No. 11-1053

IN THE SUPREME COURT OF THE UNITED STATES

BRIAN COLEMAN, Superintendent, State Correctional Institution at Fayette, et al.,

Petitioners,

v.

LORENZO JOHNSON,

Respondent.

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

LORENZO JOHNSON'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Dated: Philadelphia, PA
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COUNTER STATEMENT OF THE CASE[1]

A. Introduction

Lorenzo Johnson was convicted of first degree murder under a theory of accomplice liability. There was no dispute that his co-defendant, Corey Walker, shot and killed the decedent. On direct appeal from his conviction, Mr. Johnson argued that the evidence introduced at his trial was

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[1]The Petition for Writ of Certiorari is cited herein as "*Petition*," followed by the relevant page number.

Petitioners, the prison officials who have custody of Mr. Johnson, and who are represented by the Pennsylvania Attorney General, are referred to as "the Commonwealth."

Respondent, Lorenzo Johnson, was the habeas petitioner below and is referred to as Mr. Johnson or Johnson.

The Commonwealth filed an *Appendix* along with its *Petition for Writ of Certiorari*. References to documents in the *Appendix* are cited herein as "A," followed by a page reference.

The parties filed a *Joint Appendix* in the Court of Appeals. Documents from the *Joint Appendix* that are not contained in the Commonwealth's *Appendix* are cited herein as "*JA*," followed by a page reference.

The decision of the Court of Appeals for the Third Circuit is found at *Johnson v. Mechling*, 446 Fed.Appx. 531, 2011 WL 4565464 (C.A.3 (Pa.)). It is referred to herein as *Panel Opinion*, and cited as *Pan.Op.*, with a full reference to the page number of the Commonwealth's *Appendix.*

The district court opinion is reported at *Johnson v. Mechling*, 541 F.Supp.2d 651 (M.D. Pa. 2008). None of the relevant state court opinions is published. Each of these opinions is contained in the Commonwealth's *Appendix* and will be cited by reference to the *Appendix* page.

All emphasis herein is supplied unless otherwise indicated.

insufficient to convict him. In affirming his convictions, the Pennsylvania Superior Court never analyzed or discussed whether the Commonwealth had introduced sufficient evidence to prove Mr. Johnson had the specific intent to kill, a necessary element of first degree murder. One judge of the three judge panel deciding his case dissented, writing that there had *not* been sufficient evidence to convict. A-12f-13f.

In its opinion granting Mr. Johnson relief, the Third Circuit reviewed Mr. Johnson's claim under 28 U.S.C. § 2254(d)(1) (AEDPA), and found that the Pennsylvania courts unreasonably applied *Jackson v. Virginia,* 443 U.S. 307 (1979), by failing to consider whether the Commonwealth established each element of the offenses charged, particularly the element of specific intent to kill.

In making this determination, the Court credited all of the Commonwealth's evidence and applied Pennsylvania evidentiary law as the Pennsylvania Superior Court would have done, had that court reasonably addressed the issue of sufficiency of the evidence related to specific intent. In contrast to other federal courts that have recently and improperly granted *Jackson* relief, the Third Circuit considered and fully credited *only* the prosecution's trial evidence.

B. Procedural History

Mr. Johnson was arrested and charged with murder in the first degree and criminal conspiracy under Dauphin County, Pennsylvania docket number 1544 CD 1996. He had a joint jury trial with his co-defendant, Corey Walker (docket number 2739 CD 1996), before the Dauphin County Court of Common Pleas on March 13, 14 and 17, 1997. Each defendant was convicted on each charge. On March 17, 1997, Mr. Johnson was sentenced to life imprisonment on the first degree murder conviction and to a concurrent term of imprisonment of five to ten years on the conspiracy count.

The Pennsylvania Superior Court affirmed. *Commonwealth v. Johnson*, 726 A.2d 1079

(Pa.Super. 1998), A-1f-11f.

Then Pennsylvania Superior Court Judge and current Judge of the United States District Court for the Eastern District of Pennsylvania, Berle Schiller, dissented from the opinion of the Pennsylvania Superior Court. Judge Schiller would have vacated Mr. Johnson's convictions because the evidence was not sufficient to sustain them:

> I dissent from that portion of the Majority's decision which upholds the conviction of Lorenzo Johnson for first degree murder and criminal conspiracy . . . I believe that there is no direct evidence, nor can any be inferred, linking defendant Johnson to the death of Taraja Williams nor any agreement with defendant Walker which resulted in Williams' death.

A-12f-13f.

Mr. Johnson's petition to the Pennsylvania Supreme Court for leave to appeal was denied. *Commonwealth v. Johnson*, 737 A.2d 741 (Pa., 1999) (Table), A-1h.

Following state post-conviction proceedings (which are not relevant to these proceedings), Mr. Johnson filed a *pro se* petition for habeas corpus relief in the United States District Court for the Middle District of Pennsylvania. *Johnson v. Mechling*, 4:04-cv-1564 (M.D. Pa).

After appointing undersigned counsel, the district court issued an order and opinion denying the petition and a certificate of appealability. *Johnson v. Mechling*, 541 F. Supp. 2d 651 (M.D. Pa. 2008), A-1e, A-1d-163d.

Mr. Johnson filed a motion pursuant to Fed.R.Civ.P. 59(e) to alter the judgment to permit a certificate of appealability. This motion was granted and Johnson was given permission to appeal the sufficiency of evidence claim. *Johnson v. Mechling*, 04-cv-1564 (M.D. Pa. May 15, 2008), *JA*-50-56.[2]

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[2]The district court's order granting a certificate of appealability is not contained in the Commonwealth's *Appendix*. It is available on PACER as document # 77.

The Court of Appeals for the Third Circuit reversed the district court and remanded the case with instructions that the Writ issue. *Johnson v. Mechling*, 446 Fed.Appx. 531, 2011 WL 4565464 (C.A.3 (Pa.)), A-1a-55a (opinion); A-1c-4c (judgment).

After the Court of Appeals issued its mandate, Mr. Johnson filed in the district court a *Motion for Issuance of the Writ or Bail*, requesting his release pending completion of these *certiorari* proceedings. Following an evidentiary hearing on January 12, 2012, at which family members and prison personnel testified on behalf of Mr. Johnson, the district court released Mr. Johnson on conditions. *Order, Johnson v. Mechling*, 04-cv-1564 (M.D. Pa. Jan. 17, 2012) (available on PACER as document # 114).[3]

C. The Trial

The state trial court's post-verdict opinion outlines the Commonwealth's trial theory. Mr. Johnson was convicted of the December 15, 1995, shotgun shooting death of Taraja Williams at the entrance to a shallow alley on the 1400 block of Market Street in Harrisburg, Pennsylvania. It was undisputed that the victim was shot by Corey Walker, who was tried jointly with Mr. Johnson. Mr. Johnson was convicted of first degree murder as Walker's accomplice. Although Mr. Johnson was also convicted of the substantive offense of criminal conspiracy, the Commonwealth did not seek to convict him of murder on a theory of conspiratorial liability. A-1g-12g.

Because the Court of Appeals decision was based on its careful examination of the trial record, crediting all of the facts introduced by the Commonwealth at trial, we set out in detail here the prosecution's entire presentation of evidence:

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[3] The district court found "impressive" and "compelling" testimony from prison staff who had known Mr. Johnson for many years, characterizing Mr. Johnson as a "model prisoner," as well as testimony from his family regarding his maturity. *Id.*

Police Officer Laura Davis responded to the scene of the shooting and found Taraja Williams' body "right between these two houses" at the entry to an alley. *JA*-101-110. The alley was "not a very wide alley . . . maybe four feet, about the stretch of my arms." *JA*-115. Although the alley went back from the sidewalk about eight to ten feet (*JA*-116), the body was found "relatively" close to the sidewalk. *JA*-118.

Leroy Lucas was employed in the Harrisburg Police Department's forensic unit. He responded to the scene and saw the body at the entrance to a "small alleyway" (*JA*-127), "towards the sidewalk." *JA*-139.

Gary Miller was the son of the owner of a bar near the shooting. A-146. He was working in the bar on the night and early morning of the shooting. He saw Corey Walker with the victim, but did not see Johnson. *JA*-148. He heard his doorman tell Walker and Williams "you all got to take that out of here" and he saw Walker and the victim leave the bar alone. *JA*-150.

Carla Brown, a self-professed crack addict who admitted to being high at the time of her observations (*JA*-169), was in Miller's bar on the night of the shooting. *JA*-157-158. She "saw" but did not hear the content of an apparent argument involving the victim, Walker, and Johnson. *JA*-158-160, 179, 181. She could not say whether Johnson was arguing on Walker's side, on Williams' side, or taking a third position with respect to the unknown subject of the argument. She acted out hand gestures on the witness stand, which the prosecutor indicated showed that there were "a lot of arm movements going on." *JA*-160. These motions were not ascribed by the witness to any particular person. She said the "argument" did not last long, when the bouncer and Miller told the men "they had to go." *JA*-160.

Brown followed the three men out of the bar because "she wanted to know what was going on." *JA*-161. Walker was "walking . . . like something could have been up under there under [his]

coat." *JA*-161. The three walked in single file, Walker in front, the victim in the middle and Mr. Johnson in the rear. *JA*-162. She did not believe that Walker and Johnson knew she was following them "because they never turned around," but she believed Williams knew she was there because he "hollered out, go ahead, suh [her nickname]." *JA*-163-164.

She saw Walker and the victim go into the alley, but Johnson "never went in." *JA*-165, 184. During the time she was walking, "nobody talk[ed] about killing anybody." *JA*-184. From the time she saw Walker and the victim enter the alley, only a couple of seconds passed, during which time she proceeded another five feet, when she heard a boom. *JA*-166-167. After the boom, she did not look back, but fled. *JA*-166-167.

Aaron Dews was employed at Youth Works, located next to the alley. On the night of the incident, he heard a loud boom, and a "minute or two later" looked out a window and saw two silhouettes "running up the driveway," *JA*-214, 216-217. Because there was plastic over the window, he could not distinguish any identifying characteristics of the people he saw running, not even their gender. *JA*-218.

Brian Ramsey, another admitted drug addict, was a Dauphin County prisoner who knew Taraja Williams, and knew that Williams was a drug dealer. *JA*-221-223. He was familiar with Walker and Johnson, whom he had "seen around" and who were often together. *JA*-224-225. He saw Williams shortly before hearing the shot. He did not know where Williams was coming from or going; "he just walked off." *JA*-229. In contrast to Brown, Ramsey said that nobody was with Williams as he came from the direction of the bar. *JA*-230. He then saw Williams "moving into one of these alleys with two other individuals," and assumed that Williams was going to conduct a drug transaction. *JA*-231. He thought one of the two people was a woman. *JA*-243. Mr. Johnson was not with Williams as Williams entered the alley. *JA*-233, 246. After seeing Williams enter the

alley, Ramsey went back to his conversation and did not see Williams again. *JA*-231. Ramsey volunteered on cross examination that "I would say he was forced in that alley" (*JA*-246); however, he neither provided any facts to support that conclusion, nor did he indicate who "forced" Williams into the alley. One of the people he saw walking with the victim was a "crippled guy" who walked with a limp, and whom he knew to be a drug dealer. *JA*-233-234. Although the prosecutor would later argue that the "crippled guy" was likely Walker, who was limping from concealing the shotgun in his coat (*JA*-450-451), Ramsey clearly distinguished the "crippled" guy – whom he had known for about a year – from Walker or Johnson. *JA*-245. He later altered his testimony to indicate that four people (three plus the victim) walked toward the alley, one of whom was a woman. *JA*-244, 249. "Not even" a minute after seeing Williams walk by from the bar, he heard a shot. *JA*-234.

Ramsey later saw Walker and Johnson milling in a crowd after the body was discovered: "They appeared like sort of maced, you know like what happened, Taraja has been killed, yeah, are you serious, you know, liquid eyed. . . ." *JA*-237.

Kevin Duffin was a Harrisburg detective. At about noon on the day following the shooting, he was driving his unmarked car when he saw three individuals in a Ford automobile at 14th and Market Streets. They sped up "in an attempt to get away from him." *JA*-257-258, 262. He put a "Kojak" light on his roof and pursued the car until it hit another car. Just before the crash, the three occupants exited the car and fled. One of them was Johnson. *JA*-263-264. Duffin did not indicate who was driving or from which door of the car Johnson emerged.

Victoria Doubs was another Dauphin County prisoner. *JA*-269-270. She was with Walker and Johnson during the day of December 14. *JA*-271. At one point, Williams showed up. *JA*-273-274. When Walker saw Williams, Walker said "let me go holler at this kid." Walker walked over to Williams and those two then walked toward Doubs. Doubs said they were "talking about the

money that Taraja owed us." *JA*-274. When Doubs said the debt was owed to "us," she did not indicate whether that included Johnson. Contrary to the Commonwealth's current assertion that the money debt was owed to Johnson, Walker, and Doubs jointly (*Petition*, 3), the prosecutor argued in closing at trial that the debt was owed only to Walker. *JA-439. See also Pan. Op.,* A-48a-49a. Moreover, the state trial court found as a fact that the debt was owed *only to Walker*, not to Walker and Johnson jointly. *Commonwealth v. Johnson*, No. 1544 CD 1996 (C.P. Dauphin, Aug. 25, 1997) *slip opinion*, A-5g.

As Williams and Walker approached Doubs and Johnson, Walker asked Williams about the money. Williams got "smart" and was "cussing out" Walker, "telling him he'd give it to him when he felt like it and he ain't scared of him." *JA*-275. Walker "felt the need as though that he wanted to fight Taraja . . . and he fought Taraja in front of Kentucky Fried Chicken." Williams got the better of Walker and beat him with a broomstick. *JA*-275-276.

Many people observed the fight and laughed at Walker because he was beaten by a "crackhead," which made Walker angry. Walker stated that he was going to "kill that kid," at which point Doubs "laughed." *JA*-277-79.

Doubs also testified that in the early morning hours of December 15, she, Johnson and three other people were on their way to New York City. *JA*-280-281. Doubs spoke with a Detective Laudermilk on two occasions. On the first occasion, she indicated that she was in New York City with Johnson at the time of the shooting. On the second occasion, she indicated that she really did not remember if she was in New York on the night of the shooting. She was "going to be paid to tell that story and at the time I was going to be told I was going to tell that because I wanted to get out of jail and my bail was supposed to be paid." Later she stated that she was going to be paid by "one of their friends [referring to Walker and Johnson, but without distinguishing which] named

Larry. I'm not sure of his last name." *JA*-281-285.

Frederick Wentling, a State Police ballistican, testified about a part of the shotgun recovered in the alley. *JA*-298-313.

Wayne Ross, a medical examiner, testified about cause and manner of death. *JA*-341-356.

In closing argument, the prosecutor failed to identify a single fact from which Johnson's specific intent to kill could be inferred. *See e.g.*, *JA*-439-440 (Victoria Doubs); *JA*-441-442 (Gary Miller); *JA*-447-48 (Carla Brown: "she saw these two defendants in the bar with Taraja Williams," followed them out of the bar and saw Walker and Williams go into an alley, while Johnson "stands outside.") Notably, the prosecutor did not even suggest that Mr. Johnson had stood as a look-out or had in any other way facilitated the offense.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

I. The Commonwealth at Most Seeks Error Correction.

The Commonwealth offers this Court a scatter-shot list of alleged errors committed by the Court of Appeals. As set forth in detail below, the decision of the Court of Appeals is error-free. However, even if the Commonwealth's claimed errors did exist, none of them provides a "compelling reason," warranting this Court's consideration. *Supreme Court Rule 10.*

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"); Stern, Gressman, Shapiro & Geller, SUPREME COURT PRACTICE 255 (8th ed. 2002) (same).

At most, the Commonwealth's *Petition* amounts to a request for a highly fact-specific error correction. The Commonwealth has identified no overarching principle of law or disagreement amongst the courts of appeals that would merit this Court's intervention. Rather, the Commonwealth has manufactured five separate claims of error, suggesting in various ways that the Third Circuit has misapplied Sections 2254(d)(1) and (e)(1) of the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"). None of the alleged errors forms a proper basis for invoking this Court's *certiorari* jurisdiction. The Third Circuit Panel recognized and employed the appropriate provisions of AEDPA and applied the proper standards of deference to the state court decisions.

II. Each of the Alleged Errors Posited by the Commonwealth Is Based on a Misunderstanding of the Law or a Misstatement of Fact.

As the Third Circuit properly noted, a criminal conviction violates due process if the evidence at trial was insufficient to convince any rational trier of fact of the defendant's guilt beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 313-14, 324 (1979). In conducting a *Jackson* sufficiency review, a habeas court credits as true all of the prosecution's evidence, and applies state law to determine if each element has been proven. *Id.*, at 324, n.16 ("the standard must be applied with explicit reference to the substantive elements of the criminal offense as defined by state law."). The purpose of applying state law is to ensure that the federal reviewing court analyzes the evidence using the very same standards the state court would have used, had it reasonably undertaken a sufficiency review.

The Court of Appeals did exactly what it was supposed to do. It "view[ed] the evidence in a light most favorable to the prosecution," and analyzed it under applicable state law. *Id.,* at 29a. It also credited all reasonable inferences based on the facts that it assumed to be true. *Jackson*, 443 U.S. at 319 (court conducting sufficiency review must credit all "reasonable inferences"). The Court of Appeals then determined that the Pennsylvania courts had failed reasonably to apply *Jackson* to the facts that it presumed to be true because the Pennsylvania courts did not address sufficiency of the proof that Mr. Johnson had the requisite intent to kill, a necessary element of first degree murder in Pennsylvania for a principal or as an accomplice.

In Pennsylvania, an inference is "reasonable" and may be relied upon by a finder of fact if, and only if, the inference is "more likely than not to flow from the proved fact on which it is made to depend." *Commonwealth v. McFarland*, 308 A.2d 592, 594 (Pa. 1973), *quoting Turner v. United States*, 396 U.S. 398, 405 (1970). As the court subsequently explained:

Where the inference allowed is tenuously connected to the facts proved by the

> Commonwealth, due process is lacking. **Th[e] 'more-likely-than-not' test . . . must be viewed as a minimum standard in assessing the reasonableness of inferences** relied upon in establishing a prima facie case of criminal culpability. Anything less than such a standard would rise no higher than suspicion or conjecture which our law has repeatedly **rejected** as being a basis for a finding of a *prima facie* case.

Commonwealth v. Wodjak, 466 A.2d 991, 996 (Pa. 1983) (internal citations omitted); *see also Commonwealth v. Wagaman*, 627 A.2d 735, 740-741 (Pa.Super. 1993) (same); *Commonwealth v. Bailey*, 292 A.2d 345, 347 (Pa. 1972) (evidence insufficient when based on inference that "just as reasonably" has innocent explanation).

Only "inferences and conclusions that reasonably and logically can be drawn" from the proven facts may sustain a conviction. *Commonwealth v. Dooris*, 696 A.2d 152, 153 (Pa. 1997); *Wagaman*, 627 A.2d at 740, *citing Wodjak*, 466 A.2d at 996 ("[i]nference is a process of reasoning by which a fact or proposition is deduced as the logical consequence from other facts which have been established."). Thus, as the Panel noted, Pennsylvania law holds:

> If an inference is merely one of two or more possibilities of roughly equal appeal or probability, then the proposition has not been proven beyond a reasonable doubt and the verdict is the product of **speculation and conjecture**.

Pan.Op., A-33a, quoting *Commonwealth v. Gruff*, 822 A.2d 773, 788 (Pa. Super. 2003).

A. The Court of Appeals Followed *Jackson v. Virginia* When it Applied State Law in Determining Whether the Evidence Was Sufficient to Satisfy the Due Process Clause of the Fourteenth Amendment.

The Commonwealth initially claims two related errors: 1) that because the Pennsylvania "more likely than not" standard is not "clearly established federal law, as determined by" this Court, the application of this standard cannot support relief under 28 U.S.C. § 2254(d)(1) (*Petition*, 12, 13); and 2) the Court of Appeals' grant of relief is based upon a "finding that the state courts misapplied state law . . . which directly conflicts with this Court's holding that only noncompliance with federal law will render a state judgment" invalid. (*Id.*).

These contentions are baseless. As to the first contention, *Jackson* is the established precedent of this Court, which commanded the Court of Appeals to apply the state-law-generated "more likely than not" standard governing the reasonableness of inferences. The second contention is meritless for the same reason – *Jackson* requires an assessment employing state law in order to determine sufficiency.[4]

B. The Panel Properly Followed *Jackson* and Its Progeny When It Held that the Jury's Verdict Was Based on Speculation, and Not Reasonable Inferences as Defined by State Law.

The Commonwealth faults the Panel for improperly "substituting" its "subjective" views regarding the propriety of the inferences upon which the jury relied, *Petition*, 14-15, and complains that a habeas court is not permitted to choose one set of inferences over another when a state fact-finder presumably resolved conflicting inferences. *Petition*, at 15. However, the Panel neither substituted inferences nor chose one set of inferences over another. Rather – as required by *Jackson* – the Panel eliminated those inferences that were not permissible under state law because they did not more likely than not flow from the proven facts. The inferences that remained were insufficient to convict.

C. The Panel Did Not Make Any Credibility Determinations.

The Commonwealth correctly notes that under *Jackson* the reviewing court must take all of

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[4] The fact that the Panel cited two decisions of this Court applying the more likely than not standard with respect to statutory inferences, *Turner v. United States*, 396 U.S. 398 (1970) and *Leary v. United States*, 395 U.S. 6 (1973), does not help the Commonwealth. The Panel cited *Turner* because it was quoted by a Pennsylvania Supreme Court decision (*McFarland*), *Pan.Op.*, A- 34a. The Panel's citation to *Leary* was in addition to the many state court decisions it cited for the same "more likely than not" standard.

the prosecution's facts as true, and is therefore prohibited from substituting its own judgment for that of the fact-finder with respect to questions of weight and credibility. *Petition*, 18.

The Commonwealth contends that the Panel violated this precept when it did not credit the prosecution's proof in two instances. *Petition*, 15-17. These assertions are incorrect and are based on a selective and erroneous view of the record.

First, the Commonwealth cites the Panel's discussion of witness Brian Ramsey. *Petition*, 16.[5] Ramsey testified on direct examination that he did not see Mr. Johnson in the vicinity of the alley at the time of the shooting. On cross-examination, he volunteered that "I would say he [Williams] was forced in that alley." (*JA*-246). Ramsey provided no "facts" to support this conclusory statement that the victim was forced into the alley. As noted by the Panel, Ramsey did not testify that he saw the victim enter the alley, and "did not describe any physical action . . . that could lead to a reasonable inference that anyone 'forced' the victim into the alley." *Pan.Op.*, A-42a-43a.

Nevertheless, the Panel took as *true* that the victim was "forced," and still found proof of Mr. Johnson's specific intent to kill wanting because: 1) Ramsey testified that he did not see Mr. Johnson anywhere near the alley; and 2) Ramsey did not testify as to who forced the victim into the alley.

Second, the Commonwealth complains that the Panel compared ostensibly contradictory testimony from Carla Brown regarding the actions taken by Johnson at the entrance to the alley. *Petition*, 17. However, the Court's legal conclusion regarding this portion of Brown's testimony does not rest on any contradiction. Rather, the Court noted that a guilty inference would only be reasonable under the facts (including those testified to by Ramsey) if Brown had testified that

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[5]The Commonwealth cites to the *Panel Opinion* at A-22a. However, that portion of the Opinion simply recites, in a footnote, Ramsey's state post-conviction declaration.

Williams had been "shoved," "pushed, or "ordered" into the alley, or his exit otherwise blocked, and that such an action had been taken by *Johnson*. *Pan.Op.*, 39a-41a. Absent such testimony, the Court held that under the facts of this case, her testimony that "they" walked the victim into the alley, was legally insufficient.

The Commonwealth further contends that these two points are comparable to the errors of analysis this Court identified in *McDaniel v. Brown,* 130 S.Ct. 665 (2010) and *Cavazos v. Smith*, 132 S.Ct. 2 (2011). *Petition*, 18. This comparison is fanciful. In *McDaniel*, the federal habeas courts relied on evidence that **was not even presented** at trial. Indeed, the departure from *Jackson's* rule requiring that the habeas court view the trial evidence in a light most favorable to the prosecution was so dramatic that, by the time the case got before this Court, the respondent argued that it was not even a *Jackson* case:

> Although we granted certiorari to review respondent's *Jackson* claim, the parties now agree that the Court of Appeals' resolution of his claim under *Jackson* was in error . . . Indeed, respondent argues the Court of Appeals did not decide his case under *Jackson* at all . . .

McDaniel, 130 S.Ct. at 671.

Similarly, *Cavazos* does not undermine in the slightest the Panel's decision. This Court spelled out the manner in which the Ninth Circuit had misapplied *Jackson*: the Circuit "substituted its judgment for that of a California jury on the question of whether the prosecution's or the defense's expert witnesses more persuasively explained the cause of a death," *Cavazos*, 132 S.Ct. at 3, and beyond that, in so doing, got the facts **wrong**. *Id.* at 7 ("The Ninth Circuit's assertion that these [prosecution's] experts 'reached [their] conclusion because there was no evidence in the brain itself of the cause of death' **is simply false**.") Thus, the Ninth Circuit panel chose to credit the defense's expert testimony over that offered by the prosecution (a blatant violation of *Jackson* and its progeny, which requires a habeas court to **accept, not reject**, the prosecution's facts as true) and

was wrong about the facts, to boot.

These cases are a far cry from alleged errors the Commonwealth attributes to the Panel here. Indeed, the Panel carefully followed *Jackson* by crediting all of the Commonwealth's evidence as true and only then properly concluded that Mr. Johnson's conviction rested on speculation, not on evidence or the reasonable inferences that could be drawn therefrom.

D. The Panel's Application of Pennsylvania Law Regarding Accomplice Liability Was Proper.

The Commonwealth next argues that the Panel failed to apply the correct state law regarding accomplice liability. The Panel, citing Pennsylvania cases, notes that, in Pennsylvania, accomplice liability rests on a finding that the accomplice to an offense must be an "active partner." *Pan.Op.*, A-31a. The Commonwealth counters that "the least degree of concert or collusion is sufficient." *Petition*, 19-20. There is no contradiction here: the degree of collusion may be slight but it must nevertheless be active. The Commonwealth engages in word play but describes no genuine error.

E. The *Jackson* Review Conducted by the Court of Appeals Was Properly Done Pursuant to 28 U.S.C. § 2254(d)(1).

The Commonwealth appears to argue that the application of *Jackson v. Virginia* is governed only by 28 U.S.C. § 2254(e)(1), rather than by § 2254(d)(1), because it involves a review of the facts offered at trial. *Petition*, 20-21. This is incorrect.

As the Court of Appeals properly noted, under 28 U.S.C. 2254 (d)(1), *Jackson* is the "clearly established law" a state court must apply for purposes of analyzing a due process claim based on insufficiency of the evidence. Just as this Court did in *McDaniel,* the Panel applied (d)(1) to this *Jackson v. Virginia* claim, and held that the state court unreasonably applied *Jackson* under (d)(1) because the state court never considered whether the Commonwealth had introduced sufficient evidence to convince any rational trier of fact of one of the substantive elements of the offense with

which Mr. Johnson was charged - *i.e.*, whether he had the specific intent to kill.

This is the extremely rare case in which, even after applying AEDPA review and the deferential *Jackson* standard, there was simply insufficient evidence for any rational trier of fact to conclude that every element of the offense had been established. Where there is such a violation of due process, habeas corpus relief is required.

CONCLUSION

The Commonwealth has failed to show that this case presents an important issue of federal law that requires this Court's resolution or intervention. The Third Circuit accorded the deference required by AEDPA to all facets of the state court opinions The Circuit's review of Mr. Johnson's *Jackson* claim was thorough, careful, and error-free..

For these and all of the reasons stated above, this Court should not grant *certiorari*.

Respectfully Submitted,

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Counsel for Respondent, Lorenzo Johnson

Dated: March 27, 2012

CERTIFICATE OF SERVICE

I, Michael Wiseman, hereby certify that on this 27th day of March, 2012, I served three copies of the foregoing Respondent's Motion for Leave to File *In Forma Pauperis* and Brief in Opposition to the Petition for Writ of *Certiorari* on the following person by United States Mail, First Class, postage prepaid:

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Dated: March 27, 2012
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