No._____

IN THE SUPREME COURT OF THE UNITED STATES

TYRIUS GREEN

Petitioner

v.

ATTORNEY GENERAL, STATE OF NEW JERSEY AND STEPHEN M. D'ILIO, ADMINISTRATOR, NEW JERSEY STATE PRISON

Respondents

ON PETITION FOR A WRIT OF CERIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

APPENDIX

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APPENDIX TABLE OF CONTENTS

PAGE

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 19-3325

TYRIUS GREEN,
Appellant

v.

ATTORNEY GENERAL NEW JERSEY;
ADMINISTRATOR NEW JERSEY STATE PRISON

On Appeal from the United States District Court
for the District of New Jersey
(D.C. No. 3-15-cv-01886)
District Judge: Honorable Peter G. Sheridan

Submitted under Third Circuit L.A.R. 34.1(a)
December 15, 2020

Before: GREENAWAY, JR., SHWARTZ, and FUENTES, Circuit Judges.

JUDGMENT

This cause came to be considered on the record from the United States District Court for the District of New Jersey and was submitted on December 15, 2020.

On consideration whereof, it is now hereby ORDERED and ADJUDGED by this Court that the order of the District Court, entered September 10, 2019, is AFFIRMED.

APPENDIX A

Costs shall be taxed against Appellant. All of the above in accordance with the Opinion of this Court.

ATTEST:

s/Patricia S. Dodszuweit

Clerk

Dated: January 27, 2021

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
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(Filed: January 27, 2021)

OPINION*

SHWARTZ, Circuit Judge.

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

Tyrius Green was convicted of murder and gun possession following a jury trial. Green claims he is entitled to habeas relief because (1) his Fifth Amendment and Fourteenth Amendment due process rights were violated by the trial court's factually erroneous jury instructions regarding the witnesses' purported in-court identifications, and (2) his Sixth Amendment right to effective assistance of counsel was violated by his trial counsel's failure to object to those instructions. The District Court denied relief because Green failed to show that the errors prejudiced him. We agree and will affirm.

I

In 2003, Edgerton Munroe was shot and killed in Trenton, New Jersey. Police obtained signed statements about the incident from five witnesses. Each witness placed Green at the scene of the crime and two identified him as the shooter. For instance, one witness stated that she recognized Green as the shooter based on his distinctive walk; another said he saw Green running from the scene just after the shots were fired; a third noted that she recognized Green as the shooter even though he wore a black mask across the bottom of his face because she had known Green "[s]ince he was a little boy" and would "know [him] anywhere," J.A. 357; another witness said that she at first believed the shooter was Green, but she called out to him and he did not answer; and a final witness said he did not witness the shooting, but he saw Green call Munroe over to him just before the shooting occurred.

At trial, the testimony of two witnesses differed from their written statements. The witness who previously identified Green as the shooter based on his distinctive walk stated she could not remember anything about the shooting because the incident happened years

earlier and she was using crack cocaine at the time. The witness who previously identified Green as the shooter and who stated she had known him since he was a boy provided contradictory testimony, noting instead that she did not know Green particularly well and was "cracked out" when she made the statement. J.A. 171-72, 178-79. Overall, the five witnesses each testified that they knew Green and identified him in court, but they did not specifically identify Green as the shooter.

After the evidence was presented, the trial court instructed the jury. In its instructions, the court erroneously referred to witnesses who supposedly made in-court identifications of Green as the shooter. Specifically, the trial court stated:

> Now, the State, in trying to meet [its] burden, presented the testimony of several witnesses who identified the defendant. You will recall that these witnesses identified the defendant in court as the person who committed the offenses charged. The State also presented testimony that on a prior occasion before this trial witnesses made such an identification . . . .
> . . .
> If you determine that the out-of-court identification is not reliable, you must still consider the witness's in-court identification of the defendant, if you find it to be reliable.
> . . .
> The ultimate issues of the trustworthiness of the in court and out-of-court identifications are for you to decide.

J.A. 328-29.

The trial court also reminded the jury that it was their job to weigh the evidence and determine the facts of the case. To that end, the trial court stated that "[r]egardless of what counsel may have said, regardless of what I may have said in recalling the evidence in this case, it is your recollection of the evidence that should guide you as sole judges of the facts[,]" adding shortly after, "you must rely solely on your understanding and

recollection of the evidence that was admitted during the trial." J.A. 322. No party objected to any part of the jury instructions.

The jury returned guilty verdicts. Green appealed his conviction to the New Jersey Superior Court, Appellate Division, arguing, in relevant part, that the in-court identification instruction deprived him of a fair trial. The Appellate Division agreed with Green that the trial judge made an error but concluded that the error did not have "the clear capacity to produce an unjust result." J.A. 377. Green then sought post-conviction relief, this time arguing that his trial counsel was ineffective for, among other reasons, not objecting to the erroneous instruction. The New Jersey Superior Court rejected Green's petition, holding that trial counsel's failure to object to the erroneous instruction did not fall below the standard of competent representation. The Appellate Division affirmed the denial of post-conviction relief, and the New Jersey Supreme Court denied the petition for certification.

Green petitioned for a writ of habeas corpus under 28 U.S.C. § 2254, contending, among other things, that (1) the trial court's erroneous instruction violated his right to due process, and (2) his trial counsel was ineffective for failing to object to that instruction. The District Court rejected those contentions and denied Green's petition, but it granted a certificate of appealability on both issues. Green appeals.

II[1]

A

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. §§ 2241-2254, restricts a federal court's power to grant a writ of habeas corpus when a state court has already denied the same underlying claim on the merits, unless the state court's adjudication of that claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States . . . ." 28 U.S.C. § 2254(d)(1); Blystone v. Horn, 664 F.3d 397, 417 (3d Cir. 2011). "[A] decision by a state court is contrary to clearly established law if it applies a rule that contradicts the governing law set forth in the [Supreme] Court's cases or if it confronts a set of facts that are materially indistinguishable from a decision of the [Supreme] Court and nevertheless arrives at a result different from the [Supreme] Court's precedent." Blystone, 664 F.3d at 417 (citing Williams v. Taylor, 529 U.S. 362, 405-06 (2000)). "A state court decision is objectively unreasonable if the state court identifies the correct governing principle from the Supreme Court's decision but unreasonably applies that principle to the facts of the prisoner's case." Id. (internal quotation marks, citation, and alterations omitted).

On direct appeal, the state court determined that the jury instruction error was harmless in that it did not have "the clear capacity to produce an unjust result[,]" J.A. 377. This ruling constitutes an adjudication "on the merits" under AEDPA. Johnson v.

[1] The District Court had jurisdiction pursuant to 28 U.S.C. § 2254. We have jurisdiction under 28 U.S.C. §§ 1291 and 2253.

Lamas, 850 F.3d 119, 133-34 (3d Cir. 2017). If we were reviewing such a ruling on direct appeal, we would review whether the error is harmless beyond a reasonable doubt under Chapman v. California, 386 U.S. 18, 24 (1967). On collateral attack, however, a petitioner must show that the trial court's determination resulted in actual prejudice, which means that the error must have "had substantial and injurious effect or influence in determining the jury's verdict." Brecht v. Abrahamson, 507 U.S. 619, 637 (1993) (citation omitted). In making that determination, we must also be mindful of AEDPA deference. As result, we may not award § 2254 relief "unless the harmlessness determination itself was unreasonable." Johnson, 850 F.3d at 134 (emphasis and citation omitted). For the ruling to be unreasonable, it must be "so lacking in justification that the[] . . . error [is] well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Davis v. Ayala, 576 U.S. 257, 169-70 (2015) (citation omitted). Put succinctly, in this context, "a state-court decision is not unreasonable if 'fair-minded jurists could disagree on [its] correctness.'" Id. at 269. (alteration in original and citation omitted).

Green is correct that the identification jury instruction incorrectly stated that "several witnesses . . . identified the defendant in court as the person who committed the offenses charged." J.A. 328. The record reveals that while all five witnesses identified Green in court as someone they knew and that none of them identified him in court as the person who committed the crime. It was erroneous for the trial court to note otherwise. Assuming that this error was one of constitutional magnitude, the state court's determination that it was harmless was not unreasonable. Given all of the evidence, the

flawed instruction did not have a "substantial and injurious effect or influence in determining the jury's verdict," Brecht, 507 U.S. at 637 (citation omitted), or "so infect[] the entire trial that the resulting conviction violates due process," Estelle v. McGuire, 502 U.S. 62, 72 (1991) (citations omitted). More specifically, a fair-minded jurist could find that this error was harmless because there was considerable evidence proving that Green killed Munroe. First, the testimony of two witnesses, neither of whom actually witnessed the shooting, place Green at the scene of the crime with the victim: one witness testified that Green called Munroe over to him just before the shooting and the other witness testified that he saw Green running from the scene just after the shots were fired. Second, in the days after the incident, two other witnesses signed written statements identifying Green as the shooter, and these statements were introduced at trial as substantive evidence. While these two witnesses retracted from their written statements at trial, the jury was entitled to view the written statements as more credible than the in-court testimony.[2]

In sum, there was evidence placing Green at the scene of the crime and identifying him as the shooter. In light of this evidence and the trial court's instruction to the jury that their recollection of the evidence governed, the trial court's factually erroneous instruction did not "ha[ve] a substantial influence on the verdict. . . ." Yohn v. Love, 76 F.3d 508, 523 (3d Cir. 1996) (citation omitted). Accordingly, the state court's analysis of

[2] In fact, throughout the trial, Green's counsel repeatedly focused on whether the jury should believe the in-court testimony or the out-of-court written statements. The trial court's erroneous instruction was unlikely to distract the jurors from this key issue.

this issue was not "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Johnson, 850 F.3d at 134 (internal quotation marks and citation omitted).[3] Thus, the District Court correctly denied relief based upon Green's Fifth and Fourteenth Amendment due process claims.

B

Green's Sixth Amendment ineffective assistance of counsel claim also fails. Under the two-part test articulated in Strickland v. Washington, 466 U.S. 668 (1984), a petitioner asserting ineffective assistance of counsel "must demonstrate (1) that counsel's performance was deficient, in that it fell below an objective standard of reasonableness, and (2) that the petitioner suffered prejudice as a result of the deficiency." Blystone, 664 F.3d at 418 (citing Strickland, 466 U.S. at 687). Under the prejudice prong, a 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. A reasonable probability

[3] The erroneous jury instruction also did not "relieve[] the government of its burden of proving every element beyond a reasonable doubt," Bennett v. Superintendent Graterford SCI, 886 F.3d 268, 285 (3d Cir. 2018), because the language that Green challenges did not go to a specific element of the crime or otherwise reduce the state's burden of proof, cf. Tyson v. Superintendent Houtzdale SCI, 976 F.3d 382, 392 (3d Cir. 2020) (concluding there was a due process violation where erroneous jury instructions created "a strong likelihood the jury convicted [petitioner] as an accomplice to first-degree murder without finding he possessed the specific intent to kill.").

is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694.

Even if Green's trial counsel's failure to object to the erroneous jury instruction fell below an objective standard of reasonableness, Green has not demonstrated that he was prejudiced as a result. As already explained, the trial court's erroneous jury instruction did not harm Green as there no "grave doubt whether the error had a substantial or injurious effect or influence in determining the verdict" under Brecht, 507 U.S. at 637. For those same reasons, he cannot establish prejudice under Strickland. See Preston v. Superintendent Graterford SCI, 902 F.3d 365, 382 (3d Cir. 2018) ("The prejudice prong of the Strickland analysis is consistent with the general 'harmless error' standard applicable to all federal habeas petitioners alleging non-structural errors." (citation omitted)); Whitney v. Horn, 280 F.3d 240, 258 (3d Cir. 2002) ("[T]he ultimate issue under either [the Brecht or Strickland] test reduces to determining what effect, if any, the erroneous instruction had on the jury's verdict."). Thus, Green's ineffective assistance of counsel claim does not provide a basis for relief.

III

For the foregoing reasons, we will affirm the District Court's order denying Green's petition.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

TYRIUS GREEN, Petitioner, v. STEVEN M. D'ILIO, et al, Respondents.	Civil Action No. 15-1886 (PGS) **ORDER**

This matter has come before the Court on the Petition for Writ of Habeas Corpus of Petitioner Tyrius Green (the "Amended Petition") for relief under 28 U.S.C. § 2254. The Court having considered the submissions of the parties and for the reasons set forth in the Opinion filed herewith,

IT IS on this 10 day of September, 2019, hereby

ORDERED that the Amended Petition (ECF No. 3) is DENIED; and it is further

ORDERED that a certificate of appealability **shall issue** limited to the questions of whether the trial court's jury instruction on identification violated Petitioner's rights under the Fifth and Fourteenth Amendments (Grounds Twelve, Seventeen, Eighteen, Twenty, and Twenty-One) and whether Petitioner's counsel was ineffective for failing to object to the identification instruction (Grounds Three and Twenty-Four); and it is further

ORDERED that a certificate of appealability is denied as to all other grounds; and it is further

ORDERED that the Clerk of the Court shall serve a copy of this Order upon Petitioner by regular U.S. mail; and it is further

ORDERED that the Clerk shall marked this case as CLOSED.

PETER G. SHERIDAN
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

TYRIUS GREEN, Petitioner, v. STEVEN M. D'ILIO, et al, Respondents.	Civil Action No. 15-1886 (PGS) **OPINION**

PETER G. SHERIDAN, U.S.D.J.

I. INTRODUCTION

Petitioner Tyrius Green ("Petitioner"), a convicted criminal in the State of New Jersey, has filed an Amended Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254, challenging a conviction and sentence imposed by the State for murder, possession of a firearm for an unlawful purpose, and unlawful possession of a weapon. (ECF No. 3.) Respondents have filed a Response. (ECF No. 10.) Petitioner filed a Traverse. (ECF No. 14.) For the reasons set forth below, the Court will deny the Amended Petition on the merits.

II. BACKGROUND

The charges against Petitioner arose from an incident that occurred on August 14, 2003 in Trenton, New Jersey. The New Jersey Superior Court, Appellate Division set forth the facts, as adduced at a jury trial, as follows:

> At trial, Kenute Brown testified that at about 10:00 p.m. that night, while Brown was purchasing crack-cocaine, he heard defendant shout out, "Dred, Dred," one of Brown's nicknames. However, when Brown started to approach defendant, defendant made it clear that he was referring to another person, Edgerton Munroe, who also went by the nickname, "Dred." Brown told Munroe that defendant

> wanted to speak to Munroe, and Munroe made his way over to defendant. Brown could not recall what defendant was wearing that night, but he "could see his face." Defendant and Munroe walked into an area known as "The Hole", a dark, wooded area where people "stopped to go get high, and [be] away from police." A few minutes later, Brown heard three to four gunshots coming from the area where defendant and Munroe had just entered. About ninety seconds from the time of the gunshots, Brown saw Munroe run from "The Hole" and fall to the ground.
>
> Patrolman Brian Kowalczyk of the Trenton Police Department responded to the scene of the shooting. He observed Munroe, near a curb, lying on the ground with a gunshot wound to his chest area. Attempts to revive Munroe were unsuccessful; he was transported to a local hospital, but Munroe died as a result of excessive bleeding from a bullet wound.

(ECF No. 10-3, at 2–3 (alteration in original).)

During its investigation, the Trenton Police Department interviewed and obtained statements from a number of individuals that had been near "The Hole" on the night of the incident, including Kenute Brown, Carol Guerra, Aviva Fowler, Linda Brown, and Willie Peters. (*Id.* at 3–4.) Guerra told police she had been at The Hole on the night of the incident getting high. (*Id.* at 4.) According to her statement,

> two males came into the area and chased another man who was wearing a light-colored shirt. She described one of the pursuers as between five-eight and five-nine; the other was shorter. Both men were dressed in black. The taller man had a black fedora type hat; the shorter one wore a black ski mask. The taller man held a "Dirty Harry [type of] gun." Guerra heard gunshots and saw the taller man following the male in the light-colored shirt, shooting at him. Although she did not see their faces, when the two men in black entered "The Hole", Guerra had thought the taller man was defendant, Tyrius Green, because of "his build and the way he walked. Tyrius has a very distinctive walk, especially when he thinks he is being macho." Guerra had known defendant for between ten and fourteen years.

(*Id.* (alterations in original).) At trial, however, Guerra testified that she did not pay a lot of attention to what the men in black were doing and was focused at the time on getting high. (*Id.* at

4–5.) She also testified that she was high both times she spoke to police. (*Id.*)

Fowler was also present at The Hole on the night of the shooting "smoking 'coke.'" (*Id.*) Fowler knew the defendant and recognized his walk. (*Id.* at 4-5.) She gave the following account:

> Tyrius told him [Dred Brown] to tell Dred [Munroe] that there was a hundred dollar sell. [Munroe] came back a few minutes later, and when he came back, as soon as he came through the walkway, Tyrius reached out and tried to grab him from the back, but Dred dodged him and started to run . . . . That is when Tyrius pulled the gun out, aimed it at Dred and said Freeze. He said it again and then fired. That is when I heard Dred say ouch but he kept running. The second time that Tyrius fired the gun I saw Dred hop up off the ground a little bit. I don't think he was hit I think he was just saying ouch because somebody was firing at him. Tyrius shot three times back to back. Every time he shot the gun I saw sparks come out of it. Then Tyrius and the short guy chased after "Dred". Then I left to go find my boyfriend everyone else that was back there ran out in different directions.

(*Id.* (alterations in original).) At trial, Fowler indicated that she did not recall being in The Hole at the time of the shooting but remembered being brought to the police station to sign papers and testified that while she spoke with the detective she was "cracked out." (*Id.* at 6.)

Two other witnesses testified at trial. Linda Brown was also in The Hole at the time of the shooting and testified that she saw two men, one of whom was noticeably taller, enter the area. (*Id.*) Both were dressed in black with scarves around their faces. (*Id.*) She testified that "[t]he taller man shouted 'Don't move' to a person who entered. He then proceeded to fire four shots." (*Id.* at 6–7.) Brown also testified that she knew Petitioner "her entire life" and at first believed him to be the shooter. (*Id.* at 7.) "However, she could not positively identify him." (*Id.*) Willie Peters also testified that he was in The Hole that evening, but he did not see the shooting and only heard three gunshots. (*Id.*) Peters also knew Petitioner since he was a child and "thought that he saw [Petitioner] running from The Hole." (*Id.*)

Petitioner was charged via indictment on May 26, 2004 with first-degree murder, N.J. Stat.

Ann. § 2C:11-3(a)(1); first-degree felony murder, N.J. Stat. Ann. § 2C:11-3(a)(3); first-degree robbery, N.J. Stat. Ann. § 2C:15-1; second-degree possession of a weapon for an unlawful purpose, N.J. Stat. Ann. § 2C:39-4(a); and third-degree unlawful possession of a weapon, N.J. Stat. An.. § 2C:39-5(b). (*Id.* at 8.) The case proceeded to jury trial in May 2005. (*Id.*) At the close of evidence, defense counsel moved for judgment of acquittal on all counts. (*Id.*) The trial court granted the motion in part and dismissed the felony murder and robbery counts. (*Id.*) The jury found Petitioner guilty of the remaining charges. (*Id.*) Petitioner was sentenced to a life term of imprisonment with a 30-year period of parole ineligibility on the murder charge. (ECF No. 10-2.) The weapons offenses were merged and Petitioner was sentenced to a ten-year prison term to run consecutive to the life sentence on the murder charge. (*Id.*; *see also* ECF No. 10-3, at 2 & n.1.)

Petitioner appealed his conviction and sentence, and the Appellate Division affirmed his conviction, but remanded for resentencing on June 17, 2008 due to a discrepancy between the Court's oral pronouncement of Petitioner's sentence and the judgment of conviction. (ECF No. 10-3.) The New Jersey Supreme Court denied certification on October 6, 2008. (ECF No. 10-6.)

Petitioner then filed a petition for post-conviction relief (the "PCR Petition") in the Superior Court of New Jersey, Law Division on January 20, 2011. (ECF Nos. 10-7, 10-8.) The PCR Petition was denied by the Superior Court of New Jersey, Law Division in a written opinion issued on April 26, 2012. (ECF No. 17-4, at 218–48.) The PCR Court determined that Petitioner's claims were procedurally barred by New Jersey Court Rule 3:22-4 because the substantive issues underlying his ineffective assistance of counsel claims had been previously adjudicated on appeal. (*Id.* at 228–30.) Despite finding Petitioner's claims to be procedurally barred, the PCR Court additionally denied each claim on the merits. (*Id.* at 230–48)

Petitioner appealed that decision, and on April 30, 2014, the Appellate Division affirmed

the denial of his PCR petition. (ECF No. 10-14.) The Appellate Division agreed with the PCR Court's determination that Petitioner's claims were not only procedurally barred, but also that his claims lacked substantial merit. (*Id.*) Petitioner filed a petition for certification to the New Jersey Supreme Court, which was denied on October 24, 2014. *State v. Green*, 220 N.J. 42 (2014).

Petitioner filed the instant habeas petition with this Court on March 6, 2015. (ECF No. 1.) On March 27, 2015, this Court administratively terminated his petition for failure to use a proper habeas form. (ECF No. 2.) Petitioner executed an amended petition on April 22, 2015 (the "Amended Petition"). (ECF No. 3.) Respondents filed a timely answer to the Amended Petition. (ECF No. 10.)

On January 23, 2019, this Court entered an Order and Opinion finding that the Amended Petition constituted a "mixed petition" as it contained a mix of exhausted and unexhausted claims. (ECF Nos. 19, 20.) Accordingly, the Court declined to rule on the merits of the Amended Petition and provided Petitioner with the opportunity to either (1) move for a stay and abeyance so he may return to state court to exhaust his unexhausted claim or (2) request that this Court delete the unexhausted claim and proceed only on his exhausted claim.[1] (ECF No. 19, at 9.) This Court advised that if Petitioner did not file any response, it would take his inaction as his assent to proceed on his only exhausted claim–that the trial court's erroneous jury instruction on identification violated his due process rights under the Fifth and Fourteenth Amendments. (*See id.* at 7, 9.) Petitioner did not file a timely response.

III. LEGAL STANDARD

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C.

[1] In its prior Opinion, the Court additionally found that certain of Petitioner's claims were not cognizable under § 2254 as they pertained only to state law considerations. (*See* ECF No. 19, at 5 n.1.)

§ 2254, "a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a).

"[Section] 2254 sets several limits on the power of a federal court to grant an application for a writ of habeas corpus on behalf of a state prisoner." *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011); *Glenn v. Wynder*, 743 F.3d 402, 406 (3d Cir. 2014). Section 2254(a) permits a court to entertain only claims alleging that a person is in state custody "in violation of the Constitution or laws or treaties of the United States." *Cullen*, 563 U.S. at 181 (quoting § 2254(a)).

A federal court's authority to grant habeas relief is further limited when a state court has adjudicated petitioner's federal claim on the merits. *See* 28 U.S.C. § 2254(d). If a claim has been adjudicated on the merits in state court proceedings, this Court has "no authority to issue the writ of habeas corpus unless [the state court's] decision 'was contrary to, or involved an unreasonable application of, clearly established Federal Law, as determined by the Supreme Court of the United States,' or 'was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.'" *Parker v. Matthews*, 567 U.S. 37, 40–41 (2012) (quoting § 2254(d)). However, when "the state court has not reached the merits of a claim thereafter presented to a federal habeas court, the deferential standards provided by the AEDPA . . . do not apply." *Lewis v. Horn*, 581 F.3d 92, 100 (3d Cir. 2009) (quoting *Appel v. Horn*, 250 F.3d 203, 210 (3d Cir. 2001)).

When a claim has been adjudicated on the merits in state court proceedings, the writ shall not issue unless the adjudication of the claim (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable

determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d); *see also Parker*, 567 U.S. at 40–41. A state-court decision involves an "unreasonable application" of clearly established federal law if the state court (1) identifies the correct governing legal rule from the Supreme Court's cases but unreasonably applies it to the facts of the particular case; or (2) unreasonably extends a legal principle from Supreme Court precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply. *Williams v. Taylor*, 529 U.S. 362, 407 (2000). Federal courts must follow a highly deferential standard when evaluating, and thus give the benefit of the doubt to state court decisions. *See Felkner v. Jackson*, 562 U.S. 594, 598 (2011); *Eley v. Erickson*, 712 F.3d 837, 845 (3d Cir. 2013). A state court decision is based on an unreasonable determination of the facts only if the state court's factual findings are objectively unreasonable in light of the evidence presented in the state-court proceeding. *Miller–El v. Cockrell*, 537 U.S. 322, 340 (2003). Moreover, a federal court must accord a presumption of correctness to a state court's factual findings, which a petitioner can rebut only by clear and convincing evidence. 28 U.S.C. § 2254(e); *see Rice v. Collins*, 546 U.S. 333, 339 (2006) (petitioner bears the burden of rebutting presumption by clear and convincing evidence); *Duncan v. Morton*, 256 F.3d 189, 196 (3d Cir. 2001) (factual determinations of state trial and appellate courts are presumed to be correct).

IV. DISCUSSION

Since the Court issued its Opinion finding that the Amended Petition constituted a mixed petition, it requested from Respondents additional filings from the New Jersey Supreme Court out of an abundance of caution and to confirm that Petitioner's ineffective assistance of counsel claims were, in fact, unexhausted. (*See* ECF No. 21.) Respondents filed copies of Petitioner's petitions for certification to the New Jersey Supreme Court on direct and post-conviction review, which

revealed that certain other of Petitioner's claims were, in fact, exhausted. (*See* ECF Nos. 22, 22-1.) Accordingly, for the sake of completeness, the Court will now deny the Amended Petition in its entirety on the merits pursuant to § 2254(b)(2). *See* § 2254(b)(2) ("An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State."); *see also Mahoney v. Bostel*, 366 F. App'x 368, 371 (3d Cir. 2010).

A. Substantive Claims

1. Trial Court Erred in Denying Motion for Judgment of Acquittal (Ground Eleven)

Petitioner contends that the trial court's partial denial of his motion for judgment of acquittal violated his federal due process right because the witness testimony elicited at trial did not prove, beyond a reasonable doubt, that Petitioner was the shooter. Petitioner raised this issue to the Appellate Division on direct appeal, which was "satisfied that sufficient evidence was developed by the State to justify submitting to the jury the issue of defendant's guilt on the charges of murder, possession of a firearm for an unlawful purpose and unlawful possession of a firearm." (ECF No. 10-3, at 10.) The Appellate Division further explained that:

> The State presented several witnesses who knew defendant and who indicated defendant was present at the time of the shooting. At least two of the witnesses gave statements that were admitted into evidence in which they identified defendant as the shooter. Another, who said that defendant was not wearing a mask at all, placed defendant in the company of the victim immediately before the shooting began. Accepting this evidence as true and drawing reasonable inferences therefrom, a reasonable jury could and did find him guilty of the crimes charged.

(*Id.* at 11.)

A motion for judgment of acquittal is a motion to challenge the sufficiency of the evidence presented at trial. *See Jackson v. Virginia*, 443 U.S. 307, 317 n.10 (1979). In *Jackson*, the Supreme

Court instructed that where a petitioner claims that his conviction was against the weight of evidence, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 319. "Stated differently, a court reviewing the sufficiency of the evidence may overturn a conviction only 'if it is found that upon the record evidence adduced at trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt.'" *Eley v. Erickson*, 712 F.3d 837, 847 (3d Cir. 2013) (quoting *Jackson*, 443 U.S. at 324). This inquiry requires "federal courts to look to state law for 'the substantive elements of the criminal offense,' but the minimum amount of evidence that the Due Process Clause requires to prove the offense is purely a matter of federal law." *Coleman v. Johnson*, 566 U.S. 650, 655 (2012) (citation omitted).

On habeas review, the factual findings of the state court are presumed to be correct, absent clear and convincing evidence to the contrary. *See* § 2254(e)(1).[2] As the trial court and Appellate Division determined, there was ample evidence presented at trial on which the jury could rely to find that Petitioner was the shooter. Nevertheless, Petitioner argues that the trial court should not have submitted these charges to the jury because the evidence did "sufficiently establish beyond a reasonable doubt that [he] [w]as the masked man who shot Munroe." (ECF No. 1-2, at 34.) In

[2] Petitioner did not fully exhaust this claim and, thus, the Court's review is *de novo*. *Collins v. Sec'y of Pa. Dept. of Corrs.*, 742 F.3d 528, 544 n.9 (3d Cir. 2014) ("If there has been no adjudication on the merits of a claim, 'the federal habeas court must conduct a de novo review over pure legal questions and mixed questions of law and fact.") Nevertheless, the presumption of correctness applied to state court findings of fact still applies. *Id.*; *see also Bilal v. Walsh*, No. 11-1973, 2015 WL 10372429, at *6 (E.D. Pa. May 20, 2015). With its Answer, the State provided transcripts of only three days of trial. (*See* ECF Nos. 10-15, 10-16 (May 3, 2005, jury selection); ECF Nos. 10-17, 10-18, 10-19, 10-20 (May 5, 2005, witness testimony); ECF Nos. 10-21, 10-22, 10-23, 10-24 (May 10, 2005, witness testimony).) It is apparent from the Appellate Division's review of the record that there were additional days of witness testimony, the transcripts of which were not filed with this Court. Accordingly, in its adjudication of this claim, the Court relies on the available transcripts and the Appellate Division's summary of the testimony set forth at trial.

support of his argument, Petitioner identifies the inconsistencies between the witness testimony and their alleged lack of credibility as indicative of the lack of evidence to support the charges. However, such issues are clearly for the jury to resolve. *Jackson*, 443 U.S. at 319 (observing that it is "the responsibility of the trier of fact to fairly resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts"). The role of the court in determining whether there is sufficient evidence to support a charge is only to determine whether "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 318–19. Based on the evidence in the record, it is apparent that the determination of whether Petitioner was the shooter required weighing the credibility of witnesses who testified at trial and resolving the many inconsistencies in their testimony. Viewing that testimony in the light most favorable to the prosecution, this Court is not convinced that no trier of fact could have found Petitioner guilty beyond a reasonable doubt. As such, relief on this claim is denied.

2. Error in Jury Instruction on Identification (Ground Twelve)[3]

Petitioner next argues that the trial court's charge to the jury on identification was "unacceptably vague and contained gross misstatements of fact," making it "capable of leading the jury to a verdict it otherwise would not have reached." (ECF No. 3, at 31.)[4] The alleged "gross

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[3] As found in the Court's January 23, 2019 Opinion, this claim was fully exhausted in the state courts. Accordingly, the Court applies the AEDPA deferential standard of review.

[4] In the Amended Petition, Petitioner raises multiple claims related to the trial court's allegedly erroneous instruction on identification:

> Ground Twelve: The trial judge's erroneous identification charge, which was unacceptably vague and contained gross misstatements of fact, was clearly capable of leading the jury to a verdict it otherwise would not have reached. The severe potential for prejudice caused by this erroneous charge is even greater when the

misstatement of fact" referred to by Petitioner is the trial court's statement that certain witnesses

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> charge is evaluated against the prosecutor's insidious presentation of Guerra's and Brown's identification testimony. This violated Petitioner's right to due process, and equal protection of the law as guaranteed by the United States Constitution and the Fifth, Sixth and Fourteenth, Amendments thereto.
>
> Ground Seventeen: In light of the nature and magnitude of the judge's misstatements during the identification charge, the ensuing prejudice was not adequately diminished by the judge's earlier instruction that the jury "should" rely on its own recollection of the evidence. This violated Petitioner's right to due process, and equal protection of the law as guaranteed by the United States Constitution and the Fifth, Sixth, and Fourteenth, Amendments thereto.
>
> Ground Eighteen: The "mistake" of fact contained in the identification charge was not "fleeting." This violated Petitioner's right to due process, and equal protection of the law as guaranteed by the United States Constitution and the Fifth, Sixth, and Fourteenth, Amendments thereto.
>
> [G]round Twenty: The judge's instructions that the jury "should" rely on its own recollection of the evidence did not diminish the potential for prejudice cause[d] by the mistake in the identification charge when the jury's recollection of the identification evidence was sure to have been tainted by the prosecutor's misleading examination of key eyewitnesses. This violated Petitioner's right to due process, and equal protection of the law as guaranteed by the United States Constitution and the Fifth, Sixth and Fourteenth, Amendments thereto.
>
> Ground Twenty-One: Contrary to the well-settled principle that an error in a jury charge must not be evaluated in a vacuum, the Appellate Division failed to consider the prosecutor's misleading questioning of two eyewitnesses in measuring the potential for prejudice created by the mistake in the identification charge. This violated Petitioner's right to due process, and equal protection of the law as guaranteed by the United States Constitution and the Fifth, Sixth and Fourteenth, Amendments thereto.

Because each of these claims, ultimately, rests on whether the trial court's identification instruction violated Petitioner's right to due process, the Court will consider them together as one claim for relief.

at trial "identified the defendant in court as the person who committed the offenses charged." (*Id.*) No in-court identification was made at trial. Petitioner contends that this error, when viewed in light of the entire trial record, violated his right to due process under the Fifth and Fourteenth Amendments. (*Id.*)

With respect to identification, the trial court gave the following detailed instruction to the jury:

> Now, the defendant as part of his general denial of guilt, contends that the State has not presented sufficient reliable evidence to establish beyond a reasonable doubt that he is the person who committed the alleged offense. The burden of proving the identity of a person who committed the crime is, of course, upon the State. For you to find the defendant guilty, the State must prove beyond a reasonable doubt that this defendant is the person who committed the crime. And as I told you before, the defendant has no burden to produce evidence or that he is not the person who committed the crime. The defendant has neither the burden nor the duty to show that the crime that was committed was committed by someone else, or to prove the identity of that other person.
>
> You must determine, therefore, not only whether the State has proved each and every element of the offense charged beyond a reasonable doubt, but also, whether the State has proved beyond a reasonable doubt that this defendant is the person who committed it.
>
> Now, the State, in trying to meet that burden, presented the testimony of several witnesses who identified the defendant. *You will recall that these witnesses identified the defendant in court as the person who committed the offenses charged.* The State also presented testimony that on a prior occasion before this trial witnesses made such an identification-identified the defendant as the person who was, you may conclude circumstantially or directly or however you conclude, that the defendant was-the identification of the defendant was based upon the observations and perceptions they made of the perpetrator at the time the offense was being committed. It is your function to determine whether the witness's identification of the defendant is reliable and believable, or whether it is based on mistake, or for any reason is not worthy of belief. You must decide whether it is sufficiently reliable evidence upon which to conclude that this defendant is the person who committed the offenses charged.

In evaluating these identifications, you should consider the observations and perceptions on which the identifications were based, and the witness's ability to make those observations and perceptions. If you determine that the out-of-court identification is not reliable, you must still consider the witness's in-court identification of the defendant, if you find it to be reliable.

Unless the in-court identification resulted from the witness's observation or perceptions of the perpetrator during the commission of the offense, rather than being the product of an impression gained at the out-of-court identification procedure, it should be afforded no weight. The ultimate issues of the trustworthiness of the in court and out-of-court identifications are for you to decide.

Fundamentally, there are, as you see, three levels of identification: Identification of the alleged perpetrator at the observation of the witnesses; the subsequent prior identifications through looking through the photo array or identifying photograph; and thirdly, the in-court. So, you make the determinations as I've just instructed you. If you have any questions, look at this. If you have any further questions, you'll let me know and I'll try to explain it further.

To decide whether identification testimony is sufficiently reliable upon which to conclude that this defendant is the person who committed the offenses charged, you should evaluate the testimony of the witness in light of the factors for considering credibility that I've already explained to you. In addition, you may consider the following factors: The witness's opportunity to view the person who committed the offense at the time of the offense; the witness's degree of attention on the perpetrator when he or she observed the crime being committed; the accuracy of any description the witness gave prior to the identification of the perpetrator; the degree of certainty expressed by the witness in making the identification; the length of time between the witness's observation and the offense at the first identification; discrepancies or inconsistencies between identifications; the circumstances under which the out-of-court identification was made; here, the single and multiple photograph arrays presented to the witness by the police; or any other factor on the evidence which-or lack of evidence in this case which you consider relevant to your determination whether identifications were reliable.

If, after all of the considerations of the evidence, you determine the State has not proven beyond a reasonable doubt that the defendant was the person who committed these crimes, then you must find the

> defendant not guilty. On the other hand, after consideration of all the evidence you are convinced beyond a reasonable doubt that the defendant was correctly identified, then you will consider whether the State has proven each and every element of the offenses charged beyond a reasonable doubt.

(ECF No. 10-3, at 14–17 (emphasis in original to identify the allegedly objectionable portion)).

On direct appeal, the Appellate Division determined that "[w]hen viewed as a whole, this jury instruction was adequate." (*Id.* at 17.) Although the Appellate Division acknowledged that the trial court was mistaken in how it described the identifications, it held that the mistake did not have "the capacity to prejudice defendant so much as to offend all notions of justice." (*Id.*) In so holding, the Appellate Division explained that "the misstatement was fleeting and it did not concern an element of an offense or some other legal issues. Rather, it related to the judge's recollection or recounting of events that occurred in open court and in the presence of the jury." (*Id.* at 18–19.) Accordingly, the Appellate Division observed, the effect of the factual error was limited by the trial court's later instruction that "regardless of what I may have said in recalling the evidence in this case, it is your recollection of the evidence that should guide you as sole judges of the facts." (*Id.* at 19.)

"[H]abeas review of jury instructions is limited to those instances where the instructions violated a defendant's due process rights. *Echols v. Ricci*, 492 F. App'x 301, 312 (3d Cir. 2012) (citing *Estelle v. McGuire*, 502 U.S. 62, 71–72 (1991) (holding that "[t]he only question for us is whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process")); *see also Middleton v. McNeil*, 541 U.S. 433, 437 (2004). A petitioner's due process rights are violated where the instruction "operated to lift the burden of proof on an essential element of an offense as defined by state law." *Echols*, 492 F. App'x at 312 (quoting *Smith v. Horn*, 120 F.3d 400, 416 (3d Cir. 1997)).

An error in the jury instructions is not grounds for habeas relief if the error is harmless. *Pagliaccetti v. Kerestes*, 581 F. App'x 134, 136 (3d Cir. 2014) (citing *Yohn v. Love*, 76 F.3d 508, 522 (3d Cir. 1996)). An error is harmless unless it "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)); *see also Edwards v. New Jersey*, No. 13-6523, 2015 WL 5007824, at *5 (D.N.J. Aug. 20, 2005) ("In determining whether there is harmless error, the court examines the impact of the error on the trial as a whole."). The effect of an allegedly erroneous jury instruction "must be viewed in the context of the overall charge." *Cupp v. Naughten*, 414 U.S. 141, 147 (1973). Thus, the relevant question "is not whether the trial court failed to isolate and cure a particular ailing instruction, but rather whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." *Id.* at 148.

The Appellate Division's determination that the trial court's error in the jury instruction on identification was harmless was not contrary to federal precedent nor was it an unreasonable application of that law. Looking to the charge as a whole, and in consideration the fact that "a judgment of conviction is commonly the culmination of a trial which includes testimony of witnesses, argument of counsel, receipt of exhibits in evidence, and instruction of the jury by the judge," *Cupp*, 414 U.S. at 147, the trial court's apparent error in the jury instructions was unlikely to have an effect on the outcome of the trial. The trial court clearly instructed the jury that it was to weigh the evidence presented by the State on identification to determine if Petitioner committed the crimes at issue and further explained that it was the jury's "recollection of the evidence that should guide [it] as sole judges of the facts." (*See* ECF No. 10-3, at 18.)[5] Any error in those

[5] Petitioner nevertheless argues that when paired with the "misleading" manner in which the prosecutor questioned the identification witnesses, the trial court's reference to in-court identifications acted to deprive him of due process. The Appellate Division described the

instructions did not act to lift the State's burden of establishing beyond a reasonable doubt that Petitioner was the shooter. Relief on this claim is denied.

3. Trial Court Erred in Instructing Jury It Could Not Consider Evidence of Premeditation (Ground Thirteen)

Petitioner next argues that the trial court erred in instructing the jury that it could not consider evidence of premeditation (or the lack thereof) in response to a question from the jury regarding its deliberation on the charge of knowing of purposeful murder and that the trial court's error violated his due process rights. It appears that during its deliberation, the jury submitted to the trial court the following question: "Is premeditation a factor in considering question 1A." (ECF No. 1-2, at 31.) Question 1A referred to Petitioner's charge for knowing and purposeful murder. (*See id.*) The Court responded that "[t]he simple answer is no" and that premeditation is "not a factor." (*Id.*)

Petitioner raised this claim to the Appellate Division on his direct appeal. The Appellate Division rejected his claim, holding that the trial court's response was "essentially correct." (ECF

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misleading questioning to which Petitioner takes issue as follows:

> The prosecutor inquired of both [Guerra and Linda Brown] how the assailant was dressed. Immediately after he had elicited the description of a man in black from the witnesses, the prosecutor asked the witnesses if they knew Tyrius Green. Defendant contends this creates an inference by proximity in questioning that the man in black was in fact defendant, Tyrius Green.

(ECF No. 10-3, at 19.) Whether or not the prosecutor's questioning of Guerra and Linda Brown was in fact "misleading," it did not appear to create some mistaken impression that Guerra and Linda Brown identified Petitioner in court as the shooter. Guerra and Linda Brown were not the only witnesses who testified that they believed Petitioner to have been the shooter nor were they the only witnesses who identified him as such. Moreover, while Petitioner argues that the Appellate Division inappropriately considered the charge in a vacuum, the Appellate Division clearly considered the impact of the prosecutor's questioning on the jury and found that it was not misleading. (*See id.*) As such, the Court does not find that the prosecutor's style of questioning created some misunderstanding that witnesses identified Petitioner as the shooter in court.

No. 10-3, at 20–21.) The Appellate Division explained:

> Premeditation was not a statutory element of murder under the circumstances of this case. One may be convicted for first degree murder without motive or malice aforethought. Indeed, N.J.S.A. 2C:11-3 instructs that a defendant must have committed the offense knowingly or purposefully. The trial court had carefully outlined the applicable states of mind in its jury charge. Again, there was no objection to [the] charge at trial, and we have no reason to speculate that a more comprehensive discussion of premeditation would have led to a different result.

(*Id.*)

As this claim pertains to jury instructions, which are primarily a matter of state law, Petitioner must show that the instruction violated his right to due process under the Fifth and Fourteenth Amendments to be entitled to habeas relief. *See Estelle*, 502 U.S. at 71–72. An erroneous jury instruction arises to such a violation where it "has substantial an injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 637. The Court discerns no reason to disturb the decision of the Appellate Division on this claim. The Appellate Division determined that the trial court's answer to the jury's question was correct under state law. Even under a de novo standard of review, the Court sees no reason to disturb that finding. Relief on this claim is therefore denied.

4. Trial Court Erred in Permitting Prosecutor's Reference to Arrest Warrant (Ground Fourteen)

Petitioner next argues that the prosecutor's references to the warrant for his arrest during trial were highly prejudicial and violated his due process rights under the Fifth and Fourteenth Amendments. During the testimony of Detective McMillan, there were several references made to the warrant for Petitioner's arrest. First, Detective McMillan indicated that an arrest warrant was issued "[b]ased on the information gathered from the statements and IDs made, we were able to issue an arrest warrant for the arrest of Tyrius Green for his involvement in the death of Edgerton

Munroe." (ECF No. 10-22, at 13.) The prosecutor thereafter clarified when the arrest warrant had been issued and asked Detective McMillan to explain the efforts taken by law enforcement to effectuate Petitioner's arrest. (*See id.* at 15–16.)

Petitioner raised this claim to the Appellate Division on his direct appeal. The Appellate Division determined that Det. McMillian's testimony did not influence the jury as he "did not directly testify or imply that a judge made any determination beyond the existence of probable cause or that there had been reliance on evidence other than the investigatory material made known to the jury." (ECF No. 10-3, at 22.)

It is well-established that the violation of a right created by state law is not cognizable as a basis for federal habeas relief. *Estelle*, 502 U.S. at 67–68 ("We have stated many times that 'federal habeas corpus relief does not lie for errors of state law.'" (quoting *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990))). Accordingly, Petitioner cannot obtain relief for any errors in state law evidentiary rulings, unless they rise to the level of a deprivation of due process. *Spencer v. Texas*, 385 U.S. 554, 563–64 (1967) ("[T]he Due Process Clause guarantees the fundamental elements of fairness in a criminal trial"); *accord Estelle*, 502 U.S. at 70. For a habeas petitioner to prevail on a claim that an evidentiary error amounted to a deprivation of due process, he must show that the error was so pervasive as to have denied him a fundamentally fair trial. *Keller v. Larkins*, 251 F.3d 408, 413 (3d Cir. 2001).

Petitioner has not demonstrated that the references to his arrest warrant were in error, let alone acted to deny him a fundamentally fair trial. The references to the arrest warrant were general and acted only to explain law enforcement's investigation and the eventual arrest of Petitioner. Petitioner's conclusory statement that these references were "highly prejudicial" fails to demonstrate that he was deprived his right to due process under the federal constitution.

Accordingly, relief on this claim is denied.

5. Admission of Written Witness Statements (Ground Fifteen)

Petitioner next argues that the trial court's admission of the written statements made to police by Fowler and Guerra violated his due process rights under the Fifth and Fourteenth Amendments. At trial, the prosecutor read into evidence relevant portions of the statements made by Fowler and Guerra to impeach their trial testimony and refresh their recollections. Thereafter, the prosecutor moved to have the written copies of the statements admitted as substantive evidence. Over the objection of defense counsel, the trial court admitted the written copies of the statements. On direct appeal, Petitioner raised this issue, arguing that the admission of the written statements was cumulative and unduly prejudicial under New Jersey Rule of Evidence 403. (ECF No. 10-3, at 23.) The Appellate Division held that the statements were properly admitted as substantive evidence as they were prior inconsistent statements. The Appellate Division explained:

> At least two of the witnesses, Carol Guerra and Aviva Fowler, recanted or seriously retreated from their earlier identifications of defendant while they were being cross-examined. Indeed, Fowler claimed she signed blank sheets and implied she would have said anything in order to receive money she needed to satisfy her addiction. The admission of the prior statements was not, under such circumstances, cumulative or unduly prejudicial to defendant. For example, the trial court ruled the jury had a right to examine the placement of Fowler's signature in relation to the content of her statement. They would then weigh the credibility of her claims that her statements had been fabricated by the investigators. This was an exercise of discretion by the trial court to which we must pay deference.

(*Id.* at 24.)

A state law evidentiary ruling may only be the basis for federal habeas relief where the admission of the evidence violated federal due process. *Estelle*, 502 U.S. at 71–72; *Marshall v. Lonberger*, 459 U.S. 422, 438 n.6 (1983) ("[T]he Due Process Clause does not permit the federal

courts to engage in a finely-tuned review of the wisdom of state evidentiary rules."). To prevail on a due process claim, a petitioner "must prove that he was deprived of 'fundamental elements of fairness in [his] criminal trial.'" *Glenn v. Wynder*, 743 F.3d 402, 407 (3d Cir. 2014) (alteration in original) (quoting *Riggins v. Nevada*, 504 U.S. 127, 149 (1992)).

Petitioner has not demonstrated that the admission of these statements caused any deprivation of the fundamental elements of fairness of his trial. As the Appellate Division found, the statements were properly admitted under New Jersey evidence law. Petitioner's vague assertions that that the admission of the written statements was "unnecessary" and "highly prejudicial" are insufficient to demonstrate that his due process rights were violated. *See Zettlemoyer v. Fulcomer*, 923 F.2d 284, 301 (3d Cir. 1991) ("[B]ald assertions and conclusory allegations do not provide sufficient ground . . . to require an evidentiary hearing."). According, relief on this claim is denied.

6. Trial Court Erred in Giving Flight Charge (Ground Sixteen)

Petitioner next claims that his federal right to due process was violated by the trial court providing the jury with a flight instruction. At the charge conference, the trial court agreed with the State that a flight charge was appropriate, over the objection of defense counsel:

> [THE PROSECUTOR]: Also the State would be asking for flight.
>
> THE COURT: I'm going to give flight and I'm going to give the jury the opportunity to determine whether the propitious appearance of the defendant in the Bronx, two, three, four days after the event can be considered if they so desire, and the flight charge is broad enough to permit the jury to make that determination. I think the cross-examination of Ms. Green invites the use of that charge, and [the prosecutor] is commended for his adroitness, his occasional adroitness.
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> . . .
>
> [DEFENSE COUNSEL]: Your Honor, on that point, I don't see that

> any evidence at all was produced that he ran away from anything or he was fleeing.
>
> THE COURT: Well, you have a situation where the event took place on the 14th into the morning of the 15th. The defendant is seen on the streets, he is not seen on the streets thereafter. Detective McMillan goes out to look for him, leaves, according to his testimony, cards, knocks on the door, whatever he does three or four times, and the defendant is arrested in the Bronx. So, from that, the only person who truly knows why he was in the Bronx at that time is the defendant. It might be extremely innocent to see his sister because he goes up there a lot of times or he's looking to get out of the area because he knows people are talking that he shot somebody. That is a jury call.
>
> [DEFENSE COUNSEL]: But your honor, there's no testimony that he knew he was being pursued.
>
> THE COURT: No, no, the idea of flight refers to the essence of a feeling of good and/or apprehension, potential of apprehension. Now, if he had nothing to do with it, is totally innocent, totally gone, not part of the scene, that would be your innocent aspect. I mean, have you looked at the charge?
>
> [DEFENSE COUNSEL]: Yes, your Honor.
>
> THE COURT: It simply says it gives the opportunity of the jury to make a determination.

(ECF No. 10-24, at 16–17.) On direct appeal, the Appellate Division held that the charge was appropriately given, noting that

> While there was not a great deal of evidence that defendant was aware he was being sought or that he specifically fled to avoid capture, there was evidence that he was with Munroe immediately before Munroe was shot and that he left the scene of a shooting after the incident. He went to his sister's residence in New York. Whether his objective was to avoid the police, who attempted to arrest him at his own home, or merely to visit his sister was a legitimate issue for the jury to consider. The charge did not, in any event, deprive defendant of a fair trial.

(ECF No. 10-3, at 25.)

As discussed above, a federal court's review of jury instructions on a § 2254 petition is

limited to instances where the instructions violated the petitioner's due process rights. *Ricci*, 492 F. App'x at 312. An error in the jury instructions can only be a basis for habeas relief where it had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 637. The provision of the flight charge did not violate Petitioner's due process rights. The charge was appropriately given under New Jersey law, which permits the jury to determine whether certain conduct of a defendant may be evidence of flight. *See State v. Williams*, 919 A.2d 90, 96–97 (N.J. 2007). Petitioner has not demonstrated that the charge had a substantial or injurious effect on the jury's verdict. Accordingly, habeas relief is denied.

B. Ineffective Assistance of Counsel Claims[6]

The test announced by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 687 (1984), governs claims that a Petitioner was denied a fair trial because his counsel provided ineffective assistance. *See Lafler v. Cooper*, 566 U.S. 156, 162–63 (2012) (applying *Strickland* test). The *Strickland* test has two prongs:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland, 466 U.S. at 687.

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[6] Certain of Petitioner's ineffective assistance of counsel claims were dismissed by the PCR Court as procedurally barred, creating the possibility that Petitioner's claims have been procedurally defaulted for the purpose of federal habeas relief. *See Trevino v. Thaler*, 569 U.S. 413, 421 (2013). Procedural default is an affirmative defense to be raised by respondents. *Tucker v. Warren*, No. 13-2908, 2016 WL 3010535, at *8–9 (D.N.J. May 25, 2016). Respondents did not raise this argument in their briefing. While this Court has the discretion to raise this issue *sua sponte*, *Evans v. Secretary Pennsylvania Department of Corrections*, 645 F.3d 650, 657 n.12 (3d Cir. 2011), it declines to do so here.

The first prong of the test "requires a defendant to show 'that counsel's representation fell below an objective standard of reasonableness.'" *Lafler*, 566 U.S. at 163 (quoting *Hill v. Lockhart*, 474 U.S. 52, 57 (1985)). There is "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Strickland*, 466 U.S. at 689 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)). "The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003) (per curiam).

"In cases in which the record does not explicitly disclose trial counsel's actual strategy or lack thereof . . . the presumption may only be rebutted through a showing that no sound strategy posited [by the Respondent] could have supported the conduct." *Thomas v. Varner*, 428 F.3d 491, 500 (3d Cir. 2005) (citing *Yarborough*, 540 U.S. at 8). "[The Antiterrorism and Effective Death Penalty Act] requires that [habeas courts] 'determine what arguments or theories supported . . . or could have supported, the state court's decision.'" *Collins*, 742 F.3d at 548 (quoting *Harrington v. Richter*, 562 U.S. 86, 102 (2011)).

The second prong of the *Strickland* test, prejudice, requires a defendant to 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 546 (quoting *Strickland*, 466 U.S. at 694). The "ultimate focus" of the prejudice inquiry is on the fundamental fairness of the proceeding. *Lafler*, 566 U.S. at 179 (quoting *Strickland*, 466 U.S. at 696). "A reasonable probability is one 'sufficient to undermine confidence in the outcome.'" *Collins*, 742 F.3d at 547 (quoting *Strickland*, 466 U.S. at 694). "Prejudice is viewed in light of the totality of the evidence at trial and the testimony at the collateral review hearing." *Id.* (citing *Rolan v. Vaugh*, 445 F.3d 671, 682 (3d. Cir. 2006)).

1. Failure to Move for a New Trial (Ground Two)

Petitioner asserts that his counsel was ineffective by not filing a motion for a new trial based on the State's alleged failure to "prove all the elements of either murder [or] the weapon offenses" and because the verdict was against the weight of evidence. (ECF No. 1-2, at 17.) The PCR Court denied this claim as Petitioner had failed to demonstrate either that his counsel was deficient by not moving for a new trial or that he was prejudiced by that failure. (ECF No. 17-4, at 239–40.) Moreover, the PCR Court highlighted that Petitioner had, on direct appeal, requested the Appellate Division overturn his conviction as against the weight of evidence. (*Id.* at 240.)

Petitioner has not demonstrated that his counsel was ineffective for not moving for a new trial. As this Court discussed above, *see supra* at 8–11, there was sufficient evidence presented at trial on which to find Petitioner guilty beyond a reasonable doubt. Counsel cannot be deemed ineffective for failure to bring a motion that would have been unsuccessful. *See Werts v. Vaughn*, 228 F.3d 178, 203 (3d Cir. 2000). This claim is denied.

2. Failure to Object to Trial Court's Jury Charge on Identification (Ground Three)[7]

Petitioner next contends that his counsel was constitutionally deficient by not objecting to

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[7] Petitioner also raises this claim in Ground Twenty-Four of the Petition, which states:

> Trial counsel did not provide adequate legal representation to the defendant as a result of his failure to object to the trial court's charge to the jury regarding identification when the court erroneously indicated several witnesses had identified the defendant in court as having been the perpetrator. This violated Petitioner's right to due process, and equal protection of the law as guaranteed by the united states constitution and the Fifth, Sixth and Fourteenth Amendments thereto.

(ECF No. 3, at 48.)

a misstatement of fact made by the trial court in instructing the jury on the issue of identification.[8] Specifically, the trial court instructed the jury that "[y]ou will recall that these witnesses identified the defendant in court as the person who committed the offenses charged." However, none of the witnesses made in-court identifications of the defendant as the shooter at trial.

On its merits, the PCR Court denied this claim as counsel's failure to object did not fall below the standard for competent representation. (ECF No. 17-4, at 241–43.) In so holding, the PCR Court relied upon the Appellate Division's determination on Petitioner's direct appeal that "as a whole the jury instruction was adequate . . . though the jury instruction was not perfect, we do not conclude that the mistake had the capacity to prejudice the defendant so much as to offend all notions of justice." (*Id.* at 243.) The Appellate Division reiterated this finding in Petitioner's appeal of his PCR Petition, holding that even if counsel had been deficient by not objecting to the instruction, the "fleeting misstatement in the identification instruction did not have the capacity to undermine confidence in the outcome of defendant's trial." (ECF No. 10-14, at 9–10.)

The ruling of the Appellate Division on this claim was not unreasonable as Petitioner cannot demonstrate any prejudice that resulted from his counsel's failure to object to the trial court's misstatement in the jury instruction on identification. As discussed above, any error in the jury instructions was harmless and did not have an injurious effect on the jury's verdict. Petitioner cannot demonstrate that had his counsel objected to the instruction, the outcome of trial reasonably would have been different. Therefore, relief on this claim is denied.

3. Failure to Object at Trial (Ground Four)

Petitioner next asserts that his counsel was constitutionally deficiency because his "failure

[8] The Court's review of the additional documents submitted by the State demonstrates that this claim was duly exhausted. (*See* ECF No. 22-1, at 6–10.) Accordingly, the Court will apply AEDPA deference.

to object was pervasive throughout the trial and highly prejudicial to the Defendant." (ECF No. 1-2, at 19.) Petitioner contends that "counsel's consistent failure to object to extremely suspect/prejudicial identification testimony deprived Defendant of his Sixth Amendment right to effective assistance of counsel." Nevertheless, Petitioner fails to identify for the Court the specific testimony to which his counsel should have objected. *Accord Zettlemoyer*, 923 F.2d at 301 (requiring more than conclusory allegations to grant an evidentiary hearing on a petition for habeas relief). Nor does Petitioner indicate that the outcome of trial would have been different had his counsel objected to such testimony. *See Collins*, 742 F.3d at 546. For these reasons, relief on this claim is denied.

4. Failure to Object to Trial Court's Jury Instruction on Premeditation (Ground Five)

Petitioner claims that his counsel was ineffective because he did not object to the trial court's instruction to the jury that it could not consider premeditation as a factor of knowing or purposeful murder. (ECF No. 1-2, at 19–20.) The trial court issued this instruction following a question from the jury during its deliberation. The PCR Court rejected this claim because "premeditation was not a statutory element of murder under the circumstances." (ECF No. 17-4, at 245–46.) The Appellate Division held the same in Petitioner's direct appeal in which he argued that the trial court's response constituted reversible error.

Petitioner has not shown that his counsel was deficient for failing to object to the trial court's instruction on meditation. At the time of trial, premeditation was not an element of knowing or purposeful murder under New Jersey law, the charge which was pending against Petitioner. *See* N.J.S.A. 2C:11-3. Because premeditation was not a relevant factor, the trial court's instruction was not in error and there was no reason for counsel to object to it. Accordingly, Petitioner is not entitled to relief on this claim.

5. Failure to Object to Prosecutor's Reference to Arrest Warrant (Ground Six)

Petitioner next argues that his counsel was deficient for failing "to raise an objection to the prosecutor's repeated references to a warrant" for his arrest. As discussed, *supra*, Detective McMillan testimony at trial included references to the warrant for Petitioner's arrest—specifically when law enforcement obtained the warrant and how Petitioner's arrest was effectuated. During this testimony, Detective McMillan indicated that on the date of Petitioner's arrest he had been contacted by the New York Police Department that Petitioner was in custody and had been arrested on the arrest warrant for the Munroe shooting. (*See* ECF No. 10-22, at 16–17.) Petitioner asserts that his counsel should have objected to this testimony because it permitted the jury to infer that he was in the custody of the NYPD for some other offense, as opposed to the Munroe shooting. (ECF No. 1-2, at 22.)

While Petitioner argues that his counsel failed to object to this testimony, the record does not lend him any support. During Detective McMillan's testimony, his counsel made multiple objections to questions related to Petitioner's arrest warrant and his arrest:

> [THE PROSECUTOR]: Now, an arrest warrant is issued, when was that arrest warrant issued?
>
> [DEFENSE COUNSEL:]: Your, honor, I'm going to object to this.
>
> . . .
>
> [THE PROSECUTOR]: Detective, did there come a time when you made trip up to the Bronx?
>
> [THE WITNESS]: Yes.
>
> [THE PROSECUTOR]: And what happened when you made a trip up to the Bronx?
>
> [THE WITNESS]: We made a trip up to the Bronx because we had been informed by law enforcement personnel –
>
> [DEFENSE COUNSEL]: Your Honor, I'm going to object.

(ECF No. 10-22, at 13–14, 16.) Defense counsel cannot be ineffective where he did, in fact, object to the issues complained of by Petitioner. Moreover, although Petitioner argues that Detective McMillan's testimony permitted the jury to assume Petitioner was arrested for conduct other than the Munroe shooting, it was clear from his testimony that Petitioner was arrested on the Trenton warrant for the shooting. (*See id.* at 17 (indicating that Petitioner was "arrested on the Trenton warrant"). Petitioner's claim therefore fails under both *Strickland* prongs and is denied.

6. Failure to Object to Admission of Character Evidence (Ground Seven)

Petitioner next asserts that his counsel was ineffective for failing to object to "various forms of other-conduct evidence during trial." (ECF No. 1-2, at 23.) Petitioner maintains that certain evidence presented by the State was intended to portray Petitioner "as a person who acted Macho and called people offensive names," and further "as some[one] significantly involved in selling drugs and otherwise using drugs as a means of paying for services rendered." (*Id.*) In this respect, Petitioner contends that his counsel should have objected to the following testimony: (1) testimony from Guerra that "The Hole" was an area in which people used drugs and that Petitioner frequented "The Hole" for that purpose; (2) testimony from Kenute Brown that Petitioner had called him a "pussy"; and (3) testimony from multiple witnesses that the "The Hole" was a known area for drug-use. (*See id.* at 23–26.) Petitioner alleges that had his counsel objected to this testimony, "the trial court would have been required to preclude the evidence." (*Id.* at 27.)

Petitioner's claim fails as he has not demonstrated that he was prejudiced by his counsel's failure to raise these objections. First, testimony regarding "The Hole" and the type of activity that was conducted there was not "other crimes" evidence as the testimony was not specific to Petitioner's behavior at "The Hole." Rather, it pertained to "The Hole" itself. Thus, any objection to this testimony as improper "other crimes" evidence would have been overruled. Counsel cannot

be deemed ineffective for not raising such meritless arguments. *See Werts*, 228 F.3d at 203.

Moreover, had the other testimony been excluded at trial, there is no indication that the jury would have come to a different outcome. Petitioner cannot show that Mr. Brown's testimony that Petitioner called him a "pussy" somehow impacted the jury's verdict where there was significant other evidence presented as to Petitioner's guilt. Thus, even if this Court were to find that Petitioner's counsel was deficient for not objecting to this testimony, his claim cannot succeed on the prejudice prong of *Strickland*.

7. Failure to Raise Issue of Tainted Jury (Ground Eight)

Petitioner claims that as a result of his counsel's alleged deficient performance, he was denied his right to an impartial jury. Specifically, Petitioner takes issue with his counsel's failure to request that Juror No. 11 be excused after he disclosed previously had interacted with the state's medical expert. This disclosure came in the midst of trial proceedings. After the juror came forward, the trial judge briefly questioned him on his interaction with the expert:

> THE COURT: [I]f I can recount it myself, and you can correct me if I'm wrong, the fact that you did not recall when we first asked about the witnesses, whether – you didn't recall Dr. Ahmad having somehow been involved with a death that befell your daughter, and she of necessity is required under state law to do an autopsy. I imagine an autopsy was done?
>
> JUROR NO. 11: No, she didn't. She reviewed all the medical work and all the paperwork. She delayed the burial for a day or two.
>
> THE COURT: Because of the necessity of that?
>
> JUROR NO. 11: Yes.
>
> THE COURT: Now, do you believe that would impact you in any fashion?
>
> JUROR NO. 11: No.
>
> THE COURT: You were just being conscientious?
>
> JUROR NO. 11: The only fact that she delated the burial clicked in my mind.

> THE COURT: And you think notwithstanding that, you can make a fair decision?
>
> JUROR NO. 11: Yes.

(ECF No. 10-24, at 14.) After the juror was dismissed, the following colloquy occurred between the judge and counsel:

> THE COURT: I preempted either one of [you from examining]. I think it was fairly evident on its face that he clearly possessed a capacity to continue, and didn't question it long enough, and I didn't question[] the capacity to make a decision impartially and fairly notwithstanding the circumstances surrounding his daughter. I should have asked how long ago it was, but it was long enough that he didn't remember her. So if you have any problems with that.
>
> [PROSECUTOR]: I agree, your Honor.
>
> THE COURT: Any problem with that, Mr. Weissman?
>
> [DEFENSE COUNSEL]: No, your Honor, there's no problem at this juncture. I'm just concerned a little with the fact that you know he did emphasize the fact the only way it came to his attention is it delayed the burial, and anybody losing anybody real close to them, everybody looks for closure there, and he said it delayed a day or two. I mean he had a smile on his face.
>
> THE COURT: I think his demeanor was very genuine and ingenuous, and I was comfortable with the fact that he did not have a problem and he has so represented it, so we'll deal with that as it is.

(*Id.*)

Defendant asserts that he was prejudiced by his counsel's failure to object to the trial court's decision to retain the juror because "the insufficient inquiry resulted in a possibility that every single juror was exposed to extraneous information that the state's expert was so thorough in the medical profession that perfection was exalted above expected deadlines." (ECF No. 1-2, at 29.) Petitioner further takes issue with counsel's failure to request the trial court provide the jury with more stringent instructions on their duty not to discuss the case with each other or review

media regarding the proceeding. (*Id.* at 30.)

Petitioner, however, cannot demonstrate he suffered any prejudice under *Strickland* as a result of his counsel's failure to object to the retention of Juror No. 11 and to the trial court's apparent deficient instruction of the jury. A defendant's right to a jury trial guarantees "a fair trial by a panel of impartial, 'indifferent' jurors." *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). However, "due process does not require a new trial every time a juror has been placed in a potentially compromising situation." *Smith v. Phillips*, 455 U.S. 209, 217 (1982). Indeed, "[t]he safeguards of juror impartiality, such as *voir dire* and protective instructions from the trial judge, are not infallible; it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote." *Id.* "Due process means a jury capable and willing to decide the case solely on the evidence before it." *Id.*

The trial court's colloquy to determine the impartiality of Juror No. 11 was sufficient to preserve Petitioner's right to a jury trial as the juror confirmed he would be able to act impartially despite his previous interaction with the state's medical expert. Petitioner's claims of prejudice are merely speculative and are insufficient to demonstrate prejudice under *Strickland*. Nor can Petitioner demonstrate any prejudice that resulted from the trial court's apparent lack of instruction to the juror to not discuss or consume media regarding the criminal proceeding. He makes no allegation that any juror violated this rule. Accordingly, he is not entitled to relief on this claim.

8. Failure to Clarify Identification Testimony on Cross-Examination (Ground Twenty-Five)

Petitioner next claims that his counsel was constitutionally deficient as a result of his failure to "clarify through cross examination of two state's witnesses the misleading impression arising out of the State's questioning that the witnesses had identified defendant in court as the perpetrator." (ECF No. 3, at 37.) Petitioner raised a similar claim in his PCR, where he argued

that his counsel failed to properly cross-examine Guerra and Linda Brown. (*See* ECF No. 17-4, at 244.) On its review of the PCR Court's decision, the Appellate Division stated:

> Our review of the questioning of those witnesses does not reveal any obvious deception that would have induced a reasonably competent attorney to object. Nor would a reasonably competent attorney necessarily revisit the issue on cross-examination, which might open the door to further questioning by counsel and consideration by the jury of the fact that these witnesses had in fact identified defendant as the perpetrator when speaking to the police.
>
> . . .
>
> We also find the second prong lacking. While we are not persuaded that 'clarification' was required to assure that the jury understood that the in-court identifications of defendant were only identifying who he was and not that he was the perpetrator, such clarification would not have affected the outcome of the trial.

(ECF No. 10-14, at 10–11.)

This Court does not find that the Appellate Division's decision on this claim was unreasonable or contrary to federal law.[9] It is evident from the records provided to this Court that Fowler and Linda Brown did not identify Petitioner at trial as the shooter but, in fact, identified him as Tyrius Green. The Court agrees with the Appellate Division's conclusion that revisiting this issue on cross-examination would have opened up further testimony regarding the witnesses' long relationships with Petitioner. Moreover, Petitioner has not demonstrated that had his counsel cross-examined these witnesses in a different manner, the outcome of trial would have been different. Accordingly, relief on this claim is denied.

9. Ineffective Assistance of Appellate Counsel (Ground Nine)

Petitioner claims that he received ineffective assistance of appellate counsel because his

[9] The Court's review of the record demonstrates that this claim was exhausted in the state courts. (*See* ECF No. 22-1, at 10–11.) Accordingly, the Court considers the claim under the AEDPA's deferential standard of review.

appellate counsel "fail[ed] to raise the claims asserted in the briefs that followed the direct appeal." (ECF No. 1-2, at 32.) The Court construes Petitioner's claim as alleging his appellate counsel was ineffective for not raising the arguments set forth in the PCR Petition and the Amended Petition.

While *Strickland* is applicable to appellate counsel, "it is a well established principle . . . that counsel decides which issues to pursue on appeal." *Sistrunk v. Vaughn*, 96 F.3d 666, 670 (3d Cir. 1996). Critically, appellate counsel is not required to raise every nonfrivolous claim a defendant desires to pursue. *Jones v. Barnes*, 463 U.S. 745, 751 (1983). Nor is appellate counsel required to raise meritless claims on appeal. *See Evitts v. Lucey*, 469 U.S. 387, 394 (1985).

Petitioner is not entitled to relief on this claim. Not only does Petitioner fail to specify which claims appellate counsel should have brought, as discussed at length in this opinion, the claims raised in this Petition lack merit. Thus, appellate counsel cannot be ineffective for failing to raise those claims on appeal.

10. Cumulative Ineffective Assistance of Counsel (Ground Ten)

Finally, Petitioner brings a claim of cumulative ineffective assistance of counsel. The Third Circuit has recognized that "errors that individually do not warrant habeas relief may do so when combined." *Albrecht v. Horn*, 485 F.3d 103, 139 (3d Cir. 2007); *see also Fahy v. Horn*, 516 F.3d 169, 205 (3d Cir. 2008). Cumulative errors of counsel may entitle a petitioner to habeas relief where "they had a substantial and injurious effect or influence in determining the jury's verdict, which means that a habeas petitioner is not entitled to relief based on cumulative errors unless he can establish 'actual prejudice.'" *Albrecht*, 485 F.3d at 139. Petitioner is not entitled to relief on this claim as he has not demonstrated that his counsel was deficient in any way, nor has he demonstrated that the cumulative effect of any errors made by counsel resulted in "actual prejudice."

V. CERTIFICATE OF APPEALABILITY

Pursuant to 28 U.S.C. § 2253(c), unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken from a final order in a proceeding under 28 U.S.C. § 2254. A certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

The Court will grant a certificate of appealability on Petitioner's claim that the trial court's jury instruction on identification violated his right to due process under the Fifth and Fourteenth Amendments because reasonable jurists could find the district court's assessment of the constitutional claim as debatable. The Court will additionally grant a certificate of appealability on Petitioner's related claim of whether his counsel was ineffective for failing to objective to the trial court's instruction on identification. The Court will, however, deny a certificate of appealability on the remaining claims as Petitioner has not made a substantial showing of the denial of a constitutional right.

VI. CONCLUSION

For the reasons set forth above, the Amended Petition is denied in its entirety. A limited certificate of appealability shall issue. An appropriate order follows.

Peter G. Sheridan 9/10/19

PETER G. SHERIDAN, U.S.D.J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 19-3325

TYRIUS GREEN,
Appellant

v.

ATTORNEY GENERAL NEW JERSEY;
ADMINISTRATOR NEW JERSEY STATE PRISON

(D.C. No. 3-15-cv-01886)

SUR PETITION FOR REHEARING

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

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*Hon. Julio M. Fuentes vote is limited to panel rehearing only.

APPENDIX E

BY THE COURT,

s/Patty Shwartz
Circuit Judge

Dated: March 2, 2021
CLW/cc: George W. Keefer, Esq.
Elizabeth Newton, Esq.

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2832-05T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

TYRIUS GREEN,

Defendant-Appellant.

Submitted April 2, 2008 - Decided June 17, 2008

Before Judges Wefing, R. B. Coleman and Lyons.

On appeal from the Superior Court of New Jersey, Law Division, Mercer County, Indictment No. 04-05-0329.

Yvonne Smith Segars, Public Defender, attorney for appellant (Alyssa Aiello, Assistant Deputy Public Defender, of counsel and on the brief).

Joseph L. Bocchini, Jr., Mercer County Prosecutor, attorney for respondent (Michael A. Nardelli, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Tyrius Green appeals from a July 11, 2005 judgment of conviction based upon a May 11, 2005 jury verdict finding him guilty of murder, N.J.S.A. 2C:11-3(a)(1), second degree possession of a firearm for an unlawful purpose, N.J.S.A.

2C:39-4(a) and third degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(b). On July 8, 2005, the court sentenced defendant to life in prison with a thirty-year period of parole ineligibility for the conviction of murder; it merged the two weapons offenses and imposed a concurrent prison term of ten years on count four for the crime of second degree charge of possession of a weapon for an unlawful purpose.[1] We affirm the convictions and the sentence imposed for murder, but we reverse and remand that portion of the judgment of conviction relating to the sentences imposed for counts four and five, the weapons offenses.

The charges against defendant stem from the events of August 14, 2003. At trial, Kenute Brown testified that at about 10:00 p.m. that night, while Brown was purchasing crack-cocaine, he heard defendant shout out, "Dred, Dred," one of Brown's nicknames. However, when Brown started to approach defendant, defendant made it clear that he was referring to another person, Edgerton Munroe, who also went by the nickname, "Dred." Brown told Munroe that defendant wanted to speak to Munroe, and Munroe

[1] There was a discrepancy between the court's oral articulation of the sentence and the sentence as recorded on the judgment of conviction. The transcript of the sentencing hearing indicates the court announced that the sentence on count four was to run concurrent to the sentence on the murder charge, but the judgment of conviction provides that the sentence is to run consecutive to the sentence on count one, the murder charge.

made his way over to defendant. Brown could not recall what defendant was wearing that night, but he "could see his face." Defendant and Munroe walked into an area known as "The Hole", a dark, wooded area where people "stopped to go get high, and [be] away from police." A few minutes later, Brown heard three to four gunshots coming from the area where defendant and Munroe had just entered. About ninety seconds from the time of the gunshots, Brown saw Munroe run from "The Hole" and fall to the ground.

Patrolman Brian Kowalczyk of the Trenton Police Department responded to the scene of the shooting. He observed Munroe, near a curb, lying on the ground with a gunshot wound to his chest area. Attempts to revive Munroe were unsuccessful; he was transported to a local hospital, but Munroe died as a result of excessive bleeding from a bullet wound. The medical examiner, Dr. Rafaat Ahmad, testified there was an entrance wound in the back and an exit wound in the front abdomen area. The bullet "entered his stomach, the liver and damaged his kidney and his spleen, which were removed by the surgeons, and it perforated his small intestine, large intestine."

At the outset of the police investigation, members of the Trenton Police Department interviewed and took written statements from a number of individuals who had been in the

vicinity of "The Hole", including Kenute Brown, Carol Guerra, Avia Fowler, Linda Brown and Willie Peters. Guerra indicated she was in "The Hole" at the time of the shooting, getting high. According to Guerra's August 17, 2003 statement, two males came into the area and chased another man who was wearing a light-colored shirt. She described one of the pursuers as between five-eight and five-nine; the other was shorter. Both men were dressed in black. The taller man had a black fedora type hat; the shorter one wore a black ski mask. The taller man held a "Dirty Harry [type of] gun." Guerra heard gunshots and saw the taller man following the male in the light-colored shirt, shooting at him. Although she did not see their faces, when the two men in black entered "The Hole", Guerra had thought the taller man was defendant, Tyrius Green, because of "his build and the way he walked. Tyrius has a very distinctive walk, especially when he thinks he is being macho." Guerra had known defendant for between ten and fourteen years.

Guerra had certain doubts about her recollection, however, when she was called to testify at trial. On cross-examination, she stated that her main concern at the time of the shooting had been "getting high." She was not paying a lot of attention to how the men in black were walking or to what actions they were

taking. She testified she was high both at the time of the shooting and at the time she gave her police statements.

Avia Fowler was also in "The Hole" at the time of the shooting. She was there "smoking 'coke.'" She had known defendant "since he was a little boy" and "s[aw] him everyday." She related in her statement that on the night of the shooting, defendant was wearing all black with a black mask across his face. Nevertheless, she asserted "I know Tyrius anywhere." Like Guerra, Fowler also claimed to know defendant's walk. In her statement, Fowler gave the following account of what happened:

> Tyrius told him [Dred Brown] to tell Dred [Munroe] that there was a hundred dollar sell. [Munroe] came back a few minutes later, and when he came back, as soon as he came through the walkway, Tyrius reached out and tried to grab him from the back, but Dred dodged him and started to run . . . . That is when Tyrius pulled the gun out, aimed it at Dred and said 'Freeze.' He said it again and then fired. That is when I heard "Dred" say ouch but he kept running. The second time that Tyrius fired the gun I saw "Dred" hop up off the ground a little bit. I don't think he was hit I think he was just saying ouch because somebody was firing at him. Tyrius shot three times back to back. Every time he shot the gun I saw sparks come out of it. Then Tyrius and the short guy chased after "Dred". Then I left to go find my boyfriend everyone else that was back there ran out in different directions.

21a

At the time of trial when she was asked about the statement she had given to the police, Fowler testified she did not remember being in "The Hole" at the time of the shooting. Although she remembered being brought to the police station for questioning and signing papers, she did not remember reading any of the papers that she signed. Fowler testified she believed that the papers she had signed were blank and that she signed them only because the detective had instructed her to do so. Fowler explained that at the time she was questioned by Detective McMillan, she "was out of it," i.e., she was "cracked out" and had "been up for three weeks." In fact she stated, "I never seen [defendant] back there in "The Hole" with a gun shooting or none of that." When the prosecutor asked if her signature was on the police statement, she responded

> And at the time I was cracked out, to get out of there, I was all ready to go, all I wanted was my $10 that man offered me, the money, he offered me money, and when he told me he was going to get it, all I wanted to do was go smoke the rest of my crack. Get up out of that police station and get his ten dollars and get me some more crack.

Linda Brown was also in "The Hole" at the time of the shooting. She indicated she saw two individuals, one noticeably taller than the other, enter the area. They were dressed all in black with black scarves around their faces. The taller man shouted "Don't move" to a person who entered. He then proceeded

to fire four shots. When asked about defendant, Brown said she had known him her entire life and, at first, she thought the taller man who fired the gun was defendant. However, she could not positively identify him. She indicated she had tried to get the taller man's attention by calling out "Young'n", one of defendant's nicknames, but he did not respond. Because of this, she concluded that the taller man was someone other than defendant.

Willie Peters was in the vicinity of "The Hole"; but he did not see the shooting. He heard three gunshots and he thought that he saw defendant running from "The Hole" after the shots were fired. Like Brown, Peters had known defendant since he was a child.

Detective James McMillian of the Trenton Police Department was assigned to investigate Munroe's death. Based on statements he had obtained, an arrest warrant was issued for defendant. McMillian went to defendant's residence on several occasions. Despite knocking on the door and leaving his card three separate times, he could not locate defendant. Defendant's mother, who testified on behalf of defendant, indicated defendant frequently visited his sister in the Bronx and that she, the mother, was staying with her boyfriend between August 14 and August 19. Eventually, on August 19, 2003, law enforcement officers in the

Bronx informed Detective McMillian that they had arrested defendant at defendant's sister's residence.

On May 26, 2004, a Mercer County grand jury returned an indictment against defendant Tyrius Green containing five counts: first degree murder, N.J.S.A. 2C:11-3(a)(1) (count one); first degree felony murder, N.J.S.A. 2C:11-3(a)(3) (count two); first degree robbery, N.J.S.A. 2C:15-1 (count three); second degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a) (count four); and third degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(b) (count five). The matter was tried before the judge and a jury on May 3, 4, 5, 10 and 11, 2005. At the close of the proofs, defense counsel moved for judgments of acquittal on all counts. The court granted the motion only in part, entering judgments of acquittal and dismissing the felony murder count and the robbery count. The three remaining counts were considered by the jury, which found defendant guilty on each count.

Defendant has appealed and urges that we consider the following points of asserted error:

> POINT I: GUERRA, FOWLER AND BROWN'S LATE-NIGHT, DRUG INDUCED MUSING ON THE IDENTITY OF THE MASKED SHOOTER FAILED TO SUFFICIENTLY ESTABLISH BEYOND A REASONABLE DOUBT THAT THE SHOOTER WAS TYRIUS GREEN. THEREFORE, THE TRIAL COURT ERRED IN DENYING GREEN'S MOTION FOR A JUDGMENT OF ACQUITTAL. ALTERNATIVELY, THIS COURT SHOULD SET ASIDE THE JURY'S

VERDICTS OF GUILT AS BEING AGAINST THE WEIGHT OF THE EVIDENCE.

POINT II: THE TRIAL JUDGE'S ERRONEOUS IDENTIFICATION CHARGE, WHICH WAS UNACCEPTABLY VAGUE AND CONTAINED GROSS MISSTATEMENTS OF FACT, WAS CLEARLY CAPABLE OF LEADING THE JURY TO A VERDICT IT OTHERWISE WOULD NOT HAVE REACHED. THE SEVERE POTENTIAL FOR PREJUDICE CAUSED BY THIS ERRONEOUS CHARGE IS EVEN GREATER WHEN THE CHARGE IS EVALUATED AGAINST THE PROSECUTOR'S INSIDIOUS PRESENTATION OF GUERRA'S AND BROWN'S IDENTIFICATION TESTIMONY. (NOT RAISED BELOW).

POINT III: THE TRIAL JUDGE ERRED IN INSTRUCTING THE JURY THAT IT COULD NOT CONSIDER EVIDENCE OF PREMEDITATION OR THE LACK THEREOF IN DETERMINING WHETHER THE STATE PROVED BEYOND A REASONABLE DOUBT THAT GREEN WAS GUILTY OF KNOWING OR PURPOSEFUL MURDER. (NOT RAISED BELOW).

POINT IV: THE PROSECUTOR'S IMPROPER REFERENCES TO THE WARRANT FOR GREEN'S ARREST WERE HIGHLY PREJUDICIAL AND CLEARLY CAPABLE OF PRODUCING AN UNJUST RESULT.

POINT V: OVER DEFENSE COUNSEL'S OBJECTION, THE JUDGE ADMITTED COPIES OF THE WRITTEN STATEMENTS ALLEGEDLY MADE TO POLICE BY FOWLER AND GUERRA EVEN THOUGH THE RELEVANT PORTIONS OF THOSE STATEMENTS HAD ALREADY BEEN READ INTO EVIDENCE. THE UNNECESSARY INTRODUCTION OF THESE STATEMENTS, PARTICULARLY FOWLER'S, WAS UNDULY PREJUDICIAL.

POINT VI: THE COURT SHOULD NOT HAVE PROVIDED THE JURY WITH A FLIGHT CHARGE.

After a careful consideration of defendant's arguments and the applicable legal precedents, we affirm the convictions.

252

Although defendant did not challenge the sentence, it is manifestly illegal. Accordingly, we remand the matter for reconsideration and modification of the sentence in respect of counts four and five.

Defendant first asserts that the trial court wrongly denied his motion for judgments of acquittal on all counts. The applicable rule provides that the court shall "order the entry of a judgment of acquittal of one or more offenses charged in the indictment . . . if the evidence is insufficient to warrant a conviction." R. 3:18-1. "In deciding whether the trial court was correct in denying the motion, we of course, take into account only the evidence on the State's case, unaided by what defendant later developed at trial." State v. Lemken, 136 N.J. Super. 310, 314 (App. Div. 1974), aff'd, 68 N.J. 348 (1975). If "the proofs at the end of the State's case plainly permitted reasonable inferences by a jury that defendant committed the crimes charged beyond a reasonable doubt, the motion for acquittal was properly denied." Id. at 315.

We are satisfied that sufficient evidence was developed by the State to justify submitting to the jury the issue of defendant's guilt on the charges of murder, possession of a firearm for an unlawful purpose and unlawful possession of a firearm. While the evidence may not have been overwhelming,

"viewing the State's evidence in its entirety, . . . and giving the State the benefit of all its favorable testimony as well as all of the favorable inferences which reasonably could be drawn therefrom," a reasonable jury could find guilt of the charge beyond a reasonable doubt. State v. Reyes, 50 N.J. 454, 459 (1967).

The State presented several witnesses who knew defendant and who indicated defendant was present at the time of the shooting. At least two of the witnesses gave statements that were admitted into evidence in which they identified defendant as the shooter. Another, who said that defendant was not wearing a mask at all, placed defendant in the company of the victim immediately before the shooting began. Accepting this evidence as true and drawing reasonable inferences therefrom, a reasonable jury could and did find him guilty of the crimes charged. See, e.g., State v. Cotto, 182 N.J. 316, 323 (2005) (upholding identification of a robber by a victim who was able to identify her ex-boyfriend based on his voice and his eyes and nose, although his face was covered by a ski mask).

In the alternative, defendant urges that we should reverse those convictions as against the weight of the evidence; however, it is not disputed that counsel did not make a motion for a new trial, so the issue should not be cognizable on

27a

appeal. See State v. Love, 245 N.J. Super. 195, 198 (App. Div. 1991).

> In both civil and criminal actions, the issue of whether a jury verdict was against the weight of the evidence shall not be cognizable on appeal unless a motion for a new trial on that ground was made in the trial court. The trial court's ruling on such a motion shall not be reversed unless it clearly appears that there was a miscarriage of justice under the law.
>
> [R. 2:10-1.]

It is noted that the court may, even absent a motion for a new trial, consider a challenge to the weight of the evidence in the interests of justice. State v. Smith, 262 N.J. Super. 487, 511 (App. Div. 1993). We do not perceive any interests of justice that militate towards our consideration of this request by defendant.

Defendant argues vigorously that the court issued an erroneous identification charge to the jury that unduly prejudiced him. The standard governing our review was recently recited by the Supreme Court in State v. Chapland:

> Because defendant did not object to the court's instruction when it was delivered, a plain error standard applies. As applied to a jury instruction, plain error requires demonstration of "legal impropriety in the charge prejudicially affecting the substantial rights of the defendant and sufficiently grievous to justify notice by the reviewing court and to convince the court that of itself the error possessed a

28a

> clear capacity to bring about an unjust result." The alleged error is viewed in the totality of the entire charge, not in isolation. In addition, any finding of plain error depends on an evaluation of the overall strength of the State's case.
>
> [187 N.J. 275, 288-89 (2006) (internal citations omitted).]

We acknowledge that proper jury instructions are the cornerstones of any fair trial. See State v. Davis, 363 N.J. Super. 556, 560 (App. Div. 2003); State v. Afanador, 151 N.J. 41, 54 (1997).

> An appropriate charge [in a case where identification is the key issue] would state that the State's burden of proof on the issue of identification is beyond a reasonable doubt and [may] set forth the respective factual contentions relating to witness descriptions and identifications.
>
> [State v. Pierce, 330 N.J. Super. 479, 488 (App. Div. 2000); see State v. Green, 86 N.J. at 281, 293-94 (1981).]

The court, however, is not required to refer to the facts of the case, but rather the court has the option of doing so if it decides it to be necessary. State v. Robinson, 165 N.J. 32, 41 (2000).

In this case, defendant charges that the court in its instructions erroneously stated that several witnesses had made in-court identifications of defendant as the shooter. By virtue of that misstatement, defendant contends the charge unfairly

favored the State's interpretation of the case. We must weigh the impact of the court's instructions on the jury's ability to independently interpret the evidence presented. That assessment should be realistic and rooted in common sense. We have previously noted that

> it is highly unlikely that a jury which sat through a . . . trial in which the primary evidence was victim identification testimony, and then heard summations which discussed those identifications at length, was unaware of the specific identifications covered by the identification instruction.
>
> [State v. Walker, 322 N.J. Super. 535, 550 (App. Div. 1999).]

The court gave the following extensive identification charge to the jury:

> Now, the defendant as part of his general denial of guilt, contends that the State has not presented sufficient reliable evidence to establish beyond a reasonable doubt that he is the person who committed the alleged offense. The burden of proving the identity of a person who committed the crime is, of course, upon the State. For you to find the defendant guilty, the State must prove beyond a reasonable doubt that this defendant is the person who committed the crime. And as I told you before, the defendant has no burden to produce evidence or that he is not the person who committed the crime. The defendant has neither the burden nor the duty to show that the crime that was committed was committed by someone else, or to prove the identity of that other person.

30a

You must determine, therefore, not only whether the State has proved each and every element of the offense charged beyond a reasonable doubt, but also, whether the State has proved beyond a reasonable doubt that this defendant is the person who committed it.

Now, the State, in trying to meet that burden, presented the testimony of several witnesses who identified the defendant. You will recall that these witnesses identified the defendant in court as the person who committed the offenses charged. The State also presented testimony that on a prior occasion before this trial witnesses made such an identification -- identified the defendant as the person who was, you may conclude circumstantially or directly or however you conclude, that the defendant was -- the identification of the defendant was based upon the observations and perceptions they made of the perpetrator at the time the offense was being committed. It is your function to determine whether the witness's identification of the defendant is reliable and believable, or whether it is based on mistake, or for any reason is not worthy of belief. You must decide whether it is sufficiently reliable evidence upon which to conclude that this defendant is the person who committed the offenses charged.

In evaluating these identifications, you should consider the observations and perceptions on which the identifications were based, and the witness's ability to make those observations and perceptions. If you determine that the out-of-court identification is not reliable, you must still consider the witness's in-court identification of the defendant, if you find it to be reliable.

Unless the in-court identification resulted from the witness's observation or

perceptions of the perpetrator during the commission of the offense, rather than being the product of an impression gained at the out-of-court identification procedure, it should be afforded no weight. The ultimate issues of the trustworthiness of the in court and out-of-court identifications are for you to decide.

Fundamentally, there are, as you see, three levels of identification: Identification of the alleged perpetrator at the observation of the witnesses; the subsequent prior identifications through looking through the photo array or identifying photograph; and thirdly, the in-court. So, you make the determinations as I've just instructed you. If you have any questions, look at this. If you have any further questions, you'll let me know and I'll try to explain it further.

To decide whether identification testimony is sufficiently reliable upon which to conclude that this defendant is the person who committed the offenses charged, you should evaluate the testimony of the witness in light of the factors for considering credibility that I've already explained to you. In addition, you may consider the following factors: The witness's opportunity to view the person who committed the offense at the time of the offense; the witness's degree of attention on the perpetrator when he or she observed the crime being committed; the accuracy of any description the witness gave prior to the identification of the perpetrator; the degree of certainty expressed by the witness in making the identification; the length of time between the witness's observation and the offense at the first identification; discrepancies or inconsistencies between identifications; the circumstances under which the out-of-court identification was made; here, the single and multiple

320a

> photograph arrays presented to the witness by the police; or any other factor on the evidence which -- or lack of evidence in this case which you consider relevant to your determination whether identifications were reliable.
>
> If, after all of the considerations of the evidence, you determine the State has not proven beyond a reasonable doubt that the defendant was the person who committed these crimes, then you must find the defendant not guilty. On the other hand, after consideration of all the evidence you are convinced beyond a reasonable doubt that the defendant was correctly identified, then you will consider whether the State has proven each and every element of the offenses charged beyond a reasonable doubt.
>
> [(emphasis added to identify the allegedly objectionable portion).]

When viewed as a whole, this jury instruction was adequate, though mistaken in the respect now pointed out by defendant. See State v. Figueroa, 190 N.J. 219, 246 (2007) (holding that the offensive portion of the jury instruction cannot be viewed in a vacuum); State v. Wilbely, 63 N.J. 420, 422 (1973). "[A]ny alleged error also must be evaluated in light 'of the overall strength of the State's case.'" State v. Burns, 192 N.J. 312, 341 (2007) (quoting Chapland, supra, 187 N.J. at 289). While the jury instruction was not perfect, we do not conclude that the mistake had the capacity to prejudice defendant so much as to offend all notions of justice.

33a

The judge did incorrectly state that several witnesses identified the defendant in court as the person who committed the offenses charged. Although defendant now points out in his reply brief that "not one witness identified Green in court as the shooter," there was no objection or request for correction before the jury retired to deliberate. If the judge's misstatement was "a blatant mischaracterization of the evidence," it should have been recognized by defense counsel at the time, and an objection should have been placed on the record.

The mistake is obvious in hindsight and upon close scrutiny of the transcript, however, it apparently was not obvious at the time of trial since defense counsel raised no objection and requested no correction. Ordinarily, a party waives the right to challenge on appeal any portion of the jury charge if he or she fails to object to it. R. 1:7-2; State v. Townsend, 186 N.J. 473, 498 (2006). Because there was no objection, we must consider defendant's argument under the plain error standard. R. 2:10-2. "Under that standard, '[a] reviewing court may reverse on the basis of unchallenged error only if it finds plain error clearly capable of producing an unjust result.'" State v. Bunch, 180 N.J. 534, 541 (2004) (quoting Afanador, supra, 151 N.J. at 54). As we view it, the misstatement was

34a

fleeting and it did not concern an element of an offense or some other legal issues. Rather, it related to the judge's recollection or recounting of events that occurred in open court and in the presence of the jury. As to such matters, the jury had been instructed "Regardless of what counsel may have said, regardless of what I may have said in recalling the evidence in this case, it is your recollection of the evidence that should guide you as sole judges of the facts." We do not conclude that the judge's misstatement had the clear capacity to produce an unjust result.

Defendant also takes issue with the State's method of direct examination of certain witnesses, complaining that the sequence of questions presented to Guerra and Linda Brown was unfairly suggestive. The prosecutor inquired of both witnesses how the assailant was dressed. Immediately after he had elicited the description of a man in black from the witnesses, the prosecutor asked the witnesses if they knew Tyrius Green. Defendant contends this creates an inference by proximity in questioning that the man in black was in fact defendant, Tyrius Green. That inference could have been dispelled readily by cross-examination.

Moreover, N.J.R.E. 403 specifies that "relevant evidence may be excluded if its probative value is substantially

35a

outweighed by the risk of (a) undue prejudice, confusion of issues, or misleading the jury or (b) undue delay, waste of time, or needless presentation of cumulative evidence." The Court has recognized that "prosecutors have a special duty to seek justice." State v. Wakefield, 190 N.J. 397, 569 (2007) cert. denied sub. nom. Wakefield v. N.J., ___ U.S. ___, 128 S. Ct. 1074, 169 L. Ed. 2d 817 (2008). "'[P]rosecutors may fight hard, but they must also fight fair.'" Ibid. (quoting State v. Pennington, 119 N.J. 547, 577 (1990), overruled on other grounds by State v. Brunson, 132 N.J. 377 (1993), and superseded by statute, N.J.S.A. 2C:11-3(i), as recognized in State v. Cruz, 163 N.J. 403, 412 (2000)). Deceptive tactics should be discouraged, but given the other testimony and the opportunity afforded defense counsel to neutralize any false suggestion caused by the juxtaposition of the prosecutor's questions, we are not convinced that this questioning constituted plain error.

Defendant likewise contends that the court's response to a jury inquiry regarding the consideration of premeditation constituted reversible error. We disagree. The jury sent a note to the court asking "Is premeditation a factor in considering question 1A?" Question 1A related to knowing or purposeful murder. The court responded: "The simple answer is no. Premeditation is not a factor." The trial court was

essentially correct. Premeditation was not a statutory element of murder under the circumstances of this case. One may be convicted of first degree murder without motive or malice aforethought. Indeed, N.J.S.A. 2C:11-3 instructs that a defendant must have committed the offense knowingly or purposefully. The trial court had carefully outlined the applicable states of mind in its jury charge. Again, there was no objection to charge at trial, and we have no reason to speculate that a more comprehensive discussion of premeditation would have led to a different result.

Defendant also contends that he is entitled to a reversal of his conviction because of a witness's improper references to the warrant issued for his arrest. A judge's involvement in the warrant process is expressly contemplated and permitted by the court rules. R. 3:3-1. A passing reference to the issuance of a warrant, therefore, should not have improperly influenced the jury. See State v. McDonough, 337 N.J. Super. 27, 34 (App. Div. 2001). On the other hand, in certain situations, the mere mention of the existence of a warrant may so mislead the jury as to require a reversal.

For example, in State v. Milton, the defendant was tried and convicted of cocaine possession. 255 N.J. Super. 514, 516 (App. Div. 1992). In the prosecutor's opening statement, he

37a

stated that the police had a search warrant for the defendant's home and for defendant's person. The defendant was, however, not home at the time of the no-knock search. Id. at 519. There was no evidence that the personal search warrant was ever executed, and the arrest warrant for defendant was not executed until three weeks after the initial search of defendant's home. Ibid. This court reversed the conviction because the testimony regarding the unexecuted search warrant served to create a prejudicial inference; namely, a judge believed there to be some evidence that the defendant possessed cocaine. Id. at 520. The Milton case is clearly distinguishable from the facts of the instant case. The witness in this case did not directly testify or imply that a judge made any determination beyond the existence of probable cause or that there had been reliance on evidence other than the investigatory material made known to the jury.

Indeed, our Supreme Court has disagreed with the Milton approach, observing that "a properly instructed jury will not presume guilt based on the issuance of a search warrant. [M]oreover, . . . the fact that a warrant was issued might necessarily be put before a jury in order to establish that the police acted properly." State v. Marshall, 148 N.J. 89, 240, cert. denied, 522 U.S. 850, 118 S. Ct. 140, 139 L. Ed. 2d 88

38a

(1997). Detective McMillian offered testimony regarding the issuance of the arrest warrant. He merely stated that "[b]ased on the information gathered from the statements and IDs made, we were able to issue an arrest warrant for the arrest of Tyrius Green for his involvement in the death of Edgerton Munroe." The prosecutor then asked questions regarding the timing of the warrant and the timing of defendant's arrest. The prosecutor never mentioned the involvement of a judge. The State witness did not directly testify or imply that a judge had any involvement in the process.

Defendant asserts that the court should not have admitted, pursuant to N.J.R.E. 803(a)(1), copies of written statements made by Fowler and Guerra to the police. He argues that the evidence should have been found inadmissible as cumulative and unduly prejudicial under N.J.R.E. 403 because portions of the statements had been read by the prosecutor during trial. Defendant concedes that the court conducted the proper inquiry to admit the evidence as prescribed by State v. Gross, 121 N.J. 1 (1990), and State v. Spurell, 121 N.J. 32 (1990). A prior inconsistent statement may be admitted for substantive purposes. "[T]he burden of proving reliability of such a prior inconsistent statement is by a fair preponderance of the evidence." Spurell, supra, 121 N.J. at 42. The court must

39a

analyze "all surrounding circumstances" before admitting this evidence. Ibid. "[T]he status of the declarant can be a highly relevant circumstance . . . ." Ibid. Defendant nevertheless claims that by admitting the written statements after having allowed the reading of portions of them at trial, the court placed unwarranted importance and credence behind the statements.

At least two of the witnesses, Carol Guerra and Avia Fowler, recanted or seriously retreated from their earlier identifications of defendant while they were being cross-examined. Indeed, Fowler claimed she signed blank sheets and implied she would have said anything in order to receive money she needed to satisfy her addiction. The admission of the prior statements was not, under such circumstances, cumulative or unduly prejudicial to defendant. For example, the trial court ruled the jury had a right to examine the placement of Fowler's signature in relation to the content of her statement. They could then weigh the credibility of her claims that her statements had been fabricated by the investigators. This was an exercise of discretion by the trial court to which we must pay deference.

Defendant next argues that the court should not have instructed the jury as to flight and that the charge itself was

40a

inadequate. We disagree. The Supreme Court has recently reaffirmed the relevance of evidence of flight, noting that "evidence of flight occurring after the commission of an offense has been held probative of guilt and admissible." State v. Williams, 190 N.J. 114, 125-26 (2007). We are convinced that the trial court properly allowed the jury to consider whether defendant's post-crime departure was evidence of defendant's understanding of his own guilt or a coincidental excursion to visit his sister.

The language issued by the court regarding flight closely followed the model jury charge and was not inadequate, as defendant contends. While there was not a great deal of evidence that defendant was aware he was being sought or that he specifically fled to avoid capture, there was evidence that he was with Munroe immediately before Munroe was shot and that he left the scene of a shooting after the incident. He went to his sister's residence in New York. Whether his objective was to avoid the police, who attempted to arrest him at his own home, or merely to visit his sister was a legitimate issue for the jury to consider. The charge did not, in any event, deprive defendant of a fair trial.

Even though we affirm the convictions against defendant, we remand for modification of defendant's sentence. The sentencing

transcript reveals plain error in respect to the merger of offenses. The court noted at the sentencing hearing that "[f]or purposes of Counts 4 and 5, those counts are merged." It then sentenced defendant to a prison term of ten years on count four, the second degree charge under N.J.S.A. 2C:39-4(a), concurrent to the life sentence with the thirty-year parole disqualifier for murder. The court also directed that because the third degree offense in count five was merged into the second degree offense in count four, there would be "no additional penalties." The mergers were clearly wrong. State v. O'Neill, 193 N.J. 148, 163 n.8 (2007); State v. Cooper, 211 N.J. Super. 1, 22-23 (App. Div.) certif. denied sub. nom., State v. Lawson, 105 N.J. 525 (1986). Third degree possession of a weapon is not an included offense of possession of a weapon for unlawful purpose, and the two convictions do not merge. Ibid. As we explained in Cooper, supra,

> [t]he gravamen of an offense under N.J.S.A. 2C:39-5(b) is the failure to have a permit while that of N.J.S.A. 2C:39-4(a) is possession of a weapon with the intent to use it unlawfully. These are not included offenses within the meaning of N.J.S.A. 2C:1-8(d) and do not merge. State v. Latimore, 197 N.J. Super. 197, 215-216 (App. Div. 1984).
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> [211 N.J. Super. at 22-23.]

42a

Whereas the third degree charge under N.J.S.A. 2C:39-5(b) should have been considered separately for sentencing purposes, the charge of possession of a weapon with a purpose to use it unlawfully against the person of another, under N.J.S.A. 2C:39-4(a), should have been merged with the murder count.

Hence, the trial court committed error by failing to merge the conviction for possession of a weapon for an unlawful purpose into the conviction for murder. In State v. Diaz, the Court summarized the analysis to be applied when determining issues of merger:

> The standard for merger of offenses set forth at N.J.S.A. 2C:1-8, providing that offenses are different when each requires proof of facts not required to establish the other, has been characterized as "mechanical." State v. Truglia, 97 N.J. 513, 520, 480 A.2d 912 (1984). A preferred and more flexible standard was articulated in the pre-code case of State v. Davis, 68 N.J. 69, 342 A.2d 841 (1975). State v. Dillihay, supra, 127 N.J. at 47, 601 A.2d 1149. In Davis, the Court observed:
>
> > Such an approach would entail analysis of the evidence in terms of, among other things, the time and place of each purported violation; whether the proof submitted as to one count of the indictment would be a necessary ingredient to a conviction under another count; whether one act was an integral part of a larger scheme or episode; the intent of the accused; and the consequences

43a

> of the criminal standards transgressed.
>
> [144 N.J. 628, 637-38 (1996) (quoting Davis, supra, 68 N.J. at 81).]

A defendant may not be convicted of more than one offense if one is included in the other. N.J.S.A. 2C:1-8(a). An offense is included in another if it is established by proof of the same or less than all the facts required to establish the commission of the other offense. N.J.S.A. 2C:1-8(d)(1).

In this case, defendant used a handgun for an unlawful purpose while in the process of committing the murder. Under the Diaz/Davis analysis, the act of murder was directly linked to the possession of the handgun. The failure to merge the convictions for murder and possession of a weapon for an unlawful purpose thus resulted in an illegal sentence for which there is no procedural time limit for correction. See State v. Romero, 191 N.J. 59, 80 (2007).

Finally, as we have noted, the trial court's oral recitation of the sentence does not match the provisions of the judgment of conviction as filed. At the sentencing hearing, the court directed that the sentence for count four would run concurrently to the sentence imposed for count one, however, the written judgment of conviction provides that the sentence for count four is to run consecutively to the sentence on count one.

44a

Ordinarily, where there is a discrepancy between the judge's oral pronouncement of sentence and the sentence in the judgment of conviction, the transcript controls. State v. Pohlabel, 40 N.J. Super. 416, 423 (App. Div. 1956). Where, however, the transcript is unclear as to the judge's intent, a remand may be necessary for clarification. State v. Murray, 338 N.J. Super. 80, 91 (App. Div.), certif. denied, 169 N.J. 608 (2001). In this instance, we perceive no lack of clarity in the court's oral pronouncement imposing a concurrent term. Nor does the record provide any analysis tending to justify the imposition of a consecutive sentence. See, e.g., State v. Pennington, 154 N.J. 344, 361 (1998) (requiring sentencing court to fully explain why the consecutive maximum sentence was imposed); State v. Yarbough, 100 N.J. 627, 630 (1985), cert. denied, 475 U.S. 1014, 106 S. Ct. 1193, 89 L. Ed. 2d 308 (1986) (setting forth criteria for consecutive sentencing).

Accordingly, we remand so the trial court can merge count four into count one and impose an appropriate concurrent sentence for count five, which should not exceed the range applicable to a third degree offense.

Affirmed and remanded for sentencing.

I hereby certify that the foregoing is a true copy of the original on file in my office.
CLERK OF THE APPELLATE DIVISION

45a

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1277-12T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

TYRIUS GREEN,

Defendant-Appellant.

Submitted April 8, 2014 – Decided April 30, 2014

Before Judges Hayden and Lisa.

On appeal from the Superior Court of New Jersey, Law Division, Mercer County, Indictment No. 04-05-0329.

Joseph E. Krakora, Public Defender, attorney for appellant (William Welaj, Designated Counsel, on the brief).

Joseph L. Bocchini, Jr., Mercer County Prosecutor, attorney for respondent (John P. Boyle, Jr., Assistant Prosecutor, on the brief).

PER CURIAM

Defendant, Tyrius Green, appeals from the April 26, 2012 order denying his petition for post-conviction relief (PCR). Defendant was convicted of first-degree knowing or purposeful murder, N.J.S.A. 2C:11-3a(1),(2), second-degree possession of a

weapon for an unlawful purpose, N.J.S.A. 2C:39-4a, and third-degree possession of a handgun without a permit, N.J.S.A. 2C:39-5b. On July 8, 2005, defendant was sentenced for murder to life imprisonment with a thirty-year period of parole ineligibility. The court merged the two weapons offenses and imposed a concurrent ten-year sentence on the charge of possession of a weapon for an unlawful purpose. In an unpublished opinion, we affirmed defendant's conviction on all three counts and affirmed his sentence for murder, but remanded for correction of the sentences imposed on the weapons offenses. State v. Green, No. A-2832-05 (App. Div. June 17, 2008). The Supreme Court denied defendant's petition for certification. State v. Green, 196 N.J. 596 (2008).

In his PCR petition, defendant alleged various improprieties in his trial, including an assertion of ineffective assistance of counsel on various grounds. Based upon a review of the written submissions of both parties and oral argument, the PCR judge (who had not presided over the trial) denied defendant's petition without granting an evidentiary hearing.

On appeal, defendant has not sought review of all of the issues raised in his PCR proceeding. He has narrowed his focus to two of the items, as set forth below, and the denial of his

request for an evidentiary hearing. More particularly, defendant argues:

POINT I

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S PETITION FOR POST CONVICTION RELIEF WITHOUT AFFORDING HIM AN EVIDENTIARY HEARING TO FULLY ADDRESS HIS CONTENTION THAT HE FAILED TO RECEIVE ADEQUATE LEGAL REPRESENTATION AT THE TRIAL LEVEL.

A. THE PREVAILING LEGAL PRINCIPLES REGARDING CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL, EVIDENTIARY HEARINGS AND PETITIONS FOR POST CONVICTION RELIEF.

B. TRIAL COUNSEL DID NOT PROVIDE ADEQUATE LEGAL REPRESENTATION TO THE DEFENDANT AS A RESULT OF HIS FAILURE TO OBJECT TO THE TRIAL COURT'S CHARGE TO THE JURY REGARDING IDENTIFICATION WHEN THE COURT ERRONEOUSLY INDICATED SEVERAL WITNESSES HAD IDENTIFIED THE DEFENDANT IN COURT AS HAVING BEEN THE PERPETRATOR.

C. TRIAL COUNSEL DID NOT PROVIDE ADEQUATE LEGAL REPRESENTATION TO THE DEFENDANT AS A RESULT OF HIS FAILURE TO CLARIFY THROUGH CROSS-EXAMINATION OF TWO STATE'S WITNESSES THE MISLEADING IMPRESSION ARISING OUT OF THE STATE'S QUESTIONING THAT THE WITNESSES HAD IDENTIFIED THE DEFENDANT IN COURT AS THE PERPETRATOR.

POINT II

RULE 3:22-5 DID NOT OPERATE AS A PROCEDURAL BAR TO PRECLUDE THE DEFENDANT'S CONTENTIONS FROM BEING ADJUDICATED ON A SUBSTANTIVE BASIS.

We reject defendant's arguments and affirm.

The two substantive points defendant raises are related to each other, both pertaining to identification. The State called five witnesses who were present when an individual shot and killed Edgerton "Dred" Munroe in Trenton on August 14, 2003, at about 10:30 p.m. The witnesses were Kenute Brown, Carol Guerra, Avia Fowler, Linda Brown, and Willie Peters. All of these individuals had known defendant from the neighborhood for many years.

Guerra and Fowler gave statements to the police shortly after the shooting. The statements were reduced to writing, and they initialed and signed them. In the statements, each identified defendant as the shooter. However, at trial, Guerra and Fowler recanted and said they did not know who the shooter was. Their written statements were admitted into evidence, and they were questioned about them in their trial testimony.

None of the five witnesses specifically identified defendant in the courtroom as the person who shot Munroe. All of them did identify defendant as Tyrius Green, a person they had known for many years.

When the trial judge charged the jury, he included an identification charge, which suggested that unspecified witnesses had identified defendant in court as the shooter. More particularly, the charge included the following:

> Now, the State, in trying to meet that burden, presented the testimony of several witnesses who identified the defendant. You will recall that these witnesses identified the defendant in court as the person who committed the offenses charged. The State also presented testimony that on a prior occasion before this trial witnesses made such an identification -- identified the defendant as the person who was, you may conclude circumstantially or directly or however you conclude, that the defendant was -- the identification of the defendant was based upon observations and perceptions they made of the perpetrator at the time the offense was being committed.

In his PCR petition, defendant contended that his trial counsel was deficient for not objecting to this charge because no in-court identification of defendant as the perpetrator was made.

In a related argument, defendant contended that by virtue of the sequence of the prosecutor's questioning of Guerra and Linda Brown, the prosecutor created an impression that they were indeed identifying defendant in court as the shooter. These witnesses were first asked a series of questions about the details of the shooting, followed by questions about whether the witnesses were familiar with defendant and could identify him in the courtroom. Of course, being familiar with defendant for many years, they did identify the individual in the courtroom as defendant.

Defendant claims this line of questioning was improper and deceptive. Defendant further contends that his trial counsel was deficient for not objecting or, alternatively, clarifying on cross-examination that the witnesses were merely identifying the person charged as the defendant in the case as Tyrius Green, but not identifying him as the person who shot Munroe.

In his direct appeal, defendant raised these issues under a single point heading as follows:

POINT II

> THE TRIAL JUDGE'S ERRONEOUS IDENTIFICATION CHARGE, WHICH WAS UNACCEPTABLY VAGUE AND CONTAINED GROSS MISSTATEMENTS OF FACT, WAS CLEARLY CAPABLE OF LEADING THE JURY TO A VERDICT IT OTHERWISE WOULD NOT HAVE REACHED. THE SEVERE POTENTIAL FOR PREJUDICE CAUSED BY THIS ERRONEOUS CHARGE IS EVEN GREATER WHEN THE CHARGE IS EVALUATED AGAINST THE PROSECUTOR'S INSIDIOUS PRESENTATION OF GUERRA'S AND BROWN'S IDENTIFICATION TESTIMONY. (NOT RAISED BELOW).
>
> [State v. Green, supra, slip op. at 9.]

In rejecting these arguments, we concluded that the identification instruction as a whole was adequate and, while "not perfect," did not constitute a mistake that had the capacity to prejudice defendant and lead to an unjust result. Id. at 17. We considered the misstatement "fleeting" and one which "did not concern an element of an offense or some other legal issues." Id. at 18-19. The misstatement "related to the

judge's recollection or recounting of events that occurred in open court and in the presence of the jury." Id. at 19. We noted that the judge had instructed the jury, "Regardless of what counsel may have said, regardless of what I may have said in recalling the evidence in this case, it is your recollection of the evidence that should guide you as sole judges of the facts." Ibid. We therefore found no basis for reversal as a result of the misstatement in the identification instruction. Ibid.

We also rejected defendant's argument about the questioning of Guerra and Linda Brown. While noting that the line of questioning may have been considered deceptive, we were "not convinced that this questioning constituted plain error." Id. at 20.

We now address the arguments defendant presents in this appeal. In Point II, defendant argues that he should not be procedurally barred from raising his substantive claims in the PCR proceeding by Rule 3:22-5, which provides that "[a] prior adjudication upon the merits of any ground for relief is conclusive whether made in the proceedings resulting in the conviction or in any post-conviction proceeding. . . ." We first note that the PCR judge found the claims that are now before us procedurally barred because of the prior adjudication

on direct appeal, but he nevertheless considered each of defendant's claims on the merits and found them substantively deficient. We agree in both respects.

A PCR proceeding is not a substitute for direct appeal, R. 3:22-3, and it may not be utilized to re-litigate issues already decided on the merits. State v. Cerbo, 78 N.J. 595, 605 (1979). If the claim made in the PCR proceeding is either identical or substantially equivalent to the issue previously adjudicated, it is barred by Rule 3:22-5. State v. Marshall, 173 N.J. 343, 351 (2002).

The claims defendant has made here are identical or substantially equivalent to those raised on direct appeal. They have been adjudicated adversely to defendant, and he does not have the option of now re-litigating them in a collateral proceeding. The claims are barred by Rule 3:22-5.

The claims also lack substantive merit. A review of the trial transcript, including the summations of both counsel, makes it abundantly clear that this trial was all about identification of the person who shot and killed Munroe. Throughout their summations, both counsel presented arguments to the jury highlighting the discrepancies between the identifications Guerra and Fowler made in their statements to

the police soon after the crime and their denial of those identifications in the courtroom.

The prosecutor made extensive arguments as to why the jury should accept the written statements and reject the in-court testimony. Defense counsel argued extensively and repeatedly that the witnesses were lacking in credibility, they lied one time or the other and should not be believed, and to accept one statement over the other would be nothing more than flipping a coin and could not constitute proof of guilt beyond a reasonable doubt. As we said in our prior opinion on direct appeal,

> it is highly unlikely that a jury which sat through a . . . trial in which the primary evidence was victim identification testimony, and then heard summations which discussed those identifications at length, was unaware of the specific identifications covered by the identification instruction.
>
> [State v. Green, supra, slip op. at 14 (citing State v. Walker, 332 N.J. Super. 535, 550 (App. Div. 1999)).]

Even if we were to assume, for purposes of analysis, that trial counsel was deficient for not objecting to the instruction, the second-prong of the Strickland/Fritz[1] test was met because the error did not raise a reasonable probability that, but for such error by counsel, the results of the proceeding would have been different. Strickland, supra, 466 U.S. at 694, 104 S. Ct.

[1] Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Fritz, 105 N.J. 42 (1987).

at 2068, 80 L. Ed. 2d at 698. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Ibid. For the reasons we have expressed, this fleeting misstatement in the identification instruction did not have the capacity to undermine confidence in the outcome of defendant's trial.

We likewise find no merit regarding the method of direct examination by the prosecutor of Guerra and Linda Brown. With respect to this issue, we cannot find that either prong of the Strickland/Fritz test was satisfied. Our review of the questioning of those witnesses does not reveal any obvious deception that would have induced a reasonably competent attorney to object. Nor would a reasonably competent attorney necessarily revisit the issue on cross-examination, which might open the door to further questioning by counsel and consideration by the jury of the fact that these witnesses had in fact identified defendant as the perpetrator when speaking to the police.

Counsel's conduct is presumptively within the wide range of reasonable professional assistance to a criminal defendant and, to rebut this presumption, a defendant has the obligation to prove that his attorney's action did not amount to sound trial strategy. Strickland, supra, 466 U.S. at 689, 104 S. Ct. at

2065, 80 L. Ed. 2d at 694-95. Courts should refrain from second-guessing strategic decisions.

We also find the second prong lacking. While we are not persuaded that "clarification" was required to assure that the jury understood that the in-court identifications of defendant were only identifying who he was and not that he was the perpetrator, such clarification would not have affected the outcome of the trial.

Finally, defendant argues that the PCR judge erred in denying his request for an evidentiary hearing. Such a hearing is discretionary with the trial court and is warranted only if a defendant has made a prima facie showing of entitlement to relief. State v. Preciose, 129 N.J. 451, 462 (1992). It is necessary only if "there are material issues of disputed fact that cannot be resolved by reference to the existing record." R. 3:22-10(b).

We agree with the PCR judge that no evidentiary hearing was warranted here. Viewing the evidence in the light most favorable to defendant, there has been no prima facie showing of entitlement to relief. Further, defendant has directed us to no material facts in dispute that would be subject to resolution at an evidentiary hearing. On the contrary, the factual predicates underlying defendant's claims are contained in the trial record.

The PCR judge did not err in refusing defendant's request for an evidentiary hearing.

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - MERCER COUNTY
IND. NO. 04-05-0329
APP. DIV. NO. A-002832-05T4

THE STATE OF NEW JERSEY,

vs.

TYRIUS GREEN,

Defendant.

STENOGRAPHIC TRANSCRIPT

OF

TRIAL PROCEEDINGS

PLACE: Mercer County Courthouse
209 South Broad Street
Trenton, Jersey 08650

DATE: May 11, 2005

B E F O R E:

HONORABLE BILL MATHESIUS, J.S.C.
AND A JURY

Transcript Ordered By:

Louis G. Gonnella, ADPD
Office of the Public Defender

A P P E A R A N C E S:

JOSEPH L. BOCCHINI, JR.
PROSECUTOR - MERCER COUNTY
BY: SKYLAR S. WEISSMAN, ASSISTANT PROSECUTOR
Attorney for the State of New Jersey

GEORGE B. SOMERS, JR., ESQUIRE
(Sole Practitioner)
Attorney for the Defendant

* * * * * * *

JANET SBARRO, CSR, CRR
Mercer County Courthouse
209 South Broad Street
Trenton, New Jersey 08650

First she told us, yes, she was there; then she told us, well, I was not there, I was at my boyfriend's house, Angel Hernandez. Interesting, that all of the sudden she has a concern for her son on the date of August 19th, and tries to locate her son. And how does she go about trying to locate her son? She tells us she contacts the girlfriend. Does not even call her own daughter in the Bronx, the girlfriend has to tell her that he's in the Bronx.

And what happens, ladies and gentlemen, on August 19th, he's apprehended in the Bronx, five days after this offense. Coincidentally, that all of the sudden on the weekend of a murder he decides to go off to the Bronx. Mom has no idea where he is. Mom never receives cards, never receives the officer's cards who has been to the house on three different occasions. Ask yourself, is that coincidence or is that fact?

And when you put this case together, and again, when you assess all the evidence that the State has put in front of you, the State is confident, the State is confident that when you go back and deliberate in the jury room, you will come back with the verdicts of guilty in the three-count Indictment.

Count One, which charges murder, that this defendant did purposely and knowingly kill Mr. Munroe

on August 14th, 2003; Count Two, possession of a weapon for unlawful purpose, that the purpose of having that gun on August 14th was to kill Edgerton Munroe; and Count Three, unlawful possession of a weapon, that he had no right to have that weapon on his person.

Again, I want to thank you for your attention in this case. Thank you.

THE COURT: Thank you very much, Prosecutor.

Okay, ladies and gentlemen, I think you deserve a break for a few minutes, so we're going to ask you to step down. Your drinks are here and we'll get you back in fifteen minutes, and I'll give you your charge. Thank you very much. Please step down, be careful, and don't talk about the case yet.

(At which time the jury was excused from the courtroom for a morning recess.)

(Recess taken.)

(After recess.)

(Defendant and counsel are present.)

SHERIFF'S OFFICER: Jury entering court.

(At which time the jury was brought into the courtroom and the following took place.)

THE COURT: All right, ladies and gentlemen. You've heard the summations of counsel, and

I will now instruct you as to the law that you're to apply to the facts as you find them in this case. That's my obligation, to instruct you on the principles of the law, and you should consider my instructions in their entirety, don't single out anything in particular and say this is the answer to everything.

You will have, by the way, and you don't have to take notes, you'll have copies of these instructions for you so that you'll have all of the definitions that I'm reading, and some of them will be repetitive, and I apologize for that, but as you know, I'm obliged to give you the full spectrum of the law and some of the repetition unfortunately becomes necessary, even though I am sure you are able to comprehend at first or second opportunity some of the principles that we talk about.

As you know, you must apply the law to this case as I give it to you in this charge. Any ideas of what you might have as to what the law is or what it should be, or any statements by the attorneys as to what they believe the law is or what it should be, must be disregarded by you if they're in conflict with my charge.

As you have observed during the course of the trial, I was required to make certain rulings on

the admissibility of evidence, and that will play a particular part with respect to some of the discussion I will have later on regarding statements used and what have you, and the minor modifications in the charge itself. But I'll get into that in a while.

Those rulings and all the rulings that I've made involve questions of law, and the comments of the attorneys on those issues were not evidence. In ruling, I have decided the questions of law and whatever the ruling may have been in any particular instance, you should understand that it was not an expression by me of my opinion as to what the merits of the case were, but rather, making a dispassionate review of the law, even as an umpire might call balls and strikes, that's what I view myself as doing.

Any ruling on any aspect of this trial should not be taken as favoring one side or the other. Each matter, I believe, in my best effort was decided on its own merits.

When I use the term evidence, I mean the testimony you have heard and seen from this witness box and the exhibits that have been admitted into evidence. As jurors, it is your duty to weigh the evidence calmly, without passion, prejudice or sympathy. Any influence caused by those emotions has the potential to

deprive both the State and the defendant of what you promised them, a fair and impartial trial by fair and impartial jurors.

Speculation, conjecture, and other forms of guessing play no role in the performance of your duty.

Now, as I instructed you at the beginning of the trial, the defendant stands before you on an Indictment returned by the Grand Jury charging him with certain offenses, which I will get into a little bit later with more particularity. The Indictment is not evidence of the defendant's guilt on the charges, it is merely a step in the procedure to bring the matter before the Court and jury for the jury's ultimate determination as to whether the defendant is guilty or not guilty on the charges stated in it.

The defendant, as you know, has pleaded not guilty to the charges.

Now, I'll repeat once again some of the axioms of our law which relate to the presumption of innocence, the burden of proof and what have you, all of which you have heard and you will hear again.

The defendant on trial is presumed to be innocent, and unless each and every essential element of an offense charged is proved beyond a reasonable doubt, the defendant must be found not guilty of that

charge.

The burden of proving each element of a charge beyond a reasonable doubt rests upon the State of New Jersey, and that burden never shifts to the defendant. The defendant in a criminal case has no obligation to prove or present any evidence respecting his innocence. The prosecution must prove its case by more than a mere preponderance of the evidence, yet not necessarily to an absolute certainty.

The State has the burden of proving the defendant guilty beyond a reasonable doubt. A reasonable doubt is no more nor less than an honest and reasonable uncertainty in your minds about the guilt of a defendant after you have given full and complete impartial consideration to all of the evidence. A reasonable doubt may arise from the evidence itself or from a lack of evidence. It is a doubt that a reasonable person hearing the same evidence would have.

Proof beyond a reasonable doubt is, for example, such proof that leaves you firmly convinced of the defendant's guilt. In criminal cases the law does not require proof that overcomes every possible doubt. If based upon your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crimes charged, you must find him guilty. If on

the other hand, you are not firmly convinced of the defendant's guilt, you must give the defendant the benefit of the doubt and find him not guilty.

Now, on my preliminary charge when I started this case, I explained to you that you are the judges of the facts, and as judges of the facts, you are to determine the credibility of the various witnesses, as well as the weight to be attached to their testimony. You, and you alone, are the sole and exclusive judges of the evidence, of the credibility of the witnesses and the weight to be attached to their testimony. Regardless of what counsel may have said, regardless of what I may have said in recalling the evidence in this case, it is your recollection of the evidence that should guide you as sole judges of the facts.

Arguments, statements, remarks, objections, openings, summations of counsel, they are not evidence, and they must not be treated as evidence. Whether or not the defendant has been proven guilty beyond a reasonable doubt is for you to determine based on all of the evidence presented during the trial, and even though the attorneys may point out what they think is important in the case, you must rely solely on your understanding and recollection of the evidence that was

admitted during the trial. Any comments by counsel are not controlling. It is your sworn duty to arrive at a just conclusion after considering all of the evidence which was presented during the course of this trial.

By way of contrast, the function of the Court is separate and distinct from the function of the jury. It is my responsibility to determine all questions of law arising during the trial and to instruct the jury, as I'm doing now, as to the law which applies in this case. You must accept the law as given to me -- as given by me to you, and apply it to the facts which you find them to be.

The fact that I may have asked a question or two, and I don't recall if I did, I may have asked a question of one or another of the witnesses, should not influence you in any respect during your deliberations. The fact that I ask questions generally from my own edification to the extent that it helped you, that's fine, but it does not indicate that I hold any opinion one way or the other as to the testimony given by the witness. Any remarks made by me to counsel or by counsel to me or between counsel are not evidence, and should not be, should not affect or play any part in your deliberations.

Now, you will recall I discussed the types

of evidence that you would hear, and indeed, you did hear such evidence. It's direct or circumstantial.

Direct evidence, once again, means evidence that directly proves a fact without the necessity of an inference, and which in itself, if true, conclusively establishes that fact.

On the other hand, circumstantial evidence means evidence that proves a fact from which an inference of the existence of another fact may be drawn. And you'll recall my -- I believe I used the cookie eating child as an example of the two types of evidence that you would be able to consider as circumstantial or direct.

Again, we use terms in the law that seems more weighty than they might be given in the normal course. An inference, as I've indicated, and as you know throughout your life, is a deduction of fact that may be logically and reasonably drawn from another group of facts established by the evidence. Whether or not inferences should be drawn is for you to decide, using your own commonsense, knowledge, and everyday experience, which is why we bring twelve jurors together to consider such weighty questions. Ask yourself, is it probable, is it logical, is it reasonable.

It is not necessary that all facts be proved by direct evidence, it may be proved by direct evidence, circumstantial evidence, or the combination of direct and circumstantial evidence. All are acceptable as means of proof. In many cases, circumstantial evidence may be more certain, satisfying and persuasive than direct evidence. However, direct and circumstantial evidence should be scrutinized and evaluated carefully.

A verdict of guilty may be based on direct evidence alone, circumstantial evidence alone or a combination of direct and circumstantial evidence, provided, of course, that it convinces you of a defendant's guilt beyond a reasonable doubt.

The reverse is also true. A defendant may be found not guilty by reason of direct evidence, circumstantial evidence, a combination of the two, or lack of evidence, if it raises in your mind a reasonable doubt as to the defendant's guilt.

Now, folks, I think I said when I opened this case to you that one of the great responsibilities of jurors is to assess the credibility of witnesses. The jury, and only the jury, are the judges of the facts, and as such, are required to determine the credibility of the witnesses. And in determining

whether a witness is worthy of belief and, therefore, credible, you may take into consideration the manner and the appearance that the -- demeanor and the appearance of the witness, the manner in which he or she may have testified, the witness's interest in the outcome; that witness's means of obtaining the facts to which he or she testified to; the witness's power of discernment, meaning her ability or his ability to reason, observe, recollect and relate; the possible bias, if any, in favor of the side for whom the witness testified; the extent to which, if at all, each witness is corroborated or contradicted, that is, supported or discredited by other evidence; whether the witness testified with an intent to deceive you; the reasonableness or unreasonableness of the testimony the witness has given; and any and all other matters in the evidence which serve to support or discredit his or her testimony.

Inconsistencies or discrepancies in the testimony of a witness or between the testimony of different witnesses may or may not cause you to discredit such testimony. In the experience of all of us, two or more persons witnessing an incident we may recollect, may see or hear it differently. It may be a product of an innocent misrecollection, a failure of

recollection. Those are not uncommon experiences in our lives.

In weighing the effect of a discrepancy, consider whether it pertains to, one, if it's a matter of importance, or is it an unimportant detail; or two, whether the discrepancy results from an innocent error or a willful falsehood. Through this type of analysis, you as jurors and judges of the facts weigh the testimony of each witness and then determine the weight to give it. Through that process you may accept all of the testimony, a portion of the testimony or none of it. You are the sole judges of the facts.

Now, as I explained when Dr. Ahmad was about to testify, and she was qualified as an expert, as a general rule, witnesses can only testify as to facts known by them. It does not ordinarily permit the opinion of a witness to be received as evidence. However, the exception to that rule exists in the case of an expert witness who may give his opinion as to any matter in which he or she is versed, which is material to the case.

In legal terminology, an expert witness is a witness who has some special knowledge, skill, experience or training that is not possessed by the ordinary juror, and who thus, might be able to provide

98a

assistance to the jury in understanding the evidence presented and determine the facts in the case.

In this case, you've heard the testimony of Dr. Rafaat Ahmad, the Mercer County Medical Examiner, who was called as a forensic pathologist by the State to testify as to the manner and cause of death of Edgerton Munroe. Now, you're not bound by the expert's opinion, but you should consider the opinion and give weight to it which you deem it is entitled, whether it be great or slight, or you may reject it. In examining each opinion, you may consider the reasons given for it, if any, and you also may consider the qualifications and credibility of the witness herself.

It is always within the special function of the jury to determine whether the facts upon which the answer or testimony of an expert is based actually exists. The value or weight of the opinion of the expert is dependent upon and no stronger than the facts upon which it is based. In other words, the probative value of the opinion will depend upon whether from all of the evidence in the case, the facts that form the bases of the opinion are true, are not true, or are true only in part, and only in light of such findings should you decide what effect such determination has upon the weight to be given to the opinion of the

expert. Your acceptance or rejection of the expert opinion will depend, therefore, to some extent on your findings as to the truth of the facts that the expert relied upon. The ultimate determination, of course, of whether the State has proven the defendant's guilt beyond a reasonable doubt is made only by the jury.

Now, folks, you've heard on a couple of occasions, I believe, the Prosecutor brought out prior convictions of one of the witnesses for one or another crimes. That evidence may be used in determining the credibility or believability of those witnesses' testimony, that is to say, a jury has the right to consider whether a person who has previously failed to comply with society's rules as demonstrated through criminal convictions, would be more likely to ignore the oath requiring truthfulness on the stand than a person who has never been convicted of a crime.

You may consider in determining this issue the nature and the degree of the prior convictions and when they occurred. You are not, however, obligated to change your opinion as to the credibility of those witnesses simply because of a prior conviction. You may consider such evidence along with any of the other factors that I've mentioned in determining the credibility of the witnesses.

99a

Also, in this case, there have been evidently, quite evidently, evidence including witnesses' statements and testimony prior to the trial showing that at a prior time the witness may have said something which is inconsistent with that witness's testimony at the trial. And that may be considered by you for the purpose of judging the witness's credibility. It may also be considered by you as substantive evidence, that is, proof of the truth of what was stated in the prior contradictory statement.

Evidence has been presented showing that at a prior time a witness has said something or failed to say something which is inconsistent with the witness's testimony at trial. That was obvious in this case. This evidence may be considered by you as substantive evidence or proof of the truth of the prior contradictory statement or omitted statements. However, before you decide the prior inconsistent or omitted statements reflect the truth, in all fairness, you'll want to consider the circumstances under which the statement or failure to disclose occurred. You may consider the extent of the inconsistency or omission, the importance or lack of importance of the inconsistency or omission on the overall testimony of the witness as bearing on his or her credibility. You

may consider such factors as where and when the prior statement or omission occurred, and the reasons, if any, therefore.

The extent to which such inconsistencies or omissions reflect the truth is for you to determine. Consider their materiality and relationship to that witness's entire testimony, and all of the evidence in this case; when and where, the circumstances under which they were said and omitted, or omitted, and whether the reasons that witness gave appear to be believable and logical. You will, of course, consider other evidence and inferences from other evidence, including statements of other witnesses or acts of other witnesses and others, disclosing other motives that the witness may have had to testify as he or she did, that is, reasons other than he or she gave us.

A hypothetical example may help you understand what constitutes a prior contradictory statement, although in this case it is relatively evident, and more importantly how it may be used by you. Assuming at trial that the witness testifies that the car is red. In cross-examination or on some examination, it is revealed that the witness at some other time said at an earlier -- at some other time -- strike that.

Assume at the trial the witness has testified the car is red. An examination of that witness or at some other point in trial it is shown that at an earlier time the witness testified, related or said the car was blue. You may consider the prior contradictory statement that the car was blue as a factor in deciding whether or not you believe the statement made at trial was the car was red. You may also consider the earlier statement that the car was blue, as proof of the evidence that, in fact, the car was blue. In other words, it's your determination how to use the prior statements and/or the subsequent statements together and separately.

If you believe that any witness or party willfully or knowingly testified falsely to any material facts in the case with an intent to deceive you, you may give such weight to his or her testimony as you may deem it to be entitled. You may believe some of it or you may believe in your discretion, disregard all of it.

Now, you will recall I directed you on one or two occasions to disregard some statement that was made. You must disregard that. I ruled on evidence on a number of occasions, and in this case, you will find that you will receive evidence which you will not know

fundamentally why some evidence is admitted and why some evidence is not admitted. That was a decision I made. You will receive a facsimile of two statements alluded to by both counsel, and this is kind of a mockup, it's not the original, the statements of Avia Fowler and the statement of Carol Guerra.

You will note that if you examine these statements, that there is included what we call a redaction, that's another word for crossing stuff out, it's a fancy word, redaction is the legal word, fancy. It means that there are blanked-out areas. They were done because the Court has determined that certain matters stated there are not appropriate for the consideration of the jury. In other words, they're objectionable on a number of reasons. You don't need to know why, but they're not good evidence. So, we've undertaken to cross out those statements.

You are not to try to figure out what the questions and answers were, but merely use the statements for the purposes you deem them appropriate, and disregard those parts that are marked and crossed out. I have every confidence that you'll be able to follow the Court's direction and use those for what they are worth.

Now, the defendant as part of his general

denial of guilt, contends that the State has not presented sufficient reliable evidence to establish beyond a reasonable doubt that he is the person who committed the alleged offense. The burden of proving the identity of a person who committed the crime is, of course, upon the State. For you to find the defendant guilty, the State must prove beyond a reasonable doubt that this defendant is the person who committed the crime. And as I told you before, the defendant has no burden to produce evidence or that he is not the person who committed the crime. The defendant has neither the burden nor the duty to show that the crime that was committed was committed by someone else, or to prove the identity of that other person.

You must determine, therefore, not only whether the State has proved each and every element of the offense charged beyond a reasonable doubt, but also, whether the State has proved beyond a reasonable doubt that this defendant is the person who committed it.

Now, the State, in trying to meet that burden, presented the testimony of several witnesses who identified the defendant. You will recall that these witnesses identified the defendant in court as the person who committed the offenses charged. The

State also presented testimony that on a prior occasion before this trial witnesses made such an identification -- identified the defendant as the person who was, you may conclude circumstantially or directly or however you conclude, that the defendant was -- the identification of the defendant was based upon the observations and perceptions they made of the perpetrator at the time the offense was being committed. It is your function to determine whether the witness's identification of the defendant is reliable and believable, or whether it is based on mistake, or for any reason is not worthy of belief. You must decide whether it is sufficiently reliable evidence upon which to conclude that this defendant is the person who committed the offenses charged.

In evaluating the identifications, you should consider the observations and perceptions on which the identifications were based, and the witness's ability to make those observations and perceptions. If you determine that the out-of-court identification is not reliable, you must still consider the witness's in-court identification of the defendant, if you find it to be reliable.

Unless the in-court identification resulted from the witness's observation or perceptions of the

perpetrator during the commission of the offense, rather than being the product of an impression gained at the out-of-court identification procedure, it should be afforded no weight. The ultimate issues of the trustworthiness of the in court and out-of-court identifications are for you to decide.

Fundamentally there are, as you see, three levels of identification: Identification of the alleged perpetrator at the observation of the witnesses; the subsequent prior identifications through looking through the photo array or identifying photograph; and thirdly, the in-court. So, you make the determination as I've just instructed you. If you have any questions, look at this. If you have any further questions, you'll let me know and I'll try to explain it further.

To decide whether identification testimony is sufficiently reliable evidence upon which to conclude that this defendant is the person who committed the offenses charged, you should evaluate the testimony of the witness in light of the factors for considering credibility that I've already explained to you. In addition, you may consider the following factors: The witness's opportunity to view the person who committed the offense at the time of the offense;

the witness's degree of attention on the perpetrator when he or she observed the crime being committed; the accuracy of any description the witness gave prior to the identification of the perpetrator; the degree of certainty expressed by the witness in making the identification; the length of time between the witness's observation and the offense at the first identification; discrepancies or inconsistencies between identifications; the circumstances under which the out-of-court identification was made; here, the single and multiple photograph arrays presented to the witness by the police; or any other factor on the evidence which -- or lack of evidence in this case which you consider relevant to your determination whether identifications were reliable.

If, after all of the considerations of the evidence, you determine the State has not proven beyond a reasonable doubt that the defendant was the person who committed these crimes, then you must find the defendant not guilty. On the other hand, after consideration of all the evidence you are convinced beyond a reasonable doubt that the defendant was correctly identified, then you will consider whether the State has proven each and every element of the offenses charged beyond a reasonable doubt.

Now, folks, a lot of times you are called upon to assess aspects of a case which are not tangible, you can't put your finger on. State of mind is one of those circumstances. For example, purpose, knowledge; reckless; these are conditions of the mind which cannot be seen and only can be determined by inferences from conduct, words or acts. These are words that you know and have used in your life and this adds this legal filigree that's important to make this application in the law.

For example, a person acts purposely, you've all used that in your life. But a person acts purposely with respect to the nature of his conduct or a result thereof, if it is the person's conscious object to engage in conduct of that nature or to cause such a result. That is, a person acts purposely if he means to act in a certain way or cause a certain result. A person acts purposely with respect to attendant circumstances, if a person is aware of the existence of such circumstances or a person believes or hopes that they exist. One can be deemed to act, to be acting purposely, if one acts with design, with a purpose or a particular object, if one really means to do what one does, obviously.

A person acts knowingly with respect to the

nature of his conduct or the attendant circumstances if a person is aware that his conduct is of that nature or such circumstances exist or a person is aware of a high probability of their existence.

A person acts knowingly with respect to a result of his conduct if a person is aware that it is practically certain that his conduct will cause such a result.

One is said to act knowingly if one acts with knowledge, if one acts consciously, if he comprehends his acts. Just exactly how you would use it in your everyday parlance.

A person acts recklessly with respect to a material element of an offense if he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that considering the nature and purpose of the actor's conduct, and the circumstances known to the actor, its disregard involves a gross deviation from the standard of conduct that a reasonable person would observe in the actor's situation. One is said to act recklessly if one acts with recklessness, with scorn for the consequences, heedlessly or foolhardy.

Inasmuch as purpose, knowledge and reckless

are conditions of the mind, it is not necessary for the State to produce a witness to testify that the defendant stated he acted with a particular state of mind. It is within your power to find that proof of purpose, knowledge, or reckless behavior have been furnished beyond a reasonable doubt by inferences that may arise from the nature of the acts and circumstances surrounding the conduct in question.

Now, ladies and gentlemen, you have obviously sat through this trial, you've noticed that the defendant has elected not testify in this case. It is his constitutional right to remain silent. You must not consider for any purpose or in any manner in arriving at your verdict the fact that the defendant did not testify. That fact should not enter into your deliberations or discussions in any manner or at any time. The defendant is entitled to have the jury consider all of the evidence presented at trial, and he is presumed innocent even if he chooses not to testify.

You also heard testimony in this case from which you may infer that the defendant fled shortly after the alleged commission of the crime. The defendant denies any flight or that the acts constituted flight. The question of whether the defendant fled after the commission of a crime is

another question for you, it's a question of fact for your determination. Mere departure from the place where a crime has been committed does not constitute flight. If you find that the defendant, fearing that an accusation or arrest would be made against him on the charges involved in the Indictment, took refuge in flight for the purpose of evading accusation or arrest on that charge, then you may consider such flight in connection with all of the other evidence in this case as an indication or proof of consciousness of guilt.

Flight may only be considered as evidence of consciousness of guilt if you should determine that the defendant's purpose in leaving was to evade accusation or arrest for the offense charged in the Indictment.

There has been some testimony in this case where you may infer that the defendant fled shortly, and the testimony was that he went to the Bronx and was found in the Bronx. The defense has suggested the following explanation, that the defendant often visited his sister in the Bronx. If you find the defendant's explanation credible, you should not draw any inference of the defendant's consciousness of guilt from the defendant's departure. If, after considering all of the evidence, you find that the defendant, fearing that

an accusation or arrest would be made against him on the charges involved in the Indictment took flight, took refuge in flight for the purpose of evading the accusation or arrest, then you may consider such flight in connection with all of the other evidence in the case as an indication or proof of consciousness of guilt.

It is for you as judges of the facts to decide whether or not evidence of flight shows consciousness of guilt, and the weight to be given such evidence in light of all of the evidence in this case.

Now, there are now three charges contained in the ultimate Indictment for which you may -- for which you will consider. They are separate counts, and they are separate offenses, and the defendant is entitled to have the jury determine whether or not he is guilty on each count by the evidence which is relevant and material to that particular charge based on the law as I'm about to give it to you.

You may presume and assume that as I've alluded to before, that the Indictment was changed because of reasons that were immaterial to your consideration, but when I told you, when this trial began, I told you that, I told you and related all the charges that were contained in the Indictment, and I

also explained what an Indictment means, as a means of bringing a defendant before the jury so that the jury can decide whether the defendant has been proven guilty beyond a reasonable doubt.

As the Judge of the law, it is my responsibility to review these charges with the attorneys at the end of the case to decide which charges will be submitted to you for your deliberation, and sometimes as a matter of law, I may determine that not every charge within the Indictment should be submitted to you. At other times as a matter of law, I may determine that certain charges not originally within the Indictment should be submitted to you for deliberations, and in both cases that has happened.

You should not consider this ruling by the Court as an opinion by the Court on any of the merits of any of the charges that you must consider. My ruling on those charges was based on matters of law and should not influence your deliberations. You are not to consider for any purpose in arriving at your verdict, the fact that the Court may have deleted charges for your deliberations or in the other sense, added charges for your consideration to the murder charge which I'm going to get into. You must decide whether the State has proven the guilt of the defendant

on each charge submitted to you by the evidence which is relevant and material to that particular charge based on final instruction that I will give you after the -- that I'm giving you now.

Okay. It's a lot of words, let's everybody stand up, take a little bit of a break and we'll get into the particular charges. Just stretch a little bit, move around. I know this can be tedious listening to this and you're going to have this with you, but, I appreciate the attention you're giving me.

All right, very good, we're ready to go back. Let's do it.

The charges in the Indictment. Count One of the Indictment charges the defendant Tyrius Green with murder in pertinent part as follows. "That on the 14th day of August, 2003, the defendant did purposely or knowingly cause the death of Edgerton Munroe or purposely or knowingly did inflict serious bodily injury resulting in Edgerton Munroe's death."

In our State of New Jersey, a person is guilty of murder if, one, he cause the victim's death or serious bodily injury that then resulted in the victim's death; and two, that he did so purposely or knowingly.

In order for you to find the defendant

guilty of murder, the State is, therefore, required to prove each of the following elements beyond a reasonable doubt:

That the defendant caused Edgerton Munroe's death or serious bodily injury that resulted in Edgerton Munroe's death; and two, the defendant did so purposely or knowingly.

One element the State must prove beyond a reasonable doubt is that the defendant acted purposely or knowingly. Now, I've already given you, that's state of the mind, and I'm going to give it to you one more time and then we're no longer -- we're just going to allude to the definition.

A person acts purposely when it is the person's conscious object to cause death or serious bodily injury resulting in death. A person acts knowingly when he -- when the person is aware that it is practically certain that his conduct will cause death or serious bodily injury resulting in death.

The nature of the purpose or knowledge with which the defendant acted towards Edgerton Munroe is a question of fact for you, the jury, to decide.

Now, I've already told you, purpose and knowledge are conditions of the mind which cannot be seen and can only be determined by inferences from

conduct, words or acts. It is not necessary for the State to produce a witness or witnesses who could testify that the defendant stated, for example, that his purpose was to cause death or serious bodily injury resulting in death or that he knew that his conduct would cause death or serious bodily injury resulting in death. That's not necessary, obviously. It is within your powers to find that proof of purpose or knowledge has been furnished beyond a reasonable doubt by inferences which may arise from the nature of the acts and the surrounding circumstances. Such thing as the place where the acts occurred, the weapon used, the location, the number and nature of wounds inflicted, and all that was done or said by the defendant preceding, connected with, or immediately succeeding the events leading to the death of Edgerton Munroe are among the circumstances to be considered.

Although the State must prove the defendant acted either purposely or knowingly, the State is not required to prove a motive. If the State has proved the essential elements of the offense beyond a reasonable doubt, the defendant must be found guilty of the offense regardless of the defendant's motive or lack of motive. If the State, however, has proved a motive, you may consider that motive insofar as it

gives meaning to the circumstances.

On the other hand, you may consider the absence of motive in weighing whether or not the defendant is guilty of the crime charged.

A homicide or killing with a deadly weapon, such as a handgun, in itself would permit you to draw an inference that the defendant's purpose was to take life or cause serious bodily injury resulting in death.

A deadly weapon is any firearm or other weapon, device, instrument, material or substance, which in the manner it is used or intended to be used is known to be capable of producing death or serious bodily injury.

In your deliberations you may consider the weapon used and the manner and the circumstances of the killing, and if you're satisfied beyond a reasonable doubt that the defendant shot and killed Edgerton Munroe with a gun, you may draw an inference from the weapon used that it is a gun, and from the manner and circumstances of the killing as to the defendant's purpose or knowledge.

The other element that the State must prove beyond a reasonable doubt is that the defendant caused Edgerton Munroe's death or serious bodily injury resulting in death.

As I previously advised you, in order to convict the defendant of murder, the State must prove beyond a reasonable doubt that the defendant either purposely or knowingly caused the victim's death or serious bodily injury resulting in death. In that regard, serious bodily injury means bodily injury that creates a substantial risk of death.

A substantial risk of death exists where it is highly probable that the injury will cause death. In order for you to find the defendant guilty of purposeful serious bodily injury murder, the State must prove beyond a reasonable doubt that it was the defendant's conscious object to cause serious bodily injury that then resulted in the victim's death, and the defendant knew that the injury created a substantial risk of death, and that it was highly probable that death would result.

In order for you to find the defendant guilty of knowing serious bodily injury murder, the State must prove beyond a reasonable doubt that the defendant was aware that it was practically certain that his conduct would cause serious bodily injury that then resulted in the victim's death, that the defendant knew the injury created a substantial risk of death, and it was highly probable that death would result.

Whether the killing is committed purposely or knowingly causing death or serious bodily injury resulting in death, must be within the design and contemplation of the defendant: First, that but for the defendant's conduct the victim would not have died; second, Edgerton Munroe's death must have been within the design or contemplation of the defendant, if not, it must involve the same kind of injury or harm that is designed or contemplated, and must not be too remote, too accidental in its occurrence or too dependent on another's volitional act to have just bearing on the defendant's liability or upon the gravity of his offense.

In other words, the State must prove beyond a reasonable doubt that Edgerton Munroe's death was not so unexpected or unusual that it would be unjust to find the defendant guilty of murder.

Now, I will state unequivocally that my comments about death and murder are complicated, but, they are reducible to being less complicated. And that's where you come in using your logic, probability, your reasonableness approach as jurors. So you'll forgive me if this sounds more complicated. If it gets complicated in the jury room and you're having trouble with the words and sentences, we can straighten that

out, perhaps, but, don't be blown away by the complexity of the phrases used. Use your commonsense.

In order for you to find the defendant guilty of murder, the State must first establish beyond a reasonable doubt that the defendant caused Edgerton Munroe's death or serious bodily injury resulting in death either purposely or knowingly as I've defined these terms for you.

Now, folks, all jurors do not have to agree unanimously concerning the form of murder is present, as long as all of you believe that it was one form of the murder or the other. However, for a defendant to be guilty of murder, all jurors must agree that the defendant either knowingly or purposely caused the death or serious bodily injury resulting in the death of Edgerton Munroe.

If after consideration of all of the evidence, you are convinced beyond a reasonable doubt that the defendant either purposely or knowingly caused Edgerton Munroe's death or serious bodily injury resulting in death, then your verdict must be guilty. If, on the other hand, after consideration of the evidence, you find the State has failed to prove any element beyond a reasonable doubt, your verdict must be not guilty, and then you must go on to consider whether

the defendant should be convicted of the crimes of aggravated or reckless manslaughter.

So, in other words, when I read you the original Indictment, it alleged murder by causing serious bodily injury or purposely or knowingly. And I will give you a verdict sheet which will clarify that if you find the defendant guilty of murder, then you go to the next count to consider. If you find the defendant not guilty of murder, then you consider what we call and what the Prosecutor alluded to as lesser included offenses of aggravated manslaughter or reckless manslaughter and we'll get into that a little bit.

A person is guilty of aggravated manslaughter if he recklessly causes the death of another under circumstances manifesting extreme indifference to human life. In order for you to find the defendant guilty of aggravated manslaughter, the State is required to prove each of the following elements beyond a reasonable doubt. And this shifts ever so slightly from murder to the aggravated manslaughter. That the defendant caused Edgerton Munroe's death; that the defendant did so recklessly, and that the defendant did so under circumstances manifesting extreme indifference to human life.

110a

One element in this case that the State must prove beyond a reasonable doubt is that the defendant acted recklessly. A person who causes another's death does so recklessly when he's aware of and consciously disregards a substantial and unjustifiable risk that death will result from his conduct. It is the same definition that I gave you when I talked about state of mind recklessness, where there is a gross deviation from the conduct that a reasonable person would follow in the same situation.

In other words, you must find the defendant was aware of and consciously disregarded the risk of causing death. If you find the defendant was aware of and disregarded the risk of causing death, you must determine whether that risk that he disregarded was substantial and unjustifiable.

In doing so, you must consider the nature and purpose of the defendant's conduct and the circumstances known to the defendant, and you must determine whether in light of those factors the defendant's risk -- disregard of that risk was a gross deviation from the conduct of a reasonable person who would have observed in the defendant's situation.

Another element that the State must prove in this secondary charge, is that the defendant acted

under circumstances manifesting an extreme indifference to human life. That phrase does not focus on the state of mind of the defendant, but rather, on the circumstances under which you find he acted.

If in light of all of the evidence, you find the defendant's conduct resulted in a probability as opposed to a mere possibility of death, then you may find that he acted under circumstances manifesting extreme indifference to human life.

On the other hand, if you find that his conduct resulted only in the possibility of death, you must acquit him of aggravated manslaughter and consider the offense of reckless manslaughter.

The final element in aggravated manslaughter is you must, of course, prove beyond a reasonable doubt that the defendant caused Edgerton Munroe's death, and that is similar to the causing of the death in each one of these circumstances in this case. After consideration of all of the evidence you are convinced beyond a reasonable doubt that the defendant recklessly caused Edgerton Munroe's death under circumstances manifesting extreme indifference to human life, then your verdict must be guilty of aggravated manslaughter. However, after consideration of all the evidence you are not convinced beyond a

reasonable doubt that the defendant recklessly caused Edgerton Munroe's death under circumstances manifesting extreme indifference to human life, you must find the defendant not guilty, and then go on to consider the third murder, aggravated, and now reckless manslaughter.

And a person is guilty of reckless manslaughter if the defendant caused the, Edgerton Munroe's death, and that he did so recklessly. The reckless definition is exactly the same, that a person acts inappropriately, and that definition I'm not going to repeat because you've heard it three times now. And the other element the State must prove beyond a reasonable doubt is the defendant caused Edgerton Munroe's death, and that, of course, is identical as well.

After consideration of all the evidence you are convinced beyond a reasonable doubt that the defendant recklessly caused Edgerton Munroe's death, then your verdict must be guilty of reckless manslaughter. If, however, after consideration of all the evidence you are not convinced the defendant acted recklessly in causing Edgerton Munroe's death, you must find the defendant not guilty of reckless manslaughter.

Now, I promise you it will be a little bit

easier when you look at the verdict form and that's what we're going to be counting on to straighten out any of the issues that you might have.

Now, let's move to the second, Count Number Two. Count Two charges the defendant, Tyrius Green, with possession of a firearm for an unlawful purpose. And that alleges in pertinent part that, on or about the 14th day of August, 2003, the defendant did have in his possession a firearm, with a purpose to use it unlawfully against the person of Edgerton Munroe.

Statute in New Jersey charges, any person who has in his possession a firearm with purpose to use it unlawfully against the person or property of another, is guilty of a crime.

Once again, the elements for -- in order for you to find defendant guilty of this charge, the State has the burden of proving beyond a reasonable doubt the following four elements:

One, there was a firearm; two, defendant possessed a firearm; three, the defendant possessed the firearm with purpose to use it against the person of another; and four, the defendant's purpose was to use the firearm unlawfully.

The first element that the State must prove beyond a reasonable doubt is that there was a firearm.

A firearm is any handgun, rifle, shotgun, machine gun. In this case if you believe that the defendant possessed what he was alleged to have possessed, that's a firearm -- you go through a whole list of things here, but, if you accept the testimony as it was offered, and you conclude that a pistol was possessed or a handgun was possessed, that is a firearm.

Second element the State must prove beyond a reasonable doubt is that the defendant possessed the firearm. Now, here we have a little bit of a definition of what possession is. The word possession, as used in the criminal statute means -- it's exactly what you know it means, and I know it means, but there is a statutory way of defining it. A knowing intentional control of a designated thing accompanied by knowledge of its character. Thus, a person must know and be aware that he possesses the item, in this case, a firearm, and he must know that that which he possesses or controls is a firearm. In other words, to possess within the meaning of the law, the defendant must knowingly procure or receive the item possessed, or be aware of his control thereof for a sufficient period of time to have been able to relinquish his control if he chose to do so.

A person may possess a firearm even though

it was not physically on his person at the time of the arrest, if he had at some time prior to his arrest, had control or dominion over it.

Two kinds of possession, this again is something that you know, actual and constructive possession. They don't really play a part here in this case, nor does joint possession. Those are three different kinds of possession. But the one possession you have to determine is whether the defendant actually possessed in this case the handgun, and that he knew when he possessed it what it was, and that he had knowledge of its character and knowingly has it on his person at a given time.

Constructive possession doesn't really come into play and that's when, for example, I have now actual possession of this red pen. If I put it aside, I have only constructive possession because I don't physically possess it. I have the physical control over it, even though it's not in my possession. I'm aware of the property and I have the ability to exercise intentional control or dominion over it. So we're not going to worry too much about constructive possession or joint possession, because they are -- they do not come within the structure of your consideration. You have to determine whether the

weapon was actually possessed in this case for possession of a handgun.

Count Three charges a different type of weapons offense. Unlawful possession of a handgun, charging, once again, on August 14th, 2003, the defendant did knowingly have in his possession a handgun, without first having obtained a permit to carry said handgun. This statute in New Jersey says, any person who knowingly has in his possession any handgun without first having obtained a permit to carry the same is guilty of a crime. Once again, in order to convict the defendant of unlawful possession of a handgun, you must be convinced beyond a reasonable doubt there was a handgun; defendant knowingly possessed the handgun, and the defendant did not have a permit to possess such a weapon.

First charge is that you must show beyond a reasonable doubt, or must conclude beyond a reasonable doubt and the State must prove beyond a reasonable doubt that there was a handgun. Again, a handgun is similar to the firearm, which is any pistol, revolver or other firearm originally designed or manufactured to fire any or eject any solid projectile, ball, pellet, missile or bullet, et cetera. And in this case you may determine that -- if you determine that the State has

proven beyond a reasonable doubt that the defendant had a handgun, that that handgun was such that would meet that definition.

Again, the circularity of the definition is made complicated by the necessity to have to say all these things that don't really pertain. So they have to prove -- the State must prove beyond a reasonable doubt that there was a handgun.

Secondly, the State must prove beyond a reasonable doubt that the defendant knowingly possessed the handgun, and that again is the same kind of possession that I discussed with actual possession versus joint possession versus constructive. This is an actual possession case and you must determine the defendant actually possessed the handgun in order to convict.

In order to assess state of mind, knowingly or the possession, if you have confusion about any of the things that I've used in the terms of possession, construction or otherwise, you can refer to the instructions which have it more expressly laid out. If you have any other questions, you can call upon me to further define it.

The third element in this case that the State must prove beyond a reasonable doubt is that the

defendant did not have a permit to possess such a handgun. If you find that the defendant knowingly possessed the handgun, and there was no evidence that the defendant had a valid permit to carry such a handgun, then you may infer, if you think it appropriate to do so based upon the facts presented, that the defendant had no such permit. Note, however, that as with all other elements the State bears the burden of showing beyond a reasonable doubt the lack of a valid permit, and you may draw the inference that no permit existed only if you feel appropriate to do so under all of the facts and circumstances.

If you do find that the State has proved -- failed to prove any of the elements of the crime beyond a reasonable doubt, your verdict, of course, must be not guilty. On the other hand, if you're satisfied that the State has proven all of the elements of the crime beyond a reasonable doubt, your verdict must be guilty.

All right. Folks we're almost there, and I realize how difficult, believe me, it's warm in this courtroom, and I'm sympathetic both to you and to me and to everyone else who has to listen to me about this charge, because it's complicated in that it uses much more verbosity than I think is necessary, but that's

not my call.

This will basically conclude my instructions as to the principles of law regarding the offenses charged. There is nothing different in the way a jury is to consider the proofs in a criminal case from that in which all reasonable persons treat questions depending upon evidence presented to them. You're expected to use your own good commonsense, consider the evidence for the purposes for which it has been admitted, and give it a reasonable and fair construction in light of your knowledge of how people behave. It is the quality of the evidence not simply the number of witnesses that control.

Now, anything that has been marked into evidence can be given to you for your consideration and as I've told you, there were some things that were marked for identification which you don't get because it wasn't marked in evidence.

Very shortly you will go into the jury room to start your deliberations. Hopefully, there will be a lunch there waiting for you, and take a little bit of the drink of a cold Coca-Cola or the iced tea that you've ordered and try to recover the alertness that you've demonstrated throughout this trial.

But I want you to keep all your cell phones

off, I don't want any gongs, buzzers, electric shavers, anything to go off. That is not going to be part of the jury deliberative process, and it's disrespectful of your fellow jurors. So make sure those devices are turned off.

You are to apply the law as I have instructed you to the facts as you find them to be for the purpose in arriving at a fair and correct verdict. The verdict must represent the judgment of each juror and must be unanimous as to each charge. This means that all of you must agree if the defendant is guilty or not guilty on each charge.

It is your duty to consult with one another and deliberate with a view towards reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations do not hesitate to re-examine your own views and change your opinion if you're convinced it's erroneous, but don't surrender it simply because -- your honest convictions simply because you are, solely because of the opinion of your fellow jurors or for the mere purpose of returning your verdict. You are not partisans, you are judges, judges

of the facts.

Now, I've permitted you to take notes. You can use those notes during your deliberations to help you recall the testimony, if you so desire, however, don't over-emphasize the significance of a written note made by yourself or a fellow juror. It's your recollection, not the note, which should control. If your memory differs, you should rely on your recollection.

Okay. Now, would you hand out the jury verdict forms, please?

(Verdict forms were distributed to the jury.)

THE COURT: Thank you.

Folks, this will give you a little bit of, a little road map. We'll call it a Map Quest of jury deliberations. The verdict sets forth three basic questions. Question one, talks about murder. It says "How do you find as to Count One of the Indictment charging defendant Tyrius Green with murder, in that on or about the 14th day of August, 2003, he did purposely or knowingly cause the death of Edgerton Munroe or did purposely or knowingly inflict serious bodily injury resulting in Edgerton Munroe's death." Again, you can have a disagreement as to whether it was knowingly,

purposely or knowingly, or knowingly inflict bodily serious injury resulting in death. Either one of those, as long as all twelve of you who are ultimately selected agree that that's what you find. You then check not guilty or guilty as you so find.

Now, if you find the defendant guilty under question one, you proceed to question two on the next page. However, if you find the defendant not guilty of question one, then you drop down to the two questions that are beneath that, (b), first, and that's when you talk about aggravated manslaughter, charging and asking, "If you found the defendant Tyrius Green not guilty under question 1A, how do you find as to the lesser offense of aggravated manslaughter, in that the defendant Tyrius Green did recklessly cause the death of Edgerton Munroe under the circumstances manifesting extreme indifference to human life".

Now, again, that was that complicated instruction. You can refer to your instructions that you'll have with you if that becomes a definitional problem.

Again, if you find the defendant guilty of the second one, having found him not guilty of murder, if you find him guilty of recklessly causing death under circumstances manifesting extreme indifference to

human life, then you go on to question number two.

However, if you find the defendant not guilty of that charge, then you drop down to (c) and you say, "If you find the defendant Tyrius Green not guilty on question 1(b), how do you find as to the lesser extent, to the lesser offense of reckless manslaughter in that the defendant Tyrius Green did recklessly cause the death of Edgerton Munroe?" Then you consider not guilty or guilty for that particular charge."

And then you essentially move onto question two at the appropriate time, "How do you find the defendant Tyrius Green as to possession of a firearm for an unlawful purpose in that he did on the 14th day of August, 2003, have in his possession, a firearm, with purpose to use it unlawfully against the person of Edgerton Munroe," and make your decision there. And then move onto question three, how do you find as to question 3 of the Indictment, et cetera, relating to the possession of a handgun without first having obtained a permit to carry said handgun.

If during your deliberations you think you need something that is not covered in the instructions that you've been given or some question arises that is important, certainly feel free to hand the sheriff's

officer a note, ask the question of me, we'll get you in here as soon as I get the attorneys together, we'll go over the question, try to resolve it as best we can. When you send out a question, don't tell us where you stand, we're 11 to 1 or 10 to 2, 8 to 4, but just set forth your question.

If you've reached a unanimous verdict on each count, knock on the door, give it to the sheriff's officer, the note that your Foreman or Forelady will write, and we'll bring you into court as soon as possible to receive your verdict.

I'll see you at side bar, folks.

(At which time the following discussion was held at side bar.)

THE COURT: Any concerns about the charge?

MR. SOMERS: None.

MR. WEISSMAN: None, your Honor.

THE COURT: Okay, thank you very much.

(End of side bar discussion.)

THE COURT: Two of you will now be considered for alternates. Mr. Rein, my Court Clerk will select two of the numbers.

THE CLERK: Your Honor, the first alternate juror, Juror Number One, Keith Thorton.

THE COURT: Juror Number One, you're an

alternate, would you step down, sir.

THE CLERK: Your Honor, the second alternate juror, Juror Number 14, Beth Aird.

THE COURT: Okay, that's Juror Number 14.

Mr. Wilson, that makes you our Foreman. And everybody stays where they are. Mr. Wilson will be your Foreperson. That doesn't give him any extra votes, but he is kind of the administrative leader of the deliberations. It will be his responsibility to announce the verdict when the jury has decided it. We'll ask you to come out with your verdict, please take the seats that you were in. The Court Clerk will call the roll for the court record to ensure that everybody is in place. I will ask Mr. Wilson to stand and I will ask Mr. Wilson, Mr. Wilson, I've received your note that the jury has reached a verdict, is that the case? Mr. Wilson, I presume will respond, yes, unless there is some inordinate confusion.

I will ask him, Mr. Wilson, is the verdict unanimous, and once again, I believe, and I can anticipate with some degree of confidence that it will be unanimous, otherwise you never would have advised me you had a verdict. Mr. Wilson will say yes. If he says no, then we'll have to take a different path. But at that point in time, the Clerk will read the charges