IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ADRIN SMACK,	:	
Petitioner,	:	**No. 1:19-cv-00691-LPS**
	:	
v.	:	
	:	
THERESA DELBALSO, Superintendent,	:	
SCI Mahanoy	:	
Respondent,	:	
	:	
ATTORNEY GENERAL OF THE	:	
STATE OF DELAWARE,	:	
Respondent.	:	

REPLY TO THE RESPONDENTS' ANSWER TO THE OPENING BRIEF IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY PURSUANT TO 28 U.S.C. § 2254

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I. The United States Supreme Court decisions in *McMillan*, *Nichols*, and *Watts* clearly establish that the applicable burden of proof for contested facts presented during a state sentencing hearing must be proven by a preponderance of the evidence.

The Respondents erroneously assert that Mr. Smack's reliance on the United States Supreme Court decisions in *McMillan v. Pennsylvania*,[1] *Nichols v. United States*,[2] and *United States v. Watts*[3] is misplaced.[4] In support of this contention, the Respondents argue that "[n]one of the cases discuss the admissibility of evidence standard where the facts are not disputed, nor what standard of proof is required regarding disputed facts within the sentencing range."[5] The Respondents are incorrect.

Contrary to assertion of the Respondents, the United States Supreme Court decisions in *McMillan*, *Nichols*, and *Watts* clearly establish that the Due Process Clause of the Fourteenth Amendment requires disputed facts presented during a sentencing hearing to be proven by a preponderance of the evidence.[6] As noted in Mr. Smack's opening brief,[7] the United States Supreme Court in *McMillan* held that Pennsylvania's Mandatory Minimum Sentencing Act complied with the Due Process Clause of the Fourteenth Amendment as the sentencing act required the contested sentencing fact of being visibly in possession of a firearm at the time of the offense to be proven by a preponderance of the evidence.[8] Similarly, in *United States v. Watts*, the Supreme Court held that

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[1] *McMillan v. Pennsylvania*, 477 U.S. 79 (1986).

[2] *Nichols v. United States*, 511 U.S. 738 (1994).

[3] *United States v. Watts*, 519 U.S. 148 (1997).

[4] Respondents' July 6, 2020 Answer to Mr. Smack's Opening Brief at 8, hereinafter cited as "Answer at _."

[5] *Id.*

[6] *Watts*, 519 U.S. at 156-57; *Nichols*, 511 U.S. at 747-49; *McMillan*, 477 U.S. 84-87, 91-93.

[7] Opening at 17-18.

[8] Petitioner's February 3, 2020 Opening Brief in Support of Petition for Writ of Habeas Corpus by a Person in State Custody Pursuant to 28 U.S.C. § 2254 at 17-18 (citing *McMillan*, 477 U.S. at 81, 84-87, 89-93), hereinafter cited as "Opening at __."

acquitted conduct, which the petitioner asserted could never serve as a basis for a sentencing enhancement, could be used to enhance a sentence under the United States Sentencing Guidelines so long as the acquitted conduct had been proven by a preponderance of the evidence.[9] Furthermore, in *Nichols*, the United States Supreme Court held that the use of a defendant's prior un-counseled misdemeanor at sentencing was constitutional as it had been proven by a preponderance of the evidence.[10]

In each of the above cases, the United States Supreme Court held that at a sentencing hearing, the constitution's Due Process Clause was satisfied when a sentencing court considered and more importantly resolved a contested sentencing fact, only if the disputed fact at least met the preponderance of the evidence burden of proof standard.[11] Thus, contrary to the Respondents' assertion, the United States Supreme Court's decision in *McMillan*, *Watts*, and *Nichols* clearly establish the pertinent federal constitutional law applicable to this matter and that is that the Due Process Clause of the Fourteenth Amendment requires contested sentencing facts to be proven by a preponderance of the evidence.[12]

As the United States Supreme Court's decision in *McMillan*, *Nichols*, and *Watts* clearly establish that the Due Process Clause of the Fourteenth Amendment requires contested sentencing facts to be proven by a preponderance of the evidence, the Delaware courts continued adherence to the "minimal indicia of reliability" burden or proof is "contrary to" the above described clearly established federal law. The amicus filings clearly illustrate the error in the Delaware Supreme

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[9] Opening at 18-19 (citing *Watts*, 519 U.S. at 149, 154, 155-57).

[10] Opening at 20 (citing *Nichols*, 511 U.S. at 740, 747-48).

[11] *Watts*, 519 U.S. at 156-57; *Nichols*, 511 U.S. at 747-49; *McMillan*, 477 U.S. 84-87, 91-93

[12] *Id*.

Court's holding in Smack as the filings describe how the Delaware Supreme Court had erroneously "equat[ed] the threshold standard of minimal indicia of reliability for admission of evidence that the Court could consider in making a factual determination with the actual evaluation of admitted evidence standard, which by federal constitutional mandate is proof by a preponderance of the evidence."[13] Thus, it is apparent that the Delaware Supreme Court's belief that the "minimal indicia of reliability" burden of proof for sentencing hearing disputed facts is the product of a mistaken interpretation of *McMillan*, *Nichols*, and *Watts* applying only to federal sentencing guideline fact situations.[14] In Smack, the Delaware Supreme Court failed to recognize that the ultimate holdings in *McMillan*, *Nichols*, and *Watts* were premised on the requirement that factual disputes at sentencing hearings must comply with the Due Process Clause of the Fourteenth Amendment which requires disputed facts to be proven by at least the preponderance of the evidence.[15] Thus, the Delaware Supreme Court's application of the "minimal indicia of reliability" burden of proof to the contested facts presented at Mr. Smack's sentencing hearing is contrary to the clearly established federal law set forth in *McMillan*, *Watts*, and *Nichols.*

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[13] February 28, 2020 Brief of Amicus Curaie Office of Defender Services of the State of Delaware at 5; February 28, 2020 Brief of Amicus Curaie American Civil Liberties Union Foundation of Delaware at 5-7.

[14] SR589 (citing *McMillan*, 477 U.S. 79; *Watts*, 519 U.S. 148; *Nichols*, 511 U.S. 738; *United States v. McDowell*, 888 F.2d 285 (3d Cir. 1989)).

[15] *McMillan*, 477 U.S. at 84-87, 91-93; *Watts*, 519 U.S. at 156-57; *Nichols*, 511 U.S. at 747-49.

The Respondents disagree that Mr. Smack has demonstrated that the Delaware Supreme Court's decision was contrary to clearly established federal law.[16] Mr. Smack recognizes that pursuant to 28 U.S.C. § 2254(d) federal habeas relief may only be granted if the Delaware court's decision to apply the "minimal indicia of reliability" as the burden of proof to resolve disputed facts presented at a sentencing hearing was "contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States."[17]

A state court decision is "contrary to" clearly established federal law if "the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts."[18] Similarly in *Early v. Packer*,[19] the United State Supreme Court provided further guidance in relation to the "contrary to clearly established federal law" standard when it stated that:

> A state court decision is "contrary to" our clearly established precedents if it "applies a rule that contradicts the governing law set forth in our cases" or if it "confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent."[20]

The "contrary to" standard serves as "a guard against extreme malfunctions in the state criminal justice systems. . . ."[21]

A federal law is clearly established if it is "dictated by precedent existing at the time" of the

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[16] Answer at 10.

[17] 28 U.S.C. § 2254(d)(1); *Williams v. Taylor*, 529 U.S. 362, 412 (2000); *Appel v. Horn*, 250 F.3d 203, 210 (3d Cir. 2001).

[18] *Lambert v. Warden Greene SCI*, 861 F.3d 459, 467 (3d Cir. 2017) (quoting *Williams v. Taylor*, 529 U.S. 362, 413 (2000)); *Matteo v. Superintendent, SCI Albion*, 171 F.3d 877, 888 (3d Cir. 1999).

[19] 537 U.S. 3 (2002).

[20] *Id*. at 8 (quoting *Williams*, 529 U.S. at 405-06).

[21] *Harrington v. Richter*, 562 U.S. 86, 102 (2011) (internal quotation marks omitted).

relevant state court decision.[22] A rule that "breaks new ground or imposes a new obligation on the States or the Federal Government" is not clearly established.[23]

Mr. Smack's argument that the Delaware Supreme Court's decision to apply the "minimal indicia of reliability" as the burden of proof to resolve disputed facts presented at a sentencing hearing is "contrary to . . . clearly established federal law"[24] is supported by the multiple Third Circuit and district court habeas decisions in which a state court's action was found to be "contrary to clearly established federal law."[25] For the convenience of this Court, Mr. Smack will only

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[22] *Williams*, 529 U.S. at 381 (quoting *Teaque v. Lane*, 489 U.S. 288, 301 (1989)).

[23] *Id*.

[24] 28 U.S.C. § 2254(d)(1); *Williams*, 529 U.S. at 412; *Appel*, 250 F.3d at 210.

[25] *Pierce v. Adm'r N.J. State Prison*, No. 18-319, at 6-7 (3d Cir. Apr. 8, 2020) (attached hereto as Exhibit D); *Dennis v. Sec'y Pa. Dep't of Corr.*, 834 F.3d 263, 310 (3d Cir 2016); *Brown v. Superintendent Greene SCI*, 834 F.3d 506, 519-20 (3d Cir. 2016) (holding that "the Pennsylvania Supreme Court acted contrary to U.S. Supreme Court law by apparently requiring prosecutors to act in bad faith for protections to arise, and it misapplied *Bruton*, *Frazier*, *Richardson*, and *Gray* by not requiring a mistrial"); *Adamson v. Cathel*, 633 F.3d 248, 259 (3d Cir. 2011) (holding that the New Jersey state court's "failure to instruct the jury regarding the proper use of the accomplice statements, statements which facially incriminated Adamson, was plain and obvious error that was directly contrary to *Street*'s holding."); *Pazden v. Maurer*, 424 F.3d 303, 319 (3d Cir. 2005) (holding that the New Jersey state court's "rejection of Pazden's Sixth Amendment claim was contrary to the pronouncements of *Johnson*. Pazden's waiver of counsel was not voluntary in the constitutional sense."); *Lewis v. Johnson*, 359 F.3d 646, 654, 659 (3d Cir. 2004); *Halloway v. Horn*, 355 F.3d 707, 729 (3d Cir. 2004) (holding that application of Pennsylvania law was "at odds with *Batson*'s first step because it places a burden upon the defendant to make a record of largely irrelevant information in order to raise an inference that the prosecutor excluded members of the venire on account of race."); *Constant v. Pa. Dep't of Corr.*, 912 F.Supp. 2d 279, 308 (W.D.Pa. 2012) (holding that "the exclusion of the petitioner's wife and the general public from jury selection was contrary to . . . long standing, controlling United States Supreme Court precedent. . . ."); *Mack v. Folino*, 383 F.Supp. 2d 780, 789 (E.D.Pa. 2005) (holding that "the procedure employed by the trial court at the hearing, and specifically the complete prohibition on any cross-examination of Mosley, was constitutionally flawed because it violated the basic requirements of the Due Process Clause."); *Wallace v. Price*, 265 F.Supp. 2d 545, 558 (W.D.Pa. 2003); *McFarland v. English*, 111 F.Supp. 2d 591, 602 (E.D.PA. 2000) (holding that the Pennsylvania state court's decision to allow a defendant to appear in prison clothes over the defendant's objection was contrary to the Supreme Court's decision in *Estelle v. Williams.*).

highlight a few of these decisions.

In *Pierce*, the Third Circuit considered the New Jersey state court's analysis of *Strickland's* prejudice component which required the criminal defendant "to show 'by a preponderance of the evidence that the result of his criminal proceeding would have been different.'"[26] The Third Circuit found that this "standard required Pierce to prove more than what *Strickland* requires" and that this standard was "'diametrically different,' 'opposite in character or nature,' and ' mutually opposed' to our clearly established precedent in *Strickland* and therefore contrary to clearly established federal law."[27]

In *Dennis*, the Third Circuit considered Pennsylvania's state court's *Brady* analysis which included a requirement that the defendant "affirmatively show that the [*Brady* materials] were admissible."[28] The Third Circuit held that "The Pennsylvania Supreme Court's characterization of admissibility as a separate, independent prong of *Brady* effectively added admissibility as a requirement. This runs afoul of Supreme Court precedent."[29]

In *Lewis*, the defendant appealed the denial of his 2254 petition in which he alleged that Pennsylvania Supreme Court's decision to deny his ineffective assistance of counsel claim for counsel's failure to file a notice of appeal was contrary to clearly established federal law.[30] The Third Circuit agreed, finding Pennsylvania case law which held that counsel could never be ineffective for failing to file a notice of appeal when a defendant did not request an appeal to be filed was contrary to clearly established federal law which imposed a mandatory obligation for attorney

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[26] *Pierce*, No. 18-3192, at 6.
[27] *Id*. at 6-7 (quoting *Williams*, 529 U.S. at 406).
[28] *Dennis*, 834 F.3d at 307.
[29] *Id*. at 310.
[30] *Lewis*, 359 F.3d at 649, 651.

to consult with their client about the filing of an appeal.[31]

Like *Pierce*, *Dennis*, and *Lewis*, the present matter presents this Court with a situation in which the state courts misinterpret clearly established federal law.[32] Rather than applying the preponderance of the evidence evidentiary standard required by the United States Supreme Court's decisions in *McMillan*, *Watts*, and *Nichols*,[33] the Delaware Supreme Court misinterpreted these cases, refuted their applicability, and upheld the use of the erroneous "minimal indicia of reliability" standard.[34] As the application of the "minimal indicia of reliability" as a burden of proof to resolve fact disputes at sentencing is "diametrically different, opposite in character or nature, and mutually opposed to [the] clearly established precedent"[35] of *McMillan*, *Watts*, and *Nichols*, the Third Circuit opinions of *Pierce*, *Dennis*, and *Lewis* are controlling and require this Court to find that the Delaware Supreme Court's decision to uphold the application of the "minimal indicia of reliability" standard is contrary to clearly established federal law.

The District Court for the Western District of Pennsylvania's decision in *Wallace v. Price*[36] also provides support for Mr. Smack's argument. In *Wallace*, the defendant asserted that the Pennsylvania state court's evidentiary rulings barring the introduction of his co-defendant's prior statement and confession violated the confrontation clause of the Sixth Amendment.[37] The Third Circuit agreed and held that "the trial court's evidentiary rulings barring Wallace from exposing to

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[31] *Id*. at 654, 659.

[32] *Pierce*, No. 18-3192, at 6-7; *Dennis*, 834 F.3d at 310; *Lewis*, 359 F.3d at 649, 651.

[33] *Watts*, 519 U.S. at 156-57; *Nichols*, 511 U.S. at 747-49; *McMillan*, 477 U.S. 84-87, 91-93.

[34] SR589-90.

[35] *Pierce*, No. 18-3192, at 6-7 (quoting *Williams*, 529 U.S. at 406) (internal citations omitted).

[36] *Wallace*, 265 F.Supp. 2d 545.

[37] *Id*. at 558.

the jury the facts concerning Brown's statement that he 'shot the girl' rose to the level of a violation of the confrontation clause of the Sixth Amendment."[38] Although Mr. Smack's case does not involve a violation of the confrontation clause like in *Wallace*, the holding in *Wallace* nevertheless provides support for Mr. Smack's argument that the Delaware State Courts' evidentiary ruling that the applicable burden of proof for disputed facts presented at a Delaware sentencing hearing was a "minimal indicia of reliability" violated Mr. Smack's due process rights under the Fourteenth Amendment.[39]

II. The Respondents' argument that no disputed facts were presented at Mr. Smack's sentencing hearing is factually inaccurate, should not be entitled to the rebuttable presumption of correctness, but in any event, because it is factually inaccurate there is clear and convincing evidence to rebut any presumption.

The Respondents' claim that "[t]he Delaware Supreme Court correctly determined that the sentencing court did not violate Smack's due process rights by considering comments made by a prosecutor at sentencing, when those comments were not based on disputed facts" and that this Court "must presume that the state court's determination of factual issues are correct."[40] However, the Respondents are incorrect as the Delaware Courts did not find that no disputed facts were presented during Mr. Smack's sentencing hearings. Even if such a finding was made, there is clear and convincing evidence in the record to rebut the presumption of correctness as there were a multitude of disputed facts, which included 64 indicted counts of which Mr. Smack was not convicted, relied upon by the judge when sentencing Mr. Smack.[41]

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[38] *Id*.

[39] SR589-90; *Watts*, 519 U.S. at 156-57; *Nichols*, 511 U.S. at 747-49; *McMillan*, 477 U.S. 84-87, 91-93.

[40] Answer at 7 (citing 28 U.S.C. § 2254(e)(1); Answer at 18.

[41] SR230-31.

Pursuant to 28 U.S.C. § 2254(e)(1), "a determination of a factual issue made by a State court shall be presumed to be correct."[42] "Factual issues" are "'what happened,' 'scene-and action-setting questions,' as well as matters that turn on the appraisal of witness credibility or demeanor. . . ."[43] Although a determination of a factual issue is presumed to be correct,[44] the "[d]eference accorded a state court's determination of fact is not limitless and 'does not by definition preclude relief.'"[45] This is because a petitioner may rebut the presumption by clear and convincing evidence.[46]

While the Respondents assert "that the sentencing court did not violate Mr. Smack's due process right by considering comments made by a prosecutor at sentencing, when those comments were not based on disputed facts" is entitled to the presumption of correctness,[47] a review of the record makes it apparent that the Delaware Supreme Court made no such finding.[48] Thus, the Respondents' incorrect assertion that there were no disputed facts presented during Mr. Smack's sentencing hearing is not entitled to the presumption of correctness.

However, assuming *arguendo*, that this Court finds that the Delaware Supreme Court did make the factual determination that no disputed facts were presented at Mr. Smack's sentencing hearing, which it can not, there is clear and convincing evidence on the record to rebut the presumption of correctness.

As Mr. Smack painstakingly described in his Opening Brief, the record is clear that multiple

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[42] 28 U.S.C. § 2254(e)(1).

[43] *Washington v. Sobina*, 509 F.3d 613, 621 (3d Cir. 2007) (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003)).

[44] 28 U.S.C. § 2254(e)(1).

[45] *Washington*, 509 F.3d at 621 (quoting *Miller-El*, 537 U.S. at 340).

[46] *Id*; 28 U.S.C. § 2254(e)(1).

[47] Answer at 18.

[48] SR591 (holding that the "Superior Court did not err by applying a minimal indicia of reliability standard or by denying the evidentiary hearing.").

disputed facts were presented at Mr. Smack's sentencing hearing and were relied upon when sentencing by the judge. In particular, Mr. Smack described how during the June 22, 2016 hearing, which was the continued first stage of Mr. Smack's sentencing hearing, that the evidence did not support the State's characterization of Mr. Smack as a drug kingpin and asserted that the State was essentially "sandbagging" Mr. Smack by making arguments that were "beyond the indictment."[49] More importantly, Mr. Smack noted, during the November 9, 2016 oral argument, that he contested "the other uncharged aspects, such as Mr. Price's residence and what [was] found in Mr. Price's residence" as well as all "conduct beyond conviction."[50] Additionally, after the oral argument, Mr. Smack filed a November 18, 2016 letter to the Sentencing Judge specifically identifying the counts of the indictment that he contested.[51] Mr. Smack asserted that he would not contest "the Court's consideration at sentencing under the minimal indicium of reliability burden of proof" of 57 of the indicted counts that Mr. Smack was not convicted of, but would contest 7 non-convicted counts of the indictment which did not meet the erroneous "minimal indicia of reliability" burden of proof.[52] However, the Sentencing Court ultimately rejected this argument at the November 23, 2016 sentencing hearing when it noted "we have had this discussion and I have written in the opinion to you guys that there is a sufficient indicia of reliability to an indictment for me to, at least, consider the indicted counts."[53] Thus, the record is crystal clear that facts contested by Mr. Smack, the 64 non-convicted counts of the indictment, were resolved and relied upon by the Sentencing Judge at Mr. Smack's sentencing hearing and therefore, there is clear and convincing evidence to rebut any

[49] Opening at 8-9; SR117.
[50] Opening at 10; SR213.
[51] Opening at 11, 24-25; SR220-21.
[52] *Id*.
[53] SR230; *see also* SR219.

potentially applicable presumption of correctness to the Respondents' incorrect argument that no disputed facts were presented at Mr. Smack's sentencing hearing.

Mr. Smack's argument that there is clear and convincing evidence to rebut any applicable presumption of correctness to the Respondents' incorrect argument is buttressed by the United States Supreme Court decision in *Wiggins v. Smith* as well as the decisions of other circuit courts and other district courts in the Third Circuit.[54] In *Wiggins,* the Supreme Court found that a petitioner overcame the presumption of correctness.[55] In that case, the Supreme Court held that the "Maryland Court of Appeals' application of *Strickland's* governing legal principles was objectively unreasonable."[56] In support of this finding, the Supreme Court noted that the Maryland Court of Appeals holding that counsel's mitigation investigation was adequate was "based . . . in part, on a clear factual error– that the 'social service records . . . recorded incidences of . . . sexual abuse.'"[57] The Supreme Court continued on to note that "the records contain[ed] no mention of sexual abuse, much less of the repeated molestations and rapes of petitioner" and for this reason, "[t]he state court's assumption that the records documented instances of abuse has been shown to be incorrect by 'clear and convincing

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[54] *Wiggins v. Smith*, 539 U.S. 510, 528 (2003); *Richards v. Quarterman*, 566 F.3d 553, 570 (5th Cir. 2009) (holding that "[i]n light of the absence of any credible explanation for . . . fail[ing to introduce medical records], we agree with district court that the state court's . . . factual findings were rebutted by clear and convincing evidence."); *Mitchell v. Mason*, 325 F.3d 732, 747 (6th Cir. 2003) (holding that there was clear and convincing evidence to rebut the Michigan Supreme Court's finding that the petitioner was represented by counsel prior to his trial.); *Scott v. Mullin*, 303 F.3d 1222, 1229-30 (10th Cir. 2002) (holding that the petitioner "rebutted the presumption that he could have raised his *Brady* claim . . . on direct apeal."); *Torres v. Prunty*, 223 F.3d 1103, 1110, n.6 (9th Cir. 2000) (holding that the petitioner rebutted the presumption of correctness for the state court's finding that there was no bona fide doubt in relation to the petitioner's competency.); *Showers v. Beard*, 586 F.Supp. 2d 310, 329 (M.D.Pa. 2008).

[55] *Wiggins*, 539 U.S. at 528.

[56] *Id*. at 527.

[57] *Id*. at 528.

evidence.'"[58]

In *Showers*, the petitioner contended that trial counsel was ineffective "for failing to present rebuttal expert testimony" during petitioner's trial.[59] The Middle District Court of Pennsylvania agreed finding that the Pennsylvania Superior Court's "holding rests in part on the inappropriate factual determination that trial counsel's cross-examination of [the Commonwealth's expert witness] effectively elicited testimony helpful to the defense, and that his closing argument to the jury negated the merit of" petitioner's claim.[60]

As outlined above,[61] should this Court find that the presumption of correctness should apply to the Respondents' assertion that no disputed facts were presented at Mr. Smack's sentencing hearing, which it can not, the record provides clear and convincing evidence to rebut this presumption as was the case in *Wiggins*. Thus, like the Supreme Court in *Wiggins* and the Middle District Court of Pennsylvania, this Court must find that the Respondents' assertion that no disputed facts were presented during Mr. Smack's sentencing hearing is "plainly controverted by the evidence in the state court record" and therefore, Mr. Smack has rebutted the presumption of correctness.

In further support of their argument that Mr. Smack is not entitled to habeas relief, the Respondents make a series of unsupported factual assertions which include: 1) "Smack failed to point to materially false information relied upon by the sentencing court"; 2) "Smack did not allege that anything in the presentence report was, in fact, inaccurate"; 3) "Smack admitted to the drug

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[58] *Id*. (quoting 28 U.S.C. § 2254(e)(1)).

[59] 586 F.Supp. 2d at 313.

[60] *Id*. at 328; *Id*. at 329 ("Further, the Superior Court's factual determination that trial counsel meaningfully prepared for the guilt phase by relying solely on his cross-examination of the Commonwealth's expert and on his own closing argument is plainly controverted by the evidence in the state court record.").

[61] *Supra* at 9-10.

dealing alleged in the indictment"; and 4) "[t]he only specific factual challenge was to Smack's relationship to Price and the contraband seized from Price's residence."[62] As described below, none of the Respondents' unsupported factual assertions can serve as a ground for denying Mr. Smack relief.

The Respondents' assertion that "Smack failed to point to materially false information relied upon by the sentencing court" and "[t]he only specific factual challenge was to Smack's relationship to Price and the contraband seized from Price's residence"[63] are factually inaccurate. As described above,[64] Mr. Smack, during the June 22, 2016 hearing, argued that the evidence did not support the State's characterization of Mr. Smack as a drug kingpin and that the State was essentially "sandbagging" Mr. Smack by making arguments that were "beyond the indictment."[65] At the November 9, 2016 oral argument, Mr. Smack clearly indicated that he was not only contesting "the other uncharged aspects, such as . . . what [was] found in Mr. Price's residence" but also all "conduct beyond conviction."[66] Additionally, in Mr. Smack's November 18, 2016 letter, Mr. Smack specifically identified the specific counts of the indictment which were so lacking in evidence that they did not even meet the erroneous "minimal indicia of reliability" standard of proof.[67] Furthermore, during the November 23, 2016 sentencing hearing, Mr. Smack argued that Mr. Smack "was no[t a] kingpin, but rather a "retail drug dealer"[68] as well as presented argument to rebut the illogical argument that Mr. Smack's actions were a greater harm than those of the wholesale drug

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[62] Answer at 10.
[63] Answer at 10.
[64] *Supra* at 9-10.
[65] Opening at 8-9; SR117.
[66] Opening at 10; SR213.
[67] Opening at 11, 24-25; SR220-21.
[68] Opening at 12, 25; SR224.

supplier.[69] Nevertheless, the Sentencing Court rejected Mr. Smack's argument and considered all of the indicted counts.[70] Additionally, the Sentencing Court largely adopted the State's sentencing argument when crafting Mr. Smack's ultimate sentence.[71] Thus, the record clearly refutes the Respondents' assertions that "Smack failed to point to materially false information relied upon by the sentencing court" and "[t]he only specific factual challenge was to Smack's relationship to Price and the contraband seized from Price's residence"[72]

Additionally, the Respondents' assertion that "Smack admitted to the drug dealing alleged in the indictment"[73] is overly broad and misleading. As noted in the Opening Brief,[74] Mr. Smack was indicted on five counts of Drug Dealing in violation of 16 *Del. C.* § 4752(1) and sixty-six counts of

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[69] Opening at 12, 25-26; SR228 ("But I think what the State is essentially, making an argument is that the street-level dealer is more of an aggravating person than the individual who is the nefarious, more shadowy wholesaler supplier and the people above them. First, 77 drug deals that are recorded within a two month time period, Your Honor, that . . . indicative of retail sales"); SR228 ("what we are talking about, slightly more than one heroin deal per day over a two month time period. Your Honor, that's not even a reasonably high-level retail dealer as far as what retail sales would be. Individuals at a corner, if we step back, are we expecting that they only make two sales within a day, or less than two sales within a day? So I think this characterization is completely undermined by the irrefutable facts of what the State knows. Secondarily, the danger is not the street corner individuals.").

[70] SR230 ("we have had this discussion and I have written in the opinion to you guys that there is a sufficient indicia of reliability to an indictment for me to, at least, consider the indicted counts.").

[71] SR230-31 ("I think of all of the victims of his crime. And not only the people who purchases the drugs which he sells, but also their loved ones and families. I think about all of the lives that he has destroyed. I think about the fact that he has willingly destroyed them because it provides him with money. And I believe that, in addition to the value of punishment, I need to remove individuals from society who are going to prey upon those who are weak and addicted to drugs.").

[72] Answer at 10.

[73] Answer at 10.

[74] Opening at 7.

Drug Dealing in violation 16 *Del. C.* § 4754(1).[75] However, Mr. Smack only pled guilty[76] to two counts of Drug Dealing Heroin in a Tier 4 Quantity (Counts 36, 37)[77] and two counts of Drug Dealing Heroin no tier weight (Counts 40, 122).[78] Thus, the Respondents' assertion, which implies that Mr. Smack admitted to all drug dealing counts of the indictment, is materially incorrect, overly broad, and has no merit.

Furthermore, the Respondents' reference to *Williams v. New York* and its assertion that "Smack did not allege that anything in the presentence report was, in fact, inaccurate"[79] is meaningless as the record is clear that Mr. Smack presented multiple disputed facts during his sentencing proceedings which included 64 indicted counts of which Mr. Smack was not convicted.[80] Thus, the state court record clearly refutes the accuracy of all of the Respondents' assertions which should hold no weight in this Court's analysis of Mr. Smack's claim for relief.

III. Federal case law permits sentencing judges to consider any information when sentencing a defendant that has "probable accuracy", which means information that rises to a level of a preponderance of the evidence.

The Respondents assert that the applicable clearly established law "can be found in *United States v. Tucker* and *Townsend v. Burke*"[81] and that these cases "stand for the general proposition that a criminal defendant has a due process right to be sentenced on the basis of accurate information.[82]

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[75] SR4, DE# 3, SR16-102.
[76] SR103, SR106-11.
[77] SR30.
[78] SR31, SR56.
[79] Answer at 10.
[80] *Supra* at 9-10, 13-14.
[81] Answer at 9-10 (citing *United States v. Tucker*, 404 U.S. 443 (1972); *Townsend v. Burke*, 334 U.S. 736 (1948)).
[82] Answer at 10 (citing *United States v. Baylin*, 696 F.2d 1030, 1040 (3d Cir. 1982) ("as a matter of due process, factual matters may be considered as a basis for a sentence only if they have some minimal indicium of reliability")).

Mr. Smack firmly agrees with the "general proposition that a criminal defendant has a due process right to be sentenced on the basis of accurate information."[83] Accurate information simply must mean information that is probably accurate which is the same as more likely than not which is the preponderance of the evidence standard. It would be impossible to define the important phrase "accurate information" as meaning anything less than information that meets the preponderance of the evidence standard of proof. Thus, *Townsend* and *Tucker* can be considered by this Court as logical precursors to *McMillan*, *Nichols*, and *Watts* and provide additional support for Mr. Smack's arguments.

Additionally, the Respondents, in trying to support its argument that *McMillan*, *Watts*, and *Nichols* do not support Mr. Smack's arguments, cite to, in footnote 52 of it's Answer, language from a series of cases that mix the appellate standard of review of trial court fact findings with the issue before this Court which is the standard of proof for disputed facts presented during a sentencing hearing.[84] However, a full reading of the cases cited in footnote 52 demonstrate that the cited cases do not conflict with *McMillan*, *Nichols*, and *Watts* as they all quote language from the Federal Sentencing Guidelines and case law that fact findings that are based on probably accurate information can be considered for sentencing purposes.[85] Furthermore, the Respondents' cited case

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[83] *Id*.

[84] Answer at 11, n. 52 (citing *United States v. Zuniga*, 720 F.3d 587 (5th Cir. 2013); *United States v. Harris*, 702 F.3d 226 (5th Cir. 2012); *United States v. Christman*, 509 F.3d 299 (6th Cir. 2007) (*United States v. Moncivais*, 492 F.3d 652 (6th Cir. 1007)).

[85] *Zuniga*, 720 F.3d at 590 ("When making factual findings for sentencing purposes, a district court 'may consider any information which bears sufficient indicia of reliability to support its probable accuracy.'"); *Harris*, 702 F.3d at 230 (quoting *United States v. Johnson*, 648 F.3d 273, 277 (5th Cir. 2011)) ("In *Johnson*, we noted that our precedent 'left room for a court to consider arrests if sufficient evidence corroborates their reliability.' This rule is consistent with the constitutional due process requirement that 'sentencing facts' must be established by a preponderance of the evidence.'"); *Christman*, 509 F.3d at 305 (quoting *Moncivais*, 492 F.3d at

of *United States v. Harris* expressly notes that "the constitutional due process requirement [is] that 'sentencing facts must be established by a preponderance of the evidence.'"[86] In any event, the Respondents can not change the fact that federal case law is consistent with the guidelines and in particular the commentary note of U.S.S.G. § 6A1.3 which has read for well over a decade that "[t]he Commission believes that use of a preponderance of the evidence standard is appropriate to meet due process requirements and policy concerns in resolving disputes regarding application of the guidelines to the facts of a case."[87]

In the context of Mr. Smack, the most substantial component of disputed facts was the 64 non-convicted counts of the indictment of which the holding in *United States v. Watts*, is directly on point as it stands for the principle that non-convicted criminal conduct can be relied upon when sentencing only if there is evidence to support the illegal conduct that rises to the level of a preponderance of the evidence.[88] The Superior Court's bald reliance on 64 mere allegations, shortly and summarily described in an indictment, in no way rose to a level of proof of illegal conduct on the preponderance of the evidence standard.

Mr. Smack's constitutionally premised argument that facts relied upon when issuing a sentence by a judge must meet the preponderance of the evidence standard is not particularly novel or earth shattering as it is essentially common sense. If various facts are presented to a judge to

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658) ("U.S.S.G. § 6A1.3(a) does establish a minimum indicia-of-reliability standard that evidence must meet in order to be admissible in Guidelines sentencing proceedings."); *Moncivais*, 492 F.3d at 658 (same).

[86] *Harris*, 702 F.3d at 230 (quoting *Johnson*, 648 F.3d at 277).

[87] U.S.S.G, § 6A1.3 cmt.

[88] *Watts*, 519 U.S. at 157 ("We therefore hold that a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence.").

influence how a judge should sentence, any fact that a judge considers must be shown to be probably true in order to comply with due process.

IV. An evidentiary hearing is warranted in the event that this Court finds that the record is incomplete at present to grant relief.

As described above and within the Opening Brief,[89] Mr. Smack asserts that the state court record clearly establish the constitutional error in the Delaware Supreme Court's adherence to the "minimal indicia of reliability" burden of proof during Delaware sentencing hearings. As such, Mr. Smack asserts that an evidentiary hearing is warranted only in the event that this Court finds that the record is inadequate at present to grant Mr. Smack's habeas claim.[90]

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[89] *Supra* at 1-8; Opening at 15-32**.**

[90] *Townsend v. Sain*, 372 U.S. 293, 313 (1963) ("hold[ing] that a federal court must grant an evidentiary hearing to a habeas applicant . . . if . . . the materials facts were not adequately developed at the state court-hearing. . . ."); *Marshall v. Hendricks*, 307 F.3d 36, 117 (3d Cir. 2002) (noting "that our sister courts of appeal have likewise remanded for further factual development when the record has been inadequate to make a proper legal determination of a claim raised on habeas appeal post-AEDPA, in some instances expressly requiring an evidentiary hearing, and in others merely noting its availability as a tool for the district court to use in its development of the record."); *Gaither v. United States*, 759 A.2d 655, 657 (D.C. 2000) (holding that "[b]ecause the motions court failed to make necessary factual findings and applied an incorrect legal standard to Gaither's post-conviction *Brady* claims, we remand the case for the court to make factual findings and apply the correct rule of law."); *Farley v. United States*, 694 A.2d 887, 890 (D.C. 1997) (remanding "the record to the trial court for a hearing and determination of whether Miles' complaint to the CCRB was *Brady* material and, if so, whether had it been disclosed to the defense, there is a possibility that the result of the trial would have been undermined.").

CONCLUSION

Based on the arguments made above and within the Opening Brief regarding the merits of his claims for relief, Mr. Smack respectfully requests that this Court grant him a writ of habeas corpus so that he may be discharged from his unconstitutional confinement and restraint. This Court must recognize that Mr. Smack's sentence was the result of the Delaware state court's application of an erroneous minimal indicia of reliability burden of proof to resolve disputed facts considered by the court when imposing sentence in violation of the Due Process Clause of the Fourteenth Amendment and controlling United States Supreme Court precedent interpreting the Due Process Clause. As such, Mr. Smack's conviction must be vacated and this matter must be remanded back to the Delaware State Courts for a new sentencing hearing that fully complies with the Due Process Clause of the Fourteenth Amendment.

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Date: August 28, 2020

EXHIBIT D

LOUIS PIERCE
v.
ADMINISTRATOR NEW JERSEY STATE PRISON;
ATTORNEY GENERAL NEW JERSEY,
Appellants

No. 18-3192

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Submitted: December 10, 2019
April 8, 2020

NOT PRECEDENTIAL

Appeal from the United States District Court for the District of New Jersey (D.C. Civil Action No. 3-11-cv-05265) District Judge: Honorable Freda L. Wolfson

Submitted under Third Circuit LAR 34.1(a) On December 10, 2019

Before: RESTREPO, ROTH and FISHER, Circuit Judges

OPINION*

ROTH, Circuit Judge

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A New Jersey jury convicted Louis Pierce in state court of charges arising from a shooting in Camden, New Jersey. Pierce brings this petition for habeas corpus under 28 U.S.C. § 2254 alleging ineffective assistance of trial counsel. The District Court granted the petition and vacated Pierce's conviction. We will affirm the District Court's judgment and grant Pierce's habeas petition.

I. FACTS

On November 5, 1996, Mike Rozier and Bart Merriel stopped at a gathering in Camden where people were drinking and snorting cocaine. A little after midnight, Rozier and Merriel were leaving when someone shot them. About one year later, Rozier identified Pierce as the shooter from two photo arrays.

At trial, Rozier's testimony was the only evidence against Pierce. Two eyewitnesses testified that Pierce was not the shooter. Pierce's girlfriend testified that on November 5, like other nights, she and Pierce took the train from Camden and arrived in Philadelphia by 8:30 pm. She recalled being with Pierce the next morning when they first heard about the shooting on a 5:30 am news report. The state introduced evidence that the shooting was not reported until 5:00 pm. During the charging conference, Pierce expressed that he "was considering testifying,"[1] and the trial judge informed him it was "[t]oo late now."[2]

Pierce was convicted, and his conviction and sentence were affirmed on direct appeal. He then petitioned for post-conviction relief (PCR), alleging that his counsel was

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ineffective for failing to explain to him the process for testifying. The state PCR courts denied Pierce's petition. Pierce then petitioned for a writ of habeas corpus. The District Court held an evidentiary hearing and granted Pierce's petition. The state appealed, arguing that the District Court abused its discretion in granting an evidentiary hearing and erred in granting Pierce's habeas petition.

II. DISCUSSION

We review "a district court's grant of habeas corpus" de novo.[3] Because the state courts adjudicated Pierce's claims, we apply the deferential Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) standard.[4] Under AEDPA, a petition for a writ of habeas corpus can be granted only if the state court adjudication:

> (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 . . ..[5]

Pierce argues that the PCR courts unreasonably applied *Strickland v. Washington*[6] and made unreasonable determinations of fact. The state argues that the District Court abused its discretion in granting Pierce an evidentiary hearing and then failed to appropriately defer to the state courts in granting Pierce's habeas petition.

A. The District Court did not abuse its discretion in granting Pierce an evidentiary hearing.

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We review a district court's decision to hold an evidentiary hearing for abuse of discretion.[7] A district court has discretion to grant an evidentiary hearing so long as the petitioner has diligently "develop[ed] the factual basis of a claim in state court proceedings."[8] Diligence requires that the petitioner have sought "an evidentiary hearing in state court in the manner prescribed by state law."[9] An evidentiary hearing in New Jersey is warranted where a petitioner "has presented a *prima facie* claim in support of post-conviction relief."[10] Despite this discretion, "a court should be reluctant to convene an evidentiary hearing to explore the claims of a petitioner whose pleadings are factually insufficient to suggest any entitlement to habeas relief," or are contradicted by the record.[11] And "bald assertions and conclusory allegations do not afford a sufficient ground for an evidentiary hearing."[12] Ineffective assistance of counsel claims are "more likely to require an evidentiary hearing because the facts often lie outside the trial record and because the attorney's testimony may be required."[13]

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Pierce was diligent in developing the factual record in state court. He requested an evidentiary hearing, and his request was denied.[14] He submitted an affidavit stating that his counsel ignored his requests to testify and that he wished "to allow the jury to know [he had] no violence in [his] past."[15] This is enough to show diligence, and the District Court could have found that Pierce presented a *prima facie* case of ineffective assistance of counsel under *Strickland* sufficient to justify an evidentiary hearing. The District Court did not abuse its discretion in granting Pierce a hearing.

B. Pierce was denied effective assistance of counsel.

Pierce claims ineffective assistance of counsel under *Strickland*. A claim of ineffective assistance of counsel requires showing first "that counsel's performance was deficient," and second, that the deficiency "prejudiced the defense."[16] Prejudice, in turn, requires "show[ing] that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[17] When a defendant bringing a habeas petition under § 2254 alleges ineffective assistance of counsel, we ask "'whether the state court's application of the *Strickland* standard was unreasonable,' which 'is different from asking whether defense counsel's performance fell below *Strickland*'s standard.'"[18] In doing so, we look to the last reasoned decision of the state court—here, the opinion of the Appellate Division of the Superior Court of New

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Jersey.[19] The Appellate Division assumed deficient performance and then determined that Pierce could not show prejudice.

The Appellate Division made two errors in evaluating Pierce's petition. First, the Appellate Division determined that Pierce did not "specify what he would have said in his testimony."[20] But Pierce's affidavit mentioned that he wanted to testify that he had no history of violence, and his PCR counsel told the PCR court that he would have testified as to his alibi. The Appellate Division made no mention of these facts, and therefore its factual findings were "objectively unreasonable in light of the evidence presented in the state-court proceeding."[21]

Second, when assessing Pierce's claim of prejudice, the Appellate Division stated that Pierce "had the burden to establish that the result of the proceeding would have been different had he testified."[22] As the District Court observed, that standard required Pierce to prove more than what *Strickland* requires. *Strickland* requires only a "*reasonable probability* that . . . the result of the proceeding would have been different."[23] Requiring a petitioner to show "by a preponderance of the evidence that the result of his criminal proceeding would have been different, . . . would be 'diametrically different,' 'opposite in

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character or nature,' and 'mutually opposed' to our clearly established precedent" in *Strickland* and therefore contrary to clearly established federal law.[24]

Having determined that the state PCR court's decision was contrary to and an unreasonable application of clearly established federal law, we proceed to review Pierce's ineffective assistance of counsel claims de novo.[25] We review the District Court's factual findings following an "evidentiary hearing for clear error."[26]

Following the evidentiary hearing, the District Court found that Pierce's counsel "failed to discuss with [him] his right to testify"[27] and that Pierce misunderstood the process for testifying. Had he been allowed to do so, the District Court found that Pierce would have "take[n] the stand in his own defense and that he would have testified even if [it] meant all his prior convictions would be admitted."[28] Additionally, Pierce testified before the District Court that he would have told the jury that he never met Rozier, did not know him, and did not shoot him. Pierce said that he was infrequently in Camden during the four or five years Rozier claims to have met Pierce—he lived out of state, or in another town in New Jersey, or was incarcerated for much of that time. He additionally corroborated his girlfriend's testimony that he usually met her in Camden and would return to Philadelphia in the early evening. We find no error in these factual findings.

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Pierce has shown that counsel's performance was deficient. Counsel's performance was deficient if "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment."[29] Failure to discuss with a defendant his right to testify and inform him of the process of doing so—as counsel failed to do here—does not meet the standard of "reasonably effective assistance."[30] Therefore, counsel's performance was deficient.

Counsel's deficiency prejudiced Pierce's defense. We evaluate prejudice "in light of the totality of the evidence at trial"[31] to determine whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[32] "[A] verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support."[33] Here, the state's case came down to Rozier's identification of Pierce as the shooter. That being the only evidence supporting his

conviction, there is a reasonable probability that, had Pierce taken the stand and testified as to his alibi, the result would have been different. After all, "the most important witness for the defense in many

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criminal cases is the defendant himself."[34] Therefore, Pierce was prejudiced by counsel's deficiency.

III. CONCLUSION

For the foregoing reasons, we will affirm the District Court's grant of Pierce's petition for a writ of habeas corpus.

Footnotes:

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

[1] App. at 331.

[2] *Id.*

[3] *Rolan v. Vaughn*, 445 F.3d 671, 677 (3d Cir. 2006).

[4] *Harrington v. Richter*, 562 U.S. 86, 97-98 (2011) (citing 28 U.S.C. § 2254(d)).

[5] 28 U.S.C. § 2254(d)(1)-(2).

[6] 466 U.S. 668 (1984).

[7] *Morris v. Beard*, 633 F.3d 185, 193 (3d Cir. 2011).

[8] *Id.* (quoting 28 U.S.C. § 2254(e)(2)).

[9] *Williams v. Taylor*, 529 U.S. 420, 437 (2000).

[10] *State v. Goodwin*, 803 A.2d 102, 110 (N.J. 2002) (citing *State v. Preciose*, 609 A.2d 1280, 1286 (N.J. 1992)).

[11] *Palmer v. Hendricks*, 592 F.3d 386, 393 (3d Cir. 2010) (citing *Schriro v. Landrigan*, 550 U.S. 465, 474 (2007)).

[12] *Mayberry v. Petsock*, 821 F.2d 179, 185 (3d Cir. 1987); *see also Palmer*, 592 F.3d at 395 (rejecting claim that district court was required to hold evidentiary hearing where petitioner included only that he wanted "to tell his side of the story" and provided "conclusory invocation of the words 'self-defense'").

[13] *Preciose*, 609 A.2d at 1286.

[14] See *Thomas v. Horn*, 570 F.3d 105, 125-26 (3d Cir. 2009).

[15] App. 509.

[16] *Strickland*, 466 U.S. at 687.

[17] *Id.* at 694.

[18] *Grant v. Lockett*, 709 F.3d 224, 232 (3d Cir. 2013) (quoting *Harrington*, 562 U.S. at 101).

[19] *Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018). The New Jersey Supreme Court denied review in an unreasoned decision. *See State v. Pierce*, 13 A.3d 1290 (N.J. 2011). Although the District Court also examined the reasoning of the PCR trial court, we find no reason to do so as the Appellate Division supplied its own analysis.

[20] App. 546.

[21] *Dennis v. Sec'y, Pa. Dept of Corr.*, 834 F.3d 263, 281 (3d Cir. 2016) (en banc) (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003)).

[22] App. 546.

[23] *Strickland*, 466 U.S. at 694 (emphasis added).

[24] *Williams v. Taylor*, 529 U.S. 362, 406 (2000).

[25] *See Panetti v. Quarterman*, 551 U.S. 930, 953-54 (2007); *Branch v. Sweeney*, 758 F.3d 226, 233 (3d Cir. 2014).

[26] *Morris*, 633 F.3d at 193.

[27] App. 57.

[28] App. 59.

[29] *Strickland*, 466 U.S. at 687.

[30] *Id.*; *see also United States v. Leggett*, 162 F.3d 237, 249 n.12 (3d Cir. 1998) (acknowledging that an ineffective assistance of counsel claim "would at least be colorable if [counsel] had kept him from testifying against his will"); *United States v. Teague*, 953 F.2d 1525, 1534 (11th Cir. 1992) (giving as one example of deficient conduct that "defense counsel never informed the defendant of the right to testify, and that the ultimate decision belongs to the defendant").

[31] *Rolan*, 445 F.3d at 682.

[32] *Strickland*, 466 U.S. at 694.

[33] *Id.* at 696.

[34] *Rock v. Arkansas*, 483 U.S. 44, 52 (1987).
