APPENDIX "A"

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 19-3864

I. DEAN FULTON,
Appellant

v.

SUPERINTENDENT FRANKVILLE SCI; THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA; THE DISTRICT ATTORNEY OF PHILADELPHIA COUNTY

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civ. Action No. 2-19-cv-02295)

SUR PETITION FOR REHEARING

Present: SMITH, *Chief Judge*, McKEE, AMBRO, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, and PHIPPS, *Circuit Judges*.

The petition for rehearing filed by Appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc is denied.

BY THE COURT,

s/Joseph A. Greenaway, Jr.
Circuit Judge

Dated: June 23, 2020

kr/cc: Ronald Eisenberg, Esq.
Cheryl J. Sturm, Esq.

APPENDIX "B"

BLD-202 May 21, 2020

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **19-3864**

I. DEAN FULTON, Appellant

VS.

SUPERINTENDENT FRACKVILLE SCI, et al.

(E.D. Pa. Civ. No. 2-19-cv-02295)

Present: AMBRO, GREENAWAY, Jr., and BIBAS, Circuit Judges

Submitted are

1) Appellant's request for a certificate of appealability under 28 U.S.C. § 2253(c)(1);

2) Appellees' response; and

3) Appellant's reply

in the above-captioned case.

Respectfully,

Clerk

ORDER

Appellant's application for a certificate of appealability is denied. See 28 U.S.C. § 2253(c). Appellant's reliance on selected excerpts of trial testimony, taken out of context, is insufficient to overcome the presumption that the state courts' findings of fact were correct. See 28 U.S.C. § 2254(e)(1); cf. Wiggins v. Smith, 539 U.S. 510, 528

(2003). Jurists of reason could not debate that the District Court correctly dismissed Appellant's 28 U.S.C. § 2254 petition. See Miller-El v. Cockrell, 537 U.S. 322, 327 (2003).

By the Court,

s/Joseph A. Greenaway, Jr.
Circuit Judge

Dated: June 5, 2020

kr/cc: Ronald Eisenberg, Esq.
Cheryl J. Sturm, Esq.

A True Copy:

Patricia S. Dodszuweit, Clerk
Certified Order Issued in Lieu of Mandate

APPENDIX "C"

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

I. DEAN FULTON,	CIVIL ACTION
v.	
SUPT. SCI FRACKVILLE, *et al.*	NO. 19-2295

O R D E R

AND NOW, this 5th day of December, 2019, upon consideration of the Petition for Writ of Habeas Corpus, the Commonwealth's Answer, Petitioner's Traverse, the other documents filed by the parties, and the Petitioner's Objection to the Report and Recommendation thereto, and after review of the Report and Recommendation of the United States Magistrate Judge Carol Sandra Moore Wells, is hereby **ORDERED** that:

1. The Report and Recommendation is **APPROVED AND ADOPTED;**
2. The Petition for a Writ of Habeas Corpus is **DENIED,** without an evidentiary hearing; and
3. Petitioner has neither shown denial of a federal constitutional right, nor established that reasonable jurists would disagree with this court's procedural disposition of his claims. Consequently, a certificate of appealability is **DENIED.**

IT IS SO ORDERED.

BY THE COURT:

s/ J. Curtis Joyner

J. CURTIS JOYNER, J.

APPENDIX "D"

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

I. DEAN FULTON	:	CIVIL ACTION
v.	:	
SUPT. SCI-FRACKVILLE, *et al.*	:	NO. 19-2295

REPORT AND RECOMMENDATION

CAROL SANDRA MOORE WELLS
UNITED STATES MAGISTRATE JUDGE November 13, 2019

Presently before the court is a counseled Petition for a Writ of Habeas Corpus filed by I. Dean Fulton ("Petitioner") pursuant to 28 U.S.C. § 2254. Petitioner is serving an aggregate term of incarceration of nine to eighteen years at the State Correctional Institution-Frackville and seeks habeas relief based on a claim of ineffective assistance of counsel and claims of state court errors in violation of the federal constitution. The Honorable J. Curtis Joyner referred this matter to the undersigned for preparation of a Report and Recommendation, pursuant to 28 U.S.C. § 636(b)(1)(B). For the reasons set forth below, it is recommended that Petitioner not obtain habeas relief.

I. BACKGROUND

Petitioner asserts that the state courts have failed to accurately recount the relevant facts, therefore, this court has 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. Despite this caveat, review of the transcript has afforded this court a good understanding of the relevant

evidence.

During the evening of January 24, 2010, Dominque Jenkins was shot at 62nd and Chelwynde Streets in Philadelphia; he died from a single bullet to his forehead that penetrated his brain, rendering him incapable of any volitional movement. [1] Lamar Henderson was also shot – once in the back of the right leg and once in the left buttock. Henderson testified that, when Petitioner shot at Jenkins, he tried to escape, then was shot. N.T. 10/9/14 at 133, 222. After being shot, Henderson was unable to run, but did hobble away. *Id.* at 134. Henderson stated that, before he started to run away, he saw Jenkins fall down toward a parked car. *Id.* at 222. Henderson reiterated that he started to run away when Petitioner started shooting; after being hit, Henderson stayed down until the shooting stopped; he then left the scene, calling for help. *Id.* at 223-24. At the time of the shooting, Henderson estimated that Petitioner was 2.5 to 3 feet from Jenkins. *Id.* at 166. Henderson further testified that, as the shooting commenced, he was able to see the three other people at the scene: Petitioner, Jenkins and Steven Jorden. *Id.* at 162. Additionally, Petitioner emphasizes that Henderson testified that, before the shooting commenced, he was standing between Petitioner and Jenkins. *Id.* at 192-93.

Another witness, James Crosby, who lived close to the crime scene, heard shots as he was driving home at approximately 6:15 p.m. on January 24, 2010. When he looked toward the sound of the shooting, he only saw two people, one with his arm extended. After the shooting stopped, Crosby saw two men running away from the corner and one man hobbling away from them; one of the runners was the man Crosby saw with his arm extended as shots were fired.

The jury did not convict Petitioner of murdering Jenkins, but rather of aggravated assault on Henderson and related gun offenses. On February 11, 2015, the trial court sentenced Petitioner

[1] There is no dispute about the bulk of the testimony. Hence, the court will only cite to the trial transcript when the parties dispute the evidence presented.

to an aggregate term of incarceration of nine to eighteen years. At the sentencing, Petitioner was represented by his current habeas counsel. On direct appeal, his judgment of sentence was affirmed. *Commonwealth v. Fulton*, No. 768 EDA 2015, 2016 WL 2349178, *12 (Pa. Super. Ct. May 4, 2016).

Next, on January 31, 2017, Petitioner sought state collateral review, pursuant to the Post Conviction Relief Act ("PCRA"), 42 Pa. Cons. Stat. Ann. §§ 9541-46. Without conducting an evidentiary hearing, the PCRA court dismissed the PCRA petition on November 2, 2017. On appeal, the Superior Court affirmed. *Commonwealth v. Fulton*, No. 3614 EDA 2017, 2018 WL 4140907, *5 (Pa. Super. Ct. Aug. 30, 2018).

In the instant habeas petition, Petitioner first claims that trial counsel rendered ineffective assistance because, they[2] failed to request the court instruct the jury that, if the jury found Petitioner acted in self-defense when he shot Jenkins, he could not be convicted of aggravated assault of Henderson, if Henderson was shot accidently while Petitioner was shooting at Jenkins in self-defense. Pet'r Mem. of Law ("Pet. Mem.") at 11-17. The omitted instruction would be based upon *Commonwealth v. Fowlin*, 710 A.2d 1130 (Pa. 1998).[3] Next, Petitioner claims that the state trial and appellate courts violated due process on direct review and collateral review, because they inaccurately determined that he shot Henderson in the back while Henderson was trying to run away from the shooting.[4] Pet. Mem. at 17-19. Finally, Petitioner claims that, because the state courts reached the preceding inaccurate factual determination, the Sixth Amendment required that

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[2] At trial, Petitioner was represented by Arnold Silverstein and Larry Krasner (now the District Attorney for Philadelphia County).

[3] In *Fowlin*, the Pennsylvania Supreme Court held that, if a person unintentionally injures a third-party bystander when using force in justifiable self-defense against his attacker(s), the person cannot be criminally liable for the injury to the bystander. 710 A.2d at 1131.

[4] The importance of Henderson tuning his back to Petitioner and trying to run away before being shot in the back is that, if Henderson was running away from Petitioner, he was not a threat to Petitioner and Petitioner could have retreated in safety. In that event, Petitioner would no longer be justified to use force under Pennsylvania law. *Fowlin*, 710 A.2d at 1134.

his jury be instructed under *Fowlin*. The Commonwealth opposes the grant of habeas relief on the merits.[5] Answer at 9-20. This court finds that, under the AEDPA standard, the state courts did not unreasonably determine the material facts, hence, Petitioner cannot obtain habeas relief.

II. DISCUSSION

A. The AEDPA Standard of Review

Petitioner's claims were resolved on their merits by the state courts, hence, they must be reviewed under the deferential standard established by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which provides that habeas relief is precluded, unless the state court's adjudication of a 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 proceedings.

28 U.S.C. § 2254(d). The habeas statute further provides that any findings of fact made by the state court must be presumed to be correct; Petitioner bears the burden of rebutting the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

A state court's adjudication of a claim is contrary to U.S. Supreme Court precedent, if the state court has applied a rule that contradicts the governing law set forth in Supreme Court precedent or if the state court confronts a set of facts which are materially indistinguishable from a decision of the Supreme Court and the state court arrives at a different result from the Supreme Court. *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000). When determining whether a state court's decision was contrary to U.S. Supreme Court precedent, the habeas court should not be quick to attribute error. *See Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (*per curiam*). Instead, state court

[5] The Commonwealth raises no procedural defenses to the grant of habeas relief. Hence, they need not be considered.

decisions should be "given the benefit of the doubt." *Id.* In this regard, it is not necessary that the state court cite the governing Supreme Court precedent or even be aware of the governing Supreme Court precedent. *Early v. Packer*, 537 U.S. 3, 8 (2002) (*per curiam*). All that is required is that "neither the reasoning nor the result of the state-court decision contradicts" Supreme Court precedent. *Id.*

If, however, the state court correctly identifies the governing U.S. Supreme Court precedent, unreasonable application analysis, rather than contrary analysis, is appropriate. *Williams*, 529 U.S. at 406. A state court decision constitutes an unreasonable application of Supreme Court precedent if the state court correctly identifies the governing legal rule but applies it unreasonably to the facts of the petitioner's case. *Id.* at 407-08.

In making the unreasonable application determination, the habeas court must ask whether the state court's application of Supreme Court precedent was objectively unreasonable. *Williams,* 529 U.S. at 409. The habeas court may not grant relief simply because it believes the state court's adjudication of the petitioner's claim was incorrect. *Id.* at 411. Indeed, so long as the state court's decision was reasonable, habeas relief is barred, even if state court's application of U.S. Supreme Court precedent was incorrect. *See Harrington v. Richter*, 562 U.S. 86, 101-02 (2011). Further, when applying § 2254(d)(1), the habeas court is limited to considering the factual record that was before the state court when it ruled, *Cullen v. Pinholster*, 563 U.S. 170, 185 (2011), and the relevant U.S. Supreme Court precedent that had been decided by the date of the state court's decision. *Greene v. Fisher*, 565 U.S. 34, 38 (2011). It is permissible to consider the decisions of lower federal courts which have applied clearly established Supreme Court precedent, when deciding whether a state court's application of U.S. Supreme Court precedent was **reasonable**. *See Fischetti v. Johnson*, 384 F.3d 140, 149 (3d Cir. 2004). However, the § 2254(d)(1) bar to habeas relief

cannot be surmounted solely based upon lower federal court precedent, *i.e.*, lower federal court precedent cannot justify a conclusion that a state court's application of U.S. Supreme Court precedent was **unreasonable**; only U.S. Supreme Court precedent may be the authority for that conclusion. *See Renico v. Lett*, 559 U.S. 766, 778-79 (2010).

The Supreme Court, addressing AEDPA's factual review provisions in *Miller-El v. Cockerell*, 537 U.S. 322 (2003), interpreted § 2254(d)(2) to mean that "a decision adjudicated on the merits in a state court and based on a factual determination will not be overturned on factual grounds, unless objectively unreasonable in light of the evidence presented in the state-court proceeding." *Id.* at 340. A clear example of an unreasonable factual determination occurs where the state court erroneously finds a fact that lacks any support in the record. *Wiggins v. Smith*, 539 U.S. 510, 528 (2003). In that extreme circumstance, the presumption of correctness under § 2254(e)(1) is also clearly and convincingly rebutted. *Id.* If the state court's decision based on a factual determination is unreasonable in light of the evidence presented in the state court proceeding, habeas relief is not barred by § 2254(d)(2). *Lambert v. Blackwell,* 387 F.3d 210, 235 (3d Cir. 2004).

B. Standard of Review for Ineffective Assistance of Counsel Claims

Federal habeas ineffective assistance of counsel claims are measured against the two-part test announced in *Strickland v. Washington*, 466 U.S. 668 (1984). First, the petitioner must show that "counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. In making this determination, the court's scrutiny of counsel's performance must be "highly deferential." *Id.* at 689. The court should make every effort to "eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* In short, the "court must indulge a strong

presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the [petitioner] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* (quotation omitted).

Second, the petitioner must show that counsel's deficient performance "prejudiced the defense" by "depriv[ing] the [petitioner] of a fair trial, a trial whose result is reliable." *Id.* at 687. That is, the petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome," *id.*, but it is less than a preponderance of the evidence. *Id.* at 693, 694.

If the petitioner fails to satisfy either prong of the *Strickland* test, there is no need to evaluate the other part, as his claim will fail. *Id.* at 697. Further, counsel will not be found ineffective for failing to present an unmeritorious claim or objection. *Johnson v. Tennis*, 549 F.3d 296, 301 (3d Cir. 2008).

C. Application of Standards to Petitioner's Claims

All three of Petitioner's habeas claims are premised on his belief that the state courts unreasonably determined the facts germane to his claims. Pet. Mem. at 11. In particular, he argues that, since Henderson testified that he was between Petitioner and Jenkins immediately before Petitioner commenced firing, and because Henderson was unable to run away from the scene, Henderson must have been accidentally shot when Petitioner shot at Jenkins in self-defense. *See id.* at 11 n.9 & 16. Relying on the veracity of this scenario, Petitioner maintains that a *Fowlin* instruction should have been given. *Id.* at 16. According to Petitioner, a *Fowlin* instruction was not given at trial because of ineffective assistance of counsel (claim one), it was not mandated on appeal because of the state courts' unsupported, unreasonable fact-findings that were contrary to

Petitioner's preferred scenario (claim two) and the omission of said instruction resulted in a Sixth Amendment violation (claim three). Petitioner's arguments all rely upon his belief that the state court fact-finding is belied by the record; however, the state courts' fact-finding has record support and is quite reasonable. Hence, all of Petitioner's claims are barred by § 2254(d)(2).

At trial Henderson testified that he saw Jenkins fall after being shot by Petitioner and he started to run away from Petitioner. N.T. 10/9/14 at 222-24. After being shot in the rear of his right leg and left buttock, Henderson no longer could run, but managed to hobble off after the shooting stopped. *Id.* at 133-35, 223. Based on this testimony, it was certainly reasonable for the state courts to find that Petitioner shot and killed Jenkins first, then turned his fire on Henderson, who was running away. Once Petitioner's shots hit Henderson in the back of his body, Henderson was no longer able to run. The fact that Henderson testified that he was between Petitioner and Jenkins before Petitioner shot Jenkins does not prove, as Petitioner asserts, that Henderson was still between the two when Petitioner started shooting at Henderson.

Notably, Henderson testified that he could see Petitioner before the shooting started. If Henderson was, in fact, between Petitioner and Jenkins when Petitioner started firing and could see Petitioner, it is likely that Henderson would have been shot in the front of his body. However, Henderson was wounded in the back of his body, supporting the state courts' findings that Henderson was running away from Petitioner when Petitioner shot him.

Since the state court fact-findings are supported by record evidence, they are reasonable under § 2254(d)(2), *see Campbell v. Vaughn*, 209 F.3d 280, 291 (3d Cir. 2000); Petitioner, therefore, cannot refute the presumption of correctness afforded by § 2254(e)(1) based on the existing record. *Cf. Wiggins*, 539 U.S. at 528 (holding that the presumption of correctness for state court fact-findings may be refuted by the existing record only if the state court's fact-finding lacks

any support in the record). In light of the trial record, all of Petitioner's claims must fail for lack of an evidentiary basis.

III. CONCLUSION

All of Petitioner's claims fail under the appropriate federal standard of review. Reasonable jurists would not debate this court's disposition of Petitioner's claims; therefore a certificate of appealability should not issue for any claim. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Accordingly, I make the following:

RECOMMENDATION

AND NOW, this 13th day of November, 2019, for the reasons contained in the preceding Report, it is hereby **RECOMMENDED** that Petitioner's claims be **DENIED**, without an evidentiary hearing. Petitioner has not demonstrated that any reasonable jurist could find this court's rulings debatable, nor shown denial of any federal constitutional right; hence, there is no probable cause to issue a certificate of appealability for any of his claims.

Petitioner may file objections to this Report and Recommendation within fourteen (14) days of being served with a copy of it. *See* Local R. Civ. P. 72.1(IV). Failure to file timely objections may constitute a waiver of any appellate rights.

It be so **ORDERED**.

/s/ Carol Sandra Moore Wells
CAROL SANDRA MOORE WELLS
United States Magistrate Judge