that it supported an unconstitutional application of the "a crime" instruction. The prosecutor encouraged the jury to unconstitutionally apply the infirm instructions in two ways: (1) by telling the jury that "if you help a shooter kill, you are as guilty as the shooter," and (2) by using as an example of a "helper," an actor who unquestionably did not have a specific intent to kill (the wheel man to a bank robbery

who told the robber "don't go shooting any bank guards"). Thus, according to the prosecutor, Respondent could be found guilty of first-degree murder if he helped Powell and had the intent to commit "a" crime—any crime. A reasonable jury could have believed Respondent was guilty of "a crime" other than first-degree murder.

In sum, the court's instruction -- that an intent to commit "a crime" was sufficient for murder of the first degree -- Respondent could easily have been convicted even without the requisite finding of specific intent to kill. The court's response to the jury question and the prosecutor's closing argument heightened this likelihood.

D. Trial Counsel Ineffectively Failed to Object to the Erroneous Instructions

Trial counsel's failure to object to the erroneous instructions is reviewed under the two-prong test of *Strickland v. Washington*, 466 U.S. 688 (1984). Respondent must show (a) counsel's deficient performance, *i.e.*, that his attorney's performance fell below "an objective standard of reasonableness," *id.*, 688, and (b) prejudice, *i.e.*, that there exists a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *id*., 694.

1. Deficient Performance

Respondent's trial counsel was ineffective for not recognizing and objecting to the erroneous jury instructions. *See*, *e.g.*, *Bey v. Superintendent*, 856 F.3d 230, 238 (3d Cir. 2017) ("Generally, trial counsel's stewardship is constitutionally

deficient if he or she 'neglect[s] to suggest instructions that represent the law that would be favorable to his or her client supported by reasonably persuasive authority' unless the failure is a strategic choice." (*quoting Everett v. Beard*, 290 F.3d 500, 514 (3d Cir. 2002)); *see also Bey*, 856 F.3d at 239, 241 ("[T]he trial court's deviation from the [proper] language was so problematic that any alert defense counsel should have immediately known that it raised serious constitutional issues. . . . We can think of no strategic reason for defense counsel not to object to a charge that raises such due process concerns."); *Burns v. Gammon*, 260 F.3d 892, 897 (8th Cir. 2001) (granting habeas relief on ineffective assistance grounds due to counsel's failure to object and thus to prompt a curative cautionary jury instruction); *Freeman v. Class*, 95 F.3d 639, 642 (8th Cir. 1996) (granting habeas relief on ineffective assistance grounds due to counsel's failure to request cautionary instructions on accomplice testimony); *United States v. Span*, 75 F.3d 1383, 1389–90 (9th Cir. 1996) (finding ineffective assistance because counsel failed to request a significant jury instruction); *Harris v. Wood*, 64 F.3d 1432, 1438 (9th Cir. 1995) (finding ineffective assistance due to, *inter alia*, "failure to propose, or except to, jury instructions"); *Gray v. Lynn*, 6 F.3d 265, 271 (5th Cir. 1993) (finding ineffectiveness because counsel failed to object to erroneous jury instructions).

Counsel could have had no possible strategic reason for not objecting to this clear flaw in the instructions. After all, these instructions cast a far-wider net of

culpability than the proper instructions. It is obvious that counsel was not aware of the relevant law – any lawyer who was aware of the law would have objected to the instructions. Indeed, counsel's failure to object to the blatant misstatement of the law in the prosecutor's closing further underscores counsel's unawareness. Such unawareness is "a quintessential example of unreasonable performance under *Strickland*." *Hinton v. Alabama*, 571 U.S. 263, 274 (2014).

2. Prejudice

Strickland prejudice is present whenever "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "The adjective is important." *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Id.*; *see also Strickland*, 466 U.S. at 693.

Because a "reasonable probability" is one "sufficient to undermine confidence in the outcome," *id.*, the *Strickland* prejudice standard is not "stringent" -- it is, in fact, "less demanding than the preponderance standard." *Jermyn v. Horn*, 266 F.3d 257, 282 (3d Cir. 2001) (*quoting Baker v. Barbo*, 177 F.3d 149, 154 (3d Cir. 1999)); *see also Woodford v. Visciotti*, 537 U.S. 19, 22 (2002) (*Strickland* "specifically rejected the proposition that the defendant had to prove it more likely than not that

the outcome would have been altered."); *Williams v. Beard*, 637 F.3d 195, 227 (3d Cir. 2011).

Respondent establishes prejudice. The accomplice instructions told the jury it could find Respondent guilty of first-degree murder if it believed he was guilty of "a" crime. Further, the trial court referenced third-degree murder when it meant to instruct on first-degree murder, repeatedly referenced the intent of the "killer," and directed the jury that first-degree murder was a "better fit" than third degree. The Commonwealth's closing argument included a significantly unconstitutional example of accomplice liability compounded these instructional errors. *See Bennett v. Superintendent*, 886 F.3d 268, 287 (3d Cir. 2018) (observing that the Commonwealth's "arguments compounded the instructional error"). The trial court's errors alone—and certainly, therefore, together with the Commonwealth's erroneous closing remarks—ensured that Respondent could be convicted without a finding that he had a specific intent to kill. There was certainly a reasonable probability that this occurred.

E. The Error was Not Harmless

The standard for assessing whether a constitutional error identified in habeas corpus proceedings was harmless asks "whether the error had substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993).

When, as here, there is a reasonable probability that the jury applied the instructions in an unconstitutional manner, and the prosecutor "urged the jury to base its verdict on a theory predicated on a fundamental constitutional error," it cannot "seriously [be] contend[ed] that that error had no 'substantial and injurious effect or influence' on the verdict." *Smith v. Horn*, 120 F.3d 400, 419 (3d Cir. 1997); *see also Bennett v. Superintendent*, 886 F.3d 268, 274, 287 (3d Cir. 2018) (observing that the prosecutor's closing argument "that an accomplice or conspirator is 'equally guilty' of first-degree murder [] was incorrect as a matter of state law," that "the trial court echoed [this argument] in its jury instructions," and that this argument "compounded the instructional error").

F. The State Court's Resolution of this Claim

There is no question that the Superior Court addressed Respondent's ineffective assistance of counsel claim on the merits. *Commonwealth v. Tyson*, 574 EDA 2012 (Pa.Super.Ct. Feb. 1, 2013), A-52 ("We agree with the cogent analysis of the PCRA court and conclude that, since Appellant's underlying claim [of instructional error] has no merit, Appellant's first ineffective assistance of counsel claim fails.").

Although the Superior Court did not use the phrase "due process" its resolution of the IATC claim was based on its erroneous view that the instructions as a whole properly conveyed the prosecution's burden with respect to specific

intent. *Id*., A-51 ("After reviewing these jury instructions, as a whole, it is apparent that the instructions were sufficient to inform the jury that in order to find Appellant guilty of first-degree murder as an accomplice, the Commonwealth must have established beyond a reasonable doubt that Appellant had the shared specific intent to kill the Fotiathis brothers." (alterations adopted and internal quotation marks omitted)); *see also id*., 11) (adopting this reasoning)). Thus, it ruled on the merits of the due process claim. The Court's analysis began and ended by block quoting trial court's flawed opinion. Commonwealth v. *Tyson*, 574 EDA 2012 (Pa.Super.Ct. Feb. 1, 2013); A-49-52.

As the foregoing analysis makes clear, the Superior Court's resolution of this claim was based on an unreasonable application of, and was contrary to, the above-cited United States Supreme Court precedent regarding the prosecution's burden of proving each element of the offense, *i.e.*, specific intent to kill. *See Waddington v. Sarausad*, 555 U.S. 179, 190–91 (2009); *Francis v. Franklin*, 471 U.S. 307, 314 (1985).

G. The District Court's Opinion

The District Court reviewed this claim on the merits, having found that it was exhausted. However, its resolution of the due process claim is deeply flawed. It does nothing more than recite the conclusory Superior Court opinion, which itself did nothing more than recite the PCRA court's flawed analysis. Each of these

opinions simply said that the instructions conveyed the requisite element of a shared specific intent to kill. None contain any analysis of the critical language that Respondent was an accomplice "if with the intent to promote or facilitate the commission of **a** crime."

The District Court's opinion suffers from an additional flaw. In the portion which purports to recite the accomplice instructions, the Court misquoted the transcript, substituting "the" crime for "a" crime. *Compare* DCO; A-10-11; *with* NT 5/9/2006, 694; A-930.[7] Further, the Court failed to consider the trial court's responses to the jury question, the other portions of the instructions that enhanced the error, and the prosecutor's closing regarding accomplice liability.

H. The Commonwealth's Questions Presented are Without Merit

Initially, given the sparsity of argument in the *Petition* attempting to connect the alleged violation of *Pinholster* and *Waddington* to the actual ruling of the Court of Appeals, it is difficult to understand or reply to the Commonwealth's arguments that the Court of Appeals ruling in some way violated these holdings.

Question 1: *Pinholster* primarily addressed whether a federal habeas court may grant relief based on facts that were not presented to the state courts but were

[7] Even if the instructions said "the" crime instead of "a" crime -- they do not -- there would still have been a reasonable probability that a juror would have applied the instructions in an unconstitutional manner, given the instructions' repeated references to the intent of the killer, response to the jury questions and the prosecutor's closing.

presented for the first time to a federal court. *Cullen v. Pinholster*, 563 U.S. 170, 180 (2011) (§ 2254(d)(1) does not permit consideration of evidence introduced in an evidentiary hearing before the federal habeas court). This is not an issue in this case because there was a state court hearing; there was not a federal court hearing; and the Court of Appeals did not consider any fact that was not first presented to the state courts.

To the extent that *Pinholster* can be read as requiring deference to the state court decision in this case pursuant to 2254(d), the Court of Appeals repeatedly recognized and applied such deference. *See Pan.Op.*, at 390:

> Because we have concluded the state court decided Tyson's ineffective assistance claim on its merits, we review it in accordance 28 U.S.C. § 2254, as amended by AEPDA.

at 391;

> We are concerned here with whether the Pennsylvania courts' application of clearly established federal law was unreasonable. That is an objective inquiry. *Williams v. Taylor*, 529 U.S. 362, 409 (2000) ('a federal habeas court making the 'unreasonable application' inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable"). Under AEDPA review, "a habeas court must determine what arguments or theories supported or, ... **could have supported**, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the Supreme] Court.' *Harrington*, 562 U.S. at 102, 131 S.Ct. 770."

Given these citations to and applications of *Williams and Harrington v. Richter*, 562 U.S. 86 (2011), if the Commonwealth is arguing that the Court of

Appeals failed to provide deferential review to the state court decision, that argument rings hollow.

Question Two: *Waddington*, unlike *Pinholster*, does actually apply to this case. However, the Court of Appeals cited it and applied its directive that a reviewing court review the instructions "as a whole":

> When a habeas petitioner claims the jury instruction was unconstitutional, "we have an independent duty to ascertain how a reasonable jury would have interpreted the instructions at issue." *Smith v. Horn*, 120 F.3d 400, 413 (3d Cir. 1997) (citing *Francis*, 471 U.S. at 315-16, 105 S.Ct. 1965). We exercise this duty by "focus[ing] initially on the specific language challenged," *Francis*, 471 U.S. at 315, 105 S.Ct. 1965, and **then considering the "allegedly constitutionally infirm language ... in the context of the charge as a whole"** to determine whether there is a reasonable likelihood the jury applied the instructions in a manner violative of the accused's due process rights.

Pan.Op., at 391.

Question 3: This question -- an offshoot of Question 2 -- asserts that the Court of Appeals "ignored" the remainder of the instructions, which -- in the Commonwealth's view -- adequately conveyed the requirements for an accomplice to share a specific intent to kill to be found guilty of first-degree murder in Pennsylvania. Notably, nowhere in its brief in the District Court, in the Court of Appeals, or in its *Petition* to this Court has the Commonwealth even attempted to identify the portion of the instructions that cured the constitutional infirmity identified by the Court of Appeals. This is consistent with the Commonwealth's inability to provide the Court of Appeals in oral argument with a portion of the

instructions that cured the error. *See Tape of Oral Argument* available at https://www2.ca3.uscourts.gov/oralargument/audio/191391_Tysonv.SuperintendentHoutzdaleSCI.mp3., beginning at minute 20:00.

The Commonwealth's inability to point to the instructions that cured the error is explained simply by the fact that none exists.

On top of this, the Commonwealth has failed to point out the multiple other errors on accomplice (pointed out above), or the prosecutor's closing argument.

Conclusion

Based on the above, and the well-reasoned and error-free ruling of the Court of Appeals, the Commonwealth's *Petition for a Writ of Certiorari* should be denied.

Respectfully Submitted,

/s/ Michael Wiseman

Michael Wiseman
Counsel of Record
Wiseman & Schwartz, LLP
718 Arch Street, Suite 702 North
Philadelphia, PA 19106
215-450-0903
wiseman@wisemanschwartz.com