No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2019

I. Dean Fulton, Jr.,

Petitioner

v.

Commonwealth of Pennsylvania,

Respondent

PETITION FOR CERTIORARI TO THE COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE THIRD CIRCUIT COURT OF APPEALS VIOLATED BUCK V. DAVIS, 580 U.S. ___, 137 S.CT. 759, 197 L.ED.2D 1 (2017) WHEN IT DENIED A CERTIFICATE OF APPEALABILITY ARISING FROM SECTION 2254 HABEAS CORPUS PETITION WHERE THE CONVICTION FOR AGGRAVATED ASSAULT WAS NOT SUPPORTED BY EVIDENCE IN THE TRIAL TRANSCRIPT?

II. WHETHER TRIAL COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE FOR FAILING TO REQUEST AN INSTRUCTION INFORMING THE JURY THAT IF IT ACQUITTED PETITIONER OF MURDER ON A THEORY OF SELF-DEFENSE IT COULD NOT CONVICT THE PETITIONER OF AGGRAVATED ASSAULT ON A BYSTANDER UNLESS IT FOUND THAT THE ASSAULT WAS INTENTIONAL?

III. WHETHER PETITIONER WAS DENIED DUE PROCESS OF LAW WHEN THE TRIAL JUDGE INSTRUCTED THE JURY THAT PETITIONER COULD BE CONVICTED OF AGGRAVATED ASSAULT IF HE ACTED RECKLESSLY?

IV. WHETHER THE THIRD CIRCUIT VIOLATED 28 U.S.C. 2254(f) WHEN PETITIONER CHALLENGED THE CONVICTION BASED ON INSUFFICIENCY OF THE EVIDENCE AND THE COURT IT DID NOT REQUIRE THE STATE TO PRODUCE THE PART OF THE RECORD SUPPORTING THE CONVICTION BECAUSE THERE WAS NOTHING?

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CONSTITUTIONAL PROVISIONS

The Fifth Amendment, United States Constitution reads, in pertinent part, as follows:

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 Sixth Amendment, United States Constitution reads, in pertinent part, as follows:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial By an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor and to have the Assistance of Counsel for his defense.

The Fourteenth Amendment, Section 1, reads in pertinent part, as follows:

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

28 U.S.C. 2254(f) reads, in pertinent part, as follows:

If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein The applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record and the Federal court shall direct the State to do so by order directed to the appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

Rule 5(c) of the Rules Governing 2254 Cases reads as follows:

...The respondent must attach to the answer parts of the transcript that the respondent considers relevant...

LIST OF PARTIES BELOW

The parties are named in the caption.

OPINIONS BELOW

On June 23, 2020, the Third Circuit Court of Appeals denied an application for rehearing and suggestion for rehearing en banc from the order denying a certificate of appealability ["COA"]. [Appendix "A"]

On May 21, 2020, a Panel of the Third Circuit denied an application for certificate of appealability. [Appendix "B"]

On December 5, 2019, the district court judge entered an order denying adopting the Magistrate-Judge's Report and Recommendation, and denied the habeas petition without an evidentiary hearing. [Appendix "C"].

On November 19, 2019, the Magistrate-Judge issues a Report & Recommendation recommending that habeas corpus be denied. ["MJRR"][Appendix "D"]

STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 USC 2254. The court of appeals had jurisdiction under 28 USC 1291. This Court has jurisdiction under 28 USC 1254(1), and 28 USC 1257..

STATEMENT OF THE CASE

Petitioner was charged with murder in connection with the shooting death of Dominique Jenkins ("Jenkins") and aggravated assault in connection with the shooting of his associate, Lamar Henderson ("Henderson"). Tellingly, Henderson was dressed in black wearing "Glock" gloves but he testified that he was an unarmed bystander.

The jury concluded that Petitioner, who was 15 years old at the time of the shooting, shot Jenkins in self-defense.[1] Nevertheless, the jury convicted Petitioner of aggravated assault in connection with the shooting of Henderson probably because the trial judge erroneously

[1] Jenkins fell on top of his 9 mm. firearm which was loaded and cocked, a fact that impressed the jury.

instructed the jury that it could convict Petitioner of aggravated assault if Petitioner shot Jenkins in self-defense and shot Henderson recklessly or intentionally.[2] Significantly, the trial court did not give the jury the instruction required by ***Commonwealth v. Fowlin***, 551 PA 414, 710 A2d 1130 (PA 1998) which reads, in pertinent part, as follows: "the defender may not be simultaneously found to have justifiably acted in self-defense and be criminally liable for crimes involving recklessness or malice." Id. at 417. (hereinafter sometimes called a "***Fowlin*** instruction") In this case, the failure to give the ***Fowlin*** instruction was a denial of the right to have the jury determine all elements of the offense as required by ***United States v. Gaudin***, 515 U.S. 506, 510-511, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995) which stated, "The Constitution gives a criminal defendant the right to demand that a jury find him guilty of all elements of the

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[2] **TRIAL COURT'S JURY INSTRUCTIONS**

The trial court's instructions to the jury, which appear at Volume I, October 15, 2014, at pages 153-155 of the Trial Transcripts, read, in pertinent part, as follows: "The Defendant is charged with aggravated assault. To find Defendant guilty of this offense, you must find that each of the following elements has been proven beyond a reasonable doubt. First, that the Defendant or his accomplice caused serious bodily injury to Lamar Henderson…Secondly, that the Defendant or his accomplice acted intentionally, knowingly or recklessly under circumstances manifesting an extreme indifference to the value of human life. A person acts intentionally with respect to serious bodily injury when it is his conscious object or purpose to cause serious bodily injury. A person acts knowingly with respect to serious bodily injury when he is aware that it is practically certain that his conduct would cause such a result. A person acts recklessly with respect to serious bodily injury when he consciously disregards a substantial and unjustifiable risk that serious bodily injury will result from his conduct. The risk must be of such a nature and degree that, considering the nature and intent of the perpetrator's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a reasonable person would observe in the perpetrator's situation. It is shown by the kind of reckless conduct from which a life-threatening injury is almost certain to occur." [Id. 154-155].

As stated in the body of the application for certificate of appealability ("COA"), the trial court did not give a ***Fowlin*** instruction which held that the defendant may not be held criminally responsible for aggravated assault on a bystander even if he acts recklessly. Furthermore, even the ***Fowlin*** dissent agrees that state of mind is a jury issue.

crime with which he is charged Here, the trial judge gave an instruction on self-defense and an instruction on aggravated assault including an erroneous charge that Petitioner could be convicted of the aggravated assault on Henderson if he acted recklessly. She did not give the jury the ***Fowlin*** instruction. Surely, the trial judge and the defense attorney were required to have the sense to anticipate that if the jury acquitted Petitioner of the murder of Jenkins on a theory of self-defense, then the jury would then have to decide whether Petitioner shot Henderson recklessly or intentionally. If it found recklessness, it would have to acquit Petitioner of aggravated assault under ***Fowlin***. It was crucial to a fair trial that the trial court give the jury the ***Fowlin*** instruction. ***Fowlin, supra*** at page 422.

The trial court denied due process of law when she refused to give the ***Fowlin*** instruction, but trial counsel's performance was objectively deficient for failure to preserve the issue for appeal by making a timely objection to the omission of the ***Fowlin*** instruction after the trial court gave the jury instructions, but before the jury retired to deliberate.

When raised in the post-conviction motion, and later in the habeas petition, the trial judge continued to cling to her opinion that the state of mind of recklessness was not an issue for the jury because it was clear to her that Petitioner shot Henderson intentionally. The trial judge's decision makes no sense and it is not supported by the trial record. First, if the trial judge really believed that Petitioner shot Henderson intentionally while Henderson was running away then she should have deleted recklessness from the charge on aggravated assault. As demonstrated below, the trial transcripts do not support the opinion of the trial judge, but even if they did, Petitioner's state of mind would be an issue of elemental fact for decision by a properly instructed jury. See Judge Castille's dissenting opinion in ***Fowlin***. at page 422.

At minimum, it is the province of the jury to determine all factual components of all essential elements. ***Sullivan v. Louisiana***, 508 U.S. 275, 277-278, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993) [Jury determines all elements of the offense beyond a reasonable doubt including all facts necessary to decide elements].

Here, the trial judge violated the Fifth and Sixth Amendments by not providing the jury with the instructions necessary to resolve the charge of aggravated assault if it acquitted on a theory of self-defense. Even so, trial counsel's performance was objectively deficient for failing to make an appropriate and timely objection to the omission of the ***Fowlin*** instruction and there was at least a reasonable probability the Petitioner would have prevailed on appeal in the PA Superior Court if the objection had been preserved.

Finally, the order denying a COA violates 28 USC 2254(f) and Rule 5(c) because Petitioner's 2254 habeas corpus petition challenged the sufficiency of the evidence, and the State failed to provide trial transcripts supporting its baseless sufficiency of the evidence argument. ***Commonwealth v. Africa***, 353 A2d 855, 866 (PA 1976), ***Commonwealth v. Stewart***, 84 A3d 701, 709 PA Super. 2013)["If a trial court were to state that a witness said that it was snowing when the transcript shows that the witness stated it was raining, we would be bound by the facts in the transcript"].

In the case at hand, the trial transcripts indicate that Henderson was standing between Petitioner and Jenkins when the self-defense shooting took place. Henderson testified that he and Jenkins were shot at the same time. Henderson did not testify that he was shot while running away. The idea that Henderson was shot while running away is alternative reality invented by the trial court, and copied blindly by the state appellate courts, by the Magistrate-Judge, by the district court judge and by the Third Circuit.

Parenthetically, it also should be noted that the State has claimed that James Crosby's testimony supports its argument that Henderson was shot while running away. But Crosby's testimony is not helpful to the State. Crosby testified that he was driving down 62nd Street at 6:15 PM on January 24, 2010 when he heard a couple of gun shots. [Tr. 10/14/14 at page 28, 40, 42]. He saw two men but could not identify the shooter and he did not see the shooting. [Id. 35, 39]. He testified it was dark out. [Id. 39].

STATEMENT OF THE FACTS

Page 1 of the Report and Recommendation of the Magistrate-Judge reads, in pertinent part, as follows:

> Petitioner asserts that the state courts have failed to accurately recount the relevant facts, therefore, this court read the entire trial transcript and will summarize the facts that pertain to Petitioner's claims. In doing so, the court understands that Petitioner--or more accurately, his attorney--refuses to acknowledge certain adverse testimony that was presented at trial. Furthermore, when reviewing trial testimony, it is often the case that witnesses do not express themselves perfectly, and, as a result, may obfuscate certain events that transpired.

First, the Magistrate-Judge's Report and Recommendation rests upon fact finding that are unreasonable when measured against the evidence presented in the State court proceedings.

A decision is "unreasonable" where, as here, it is not supported by the trial transcripts. ***Commonwealth v. Africa***, 466 PA 603, 353 A2d 855, 866 (PA 1976), ***Commonwealth v. Stewart***, 84 A3d 701, 709 (PA Super. 2013). In ***Stewart***, the Court stated: "where the evidentiary record is in opposition or does not support a statement made by the trial court in its opinion, the evidentiary record controls… For example, if a trial court were to state that a witness said that it was snowing, when the transcript shows that the witness stated it was raining, we would be bound by the facts in the transcript." If the trial transcript trumps opinions of the court system, then it surely trumps the assertions of prosecutors trying to win a case at the expense of truth.

Parenthetically, it also should be noted that the State has claimed that James Crosby's testimony supports its argument that Henderson was shot while running away. But Crosby's testimony is not helpful to the State. Crosby testified that he was driving down 62nd Street at 6:15 PM on January 24, 2010 when he heard a couple of gun shots. [Tr. 10/14/14 at page 28, 40, 42]. He saw two men but could not identify the shooter and he did not see the shooting. [Id. 35, 39]. He testified it was dark out. [Id. 39].

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Here, the Magistrate's Report and Recommendation ["MJRR"] is based on the functional equivalent of saying earth is flat. There is no evidence that Henderson did not express himself perfectly or obfuscated certain events that transpired.

Here, the record consists of the trial transcripts wherein Henderson (the alleged unarmed bystander) testified that he was standing between the Petitioner (I. Dean Fulton) and the decedent (Dominique Jenkins) when he (Lamar Henderson) was shot. [Trial Transcript dated 10/9/14, pages 133-134]. Mr. Henderson testified that "I couldn't run." [Tr. 10/9/14, page 134]. Mr. Henderson testified that he was not shot while running away, because he could not run. [Tr. 10/9/14 page 134].

The story as retold by Henderson was as follows. Dominique Jenkins ("Jenkins") asked Henderson to go with him to meet I. Dean Fulton. [Tr. 159]. Jenkins and Henderson met Mr. Fulton and Steven Jorden at 62nd and Buist, exchanged handshakes, and then walked down to 62nd and Chelwynde to exchange guns. [Tr. 131-132]. Jenkins pulled the gold and black collateral gun and Petitioner pulled the silver gun and started shooting. [Tr. 132-133]. Petitioner shot Jenkins in the head at point blank range from an indeterminate distance [Transcript of testimony of Medical Examiner, Tr. 10/14/14, page 9, 12]. Petitioner shot Henderson the same time he shot Jenkins. [Tr. 133-134, 162, 167]. **Henderson saw Dom fall. [Exhibit A, Tr. 134].**[3] **[Tr. 134]. Henderson tried to run away but he could not run away because he had been**

[3] Whether Henderson was a bystander shot while Fulton was acting in self-defense or shot intentionally while running away were issues for resolution by a properly instructed jury using the standard of proof beyond a reasonable doubt. See, for example, ***Kubsch v. Neal***, 838 F3d 845, 861 (7th Cir. 2016) (en banc) which reversed a conviction for triple murder stating," All we are saying is that the jury should have been given the chance to evaluate this case based on all the evidence, rather than on the basis of a truncated record that omitted the strongest evidence the defense had."

shot. [Tr. 134]. **Henderson stated that he was standing between Fulton and Jenkins when he was shot. [Tr. 192].**

Remarkably, the trial transcripts contradict the Report and Recommendation of the Magistrate-Judge on the following four key points:

First, **Henderson was standing between Mr. Jenkins and Mr. Fulton** when the shooting started. [Tr. 192-193].

MR. SILVERSTEIN. A few moments ago, you said you were standing between the person you are identifying as I Dean Fulton and the person you are saying is Dominique Jenkins, am I right about that, sir?

MR. HENDERSON. Yes. [Tr. 192-193].

Second, Henderson was shot at the same time Jenkins was shot. The prosecutor asked: **At what point did you get shot? Henderson replied: When he started shooting. [Tr. 134]**[4]

Third, Henderson testified that he could not run away because he had been shot. [Tr. 134].

Fourth, Petitioner shot Jenkins in the head at point blank range from an indeterminate distance [Transcript of testimony of Medical Examiner, Tr. 10/14/14, page 9, 12].

The MJRR blindly adopts the decision of the State courts, which is not supported by the trial transcript. As such, the State fact finding is flagrantly unreasonable because it contradicts the trial transcripts which takes precedence over opinions of all the courts where there is a

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[4] It should be noted that when reviewing a claim ineffective assistance of trial counsel ("IATC"), the Court must consider all of the facts. ***Strickland***, 466 U.S. at 695. The PCRA judge is not at liberty to change the trial transcript because is convinced the petitioner was guilty. In this case, the trial transcript indicates that Henderson was standing between Fulton and Jenkins when he was shot.

conflict. The record was tainted by the Commonwealth's patently false claim that Henderson was shot while running away.

Petitioner shot Dominique Jenkins because Jenkins was holding a 9 mm. automatic that was loaded and cocked. The jury, acting sensibly, acquitted Petitioner because he shot Dominique Jenkins in self-defense from an indeterminate distance. The record indicates that Jenkins fell on top of a 9mm handgun. which was loaded and cocked. The trial transcripts do not support the claim that Petitioner turned and shot Henderson after Henderson screamed and started running down the street. That statement is a complete fabrication, contrary to the trial transcript.

The trial transcripts indicate that Henderson was shot at the same time Jenkins was shot. The prosecutor asked: At what point did you get shot? Henderson replied: When he started shooting. [Tr. 134][5]

The MJRR relies on facts not supported by the record and it stands the law on its head when it suggests as an explanation for the trial transcripts that witnesses do not always express themselves perfectly. It also stands the lawon its head when it does not understand that ***Fowlin*** held that if Petitioner shot Jenkins in self-defense, he could not be convicted of shooting the bystander on a theory that he acted recklessly. Petitioner does not have to show that the Henderson shooting was "accidental" as claimed on page 7 of the MJRR.

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[5] It should be noted that the PCRA is not part of the appellate process where the facts are reviewed in the light most favorable to the State. When reviewing a claim ineffective assistance of trial counsel ("IATC"), the Court must consider all of the facts. ***Strickland***, 466 U.S. at 695. The PCRA judge is not at liberty to contradict the trial transcript which, in this case, indicates that Henderson was standing between Fulton and Jenkins when he was shot.

Likewise, page 8 of the MJRR is unreasonable because Henderson did not testify that he was shot while "running away." Furthermore, the findings of fact were within the province of a properly instructed jury, and this jury was not properly instructed.

REASONS WHY THE WRIT SHOULD BE GRANTED

Rule 10. Considerations Governing Review on Certiorari

> Review on certiorari is not a matter of right, but of judicial discretion. A petition for writ of certiorari will be granted only for compelling reasons. The following, though neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of the Court's supervisory power;
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A. THE VIOLATION OF *Buck v. Davis*, 137 S.Ct. 759, 764, 197 L.Ed. 2d 1 (2017) which held that the COA inquiry is not the same as a merits inquiry. At the COA stage, review is limited to whether the application has shown that jurists of reason could disagree with the district court's resolution of his constitutional claims or whether jurists could conclude that the issues presented are adequate to deserve encouragement to proceed further. The threshold question should be decided without full consideration of the factual or legal bases adduced in support of the claims. A claim can be "debatable" even though every jurist might agree, after the COA has

been granted, and the case has received full consideration, that the applicant will not prevail. 28 USC 2253 set forth a two- step process: (1) the initial determination whether a claim is reasonably debatable; (2) then treat the appeal as it would normally.

The following cases show that reasonable jurists can disagree with the district court and the appellate court.

First, the Third Circuit's decision is contrary to 28 U.S.C. 2254(f), which states that when the applicant challenges the sufficiency of the evidence adduced in the State court proceeding to support the State court's determination of a factual issue, the State shall produce the part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. In this case, Petitioner produced the trial transcripts supporting his position that Henderson (the alleged victim of the aggravated assault) was standing between Fulton and Jenkins when he was shot. The State did not produce transcripts supporting its position. Instead, it merely argued that the trial transcripts were wrong and that Petitioner's attorney had taken the testimony out of context. The State has yet to meet its statutory obligation to produce one shred of evidence supporting its position that Petitioner turned and shot Henderson as Henderson was running away. At the risk of flogging the point, the State has not produced a shred of trial transcript to support its version in violation of 2254(f), and Rule 5(c) of the Rules Governing 2254 cases in the United States District Courts.

Second, the Third Circuit did not address all of the issues presented in the application for COA including but not limited to Petitioner's claim that the trial court's refusal to give the ***Fowlin*** instruction was a denial of the right to have the jury determine all elements of the offense. ***United States v. Gaudin***, 515 U.S. 506, 510-511, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995) [Failure or refusal to instruct on all elements of the offense violates the Fifth and Sixth

Amendments to the Constitution of the United States]. The ***Gaudin*** Court stated, "The Constitution gives a criminal defendant the right to demand that a jury find him guilty of all elements of the crime with which he is charged Here, the trial judge gave an instruction on self-defense and an instruction on aggravated assault, but she did not give the jury the ***Fowlin*** instruction. Plainly, the trial judge and the defense attorney were required to anticipate that if the jury acquitted Petitioner of the murder of Jenkins on a theory of self-defense, it could not convict Petitioner of aggravated assault on a theory of recklessness. If the jury found self-defense, it would be faced with the decision whether Petitioner shot Henderson intentionally. It could not convict Petitioner on a theory that he shot Henderson recklessly. It was essential to a fair trial that the trial court give the jury the ***Fowlin*** instruction. Whether the Petitioner shot Henderson intentionally was an issue for a properly instructed jury. ***Fowlin, supra*** at page 422.

Third, the Third Circuit did not address Petitioner's claim that trial counsel's performance was objectively deficient when he failed to object to the omission of the ***Fowlin*** instruction after the jury was instructed but before it retired to deliberate. The trial judge was of the opinion that Petitioner's state of mind (reckless v. intentional) was not an issue for the jury because, in her opinion, Petitioner shot Henderson intentionally while Henderson was running away. As demonstrated below, the trial transcripts do not support her opinion, but even if they did, Petitioner's state of mind would be an issue of elemental fact for decision by a properly instructed jury. See Judge Castille's dissenting opinion in ***Fowlin***. at page 422. The failure to make an appropriate and timely objection to omission of the ***Fowlin*** instruction was prejudicial in at least two ways. First, the failure to object to the omission deprived Petitioner of the fundamental constitutional right to have the jury determine all of the elements of aggravated assault in violation of ***Gaudin, supra***. If the jury had been given a ***Fowlin*** instruction, there was

a reasonable probability of an acquittal on the charge of aggravated assault based on the theory that Henderson was a bystander shot recklessly during the course of the self-defense shooting of Jenkins. Second, as a result of trial counsel's failure register an objection after the instructions were given but before the jury retired to deliberate, the Superior Court regarded the omission of the Fowlin instruction as "waived." As such, Petitioner lost the right to the process of an appeal based on the ***Gaudin*** violation. .And, it is fair to say that if Petitioner's' attorney had objected to the omission of the ***Fowlin*** charge, there was a reasonable probability the appellate court would have reversed the conviction for aggravated assault based on omission of the ***Fowlin*** instruction in conjunction with the ***Gaudin*** case.

The trial transcripts do not support the trial court's unreasonable view (based on nothing) that Henderson was shot intentionally while running away. Even if Henderson was shot while running away, which is supported by nothing, omission of the ***Fowlin*** instruction deprived Petitioner of the fundamental constitutional right to have the jury determine whether Henderson was shot recklessly (not guilty) or intentionally (guilty). ***Gaudin, supra*** at page 511 which held that, at minimum, the jury determines all factual components of all essential elements. ***Sullivan v. Louisiana***, 508 U.S. 275, 277-278, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993) [Jury determines all elements of the offense beyond a reasonable doubt including all facts necessary to decide elements]. At the risk of flogging the point, the trial judge has insisted that she had no obligation to give a ***Fowlin*** instruction and she would have refused to give it even if the attorney had begged for it. The problem with the trial court's rationale is that her refusal to give the ***Fowlin*** instruction was a decision she had no right to make. The Fifth and Sixth Amendments mandate that the trial judge provide the jury with the instructions necessary to resolve the charge of aggravated assault if it acquitted on a theory of self-defense.

Fourth, regardless of the attitude of the trial judge, trial counsel's performance was objectively deficient for failing to make an appropriate and timely objection to the omission of the ***Fowlin*** instruction after the instructions were given but before the jury retired to deliberate. There was at least a reasonable probability of acquittal on the charge of aggravated assault if trial counsel had made an appropriate and timely objection to omission of the ***Fowlin*** charge. The State court decisions violate 2244(d)(1) because they are contrary to ***Strickland v. Washington***, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and ***Hinton v. Alabama***, 134 S.Ct. 1081, 1089, 188 L.Ed. 2d 1 (2014) which hold that an attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under ***Strickland.***

Fifth, the Third Circuit did not address Petitioner's claim that trial counsel's performance was objectively deficient when he failed to object to the omission of the ***Fowlin*** instruction after the jury was instructed but before it retired to deliberate. The trial judge was of the opinion that Petitioner's state of mind (reckless v. intentional) was not an issue for the jury because, in her opinion, Petitioner shot Henderson intentionally while Henderson was running away. As demonstrated below, the trial transcripts do not support her opinion, but even if they did, Petitioner's state of mind would be an issue of elemental fact for decision by a properly instructed jury. See Judge Castille's dissenting opinion in ***Fowlin***. at page 422. The failure to make an appropriate and timely objection to omission of the ***Fowlin*** instruction was prejudicial in at least two ways. First, the failure to object to the omission deprived Petitioner of the fundamental constitutional right to have the jury determine all of the elements of aggravated assault in violation of ***Gaudin, supra***. If the jury had been given a ***Fowlin*** instruction, there was a reasonable probability of an acquittal on the charge of aggravated assault based on the theory

that Henderson was a bystander shot recklessly during the course of the self-defense shooting of Jenkins. Second, as a result of trial counsel's failure register an objection after the instructions were given but before the jury retired to deliberate, the Superior Court regarded the omission of the Fowlin instruction as "waived." As such, Petitioner lost the right to the process of an appeal based on the ***Gaudin*** violation. .And, it is fair to say that if Petitioner's' attorney had objected to the omission of the ***Fowlin*** charge, there was a reasonable probability the appellate court would have reversed the conviction for aggravated assault based on omission of the ***Fowlin*** instruction in conjunction with the ***Gaudin*** case.

B. THE VIOLATION OF *United States v. Gaudin*, 515 U.S. 506, 510-511, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995) which held that the failure or refusal to instruct on all elements of the offense violates the Fifth and Sixth Amendments to the Constitution of the United States]. The ***Gaudin*** Court stated, "The Constitution gives a criminal defendant the right to demand that a jury find him guilty of all elements of the crime with which he is charged Here, the trial judge gave an instruction on self-defense and an instruction on aggravated assault, but she did not give the jury the ***Fowlin*** instruction. Plainly, the trial judge and the defense attorney were required to anticipate that if the jury acquitted Petitioner of the murder of Jenkins on a theory of self-defense, it could not convict Petitioner of aggravated assault on a theory of recklessness. If the jury found self-defense, it would be faced with the decision whether Petitioner shot Henderson intentionally. It could not convict Petitioner on a theory that he shot Henderson recklessly. It was essential to a fair trial that the trial court give the jury the ***Fowlin*** instruction. Whether the Petitioner shot Henderson intentionally was an issue for a properly instructed jury. ***Fowlin, supra*** at page 422.

The trial transcripts do not support the trial court's unreasonable view (based on nothing) that Henderson was shot intentionally while running away. Even if Henderson was shot while running away, which is supported by nothing, omission of the ***Fowlin*** instruction deprived Petitioner of the fundamental constitutional right to have the jury determine whether Henderson was shot recklessly (not guilty) or intentionally (guilty). ***Gaudin, supra*** at page 511 which held that, at minimum, the jury determines all factual components of all essential elements. ***Sullivan v. Louisiana***, 508 U.S. 275, 277-278, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993) [Jury determines all elements of the offense beyond a reasonable doubt including all facts necessary to decide elements]. At the risk of flogging the point, the trial judge has insisted that she had no obligation to give a ***Fowlin*** instruction and she would have refused to give it even if the attorney had begged for it. The problem with the trial court's rationale is that her refusal to give the ***Fowlin*** instruction was a decision she had no right to make. The Fifth and Sixth Amendments mandate that the trial judge provide the jury with the instructions necessary to resolve the charge of aggravated assault if it acquitted on a theory of self-defense.

C. THE VIOLATION OF *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and ***Hinton v. Alabama***, 134 S.Ct. 1081, 1089, 188 L.Ed. 2d 1 (2014) which held that an attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under ***Strickland.***

In this case, regardless of the attitude of the trial judge, trial counsel's performance was objectively deficient for failing to make an appropriate and timely objection to the omission of the ***Fowlin*** instruction after the instructions were given but before the jury retired to deliberate. There was at least a reasonable probability of acquittal on the charge of aggravated assault if trial

counsel had made an appropriate and timely objection to omission of the ***Fowlin*** charge. The State court decisions violate 2244(d)(1) because they are contrary to ***Strickland v. Washington***, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and ***Hinton v. Alabama***, 134 S.Ct. 1081, 1089, 188 L.Ed. 2d 1 (2014) which hold that an attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under ***Strickland.***

The Third Circuit did not address Petitioner's claim that trial counsel's performance was objectively deficient when he failed to object to the omission of the ***Fowlin*** instruction after the jury was instructed but before it retired to deliberate. The trial judge was of the opinion that Petitioner's state of mind (reckless v. intentional) was not an issue for the jury because, in her opinion, Petitioner shot Henderson intentionally while Henderson was running away. As demonstrated below, the trial transcripts do not support her opinion, but even if they did, Petitioner's state of mind would be an issue of elemental fact for decision by a properly instructed jury. See Judge Castille's dissenting opinion in ***Fowlin***. at page 422. The failure to make an appropriate and timely objection to omission of the ***Fowlin*** instruction was prejudicial in at least two ways. First, the failure to object to the omission deprived Petitioner of the fundamental constitutional right to have the jury determine all of the elements of aggravated assault in violation of ***Gaudin, supra***. If the jury had been given a ***Fowlin*** instruction, there was a reasonable probability of an acquittal on the charge of aggravated assault based on the theory that Henderson was a bystander shot recklessly during the course of the self-defense shooting of Jenkins. Second, as a result of trial counsel's failure register an objection after the instructions were given but before the jury retired to deliberate, the Superior Court regarded the omission of the Fowlin instruction as "waived." As such, Petitioner lost the right to the process of an appeal

based on the ***Gaudin*** violation. .And, it is fair to say that if Petitioner's' attorney had objected to the omission of the ***Fowlin*** charge, there was a reasonable probability the appellate court would have reversed the conviction for aggravated assault based on omission of the ***Fowlin*** instruction in conjunction with the ***Gaudin*** case.

CONCLUSION

The Court should reverse the order denying a COA, and grant habeas corpus for the ***Gaudin*** violation.

/s/Cheryl J. Sturm
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