No. _____

In the Supreme Court of the United States

LONNIE OLIVER, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT CAMBRIDGE SPRINGS, *et al.*,
Petitioners,

v.

AUDREY MCDANIELS,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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Questions Presented

Respondent Audrey McDaniels starved her severely disabled stepson to death. At her first trial, the jury announced that they were hopelessly deadlocked. Accordingly, the trial court discharged the jury, excused the jurors from the courtroom, and declared a mistrial. Defense counsel then made a routine request to speak with the former jurors, which the trial court granted. Thereafter, defense counsel, the prosecutor, the trial court, and the ex-jurors all discussed the case together in the jury deliberation room off the record. Following this discussion, the court reassembled the jurors and had them announce a new verdict of not guilty of third-degree murder. The state appellate court ruled that this purported acquittal, after the jury had already been discharged and a mistrial declared, was a legal nullity under state law. Consequently, the state court remanded for reinstatement of the murder charge. At the retrial, McDaniels was convicted of third-degree murder.

Was a one-sentence allegation of fact in the background section of the prisoner's state court brief for appellee sufficient to exhaust her novel and complex federal constitutional double jeopardy claim?

Is it unreasonable to conclude that double jeopardy did not bar retrial, where this Court has repeatedly indicated that double jeopardy does not apply if the trial court lacked the power to enter a verdict?

List of Parties

Petitioners

Lonnie Oliver, Superintendent, State Correctional Institution at Cambridge Springs

The Attorney General of the Commonwealth of Pennsylvania

The District Attorney of the County of Philadelphia, Pennsylvania

Respondent

Audrey McDaniels

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The opinion of the United States Court of Appeals for the Third Circuit affirming the judgment of the district court is available via Westlaw at 2017 WL 2875109, and is reprinted at App. 1-66. The opinion of the district court unconditionally granting the petition for a writ of habeas corpus is available via Westlaw at 2014 WL 2957460, and is reprinted at App. 67-105.

Statement of Jurisdiction

The judgment of the Third Circuit was entered on July 6, 2017. On September 22, 2017, Justice Alito extended the time to file the petition for a writ of certiorari to November 3, 2017. This Court has jurisdiction to review the judgment of the Court of Appeals under 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved

The constitutional provision involved in this case is the Fifth Amendment to the United States Constitution, which provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness

> against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The statutory provisions involved are 28 U.S.C. § 2254(b)(1), and 28 U.S.C. § 2254(d). Section 2254(b)(1) provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that –
>
> (A) the applicant has exhausted the remedies available in the courts of the State; or
>
> (B)(i) there is an absence of available State corrective process; or
>
> (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

Section 2254(d) provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly

established Federal law, as determined by the Supreme Court of the United States; or

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

Statement of the Case

This case involves a "horrific crime." McDaniels v. Warden Cambridge Springs SCI, 2017 WL 2875109 at *1 (3d Cir. 2017). The victim, Brahim Dukes, had serious disabilities. He was autistic, retarded, and could not speak. He had the mental capacity of a child in nursery school. He needed the assistance of others just to bathe and dress himself, and he wore diapers.

When the victim was six or seven years old, his father, Dewey Gillespie, met the respondent, Audrey McDaniels. At that time, McDaniels had two children by a prior relationship. Gillespie and McDaniels began a romantic relationship and ultimately had nine additional children together. Gillespie was the primary caretaker for the victim when Gillespie was not incarcerated.

In the summer of 1999, Gillespie was in prison, and the victim was left in the exclusive care of McDaniels. During this time, when McDaniels was supposed to be caring for the disabled victim, the victim's great aunt (Quarlean Singletary) went to McDaniels' house to take the victim to live with her. When McDaniels brought the victim outside to go with Ms. Singletary, "[h]e was wet, he was shitty, and he was stinking." In addition,

when the victim got to Singletary's house, he shoved food into his mouth with both hands and ate and drank a lot. The victim stayed with Ms. Singletary for approximately one month.

On December 13, 2001, Gillespie was again sent to prison, which again left McDaniels as the victim's sole caretaker. When Gillespie first went to prison, the victim was in good physical health and had a medium build. McDaniels knew that the victim was unable to care for himself.

During the next sixteen days, until the victim's death on December 29, 2001, Gillespie remained in prison, and the victim was in the exclusive custody of McDaniels. During this time, McDaniels locked the victim in a small back room adjacent to the kitchen. The room was not heated and substantially colder than the rest of the house. It had a dirty tile floor and two mattresses stacked on the floor to the right of the door. There were cardboard storage boxes to the rear of the room. The room smelled of urine and feces. The victim scratched on the door leading from the back room to the kitchen to try to get out.

In addition, during this more than two-week period when Gillespie was incarcerated and McDaniels was the victim's sole caretaker, she did not send him to school, thereby concealing him from anyone who could have interceded on his behalf. She bathed him only once or twice. She made sure that he had food to eat on only one or two occasions. The victim went from having a medium build to having a very thin, emaciated appearance and weighing just ninety-four pounds. His ribs began to stick out. His skin dried out. He lost all

fat in his body. He suffered extensive muscle wasting of his extremities. McDaniels saw the victim every day. She did not seek medical attention for him. She also turned down an offer by Ms. Singletary to help with the victim. McDaniels took good care of her other children, who, unlike the victim, were her biological offspring.

On December 29, 2001, McDaniels got home from work at approximately 9:00 p.m. The victim was in the back room. McDaniels saw that the victim was not moving and that his eyes were open. She called 911.

Paramedics arrived at McDaniels' house a few minutes later. McDaniels summoned them to the back room. The victim was lying on his back on the floor with his knees bent. He was wearing only a dirty white tee-shirt and soiled boxer shorts. He was not responsive to any verbal or physical stimuli. He had no pulse and was not breathing. His skin temperature was cool.

The paramedics asked McDaniels what had happened to the victim to cause him to collapse. She responded that just prior to her calling 911, the victim had been throwing a temper tantrum during which he was jumping up and down on the bed when he suddenly collapsed. McDaniels showed no emotion. Her tone of voice was conversational, and she did not cry, yell, or shake in any way.

The paramedics transported the victim to the hospital, where he was declared dead almost immediately. When McDaniels was informed of his death, she again showed no emotion.

The next day, McDaniels indicated to the victim's aunt and great aunt that his death was related to his appendix.

An autopsy of the victim revealed that the actual cause of his death was inanition (the effect on the body of lack of food and water) and dehydration. The manner of death was homicide. The victim had been dead for several hours before he was found, rendering it "absolutely impossible" for him to have had a temper tantrum immediately before McDaniels called 911. In addition, there was nothing wrong with the victim's appendix. His retardation also played no role in his death.

McDaniels gave a statement to the police. She confessed that although she knew that the victim was incapable of caring for himself, during the entirety of the sixteen-day period from December 13, 2001 to December 29, 2001, she only bathed him once or twice, and only supervised his eating on one or two occasions. She also claimed that the victim usually stayed in an upstairs bedroom.

The police executed a search warrant at McDaniels' house. The police discovered many scratch marks on the inside of the door that led from the back room, where the victim was forced to stay, to the kitchen. There were no scratch marks on any other door in the house, nor was there any physical evidence of a dog or other pet in the house.

The police ultimately arrested McDaniels for murder. She gave a second statement to the police in which she confessed that, contrary to her previous

statement in which she alleged that the victim stayed in an upstairs bedroom, he actually stayed in the back room adjacent to the kitchen.

In July of 2004, McDaniels' first jury trial began in state court. At the close of the Commonwealth's case in chief, the trial court granted a judgment of acquittal on the charge of first-degree murder, even though there was sufficient evidence to support this charge. See, e.g., Commonwealth v. Tharp, 830 A.2d 519, 527 (Pa. 2003) ("evidence of a seven-year-old's starvation death at the deliberate hand of her own mother . . . reveals the sort of premeditation and deliberation that separates first degree murder from other killings or, at least, the jury could so find. Accordingly, appellant's sufficiency challenge fails"). The case ultimately proceeded to the jury on the charges of third-degree murder and involuntary manslaughter only.

The day after the jurors began their deliberations, they provided the court with a note stating that they were hopelessly deadlocked and unable to reach a verdict. The trial judge reminded the jurors that there were two separate charges against McDaniels, and asked the jury foreman whether the jury was in fact unable to reach a verdict on either offense. The foreman explicitly stated that the jury was deadlocked as to both third-degree murder and involuntary manslaughter.

The trial judge then asked the foreman whether there was any possibility that further deliberations would lead to a verdict on either offense. He responded in the negative, and the court crier noted for the record that the verdict sheet was blank. At that point, the

judge discharged the jury, thanked them for their service, and told them that the case would have to be retried and that they were free to talk about the case when they left.

After the jury was excused from the courtroom, the judge declared a mistrial. McDaniels' counsel made a routine request to speak with the discharged jurors, and the judge agreed. Defense counsel then raised a motion for bail, and there was argument on the amount and conditions of bail. In addition, the prosecutor and defense counsel argued about whether the case should be scheduled for retrial before the same trial judge or sent back to the calendar judge.

Following these brief arguments, the trial judge, the prosecutor, and defense counsel went back to the jury deliberation room to discuss the case with the discharged jury. In the jury room, there was a conversation regarding the case.[1] After this backroom

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[1]The proceedings in the jury room were not transcribed, and there was no subsequent evidentiary hearing concerning these events. According to the trial judge's after-the-fact statements on the record:

> After the jury went to the jury room there was a conversation concerning the understanding of my question, and the jury explained that they did not fully understand what I was asking. And that in fact, they all had agreed that it was not guilty as to third degree murder. The only thing that they could not agree on is whether or not it was involuntary manslaughter. So with that, Counsel requested that the jury be re-established into the jury box where they are now.

(continued...)

discussion, the judge reassembled the discharged jury, and had the foreman announce a new verdict of not guilty of third-degree murder.

The Commonwealth subsequently filed a motion to set aside the purported, post-discharge not guilty verdict. McDaniels responded to the motion by contending that the alleged verdict was proper under state law. She did not allege that a retrial on third-degree murder would violate the double jeopardy clause of the Fifth Amendment to the United States Constitution. The trial judge denied the Commonwealth's motion.

The Commonwealth appealed to the Pennsylvania Superior Court. McDaniels filed a motion to quash the Commonwealth's appeal, and a brief for appellee.

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[1](...continued)

The trial court further characterized these events in its opinion as follows:

> The judge and the attorneys then proceeded into the jury room. On the marker-board in the jury room, the jury had recorded its verdicts for manslaughter and third-degree murder. According to the information on the marker-board, the jury was unanimous in finding that the defendant was not guilty of third-degree but was not unanimous on the manslaughter charge. The judge asked if this was their verdict and they said yes. The jurors had become confused about how they were supposed to render a verdict and thought that they were required to find on third-degree murder and manslaughter jointly. It was the jury's unanimous decision that defendant was not guilty of third-degree murder. The jury was deadlocked on manslaughter. Therefore, the jury had not delivered its true verdict in court.

Neither her quashal motion nor her appellate brief raised a claim of double jeopardy.

The state Superior Court ruled that the purported, post-discharge acquittal of third-degree murder was a "legal nullity" under Pennsylvania law. Commonwealth v. McDaniels, 886 A.2d 682, 688 (Pa. Super. 2005). Accordingly, the Superior Court reversed the denial of the Commonwealth's motion to set aside the supposed not guilty verdict, and remanded for reinstatement of the charge of third-degree murder.

McDaniels filed unsuccessful petitions for reargument in the Superior Court, allowance of appeal to the Pennsylvania Supreme Court, and certiorari to this Court. None of these petitions raised a double jeopardy claim.

In 2007, McDaniels was retried in state court and convicted of third-degree murder. She was then sentenced to 15 to 30 years imprisonment. At no point in the trial court, either before, during, or after the retrial, did McDaniels claim that the second trial violated double jeopardy.

McDaniels appealed. Although she raised five claims for relief on appeal, a double jeopardy issue was not among them. The Superior Court affirmed her judgment of sentence, and the state Supreme Court denied allowance of appeal.

In 2009, McDaniels filed a *pro se* petition for relief under Pennsylvania's Post Conviction Relief Act (PCRA). In her form PCRA petition, under the heading "[t]he following facts were made known to me by means

other than my own personal knowledge[,]" McDaniels wrote "Double Jeopardy". Also, she indicated that if she were permitted an appeal, she intended to raise the "Double Jeopardy Clause."

Counsel was appointed and subsequently filed a letter, pursuant to Pennsylvania v. Finley, 481 U.S. 551 (1987), concluding that there were no meritorious issues that could be raised on McDaniels' behalf. Counsel also filed a motion to withdraw. In May of 2011, the PCRA court dismissed McDaniels' PCRA petition and permitted counsel to withdraw from the case.

McDaniels appealed the denial of PCRA relief *pro se*. However, on December 6, 2011, the Superior Court dismissed the appeal for failure to file a brief.

Meanwhile, on September 9, 2011, McDaniels filed a *pro se* petition for a writ of habeas corpus in federal court. Counsel was appointed to represent her, and McDaniels filed a counseled memorandum of law claiming, inter alia, that her "re-trial and conviction on the charge of third degree murder was in violation of the Double Jeopardy Clause of the United States Constitution."

On October 12, 2012, Magistrate Judge M. Faith Angell issued a report and recommendation proposing that McDaniels' habeas petition be denied and dismissed without an evidentiary hearing. Judge Angell concluded that "the issue of double jeopardy . . . has not been fairly presented to all levels of the state judicial system. Consequently, it is unexhausted and

procedurally defaulted, as it is too late to return to the state courts with it."

On July 1, 2014, the district court, per the Honorable Cynthia M. Rufe, ordered that the report and recommendation was approved and adopted in part and rejected in part. Specifically, the district court rejected the report and recommendation with respect to the double jeopardy claim. The district court concluded that McDaniels "exhausted her double jeopardy claim" and that the state Superior Court's rejection of the issue was "contrary to" and "an unreasonable application of" this Court's case law. Accordingly, the district court granted the habeas petition unconditionally and directed that McDaniels be released from custody forthwith.

The Commonwealth appealed to the Third Circuit. McDaniels conceded at oral argument that she did not fairly present her double jeopardy claim to the state courts. Oral Arg. 30:00 – 30:08. On July 6, 2017, a divided panel of the Court of Appeals affirmed the grant of unconditional habeas relief.

Notwithstanding McDaniels' concession, the panel majority held that McDaniels did in fact fairly present her double jeopardy claim to the state courts. According to the majority, McDaniels fairly presented this issue on the Commonwealth's appeal from the first trial, when she alleged in the statement of the case section of her brief for appellee that the "Commonwealth is seeking to overturn the verdict of not guilty on murder of the third degree and has asked this Honorable Court to review the same." McDaniels, 2017 WL 2875109 at *4 (quoting Brief for Appellee at 12). The majority

reasoned that "even though McDaniels' brief failed to cite chapter and verse of the Constitution or even to invoke the term 'double jeopardy,' . . . her statement that the State sought to overturn her not guilty verdict brought [her double jeopardy claim] to the attention of the Superior Court." Id. (quotation marks, footnote, and citation omitted).

On the merits, the panel majority determined that "the Superior Court's analysis [of the double jeopardy issue] was an unreasonable application of clearly established federal law." McDaniels, 2017 WL 2875109 at *7. Specifically, the Court of Appeals reasoned that in Ball v. United States, 163 U.S. 662 (1896), this Court "held that an acquittal 'could not be reviewed, on error or otherwise, without putting him twice in jeopardy, and thereby violating the constitution.'" McDaniels, 2017 WL 2875109 at *7 (quoting Ball, 163 U.S. at 671). The Third Circuit argued that "[a]lthough the Superior Court recognized the error at play, it did not apply the well-established rule set out in Ball to the erroneous acquittal by the jury." Id.

The Honorable Cheryl Ann Krause authored a dissenting opinion vigorously disputing both the majority's finding of fair presentation, as well as its determination that the state court unreasonably applied clearly established case law from this Court. Indeed, Judge Krause indicated that the majority decision was a prime candidate for summary reversal by this Court:

> As a federal court reviewing a state court conviction, we are obligated to comport with the principles of federalism, comity, and finality that

> undergird the procedural default bar and the exceedingly high degree of deference mandated by [28 U.S.C. § 2254]. And in cases where the Supreme Court has perceived Courts of Appeals to disregard this mandate and to substitute their own judgment for that of state courts, it has not hesitated to summarily reverse with harsh admonitions that the appellate court "misunderstood the role of a federal court in a habeas case," Davis v. Ayala, —— U.S. ——, 135 S.Ct. 2187, 2202, 192 L.Ed.2d 323 (2015), and "all but ignored the only question that matters under § 2254(d)(1)," that is, "whether it is possible fairminded jurists could disagree that [the state court's] arguments or theories are inconsistent with the holding in a prior decision of" the Supreme Court[.]
>
> Heading those admonitions, I would reverse the District Court's grant of habeas relief in this case.

Id. at *25.

Reasons for Granting the Writ

The Third Circuit in this case egregiously violated this Court's decisions governing federal habeas exhaustion and the highly deferential habeas standard of review applicable to merits determinations in state court. Specifically, the Court of Appeals erroneously concluded that a fleeting allegation of fact was adequate to fairly present a federal constitutional claim to the state courts, notwithstanding this Court's repeated pronouncements that alleging facts alone is insufficient

to exhaust a federal claim. In addition, the Third Circuit wrongly found that there could be no fair-minded disagreement that double jeopardy was violated in this case, despite numerous decisions by this Court providing that double jeopardy does not apply if the trial court lacked the power to enter a verdict in the first place. These blatant errors, if left uncorrected, will result in the unconditional and permanent release of a horrific murderer who locked her own disabled stepson away in a filthy and frigid back room and starved him to death over the course of weeks. The Commonwealth will be forever barred from retrying this cold-hearted killer. The clear missteps by the Court of Appeals will also sow the misunderstanding prevalent among several circuits that asserting mere facts suffices to exhaust a federal claim, and serve to undermine the jury system. Further review is appropriate.

A. McDaniels' one-sentence allegation of fact in the background section of her state court brief for appellee did not fairly present her novel and complex federal constitutional double jeopardy claim

"Before a federal court may grant habeas relief to a state prisoner, the prisoner must exhaust his remedies in state court." O'Sullivan v. Boerckel, 526 U.S. 838, 842 (1999). "[E]xhaustion of state remedies requires that petitioners 'fairly presen[t]' federal claims to the state courts." Duncan v. Henry, 513 U.S. 364, 366 (1995) (per curiam). "[F]or purposes of exhausting state remedies, a claim for relief in habeas corpus must include reference to a specific federal constitutional guarantee, as well as a statement of the facts that

entitle the petitioner to relief." Gray v. Netherland, 518 U.S. 152, 162-163 (1996). Thus, "[i]t is not enough that all the facts necessary to support the federal claim were before the state courts." Anderson v. Harless, 459 U.S. 4, 6 (1982).

For instance, in Picard v. Connor, 404 U.S. 270 (1971), this Court ruled that it was "unable to agree with that [the Court of Appeals] that respondent provided the Massachusetts 'court with 'an opportunity to apply controlling legal principles to the facts bearing upon (his) constitutional claim.' . . . To be sure, respondent presented all the facts. Yet the constitutional claim the Court of Appeals found inherent in those facts was never brought to the attention of the state courts." Id. at 277. See also Gray, 518 U.S. at 163 (in Picard "we rejected the contention that the petitioner satisfied the exhaustion requirement of 28 U.S.C. § 2254(b) by presenting the state courts only with the facts necessary to state a claim for relief").

Simply reciting facts and requiring the state courts to sua sponte discern a federal constitutional claim from these bare factual assertions does not provide the state courts with "a full and fair opportunity" to address the federal question that is later sought to be presented in federal court. O'Sullivan, 526 U.S. at 845. This is particularly true where, as here, state law bars state courts from raising issues sua sponte, see Commonwealth v. Waters, 418 A.2d 312, 318 (Pa. 1980) ("We have held that our courts should not raise issues sua sponte"), and where the federal issue is "novel and complex," McDaniels, 2017 WL 2875109 at *20 (Krause, J., dissenting).

The exhaustion requirement "protect[s] the state courts' role in the enforcement of federal law and prevent[s] disruption of state judicial proceedings." Rose v. Lundy, 455 U.S. 509, 518 (1982). As this Court has long emphasized, "it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation." Darr v. Burford, 339 U.S. 200, 204 (1950).

Here, the Third Circuit ruled that McDaniels exhausted her federal double jeopardy claim on the Commonwealth's appeal from the first trial. Specifically, the Court of Appeals determined that McDaniels fairly presented this claim to the state courts when she noted in the statement of the case section of her brief for appellee that the Commonwealth was seeking to overturn the verdict of not guilty of third-degree murder. See McDaniels, 2017 WL 2875109 at *4. Thus, the Third Circuit's finding of exhaustion was predicated entirely on a single-sentence statement of fact from the fact section of McDaniels' brief for appellee. This fleeting factual assertion was not accompanied by any sort of legal argument, much less a reference to the specific federal constitutional protection against double jeopardy. While McDaniels may have noted as a factual matter in passing that the Commonwealth was challenging an illegal verdict, the novel and complex double jeopardy question that "the Court of Appeals found inherent in those facts was never brought to the attention of the state courts." Picard, 404 U.S. at 277.

The very thin reed of a one-sentence statement of fact buried in the background portion of McDaniels'

brief for appellee does not remotely support a finding of fair presentation. Indeed, even McDaniels herself "has conceded in this appeal that she did not fairly present her double jeopardy claim to the state courts." McDaniels, 2017 WL 2875109 at *10 (Krause, J., dissenting). The Third Circuit's exhaustion ruling clearly conflicted with the repeated decisions of this Court providing that bare allegations of fact are insufficient to exhaust. See Gray, 518 U.S. at 163; Anderson, 459 U.S. at 6; Picard, 404 U.S. at 277.

In addition to violating this Court's precedents, the Third Circuit employed a results-oriented approach to exhaustion that began with the outcome desired by the panel majority and then reasoned backward. This is the only reasonable conclusion to be drawn from a comparison of this case with other recent decisions by the Court of Appeals.

For instance, in Bey v. Superintendent Greene SCI, 856 F.3d 230 (3d Cir. 2017), a published decision decided less than two months before this case, Bey, like McDaniels, conceded that he had not fairly presented his federal constitutional claim to the state courts. See Bey, 856 F.3d at 237 ("Bey concedes that his PCRA counsel failed to argue that his trial counsel's assistance was ineffective in failing to object to the Kloiber instruction that the jury 'may not . . . receive [ ] with caution' positive eyewitness testimony. Bey therefore acknowledges that his claim is procedurally defaulted"). Moreover, in Bey, as here, all the facts supporting the federal claim were presented to the state courts. See Bey, 856 F.3d at 237 ("Bey's PCRA petition did claim ineffective assistance of counsel based on a faulty Kloiber instruction and argued that

as a basis for the objection under the state and federal constitutions"); id. ("Bey's petition and the PCRA Court's opinion reprint the problematic phrase"). However, in Bey the Third Circuit concluded that the federal claim "was not raised in state court" and was thus "procedurally defaulted." Id. at 237.

The Third Circuit's opposite conclusion here is readily explained by the differing consequences of a default ruling in each case. In Bey, the Third Circuit excused the default under Martinez v. Ryan, 566 U.S. 1, 9 (2012) ("Inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial"). Thus, the default was not fatal to Bey's claim. See Bey, 863 F.3d at 244 ("Bey's case, therefore, fits into the narrow category of cases outlined in Martinez, and his procedural default is excused as to his ineffectiveness claim based on the faulty Kloiber jury instruction"). On the contrary, the promptly-excused default in Bey permitted the Third Circuit to circumvent the highly deferential and difficult-to-meet standard of review under 28 U.S.C. § 2254(d) – which the Court in that case had disdainfully referred to as "AEDPA-shmedpa" at oral argument, see http://www2.ca3.uscourts.gov/oralargument/audio/15-2863SaleemBayv.SuperintendentGreeneSCI.mp3, at 11 minutes 58 seconds – and instead apply the more prisoner-friendly de novo standard of review.[2]

In McDaniels' case, on the other hand, a finding of default would have absolutely foreclosed merits review and relief. The Martinez exception was unavailable to

[2]The Commonwealth is also seeking certiorari in Bey.

her because she had not raised this argument in the district court, and it was therefore waived. See McDaniels, 2017 WL 2875109 at *24 (Krause, J., dissenting) ("while ineffective assistance of counsel can be 'cause' excusing a petitioner's failure to exhaust her claims, Petitioner did not argue to the District Court that her state trial or appellate counsel were ineffective for failing to pursue a double jeopardy argument, . . . or that her PCRA counsel was ineffective for failing to pursue an ineffective-assistance-of-trial-counsel claim resting on the omitted double jeopardy argument . . . . Any such arguments are hence waived").

The Third Circuit's results-driven approach to exhaustion is likewise evidenced by its recent opinion in Mathias v. Frackville SCI, 869 F.3d 175 (3d Cir. 2017), which was decided less than two months after this case. In Mathias, the Court of Appeals concluded that federal constitutional claims were waived because they had not been raised in the district court. See id. at 187. The court expressly rejected the notion that the claims were fairly presented to the district court merely because the facts underlying the claims were before the lower court:

> We reject the notion that the mere recitation of facts or procedural history or some combination of hints and innuendo suffice to fairly raise a claim. Rather, the crucial question regarding waiver is whether the petitioner presented the argument with sufficient specificity to alert the district court, that is, whether the district court was put on notice of the legal argument. . . . And that standard is not met merely because the facts underlying a potential legal argument were

> available in the record. Mathias failed to alert the District Court to the legal claims themselves . . . .

Id. at 187 (quotation marks and citations omitted).

The explicit holding in Mathias that the mere allegation of facts is insufficient to fairly present a constitutional claim in **federal** court certainly dictates that bare factual assertions are likewise inadequate to fairly raise a constitutional claim in **state** court for purposes of the exhaustion doctrine. A lesser standard for fair presentation in state court would not adequately protect against the "unseemly" result of a state prisoner upsetting his conviction in federal court based on a constitutional issue that the state courts did not have a fair opportunity to address in the first instance. Darr, 339 U.S. at 204. Indeed, if anything, the comity, federalism, and finality concerns that constrain habeas review mandate that petitioners present **more** to the state courts than would be necessary in federal court.

The stakes in this case, involving an egregious, result-motivated error of law by the Third Circuit, a horrific crime, and an order for the immediate and unconditional release of a convicted murderer without the possibility of retrial, would alone warrant corrective action by this Court. However, the Court of Appeal's erroneous exhaustion ruling also presents this Court with an opportunity to provide needed clarification concerning a recurring issue.

Notwithstanding this Court's clear and repeated pronouncements that merely alleging facts is

insufficient to fairly present a federal constitutional claim in state court, a number of circuits have nonetheless endorsed the contrary view. Several circuits, including the Third, have stated that exhaustion may be accomplished via the "allegation of a pattern of facts that is well within the mainstream of constitutional litigation." E.g., Wilkerson v. Superintendent Fayette SCI, 871 F.3d 221, 229 (3d Cir. 2017); Carvajal v. Artus, 633 F.3d 95, 104 (2d Cir. 2011); Soffar v. Dretke, 368 F.3d 441, 465 (5th Cir. 2004). But see Nadworny v. Fair, 872 F.2d 1093, 1098 (1st Cir. 1989) (expressly declining to adopt this language). This language derives from a decades-old decision by the Second Circuit, not anything this Court has ever said. See Daye v. Attorney General of New York, 696 F.2d 186, 194 (2d Cir. 1982).

These erroneous circuit precedents reflect the need for renewed guidance from this Court as to this question that arises time and again in habeas litigation. The persistence in multiple circuits of the mistaken notion that bare factual assertions are alone adequate to exhaust a federal constitutional claim will inevitably lead to the exhaustion error here being repeated in other cases. This Court should intervene to correct the unwarranted grant of unconditional habeas relief in this horrific case, and to forestall future such injustices.

B. It is reasonable to conclude that the purported acquittal did not bar retrial in light of this Court's many precedents indicating that double jeopardy does not apply where the trial court lacked the power to acquit

The Third Circuit compounded its clear error in disregarding the procedural default in this case by egregiously violating the highly deferential standard of review required by 28 U.S.C. § 2254(d). Assuming, for the sake of argument, that McDaniels did fairly present a federal double jeopardy claim to the Pennsylvania state courts (although she plainly did not), the "strong presumption" that the state courts adjudicated the claim on the merits is not rebutted. See Johnson v. Williams, 568 U.S. 289, 301, 302 n.3 (2013). A claim "adjudicated on the merits" in state court is "subject to review under § 2254(d)" in federal court. Ryan v. Gonzalez, 568 U.S. 57, 75 (2013). The requirements of § 2254(d) are "intentionally difficult to meet." Woods v. Donald, 135 S.Ct. 1372, 1376 (2015). "Section 2254(d) reflects the view that habeas corpus is a guard against extreme malfunctions in the state criminal justice systems, not a substitute for ordinary error correction through appeal." Harrington v. Richter, 562 U.S. 86, 102-103 (2011).

"[A] state-court decision is an unreasonable application of [this Court's] clearly established precedent if it correctly identifies the governing legal rule but applies that rule unreasonably to the facts of a particular prisoner's case." White v. Woodall, 134 S.Ct. 1697, 1706 (2014). "In order for a federal court to find a state court's application of [this Court's] precedent unreasonable, the state court's decision must have been

more than incorrect or erroneous." Wiggins v. Smith, 539 U.S. 510, 520 (2003). "[E]ven clear error will not suffice." Woodall, 134 S.Ct. at 1702. Rather, "relief is available under § 2254(d)(1)'s unreasonable-application clause if, and only if, it is so obvious that a clearly established rule applies to a given set of facts that there could be no fairminded disagreement on the question" Id. at 1706-1707. If, on the other hand, "there are reasonable arguments on both sides[,]" then relief must be denied. Id. at 1707.

Here, the Third Circuit concluded that the Pennsylvania Superior Court unreasonably applied clearly established federal law because the state court failed to apply the rule of Ball – that an acquittal cannot be reviewed on error or otherwise without violating double jeopardy – to the purported acquittal in this case. McDaniels, 2017 WL 2875109 at *7. However, it is not remotely so obvious that Ball applies to the facts of this case that there could be no fairminded disagreement on the question.

Ball is readily distinguishable on its facts. In Ball, the error underlying the acquittal was that the indictment "fail[ed] to aver either the time or the place of the death of" the victim and was therefore "fatally defective[.]" 163 U.S. at 664. Here, on the other hand, the purported acquittal was not invalid due to a defective indictment. Rather, the underlying error in this case was that once the jury had been discharged and a mistrial had been declared, the trial court lacked the authority to enter a new verdict. See McDaniels, 886 A.2d at 685 ("the court had no authority to dismiss the deadlocked verdict on third degree murder once it was recorded and the jury dismissed"); id. at 688 ("the court

had no authority to reassemble the jury to allow them to render a different verdict than the one previously announced and recorded"); id. ("Laudable as its intentions were, the court had no authority to reassemble the jury to allow them to render a different verdict than the one previously announced and recorded").

This Court has repeatedly indicated that where, as here, the trial court lacked the power or authority to enter any verdict at all, a purported acquittal does not bar retrial under the double jeopardy clause. Indeed, in Ball itself the Court stated that "[a]n acquittal before a court having no jurisdiction is, of course, like all the proceedings in the case, absolutely void, and therefore no bar to subsequent indictment and trial in a court which has jurisdiction of the offense." 163 U.S. at 669. "Jurisdiction" has been defined as "[a] court's power to decide a case or issue a decree." Black's Law Dictionary (10th ed. 2014), jurisdiction.

Moreover, Ball is but one of numerous decisions by this Court that have "at least strongly suggested" that a purported acquittal before a court without the power to decide the accused's guilt or innocence does not present a double jeopardy barrier to retrial. McDaniels, 2017 WL 2875109 at *16 (Krause, J., dissenting). See Serfass v. United States, 420 U.S. 377, 389, 392 (1975) (holding that order dismissing indictment did not bar reprosecution under double jeopardy clause because at time of dismissal, "the District Court was without power to make any determination regarding petitioner's guilt or innocence"; "[i]t is, of course, settled that 'a verdict of acquittal . . . is a bar to a subsequent prosecution for the same offence. . . . But the language of cases in which we have held that there can be no

appeal from, or further prosecution after, an 'acquittal' cannot be divorced from the procedural context in which the action so characterized was taken. . . . The word itself has no talismanic quality for purposes of the Double Jeopardy Clause"); United States v. Sanford, 429 U.S. 14, 21-22 (1976) (per curiam) (concluding that district court's lack of authority to enter post-trial judgment of acquittal beyond seven-day deadline mandated by federal rules of criminal procedure foreclosed double jeopardy protection). Compare Kepner v. United States, 195 U.S. 100, 133 (1904) ("[t]he court of first instance, **having jurisdiction to try the question of the guilt or innocence of the accused**, found Kepner not guilty; to try him again upon the merits, even in an appellate court, is to put him a second time in jeopardy for the same offense") (emphasis added); Fong Foo v. United States, 369 U.S. 141, 142-143 (1962) (per curiam) (rejecting conclusion of Court of Appeals that "the District Court was without power to direct acquittals under the circumstances disclosed by the record" before "conclud[ing] that the [double jeopardy clause] was violated when the Court of Appeals set aside the judgment of acquittal"); United States v. Martin Linen Supply Co., 430 U.S. 564, 570 (1977) ("The normal policy granting the Government the right to retry a defendant after a mistrial that does not determine the outcome of a trial . . . is not applicable since valid judgments of acquittal were entered **on the express authority of, and strictly in compliance with, Rule 29(c)**") (emphasis added); Smith v. Massachusetts, 543 U.S. 462, 469 (2005) (providing that "what matters[,]" in determining whether midtrial ruling by Massachusetts state trial court that Smith was not guilty of one count due to lack of evidence constituted judgment of acquittal subject to double

jeopardy protection, "is that, as the **Massachusetts Rules authorize**, the judge evaluated the [Commonwealth's] evidence and determined that it was legally insufficient to sustain a conviction") (emphasis added) (quotation marks and citations omitted); Evans v. Michigan, 568 U.S. 313, 329-330 (2013) ("[S]overeigns are hardly powerless to prevent [erroneous midtrial aquittals.] Nothing obligates a jurisdiction to afford its trial courts **the power to grant a midtrial acquittal**, and at least two States disallow the practice. . . . But having chosen to vest its courts with **the power to grant midtrial acquittals**, the State must bear the corresponding risk that some acquittals will be granted in error") (emphasis added) (citations and footnotes omitted). See also id. at 318 (identifying kinds of errors encompassed by principle that acquittal bars retrial even if it is "based upon an egregiously erroneous foundation" and excluding circumstance where trial court lacks power to enter verdict; "an acquittal precludes retrial even if it is premised upon an erroneous decision to exclude evidence; a mistaken understanding of what evidence would suffice to sustain a conviction . . . ; or a misconstruction of the statute defining the requirements to convict . . . . In all these circumstances, the fact that the acquittal may result from erroneous evidentiary rulings or erroneous interpretations of governing legal principles affects the accuracy of that determination, but it does not alter its essential character") (citations and quotation marks omitted).

In light of these many precedents that "strongly indicate" that a purported acquittal before a court without the power to enter a verdict is not subject to double jeopardy, McDaniels, 2017 WL 2875109 at *11 (Krause,

J., dissenting), the Third Circuit's conclusion that there could be no fairminded disagreement that the readily distinguishable Ball decision dictates a finding of a double jeopardy violation here is absolutely untenable. Given the language of Ball itself, as well as Serfass, Sanford, Kepner, Fong Foo, Martin Linen, Smith, and Evans, it is certainly at least reasonable to conclude that Ball's rule that even an erroneous acquittal bars retrial does not apply where the error at issue is a lack of authority to enter a verdict at all. Indeed, as Judge Krause cogently observed in dissent in the Third Circuit, given this Court's multiple decisions strongly indicating that the power to enter an acquittal is a requirement for double jeopardy protection, the conclusion that double jeopardy was not violated here "hardly seems an incorrect application, much less an unreasonable application of clearly established federal law." McDaniels, 2017 WL 2875109 at *19 (Krause, J., dissenting) (quotation marks omitted).

The Third Circuit's egregious misapplication of the highly deferential standard of review under section 2254(d)(1) has broad negative implications well beyond the unwarranted grant of relief in this horrific case. Numerous serious concerns counsel against finding a double jeopardy bar to retrial where the supposed verdict was returned after the jurors were already discharged and a mistrial was declared.

For instance, as this Court has recently observed, "[f]reed from the crucible of the jury's group decision-making enterprise, discharged jurors may begin to forget key facts, arguments, or instructions from the court." Dietz v. Boulden, 136 S.Ct. 1885, 1894 (2016). In addition, discharged jurors "are more likely to be

exposed to potentially prejudicial sources of information or discuss the case with others." Id. "Even apparently innocuous comments about the case from someone like a courtroom deputy . . . may be sufficient to taint a discharged juror." Id. Indeed, there were such potentially prejudicial communications in this case. The record reflects that both the trial judge and defense counsel spoke with the discharged jurors in the deliberation room before they were reassembled and purported to acquit McDaniels of murder.

Moreover, the prospect of a post-discharge, post-mistrial acquittal will encourage the harassment of jurors by convicted defendants eager to have their verdicts permanently set aside. Such a procedure also converts what is intended to be private deliberations into the subject of public investigation, thereby chilling free and open discussion among jurors. Further, permitting discharged jurors to revisit their previously announced verdicts absolutely obliterates the principle of verdict finality.

The Third Circuit's approach "does not accord with these concerns." McDaniels, 2017 WL 2875109 at *12 (Krause, J., dissenting). On the contrary, it encourages the "highly unorthodox" procedure employed by the trial judge here, id. at *12 (Krause, J.), a procedure that fundamentally threatens the fairness, reliability, finality, and viability of the jury system. The Third Circuit's gross errors of law enabling the permanent release of a convicted murderer who brutally killed her own disabled stepson demand further review.

Conclusion

For the reasons set forth above, petitioners respectfully request that this Court grant the petition for writ of certiorari.

Respectfully submitted,

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APPENDIX

Appendix

Page

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 14-3485

AUDREY MCDANIELS

v.

WARDEN CAMBRIDGE SPRINGS SCI; THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA; THE DISTRICT ATTORNEY PHILADELPHIA, PA,
Appellants

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
District Court No. 2-11-cv-05679
District Judge: The Honorable Cynthia M. Rufe

Argued April 13, 2016

Before: AMBRO, SMITH, *Chief Judge*[1] and
KRAUSE, *Circuit Judges*

(Filed: July 6, 2017)

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[1]Honorable D. Brooks Smith, United States Circuit Judge for the Third Circuit, assumed Chief Judge status on October 1, 2016.

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OPINION[2]

SMITH, *Circuit Judge*.

Although the jurors in Audrey McDaniels' case initially miscommunicated to the trial judge that they were unable to return a verdict on the charge of third degree murder, they subsequently confirmed in open court that in fact they had unanimously found McDaniels not guilty of that charge. The trial court then recorded a not guilty verdict. The Commonwealth of Pennsylvania successfully appealed the trial court's refusal to set aside the not guilty verdict. Thereafter, the Commonwealth tried McDaniels a second time. The second jury found McDaniels guilty of third degree murder, and she received a sentence of 15 to 30 years

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[2]This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

of imprisonment. Eventually she filed a habeas petition pursuant to 28 U.S.C. § 2254. The District Court concluded that the retrial violated McDaniels' rights under the Double Jeopardy Clause of our Constitution and granted relief. The Commonwealth appealed.[3] For the reasons set forth below, we will affirm the judgment of the District Court.

I.

Brahim Dukes, an 18 year old with significant physical disabilities, died of starvation and dehydration in December of 2001. At the time of his death, Brahim was in the custody of McDaniels, who was his stepmother. This horrific crime resulted in the Commonwealth charging McDaniels with, *inter alia*, third degree murder and involuntary manslaughter. The matter proceeded to trial, and on the first day of deliberations the jury advised the court that it was deadlocked on the charges. Court adjourned for the day and the jury went home.

The following morning, the jury resumed its deliberations. Later that afternoon, they again advised the court by a note that they were deadlocked. The jury returned to the courtroom, and once they were seated in the jury box, the following exchange occurred:

> Court: For the record, the jury sent exhibit number four. "Your Honor, we are hopelessly

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[3]The District Court exercised jurisdiction under 28 U.S.C. § 2254. We have appellate jurisdiction under 28 U.S.C. §§ 2253(a) and 1291.

deadlocked at this time and unable to reach a verdict."

Now, there were two separate charges in this case.

Who is the foreman or forelady?

Foreman, stand up please.

(Juror complies).

Court: Was there an agreement on any of the two charges?

Foreman: Yes, Your Honor.

Court: There was?

Foreman: Yes.

Court: What was the agreement?

Foreman: That we had an agreement on involuntary manslaughter --

Juror: No.

Foreman: I mean third degree, I am sorry.

Court: You agreed on third degree?

Juror: No.

Foreman: No, we did not agree, I am sorry.

Court: You did not agree. And you did not agree on involuntary?

Foreman: We had -- some did agree on involuntary.

Court: All right. The point is, is there any possibility of a verdict in this case?

Foreman: At this point, Your Honor, I don't think so.

Court: Okay. Well, I asked you before, and I will ask you again, if any further deliberations will prove fruitful I will send you back. But if you don't think so then we'll just end it right here. Does anybody on the jury think that further deliberations will be worthwhile?

No response.

Court Crier: For the record, there is nothing on the verdict sheet.

Court: All right. Okay. This case will have to be retried before another jury. That's the problem.

As the foreman, you are telling me there is no hope for a decision in this case.

Foreman: No sir.

A98-99.

Despite the red flags raised by the foreman's initial indication that there was an agreement and the immediate contradictions from another juror, the trial judge failed to step back and take the time necessary to "scrupulous[ly]" consider whether "manifest necessity" required the declaration of a mistrial. *United States v. Jorn*, 400 U.S. 470, 485 (1971) (plurality opinion). Instead of carefully examining the foreman and jury to "assure himself that the situation warrant[ed] action on his part foreclosing [McDaniels] from a potentially favorable judgment," *id.* at 486, the trial judge simply declared a hung jury and discharged them. He and counsel then proceeded to the jury room.

Upon entering the deliberation room, the trial judge was confronted with something remarkable: "On the blackboard each juror had voted, not guilty, right on down the line," on the third degree murder charge. A107. According to the judge, after the jurors returned to the deliberation room they discussed the court's questions concerning their ability to reach a verdict. When the judge entered that room, the jury explained that it "did not fully understand what [he] was asking. And that in fact, they all had agreed that it was not guilty as to third degree murder. The only thing they could not agree on [was] whether or not it was involuntary manslaughter." A101. McDaniels' counsel then asked that the "jury be re-established into the jury box" and the court granted that request. A101.

Having returned to the courtroom, the trial judge placed on the record what took place when he and counsel entered the jury room. He then "ask[ed] the foreman to rise and announce to the Court what was the decision of the jury on third degree murder." A101.

The foreman replied: "Not guilty." *Id*. The court inquired: "Did everybody agree to that [verdict]?" A102. "Everybody . . . said yes." *Id*. The court posed a different question to the jurors in an effort to determine if any juror disagreed. When there was no response indicating disagreement, the court declared that the "jury has unanimously said that it was not guilty as to third degree murder." *Id*. The judge then asked: "And as to involuntary[,] could you agree?" *Id*. The foreman advised that "we had some that agreed" to the involuntary manslaughter charge and "[s]ome did not." *Id*. The trial judge noted that the deadlock was on the involuntary manslaughter charge, and he then permitted the jurors to fill out the verdict slip. McDaniels' counsel requested that the judge "record that verdict officially as not guilty as to third degree." *Id*. The trial judge agreed and announced the verdict of "[n]ot guilty of third and hopelessly deadlocked on involuntary." *Id*.

Thereafter, the Commonwealth filed a motion to set aside the not guilty verdict. At a hearing on the motion, the trial judge stated that when he and counsel walked into the jury room, he saw "on the board there was a list of all the jurors and how they voted on third degree murder. And each one of them voted[] not guilty." A107. The judge denied the Commonwealth's motion, stating that "once a person has been found not guilty by a jury, that person is not entitled to be retried a second time." A110. In a subsequent written opinion, he explained that he acted to "prevent [McDaniels] from being tried a second time for a charge for which the jury intended her to be acquitted. Changing the jury's verdict was necessary to prevent defendant from being placed in double jeopardy as prohibited by the federal constitution." A436. The judge further noted in

his written opinion that he "did not attempt to influence the jurors in any way when he addressed them after the verdict was recorded, and was indeed surprised to see the marker-board that contained the jury's unanimous votes for acquittal on the third-degree murder charge." A437-38.

The Commonwealth appealed. McDaniels' brief in opposition did not explicitly invoke the Double Jeopardy Clause. Nonetheless, after a thorough factual recitation, counsel asserted that the "Commonwealth is *seeking to overturn the verdict of not guilty* on murder of the third degree." A505 (emphasis added). Counsel argued that it would be a tragedy if McDaniels were to "be retried on third degree murder." A513.

The Pennsylvania Superior Court began its analysis of the appeal by stating: "At first glance, it appears that the Commonwealth is appealing a verdict of acquittal, which is clearly impermissible." *Commonwealth v. McDaniels*, 886 A.2d 682, 686 (Pa. Super. Ct. 2005). The Superior Court, however, focused on the unusual procedural history of the case and declared that the trial "court had no authority to dismiss the deadlocked verdict on third degree murder once it was recorded and the jury dismissed." *Id*. It determined that the not guilty verdict on third degree murder was "a legal nullity." *Id*.

On remand, a second trial followed in May of 2007. That jury convicted McDaniels of third degree murder and acquitted her on the involuntary manslaughter charge. The trial court sentenced McDaniels to 15 to 30

years of imprisonment.[4] McDaniels' subsequent direct appeal and her petition for post-conviction relief were unsuccessful. This § 2254 petition followed, which asserts that the retrial following the not guilty verdict in the first trial violated the Double Jeopardy Clause. In a comprehensive opinion, District Judge Cynthia M. Rufe agreed and granted relief under § 2254. The Commonwealth filed this timely appeal.

II.

The Commonwealth contends that McDaniels' double jeopardy claim is procedurally defaulted and that we cannot reach its merits. Our review of whether a habeas petitioner has fairly presented and exhausted a constitutional claim is plenary. *Greene v. Palakovich*, 606 F.3d 85, 93 n.3 (3d Cir. 2010).

In determining whether McDaniels exhausted her double jeopardy claim, we start by recognizing that "the most fundamental rule in the history of double jeopardy jurisprudence has been that '[a] verdict of acquittal . . . could not be reviewed, on error or otherwise, without putting [a defendant] twice in jeopardy, and thereby violating the Constitution.'" *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977)

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[4]McDaniels served one year and eight months by the time the trial court denied the Commonwealth's motion to set aside the not guilty verdict in the first trial. Together with the years of imprisonment served since her May 2007 conviction, she has already served more than eleven years of her sentence. It is worth noting that a conviction for involuntary manslaughter is a misdemeanor of the first degree subject to only a five year term of imprisonment. *See* 18 Pa. Con. Stat. §§ 1104, 2504.

(quoting *Ball v. United States*, 163 U.S. 662, 671 (1896)). "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense . . . ." *Green v. United States*, 355 U.S. 184, 187 (1957). The Court in *Green* declared that it "is one of the elemental principles of our criminal law that the Government cannot secure a new trial by means of an appeal even though an acquittal may appear to be erroneous." *Id.* at 188 (citing *Ball*, 163 U.S. at 671). In *Benton v. Maryland*, the Supreme Court "f[ou]nd that the double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage," and it held that the prohibition applies "to the States through the Fourteenth Amendment." 395 U.S. 784, 794 (1969).

Whether McDaniels exhausted her double jeopardy claim requires consideration of whether Pennsylvania's state courts were given "an initial opportunity to pass upon and correct" the alleged violation of this fundamental right against double jeopardy. *Picard v. Connor*, 404 U.S. 270, 275 (1971) (internal quotation marks and citation omitted); *see also O'Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999) (reiterating that state courts must be given "a fair opportunity to act" on a state prisoner's claims (emphasis omitted)). The doctrine of exhaustion "prevent[s] 'unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution.'" *Picard*, 404 U.S. at 275 (quoting *Ex Parte Royall*, 117 U.S. 241, 251 (1886)). Thus, the habeas petitioner must "present the state courts with the same claim he urges upon the federal court." *Id.* at

276. While the claim must be "brought to the attention of the state courts," a state petitioner is not required to "cit[e] 'book and verse on the federal constitution'" to satisfy the exhaustion requirement. *Id.* at 278 (omitting citation). Rather, *Picard* "simply h[e]ld that the *substance* of the federal habeas corpus claim must first be presented" to the state courts. *Id.* (emphasis added); *see also Baldwin v. Reese*, 541 U.S. 27, 32 (2004) (concluding a state prisoner must "alert" the state court to the claim in her petition or brief and cannot rely on reference to the claim in a lower court opinion).

The record before us confirms that the issue of whether McDaniels could be retried in light of the not guilty verdict was entertained by the trial court when it considered the Commonwealth's motion. The trial court recognized the double jeopardy issue and denied the Commonwealth's motion to set aside the not guilty verdict on the basis that "once a person has been found not guilty by a jury, that person is not entitled to be retried the second time." A110. In its opinion denying the motion, the trial court explained that McDaniels could not be retried again or she would be "placed in double jeopardy, as prohibited by the federal constitution." A436.

McDaniels' appellate brief, opposing the Commonwealth's appeal to Superior Court, asserted that the trial court's order should be affirmed because the "Commonwealth is *seeking to overturn the verdict of not guilty* on murder of the third degree and has asked this Honorable Court to review the same." A505 (emphasis added). As we explained above, when an appellant alleges the State is seeking to overturn a not guilty verdict, an appellant has explicated the sine qua non of

a double jeopardy claim. *See Martin Linen Supply*, 430 U.S. at 571 ("Perhaps the most fundamental rule in the history of double jeopardy jurisprudence has been that '[a] verdict of acquittal . . . could not be reviewed, on error or otherwise, without putting [a defendant] twice in jeopardy, and thereby violating the Constitution.'" (quoting *Ball*, 163 U.S. at 671)); *see also Gregg v. Georgia*, 428 U.S. 153, 199 n.50 (1976) (plurality opinion) ("The suggestion that a jury's verdict of acquittal could be overturned and a defendant retried would run afoul of the Sixth Amendment jury-trial guarantee and the Double Jeopardy Clause of the Fifth Amendment."). Thus, even though McDaniels' brief failed to cite chapter and verse of the Constitution or even to invoke the term "double jeopardy,"[5] her statement that the State sought to overturn her not guilty verdict "brought [her double jeopardy claim] to the attention" of the Superior Court. *Picard*, 404 U.S. at 277. In short, there was no need for the Superior Court to read beyond McDaniels' brief to glean her claim. Her brief, which also contained a detailed factual description, "alert[ed]" the Superior Court to her double jeopardy claim, which challenged the Commonwealth's attempt to overturn the not guilty verdict. *Baldwin*, 541 U.S. at 32.

The Superior Court understood the basis of McDaniels' opposition to the Commonwealth's appeal. Indeed, as noted above, that court began its analysis by stating: "At first glance, it appears that the Commonwealth is

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[5]Not even the Fifth Amendment contains the phrase "double jeopardy." *See* U.S. Const. amend. V ("[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb.").

appealing a verdict of acquittal, which is clearly impermissible." *McDaniels*, 886 A.2d at 686. That, quite simply, is the stuff of which double jeopardy is made.

We conclude that McDaniels' argument in her brief opposing the Commonwealth's motion presented the Superior Court with the "substance of [her] federal habeas corpus claim." *Picard*, 404 U.S. at 278. We also conclude that, inarticulately as it may have been framed, the claim McDaniels advanced was a claim of double jeopardy, and it has been exhausted.[6]

Because the Superior Court acknowledged that the foundation of McDaniels' opposition to the Commonwealth appeal was the constitutional guarantee against double jeopardy, and because the Superior Court denied McDaniels the relief she was seeking, we may "presume[] that the state court adjudicated the claim on the merits." *Harrington v. Richter*, 562 U.S. 86, 99 (2011); *see also Johnson v. Williams*, 133 S. Ct. 1088, 1091 (2013) (concluding that

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[6]The Commonwealth (and the dissent) contend that a state court's sua sponte consideration of a federal claim cannot satisfy the exhaustion requirement. Because we have concluded that McDaniels presented the substance of her claim to the state court, we need not resolve this issue. Nonetheless, as we previously noted, the Supreme Court has "recognized exceptions to th[e] general rule" of exhaustion "'where the State has actually passed upon the claim . . . .'" *Sharrieff v. Cathel*, 574 F.3d 225, 228 n.4 (3d Cir. 2009) (quoting *Castille v. Peoples*, 489 U.S. 346, 351 (1989)); *see also Jones v. Dretke*, 375 F.3d 352, 354-55 (5th Cir. 2004). In such a situation, the state court has already had an opportunity to avoid any constitutional violation, and requiring re-presentation of a claim will not avoid "friction between the state and federal court systems." *O'Sullivan*, 526 U.S. at 845.

the *Richter* presumption also applies when a state court decision addresses some issues, but does not expressly address the federal claim). Accordingly, our review is governed by 28 U.S.C. § 2254(d)(1).

III.

In *United States v. Jorn*, the Supreme Court declared that "a defendant is placed in jeopardy in a criminal proceeding once the defendant is put to trial before the trier of the facts, whether the trier be a jury or a judge." 400 U.S. at 479 (citing *Green*, 355 U.S. at 188). "Acquittals, unlike convictions, terminate the initial jeopardy." *Justices of Bos. Mun. Ct. v. Lydon*, 466 U.S. 294, 308 (1984). In determining what constitutes an acquittal, the Court in *Martin Linen* instructed that the focus of the inquiry is whether there has been a "resolution, correct or not, of some or all of the factual elements of the offense charged." 430 U.S. at 571. That is, did the government prove its case beyond a reasonable doubt? *See id.* at 572. Was there a determination that the evidence was "legally insufficient to sustain a conviction"? *Id.* It is a question of whether, once jeopardy has attached, there has been a determination regarding the defendant's guilt or innocence. *United States v. Scott*, 437 U.S. 82, 98 & n.11, 99-100 (1978).

Here, there can be no dispute. Jeopardy attached once the jury was empaneled. Because the jury confirmed in court that it unanimously had determined McDaniels was not guilty of third degree murder, there was a substantive determination that the Commonwealth failed to prove its case. Indeed, at oral argument before us, the Commonwealth acknowledged that it did "not dispute that [what occurred] meets the very

broad and easily met definition of acquittal." *See* Oral Argument at 12:04-12:13, *McDaniels v. Warden Cambridge Springs SCI*, No. 14-3485 (April 13, 2016).

The unconstitutionality of reviewing a verdict of acquittal had its genesis in *Ball v. United States*, 163 U.S. 662 (1896). There, three defendants were tried for murder. 163 U.S. at 663. Millard Ball was acquitted by a jury. *Id*. at 664. Millard Ball's brother, John Ball, and Robert Boutwell were found guilty. John Ball and Boutwell successfully appealed, obtaining a reversal of their convictions on the basis that the indictment was fatally defective. A new indictment was returned against all three defendants and they objected to their retrial on double jeopardy grounds. Despite their objections, the second trial was held and the three men were convicted of murder. They appealed.

Addressing Millard Ball's appeal, the Supreme Court pointed out that he had been acquitted by the jury and that the insufficiency of the indictment did not factor into his freedom. *Id*. at 670. The Court declared that Millard Ball's "acquittal by verdict of the jury could not be deprived of its legitimate effect." *Id*. It then articulated the bedrock principle of double jeopardy jurisprudence, stating:

> As to the defendant who had been acquitted by the verdict duly returned and received, the court could take no other action than to order his discharge. The verdict of acquittal was final, and could not be reviewed, *on error or otherwise*, without putting him twice in jeopardy, and thereby violating the constitution.

Id. at 671 (emphasis added).

The Supreme Court has steadfastly applied this rule from *Ball*, even where the acquittal was clearly erroneous. For example, in *Fong Foo v. United States*, during the testimony of the government's fourth witness, the trial court directed the jury to return verdicts of acquittal as to all defendants. 369 U.S. 141, 142 (1962) (per curiam). The United States filed a petition for a writ of mandamus seeking vacatur of the judgments of acquittal, which the First Circuit granted. The Supreme Court granted certiorari. Although Justice Clark dissented on the basis that the trial court lacked the "power" to direct the verdicts of acquittal in the midst of the government's case in chief and that the judgments were a "nullity," *id*. at 144 (Clark, J., dissenting), the majority was not persuaded. It followed *Ball* and determined that, even though the acquittals by the jury were based on an "egregiously erroneous foundation," retrial was barred under the Double Jeopardy Clause. *Id*. at 143.

In *Smith v. Massachusetts*, the Supreme Court concluded that a midtrial Rule 29 acquittal was a "substantive determination that the prosecution ha[d] failed to carry its burden" on one of the crimes charged. 543 U.S. 462, 468 (2005). That ruling, though based on the court's misapprehension of the government's evidence in chief, barred retrial because it is "well-established . . . that the bar [to retrial] will attach to a preverdict acquittal that is patently wrong in law." *Id*. at 473. As support for this declaration, the Supreme Court cited *Martin Linen* and *Fong Foo*, as well as other cases in which there was an erroneous acquittal that nonetheless served as a double jeopardy bar to

future prosecution. *Id.*; *see also Smalis v. Pennsylvania*, 476 U.S. 140, 144 n.7 (1986) (instructing that even if trial court's dismissal of certain charges after the prosecution had rested its case was wrong, it would not alter the essential character of the ruling, which was that the evidence was insufficient to establish the defendants' guilt and constituted an acquittal); *Sanabria v. United States*, 437 U.S. 54, 68-69 (1978) (concluding that acquittal based on "erroneous evidentiary ruling, which led to an acquittal for insufficient evidence," barred further prosecution); *Arizona v. Rumsey*, 467 U.S. 203, 211 (1984) (concluding that sentencing court's entry of judgment in favor of the defendant on the issue of life, even though it was based on a misconstruction of the statute, amounted to an acquittal on the death penalty, which barred resentencing to death after the initial sentence of life was set aside). In fact, the Supreme Court noted in *Evans v. Michigan* that its "cases have applied *Fong Foo*'s principle broadly." 133 S. Ct. 1069, 1074 (2013).

In *McDaniels*, the Superior Court declared that Pennsylvania law does not allow a trial court to re-empanel a criminal jury that has been discharged. 886 A.2d at 688. Nevertheless, we conclude that the trial court's erroneous re-empanelment and the subsequent entry on the record of the not guilty verdict on the third degree murder charge constituted an acquittal that should have barred retrial. *Ball*, 163 U.S. at 671; *Fong Foo*, 369 U.S. at 143. Thus, the Superior Court's decision, which allowed McDaniels to be tried a second time on the third degree murder charge, resulted in a violation of McDaniels' rights under the Double Jeopardy Clause.

That conclusion does not end our inquiry, however. We must also determine whether the Superior Court's adjudication was "an unreasonable application of . . . clearly established Federal law . . . as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).

Our review of the Supreme Court's double jeopardy jurisprudence convinces us that, when the Pennsylvania Superior Court rendered its decision in 2005, it was well settled that even an erroneous acquittal will bar the government from retrying a defendant. *Ball*, 163 U.S. at 671; *see also Martin Linen*, 430 U.S. at 571; *Fong Foo*, 369 U.S. at 143. Yet the Superior Court in this case focused solely on the procedural impropriety of re-empaneling the jury. It did not mention *Ball*. In other words, the Superior Court failed to apply *Ball*'s "most fundamental rule" regarding the acquittal by the re-empaneled jury. Given the bedrock nature of the Double Jeopardy Clause and the Supreme Court's steadfast adherence to the principle enunciated long ago in *Ball*, we conclude that the Superior Court's analysis was an unreasonable application of clearly established federal law as determined by the Supreme Court in *Ball*, *Fong Foo*, *Martin Linen*, and their progeny. *Ball* held that an acquittal "could not be reviewed, on error or otherwise, without putting him twice in jeopardy, and thereby violating the constitution." 163 U.S. at 671. Although the Superior Court recognized the error at play, it did not apply the well-established rule set out in *Ball* to the erroneous acquittal by the jury.

In an attempt to avoid the principle that an acquittal need not be error free, the Commonwealth

argues that the trial court lacked jurisdiction to re-empanel the jury and enter a judgment of acquittal. It relies on the Supreme Court's observation in *Ball* that "[a]n acquittal before a court having no jurisdiction is, of course, like all the proceedings in the case, absolutely void, and therefore no bar to subsequent . . . trial in a court which has jurisdiction of the offense." 163 U.S. at 669. This exception to the *Ball* rule does not apply here. That exception is generally applicable where the trial court lacked jurisdiction at the inception of the case, such as where a prosecution is brought in the wrong county. *See*, *e.g.*, *Daniel v. Warden, State Corr. Inst. at Huntingdon*, 794 F.2d 880, 883-84 (3d Cir. 1986). But here there is no dispute that jurisdiction was proper at the case's inception. Nor is there any question that the trial court retained jurisdiction over the case for post-trial proceedings. Because a mistrial had been declared, the case was far from over. McDaniels remained in jeopardy. Indeed, the Commonwealth implicitly recognized that the trial court still had jurisdiction over McDaniels' case when it submitted the motion to set aside the not guilty verdict. Thus, the state trial court retained jurisdiction. Even though it may have been procedurally erroneous as a matter of state law to reassemble the jury and record the not guilty verdict, under *Ball* and its progeny that verdict should have barred further prosecution on the third degree murder charge.[7]

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[7]We are well aware of the Supreme Court's decision in *Dietz v. Bouldin*, 136 S. Ct. 1885, 1895 (2016), and its observation that under certain circumstances, a district court may exercise its "inherent power to recall a jury" and that this power might be "limited to civil cases only." The Court further noted that "[g]iven

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Nor do the Supreme Court's decisions in *Serfass v. United States*, 420 U.S. 377 (1975), and *United States v. Sanford*, 429 U.S. 14 (1976) (per curiam), aid the prosecution. The Commonwealth asserts that these cases demonstrate that a court may preside over a criminal action and enter a dismissal of the charges

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additional concerns in criminal cases, such as attachment of the double jeopardy bar, we do not address here whether it would be appropriate to recall a jury after discharge in a criminal case." *Id.* *Dietz* is not controlling. We are not addressing whether the state court erred in concluding that the jury could not be recalled after it was discharged. Rather, given the impropriety under state law of entering the jury's not guilty verdict on the record, we are determining whether that erroneous acquittal barred retrial under the Double Jeopardy Clause.

The dissent makes much of the *type* of error at issue in this case, positing that the trial court acted "*ultra vires* of state law." We need not resolve the issue, but nonetheless express skepticism about this conclusion. We acknowledge that *Commonwealth v. Johnson*, 59 A.2d 128, 129 (Pa. 1948), declared, in a case in which the initial verdict of not guilty on first degree murder and voluntary manslaughter was then altered to guilty on the manslaughter charge, that "[t]he established rule is that the verdict as recorded is the verdict of the jury and the latter shall not be permitted to impeach or to alter or amend it after their separation or discharge." But the Pennsylvania Supreme Court subsequently noted that the verdict might be altered "in 'extremely exceptional cases' . . . and even then 'only unless to make the corrected verdict conform to the obvious intention of the jury[.]'" *Commonwealth. v. Dzvonick*, 297 A.2d 912, 914 n.4 (Pa. 1972). That would appear to support the trial court's action here, even if -- as the Pennsylvania Superior Court concluded -- it was wrong. Moreover, we are mindful of the Supreme Court's observation that "a jurisdictionally proper but substantively incorrect judicial decision is not ultra vires." *City of Arlington, Tx. v. FCC*, 133 S. Ct. 1863, 1869 (2013).

without acquitting the defendant for purposes of the Double Jeopardy Clause. This argument ignores that the district court in each of those cases dismissed the indictments before trial even commenced -- trials the government had every right to prosecute. In *Serfass*, the Supreme Court pointed out that the dismissal occurred before jeopardy had attached. 420 U.S. at 389. Thus in *Serfass*, the district court had no "power to make any determination regarding the petitioner's guilt or innocence" and the dismissal did not constitute an acquittal for double jeopardy purposes.[8] *Id.*

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[8]The dissent relies upon *Fong Foo*, *Martin Linen*, *Smith* and *Evans* for the principle that there is "constitutional significance to whether the trial court was authorized under state law to enter the acquittal at the point it did." In the dissent's view, it is only when the trial court has the power or the authority to enter a verdict that there can be a valid acquittal barring retrial under the Double Jeopardy Clause. We are not persuaded.

We agree with the dissent that we must first ask whether there "was, in fact, a judgment of acquittal." And we acknowledge that the procedural context and the authority of the trial court -- or, as the dissent contends, the "power" of the court to act -- informs the determination of whether there was an acquittal barring reprosecution. Both of these considerations inform whether jeopardy actually attached and the factfinder made a determination as to the defendant's factual guilt or innocence. *See Scott*, 437 U.S. at 98-100. But there is no question in this case that jeopardy attached, or that jurisdiction was proper, or that jeopardy terminated in a unanimous jury verdict of not guilty. That resolution falls squarely within the definition of acquittal for purposes of double-jeopardy jurisprudence, notwithstanding the procedural errors that led to the acquittal. *See Martin Linen*, 430 U.S. at 571. The dissent has not identified a single case that has rejected a double-jeopardy claim under such circumstances.

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Aside from cases where the trial court lacked jurisdiction, or cases where jeopardy never attached, the dissent's distinction between "evidentiary" defects and defects in "power" proves to be illusory. For example, the dissent reads *Fong Foo* as "expressly" rejecting the argument that the district court "was without power to direct acquittals." Dissent at 12. But nowhere did the Supreme Court hold, "expressly" or otherwise, that the district court in fact had the power to direct an acquittal before the government concluded its case-in-chief, based on, *inter alia*, a perception of prosecutorial misconduct. Rather, any lack of "power" under the applicable procedural rules was irrelevant to the Court's analysis. It was enough in *Fong Foo* that the petitioners were "tried under a valid indictment," the trial court "had jurisdiction over them and over the subject matter," the trial judge directed a return of the verdicts of acquittal and jeopardy was "terminated with the entry of a final judgment of acquittal as to each petitioner." *Fong Foo*, 369 U.S. at 143. Thus, the critical point in *Ball*, *Fong Foo*, and others is that the proceedings resolved in flawed judgments of acquittal, but judgments of acquittal all the same. That is the case here.

Smith further illustrates this point. There the Supreme Court looked to the Massachusetts Rules of Criminal Procedure not to determine the trial judge's "power" to take the action it did -- but rather to confirm that the trial judge's grant of a "motion for a required finding of not guilty" after the prosecution rested its case in chief was in fact an acquittal -- i.e., an evaluation of the evidence and its sufficiency. 543 U.S. at 468-69. Because the trial court had concluded the prosecution failed to introduce "a scintilla of evidence" on an element of the offense, *id*. at 465, the Supreme Court determined there was an acquittal that barred further fact-finding of the defendant's guilt on that particular offense. *See also United States v. Sissoon*, 399 U.S. 267, 288-90 (1970) (analyzing District Court's action in granting the Rule 34 motion for arrest of judgment, focusing on District Court's reliance upon the "evidence adduced at the trial," and concluding that the arrest of judgment "was in fact an acquittal rendered by the District Court after the

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Likewise in *Sanford*, the jury was deadlocked and the district court declared a mistrial. Prior to retrial, the district court dismissed the indictment. The Supreme Court concluded that *Serfass* was controlling and that the order granting dismissal of Sanford's indictment before the commencement of the retrial did not implicate the Double Jeopardy Clause because no factual determination had been made of the defendant's guilt. 429 U.S. at 16. The circumstances here are a far cry from an order dismissing an indictment without any resolution by a factfinder of the defendant's guilt or innocence, *see Scott*, 437 U.S. at 98-100,[9] and

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[8](...continued)
jury's verdict of guilty" that could not be appealed by the government).

[9]In our view, it is also settled that an acquittal requires a factual determination of the defendant's guilt or innocence by judge or jury. *Martin Linen* acknowledged that it is not the label that is determinative of whether there is an acquittal, but whether what happened "actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." 430 U.S. at 571. *Scott* reinforced this by analyzing whether there had been a determination of the defendant's guilt or innocence. *Scott*, 437 U.S. at 98. A few months before the Superior Court ruled on McDaniels' case, the Supreme Court observed in *Smith* that the *Martin Linen* definition focusing on whether there had been a factual resolution had been "consistently used" in double jeopardy cases. 543 U.S. at 468. Here there is no dispute that there was a factual determination made by the jury. Yet the significance of this not guilty determination was unreasonably disregarded by the Superior Court. Indeed, *Evans*, though issued after the Superior Court's decision, confirms that the Supreme Court has been of the view that courts have understood for some time that *Scott* provided
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therefore neither *Serfass* nor *Sanford* support the Commonwealth's position.

In sum, we conclude that this case is governed by *Ball* and *Fong Foo*. Although the re-empanelment of the jury and the entry on the docket of the not guilty verdict may have been error according to the Pennsylvania Superior Court, it remains that the re-empaneled jury announced a unanimous verdict of acquittal of the third degree murder charge -- the same verdict it had agreed upon in the sanctity of the jury room. Under clearly established Supreme Court law, the government may not subject an accused to retrial after a "verdict of acquittal . . . on error or otherwise." *Ball*, 163 U.S. at 671; *see also Fong Foo*, 369 U.S. at 143; *Martin Linen*, 430 U.S. at 570-71. The Superior Court did not take into account this fundamental rule.[10] Given the bedrock

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the applicable test. 133 S. Ct. at 1080 ("*Scott* has stood the test of time and we expect courts will continue to have little 'difficulty in distinguishing between those rulings which relate to the ultimate question of guilt or innocence and those which serve other purposes.'" (quoting *Scott*, 437 U.S. at 98 n.11)).

[10]The dissent implies that the state court's decision was reasonable because two other state courts have held double jeopardy did not bar retrial in similar circumstances. But those state court decisions obviously were not reached in the context of a federal habeas proceeding, and therefore did not address the issue we face today: whether those state court decisions involved an unreasonable application of the Supreme Court's clearly established double jeopardy jurisprudence. Furthermore, we note that one of those state court decisions was found unreasonable by a federal court and habeas relief was granted. *See Davenport v. Richardson*, No.14-1092, 2016 WL 299081 (W.D. La. Jan. 20, (continued...)

principle articulated in *Ball*, it was objectively unreasonable not to apply this precedent and its progeny.[11]

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[10](...continued)
2016), adopting No. 14-cv-1092, 2015 WL 9906262 (W.D. La. Apr. 29, 2015). Notably, Louisiana did not appeal the District Court's decision.

[11]Had the trial judge's initial declaration of mistrial stood, there probably still would have been a solid foundation for challenging McDaniels' retrial as a violation of the Double Jeopardy Clause. That is because, in addition to preventing retrial following a verdict of acquittal, the Double Jeopardy Clause protects a criminal defendant's "valued right to have his trial completed by a particular tribunal." *Oregon v. Kennedy*, 456 U.S. 667, 671-72 (1982) (internal quotation marks and citation omitted). The Supreme Court has held that reprosecution following a mistrial may violate the defendant's double jeopardy rights if the prosecution is unable to "shoulder the burden of justifying the mistrial" by showing that there was a "manifest necessity" for it. *Arizona v. Washington*, 434 U.S. 497, 505 (1978); *see also id.* (describing the prosecution's burden as "a heavy one"); *United States v. Rivera*, 384 F.3d 49, 56 (3d Cir. 2004) ("Where a District Court *sua sponte* declares a mistrial in haste, without carefully considering alternatives available to it, it cannot be said to be acting under a manifest necessity. . . . Any subsequent reprosecution under those circumstances is barred by the Double Jeopardy Clause."). The importance of the trial judge's role in ensuring that "manifest necessity" compels a mistrial cannot be overstated. *See Jorn*, 400 U.S. at 485-86.

Here, because the trial judge sua sponte declared a mistrial without seeking input from either party, McDaniels had little opportunity to object. *Cf. id.* at 487 (noting that "the trial judge acted so abruptly in discharging the jury that, had . . . the defendant [been disposed] to object to the discharge of the jury, there would have been no opportunity to do so"). In any event, McDaniels' double jeopardy claim was not premised on the trial
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We will affirm the judgment of the District Court.

[11](...continued)
judge's initial declaration of mistrial.

McDaniels v. Warden Cambridge Springs SCI, 14-3485.
KRAUSE, *Circuit Judge*, dissenting.

If this case indeed involved a retrial following a cognizable verdict of acquittal, I would agree with the Majority that we might have overcome Petitioner's procedural default to correct a state court's unreasonable application of "clearly established" Supreme Court double jeopardy law. But that is not at all what happened here. There were two and only two legally cognizable verdicts returned by Pennsylvania juries in this case on the count of third degree murder, and neither of them was an acquittal. The first was a verdict of a mistrial, and the second, upon retrial, was a verdict of guilt. And what transpired between these two valid and lawfully entered verdicts—a state trial judge indisputably acting ultra vires under state law by purporting to re-empanel a discharged jury, to conclude in the absence of any hearing that the discharged jurors had not been tainted by the intervening off-the-record communications with defense counsel and the judge, and to supersede the final, properly recorded verdict of mistrial with an "amended verdict" of acquittal—was no "verdict" at all. Rather, as the Superior Court held on direct appeal when it set aside that "[i]llegal [v]erdict" and reinstated the third degree murder charge for retrial, the trial judge's purported entry of an "acquittal" was nothing short of a "legal nullity" under controlling Pennsylvania Supreme Court precedent. *Commonwealth v. McDaniels*, 886 A.2d 682, 686, 688 (Pa. Super. Ct. 2005) (citing *Commonwealth v. Johnson*, 59 A.2d 128, 131 (Pa. 1948)).

No wonder then that Petitioner did not raise in the state court and the Superior Court did not recognize or

address any federal issue presented by this case, focusing instead on Petitioner's purely state law arguments concerning the trial court's power to re-empanel a discharged jury and supersede its properly recorded verdict with a different verdict. Concluding the trial court lacked that power and thus there had been no cognizable verdict of acquittal under state law, the Superior Court had neither reason nor opportunity to address the merits of any double jeopardy claim, let alone the unusual and nuanced one that Petitioner now presents for the first time in her habeas petition, i.e., under what circumstances, if ever, a purported "amended verdict" of acquittal that a trial court had no power under controlling state law to enter at that point in the proceeding nonetheless must be treated as a valid acquittal under federal law, barring retrial under the Double Jeopardy Clause.

Yet, even though Petitioner has conceded in this appeal that she did not fairly present her double jeopardy claim to the state courts, the Majority not only posits that she did, but proceeds to hold that the Superior Court's failure to treat the ultra vires action of the trial court as a valid acquittal was an unreasonable application of "clearly established" federal double jeopardy law. Maj. Op. at 18-24; *see Harrington v. Richter*, 562 U.S. 86, 98 (2011) (citing 28 U.S.C. § 2254(d)). I respectfully dissent.

As explained below, first, even if Petitioner's claim was not procedurally barred, the Superior Court's decision did not contravene any "clearly established" Supreme Court case law; on the contrary, it was entirely consistent with a long line of Supreme Court cases—most recently *Dietz v. Bouldin*, 136 S. Ct. 1885

(2016)—that strongly indicate an "erroneous" verdict of acquittal will *only* be deemed operative for double jeopardy purposes so long as the trial court that entered it was authorized by its governing rules or decisional law to do so at that point in the proceedings. And second, principles of federalism, comity, and finality prevent us from reviewing Petitioner's double eopardy claim when it was not presented to the state courts, was not ruled on by the state courts, and fits no exception to the firm prohibition on federal review of procedurally defaulted claims. After reviewing some points on background, I will address these issues in turn.

I.

Although the Majority has fairly summarized the factual and procedural history of this case, there are additional details that seem to me salient to understand why we should be reaching a different outcome.

Petitioner Audrey McDaniels was charged with murder and involuntary manslaughter of Brahim Dukes, a non-verbal and severely disabled teenager who was left in her care for two weeks while his father, Petitioner's boyfriend, was temporarily incarcerated for failure to pay traffic tickets. Brahim's soiled and emaciated body was found by paramedics on the floor of a bare, frigid room, which reeked of urine and feces and in which the boy apparently had been for some time. Petitioner asserted the boy had had a temper tantrum and collapsed on the floor. According to the autopsy report, however, Brahim was dead for several hours before Petitioner called 911, and his cause of death was protracted starvation and dehydration.

At her first trial, the jury reported that it could not reach a verdict on either the third degree murder charge or the involuntary manslaughter charge. The judge then engaged the foreman in an extended colloquy in which he sought to ascertain on the record that the jurors had tried diligently to reach unanimity, in the end asking the foreman whether there was any possibility that through further deliberations the jury might reach a verdict, asking the entire jury whether "anybody on the jury think[s] that further deliberations would be worthwhile," and again inquiring of the foreman whether "there is no hope for a decision in this case." The responses were uniformly negative. At that point, consistent with Pennsylvania law, the trial judge declared the jury deadlocked, recorded the jury's verdict of mistrial, and discharged the jury.

The trial court then moved on to other proceedings, including a bail hearing and scheduling discussions with counsel regarding a date for Petitioner's retrial. Subsequently, on the request of defense counsel, the trial judge accompanied counsel to the jury room to debrief any jurors that might remain. There is no contemporaneous record of what occurred next. From the trial court's subsequent comments on the record, however, it appears that the judge and counsel entered the jury room and engaged in unspecified discussions about the case with the discharged jurors, who had not yet dispersed. The judge and counsel then noticed markings on the blackboard suggesting the jurors had voted unanimously at some point in their deliberations for acquittal on the third degree murder charge. The trial judge did not take testimony from counsel, court staff, or any of the jurors as to what transpired in their post-verdict exchange, but the trial judge's later explanation

of his actions reflects that, in response to whatever questions or comments were posed to them, one or more of the jurors said they had been confused by the jury instructions and mistakenly thought the verdicts on the two charges needed to be returned jointly.

The judge then took the highly unorthodox step—prohibited by Pennsylvania law—of re-empaneling the discharged jury, soliciting from the foreperson on the record that the jury was now returning a verdict of acquittal as to the third degree murder charge, and purporting to supersede that original verdict with an "amended verdict" of acquittal. A few days later the Commonwealth filed a "Motion to Set Aside Illegal Verdict," App. 80, which the trial judge denied, explaining that his "judicial intervention" had been required "to prevent [Petitioner] from being tried a second time for a charge for which the jury intended her to be acquitted [and] . . . to prevent [her] from being placed in double jeopardy." App. 436.

The Commonwealth appealed the denial of its motion to the Superior Court, arguing on the basis of Pennsylvania rules and case law that there was no cognizable "amended verdict" because the trial court had no power to recall a jury after it had been discharged, to set aside the jury's properly returned and finally recorded verdict of mistrial, or to enter an amended verdict of acquittal. In response, Petitioner too relied on Pennsylvania state authorities[1] and made

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[1]Petitioner cited exclusively to state cases, with the exception of one Fourth Circuit case on which she relied to argue that trial

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arguments, limited to state law, concerning the trial court's ability to recall the jury and "to correct a defective verdict," asserting, for example, that "[a]lthough the trial judge said [the jurors] were discharged, in reality, they were not." App. 514, 517. Petitioner styled these arguments as reasons that the "correct verdict" should not be set aside and made no reference to double jeopardy, no arguments based on double jeopardy, and no reference to that body of federal case law.

As the Superior Court was presented with a purely state law question of the power of the trial court and was proceeding to resolve the question on that basis, it took pains at the outset of its opinion to make that clear, noting that "[a]t first glance, it appears that the Commonwealth is appealing a verdict of acquittal, which is clearly impermissible," *McDaniels*, 886 A.2d at 686, but that, on closer inspection, that was not the case at all because, under longstanding Pennsylvania Supreme Court precedent, "a jury's recorded verdict is inviolate," *id.* at 686 (citing *Johnson*, 59 A.2d at 129), and "[o]nce the original verdict was recorded, and the jury was discharged," the trial court's "authority to alter that verdict ceased," *id.* at 688 (citing *Johnson*, 59 A.2d at 131). At that point, "neither the judge nor the jury had any power to change the verdict," *id.* at 689, and the "amended verdict" under Pennsylvania law was thus a "legal nullity," *id.* at 688.

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judges generally have power to re-empanel juries. *See* App. 516 (citing *Summers v. United States*, 11 F.2d 583 (4th Cir. 1926)). That case neither involved an amended verdict nor any double jeopardy claim.

The Superior Court also noted its concern that the jury had been tainted, observing "here that either the judge or defense counsel approached the jurors regarding their inaccurate verdict after seeing the votes on the blackboard; the jurors did not approach the court staff about their mistake." *Id.* at 688. Moreover, the court observed, "although the trial court and [defendant] indicate that the jurors were not exposed to any outside influences between the time they were discharged and the time they were reassembled in the courtroom, we have no record evidence of this, *i.e.*, no testimony from any jurors themselves or the court staff," and "it appears that some person, whether the trial judge or defense counsel, questioned the jurors about their verdict after seeing their recorded votes on the marker board." *Id.* Under these circumstances, the Superior Court concluded, "[w]e would be hard pressed to conclude that this 'discussion' did not constitute an outside influence." *Id.*

On retrial, Petitioner was convicted of third degree murder and acquitted of involuntary manslaughter. She then appealed, raising only state law claims pertaining to evidentiary rulings, jury instructions, and sufficiency of the evidence. When her direct appeal was not successful, she filed a pro se PCRA petition in the Court of Common Pleas in which she made a fleeting reference to double jeopardy without explaining the basis for any corresponding claim, but she dropped her appeal of the denial of that petition to the Superior Court. Petitioner next turned to the federal courts and procured counsel, arguing *for the first time* that the Superior Court's failure to treat the illegal verdict of acquittal as a valid verdict that barred retrial violated the Double Jeopardy Clause.

The Magistrate Judge, after reviewing the procedural history, observed "[t]he record reveals that the issue of double jeopardy was not raised in the state court system" and Petitioner's claim was thus unexhausted and procedurally defaulted. Accordingly, the Magistrate recommended denial and dismissal of the habeas petition without the issuance of a certificate of appealability. The District Court disagreed and held that Petitioner fairly apprised the Superior Court "of the nature of the double jeopardy claim" because "her assertion of her right not to be retried again crie[d] out that she claimed a double jeopardy violation." *McDaniels v. Winstead*, No. 11-5679, 2014 WL 2957460, at *7 (E.D. Pa. July 1, 2014).

Proceeding to address the merits, the District Court characterized the issue, in contrast to the Superior Court, as whether a "trial judge's error of state law" can "vitiate . . . double jeopardy protection," *id*. at *10, that is, whether "the state-law 'legal nullity' was also a federal law nullity," *id*. at *12, and like the Majority, the District Court perceived no distinction between Petitioner's case and the line of Supreme Court cases that have held an "erroneous acquittal" operative for purposes of double jeopardy. The District Court therefore concluded the Superior Court's decision was contrary to or an unreasonable application of clearly established double jeopardy law. *Id*. at *11-12.

Using the same reasoning, my esteemed colleagues in the Majority will affirm. The effect of that holding—in view of the District Court's determination that Petitioner's conviction of third degree murder on retrial must be vacated, its conclusion that double jeopardy barred and will bar any retrial on the count of third

degree murder, and the fact that the jury on retrial, having convicted Petitioner of third degree murder, had acquitted her on the involuntary manslaughter charge, *id*. at *14—is that Petitioner will be deemed "not guilty" of any criminal charge in connection with Brahim's death and will be entitled to the unconditional issuance of the Great Writ.

II.

As the Majority engages the merits of Petitioner's habeas petition, I will start there, before addressing the procedural bar that I believe should have prevented us from ever going so far.

A.

Our standard of review is governed by the Antiterrorism and Effective Death Penalty Act ("AEDPA"), which instructs that we may not grant habeas relief to a petitioner unless, in relevant part, she is in custody pursuant to a decision that is "contrary to federal law then clearly established in the holdings of [the Supreme] Court," or "involve[s] an unreasonable application of such law." *Richter*, 562 U.S. at 100 (citing 28 U.S.C. § 2254(d)) (internal quotation marks omitted). In turn, "[a] state court decision is 'contrary to' clearly established federal law if it 'applies a rule that contradicts the governing law set forth' in Supreme Court precedent, or if it 'confronts a set of facts that are materially indistinguishable from a decision of the Supreme Court and nevertheless arrives at a result different from that reached by the Supreme Court.'" *Eley v. Erickson*, 712 F.3d 837, 846 (3d Cir. 2013) (quoting *Williams v. Taylor*, 529 U.S. 362, 405, 406 (2000)).

An "*unreasonable* application of federal law is different from an *incorrect* application of federal law." *Richter*, 562 U.S. at 101 (quoting *Williams*, 529 U.S. at 410). We cannot grant habeas relief simply because "we conclude[] in [our] independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." *Williams*, 529 U.S. at 411. That is, the relevant state court decision must be *more* than wrong: it "must . . . be unreasonable." *Id*. And as long as a "fairminded jurist[]" could agree with the state court's decision, it is not unreasonable. *Richter*, 562 U.S. at 101 (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). Put another way, we may grant the Great Writ *only* "where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with [the Supreme] Court's precedents." *Id*. at 102. As the Supreme Court has advised, "[i]f [AEDPA's] standard is difficult to meet, that is because it was meant to be." *Id*.

B.

Petitioner's claim on federal habeas is that her retrial violated the Double Jeopardy Clause because the supposed "corrected verdict" entered by the trial court—although ultra vires and a "legal nullity" under state law—must be deemed operative as a matter of federal law. And the Majority accepts this argument. Notwithstanding the Majority's acknowledgment that Pennsylvania law "does not allow a trial court to re-empanel a criminal jury that has been discharged," Maj. Op. at 17, and that the entry of the re-empaneled jury's verdict of acquittal was an "impropriety under state law," Maj. Op. at 20 n.5, the Majority concludes "there can be no dispute" that the entry of that verdict

"constituted an acquittal that should have barred retrial," Maj. Op. at 14, 17, because (1) initial jeopardy attached; (2) the trial court retained general jurisdiction over the case even post-trial; and (3) the jury, in the Majority's view, at some point made a factual determination of innocence. Maj. Op. 14, 21 n.6, 23 n.7. So long as those conditions are met, the Majority reasons, the entry of an "erroneous" verdict of acquittal bars retrial under the Double Jeopardy Clause—regardless of the nature of the error.

Facially appealing as it may be, the Majority's reasoning comports with neither the facts of this case nor Supreme Court precedent. As a threshold matter, that recitation of the conditions here ignores the central feature of this case: the intervening recording of a final verdict of mistrial and the discharge of the jury. In that circumstance, the Supreme Court has held, "the [Double Jeopardy] Clause does not prevent the Government from seeking to reprosecute" because "the second trial does not place the defendant in jeopardy 'twice,'" and "the 'interest in giving the prosecution one complete opportunity to convict those who have violated its laws' justifies treating the jury's inability to reach a verdict as a nonevent that does not bar retrial." *Yeager v. United States*, 557 U.S. 110, 118 (2009) (quoting *Arizona v. Washington*, 434 U.S. 497, 509 (1978)); *see also United States v. Sanford*, 429 U.S. 14, 16 (1976) (holding that double jeopardy did not bar retrial where "[t]he District Court's dismissal of the indictment occurred several months after the first trial had ended in a mistrial, but before the retrial of respondents had begun" because as a result of the verdict of mistrial, "the Government had a right to prosecute and . . . the

defendant was required to defend" (citing *Serfass v. United States*, 420 U.S. 377 (1975)).

Moreover, the Majority can assert "there is no dispute that there was a factual determination made by the jury," Maj. Op. at 23 n.7, only by disregarding the record and substituting its judgment for that of the Pennsylvania Superior Court, which reasonably concluded that—where the judge or defense counsel approached the jurors about their alleged "mistake," not vice versa; the judge or defense counsel questioned the discharged jurors about their verdict off the record; and there was no testimony from the jurors themselves or from court staff about the "discussion" that took place—the court "would be hard pressed to conclude that this 'discussion' did not constitute an outside influence." *McDaniels*, 886 A.2d at 688.[2]

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[2]The Majority is content to rely on the trial judge's statement that he personally "did not attempt to influence the jurors in any way when he addressed them after the verdict was recorded." App. 437. The trial judge's individual intent is of little moment, however, especially when relayed in a later statement defending his own highly problematic handling of the situation, for that statement says nothing about what was actually said to the jury by defense counsel or the judge or the effect on the jury of whatever was discussed. Absent testimony from counsel, court staff, or the jurors themselves as to what transpired, the Superior Court was reasonably concerned about the effect of those outside influences and the reliability of the purported "amended verdict." Indeed, the serious risk of jury taint if discharged jurors are permitted later to reassemble and alter their verdict is the very reason Pennsylvania, like many jurisdictions, *see infra* Sec. II.C, maintains a rule that "the verdict as recorded is the verdict of the jury and the latter shall not be permitted to impeach or to alter or amend it after their separation or discharge," *Johnson*, 59 A.2d at 129, nor may the

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More fundamentally, however, Supreme Court precedent does not support the proposition that an "erroneous verdict" of acquittal bars retrial where the entry of the verdict itself is ultra vires,[3] and it makes crystal

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[2](...continued)
verdict "be molded by the trial judge," *Commonwealth v. Dzvonick*, 297 A.2d 912, 914 (Pa. 1972). And while, as the Majority notes, the Pennsylvania Supreme Court has left open the possibility "that the verdict might be altered 'in extremely exceptional cases and even then only unless to make the corrected verdict conform to the obvious intention of the jury," Maj. Op. at 20 n.5 (alterations omitted) (quoting *Dzvonick*, 297 A.2d at 914 n.4), that sentence continues with: "i.e., to conform to a verdict actually rendered, but informally or improperly stated in writing," *Dzvonick*, 297 A.2d at 914 n.4, making clear, as do other Pennsylvania authorities, that the exception is limited to the correction of clerical errors, *e.g.*, *Commonwealth v. Homeyer*, 94 A.2d 743, 747-48 (Pa. 1953) (holding that the clerk's incorrect announcement and recordation of the jury's properly returned verdict could be corrected "to read exactly as the jury found"); *Commonwealth v. Meyer*, 82 A.2d 298, 300 (Pa. Super. Ct. 1951) ("[C]lerical errors may be corrected by amendment even in a criminal case."); *see also* Burton R. Laub, Pennsylvania Trial Guide: Civil and Criminal § 244 at 415 (1959) ("[I]f the jury makes a return which, though not in proper form, adequately expresses its true findings, and the clerk records the verdict in another form, the mistake in the entry on the docket may properly be corrected to accord to the actual announcement made.") (cited in *Dzvonick*, 297 A.2d at 914 n.4).

[3]*City of Arlington v. FCC*, 133 S. Ct. 1863 (2013), which the Majority cites to support the notion that "a jurisdictionally proper but substantively incorrect judicial decision is not ultra vires," *id.* at 1869; *see* Maj. Op. at 20 n.5, is inapposite to this case. There, in considering whether the FCC's interpretation of its own statutory jurisdiction was entitled deference, the Supreme Court contrasted the jurisdiction of agencies with that of the courts, observing that "[w]hether [a] court decided *correctly* is a question that has
(continued...)

clear, at a minimum, that such a proposition is not "clearly established." For the general principle that a "verdict of acquittal . . . on error or otherwise" is operative for double jeopardy purposes, the Majority relies on the Supreme Court's decision in *United States v. Ball*, 163 U.S. 662 (1896), in which the Court held that retrial following a verdict of acquittal was barred even though it was later determined that the indictment was defective, *id.* at 670-71; *see* Maj. Op. at 15. But more specifically, the Majority relies on a series of Supreme Court cases, including *Fong Foo v. United States*, 369 U.S. 141, 143 (1962) (per curiam); *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 570-76 (1977); *Smith v. Massachusetts*, 543 U.S. 462, 469-75 (2005); and *Evans v. Michigan*, 133 S. Ct. 1069, 1074-81 (2013), in which the Supreme Court held that the particular errors underlying those verdicts or judgments of acquittal did not affect their validity and, hence, those erroneous acquittals still triggered the double jeopardy bar. From these cases, the Majority generalizes that any "erroneous" acquittal bars retrial, including what it characterizes as the "erroneous re-empanelment and

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[3](...continued)
different consequences from the question whether it had the power to decide at all," whereas because agencies' "power to act and how they are to act" are both "prescribed by Congress, ... the question . . . is always whether the agency has gone beyond" its delegated authority. *Arlington*, 133 S. Ct. at 1868-69. As far afield as this case is from the Supreme Court's double jeopardy case law, it hardly bears mention. I note, however, that the Court's statement in context, reflecting that a decision a court has power to enter is not ultra vires even if substantively incorrect, is entirely consistent with this dissent.

the subsequent entry on the record of the not guilty verdict." Maj. Op. at 17.

The fatal flaw in that reasoning is the failure to make the distinction that the Supreme Court does explicitly in these very cases. That is, the Supreme Court expressly distinguishes between one kind of "error"—in which the trial court renders an acquittal based on an improper evidentiary ruling or merits determination—and a different kind of "error"—in which the trial court lacks the power to enter the verdict at all. While the Supreme Court variously calls the latter a lack of "power," *e.g.*, *Evans*, 133 S. Ct. at 1081; *Fong Foo*, 369 U.S. at 142, or "authority," *Martin Linen*, 430 U.S. at 570, a review of its cases from *Fong Foo* to, most recently, *Dietz*, reflects that the Court—at least thus far—has treated an erroneous verdict of acquittal as nonetheless valid for purposes of double jeopardy *only* when it has fallen into the first category, namely, only where the Court has assured itself that the trial court had the power to enter the acquittal at that point in the proceeding. That is, to the extent there was "clearly established" Supreme Court case law on this subject, that law, if anything, supports the Superior Court's conclusion and the Commonwealth's argument here that a purported superseding verdict of acquittal that a trial court had no power to enter is a legal nullity, devoid of double jeopardy implications.[4]

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[4]To the extent the Majority may be implying that the Commonwealth waived this argument, which forms the entirety of its appeal, by stating at oral argument that it did "not dispute that [what occurred] meets the very broad and easily met definition of acquittal," Maj. Op. at 14 (quoting Oral Arg. 1:48-1:55), the oral

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I begin with *Fong Foo*. There, the district court, outraged that a federal prosecutor spoke with a Government witness during a break in his testimony and believing the Government's witnesses to that point to be lacking in credibility, directed the jury to acquit the defendants in the middle of trial. *See In re United States*, 286 F.2d 556, 558-60 (1st Cir. 1961), *rev'd by Fong Foo*, 369 U.S. 141. The First Circuit reversed based on its conclusion that district courts lacked power under the Federal Rules of Criminal Procedure to enter a judgment of acquittal before a party had rested, so that, in its view, the district court's directed verdict of acquittal "was not only plainly erroneous but

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[4](...continued)
argument transcript makes clear that it did no such thing. In context, that excerpt was the Commonwealth's response to the question whether what occurred here "was in fact a determination by those twelve jurors of not guilty on the charge of third degree murder, as a matter of fact?" Oral Arg. 1:35-1:46. Declining to concede that the jury had made a factual finding of innocence and characterizing the issue presented to this Court instead as one involving "the very broad and easily met definition of acquittal," the Commonwealth immediately proceeded to argue, as it has throughout this appeal, that that "acquittal" was a legal nullity because the trial court "lacked jurisdiction" to enter it. Oral Arg. 1:50-1:59. And to the extent the Majority takes issue with the Commonwealth's references to the trial court's lack of "jurisdiction," Maj. Op. at 19, its concerns also are not well founded. There is no question that the trial court retained general jurisdiction over the case through its handling of post-trial motions. Instead, as the Commonwealth states explicitly in its briefing, it is using the term "jurisdiction" in the context of this case (as it does interchangeably with "authority" and "power") to mean "jurisdiction over the type of relief sought—acquittal," a remedy which the Commonwealth argues the trial court simply "lacked the authority" to enter. Appellant's Br. 51.

beyond his jurisdiction." *Id.* at 560. A majority of the Supreme Court reversed and held that, even if based on an "egregiously erroneous foundation," the verdict of acquittal was operative, *Fong Foo*, 369 U.S. at 143, while Justice Clark in dissent adopted the First Circuit's view and asserted that the district court's lack of power to enter the verdict rendered the acquittal a "nullity," *id.* at 144 (Clark, J., dissenting).

The Majority reads these opinions together as holding that an acquittal is final for double jeopardy purposes even where a trial court lacked power to enter that verdict. Maj. Op. at 16. On inspection, however, *Fong Foo* holds no such thing.

Although Justice Clark in dissent, like the First Circuit, perceived the issue as relating to the power of state courts, *Fong Foo*, 369 U.S. at 144-46 (Clark, J., dissenting), the Supreme Court majority did not, instead expressly rejecting the notion that the district court "was without power to direct acquittals under the circumstances disclosed by the record," *id.* at 142, and holding that the trial "terminated with the entry of a final judgment of acquittal," *id.* at 143, *i.e.*, a judgment cognizable precisely because the district court had power to enter it. The "egregiously erroneous foundation" to which the Court referred was the evidentiary one—the district court having based the acquittal on the prosecutor's conversation with a witness and its view of the witnesses' credibility—and the Court's holding was that, where the trial court did have power to enter the verdict of acquittal, an acquittal based on an erroneous ground was "[n]evertheless . . . final and could not be reviewed" under the Double Jeopardy Clause. *Id.*

Subsequent Supreme Court cases only reinforce the line between inaccurate or mistaken judgments of acquittal, which the Court has held still count as acquittals for double jeopardy purposes under *Fong Foo* and its progeny, and purported judgments of acquittal that a trial court had no power to enter (for federal courts, under the Federal Rules of Criminal Procedure and their inherent powers, and for state courts, under their state rules of criminal procedure and state law), which the Court has at least strongly suggested would not count as acquittals at all. More significantly for purposes of this habeas action, these cases make perfectly clear that there has been—and at the time the Superior Court ruled in Petitioner's case there was—no "clearly established" Supreme Court precedent under which the states (which assuredly may define the boundaries of their own courts' jurisdiction and power) were constitutionally required to treat as valid judgments of acquittal, actions of their state judges that were ultra vires to the judges' power and therefore null and void under state law.

In *United States v. Martin Linen Supply Co.*, for example, the Supreme Court considered the validity of a judgment of acquittal entered by a district court purportedly exercising its power under federal law. 430 U.S. at 565-76. There, as here, the jury had deadlocked and the district court declared a mistrial and discharged the jury. *Id.* at 565. The defendants timely filed motions for acquittal under the version of Federal Rule of Criminal Procedure 29(c) then in effect, which provided that "a motion for judgment of acquittal may be made . . . within 7 days after the jury is discharged (and) the court may enter judgment of acquittal," *id.* at 566 (quoting Fed. R. Crim. P. 29(c) (1977)), and the

district court granted those motions. In holding that this post-discharge judicial verdict of acquittal was operative to bar the Government's appeal—and rejecting the Government's argument that "(o)nce the district court declared a mistrial and dismissed the jury, any double jeopardy bar to a second trial dissolved," *id*. at 572—the Supreme Court emphasized that the federal judge was expressly authorized under the Federal Rules of Criminal Procedure to act as he did, producing "valid judgments of acquittal . . . entered on the *express authority of, and strictly in compliance* with, Rule 29(c)," *id*. at 570 (emphasis added).

Likewise, Justice Stevens concluded his concurrence (which focused on what statutory appeals were authorized under the Criminal Appeals Act) by observing that, because Congress had not statutorily authorized the Government to appeal from a judgment of acquittal:

> [T]he only question presented is whether such a judgment was entered in this case. The answer to that question, as the Court demonstrates, is perfectly clear. By virtue of [Rule] 29(c), the mistrial *did not terminate the judge's power to make a decision on the merits*. His ruling, in substance as well as form, was therefore an acquittal.

Id. at 581 (Stevens, J., concurring) (emphasis added); *see also United States v. Sisson*, 399 U.S. 267, 277, 289-90 (1970) (holding that the district court's order granting defendant's "motion in arrest of judgment," which functioned as a judgment of acquittal, triggered the double jeopardy bar specifically because "Rules

29(b) and (c) of the Federal Rules of Criminal Procedure . . . expressly allow a federal judge to acquit a criminal defendant after the jury 'returns a verdict of guilty'").

In cases involving the review of state court judgments, the Supreme Court has also strongly suggested that the validity of a purported verdict of acquittal depends on whether the judge had power to enter it. In *Smith v. Massachusetts*, decided mere months before the Superior Court's opinion in the instant case, the state court entered a midtrial finding of not guilty as to one count for lack of evidence but later concluded the evidence was sufficient to submit that charge to the jury, which convicted. 543 U.S. at 465-66. The Supreme Court reversed the conviction. The "first question" the Court had to answer was "whether the judge's initial ruling on petitioner's motion was, in fact, a judgment of acquittal." *Id*. at 467. As the Majority points out, the Court held that it was, even if that midtrial ruling was erroneous. *See* Maj. Op. at 16-17.

But the Supreme Court expressly based that conclusion on the fact that Massachusetts Rule of Criminal Procedure 25(a) "directs the trial judge to enter a finding of not guilty 'if the evidence is insufficient as a matter of law to sustain a conviction.'" *Smith*, 543 U.S. at 467 (quoting Mass. R. Crim. P. 25(a)). Regardless of whether Massachusetts would characterize the trial judge's finding of "not guilty" as a legal or factual conclusion, the Court explained, for double jeopardy purposes "what matters is that, *as the Massachusetts Rules authorize*, the judge 'evaluated the [Commonwealth's] evidence and determined that it was legally insufficient to sustain a conviction.'" *Id*. at 469

(emphasis added) (quoting *Martin Linen*, 430 U.S. at 572). The Court made even more clear that its assessment of the validity of the acquittal turned on whether the judge had power under state law to enter it by observing "that as a general matter state law may prescribe that a judge's midtrial determination of the sufficiency of the State's proof can be reconsidered," *id*. at 470, but "Massachusetts had not adopted any such rule," *id*. at 471. The necessary corollary, of course, is that if Massachusetts had opted to circumscribe the power of its state judges with a different rule, the trial judge's midtrial "finding" of not guilty would not have triggered the double jeopardy bar.

And *Evans v. Michigan*, although post-dating the Superior Court's decision, made the same point even more starkly, 133 S. Ct. at 1074-81, and thus sheds light on what was then clearly established double jeopardy law.[5] In that case, the state trial judge entered a midtrial directed verdict of acquittal, which it was authorized to do under Michigan law, but it did so erroneously, by requiring proof of an extra element for the charged offense. *Id*. at 1073-75. This kind of error, the Supreme Court held, fell comfortably within "*Fong Foo*'s principle," which it summarized as follows:

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[5]For the purposes of AEDPA, "clearly established law" includes the "holdings . . . of [the Supreme] Court's decisions as of the time of the relevant state-court decision"—here, the Superior Court's decision. *See Carey v. Musladin*, 549 U.S. 70, 74 (2006) (quoting *Williams*, 529 U.S. at 412). But subsequent cases are relevant insofar as they reflect what was then clearly established, "clarifying the law as . . . applied to the particular facts of that case." *Lewis v. Johnson*, 359 F.3d 646, 655 (3d Cir. 2004); *see also* Brian R. Means, Federal Habeas Manual § 3:29 (2016).

> [A]n acquittal precludes retrial even if it is premised upon an erroneous decision to exclude evidence; a mistaken understanding of what evidence would suffice to sustain a conviction; or a "misconstruction of the statute" defining the requirements to convict. In all these circumstances, "the fact that the acquittal may result from erroneous evidentiary rulings or erroneous interpretations of governing legal principles affects the accuracy of that determination, but it does not alter its essential character."

Id. at 1074 (citations omitted).

Notably absent from the Court's survey of *Fong Foo*-type errors is the categorically different kind of error involved when a judge acts ultra vires by attempting to enter a verdict of acquittal at a point in the proceeding when it is disallowed under state law. And that kind of "erroneous" acquittal, the Court indicated, would not operate as an acquittal for double jeopardy purposes. *Id*. at 1081. That is, in responding to the Government's argument that the Court's holding would allow defendants to reap the benefit of trial judges' unreviewable errors, the Court explained:

> [S]overeigns are hardly powerless to prevent this sort of situation, as we observed in *Smith*. Nothing obligates a jurisdiction to afford its trial courts the power to grant a midtrial acquittal, and at least two States disallow the practice. . . . And for cases such as this . . . we see no reason why jurisdictions could not provide for mandatory continuances or expedited interlocutory appeals if they wished to prevent misguided

> acquittals from being entered. But having chosen to vest its courts with the power to grant midtrial acquittals, the State must bear the corresponding risk that some acquittals will be granted in error.

Id. (citations omitted). Again, in other words, the Court attached constitutional significance to whether the trial court was authorized under state law to enter the acquittal at the point it did.

Despite the language and reasoning of *Fong Foo*, *Martin Linen*, *Smith*, and *Evans*, the Majority contends that "any lack of 'power' under the applicable procedural rules was irrelevant to the Court's analysis," and dismisses any "distinction between 'evidentiary' defects and defects in 'power'" as "illusory." Maj. Op. 21 n.6. But were the trial courts' power and authority to enter those verdicts indeed irrelevant to the Supreme Court in assessing their validity, there would have been no reason for the Supreme Court to find "power" in *Fong Foo*, 369 U.S. at 142, and in *Evans*, 133 S. Ct. at 1081, "authority" in *Martin Linen*, 430 U.S. at 570, and "authoriz[ation]" in *Smith*, 543 U.S. at 469. Nor would there have been reason for the Court in *Martin Linen* to explain that the Federal Rules of Criminal Procedure authorized the district court to act as it did, producing "valid judgments of acquittal . . . entered on the express authority of, and strictly in compliance with, Rule 29(c)," 430 U.S. at 570, or in *Smith* to highlight that "what matters is that, *as the Massachusetts Rules authorize*, the judge 'evaluated the [Commonwealth's] evidence and determined that it was legally insufficient to sustain a conviction," 543 U.S. at 469 (emphasis added) (quoting *Martin Linen*, 430 U.S. at

572). And in *Smith* and *Evans*, the Court went out of its way to point out that states could choose to circumscribe the power of their judges to enter verdicts only at certain points in the trial process and to allow appeals from purported "acquittals" outside those parameters—implicitly acknowledging that such ultra vires acquittals would lack any legal force and would not trigger the double jeopardy bar. *Smith*, 543 U.S. at 474; *Evans*, 133 S. Ct. at 1081.

In sum, only having determined in each case that the midtrial directed verdicts or judgments of acquittal were expressly authorized under the relevant state or federal rules did the Supreme Court deem them valid acquittals—notwithstanding other factual or legal errors that may have affected their accuracy pursuant to *Fong Foo*. But more to the point on habeas review, the Court's case law up to and including *Evans* confirms that the contrary proposition—that such ultra vires verdicts *must* be treated as valid acquittals for double jeopardy purposes—was not "clearly established" under federal law. And in the absence of such clearly established law, we should be reversing, not affirming, the District Court's grant of habeas relief in this case.

Here, there is no question that the trial judge in Petitioner's case exceeded his power under state law when he reconstituted the discharged jury and purported to enter a superseding verdict of acquittal in lieu of the jury's original and properly entered verdict of mistrial. As the Superior Court observed when it declined to give effect to those ultra vires actions, Pennsylvania law for decades has expressly forbid a trial court from reconstituting a jury after discharge to

amend its verdict. *McDaniels*, 886 A.2d at 686-87 (citing *Johnson*, 59 A.2d at 129 (holding that a jury cannot amend a verdict after being discharged)); *see Dzvonick*, 297 A.2d at 914 & n.4 (Pa. 1972) (holding that after a verdict has been recorded and a jury discharged, a court can "mold" a verdict "only in extremely exceptional cases . . . and even then only . . . to make the corrected verdict conform to the obvious intention of the jury, i.e., to conform to a verdict actually rendered, but informally or improperly stated in writing") (internal quotation marks omitted)).

For that reason, in an analysis that fair-minded jurists could view as entirely consistent with *Fong Foo*, *Martin Linen*, *Smith*, and *Evans*, the Superior Court concluded that "[o]nce the verdict was announced and recorded, and the jury was discharged, neither the judge nor the jury had any power to change the verdict," *McDaniels*, 886 A.2d at 689; that the trial judge's subsequent attempt to enter a superseding verdict of acquittal was a "legal nullity," *id.* at 688; and, hence, that the Commonwealth was not "appealing a verdict of acquittal," *id.* at 686, but rather was appealing the trial judge's entry of an "[i]llegal [v]erdict," *id.*—along the lines expressly contemplated in *Evans*, 133 S. Ct. at 1081. The Superior Court's decision thus hardly seems an "incorrect application," much less an "unreasonable application" of "clearly established federal law." *Richter*, 562 U.S. at 100-01 (emphasis omitted).

And if there remained any doubt about that even after *Evans*, it was dispelled by the Supreme Court's recent decision in *Dietz v. Bouldin*. In *Dietz*, the Court granted a writ of *certiorari* to resolve a Circuit split as

to "whether and when a federal district court has the authority to recall a jury after discharging it." 136 S. Ct. at 1891. Although the Court held that in civil cases, federal courts do have "carefully circumscribed" inherent power to recall a jury to correct a verdict, which they ought not exercise if there is "[a]ny suggestion of prejudice" as a result of taint or external influences on the jury, *id*. at 1893-94, the Court explained that if a federal rule or statute had prohibited district courts from recalling juries and setting aside a validly recorded jury verdict, federal judges would *not* have the "power" to take those steps—at least in the civil context, *id*. at 1892-93. As for the criminal context, the Court expressly observed it was not deciding "whether it would be appropriate to recall a jury after discharge in a criminal case," *id*. at 1895, citing specifically to *Smith*'s discussion of the double jeopardy bar *and* the ability of states to "protect themselves" by crafting procedural rules that define when a trial judge has power to enter a verdict or judgment of acquittal in the course of the proceeding, *Smith*, 543 U.S. at 473-74. *Dietz* left for another day when and whether a federal court has power to reconstitute a jury and to enter a corrected verdict that will be deemed operative in a criminal case; *a fortiori*, when and whether a state court *must* treat as operative in a criminal case a corrected verdict that the trial judge had no power under state law to enter was, before *Dietz*, and remains even today anything but "clearly established."

Yet the Majority asserts that *Dietz* is not controlling because "[w]e are not addressing whether the state court erred in concluding that the jury could not be recalled after it was discharged. Rather, given the

impropriety under state law of entering the jury's not guilty verdict on the record, we are determining whether that erroneous acquittal barred retrial under the Double Jeopardy Clause." Maj. Op. at 20 n.5. In my view, this unduly cabins the Court's holding in *Dietz*: The Court was not deciding in the abstract whether federal judges have the power under federal law to recall a discharged jury and to set aside its previously entered verdict with a "corrected verdict"; it was deciding that question as a predicate for determining whether the purported "corrected" verdict entered in that case was a legal nullity so that the original verdict would stand or whether, instead, the corrected verdict would be deemed the operative verdict. *Dietz*, 136 S. Ct. at 1896.

That was precisely the question before the Superior Court in this case and, after considering the very factors the Supreme Court later indicated in *Dietz* were appropriate to determine whether the superseding verdict of a recalled jury should be given effect—including whether the trial court was acting "contrary to any express grant of or limitation on the [trial] court's power," *id*. at 1892, and whether such power should be circumscribed in any event due to concerns of "external influences that can taint a juror," *id*. at 1893—the Superior Court concluded the purported superseding verdict of acquittal had no legal effect, *McDaniels*, 886 A.2d at 686-88. Specifically, it reasoned that, under controlling state law, a judge's "later reassembling [of] those who had constituted the jury" to enter an amended verdict after the jury's verdict was properly recorded and the jury discharged, was a "nullity." *Id*. at 687 (citing *Johnson*, 59 A.2d at 131). And it also opined that although the trial judge and Petitioner asserted

that the jurors had not been exposed to outside influences between the time they were discharged and reassembled, "we have no record evidence of this" and "it appears that some person, whether the trial judge or defense counsel, questioned the jurors about their verdict after seeing their recorded votes on the marker board"—a "discussion" the Superior Court reasonably considered to be "an outside influence." *Id*. at 688.

The Superior Court anticipated the reasoning of the Supreme Court itself in *Dietz* by identifying the question of whether the trial judge had the power to recall the jury in Petitioner's case as dispositive of the question whether the superseding verdict the trial judge purported to enter was legally cognizable. Given the distinction the Supreme Court appears to have drawn in cases before *Dietz* between legal errors going to the accuracy of an acquittal and ultra vires action going to the validity of an acquittal, its holding in *Dietz* that the validity of a corrected civil verdict turned on the "power" of the trial court to recall the discharged jury, *Dietz*, 136 S. Ct. at 1893, and its express reservation for another day of the application of this rule in criminal cases, we simply cannot say the Superior Court's decision was "an unreasonable application of clearly established [f]ederal law." *Richter*, 562 U.S. at 786.

For these reasons, I believe we are overstepping AEDPA's carefully circumscribed review by affirming the grant of habeas relief in this case. We cannot recharacterize the novel and complex question here as a simplistic one of whether a defendant can be retried following acquittal or whether a generic "erroneous" verdict of acquittal is nonetheless operative. Rather, the relevant question is whether a state trial judge's

actions in recalling a discharged jury and purporting to supplant a final and properly recorded jury verdict of mistrial with a superseding verdict of acquittal—at a point in the proceeding when such actions were expressly disallowed by controlling state law—must nonetheless be deemed a valid acquittal, barring retrial under the Double Jeopardy Clause. And the Supreme Court's carefully crafted decisions in *Fong Foo*, *Martin Linen*, *Smith*, *Evans*, and now *Dietz* reflect that the answer to that question was not "clearly established" at the relevant time. I do not begrudge the Majority that these cases are susceptible to other reasonable interpretations on which fairminded jurists can disagree. But on habeas review, relief must be denied unless "there is no possibility fairminded jurists could disagree that the state court's decision conflicts with the [Supreme] Court's precedents." *Richter*, 562 U.S. at 102. That threshold is not met here, and for that reason if we reached Petitioner's claim, I would reverse.

C.

My dissent as to the Majority's analysis and disposition on the merits is prompted not only by the deferential standard of review imposed by AEDPA and the federalism and comity concerns that underlie it, but also by the broad implications of the Majority's reasoning for state laws currently in effect and for the practice of criminal law generally.

Just as many states have prescribed when midtrial acquittals may be entered by their state courts, *see Evans*, 133 S. Ct. at 1081; *Smith*, 543 U.S. at 474, many states in addition to Pennsylvania have

prescribed when a court may reconstitute a jury after discharge to correct or amend a verdict. In some states it is forbidden,[6] and in some it depends on whether the court lost control over the jurors such that they had the opportunity to be exposed, or were actually exposed, to an outside influence.[7] Moreover, at least two state supreme courts have held that double jeopardy does not bar retrial in circumstances similar to those here.[8]

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[6]*See*, *e.g.*, *T.D.M. v. State (Ex Parte T.D.M.)*, 117 So.3d 933, 941 (Ala. 2011) (per curiam), *Spears v. Mills*, 69 S.W.3d 407, 413 (Ark. 2002); *West v. State*, 92 N.E.2d 852, 855 (Ind. 1950); *State v. Hurd*, 8 A.3d 651, 662 (Me. 2010); *Sargent v. State*, 11 Ohio 472, 474 (1842) (en banc); *Ware v. Graham*, 417 P.2d 936, 939 (Okla. Crim. App. 1966); *Yonker v. Grimm*, 133 S.E. 695, 697-98 (W. Va. 1926).

[7]*See*, *e.g.*, *People v. Hendricks*, 737 P.2d 1350, 1358-59 (Cal. 1987) (en banc); *Montanez v. People*, 966 P.2d 1035, 1036-37 (Colo. 1998) (en banc); *State v. Colon*, 864 A.2d 666, 775 (Conn. 2004); *Lahaina Fashions, Inc. v. Bank of Hawai'i*, 319 P.3d 356, 368 (Haw. 2014); *State v. Fornea*, 140 So.2d 381, 383 (La. 1962); *Commonwealth v. Brown*, 323 N.E.2d 902, 905 (Mass. 1975); *Anderson v. State*, 95 So.2d 465, 467-68 (Miss. 1957); *Pumphrey v. Empire Lath & Plaster*, 135 P.3d 797, 804 (Mont. 2006); *Sierra Foods v. Williams*, 816 P.2d 466, 467 (Nev. 1991) (per curiam); *Sierra Foods v. Williams*, 816 P.2d 466, 467 (Nev. 1991) (per curiam); *State v. Rodriguez*, 134 P.3d 737, 741 (N.M. 2006); *Newport Fisherman's Supply Co. v. Derecktor*, 569 A.2d 1051, 1053 (R.I. 1990); *State v. Myers*, 459 S.E.2d 304, 305 (S.C. 1995); *Webber v. State*, 652 S.W.2d 781, 782 (Tex. Crim. App. 1983) (en banc); *Melton v. Commonwealth*, 111 S.E. 291, 294 (Va. 1922).

[8]*See People v. Carbajal*, 298 P.3d 835, 840 (Cal. 2013) (holding that double jeopardy did not bar retrial where the court entered a not guilty verdict on a charge for which it "had no authority to consider" and for which "no valid verdict could have been rendered"); *State v. Davenport*, 147 So. 3d 137, 150 (La. 2014) (holding

(continued...)

States institute these rules for good reason. "Freed from the crucible of the jury's group decisionmaking enterprise, discharged jurors may begin to forget key facts, arguments, or instructions." *Dietz*, 136 S. Ct. at 1894. Moreover, "they are more likely to be exposed to potentially prejudicial sources of information or discuss the case with others," *id.*, including the attorneys and judge in the case—and such exposure may happen immediately.

As the Pennsylvania Supreme Court put it in *Johnson*, the case on which the Superior Court in this case expressly relied:

> [A] consideration of the evil consequences [that] would follow permitting a jury to reassemble and alter its verdict on the ground of mistake, should in itself deter courts from sanctioning such practice. If this practice were judicially sanctioned, a jury might acquit a defendant of a crime and then a day, a week or a month later reassemble and declare that the verdict was a mistake, that they intended to find the

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[8](...continued)
that a judgment of acquittal erroneously entered in the midst of a jury trial under a statute applicable only in bench trials did not bar retrial); *but cf. Davenport v. Richardson*, No.14-cv-1092, 2016 WL 285060 (W.D. La. Jan. 20, 2016) (applying de novo review to a § 2241 petition and granting habeas relief on the ground that, although the trial judge had entered the acquittal in that case based on the wrong statute, there was no state authority prohibiting the trial judge from entering a midtrial acquittal and the trial judge in fact "had the authority to order an acquittal based on the original jurisdiction granted to him by the Louisiana Constitution").

> defendant guilty and would then proceed to do so. To permit such a disorderly practice in the administration of justice is unthinkable. It is the antithesis of due process of law.

Johnson, 59 A.2d at 131.

The Majority's approach does not accord with these concerns. Instead, it encourages state courts to re-empanel discharged juries where subsequent debriefing ostensibly reveals that, for example, one or more jurors misunderstood the jury instructions and would have acquitted. The longstanding rule that jurors are presumed to follow their instructions as given, which rarely permits second-guessing the jury's performance after the fact, was intended to safeguard the propriety and finality of verdicts and to avoid this very result. *See*, *e.g.*, *Richardson v. Marsh*, 481 U.S. 200, 211 (1987); *Commonwealth v. Baker*, 614 A.2d 663, 672 (Pa. 1992); *see also* Fed. R. Evid. 606(b)(1) ("During an inquiry into the validity of a verdict . . . , a juror may not testify about any statement made or incident that occurred during the jury's deliberations . . . or any juror's mental processes concerning the verdict or indictment."); Pa. R. Evid. 606(b) (same); *Karl v. Burlington N. R.R. Co.*, 880 F.2d 68, 74 (8th Cir. 1989) (stating that Federal Rule of Evidence 606 allows juror testimony about a "clerical error" in recording the verdict but not about "the jury's understanding of the court's instructions").

What's more, if a jury not only can, but as a matter of double jeopardy law must, be re-empaneled after it renders its verdict (or declares that it cannot reach one) whenever the jurors allegedly misunderstood the

jury instructions and later assert that, with a better understanding of those instructions, they would have voted to acquit, the work of the defendant's trial counsel must carry on well beyond the jury's discharge. For if the Majority's rationale is correct, trial counsel who forego the opportunity post-trial to explore any misunderstanding the jurors may have had concerning the jury instructions or any possibility that the verdict, although accurately reflecting what the jurors reported in open court, did not reflect their true intentions, do so at their peril—inviting habeas claims based not only on the ground that the jury's properly recorded verdict was incorrect and should have been "amended," but also that trial counsel was ineffective for failing to investigate this possibility.

III.

Notwithstanding the above-referenced reasons to reverse on the merits, I also dissent because we should not be reaching those merits. As Petitioner's counsel candidly conceded at oral argument, Petitioner's double jeopardy claim "wasn't specifically presented, it's clear." Oral Arg. 30:00-30:08. And for that reason, Petitioner did not even attempt in her briefing before this Court to argue that the claim had been raised, instead seeking to excuse her admitted procedural default on two specific grounds. Yet, over Petitioner's own denial, the Majority contends that Petitioner did fairly present her claim to the state court. I respectfully disagree.

To "fairly present[]" a claim to the state courts, a habeas petitioner "must present a federal claim's factual and legal substance to the state courts in a

manner that puts them on notice that a federal claim is being asserted." *Robinson v. Beard*, 762 F.3d 316, 328 (3d Cir. 2014) (alteration in original). A petitioner does not satisfy the fair presentation requirement merely by "present[ing] all the facts" to a state court, *Picard v. Connor*, 404 U.S. 270, 277 (1971); *see Gray v. Netherland*, 518 U.S. 152, 163 (1996), even when those facts evince a "clear violation[]" of the petitioner's constitutional rights, *Duckworth v. Serrano*, 454 U.S. 1, 4 (1981) (per curiam). The Supreme Court has admonished that we must "adhere[] to this federal policy, for 'it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation,'" *Picard*, 404 U.S. at 275 (quoting *Darr v. Burford*, 339 U.S. 200, 204 (1950)), and further, that "[f]ederal courts sitting in habeas are not an alternative forum for trying facts and issues which a prisoner made insufficient effort to pursue in state court proceedings," *Brown v. Wenerowicz*, 663 F.3d 619, 629 (3d Cir. 2011) (quoting *Cullen v. Pinholster*, 563 U.S. 170, 186 (2011)). We are called upon to safeguard this principle "[a]s a matter of comity and federalism," *Lark v. Sec'y Pa. Dep't of Corr.*, 645 F.3d 596, 611 (3d Cir. 2011), and "[o]ut of respect for the finality of state-court judgments," *House v. Bell*, 547 U.S. 518, 522 (2006).

The record in this case demonstrates Petitioner's double jeopardy claim was not fairly presented to the state courts and therefore, absent some basis to overcome her default, is procedurally barred. On direct appeal to the Superior Court, the Commonwealth argued that the trial court had no authority to re-empanel the jury and enter the acquittal, and

because that verdict was a legal nullity, the trial court's original declaration of a mistrial must stand. And the only arguments raised by Petitioner in response were that the second verdict was not tainted so that the trial court properly exercised its "discretionary power to insure the fairness of the proceedings" in the "interest of justice," App. 511 (quoting *Commonwealth v. Powell*, 590 A.2d 1240, 1243 (Pa. 1991)), and that the Superior Court lacked jurisdiction over the appeal because it was not a final or collateral order under the Pennsylvania Rules of Appellate Procedure. Petitioner did not so much as mention the trial court's passing reference to double jeopardy in its decision denying the Commonwealth's Motion to Set Aside Illegal Verdict, and the Superior Court did not address double jeopardy concerns in its decision, instead reversing the trial court and remanding for retrial on the ground that the trial court, under *Johnson*, 59 A.2d at 131, "had no authority to dismiss the deadlocked verdict on third degree murder once it was recorded and the jury dismissed," *McDaniels*, 886 A.2d at 686-87.

Similarly, when Petitioner appealed her conviction of third degree murder following retrial, she raised only state law evidentiary and trial error claims. And while she listed "[d]ouble [j]eopardy clause" among the four claims she intended to pursue in her subsequent pro se PCRA petition, Petitioner failed to complete her appeal to the Superior Court after that petition was denied. Given this procedural history, the state courts here did not have "a fair opportunity to consider the [double jeopardy] claim and to correct that asserted constitutional defect in [Petitioner's] conviction," *Picard*, 404 U.S. at 276, and it was for good reason that

Petitioner opted on federal habeas to concede that her double jeopardy claim had not been fairly presented and instead to dedicate her efforts to overcoming the procedural bar.

Neither of the two grounds on which the Majority relies support its conclusion that Petitioner's claim was fairly presented. First, the Majority maintains it was sufficient for Petitioner, in the context of opposing the Commonwealth's appeal to the Superior Court, to note that the "Commonwealth is seeking to overturn the verdict of not guilty on murder of the third degree and has asked this Honorable Court to review the same." Maj. Op. at 11 (emphasis omitted) (quoting App. 505). But that remark in the fact section of Petitioner's brief was simply recharacterizing the "[i]llegal [v]erdict" the Government sought to set aside and does not come close to fairly raising for the Superior Court the question whether a verdict that is ultra vires and a "legal nullity" under state law must be recognized as a valid verdict as a matter of federal double jeopardy law, or, more precisely, whether an error in the very power of the court to enter that verdict equates with the evidentiary and merits-based errors that the Supreme Court held did not vitiate the verdicts in *Ball*, *Fong Foo*, and their progeny. Instead, this excerpt is nothing more than an accurate statement of the procedural posture of the case—a statement of fact devoid of any legal substance and insufficient to constitute exhaustion, *Picard*, 404 U.S. at 277, particularly where, as here, the facts do not evince a "clear violation" of constitutional rights, *Serrano*, 454 U.S. at 4.

Second, the Majority suggests that when the Superior Court mentioned at the outset of its opinion that

this case did not raise any concern that the Commonwealth was "appealing a verdict of acquittal, which [would be] clearly impermissible," *McDaniels*, 886 A.2d at 686, it was acknowledging that this case did raise that concern and that Petitioner had presented that concern in the form of a federal double jeopardy claim based on *Fong Foo*'s "erroneous acquittal" doctrine, Maj. Op. at 12. I find that logic perplexing. By remarking that it might appear "at first glance" that the Commonwealth was appealing an acquittal and then explaining that the Commonwealth was actually appealing an ultra vires verdict that had no legal force under Pennsylvania Supreme Court precedent, the Superior Court made clear that it believed itself presented with only a question of state law and that its resolution of that state law question obviated any need to consider whether the Commonwealth was "appealing a verdict of acquittal." *McDaniels*, 886 A.2d at 686. To turn that statement on its head and contend, as the Majority does, that it demonstrates the state court had fair notice of, considered, and actually decided the complex double jeopardy question Petitioner now seeks to raise, steps far outside of our role and gives short shrift to the fundamental principles of federalism and comity that undergird the exhaustion requirement. *See Lawrence v. Florida*, 549 U.S. 327, 341 (2007).

Because it espouses an exhaustion argument that was not raised by Petitioner, the Majority does not reach the two arguments Petitioner did raise, namely that (1) it would be sufficient for the Superior Court to rule on the merits of her double jeopardy claim *sua*

sponte and that it had in fact done so,[9] and (2) there was cause and prejudice for her failure to exhaust her claim because her attorneys did not raise the argument in state court. The first lacks merit because the Superior Court never proceeded beyond its conclusion under state law that there was no legally cognizable acquittal. And as to the second, while ineffective assistance of counsel can be "cause" excusing a petitioner's failure to exhaust her claims, Petitioner did not argue to the District Court that her state trial or appellate counsel were ineffective for failing to pursue a double jeopardy argument, *see*, *e.g.*, *Trevino v. Thaler*, 133 S. Ct. 1911, 1917 (2013), or that her PCRA counsel was ineffective

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[9]The Majority observes that even if it had determined that Petitioner did not raise a double jeopardy claim, it likely would have concluded that the Superior Court's *sua sponte* consideration of the issue would satisfy the exhaustion requirement. *See* Maj. Op. at 13 n.4. Although a state court's *sua sponte* consideration of an argument not actually raised by a petitioner may well satisfy the interests of comity and federalism underlying the procedural default bar and thus may be sufficient to constitute exhaustion, the Supreme Court has not yet adopted this rule. While it said in *Castille v. Peoples*, that "[i]t is reasonable to infer an exception [to the exhaustion requirement] where the State has actually passed upon the claim," the claim in that case was presented belatedly to the state courts. 489 U.S. 346, 351 (1989). To date, our Circuit has not adopted this rule either, *see Sharrieff v. Cathel*, 574 F.3d 225, 228 n.4 (3d Cir. 2009) (noting in dictum that the Supreme Court raised the possibility in *Castille* of this exception to the exhaustion requirement), although some Circuits have, *see*, *e.g.*, *Jones v. Dretke*, 375 F.3d 352, 355 (5th Cir. 2004); *Sandgathe v. Maass*, 314 F.3d 371, 376-77 (9th Cir. 2002); *Walton v. Caspari*, 916 F.2d 1352, 1356 (8th Cir. 1990); *Sandstrom v. Butterworth*, 738 F.2d 1200, 1206 (11th Cir. 1984). The exception, in any event, is inapplicable here as the Superior Court did not address any double jeopardy claim *sua sponte*.

for failing to pursue an ineffective-assistance-of-trial-counsel claim resting on the omitted double jeopardy argument, *see Martinez v. Ryan*, 132 S. Ct. 1309, 1315 (2012). Any such arguments are hence waived. *See*, *e.g.*, *Lomando v. United States*, 667 F.3d 363, 381 n.19 (3d Cir. 2011).

In short, Petitioner failed to fairly present her double jeopardy claim to the state courts, waived on federal habeas any argument that she did, and states no ground to overcome her default. Accordingly, she was procedurally barred from pursuing her double jeopardy claim on federal habeas and neither the District Court nor this Court should have reached the merits of that claim.

IV.

As a federal court reviewing a state court conviction, we are obligated to comport with the principles of federalism, comity, and finality that undergird the procedural default bar and the exceedingly high degree of deference mandated by AEDPA. And in cases where the Supreme Court has perceived Courts of Appeals to disregard this mandate and to substitute their own judgment for that of state courts, it has not hesitated to summarily reverse with harsh admonitions that the appellate court "misunderstood the role of a federal court in a habeas case," *Davis v. Ayala*, 135 S. Ct. 2187, 2202 (2015), and "all but ignored the only question that matters under § 2254(d)(1)," that is, "whether it is possible fairminded jurists could disagree that [the state court's] arguments or theories are inconsistent with the holding in a prior decision of" the Supreme

Court, *Richter*, 562 U.S. at 102 (internal quotations and citations omitted).

Heeding those admonitions, I would reverse the District Court's grant of habeas relief in this case.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

AUDREY MCDANIELS, Petitioner,	:	
v.	:	**CIVIL NO. 11-5679**
WINSTEAD, et al., Respondents.	:	

MEMORANDUM OPINION

RUFE, J. **JULY 1, 2014**

INTRODUCTION

At Petitioner Audrey McDaniels's first trial, she was acquitted of first and third degree murder. The Commonwealth of Pennsylvania, Respondent here, appealed the acquittal of third degree murder, which was reversed. The Commonwealth retried McDaniels; she was acquitted of involuntary manslaughter but convicted of third degree murder. She is currently serving a sentence of incarceration. McDaniels petitioned this Court for a writ of habeas corpus, and the petition was referred to Magistrate Judge M. Faith Angell. Judge Angell recommended that the petition be dismissed for failure to exhaust state remedies. Notwithstanding Judge Angell's careful and thorough analysis, this Court will not approve her recommendation. For the reasons below, the Court holds that McDaniels is in custody in violation of the Double Jeopardy Clause of the United States Constitution and that the writ must

be granted. Furthermore, because McDaniels has been acquitted of all charges filed against her, the Commonwealth will be ordered to release her forthwith.

I. Overview and Procedural History

This peculiar and troubling case challenges that petitioner Audrey McDaniels is incarcerated in violation of the United States Constitution. Her most substantial claim is that the protections of the Double Jeopardy Clause were violated when she was tried a second time for the murder of her stepson, Brahim Dukes. She also claims that her second trial counsel was ineffective for failing to investigate and call at trial Dukes's treating physician.

Dukes was 18 years old, but he could neither speak nor care for himself. In late December 2001, Dukes's father was incarcerated, and McDaniels was the only adult in charge of him. On December 29, 2001, McDaniels called 911 and reported that Dukes had had a temper tantrum and collapsed on the floor. Paramedics responded and discovered Dukes in a room that measured six feet by four feet nine inches. The room reeked of human waste, and it appeared that Dukes had spent some time scratching the door from the inside. Dukes showed no vital signs and was pronounced dead on his arrival at the hospital. The causes of death were starvation and dehydration.

McDaniels was charged with first degree murder and the lesser included offenses of third degree murder and involuntary manslaughter. At trial, after the close of the Commonwealth's case in chief, the court entered a judgment of acquittal on the charge of first degree

murder. On July 12, 2004, at the close of the trial, the jury was instructed on third degree murder and involuntary manslaughter. As discussed in greater detail below, the foreman reported that the jury was deadlocked, and the judge declared a mistrial. Approximately five minutes later, the judge and counsel for both the defense and prosecution went to the jury room to talk with the jurors. There they discovered, based on notes on a white board, that the jury had intended to acquit McDaniels of third degree murder and that they were only deadlocked with respect to the involuntary manslaughter charge. The judge brought the jury back into court and recorded a verdict of not guilty with respect to third degree murder and again declared a mistrial with respect to involuntary manslaughter.

The Commonwealth appealed to the Superior Court, which reversed the entry of acquittal on third degree murder and remanded the case for retrial. McDaniels moved the Superior Court for reconsideration, which was denied, and she petitioned the Supreme Court of Pennsylvania for allowance of appeal, which was also denied. She was retried for third degree murder and involuntary manslaughter (the Commonwealth did not appeal the acquittal of first degree murder). On May 3, 2007, the jury returned a verdict of guilty on third degree murder, but not guilty of involuntary manslaughter.[1] McDaniels, through counsel, appealed to the Superior Court, lost, petitioned the Supreme Court

[1]Although this verdict is inconsistent, since all of the elements of involuntary manslaughter are also elements of third degree murder, the Supreme Court has held that such verdicts have no constitutional infirmity. *United States v. Powell*, 469 U.S. 57, 64-66 (1984).

for allowance of appeal, which was denied, filed a counseled petition pursuant to Pennsylvania's Post-Conviction Review Act ("PCRA"), which was denied, filed an appeal (*pro se*) to the Superior Court, which was dismissed when she failed to file a brief, and then petitioned this Court for a writ of habeas corpus. Counsel was appointed, and he amended her habeas petition. The petition was referred to Judge Angell, who filed a report and recommendation ("R&R") concluding that the petition should be denied because McDaniels's claims are unexhausted and procedurally defaulted. McDaniels timely objected. The Court has conducted a *de novo* review of the record, and this Memorandum Opinion resolves McDaniels's objections.

The underlying facts and McDaniels's arguments about them must be laid out in some detail because the Commonwealth argues that McDaniels failed to exhaust her claims. As discussed at greater length below, in order to evaluate this contention, the Court will have to conduct a thorough examination of the state courts' records.

II. Background

On July 12, 2004, the jury in McDaniels's first trial began to deliberate. At some point the next day, the jury entered the courtroom, and the following scene played out. The crux of this unusual case will be presented at length:

> THE COURT: For the record, the jury sent exhibit number four. "Your Honor, we are hopelessly deadlocked at this time and unable to reach a verdict." Now there were two separate charges in this case

. . . . Was there an agreement on any of the two charges?

THE FOREMAN: Yes, Your Honor.

THE COURT: There was?

THE FOREMAN: Yes.

THE COURT: What was the agreement?

THE FOREMAN: That we had agreement on involuntary manslaughter—

JUROR: No.

THE FOREMAN: I mean third degree, I am sorry.

THE COURT: You agreed on third degree?

JUROR: No.

THE FOREMAN: No, we did not agree, I am sorry.

THE COURT: You did not agree. And you did not agree on involuntary?

THE FOREMAN: We had—some did agree on involuntary.

THE COURT: All right. The point is, is there any possibility of a verdict in this case?

THE FOREMAN: At this point, Your Honor, I don't think so.

THE COURT: Okay. Well, I asked you before, and I will ask you again, if any further deliberations will prove fruitful I will send you back. But if you don't think so then we'll just end it right here. Does anybody on the jury think that further deliberations will be worthwhile? No response.[2]

THE COURT CRIER: For the record, there is nothing on the verdict sheet.

THE COURT: All right. Okay. This case will have to be retried before another jury. That's the problem. As the foreman, you are telling me there is no hope for a decision in this case?

THE FOREMAN: No, sir.

THE COURT: Okay. All right. With that, the jury will be discharged. And I thank you for trying, and thank you for your services. This case will have to be retried on another date before probably a different jury, maybe even a different judge. But thank you anyway. With that, you are free to talk about the case when you leave.
(Jurors are excused)

THE COURT: We'll declare it a mistrial.

MR. STRETTON [Defense counsel]: Can we go back and talk to the jury?

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[2]It is unclear in the transcript whether the judge said "No response" or whether the court reporter noted the lack of a response with these words.

> THE COURT: Sure you can. I have no problem with that at all.[3]

There followed a brief hearing on a motion for bail. When that concluded, defense counsel reiterated his request to talk to the jury:

> MR. STRETTON: Can we go back and knock on the door?
>
> THE COURT: If you want to speak to the jury, yes.
>
> MR. STRETTON: I would like to.
> (All Counsel and the Court go to the jury room.)
>
> * * *
>
> THE COURT: On the record. After the jury went to the jury room, there was a conversation concerning the understanding of my question and the jury explained that they did not fully understand what I was asking. And that in fact, they all had agreed that it was not guilty as to third degree murder. The only thing that they could not agree on is whether or not it was involuntary manslaughter. So with that, Counsel requested that the jury be re-established into the jury box where they are now.
>
> And I ask the foreman to rise and announce to the Court what was the decision of the jury on third degree murder?
>
> THE FOREMAN: Third degree?

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[3]Hr'g Tr. at at 7:10-10:2, *Commonwealth v. McDaniels*, No. 1110-2002 (July 13, 2004).

THE COURT: Yes.

THE FOREMAN: Not guilty.

THE COURT: Did everybody agree to that?

JURORS: Yes.

MR. STRETTON: Judge, call you pole [sic] the jury on that issue.

THE COURT: Everybody just said, yes. Everybody just said, yes.

JURORS: Yes.

THE COURT: Okay. Is there anybody that says, no? (No response from the jury.)

Okay. The jury has unanimously said that it was not guilty as to third degree murder. And as to involuntary could you agree?

THE FOREMAN: Involuntary we had some that agreed.

THE COURT: Some agreed and some did not.

THE FOREMAN: Some did not, yes.

THE COURT: Okay. So that's where the jury was deadlocked. Okay. With that, the jury can retire.

MR. STRETTON: Can they fill out the verdict slip correctly and sign it then.

> THE COURT: Sure.
>
> MR. STRETTON: I would still like to talk to the jury when we're done.
>
> THE COURT: If you want to, go ahead.
>
> MR. STRETTON: Before you leave the bench, could you then record that verdict officially as not guilty as to third degree.
>
> THE COURT: All right. Not guilty of third, and hopelessly deadlocked on involuntary.[4]

There followed further discussion about bail, and proceedings closed shortly thereafter.

After the court recorded a verdict of not guilty of third degree murder, the Commonwealth sought to reinstate the charge. The judge issued an opinion holding that the court "simply correct[ed] a mistake on the record" pursuant to its "'duty' to change defendant's verdict to not guilty of third degree murder once it became apparent that this was the true verdict of the jury at the time the verdict was recorded."[5] The court stated that it took its actions in the interests of justice and that "[t]he rationale 'in the interests of justice,' employed to rectify errors which would otherwise result in unfairness, is deeply rooted in both federal

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[4] *Id*. at 19:25-22:12.

[5] *Commonwealth. v. McDaniels*, C.P. 0212-1110, slip. op. at 2 (Pa. Com. Pl. Jul. 27, 2004).

jurisprudence and the common law of Pennsylvania."[6] Furthermore, the court held that "judicial intervention to allow the jury to correct a mistakenly recorded verdict was required in order to prevent defendant from being tried a second time for a charge for which the jury intended her to be acquitted. Changing the jury's verdict was necessary to prevent defendant from being placed in double jeopardy, as prohibited by the federal constitution."[7]

The Commonwealth appealed to the Superior Court. McDaniels moved to quash the appeal, arguing that the case should proceed to trial only on the involuntary manslaughter charge. She also filed a responsive brief arguing that the Superior Court lacked jurisdiction over the Commonwealth's appeal, characterizing that Commonwealth as "seeking to overturn the verdict of not guilty on murder of the third degree."[8] In her brief, she relied heavily on Pennsylvania law relating to when it is appropriate to "mold" a jury's verdict.[9]

The Superior Court reversed, holding that the not guilty verdict was a "legal nullity" and that McDaniels could be retried on third degree murder.[10] As previously stated, she was retried, adjudged guilty, appealed and engaged in some state collateral review proceedings. After the conclusion of her appeal to the Superior Court

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[6]*Id*. at 3.

[7]*Id*.

[8]Appellee's Br. 12, ECF No. 10-8.

[9]*Id*. at 17-19.

[10]*Commonwealth v. McDaniels*, 886 A.2d 682, 686 (Pa. Super. Ct. 2005).

on collateral review, she filed a petition for a writ of habeas corpus in this Court.

III. Exhaustion and Procedural Default

In order to obtain habeas relief, a state prisoner must exhaust available state remedies before filing a habeas petition.[11] Exhaustion requires that the grounds for relief be "fairly presented"[12] to "one complete round of the State's established appellate review process."[13] In order to present a constitutional claim fairly to state courts, habeas petitioners need not cite "book and verse on the federal constitution;" rather, "the substance of a federal habeas corpus claim must first be presented to the state courts."[14]

The Third Circuit has held that "[a] determination of whether the substance of [a] claim was advanced in the state proceedings requires 'a searching scrutiny by the federal habeas court of the points that were raised in the state tribunals, in order to ensure that the state system was granted a fair opportunity to confront arguments that are propounded to the federal habeas courts.'"[15] When a petitioner does not cite "book and verse" of the Constitution,

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[11]28 U.S.C. 2254(b)(1)(A).

[12]*Picard v. Connor*, 404 U.S. 270, 275 (U.S. 1971).

[13]*O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999).

[14]*Picard*, 404 U.S. at 278.

[15]*Bisaccia v. Attorney Gen. of State of N. J.*, 623 F.2d 307, 310 (3d Cir. 1980) (quoting *Zicarelli v. Gray*, 543 F.2d 466, 472 (3d Cir. 1976) (en banc)).

> the required message can be conveyed through (a) reliance on pertinent federal cases employing constitutional analysis, (b) reliance on state cases employing constitutional analysis in like fact situations, (c) assertion of the claim in terms so particular as to call to mind a specific right protected by the Constitution, and (d) allegation of a pattern of facts that is well within the mainstream of constitutional litigation.[16]

A claim is fairly presented where "the method of analysis asserted in the federal courts was readily available to the state court."[17]

To illustrate how little it takes in certain circumstances to present a claim fairly to the state courts, consider *Bisaccia v. Attorney General*. There, the Third Circuit held that a due process violation was fairly presented to the state courts—even though the petitioner did not cite the federal Constitution—when a dissent in the Supreme Court of New Jersey described the trial as "patently unfair." The Third Circuit held that this "statement that the trial was 'patently unfair' is a description similar to the traditional characterizations used to assess purported Fourteenth Amendment due process violations . . . . Particularly in view of [the dissenting justice's] finding that the admission of the evidence was 'patently unfair,' thereby casting his dissent in constitutional language, this is not a case . . .

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[16] *McCandless v. Vaughn*, 172 F.3d 255, 261 (3d Cir. 1999) (internal quotation marks omitted).

[17] *Bisaccia v. Attorney Gen.* 623 F.2d 307, 310 (3d Cir. 1980) (internal quotation marks omitted).

where the state courts had no indication of constitutional infirmity."[18]

If a claim is unexhausted, a court may not award habeas relief. A claim is deemed exhausted if there is no available state remedy.[19] However, if there is no available remedy (or presenting the claim to the state would be futile) *because* the petitioner failed to exhaust his claim, as when a statute of limitations has expired, the respondent may raise the affirmative defense of procedural default.[20] In this case, respondent has raised the defense of procedural default. There is no dispute that any state process for McDaniels would be futile, and therefore if her claims are unexhausted, they are also procedurally defaulted. If a claim is procedurally defaulted, the default may be overcome if the habeas petitioner can demonstrate cause for the default or if overcoming the default is necessary to avoid a fundamental miscarriage of justice.

IV. Double Jeopardy

A. The Claim is Exhausted

After surveying the law of exhaustion and procedural default, the R&R relates that after McDaniels lost the direct appeal of her first trial, she was retried and convicted, following which she appealed without raising the double-jeopardy issue.

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[18] *Id.* at 311.

[19] 28 U.S.C. § 2254(c).

[20] *Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991).

The R&R's discussion of whether McDaniels fairly presented her double jeopardy claim concludes:

> The record reveals that the issue of double jeopardy was not raised in the state court system. As a result, this claim, as presented herein, has not been fairly presented to all levels of the state judicial system. Consequently, it is unexhausted and procedurally defaulted, as it is too late to return to the state courts with it. This claim is not properly before this Court, and nothing in the record supports a finding of cause and prejudice or a miscarriage of justice to excuse its procedural default.[21]

Although not entirely clear on this point, the R&R appears to have focused on McDaniels's presentation of her double jeopardy argument to the state courts following her second trial and conviction. However, exhaustion requires that "state prisoners . . . give the state courts *one* full opportunity to resolve any constitutional issues by invoking *one* complete round of the State's established appellate review process."[22] By way of example, it is well established that a claim properly presented at all relevant levels of direct review need not be brought in state collateral proceedings before it will be exhausted for federal habeas purposes.[23] The basis for this rule is that when a full round of appellate

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[21]Report & Recommendation 19, Oct. 12, 2012, ECF No. 26 (footnote omitted).

[22]*O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999) (emphasis added).

[23]*Brown v. Allen*, 344 U.S. 443, 447 (U.S. 1953).

litigation in the state has not resulted in relief, "it is fair to assume that further state proceedings would be useless."[24] In the double jeopardy context, a claim is exhausted if presented on direct appeal of the first criminal trial.[25]

To answer the question whether McDaniels exhausted her double jeopardy claim on direct review of her first criminal trial, the Court must examine her arguments made to the Superior Court.[26] McDaniels's brief to the Superior Court stated, "The Commonwealth is seeking to overturn the verdict of not guilty on murder of the third degree and has asked this Honorable Court to review the same."[27] The opinion from which the Commonwealth appealed had held, "Changing the jury's verdict was necessary to prevent defendant from being placed in double jeopardy, as

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[24]*Castille v. Peoples*, 489 U.S. 346, 351 (1989).

[25]*Justices of Bos. Mun. Ct. v. Lydon*, 466 U.S. 294, 303 (1984) ("Because the [Double Jeopardy] Clause protects interests wholly unrelated to the propriety of any subsequent conviction, a requirement that a defendant run the entire gamut of state procedures, including retrial, prior to consideration of his claim in federal court, would require him to sacrifice one of the protections of the Double Jeopardy Clause." (internal quotation marks omitted)); *United States ex rel. Webb v. Ct. of Common Pleas of Phila. Cnty.*, 516 F.2d 1034, 1037 (3d Cir. 1975); *United States ex rel. Russo v. Super. Ct. of N.J., Law Div., Passaic Cnty.*, 483 F.2d 7, 12 (3d Cir. 1973).

[26]Whether a claim must be presented to a state supreme court or only to an intermediate appellate court turns on how a state characterizes review by the highest court; in Pennsylvania, exhaustion requires only presentation to Superior Court. *Lambert v. Blackwell*, 387 F.3d 210, 233-35 (3d Cir. 2004).

[27]Appellee's Br. 12, ECF No. 10-8.

prohibited by the federal constitution."[28] McDaniels contested the Superior Court's jurisdiction over the appeal, and it is well established that the Double Jeopardy Clause deprives appellate courts of jurisdiction over appeals from acquittals.[29] McDaniels's brief continued by laying out the facts of the conclusion of the first trial in detail, when twelve people previously constituted as a jury assembled in the jury box of a courtroom and responded to a judge's question that their verdict was "not guilty." She then turned to her legal argument, which focused on the contention that it was appropriate for the judge to allow the jury to correct its statement that it was deadlocked and to render a verdict. In building this argument, McDaniels relied on *Commonwealth v. Johnson*, which had held that "[b]oth the Federal and State Constitutions protect individuals from being deprived of life, liberty, and property without due process of law. To deprive a man of his liberty because of a certain criminal charge made against him, after he had been formally acquitted of that charge by a jury would be a violation of his constitutional rights."[30]

The next section of her legal argument relied on cases from outside of Pennsylvania with arguably similar facts to this case where courts had recognized the power to amend jury verdicts. Relevant here, she

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[28] *Id.*

[29] *United States v. Sisson*, 399 U.S. 267, 289-90 & n.18 (1970); *United States v. Jenkins*, 420 U.S. 358, 360 (1975) (affirming lower court that "dismissed the appeal 'for lack of jurisdiction on the ground that the Double Jeopardy Clause prohibits further prosecution.'").

[30] 59 A.2d 128 at 131 (Pa. 1948).

cited a lengthy Connecticut case with about four pages devoted to the question of whether a verdict corrected from not guilty to guilty violated the Double Jeopardy Clause;[31] a Massachusetts case where the court held that "erroneous 'not guilty' verdicts on the murder indictments do not preclude a new trial" where the verdicts were corrected to guilty and a different error required a new trial;[32] and a Kentucky case that held, "the jury was not reassembled to further deliberate a question under corrected instructions, but was reassembled to consider the same issue it had previously decided. As such, the second verdict rendered by it, finding [defendants] guilty . . . violated their right against double jeopardy."[33] She also cited a chapter of the American Law Reports on the propriety of altering jury verdicts, which discusses the double jeopardy implications of many situations.[34] Her appellate brief concludes with the argument that the Superior Court lacked jurisdiction over the appeal.

It is true that McDaniels's brief before the Superior Court did not cite "book and verse" of the Constitution. However, she apprised the Superior Court of her

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[31] *State v. Colon*, 864 A.2d 666, 781-84 (Conn. 2004).

[32] *Commonwealth v. Brown*, 323 N.E.2d 902, 905 (Mass. 1975).

[33] *Burchett v. Commonwealth*, 734 S.W.2d 818, 820 (Ky. Ct. App. 1987) (citation omitted).

[34] 14 A.L.R. 5th 89 (1993) §§ 8, 11(b), 12(b) &13(a). For example, the chapter discusses a case where "the court stated that sending the jury back for what was in essence a second verdict violated the defendants' right against double jeopardy under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, as well as their rights under similar provisions of the state constitution."

double jeopardy claim by "reliance on state cases employing constitutional analysis in like fact situations, . . . assertion of the claim in terms so particular as to call to mind a specific right protected by the Constitution, and . . . allegation of a pattern of facts that is well within the mainstream of constitutional litigation."[35] As a general matter, it is hardly possible for a state to appeal an acquittal without calling to mind the Double Jeopardy Clause. And here, double jeopardy concerns were evident below, and the Commonwealth explicitly sought to retry a defendant who, arguably at least, had been acquitted. This pattern of facts is "well within the mainstream" of double jeopardy litigation. McDaniels further relied on factually analogous cases from other jurisdictions that considered double jeopardy implications, and her assertion of her right not to be retried again cries out that she claimed a double jeopardy violation. It is implausible that a trained lawyer or even a layperson could consider the facts of this case and not wonder whether the Double Jeopardy Clause has been violated. It also bears noting that the Commonwealth has repeatedly relied on the decision that the Superior Court handed down in the appeal from McDaniels's first trial for the general proposition that the Commonwealth is not "permitted to appeal from an acquittal due to double jeopardy protections."[36] In short,

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[35]*McCandless v. Vaughn*, 172 F.3d 255, 261 (3d Cir. 1999) (internal quotation marks omitted).

[36]Appellant's Br., *Commonwealth v. Alicea*, 2009 WL 5818538, *4 (Pa. Super. Ct. March 11, 2009); Appellant's Br., *Commonwealth v. Brown*, 2010 WL 5858775, *3 n.2 (Pa.Super. Ct. June 28, 2010); Appelant's Br., *Commonwealth v. Nobles*, 2007 WL 4778162,

(continued...)

although McDaniels's lawyer focused on the propriety of molding a jury verdict, as soon as the Commonwealth took an appeal from McDaniels's apparent acquittal, this became a double jeopardy case (as the trial court recognized), and McDaniels presented enough legal and factual argument to the Superior Court to apprise it of the nature of the double jeopardy claim, and that court issued a ruling that has subsequently been read by the Commonwealth as a double jeopardy decision. McDaniels has thus exhausted her double jeopardy claim.

B. Section 2254(d) Does Not Bar Relief

1. Standard of Review

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a federal court may not issue a writ of habeas corpus to a state prisoner unless the prisoner "is in custody in violation of the Constitution or laws or treaties of the United States."[37] Where, as here, a state court has adjudicated a claim on the merits,[38] the petition for the writ must be denied

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[36](...continued)
*3 (Pa. Super. Ct. July 16, 2007) (all quoting *Commonwealth v. McDaniels*, 886 A.2d 682, 686 (Pa. Super. Ct. 2005) for the proposition that a Commonwealth appeal from a verdict of acquittal is "clearly impermissible").

[37]28 U.S.C. § 2254(a).

[38]Where a state court denies relief and does not give a procedural reason for the denial, there is a presumption that the denial was on the merits. *Harrington v. Richter*, 131 S. Ct. 770, 784-85 (2011). Therefore, even if this Court did not consider Superior (continued...)

unless, as relevant here, "the adjudication of the claim resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."[39]

Clearly established federal law "refers to the holdings, as opposed to the dicta, of [the United States Supreme] Court's decisions as of the time of the relevant state-court decision."[40] "A state-court decision will certainly be contrary to [the Supreme Court's] clearly established precedent if the state court applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases."[41] And "when a state-court decision unreasonably applies the law of [the Supreme] Court to the facts of a prisoner's case, a federal court applying § 2254(d)(1) may conclude that the state-court decision falls within that provision's 'unreasonable application' clause."[42]

Federal courts sitting in habeas review of state convictions must show great deference both to the factual and the legal determinations of the state court that has passed on the prisoners' claims. State legal determinations will be disturbed only when they are "objectively

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[38](...continued)
Court's holding in this case to turn on the Double Jeopardy Clause, the issue was still decided on the merits since neither party has rebutted the merits presumption.

[39]28 U.S.C. § 2254(d)(1).

[40]*Williams v. Taylor*, 529 U.S. 362, 412 (2000).

[41]*Id.* at 405.

[42]*Id.* at 409.

unreasonable" and contain "an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement."[43]

2. The "Clearly Established" Law of the Supreme Court

The Fifth Amendment, incorporated against the states via the Due Process Clause of the Fourteenth Amendment, provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb in criminal or civil cases."[44] In order to claim the protections of the Clause, jeopardy must "attach," which occurs in jury trials when the jury is empanelled and sworn.[45] After jeopardy attaches, it concludes, among other situations, when a defendant is acquitted.[46] A final acquittal, even when "based upon an egregiously erroneous foundation,"[47] bars retrial and appeal. The only exception to this rule is that "[w]hen a jury returns a verdict of guilty and a trial judge (or an appellate court) sets aside that verdict and enters a judgment of acquittal, the Double Jeopardy Clause does not preclude a prosecution appeal to reinstate the jury verdict of guilty."[48] An action by a trial court will

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[43]*White v. Woodall*, 134 S. Ct. 1697, 1702 (2014) (citations omitted).

[44]U.S. Const. amend. V, cl. 2.

[45]*Crist v. Bretz*, 437 U.S. 28, 38 (1978).

[46]*Green v. United States*, 355 U.S. 184, 188 (1957).

[47]*Fong Foo v. United States*, 369 U.S. 141, 143 (1962).

[48]*Smith v. Massachusetts*, 543 U.S. 462, 467 (2005). *Smith* was announced on February 22, 2005, before *McDaniels*, which was

(continued...)

be deemed an acquittal if "[i]t actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged."[49] By contrast, an action by a trial court that appears to be an acquittal does not actually represent a resolution of a factual element if in performing the action the court lacks jurisdiction within the meaning of double jeopardy jurisprudence; or, to use the words of the Supreme Court, "An acquittal before a court having no jurisdiction is, of course, like all the proceedings in the case, absolutely void, and therefore no bar to subsequent indictment and trial in a court which has jurisdiction of the offense."[50] Jurisdiction for double jeopardy purposes is not a question of state law, but a more basic question of whether "the court had jurisdiction of the cause and of the party."[51]

The most factually on point Supreme Court case is *United States v. Martin Linen Supply Co.*[52] In that case, a "hopelessly deadlocked jury was discharged when unable to agree upon a verdict."[53] After the discharge, the trial court granted a motion for

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[48](...continued)
issued on October 13, 2005. *Smith*—which in any event did not purport to change existing law in any respect—therefore represents clearly established Supreme Court precedent "as of the time of the relevant state-court decision." *Williams*, 529 U.S. at 412.

[49]*Smith*,543 U.S. at 468.

[50]*Ball v. United States*, 163 U.S. 662, 669 (1896).

[51]*Benton v. Maryland*, 395 U.S. 784, 797 (1969) (quoting *Ball*, 163 U.S. at 669).

[52]430 U.S. 564 (1977).

[53]*Id.* at 565.

judgment of acquittal under Federal Rule of Criminal Procedure 29(c).[54] The government appealed. The Supreme Court held,

> The normal policy granting the Government the right to retry a defendant after a mistrial that does not determine the outcome of a trial, is not applicable since valid judgments of acquittal were entered on the express authority of, and strictly in compliance with, Rule 29(c). Those judgments, according to the very wording of the Rule, act to terminate a trial in which jeopardy has long since attached. And a successful governmental appeal reversing the judgments of acquittal would necessitate another trial, or, at least, further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged.[55]

The Court continued that "the most fundamental rule in the history of double jeopardy jurisprudence has been that a verdict of acquittal could not be reviewed,

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[54]At the time of *Martin Linen*, Rule 29(c) provided:

"(c) Motion after Discharge of Jury. If the jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within 7 days after the jury is discharged or within such further time as the court may fix during the 7-day period. If a verdict of guilty is returned the court may on such motion set aside the verdict and enter judgment of acquittal. If no verdict is returned the court may enter judgment of acquittal. It shall not be necessary to the making of such a motion that a similar motion has been made prior to the submission of the case to the jury."

[55]430 U.S. at 570 (citation, footnote, and internal quotation marks omitted).

on error or otherwise, without putting a defendant twice in jeopardy, and thereby violating the Constitution."[56] The Court further held, "There can be no question that the judgments of acquittal entered here by the District Court were 'acquittals' in substance as well as form. The District Court plainly granted the Rule 29(c) motion on the view that the Government had not proved facts constituting [the charged crime]."[57] The result of the case was that the Double Jeopardy Clause barred reprosecution.

Finally, in *Smith v. Massachusetts*, in the middle of a jury trial, a judge entered a verdict of acquittal pursuant to Massachusetts Rule of Criminal Procedure 25(a) that the evidence was insufficient to sustain a conviction.[58] The Supreme Judicial Court of Massachusetts held that as a matter of state law, the judge's action was not an acquittal because it represented a legal rather than a factual determination. The United States Supreme Court held that "Massachusetts' characterization of the required finding of not guilty . . . is, as a matter of double jeopardy law, not binding on us."[59] The Supreme Court applied *Martin Linen* and held that the acquittal by the judge "actually represent[ed] a resolution, correct or not, of some or all of the factual elements of the offense charged."[60]

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[56]*Id.* at 571 (alterations omitted).

[57]*Id.* at 571-72.

[58]543 U.S. 462, 465 (2005).

[59]*Id.* at 468-69.

[60]*Id.* at 468.

3. The Superior Court's Ruling

In ruling on the Commonwealth's appeal, the Superior Court first noted that "it appears that the Commonwealth is appealing a verdict of acquittal, which is clearly impermissible."[61] The opinion does not explain why the appeal of an acquittal is impermissible, but there is no doubt that it is the Double Jeopardy Clause that generally bars such appeals.[62] The Court held that it had jurisdiction to entertain the appeal because "the same principles apply" as in appeals from pretrial orders quashing indictments.[63] The court then agreed with the Commonwealth that the jury's pronouncement of "not guilty" was a "legal nullity."[64] The Superior Court held that the trial "court had no authority to reassemble the jury to allow them to render a different verdict than the one previously announced and recorded."[65]

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[61] *Commonwealth v. McDaniels*, 886 A.2d 682, 686 (Pa. Super. Ct. 2005).

[62] *E.g.*, *Smith v. Massachusetts*, 543 U.S. 462 (2005); *see also* Appellant's Br., *Commonwealth. v. Brown*, 2010 WL 5858775, *3 (Pa. Super. Ct. June 28, 2010); Appellant's Br., *Commonwealth v. Alicea*, 2009 WL 5818538, *4 (Pa. Super. Ct. March 11, 2009); Appellant's Br., *Commonwealth v. Nobles*, 2007 WL 4778162, *3 (Pa. Super. Ct. July 16, 2007) (all relying on *Commonwealth v. McDaniels*, 886 A.2d 682, 686 (Pa. Super. 2005) for the proposition that a Commonwealth appeal from a verdict of acquittal is "'clearly impermissible'" (quoting *McDaniels*) "due to double jeopardy protections").

[63] *McDaniels*, 886 A.2d at 686.

[64] *Id.*

[65] *Id.* at 688.

The Superior Court relied on state law in reaching its conclusion, but this Court defers to the state court and reads its decision as having resolved McDaniels's federal double jeopardy claim on the merits. A fair reading of the decision is that the Superior Court determined that what happened in this case was not an egregiously erroneous acquittal, but rather an instance of a court acting outside its jurisdiction within the meaning of *Ball v. United States*, and therefore McDaniels could be reprosecuted.

4. The Superior Court's Ruling Cannot be Squared with the Clearly Established Law of the Supreme Court

As in *Martin Linen*, McDaniels's jury was "hopelessly deadlocked."[66] As in *Martin Linen*, the jury was discharged.[67] As in *Martin Linen*, a verdict of acquittal was entered after the jury discharge.[68] The only difference between *Martin Linen* and this case is that in *Martin Linen*, the trial judge acted in accordance with the applicable rules of criminal procedure. Here, rather than entertaining a Motion for Judgment of Acquittal After Discharge of Jury under Pennsylvania Rule of Criminal Procedure 608,[69] the trial judge brought the

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[66]*Id.* at 684; *Martin Linen*, 430 U.S. at 565.

[67]*McDaniels*, 886 A.2d at 684; *Martin Linen*, 430 U.S. at 565.

[68]*McDaniels*, 886 A.2d at 684; *Martin Linen*, 430 U.S. at 566.

[69]Rule 608 provides: "(A) Time for Motion.

"(1) *Oral Motion.* An oral motion for judgment of acquittal may be made and decided at the time the jury is discharged without agreeing upon a verdict if the defendant so agrees on the record.

(continued...)

jury back into the courtroom and had the jury record its own verdict of not guilty. The question before this Court therefore becomes, can the Pennsylvania trial judge's error of state law vitiate McDaniels's double jeopardy protection, when, had he and McDaniels's counsel followed the proper motion practice and entered a judgment of acquittal pursuant to Rule 608, there is no question that *Martin Linen* would have barred reprosecution?

To answer the question, the Court must consider the dictum quoted above from *Ball*: "An acquittal before a court having no jurisdiction is, of course, like all the proceedings in the case, absolutely void, and therefore no bar to subsequent indictment and trial in a court which has jurisdiction of the offense."[70] Although "[t]he concept of 'jurisdiction' in a double jeopardy context is a jurisprudential greased pig—easy

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[69](...continued)

"(2) *Written Motion*. A written motion for judgment of acquittal shall be filed within 10 days after the jury has been discharged without agreeing upon a verdict.

"(B) Time for Decision on Motion.

"(1) A motion for judgment of acquittal after the jury has been discharged without agreeing upon a verdict shall be decided within 30 days after the motion is filed. If the judge fails to decide the motion within 30 days, the motion shall be deemed denied.

"(2) When a motion for judgment of acquittal is denied by operation of law under this rule, the clerk of courts shall enter an order on behalf of the court, and shall immediately notify the attorney for the Commonwealth, the defendant(s), and defense counsel that the motion is deemed denied."

[70]*Ball v. United States*, 163 U.S. 662, 669 (1896).

to see, but tough to grasp,"[71] this much is clear: want of jurisdiction in the sense that *Ball* uses the term renders "*all the proceedings*" in a case void. Additionally, even if proceedings are "void" as a matter of state law, they may not be void under federal double jeopardy jurisprudence.[72]

There have not been a great many cases applying the relevant statement in *Ball*, but *Hoffler v. Bezio*, an opinion of the Second Circuit, is particularly instructive. The *Hoffler* case relied on an opinion by Judge Friendly explaining "that *Ball* referenced jurisdiction in the basic sense, asking only whether a cause of action under our law was asserted, and whether the court had power to determine whether it was or was not well founded in law and effect."[73] This reading of *Ball* finds support in *Ball* itself,[74] as well as *Benton v. Maryland*, where a defendant was tried once under an indictment that was void under state law. In *Benton*,

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[71]*Boyd v. Meachum*, 77 F.3d 60, 64 (2d Cir. 1996).

[72]*Benton v. Maryland*, 395 U.S. 784, 796-97 (1969).

[73]*Hoffler v. Bezio*, 726 F.3d 144, 158 (2d Cir. 2013) (citing *United States v. Sabella*, 272 F.2d 206 (2d Cir.1959)). AEDPA constrains this Court's review to the way in which the Pennsylvania court applied Supreme Court law, namely *Benton* and *Ball*. This Court relies on *Hoffler* for its crystallization of the meaning of *Ball* and *Benton*, not as an independent source of "clearly established federal law." Another thorough, scholarly, and persuasive opinion on the meaning of "jurisdiction" in double jeopardy cases may be found at *State v. Corrado*, 81 Wash. App. 640, 655-62 (1996).

[74]*Ball*, 163 U.S. at 669-70 ("[A]lthough the indictment was fatally defective, yet, if the court had jurisdiction of the cause and of the party, its judgment is not void, but only voidable by writ of error, and until so avoided cannot be collaterally impeached.").

the Supreme Court held that since "the court had jurisdiction of the cause and of the party, its judgment is not void," and therefore Benton could not have been prosecuted a second time.[75]

In an argument perfectly analogous to the state's position in *Benton*, the Commonwealth here contends that the verdict at the first trial was void (or, to use the Commonwealth's term, a nullity). But *Benton* teaches that what is void as a matter of state law is not necessarily void as a matter of federal double jeopardy law.[76] There is no dispute that, as in *Benton*, the Court of Common Pleas had jurisdiction over McDaniels in the "basic sense," namely—as *Benton* puts it, quoting *Ball*—"jurisdiction of the cause and of the party."[77] There is also no dispute that other proceedings in the first trial, such as the mistrial on the involuntary manslaughter charge and the bail order entered after the reconstituted jury's verdict, were not void. Under *Ball*, when a court lacks jurisdiction, "all the proceedings" are void; here, because some of the proceedings were not void, the trial court must have had jurisdiction as *Ball* uses the term. When the trial court accepted the pronouncement that McDaniels was not guilty, McDaniels had not yet been sentenced, and there was still time for filing post-verdict motions, including a motion for acquittal under Pennsylvania

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[75]395 U.S. 784, 797 (1969).

[76]*Id.*; *see also Smith v. Massachusetts*, 543 U.S. 462, 468-69 (2005) (emphasizing that state characterizations of state proceedings are "'as a matter of double jeopardy law, . . . not binding on'" federal courts (quoting *Smalis v. Pennsylvania*, 476 U.S. 140, 144 n.5 (1986) (ellipsis in original)).

[77]*Id.*

Rule 608. In other words, even if the twelve people assembled in the jury box in the courtroom had ceased to be a "jury" under Pennsylvania law, the Court of Common Pleas still had the power to enter a verdict of acquittal, which it did (albeit with a jury as interlocutor). Because the court had jurisdiction over the criminal action and the defendant, as a matter of federal double jeopardy law, the verdict was not void, not a nullity.

Because the verdict taken by the first trial judge is not void, the question becomes whether the verdict was a "judgment of acquittal" for double-jeopardy purposes. The Supreme Court has stated that an "acquittal" for double jeopardy purposes is something that, "whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged."[78] Even if it could be doubted that the jury's statement was a "judgment of acquittal," immediately following the jury's statement, defense counsel requested that the judge "record that verdict officially as not guilty as to third degree," which the judge did (without objection from the prosecution).[79] The Commonwealth does not argue and no state court has found that the verdict was really a dismissal[80] or lacked the finality of a true verdict.[81] The only argument that the jury's action in stating "not guilty" did not actually

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[78]*United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977).

[79]Hr'g Tr. 22:7-12, *Commonwealth v. McDaniels*, No. 1110-2002, (July 13, 2004.)

[80]*United States v. Scott*, 437 U.S. 82, 115 & n.11 (1978).

[81]*Price v. Vincent*, 538 U.S. 634, 637 (2003).

represent a resolution of the factual elements of the charge of third-degree murder is the legal nullity argument already discussed and rejected above.

One argument that the Superior Court reasonably applied Supreme Court precedent would be to conclude that *Martin Linen* is distinguishable because in *Martin Linen*, the "judgments of acquittal were entered on the express authority of, and strictly in compliance with" the applicable Rule of Criminal Procedure.[82] By contrast, the Court of Common Pleas in *McDaniels* bypassed Pennsylvania Rule of Criminal Procedure 608 and reconstituted the jury to correct its verdict, an act that the Superior Court held to be improper.[83] The distinction is unreasonable, though, because the Supreme Court has repeatedly held that an acquittal bars reprosecution even if it is "based upon an egregiously erroneous foundation."[84] Even if the trial

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[82]430 U.S. at 570.

[83]The Commonwealth correctly argues that this Court may not second-guess the Superior Court's determination on this point as a matter of state law. *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) ("[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions."). Nevertheless, the Court may examine the event for the purpose of determining whether it was an acquittal under the Double Jeopardy Clause.

[84]*Fong Foo v. United States*, 369 U.S. 141, 143 (1962). The egregiously erroneous acquittals that the Supreme Court has held to bar reprosecution involved errors of substantive law, whereas the error in McDaniels was arguably procedural. But this distinction is not relevant for double jeopardy purposes because the way a state characterizes acquittals as a matter of state law is "'as a matter of double jeopardy law, . . . not binding on'" federal courts. *Smith v. Massachusetts*, 543 U.S. 462, 468-69 (2005) (quoting (continued...)

court is "without power to direct acquittals under the circumstances disclosed by the record"[85] once an acquittal is entered, so long as it, "whatever its label . . . actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged,"[86] the Double Jeopardy Clause bars reprosecution.

As this Court must, it defers to the Superior Court's ruling on McDaniels's double jeopardy claim. The Court has accepted the factual findings of the state courts as true, and it has read the Superior Court's holding that the verdict was a legal nullity to mean that according to the Superior Court the trial court lacked jurisdiction within the meaning of *Ball*. Nevertheless, the ruling that a "legal nullity" under state law does not bar reprosecution is the opposite of what the Supreme Court held in *Benton*. It is therefore "contrary to" Supreme Court case law, within the meaning of § 2254(d)(1).[87] And it is impossible to apply the holding of *Martin Linen*, that a verdict of acquittal entered after a hopelessly deadlocked jury resulted in a mistrial bars reprosecution, to the facts of this case (where a verdict of acquittal was entered after a hopelessly deadlocked jury resulted in a mistrial) without granting relief. The Superior Court's decision was therefore

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[84](...continued)
Smalis v. Pennsylvania, 476 U.S. 140 n.5 (1986) (ellipsis in original)).

[85]*Fong Foo*, 369 U.S. at 142.

[86]*United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977).

[87]*See also Williams v. Taylor*, 529 U.S. 362, 412 (2000).

an "unreasonable application" of Supreme Court case law, within the meaning of 2254(d)(1).[88]

The Superior Court committed "an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement"[89] when it held that McDaniels could be prosecuted again because the verdict was void under state law: that conclusion is exactly the opposite of the Supreme Court's holding in *Benton*. Similarly, it was "objectively unreasonable" not to apply *Martin Linen*.[90] That case is distinguishable only in the irrelevant aspect that the *Martin Linen* trial judge acted according to the appropriate criminal procedure rule, and there is no principled way to apply the facts of that case so as to conclude that double jeopardy was not violated here.[91]

The Commonwealth does not suggest, and the Court cannot conceive of, a way to read the Superior Court's opinion that is more favorable to the Commonwealth's position than that the trial court lacked jurisdiction within the meaning of *Ball* to enter the verdict of acquittal. The Commonwealth urges this Court to read

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[88]*See also id*. at 405.

[89]*White v. Woodall*, 134 S. Ct. 1697, 1702 (2014) (quoting *Harrington v. Richter*, 131 S. Ct. 770, 786-87 (2011)).

[90]*Id*. (quoting *Lockyer v. Andrade*, 538 U.S. 63, 75-76 (2010)).

[91]Acting within the rules of procedure is irrelevant because the state trial court's procedural error here rendered the acquittal void as a matter of state law. But *Benton* holds that acts that are void under state law are not necessarily void under federal law, and there is no question that the entry of acquittal here satisfied the Supreme Court's definition of "acquittal" for Double Jeopardy Clause purposes.

the first trial as having terminated in a mistrial, but plainly it did not. A mistrial occurred, then a bail hearing, then what appeared to be a verdict of acquittal well within the time to make a motion for a verdict of acquittal under Rule 608, then the trial judge's opinion on entering the verdict of acquittal. No state court has held as a matter of fact that the first trial concluded in a mistrial, and holding that it terminated in a mistrial as a matter of law is irreconcilable with Supreme Court double jeopardy jurisprudence. Although this Court agrees with the Commonwealth that federal habeas courts cannot reexamine state-court determinations of state law, the question here is whether the state-law "legal nullity" was also a federal law nullity. *Benton* precludes such a ruling. For the reasons stated above, void or not under state law, the acquittal was valid as a matter of federal double jeopardy law.

C. Relief Under Section 2254(a)

It does not automatically follow from the fact that Petitioner satisfies § 2254(d) that she is in custody in violation of the Constitution and therefore entitled to relief under § 2254(a).[92] Here, however, the discussion above has made clear that not only was the adjudication of McDaniels's double jeopardy claim unreasonable, but the Double Jeopardy Clause entitles her to the writ of habeas corpus: jeopardy attached when the first jury was empanelled and sworn, and it concluded when the first trial court entered a verdict of acquittal. The Double Jeopardy Clause barred the reprosecution

[92] *E.g. Lewis v. Comm'r of Correction*, 975 F. Supp. 2d 169, 173 (D. Conn. 2013).

of McDaniels, and therefore the guilty verdict against her must be set aside.

A federal district court may issue a conditional or unconditional writ of habeas corpus. A conditional writ requires the state either to release or to retry the petitioner, while an unconditional writ prohibits reprosecution. A conditional writ is appropriate when it is possible to retry the petitioner in compliance with the Constitution, as for example, when the writ affords the state an opportunity to correct a *Brady* violation.[93] However, when a conviction is set aside as a double jeopardy violation, an unconditional writ is the only logical remedy because the holding that underpins the writ is that reprosecution would be unconstitutional.[94] As stated above, McDaniels has been charged with first degree murder, which has lesser included offenses of third degree murder and involuntary manslaughter. She has been acquitted of all three counts at different times. Reprosecution on any of these charges would be unconstitutional, and therefore an unconditional writ will issue.

At the same time, the Court is mindful that an unconditional writ is an extraordinary remedy.

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[93] *See, e.g.*, *Wilson v. Beard*, No. 02-cv-374, 2012 WL 1382447 (E.D. Pa. Apr. 20, 2012).

[94] *Cf. Crist v. Bretz*, 437 U.S. 28, 31 (1978); *see also* 2-3 Randy Hertz & James S. Liebman, Federal Habeas Corpus Practice and Procedure § 33.2 ("[U]nconditional relief orders are required when a court concludes that the fact of the prosecution and not simply the manner in which the prosecution occurred violates the Constitution, thus requiring release from custody *with prejudice* to reprosecution. Falling into this category [is] . . . double jeopardy.").

Therefore the Court will stay its Order for a period of thirty days to allow the Commonwealth to consider whether it will appeal. If the Commonwealth appeals, the Court will consider a motion to stay the writ pending appeal.[95]

CONCLUSION

Issuing the writ should not—and does not—obscure the human tragedy at the center of this case. Brahim Dukes died young, neglected, in pain. As another judge has written, in horrifying cases, judges "hear the tortured voices of the victims crying out to [us] for vindication."[96] But vindication cannot come at the expense of constitutional rules. The Double Jeopardy clause is no antiquated technicality; it is a vital limit on governmental power. Applying the Constitution selectively would undermine a fundamental independent variable in our national experiment "that ours is a government of laws, not of men, and that we submit ourselves to rulers only if under rules."[97] It is for this reason that "[t]he constitutional rights of criminal defendants are granted to the innocent and the guilty alike,"[98] and only by applying constitutional rules faithfully—even, or especially, when we would prefer not to—do we assure

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[95]McDaniels has also objected to the R&R's determination that her ineffective-assistance-of-counsel claim was unexhausted and procedurally defaulted. The Court has reviewed the claim *de novo* and approves of the R&R's analysis and conclusion on this point.

[96]Alex Kosinski, "Tinkering With Death," 72 *The New Yorker* 48, 53 (Feb. 10, 1997).

[97]*Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 646 (1952) (Jackson, J., concurring).

[98]*Kimmelman v. Morrison*, 477 U.S. 365, 380 (1986).

ourselves that the Constitution meaningfully guides government actors in exercising their discretion to pursue the objects of their will.

Nor should this Opinion be read to condone highly unusual procedure that the court in McDaniels's first trial chose to record a verdict. The Superior Court rightly viewed the trial court's actions as egregiously erroneous. Nevertheless, this Court must recognize the constitutional significance of a verdict of acquittal.

AEDPA deference and habeas law in general serve the important purpose of guaranteeing that habeas does no more than "guard against extreme malfunctions in the state criminal justice systems."[99] This Court does not hesitate to conclude that such a malfunction occurred here: McDaniels has been tried for first degree murder, third degree murder, and involuntary manslaughter. She has been acquitted of all three counts at different times. Nonetheless, she has been imprisoned for a decade. The writ must be granted.

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[99] *Harrington v. Richter*, 131 S. Ct. 770, 786 (2011) (quoting Jackson v. Virginia, 443 U.S. 307, 332 n.5 (1978) (Stevens, J., concurring in the judgment)).

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

AUDREY MCDANIELS,	:	
Petitioner,	:	
v.	:	**CIVIL NO. 11-5679**
WINSTEAD, et al.,	:	
Respondents.	:	

ORDER

AND NOW, this 1st day of July 2014, after a careful and independent consideration of the Petition for a Writ of Habeas Corpus and of the Report and Recommendation of United States Magistrate Judge M. Faith Angell ("R&R"; Doc. No. 26), Petitioner's objections thereto (Doc. No. 27), and the entire record in this case, and for the reasons stated in the accompanying Memorandum Opinion it is hereby **ORDERED** that:

1. The R&R is **APPROVED and ADOPTED in part** and **REJECTED in part**, and Petitioner's Objections are **OVERRULED in part** and **SUSTAINED in part** as follows:

    a. The R&R is approved and adopted with respect to Petitioner's claim of ineffective assistance of counsel;

    b. The R&R is rejected with respect to Petitioner's double jeopardy claim.

2. The Petition (Doc. No. 1) is **GRANTED UNCONDITIONALLY**, and Respondent is **DIRECTED** to **RELEASE** Petitioner forthwith.

3. This Order is **STAYED until July 31, 2014**.[100]

It is so **ORDERED.**

BY THE COURT:

/s/ Cynthia M. Rufe
CYNTHIA M. RUFE, J.

[100]The Commonwealth has thirty days from the entry of a final order to appeal the order. Fed. R. App. P. 4(a)(1)(A). Mindful of the disruption that an Order releasing Petitioner could cause while the Commonwealth considers whether to appeal, the Court enters this stay.