PETITION
APPENDIX

APPENDIX A

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 20-1259

ARMEL BAXTER,
Appellant

v.

SUPERINTENDENT COAL TOWNSHIP SCI; DISTRICT ATTORNEY PHILADELPHIA; ATTORNEY GENERAL PENNSYLVANIA

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. No. 2-18-cv-00046)
District Judge: Honorable J. Curtis Joyner

Submitted under Third Circuit L.A.R. 34.1(a)
March 15, 2021

Before: SHWARTZ, PORTER, and MATEY, Circuit Judges.

(Filed: April 8, 2021)

Daniel A. Silverman
Suite 2500
123 South Broad Street
Philadelphia, PA 19109

Counsel for Appellant

David Napiorski
Philadelphia County Office of District Attorney
3 South Penn Square
Philadelphia, PA 19107

Ronald Eisenberg
Office of Attorney General of Pennsylvania
1600 Arch Street
Suite 300 Philadelphia, PA 19103

Counsel for Appellees

OPINION

SHWARTZ, Circuit Judge.

Armel Baxter was convicted of first-degree murder, criminal conspiracy, and possession of an instrument of crime in Pennsylvania state court. Baxter filed a federal habeas petition, asserting that his trial counsel was ineffective for failing to object to the trial court's reasonable doubt jury

instruction.[1] The District Court denied Baxter's petition, but issued a certificate of appealability. Because the reasonable doubt instruction did not prejudice Baxter, we will affirm.

I

A

On a warm April 2007 afternoon, Demond Brown was shot and killed at a playground in Philadelphia. Two eyewitness accounts and a corroborating witness implicated Baxter and his co-defendant Jeffrey McBride as the shooters. The two eyewitnesses, Hassan Durant and Anthony Harris, saw Baxter and McBride enter the playground wearing hooded sweatshirts. Brown noticed the pair and began to run. The pair then shot Brown eight to ten times and ran away. Durant and Harris knew Baxter from living in the same neighborhood.

Rachel Marcelis, a friend of Baxter and McBride, confirmed Baxter and McBride's presence at the playground and their roles in the shooting. On the day of the incident, Marcelis drove by the playground with McBride and Baxter in her car. Either McBride or Baxter said they saw someone at the playground and told her to stop to let them out of the car, and she did so. She thereafter noticed many people running from the playground, including Baxter and McBride. Baxter and McBride got back into the car and said that "they got him" and that McBride "didn't have the chance to shoot" because his gun did not work. J.A. 158, 160. McBride later told Marcelis that Brown had killed their good friend. That

[1] Baxter raised other issues, but we focus on the sole claim for which a certificate of appealability was issued.

weekend, Marcelis drove Baxter and McBride to Wilkes-Barre, Pennsylvania. Marcelis returned to Philadelphia a few days later, but McBride and Baxter stayed in Wilkes-Barre until their arrests.[2] When law enforcement first confronted Baxter in Wilkes-Barre, Baxter gave three false names.

B

Baxter was charged with first-degree murder, 18 Pa. Cons. Stat. § 2502(a); criminal conspiracy to engage in murder, id. § 903(a)(1); and first-degree possession of an instrument of a crime with intent to employ it criminally, id. § 907(a). Durant, Harris, and Marcelis testified at his trial.

At issue in this appeal is the trial judge's reasonable doubt instruction. The trial judge first explained that the Commonwealth's burden of proof is "beyond a reasonable doubt," which is "the highest standard in the law," and is "the only standard that supports a verdict of guilty." J.A. 34. The trial judge stated that the Commonwealth "is not required to meet some mathematical certainty" or "to demonstrate the complete impossibility of innocence." J.A. 34. Instead, the trial judge explained that reasonable doubt is "a doubt that would cause a reasonably careful and sensible person to pause, to hesitate, to refrain from acting upon a matter of the highest

[2] At trial, Baxter's lawyer attempted to impeach Marcelis by suggesting that she imagined the events as the result of drugs and alcohol she consumed the night before the shooting. Marcelis admitted to using drugs and not sleeping that night but testified that she did not imagine the events or conversations with McBride and Baxter.

importance to your own affairs or to your own interests." J.A. 34.

The judge then provided an example for how to think about reasonable doubt:

> If you were advised by your loved one's physician that that loved one had a life-threatening illness and that the only protocol was a surgery, very likely you would ask for a second opinion. You'd probably get a third opinion. You'd probably start researching the illness, what is the protocol, is surgery really the only answer. You'd probably, if you're like me, call everybody you know in medicine: What do you know about this illness? What do you know about this surgery? Who does this surgery across the country? What is my option.
>
> At some moment, however, you're going to be called upon to make a decision: Do you allow your loved one to go forward? If you go forward, it's because you have moved beyond all reasonable doubt.

J.A. 34. The judge then explained that "a reasonable doubt must be a real doubt" and "may not be a doubt that is imagined or manufactured to avoid carrying out an unpleasant responsibility." J.A. 34. Defense counsel did not object to the instruction.

A jury convicted Baxter on all charges, and Baxter was sentenced to life in prison without parole for first-degree

murder, and concurrent terms of ten-to-twenty years' imprisonment for conspiracy and one-to-two years' imprisonment for instrument possession.

The Pennsylvania Superior Court affirmed Baxter's conviction, Commonwealth v. Baxter, 996 A.2d 535 (Pa. Super. Ct. 2010), and the Pennsylvania Supreme Court denied review, Commonwealth v. Baxter, 17 A.3d 1250 (Pa. 2011). Baxter filed a pro se petition and amended petition under the Post Conviction Relief Act ("PCRA"), 42 Pa. Cons. Stat. § 9541 et seq., raising several arguments challenging the effectiveness of his trial counsel, but not challenging counsel's failure to object to the reasonable doubt jury instruction. The PCRA court denied Baxter's petition, the Pennsylvania Superior Court affirmed, Commonwealth v. Baxter, 159 A.3d 589 (Pa. Super. Ct. 2016), and the Pennsylvania Supreme Court denied review, Commonwealth v. Baxter, 169 A.3d 547 (Pa. 2017).

Baxter petitioned for a writ of habeas corpus in the United States District Court for the Eastern District of Pennsylvania, arguing for the first time that his trial counsel was ineffective for failing to object to the trial court's reasonable doubt instruction.[3] The Magistrate Judge concluded that his claim was meritless because "[a]lthough the contested instruction is inartful and its illustration inapt," jury instructions should be viewed in their entirety, and here, the instruction read as a whole was constitutional. Baxter v.

[3] Despite Baxter's failure to raise this ineffective assistance of counsel claim until his petition for a writ of habeas corpus, the Commonwealth does not argue that Baxter's claim is procedurally barred.

McGinley, No. 18-cv-46, 2019 WL 7606222, at *5-6 (E.D. Pa. Dec. 5, 2019) (citing Supp. Report & Recomm., Corbin v. Tice, No. 16-4527 (E.D. Pa. Jan. 15, 2019), ECF No. 42). Accordingly, the Magistrate Judge recommended that the petition for writ of habeas corpus be denied with prejudice. Id. at *10.

The District Court adopted the Magistrate Judge's Report and Recommendation, but found that there was probable cause to issue a certificate of appealability on Baxter's ineffective assistance of counsel claim based on his trial counsel's failure to object to the trial court's reasonable doubt instruction. Baxter appeals.

II[4]

A

Because Baxter's ineffective assistance of counsel claim regarding the constitutionality of the reasonable doubt instruction was not adjudicated on the merits in state court, we need not apply the deferential standard of review set forth in the Antiterrorism and Effective Death Penalty Act, 28 U.S.C. § 2254(d). Rather, our review of the state court's legal determinations is plenary. Appel v. Horn, 250 F.3d 203, 210 (3d Cir. 2001). Because the District Court did not hold an evidentiary hearing, our review of its decision is plenary. Ross v. Dist. Att'y of the Cnty. of Allegheny, 672 F.3d 198, 205 (3d Cir. 2012).

[4] The District Court had jurisdiction under 28 U.S.C. § 2254. This Court has jurisdiction under 28 U.S.C. §§ 1291 and 2253.

B

Baxter argues that his counsel was ineffective for failing to object to the reasonable doubt instruction. Normally, we would review an ineffective assistance claim under Strickland v. Washington, 466 U.S. 668, 687 (1984), which requires that we consider whether the failure to object fell below the standards for competent representation and whether that failure resulted in prejudice.

We will assume that the failure to object to the instruction fell below the standard for competent representation,[5] and thus focus on the prejudice issue. Under Strickland, to establish prejudice, 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." 466 U.S. at 694. Baxter, however, contends that he need not prove actual prejudice because the failure to

[5] Although the Commonwealth does not challenge whether the failure to object to the instruction fell below the standard of competent representation, there are persuasive arguments that the instruction, read in its entirety, did not violate due process and thus justified counsel's decision not to object to the instruction. See Supp. Report & Recomm. Corbin, No. 16-4527, ECF No. 42 (collecting cases and upholding identical jury instructions because "in evaluating a challenge to jury instructions, the court must 'consider the totality of the instructions and not a particular sentence or paragraph in isolation'" (quoting United States v. Thayer, 201 F.3d 214, 221 (3d Cir. 1999))). We, however, need not decide this issue in this case.

object to the reasonable doubt jury instruction led to a structural error, and such errors so fundamentally impact the trial process that prejudice is presumed. We will therefore discuss the concept of structural error and whether prejudice is always presumed.

The Supreme Court has defined a structural error as one that "affect[s] the framework within which the trial proceeds, rather than being simply an error in the trial process itself." Weaver v. Massachusetts, 137 S. Ct. 1899, 1907 (2017) (alteration in original) (quotation marks and citation omitted). The Court has identified the following as structural errors: (1) complete deprivation of the right to counsel; (2) lack of an impartial judge; (3) unlawful exclusion of grand jurors of the defendant's race; (4) denial of the right to self-representation at trial; (5) denial of the right to a public trial; and (6) an erroneous reasonable doubt jury instruction. See Johnson v. United States, 520 U.S. 461, 468-69 (1997) (collecting cases); Lewis v. Pinchak, 348 F.3d 355, 358 (3d Cir. 2003).

The Supreme Court has stated that "the . . . doctrines [of structural error and ineffective assistance of counsel] are intertwined; for the reasons an error is deemed structural may influence the proper standard used to evaluate an ineffective-assistance claim premised on the failure to object to that error." Weaver, 137 S. Ct. at 1907. A showing of structural error, however, does not always trigger a presumption of prejudice. For example, in Weaver, the Supreme Court examined a structural error related to the right to a public trial, closing the courtroom during jury selection, and whether that error triggered a presumption of prejudice. 137 S. Ct. at 1905. The petitioner argued that he need not show prejudice, as his attorney's failure to object to the courtroom closure (the

structural error) rendered the trial "fundamentally unfair." Id. at 1911.

The Court stated that it would "assume," "[f]or the analytical purposes of th[e] case," "that petitioner's interpretation of Strickland is the correct one," but, in light of its ultimate holding, it wrote that it "need not decide that question here." Id. The Court concluded that, even under the petitioner's theory, while some deprivations of the right to a public trial might not require proof of actual prejudice, others do require such proof. See id. at 1908 ("[T]he question is whether a public-trial violation counts as structural because it always leads to fundamental unfairness or for some other reason."). The Court noted that closing voir dire is not akin to closing the part of trial where the evidence is being adduced, and thus prejudice was not presumed.[6] See id. at 1913

[6] Contrary to Baxter's argument, Weaver did not establish that an erroneous reasonable doubt instruction is a structural error that warrants presumptive prejudice. In Weaver, the Supreme Court acknowledged that its holding did not call into question precedents determining that certain structural errors, such as an erroneous jury instruction, require automatic reversal if raised on direct appeal. 137 S. Ct. at 1911-12 (citing, e.g., Sullivan v. Louisiana, 508 U.S. 275, 278-79 (1993)). Furthermore, the Court declined to address, in the context of structural errors other than the one at issue in Weaver, "whether the result should be any different if the errors were raised instead in an ineffective-assistance claim on collateral review," as is the case here. Id. at 1912; see also id. at 1907 (limiting the holding to "the context of trial counsel's failure to object to the closure of the courtroom during jury selection").

(explaining that some circumstances might warrant a presumption of prejudice, such as if "defense counsel errs in failing to object when the government's main witness testifies in secret"). Assuming without deciding that an inartful or partially incorrect reasonable doubt instruction constitutes a structural error, and, like the Weaver Court, "that prejudice can be shown by a demonstration of fundamental unfairness," we will apply a similar approach to evaluate whether such an error triggers the presumption of prejudice. Id. at 1913. The complete failure to give such an instruction is a structural error that so infects the trial process that the verdict cannot be said to reflect a proper verdict in a criminal case. See Sullivan v. Louisiana, 508 U.S. 275, 281 (1993) (stating that "[d]enial of the right to a jury verdict of guilt beyond a reasonable doubt" is a "structural defect[] in the constitution of the trial mechanism, which def[ies] analysis by harmless-error standards" (citation and internal quotation marks omitted)). In such circumstances, "the resulting trial is always a fundamentally unfair one." Weaver, 137 S. Ct. at 1908 (citing Sullivan, 508 U.S. at 279). When a reasonable doubt instruction is given, however, the rules concerning evaluating a jury instruction apply. United States v. Isaac, 134 F.3d 199, 204 (3d Cir. 1998). These rules "do[] not require that any particular form of words be used in advising the jury of the government's burden of proof." Victor v. Nebraska, 511 U.S. 1, 5 (1994). Instead, the rules require examining the language in its totality and determining whether the instructions correctly captured the applicable legal concepts. Isaac, 134 F.3d at 204 (upholding a reasonable doubt instruction because although part of the instruction was erroneous, "this defect was counterbalanced by the explanation that preceded and succeeded it"). In the context of an ineffective assistance of counsel claim, if we conclude that the instruction contains an

error, we then examine whether the instruction resulted in actual prejudice.[7]

Here, Baxter contends, and the Commonwealth does not dispute, that the instruction contained an example that impacted the accuracy of the jury instruction. Even if the example used in the instruction improperly cast the reasonable doubt standard, the surrounding language correctly expressed the standard. Moreover, the evidence against Baxter shows that even the inapt example did not prejudice him. See Buehl v. Vaughn, 166 F.3d 163, 171-72 (3d Cir. 1999) (concluding that "[i]n view of the magnitude of the evidence that the Commonwealth presented," the defendant could not show he was prejudiced by the absence of a limiting instruction).

[7] This approach is similar to how we examine various claims of ineffective assistance of counsel. For example, in United States v. Cronic, 466 U.S. 648, 658 (1984), the Supreme Court noted that prejudice is presumed when (1) there is complete denial of counsel, (2) counsel fails to subject the prosecution's case to meaningful adversarial testing, or (3) there is a very small likelihood that even a fully competent counsel could provide effective assistance. Id. at 659-60; see also Bell v. Cone, 535 U.S. 685, 695-96 (2002) (same). When, however, counsel makes an isolated error during the trial, such as failing to object to a jury instruction, the defendant must show actual prejudice to prevail on a claim of ineffective assistance of counsel. See Strickland, 466 U.S. at 695-96 (distinguishing errors that have an "isolated, trivial" effect and do not affect factual findings from those that have a pervasive effect that therefore result in a "breakdown in the adversarial process"). Thus, not all errors involving the actions of counsel trigger a presumption of prejudice.

Various eyewitnesses who were in close proximity of and who knew Baxter for years testified that Baxter and McBride chased Brown and repeatedly shot him. Baxter's friend Marcelis corroborated the eyewitness accounts with her report of driving Baxter and McBride to the playground, hearing their incriminating remarks after the shooting and their motive for it, and their flight to Wilkes-Barre.[8] This flight, together with Baxter's use of false names when he encountered law enforcement after the murder, provided a basis to infer a consciousness of guilt. In light of this evidence, Baxter cannot show he was prejudiced by the phrasing of the example in an otherwise correct reasonable doubt jury instruction. See Saranchak v. Secretary, Pa. Dep't of Corrs., 802 F.3d 579, 592 (3d Cir. 2015) (concluding that trial errors "did not contribute to a reasonable probability of a different outcome given the strength of the Commonwealth's case"). Accordingly,

[8] Baxter's challenges to the strength of the evidence are not persuasive. First, although Baxter notes that Durant had an open drug case at the time he testified, there was no promise he would reason favorable treatment in that case in exchange for his testimony against Baxter. Next, Baxter relies upon testimony at the PCRA hearing to argue that Harris identified a different shooter. Because this evidence was not presented at trial, we cannot consider it to determine prejudice. See Berghuis v. Thompkins, 560 U.S. 370, 389 (2010) ("In assessing prejudice, courts must consider the totality of the evidence before the judge or jury." (quotation marks and citations omitted)). His efforts to undermine Marcelis testimony also fail. The jury had sufficient evidence to reject his argument that Marcelis imagined the events about which she testified given her testimony that, while she used drugs the night before, she had a clear recollection of the events.

Baxter's counsel's failure to object to the reasonable doubt instruction did not prejudice him, and thus he cannot show he was deprived of effective assistance of counsel.

III

For the foregoing reasons, we will affirm.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 20-1259

ARMEL BAXTER,
Appellant

v.

SUPERINTENDENT COAL TOWNSHIP SCI; DISTRICT ATTORNEY PHILADELPHIA; ATTORNEY GENERAL PENNSYLVANIA

(D.C. No. 2-18-cv-00046)

SUR PETITION FOR REHEARING

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

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

BY THE COURT,

s/ Patty Shwartz
Circuit Judge

Dated: April 30, 2021
cc: Daniel A. Silverman, Esq.
David Napiorski, Esq.
Ronald Eisenberg, Esq.

APPENDIX C

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

ARMEL BAXTER, Petitioner, v. THOMAS MCGINLEY, et al., Respondents.	CIVIL ACTION NO. 18-46

O R D E R

AND NOW, this 16th day of January, 2020, upon careful and independent consideration of the petition for a writ of habeas corpus, and after review of the Report and Recommendation of United States Magistrate Judge Timothy R. Rice, and Petitioner's Objections and Supporting Authority thereto, IT IS ORDERED that:

1. The Report and Recommendation is APPROVED and ADOPTED;
2. The Petition for Writ of Habeas Corpus is DENIED with prejudice;
3. There is probable cause to issue a certificate of appealability;[1] and
4. The Clerk of Court shall mark this case closed for statistical purposes.

[1] We find that a certificate of appealability should be issued because we find that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and whether this Court was correct in its ruling. See *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

BY THE COURT:

s/ J. Curtis Joyner

J. CURTIS JOYNER, J.

APPENDIX D

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

ARMEL BAXTER, Petitioner,	:	CIVIL ACTION
v.	:	No. 18-cv-46
THOMAS MCGINLEY, et al., Respondents.	:	

REPORT AND RECOMMENDATION

TIMOTHY R. RICE **December 4, 2019**
U.S. MAGISTRATE JUDGE

Petitioner Armel Baxter, a prisoner at the State Correctional Institution in Coal Township, Pennsylvania, has filed a counseled petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. He argues trial counsel was ineffective for failing to: (1) object to the trial court's reasonable doubt instruction; (2) obtain bench warrants for two subpoenaed witnesses; and (3) appear during jury deliberations. Pet. (doc. 1) at 6, 15, 29, 58. I respectfully recommend denying Baxter's claims with prejudice as meritless and/or procedurally defaulted.

FACTUAL AND PROCEDURAL HISTORY

In February 2009, Baxter was convicted of first-degree murder, conspiracy to commit murder, and possession of an instrument of crime. Commonwealth v. Baxter, CP-51-CR-0013121-2007, Dkt. at 4–5. The Commonwealth presented testimony from three eyewitnesses at trial. Rachel Marcelis testified that on the afternoon of April 21, 2007, Baxter and co-defendant, Jeffrey McBride, were in her car when they saw someone on the playground, asked her to return there, and then exited the car. N.T. 01/30/09 at 115–19; see also 03/03/10 Super. Ct. Op. at 1. When they returned to Marcelis's car, she heard one of them say that they "got him" and that McBride's gun did not work so he "couldn't get any rounds off." Id. at 123, 131. McBride told

Marcelis that the victim was the person who had shot their friend a couple of months earlier. Id. at 125. Marcelis, Baxter, and McBride then drove to Wilkes-Barre for the weekend, and only Marcelis returned to Philadelphia that Monday. Id. at 125–26. Arrest warrants were issued for both Baxter and McBride, but police did not arrest Baxter until July 10, 2007, after receiving a domestic violence call at a Wilkes-Barre motel. 03/03/10 Super. Ct. Op. at 2.

Hassan Durant and Anthony Harris were on the public playground where the victim was shot. N.T. 1/29/09 at 68; N.T. 1/30/09 at 5. Both testified that they saw Baxter and McBride enter the playground wearing hooded sweatshirts even though it was a very warm day. Id. They said that Baxter and McBride approached the victim and fired approximately eight to ten shots. N.T. 1/29/09 at 82; N.T. 01/30/09 at 37. The victim had been Durant's best friend for about fifteen years, N.T. 1/29/09 at 63, and was Harris's cousin, N.T. 01/30/09 at 4. Each said that he could clearly see Baxter's face and was familiar with Baxter.[1] Id. at 76–77; N.T. 01/30/09, 15–16.

Baxter contends that two defense witnesses, Kyle Carter and Gregory Blackmon, would have refuted Harris's and Durant's testimony but they never got to testify. Although these witnesses attended the trial's first three days, they were not present on the fourth day, when the defense case started and a snowstorm hit Philadelphia. N.T. 02/04/09 at 20, 23–24. Carter and

[1] Durant testified that he knew Baxter from the neighborhood for approximately "a year or two," N.T. 01/29/09 at 65, and Harris testified that he lived three doors from Baxter and had known him his entire life. N.T. 01/30/09 at 7-8.

Eyewitness testimony based on prior familiarity with the suspect does not pose the same risk of misidentification as eyewitness testimony of a stranger after a brief encounter. See Third Circuit Model Jury Instruction (Criminal) 4.15; Perry v. New Hampshire, 565 U.S. 228, 243–44 (2012) (time witness has to observe suspect bears on risk of misidentification).

Blackmon later claimed that they mistakenly thought court was cancelled because of the weather. N.T. 01/20/15 at 122–23, 172. They would both have testified that, contrary to the testimony of Harris and Durant, the shooters' hoodies were pulled low enough to obscure their faces and that both shooters had been tall and thin (Baxter is 5'6" tall). N.T. 1/20/15 at 109–28, 161–84. Both also would have testified that, after the shooting, Harris was distraught and shouted to the crowd that "Malik from Smedley Street" or "Malik Ware" was the shooter. Id. at 118–19, 171. During cross-examination, Harris denied identifying Malik as the shooter or even knowing a Malik Ware. N.T. 1/30/19 at 60.

Although Baxter's trial counsel did not request a continuance to secure the appearance of Carter and Blackmon, McBride's counsel did. N.T. 2/4/09 at 24. Counsel was granted a short recess to telephone the witnesses, but one of the witnesses ignored his call and the other had gone to school. Id. at 31. The trial judge concluded that issuing a bench warrant would be futile because she could not compel the witnesses to testify. Id. at 39–41.

At the close of trial, the trial judge provided the following reasonable doubt instruction:

> Now, let's talk about this burden that the Commonwealth bears. This is the burden of proof beyond a reasonable doubt. Ladies and gentlemen, without question, it is the highest standard in the law, and it is the only standard that supports a verdict of guilty. Now, although the Commonwealth bears this burden of proving a citizen guilty beyond a reasonable doubt, this does not mean that the Commonwealth must prove its case beyond all doubt. The Commonwealth is not required to meet some mathematical certainty. The Commonwealth is not required to demonstrate the complete impossibility of innocence. A reasonable doubt is a doubt that would cause a reasonably careful and sensible person to pause, to hesitate, to refrain from acting upon a matter of the highest importance to your own affairs or to your own interests. A reasonable doubt, ladies and gentlemen, must fairly arise out of the lack of evidence that was presented with respect to some element of each of the crimes charged.
>
> Now, as we move through this, what I'm going to do is define for you each of the crimes charged; that definition is called the elements of the crime.

> The Commonwealth must prove each element beyond a reasonable doubt. I find it helpful to think about reasonable doubt in this way: Each one of you loves someone. Each one of you is blessed to love someone. A spouse, a significant other, a parent, a child, a niece, a nephew, each one of you has someone in your life who is precious.
>
> If you were advised by your loved one's physician that that loved one had a life-threatening illness and that the only protocol was a surgery, very likely you would ask for a second opinion. You'd probably get a third opinion. You'd probably start researching the illness, what is the protocol, is surgery really the only answer. You'd probably, if you're like me, call everybody you know in medicine: What do you know about this illness? What do you know about this surgery? Who does this surgery across the country? What is my option.
>
> At some moment, however, you're going to be called upon to make a decision: Do you allow your loved one to go forward? If you go forward, it's not because you have moved beyond all doubt. There are no guarantees. If you go forward, it's because you have moved beyond all reasonable doubt.
>
> Ladies and gentlemen, a reasonable doubt must be a real doubt. It may not be a doubt that is imagined or manufactured to avoid carrying out an unpleasant responsibility. You cannot find a citizen who is accused of a crime guilty based upon a mere suspicion of guilt. The Commonwealth's burden is to prove the defendant guilty beyond a reasonable doubt. If the Commonwealth has met that burden, then the defendant is no longer presumed to be innocent and you should find him guilty. On the other hand, if the Commonwealth has not met its burden, then you must find him not guilty.

N.T. 02/04/09 at 142–45. Trial counsel did not object to this instruction. See Pet. at 7; see also 11/09/17 Declaration of Daniel Silverman, ¶ 7, at App'x A, 80.

As jury deliberations began, Baxter's counsel left to take care of his ill mother in Baltimore. N.T. 02/04/09 at 30. He told the Court he would return the next day, and if necessary, replace himself with another lawyer. Id. at 31; N.T. 02/05/09 at 15–16. On the second day of jury deliberations, the trial judge convened the parties for jury questions, and Baxter's substitute counsel appeared. Id. at 15–16. The jury asked the judge to (1) explain the difference between first and third degree murder; (2) explain the difference between accomplice

liability and conspiracy; and (3) provide them with an excerpt of Marcelis's testimony and police statement. Id. at 2. When reached by telephone in Baltimore, Baxter's counsel instructed substitute counsel to defer to the judgments of McBride's counsel. Id. at 16. After an off-the-record discussion, the trial judge read the jury an excerpt Marcelis's testimony but not her police statement, and repeated jury instructions on first and third degree murder, accomplice liability, and conspiracy, which were substantially identical to the ones the jury had already heard. Id. at 5-13.

Baxter was convicted and sentenced to life in prison without the possibility of parole for first-degree murder, and concurrent terms of ten-to-twenty years of incarceration for conspiracy, and one-to-two years of incarceration for possessing an instrument of crime. Dkt. at 5. The Superior Court affirmed in March 2010, and the Pennsylvania Supreme Court denied review in February 2011. Id. at 11–12.

In September 2011, Baxter filed a pro se petition for relief under Pennsylvania's Post-Conviction Relief Act, 42 Pa. C.S. § 9524 et seq. ("PCRA"). Id. at 12. Baxter filed an amended and counseled PCRA petition in September 2013, and in November 2014, a new judge granted Baxter's request for a PCRA hearing. Id. at 13, 16; see also 03/04/15 Trial Ct. Op. at 2. The PCRA court dismissed Baxter's petition in March 2015. Dkt. at 16; see also 03/04/15 Trial Ct. Op. at 12. The Superior Court affirmed in November 2016, and the Pennsylvania Supreme Court denied review in May 2017. Dkt. at 16–17.

In January 2018, Baxter timely filed his habeas petition. Pet. at 17. In May 2018, I heard oral argument concerning Baxter's reasonable doubt instruction claim. See 04/30/18 Order (doc. 18). In September 2018, I granted Baxter's unopposed motion to stay the case while the parties

pursued a negotiated resolution. See 09/18/18 Order (doc. 27). In September 2019, the parties notified me that the case was ripe for decision. See 07/23/19 Order (doc. 38); 08/20/19 Status Report (doc. 39).

DISCUSSION

Before seeking federal habeas relief, a petitioner must exhaust all available state court remedies, "thereby giving the State the opportunity to pass upon and correct alleged violations of its prisoners' federal rights." Baldwin v. Reese, 541 U.S. 27, 29 (2004) (citations omitted); see also 28 U.S.C. § 2254(b)(1). The petitioner must "fairly present his claim in each appropriate state court . . . alerting that court to the federal nature of the claim." Baldwin, 541 U.S. at 29. If a petitioner has failed to exhaust his state court remedies on a claim and the state court would now refuse to review the claim based on a state procedural rule that is independent of the federal question and adequate to support the judgment, the court may deny that claim as procedurally defaulted. See Coleman v. Thompson, 501 U.S. 722, 731–32, 735 n.1 (1991). The court also may find a habeas claim procedurally defaulted if the petitioner presented it to the state court, but the state court refused to address its merits based on an adequate and independent state procedural ground. Id. at 731–32; Cone v. Bell, 556 U.S. 449, 465 (2009).

A court may consider a procedurally defaulted claim only if a petitioner demonstrates: (1) a legitimate cause for the default and actual prejudice from the alleged constitutional violation; or (2) a fundamental miscarriage of justice from a failure to review the claim. Coleman, 501 U.S. at 750. Ineffective assistance of counsel may establish cause for a procedural default if the ineffectiveness claim was properly raised before the state courts or the petitioner can show cause for failing to properly raise it. See Edwards v. Carpenter, 529 U.S. 446, 452–53 (2000);

Martinez v. Ryan, 566 U.S. 1, 14, 17–18 (2012). The petitioner also must show actual prejudice, meaning counsel's alleged ineffectiveness "worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." United States v. Frady, 456 U.S. 152, 167–70 (1982). To establish a fundamental miscarriage of justice, a petitioner must present "new reliable evidence" of his actual innocence, such as "exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence." Schlup v. Delo, 513 U.S. 298, 321–24 (1995).

If a claim is not procedurally defaulted and the state court has denied it on its merits, I can grant relief only if the state court's decision: (1) "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) "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). This is a "difficult to meet and highly deferential standard . . . which demands that state-court decisions be given the benefit of the doubt." Cullen v. Pinholster, 563 U.S. 170, 181 (2011).

I. Reasonable Doubt Jury Instruction

Baxter alleges the reasonable doubt instruction violated due process and counsel was ineffective for failing to object to it. Pet. at 6.

Not only did trial counsel fail to object to the instruction, Baxter never challenged the instruction on appeal or counsel's ineffectiveness related to the instruction in his PCRA proceedings. Pet. at 26. Because independent and adequate state court rules would preclude Baxter from raising these claim in state court now, they are procedurally defaulted. Coleman,

301 U.S. at 735 n.1. Baxter argues his default should be excused due to the serial ineffectiveness of trial and PCRA counsel. Pet. at 26.

1. Ineffective Assistance of Counsel

The Sixth Amendment guarantees an accused a "reasonably competent attorney." United States v. Cronic, 466 U.S. 648, 654–55 (1984) (citing McMann v. Richardson, 397 U.S. 759, 770 (1970)). Baxter must establish two elements: (1) his counsel was deficient, meaning "counsel made errors so serious that [he] was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment;" and (2) counsel's "deficient performance prejudiced" him, meaning he was "deprived of a fair trial" with a "reliable" result. Strickland v. Washington, 466 U.S. 668, 687 (1984). "Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable."[2] Id.

2. Procedural Default

Trial counsel ineffectiveness can only excuse procedural default of a trial court error if counsel's failure to raise the issue itself meets the Strickland ineffectiveness standard. Edwards v. Carpenter, 529 U.S. 446, 452–53 (2000). PCRA counsel ineffectiveness may excuse procedural default only if: (1) the claim involves trial counsel ineffectiveness; and (2) the underlying claim is "substantial," i.e., has "some merit." Martinez, 566 U.S. at 14. Because trial counsel never objected to the trial court's instruction and PCRA counsel did not claim trial

[2] Pennsylvania essentially applies the same test for ineffectiveness assistance of counsel as the federal courts. See Werts v. Vaughn, 228 F.3d 178, 203 (3d Cir. 2000); Commonwealth v. Sneed, 899 A.2d 1067, 1076 (Pa. 2006).

counsel was ineffective for failing to object, Baxter's must satisfy Martinez to obtain review of his due process challenge. Edwards, 529 U.S. at 452–53.

Under Martinez, a claim of trial counsel ineffectiveness is substantial if "reasonable jurists could debate that [it] has merit." Preston v. Superintendent Graterford SCI, 902 F.3d 365, 377 (3d Cir. 2018). Baxter meets this standard. Courts are divided on the legality of essentially the same reasonable double jury instruction given in this case. Compare, e.g., Brooks v. Gilmore, No. 15-5659, Order (doc. 20), 2017 WL 3475475, at *3, *8–10 (E.D. Pa. Aug. 11, 2017) (granting writ on ineffectiveness claim for failure to object to a reasonable doubt instruction using a hypothetical involving a "life threatening condition" affecting someone "absolutely precious" to a juror, where the "best protocol" was "an experimental surgery"),[3] with Gant v. Girouz, No. 15-4468, Report & Recomm. (doc. 18), 2017 WL 2825927, at *14–15 (E.D. Pa. Feb. 27, 2017), Order adopting Report & Recomm. (doc. 23), No. 15-4468, 2017 WL 2797911 (E.D. Pa. June 28, 2017) (dismissing ineffectiveness claim based on counsel's failure to object to an almost identical reasonable doubt instruction because the instruction, when fully examined in the context of the entire trial, did not violate the petitioner's due process rights) and Corbin v. Tice, No. 16-4527, Supp. Report & Recomm. (E.D. Pa. Jan. 15, 2019) (doc. 42).[4]

---

[3] Moreover, in Brooks, the Commonwealth withdrew its appeal of the district court's decision granting the writ, and did not defend the constitutionality of the reasonable doubt instruction. See Brooks v. Superintendent Greene SCI, No. 17-2971, 2018 WL 1304895, at *1 (3d Cir. Feb. 28, 2018) (appeal dismissed).

[4] State courts also have held the contested instruction was proper. See also Commonwealth v. Johnson, 1639 EDA 1999 at 3 (Pa. Super. 2000); Commonwealth v. Gant, 1612 EDA 2007 at *9 (Pa. Super. 2009); Commonwealth v. Brooks, 2014 WL 8134138, at *4 (Phila. C.C.P. 2014); Commonwealth v. Brooks, 2015 WL 6180873, at *6 (Pa. Super. 2015); Commonwealth v. Corbin, 2016 WL 1603471, at *6, *17 (Pa. Super. 2016).

Because this claim involves trial counsel ineffectiveness and is substantial, its procedural default can be excused due to PCRA counsel's failure to raise it. Martinez, 566 U.S. at 14.

3. Merits

At the time of Baxter's trial, the Pennsylvania Superior Court and District Court for the Eastern District of Pennsylvania had already upheld the contested instruction and its "life-threatening illness" illustration. See Commonwealth v. Johnson, 1639 EDA 1999 (Pa. Super. Aug. 23, 2000); Johnson v. Varner, No. 01-2409, 9/4/2003 Order (doc. 24), 7/23/2002 Report & Recommendation (doc. 21). Counsel cannot be ineffective for failing to raise a meritless claim.[5] United States v. Sanders, 165 F.3d 248, 253 (3d Cir. 1999).

The Commonwealth now essentially concedes that a portion of the instruction was unconstitutional, but asserts Baxter suffered no prejudice from the instruction due to the overwhelming evidence against him. See 5/3/2018 hrg. at 4, 13–15 (noting strength of the case against Baxter based on the Commonwealth's three eyewitnesses, evidence of motive, and evidence of evading police). Although I agree that Baxter cannot establish prejudice,[6] I also do

[5] The Commonwealth relies on Brown v. Folino to argue there can be no ineffectiveness for failing to object to even a "constitutionally problematic" jury instruction that has already been upheld. 179 F. App'x 845, 848 n.3 (3d Cir. 2006). There is at least one significant difference between this case and Brown. In Brown, the Commonwealth defended the contested jury instruction, arguing there was no attorney ineffectiveness because the challenged instruction was constitutional. See 5/3/2018 hrg. at 17.

[6] The overwhelming evidence included two eyewitnesses who were familiar with Baxter and were consistent in identifying him. N.T. 1/29/09 at 65, 84–85; N.T. 1/30/09 at 7–8; N.T. 10/31/07 at 6–7, 22–26. The identifications were made in close proximity with good lighting and their descriptions of the shooting were consistent. See, generally, N.T. 1/29/09 at 62–138 (Durant); N.T. 1/30/09 at 4–71 (Harris). Moreover, both witnesses were close with the victim and had no bias against Baxter or incentive to misidentify him. Id. Marcelis, who had a close relationship with McBride, testified that Baxter and McBride admitted to the crime, stating "we got him" and then discussing problems with McBride's gun that corroborated the eyewitnesses'

not find that the instruction violated Baxter's rights to due process for the reasons articulated By Judge Reuter in Corbin and Judges Lloret and Savage in Gant.

No particular set of words are required to explain the government's burden of proof to a jury. Victor v. Nebraska, 511 U.S. 1, 5 (1994). The trial court's instruction, when viewed in its entirety, must simply convey that the government bears the burden to prove a defendant's guilt beyond a reasonable doubt. Id. (citing Holland v. United States, 348 U.S. 121, 140 (1954)). Reasonable doubt should be explained "in terms of the kind of doubt that would make a person hesitate to act rather than the kind on which he would be willing to act." Holland, 348 U.S. at 140. The Third Circuit has described proof beyond reasonable doubt as "proof of such a convincing character that you would be willing to rely and act upon it, unhesitatingly, in the most important of your affairs." United States v. Isaac, 134 F.3d 199, 203 (3d Cir. 1998).

After tracing the Supreme Court's repeated instructions to refrain from examining instructions "in artificial isolation," Cupp v. Naughten, 414 U.S. 141, 147 (1973), Judge Reuter concluded that the state court judge's charge did not restrict the definition of reasonable doubt to only those doubts that would preclude one from acting at all because, in addition to the medical care illustration, the instruction contained the following well-established definition of reasonable doubt: "[R]easonable doubt is a doubt that would cause a reasonably careful and sensible person to pause, to hesitate, or to refrain from acting upon a matter of the highest importance in their own affairs or their own interests." Corbin, No. 16-4526, Supp. Report & Recomm. at 15. The

---

testimony. N.T. 1/30/09 at 115–65. Marcelis's testimony also provided evidence of motive – that Baxter and McBridge intended to kill the victim because they believed he had shot their friend. Id. at 124–25. Finally, there was evidence showing consciousness of guilt because Baxter was arrested in Wilkes-Barre, where Marcelis testified he fled after the shooting, and gave the officers a series of false names before he was finally identified. N.T. 2/3/09 at 99–02.

instruction in this case contained the same language. See N.T. 2/4/2009 at 142.

In Brooks, however, the Court noted the "emotionally charged hypothetical," which it claimed "improperly elevated the level of doubt necessary to secure an acquittal." Brooks, 2017 WL 3475475, at *1. According to Brooks, "one would need profound, if not overwhelming, doubt to deny a loved one their only or best opportunity for cure," and "any person of decency and morals would strive to put aside doubt when faced with a single life-saving option for a loved one." Id. at *4.

Although the contested instruction is inartful and its illustration inapt, it does not violate due process because there is no "reasonable likelihood that the jury applied it unconstitutionally." Victor, 511 U.S. at 62 (citing Estelle v. McGuire, 502 U.S. 62, 72 (1991)). Read as a whole, the instruction is constitutional, as Judges Reuter, Lloret, and Savage reasoned.

This claim should therefore be dismissed as meritless.

II. Failure to Obtain Bench Warrants for Two Subpoenaed Witnesses

Baxter alleges trial counsel was ineffective for failing to seek bench warrants for Carter and Blackmon, who would have offered exculpatory testimony and contracted the eyewitness testimony offered by the Commonwealth. Pet. at 29.

McBride's counsel had subpoenaed both Carter and Blackmon for trial and the trial court specifically instructed Baxter's counsel there was no need for him to issue duplicative subpoenas, even though he had taken independent steps to identify and locate the witnesses. N.T. 2/4/09 at 20, 27. Both witnesses attended the first several days of trial. Id. at 23. When the witnesses did not appear on the day their testimony was sought, McBride's counsel attributed their absence to inclement weather and requested a continuance. Id. at 24. The court instead

granted a short recess to allow counsel to call them.[7] Id. at 24-26. One of the witnesses failed to answer his phone, and the other witness's phone was answered by his mother, who said he was in school. Id. at 31. The trial court had already found that the "purported witnesses refused to come in." Id. at 25. She further explained that she was unable to issue bench warrants for their arrests because Baxter had failed to provide good addresses for them, and that even a successfully executed bench warrant would not "force [them] to testify." Id. at 40-41.

Although the Superior Court found Baxter's ineffectiveness claim had "arguable merit" because counsel should have requested a bench warrant, it upheld the PCRA court's denial of relief. 11/17/16 Super. Ct. Op. at 17–19. The Superior Court acknowledged Baxter's constitutional right to compulsory process, id. at 10, and noted that counsel was ineffective only if his failure to seek compulsory process had no reasonable basis or was the result of "sloth or lack of awareness of the available alternatives," id. at 11-12. The court reasoned that Baxter's and McBride's attorneys had been working jointly to procure the witnesses' appearance and requested time to locate them when they failed to appear, which the trial court denied within its discretion. Id. at 18–19 (citing 3/3/2010 Super Ct. Op. at 14-15 finding no abuse of discretion by trial court). The Superior Court then found "both counsel were correct to infer that the [trial] court would not grant them even more additional time to procure a bench warrant and that such

[7] On direct appeal, the Superior Court found that the trial court's refusal to grant a continuance was not an abuse of discretion under state law. See 3/3/2010 Super. Op. at 14. The court explained, "[a]lthough the weather conditions were poor, court was in session, the weather did not prevent the jury or other witnesses from appearing, and public transportation was operational. Id. (citing N.T. 2/4/09 at 24). Moreover, neither defense witness communicated with Baxter or his counsel about their absence and no information was presented that the witnesses would appear if a continuance was granted. Id. I cannot revisit the state court's application of state law. See Estelle v. McGuire, 502 U.S. 62, 68 (3d Cir. 1980).

an attempt would be futile." 11/17/16 Super. Ct. Op. at 18. It explained that, by specifically declining the request for a continuance, the trial court made clear that even the remedy offered by a bench warrant – effectively contempt against each witness – "would not have helped the defense." Id. at 18 n.11. The Superior Court concluded that counsel's failure to seek a bench warrant was not based on "sloth or lack of awareness of the available alternatives," id. at 20, and counsel was not ineffective "for failing to pursue a bench warrant because it would have been considered a non-meritorious or frivolous claim," id. at 19.

The Superior Court's denial of Baxter's ineffectiveness claim was neither an unreasonable determination of the facts nor an unreasonable application of Strickland. See Sanders, 165 F.3d at 253; Woods v. Etherton, 136 S. Ct. 1149, 1151 (2016) (state court determination that claim lacks merit precludes habeas relief unless "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement") (quoting White v. Woodall, 134 S. Ct. 1697, 1702 (2014)). The Superior Court painstakingly reviewed the circumstances confronting trial counsel, i.e., a difficult trial judge who had clearly stated an unwillingness to delay the trial based on the witnesses' failure to appear to testify. Although I may have reached a different result – both at trial and on PCRA appeal – I cannot conclude under the "doubly deferential" habeas standard for ineffectiveness claims, Yarborough v. Gentry, 540 U.S. 1, 6 (2003), that the state court applied Strickland in an objectively unreasonable manner. By allowing solely a brief recess to locate the missing witnesses, the trial court unmistakably signaled that a request for a warrant would be futile and unproductive. See N.T. 2/4/09 at 40-41. Under the circumstances, counsel cannot be ineffective for failing to do more. See United States v. Padilla, 307 F. App'x 663, 664 (3d Cir.

2009) (counsel cannot be ~~ineffective for~~ failing to take futile action); Savinon v. Mazucca, 318 F. App'x 41, 44 (2d Cir. 2009) (same); Williams v. Bickle, No. 11-7124, 2012 WL 6209889, at *3 (E.D. Pa. Dec. 12, 2012) (same).

III. Failure to Appear at a Critical Stage of Trial

Baxter argues he was denied counsel when trial counsel failed to appear during jury deliberations, Pet. at 58 (citing United States v. Cronic, 466 U.S. 648 (1994)), or alternatively, he was denied effective assistance of counsel pursuant to Strickland.

1. Procedural Default

The Superior Court found Baxter did not properly preserve his Cronic claim with the PCRA court, stating Baxter first raised this argument on appeal. 11/17/16 Super Ct. Op., at 33. Baxter, however, included this claim in both his 2012 supplemental PCRA petition and in his 2013 amended PCRA petition. See 03/08/12 Supp. PCRA Pet. at 1 (citing Cronic, referencing "critical stage" of trial); 09/24/13 Am. PCRA Pet. at 2, Mem. (same). Because Baxter fairly presented his Cronic claim but the Superior Court never reached its merits, I must conduct a de novo review. Fahy v. Horn, 516 F.3d 169,190 (3d Cir. 2008).

Baxter, however, failed to exhaust his alternative–Strickland claim in state court. See Evans v. Court of Common Pleas, 959 F.2d 1227, 1231 (3d Cir. 1992) (for a claim to be exhausted, the defendant must present both the legal theory and the facts supporting the federal claim to the state courts); see also Bell v. Cone, 535 U.S. 685, 697 (2002) ("For purposes of distinguishing between that of Strickland and that of Cronic, this difference is not of degree but of kind."); Scott v. Sobina, No. 09-1081, 2011 WL 6337566, at *5 (E.D. Pa. Dec. 16, 2011) ("Strickland and Cronic are distinct legal theories that require different types of analyses.").

In both his 2012 supplemental PCRA petition and 2013 amended PCRA petition, Baxter stated that trial counsel violated his Sixth Amendment right to counsel. See 3/8/12 Supp. PCRA Pet. at 1 ("Trial counsel violated Appellant's essential Constitution Amendment 6, right to counsel, by completely denying Appellant counsel during a critical stage of trial, supplemental jury instructions."); 9/24/13 Am. PCRA Pet. at 2 ("The Petitioner's Sixth Amendment constitutional right to counsel was denied where his trial counsel failed to appear or to meaningfully participate telephonically in a discussion about how to answer a jury question."). Rather than citing Strickland and establishing ineffectivenes and prejudice, Baxter relied on Cronic and argued prejudice should be presumed because he suffered a complete denial of counsel during a critical stage of trial. See 3/8/12 Supp. PCRA Pet. at 1, 9–10. On appeal, Baxter raised only a Cronic claim. See Pet.'s Super. Ct. Br. at 65 ("Greenb[e]rg was 'totally absent' on February 5, 2019 when the trial court received and addressed three jury questions.") (citing Cronic, 466 U.S.at 659 n.25).

Baxter cannot return to state court to raise his Strickland claim because the time has expired to file a PCRA petition. See 42 Pa. C.S. § 9545(b)(1) (requiring PCRA petition to be filed within one year of final judgment). Because Baxter is raising this claim for the first time in federal court, the claim is procedurally defaulted. See Coleman, 501 U.S. at 735 n.1. To excuse its default, Baxter would need to show that his ineffective assistance of counsel claim has "some merit." Martinez, 566 U.S. at 14. He cannot.

2. Merits

The temporary absence of a defendant's trial counsel during only a portion of the trial does not necessarily violate the defendant's right to counsel. See Arizona v. Fulminante, 499

U.S. 299, 309 (1991) (holding the total deprivation of counsel is a constitutional violation); Vine v. United States, 28 F.3d 1123, 1129 (11th Cir. 1994) ("While trial counsel may exercise poor judgment in absenting himself or herself from a portion of a trial, such flaw does not necessary infect the entire trial."). If, however, counsel is absent during a "critical stage" of trial, prejudice is presumed. Cronic, 466 U.S. at 659, 659 n.25. A critical stage of a proceeding is one that holds "significant consequences for the accused." Bell, 535 U.S. at 696 (2002); Mempa v. Rhay, 289 U.S. 128, 134 (1967) (requiring counsel at every stage where the substantial rights of the defendant may be affected).

Whether jury deliberations constitute a critical stage under Cronic turns on the questions asked by the jury and how they were handled. See United States v. Toliver, 330 F.3d 609, 614–15 (3d Cir. 2003) (declining to find a presumption of prejudice when the trial judge did not consult defense counsel before responding to a jury question requesting verbatim excerpted record testimony). Prejudice is presumed only in "those critical stages of litigation where a denial of counsel would necessarily undermine the reliability of the entire criminal proceeding."[8] Smith v. Kerestes, et al., 414 F. App'x 509, 511 (3d Cir. 2011) (quoting Ditch v. Grace, 479 F.3d 249, 255 (3d Cir. 2007)).

During its deliberations, the jury requested that the court: (1) explain the difference between first and third-degree murder; (2) explain the difference between accessory and

[8] Even if a trial judge has erred by failing to consult trial counsel on a jury's request, that error can be harmless. Toliver, 330 F.3d at 617 (finding no prejudice to the defendant when the trial judge submitted to the jury, with or without the presence of trial counsel, correct excerpts of limited trial testimony); United States v. Widgery, 778 F.2d 325, 330–31 (7th Cir. 1985) (failing to allow defense counsel to see a note from the jurors at the time it was submitted was not an error of constitutional dimension).

conspiracy; and (3) read back Marcelis's testimony and police statement regarding the conversation that occurred after the defendants returned to the car. Id. at 4–5. The trial judge did not consult counsel about the first two questions and responded to them by reading the jury instructions that were almost identical to those they had previously heard. Compare id. at 2, 5–13 with N.T. 2/4/2009 at 161–74. Trial counsel's absence was irrelevant related to these questions.

The third jury question required more consideration because Marcelis's police statement "was not read in the record verbatim" during her testimony. N.T. 2/5/2009 at 2. The trial judge discussed the issue off-the-record with Baxter's substitute counsel and McBride's counsel. Id. at 3. Substitute counsel contacted Baxter's counsel, who instructed him to defer to McBride's counsel. Id. at 16. Marcelis's testimony about the conversation in the car was read to the jury but her police statement was not. Id. at 5.

After the jury's requests were answered, McBride's counsel answered a question for Baxter, who appears to have refused to pose his question to his substitute counsel. Id. at 14. The trial judge noted, on the record, that she believed McBride's counsel had adequately represented Baxter's legal interests during jury deliberations. Id. at 16–17.

Baxter's Cronic claim is meritless because counsel's absence was not "so likely to prejudice [Baxter] that the cost of litigating [its] effect is . . . unjustified." Cronic, 466 U.S. at 658. The only jury inquiry about which the judge consulted the attorneys was whether she could read Marcelis's testimony and police statement regarding the conversation in her car. N.T. 2/5/2009 at 2–3. Baxter's trial attorney was reached by telephone during the discussion of jury questions and instructed substitute counsel "to defer to whatever [McBride's counsel] agreed to."

Id. at 16. Because Baxter had the benefit of counsel, he was not "denied counsel at a critical stage of trial." Cronic, 466 U.S. at 659; see also Carol v. Renico, 475 F.3d 708, 712 (6th Cir. 2007) (concluding the trial court did not deny the defendant his right to counsel by allowing counsel for the co-defendant to "stand in" for the defendant's counsel).

For the same reasons, Baxter's related Strickland claim is meritless, Strickland, 466 U.S. at 687, and its procedural default cannot be excused under Martinez. 544 U.S. at 14.

The strategic decision Baxter's counsel made – to defer to co-counsel – is afforded great deference. Thomas v. Varner, 428 F.3d 491, 500 (3d Cir. 2005) (counsel's actions are presumed to reflect sound strategy unless a petitioner shows "no sound strategy . . . could have supported" counsel's decisions). Even assuming counsel's performance was ineffective, Baxter cannot establish prejudice. Strickland, 466 U.S. at 687. The jury was entitled to have admissible testimony it had heard from Marcelis read back, United States v. Zarintash, 736 F.2d 66, 69–70 (3d Cir. 1984), and her police statement was not provided, N.T. 2/5/2009 at 2, 5. Because the trial judge did not consult the attorneys regarding two of the jury's questions and the jury only received evidence it had already heard, none of the actions taken during jury deliberations prejudiced Baxter. Toliver, 330 F.3d at 617.

Accordingly, I make the following:

RECOMMENDATION

AND NOW, on December 4, 2019, it is respectfully recommended that the petition for writ of habeas corpus be DENIED with prejudice. It is further recommended that there is no probable cause to issue a certificate of appealability.[9] The petitioner may file objections to this Report and Recommendation within fourteen days after being served with a copy. See Local Civ. Rule 72.1. Failure to file timely objections may constitute a waiver of any appellate rights. See Leyva v. Williams, 504 F.3d 357, 364 (3d Cir. 2007).

BY THE COURT:

/s/ Timothy R. Rice
TIMOTHY R. RICE
U.S. MAGISTRATE JUDGE

9 Because jurists of reason would not debate my recommended disposition of the petitioner's claims, a certificate of appealability also should not be granted. See Slack v. McDaniel, 529 U.S. 473, 484 (2000).

APPENDIX E

First Judicial District of Pennsylvania

51CR00131142007
Jeffrey Mc Bride

Trial (Jury) Volume 1
February 04, 2009

CRS
Court Reporting System

First Judicial District of Pennsylvania
100 South Broad Street, Second Floor
Philadelphia, PA 19110
(215) 683-8000 FAX:(215) 683-8005

Original File 2-4-09.txt, 186 Pages
CRS Catalog ID: 09021387

JA 33

Page 141

opportunity to present evidence if they choose to. In this proceeding, both Jeffrey McBride and Armel Baxter presented what we call character testimony. You will remember at the end of the proceeding, both attorneys entered stipulations on behalf of their clients as to their character. They offered evidence tending to prove that Jeffrey McBride and Armel Baxter have reputations in their community for being peaceful and nonviolent.

The law recognizes that a person of good character is not likely to commit a crime that is contrary to that person's nature. Evidence of good character may itself raise a reasonable doubt and require a verdict of not guilty. You must weigh and consider the evidence of good character along with all the other evidence in the case.

If after considering all the evidence, you have a reasonable doubt of the defendant's guilt, you must find him not guilty. On the other hand, if all the evidence considered by you leads you to the conclusion that you are satisfied beyond a reasonable doubt that the defendant is guilty,

Page 142

then you should find him guilty.

Now, ladies and gentlemen, your obligation is to consider all the evidence that was presented. If the evidence presented fails to meet the Commonwealth's burden, then your verdict must be not guilty. On the other hand, if the evidence does prove beyond a reasonable doubt that the defendant is guilty of the crimes charged, then your verdict should be guilty.

Now, let's talk about this burden that the Commonwealth bears. This is the burden of proof beyond a reasonable doubt. Ladies and gentlemen, without question, it is the highest standard in the law, and it is the only standard that supports a verdict of guilty. Now, although the Commonwealth bears this burden of proving a citizen guilty beyond a reasonable doubt, this does not mean that the Commonwealth must prove its case beyond all doubt. The Commonwealth is not required to meet some mathematical certainty. The Commonwealth is not required to demonstrate the complete impossibility of innocence.

A reasonable doubt is a doubt that

Page 143

would cause a reasonably careful and sensible person to pause, to hesitate, to refrain from acting upon a matter of the highest importance to your own affairs or to your own interests. A reasonable doubt, ladies and gentlemen, must fairly arise out of the evidence that was presented or out of the lack of evidence that was presented with respect to some element of each of the crimes charged.

Now, as we move through this, what I'm going do is define for you each of the crimes charged; that definition is called the elements of the crimes. The Commonwealth must prove each element beyond a reasonable doubt. I find it helpful to think about reasonable **doubt in this way**: Each one of you loves someone. Each one of you is blessed to love someone. A spouse, a significant other, a parent, a child, a niece, a nephew, each one of you has someone in your life who is precious.

If you were advised by your loved one's physician that that loved one had a life-threatening illness and that the only protocol was a surgery, very likely you would

Page 144

ask for a second opinion. You'd probably get a third opinion. You'd probably start researching the illness, what is the protocol, is surgery really the only answer. You'd probably, if you're like me, call everybody **you know in medicine**: What do you know about this illness? What do you know about this surgery? Who does this surgery across the country? What is my option.

At some moment, however, you're going to be called upon to make a decision: Do you allow your loved one to go forward? If you go forward, it's not because you have moved beyond all doubt. There are no guarantees. If you go forward, it's because you have moved beyond all reasonable doubt.

Ladies and gentlemen, a reasonable doubt must be a real doubt. It may not be a doubt that is imagined or manufactured to avoid carrying out an unpleasant responsibility. You cannot find a citizen who is accused of a crime guilty based upon a mere suspicion of guilt. The Commonwealth's burden is to prove the defendant guilty beyond a reasonable doubt. If the Commonwealth has met

Page 145

that burden, then the defendant is no longer presumed to be innocent and you should find him guilty. On the other hand, if the Commonwealth has not met its burden, then you must find him not guilty.

Now, ladies and gentlemen, you heard evidence in this proceeding that several of the witnesses, Rachel Marcelis, Anthony Harris and Hassan Durant, made statements on earlier occasions that were consistent with their testimony before you. This evidence of prior consistent statements may be considered by you for one purpose only, and that is to help you judge the credibility of and the weight of the testimony that was given by the witness.

You may not regard the evidence of a prior consistent statement as proof of the truth. It is merely a tool to help you judge the credibility and the weight of testimony that was given before you.

Now, ladies and gentlemen, this process of assessing the credibility and weight that should be accorded to any citizen, I want you to, and I'm directing you to, evaluate the testimony of every witness.

Page 146

You're going to assess the testimony of every witness to determine the weight it is entitled to receive. When I talk about weight, I'm focusing on the credibility of a witness, whether the witness' testimony was believable and accurate in whole or in part. That is solely for your determination.

Now, some of the factors that might bear on your determination include does the witness have an interest in the outcome of the case? Does the witness have a friendship with persons involved in the case? Does the witness have animosity toward persons involved in the case?

Focus on the behavior of the witness on the witness stand. Think about the person's demeanor, the manner in which they testified. Focus on whether the person showed any bias or prejudice that might color their recollection. Think about the person's ability and opportunity to acquire knowledge and to observe the matters concerning which the witness testified. Think about the consistency or the inconsistency of the testimony, as well as its reasonableness or

Page 147

unreasonableness in light of all the evidence that was presented before you.

Now, as you go through this process, you may determine that one of the witnesses testified falsely and did so intentionally. If you reach that conclusion about a fact which is necessary to your decision in this case, then you may, for that reason and that reason alone, disregard everything the witness said.

Now, ladies and gentlemen, you are not required to disregard the testimony of a witness who testified falsely. It is entirely possible for a witness to testify falsely and intentionally so about one issue or one fact, but truthfully about everything else. If you find that to be the situation, then you accept the part of the testimony which you believe, which you find to be truthful, and you reject that which is false and not worthy of belief.

You will very likely discover that there are conflicts in the testimony. In fact, the lawyers spent a lot of time trying to get you to focus on conflicts in the testimony. You have an obligation to try to

Page 148

reconcile these conflicts; in other words, literally fit the testimony together, if you can fairly do so.

Ladies and gentlemen, discrepancies between witnesses, conflicts between the testimony of witnesses, may or may not be a reason to disbelieve a witness' testimony. It is critical for you to remember that no two persons to the same event are going to see it, hear it and remember it the same. It is extremely common for two people to the same event to see it, hear it and remember it differently. So you first try to reconcile the conflicts in the testimony if you can fairly do so.

As you do that, focus on whether the witness was innocently mistaken in their recollection or whether the witness was being deliberately false. It is up to you to decide which testimony, if any, to believe and which to reject as not true or inaccurate. In making your decision, you want to focus on whether the conflict involves a matter of importance to your decision or whether it is merely some insignificant, unimportant detail.

APPENDIX F

IN THE COURT OF COMMON PLEAS

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

CRIMINAL TRIAL DIVISION

COMMONWEALTH	:	
	:	
vs.	:	
	:	
ARMEL BAXTER	:	CP-51-CR-0013121-2007

PCRA HEARING

January 20, 2015

Courtroom 507
The Justice Juanita Kidd Stout
Center for Criminal Justice
Philadelphia, PA

BEFORE: HONORABLE BARBARA A. McDERMOTT, JUDGE

JA 182

02:02 **Q.** I have a hoody here, just a plain Gap hoody. I'm going to put it on. I want you to show me how the hood was covering their face. Okay. So I'm going to put this bad boy on. All right. Now, when you saw these two hooded men walk into the schoolyard on a hot day about to shoot somebody in Broad daylight how was their -- was it like this?

MR. BLANCHARD: I would object to this.

THE COURT: That's sustained.

Just tell him to tell you how the hoody was. Was the hood up?

BY MR. COOLEY:

Q. Was it like this?

A. **No.**

Q. Because there's testimony at trial --

THE COURT: Forget whether there's testimony at trial. That's not relevant.

You just need to ask him questions.

BY MR. COOLEY:

Q. How was the hoody?

A. **It was all the way on, tied down.**

Q. So we have strings --

THE COURT: Were they zipped all the

way and were both of the hoodies on both of the men the same way?

THE WITNESS: They both was tied all the way down, just enough to see out of them.

THE COURT: And you could tell they were men, not women?

THE WITNESS: I'm saying by the structure like you can tell they was men.

THE COURT: Okay.

MR. COOLEY: So just for the record, Your Honor --

THE COURT: The hoody is on and you have the hood on your head and we can see your face.

THE WITNESS: No, you couldn't.

MR. COOLEY: I don't think he said that, Your Honor.

THE COURT: I'm saying you asked me to describe the hood as you have it on.

THE WITNESS: It was on tighter than that.

THE COURT: Tighter, so that what portion of the face, if any, was showing?

BY MR. COOLEY:

Q. Was it like this?

MR. BLANCHARD: Your Honor, can I reposition myself so I can see?

THE WITNESS: You couldn't see any of the face.

THE COURT: Pardon me?

THE WITNESS: You couldn't see any of the face.

THE COURT: You couldn't see any of the face?

THE WITNESS: No.

BY MR. COOLEY:

Q. How were they walking? Were they walking head down?

MR. BLANCHARD: Objection, Your Honor.

THE COURT: Sustained.

No leading questions.

BY MR. COOLEY:

Q. How were they walking?

A. **They were walking straight. I'm not sure if their heads was down or up, but I know their hood was tight enough so you wouldn't be able to see them.**

THE COURT: Okay. You may continue.

Could you tell their race?

THE WITNESS: No.

BY MR. COOLEY:

Q. So you weren't able to see their face?

A. **No.**

Q. How about the description, physical characteristics, how tall would you say?

A. **Probably about six-one, six-two, slim.**

MR. COOLEY: Your Honor, may I ask Mr. Baxter to stand up for demonstrative purposes? Can he stand up?

THE COURT: Sure.

(Petitioner complies with request)

BY MR. COOLEY:

Q. Keep in mind I'm six-four. Considering his height, would you say that the shooter was Mr. Baxter's height, which I believe is roughly five-six?

A. **No, they was taller than him.**

MR. COOLEY: Thank you. You can sit down.

(Petitioner complies with request)

of the matter.
THE COURT: What it's being offered for?
MR. COOLEY: Prior inconsistent statement.
THE COURT: By who? Did he testify before?
MR. COOLEY: I'm saying Anthony Harris testified at trial that he -- again, if this witness testified at trial, I would put him on for the sole purpose of saying you know what, Anthony Harris did not immediately identify my client, you know why, because he made an excited utterance shortly after a startling event that said, you know what, I'll ask Mr. Studivant, who did he accuse.
THE WITNESS: He accused Malik.
MR. BLANCHARD: Objection.
THE COURT: Sir, there's no question before you yet.
The issue is, though, we're not at trial. Are you calling Mr. Harris? Is anyone calling Mr. Harris today?

MR. COOLEY: No.
MR. BLANCHARD: No, Your Honor.
THE COURT: So you need to establish more of a foundation for an excited utterance. I may consider letting you do it for prior inconsistent statement, but you don't have it as an excited utterance yet given the time frame.
MR. COOLEY: Five minutes?
THE COURT: Yes.
MR. COOLEY: From the research I've done, five minutes is well within.
THE COURT: No, it isn't. There's a lot more that you have to establish other than the time frame.
MR. COOLEY: It's a startling event.
THE COURT: I've sustained it.
MR. COOLEY: Okay.
THE COURT: Rephrase it. I will let it in as a prior inconsistent statement. Be specific.
BY MR. COOLEY:
Q. I will simply say what did you hear -- who did Mr. Anthony Harris accuse?

A. One of my friends by the name of Malik.
Q. Okay. Does Malik have a last name?
A. Ware. Malik Ware.
Q. Okay. All right. Let's talk about your availability for trial.
THE COURT: Let me ask a question.
MR. COOLEY: Go ahead.
THE COURT: So you hear Anthony Harris accuse Malik Ware who is standing out there of being one of the shooters?
THE WITNESS: Yes.
THE COURT: Okay. Were the police there when that happened?
THE WITNESS: They was just getting there, yes.
THE COURT: Was Malik Ware there when this happened?
THE WITNESS: Yes.
THE COURT: Okay. What, if anything, did Malik Ware do?
THE WITNESS: Malik told him, "Don't say I shot him."
THE COURT: And did Malik Ware stay there?

THE WITNESS: I'm not sure if he stayed or not.
THE COURT: Did Anthony Harris stay there?
THE WITNESS: Yes.
THE COURT: All right. Give me a second.
(Pause)
THE COURT: You may continue.
MR. COOLEY: Did you have additional questions?
THE COURT: No. Those are my questions.
BY MR. COOLEY:
Q. Before Mr. Baxter's trial which again took place --
THE COURT: I'm sorry, there was one question. Did you stay and talk to the police?
THE WITNESS: No.
THE COURT: So you left and you don't know who said anything to the police because you were gone?
THE WITNESS: Yes.

JA 184

see who was shooting?
A. No, I did not.
Q. So let's talk about these two guys with hoodies on. Could you -- once they enter the schoolyard, could you see their face?
A. No, I couldn't see. They had on hoodies.
MR. COOLEY: Now, with the Court's permission?
THE COURT: You may.
BY MR. COOLEY:
Q. I'm going to put on a nice hoody my wife bought me for Christmas and ask you to describe to me like how the hood -- these hoods were on when you saw them.
MR. COOLEY: For the record, it's zipped up, it's on.
THE WITNESS: It was fully on as if it was cold out, tied.
BY MR. COOLEY:
Q. A lot of hoodies have these --
A. It was tied.
Q. You are saying it was tied down like this?
A. It was tied, yes.
THE COURT: So it wasn't loose?

THE WITNESS: No, it was not.
MR. COOLEY: Thank you, Your Honor.
BY MR. COOLEY:
Q. Now, you couldn't see their face; is that correct?
A. No.
Q. But you saw their physical --
MR. BLANCHARD: Objection.
THE COURT: He hasn't finished.
MR. COOLEY: I said you saw.
MR. BLANCHARD: Just by that question he's putting words in his mouth.
THE COURT: Well, no, he already said he couldn't see his face.
MR. COOLEY: He saw the shooters.
THE COURT: Go ahead.
BY MR. COOLEY:
Q. You saw the shooters; yes?
A. Yes, I saw two guys.
Q. Could you give a physical description of how tall they were?
A. They were rather tall, like maybe my height. Maybe one of them is taller than me.
Q. How tall are you, sir?

A. I'm six foot even.
MR. COOLEY: Again, if I may, Your Honor, if I can have Mr. Baxter stand up.
THE COURT: You may.
(Petitioner complies with request)
BY MR. COOLEY:
Q. Keep in mind, Mr. Carter, I'm six-four and Mr. Baxter is about five-six --
THE COURT: Well, are you testifying to that?
MR. COOLEY: I'm sorry.
THE COURT: You can testify to -- well, you really shouldn't to what your height is, but you can't testify to your client's height.
MR. COOLEY: Okay.
BY MR. COOLEY:
Q. Based on what you see here, based on what you saw on April 21st, 2007, does his height fit the height of the two shooters?
A. They're rather tall and slimmer.
Q. So are you saying he was taller or shorter than the shooters?
A. He is shorter than the shooter, than the

figures I saw.
MR. COOLEY: Okay. Thank you. You can sit down.
(Petitioner complies with request)
BY MR. COOLEY:
Q. So after the shooting you did what?
A. I got under the car. I was sitting on the car talking to someone when the gunfire went off. I got under the car, seeing everybody running actually towards 15th Street. Everybody was scattered. Some people went to 15th Street. Some went -- it's like it's another gate going towards the opposite way. Everybody was scattered.
Q. Everybody was scattered?
A. Yes.
Q. No one was standing around?
A. No.
Q. All right. So you scatter after the shooting. What did you do after?
A. I got under the car.
Q. Okay. Now, after that what happened?
A. I waited for maybe about 20 seconds after the shooting stopped and I begin to come from under the car and I saw everybody else start to congregate

JA185

back into the schoolyard from 15th Street and from everywhere.

Q. Okay. And as you're congregating what did you see?

A. I actually saw the guy -- I actually saw the guy, he was coming in and he started to say he knew who did it and it was a kid from around the corner.

MR. BLANCHARD: Objection.

THE COURT: No, I'll permit that.

BY MR. COOLEY:

Q. Do you know this guy's name?

A. No. He said it was Malik from Smedley Street.

Q. The individual who accused this other individual, what was his name?

A. Tone.

Q. And who is Tone?

A. Tone, he from around the neighborhood. He play basketball. That's where everybody come at to play basketball.

Q. Do you know his real name? If you don't, just say you don't.

A. No, I don't.

Q. Tone?

A. Yes.

Q. And what did you hear?

A. He blurted out, he said I know who it was, it was Malik and them from Smedley Street.

THE COURT: From what street?

THE WITNESS: Smedley Street.

THE COURT: Thank you.

MR. BLANCHARD: Just note my standing objection.

THE COURT: All right. But I'm permitting it. It would have been a prior inconsistent statement.

BY MR. COOLEY:

Q. Did you talk with any law enforcement that day?

A. No, I did not.

Q. So in terms -- let's talk about your experience going to court and trial. Did you -- were you subpoenaed?

A. I was. I missed a week of school. I had to take off of school to come to court.

Q. Okay. And do you know who subpoenaed you?

A. I believe his name was Greenberg if I'm not mistaken.

THE COURT: Say that again.

THE WITNESS: Greenberg.

THE COURT: Kareem Byrd?

THE WITNESS: Greenberg.

THE COURT: I didn't get it.

MR. BLANCHARD: Greenberg.

MR. COOLEY: Greenberg.

THE COURT: Greenberg. Oh, okay. That was the last name?

THE WITNESS: I believe so, yes.

BY MR. COOLEY:

Q. So you received a subpoena?

A. Yes.

Q. And your testimony is you went multiple days, is that what you're saying?

A. Four days in a row.

Q. In those four days did Mr. Greenberg ever have a conversation with you?

A. I had one conversation with him the first day. He told me he wasn't sure if they were going to actually need me or not.

Q. Okay. And you never -- did you end up testifying?

A. I did not.

Q. Now, by not testifying why didn't you testify?

A. I'm not sure. My services weren't needed.

Q. Now, had Mr. Greenberg put you on the stand, would you have testified at the trial to what you've testified here in front of Judge McDermott?

A. Yes.

Q. And you were willing to testify?

A. Yes.

Q. By not showing up, that wasn't you saying, oh, screw it, I don't want to testify?

A. No. They subpoenaed me, so I was obligated to come and testify.

Q. Okay.

MR. COOLEY: That's all for now, Your Honor.

THE COURT: Cross.

CROSS-EXAMINATION

BY MR. BLANCHARD:

Q. So again you were at the schoolyard on April 21st, 2007, when Mr. Brown was shot?

A. Yes.

Q. And you ran and jumped under the car when the shooting started?

A. Yes, I got under the car when the shooting started and saw everybody scatter.

the 15th Street side or the Sydenham Street side?
A. On Sydenham side.
Q. And were they already within the schoolyard or were they walking down? When did you first see them?
A. I first saw them like they was just like entering the schoolyard.
Q. So using picture P-1, now, this is the Sydenham side, is that an accurate portrayal?
A. Yes.
Q. Was that fence there back in 2007, April 2007?
A. Yes.
Q. And was this opening here in P-1 there?
A. Yes.
Q. And is it your testimony that you initially saw them as they walked through this?
A. Yes.
MR. COOLEY: For the record, he testified that he saw the two hooded men walking through the gate on P-1.
THE COURT: Were they walking or running?
THE WITNESS: Walking.

BY MR. COOLEY:
Q. All right. So you see these two hooded men. Did you just stare at them the whole time? Did you see those guys go back conversing? Did you witness the actual shooting when they pulled out their guns and start shooting or were you talking to somebody when the shooting occurred, you're like, "Oh, shit, they're shooting"?
THE COURT: Sir.
MR. COOLEY: Sorry for my language. My bad.
THE COURT: And don't lead. Just ask him what he saw.
BY MR. COOLEY:
Q. What did you see?
A. When they was walking in, I looked at them, then I turned my head to finish my conversation and that's when I started hearing gunshots like 15 seconds later. Then I looked to see where it was coming from. Then I looked behind cars to run out the gate.
Q. Okay. So again using P-4, you're saying there were cars parked at the south base of the courts?
A. Yes.

Q. Okay. And you were waiting near the cars?
A. Yes.
Q. While the game was going on?
A. Yes.
Q. Okay. And this is where you were when you saw them enter?
A. Yes.
Q. Okay. And that's where you were when they started shooting?
A. Yes.
Q. And you actually saw them start shooting?
A. No, I didn't actually see them start shooting. I heard it, then I looked.
Q. When you looked, were they still shooting?
A. Yes.
Q. They were still shooting. Okay. Now, you mentioned they wore hoodies?
MR. COOLEY: If I may have the Court's permission again.
THE COURT: You do.
BY MR. COOLEY:
Q. I'm going to put on a hoody and I'm going to ask you to describe how this hoody -- how their hoodies were on, okay. So describe it for me,

meaning --
A. It was like covering over their face.
Q. Down like this?
A. Yes.
MR. COOLEY: Can you see it, Your Honor?
THE COURT: Yes. The hoody is pulled forward.
BY MR. COOLEY:
Q. Pulled forward?
A. Yes.
Q. Were these taut or lose?
A. It was tight because you couldn't really see it.
MR. COOLEY: Can you see?
MR. BLANCHARD: For the record, I can still see your entire face.
THE COURT: Okay.
BY MR. COOLEY:
Q. Let me ask you, the witness, did you see their face?
A. No.
Q. But I think when you first described the shooting, you mentioned they were tall.

03:32 **A. Yes.**
03:32 Q. Roughly when you say tall, what is your
03:32 definition of tall?
03:32 **A. Probably like six-two.**
03:32 Q. All right.
03:32 MR. COOLEY: If I can have Mr. Baxter
03:32 stand up one more time.
03:33 (Petitioner complies with request)
03:33 BY MR. COOLEY:
03:33 Q. Were they -- the two hooded people you saw,
03:33 were they this height?
03:33 **A. No. Much taller.**
03:33 Q. So after you see the shooting occur, what did
03:33 you do once you saw the shooting?
03:33 **A. I ran behind the car and I ran out the gate.**
03:33 Q. Now, when you say gate, was that on the 15th
03:33 Street side or Sydenham side?
03:33 **A. Sydenham side.**
03:33 Q. Okay. And did you just run or were there more
03:33 people running?
03:34 **A. Everybody.**
03:34 Q. Describe the scene.
03:34 **A. When I ran, everybody ran. The whole**
03:34 **schoolyard was cleared out.**

03:34 Q. Okay. And you're saying everyone ran right
03:34 when the shooting started?
03:34 **A. Yes.**
03:34 Q. Now, what happened after the shooting? What
03:34 did you do?
03:34 **A. After the shooting I had went back to the**
03:34 **schoolyard to get my belongings. That's when**
03:34 **everybody was coming back to the schoolyard.**
03:34 Q. Okay.
03:34 **A. And some guy named Tone was screaming out it**
03:34 **was somebody named Malik that did it.**
03:34 Q. Let me back up there. A guy named Tone, do
03:34 you know Tone's name?
03:34 **A. I don't know his real name.**
03:34 Q. Okay. That's fine. But Tone you're saying
03:34 implicated a person named Malik?
03:34 **A. Yes.**
03:34 Q. Does Malik have a last name or just Malik?
03:35 **A. Malik Ware.**
03:35 Q. Did you talk to -- when you came back to the
03:35 school, did you see any police presence?
03:35 **A. No, it wasn't no police there at the time.**
03:35 Q. And did you talk to any law enforcement that
03:35 day?

03:35 **A. No.**
03:35 Q. All right. Were you subpoenaed for Mr.
03:35 Baxter's trial?
03:35 **A. Not that I can remember.**
03:35 Q. Okay. Were you at court any day for his
03:35 trial?
03:35 **A. Yes, I was there every day except for like the**
03:36 **last day when it was snowing.**
03:36 Q. Okay. But what was your intention of going to
03:36 court?
03:36 **A. To testify.**
03:36 Q. For who?
03:36 **A. For who?**
03:36 Q. Yes.
03:36 **A. Armel.**
03:36 THE COURT: I'm sorry, I missed it.
03:36 Testify for who?
03:36 THE WITNESS: Armel and Jeffrey.
03:36 THE COURT: Both of them?
03:36 THE WITNESS: Yes.
03:36 BY MR. COOLEY:
03:36 Q. All right. And had you testified, would you
03:36 have testified to what you just told the Court and
03:36 me and the DA?

03:36 **A. Yes.**
03:36 Q. Did Mr. Baxter's attorney Mark Greenberg ever
03:36 contact you either over the phone or in person to
03:36 listen to what you had to say as to the events what
03:36 happened on April 21st, 2007?
03:36 **A. I'm not sure. I talked with one lawyer. I'm**
03:37 **not sure which one was who. I'm not sure.**
03:37 MR. COOLEY: May I have a second, Your
03:37 Honor?
03:37 THE COURT: You may.
03:37 BY MR. COOLEY:
03:37 Q. Do you recall --
03:38 MR. COOLEY: I don't think I have a
03:38 hard copy. I was going to show him his
03:38 statement.
03:38 THE COURT: Which one? Which
03:38 statement?
03:38 MR. COOLEY: He met with Mike Wallace.
03:38 It's a statement he gave on the date
03:38 January 16th, 2009, at 2:55.
03:38 THE COURT: He actually met with the
03:38 investigator, I believe.
03:38 MR. COOLEY: Well, I'm saying Mike
03:38 Wallace --

So you yourself did not subpoena anybody?

THE COURT: Well, so it's clear, it says, "By the way, Judge, those two individuals Mr. Baxter also wants me to call and Mr. Wallace has assured me that they made efforts to subpoena them and I am basically working on his coattails in that regard."

THE WITNESS: And the judge I think said that was sufficient.

THE COURT: Correct.

BY MR. COOLEY:

Q. In terms of subpoenaing Gregory Blackmon, Kyle Carter, those two, we'll stick with those two for now, what was your purpose of subpoenaing them?

A. The purpose would have been because Mr. Baxter wanted them to testify. I don't recall what they would have said. I don't know if they were character witnesses or fact witnesses. I don't recall.

Q. Did you read a statement provided by Gregory Blackmon to Mike Wallace or his investigator shortly before trial where he says that the hoods were down,

they couldn't identify anybody?

A. I think Mike would have shared that with me, yes. I sort of have a vague memory of reading that.

Q. So before trial did you interview Kyle Carter?

A. Personally I don't think I did. I think Shaffer's letter memorialized the efforts that he undertook on my behalf to find Mr. Carter and other witnesses and I don't think he was successful, unless there was other correspondence to say he was.

Q. Well, then how did they show up for court with a subpoena?

A. I guess because -- the answer is --

Q. Did somebody have to find them to serve them?

A. I guess. I don't know. If they had a subpoena, they had a subpoena. I don't know. Maybe Shaffer did succeed in finding them and they showed up on a particular day. Unfortunately, they didn't show up on the day that they had to testify.

Q. So you didn't interview Kyle Carter?

A. I can't tell you one way or the other.

Q. How about Gregory Blackmon?

A. Can't tell you one way or the other, I don't remember.

Q. Stephan Studivant?

A. I don't remember. It's entirely possible that if they came to court, I would have talked to them during a recess. I would probably -- I definitely would have done that.

Q. As you're going into trial, you subpoenaed these witnesses -- Kyle Carter and Gregory Blackmon you didn't subpoena, but Mr. Wallace subpoenaed and that's fine. What was your theory of the defense going into trial? I'm assuming you're an experienced trial attorney, you have all the discovery and you say, okay, this is how we're going to attack this. What was your theory of defense that first day of trial?

A. I think the theory of defense was mistaken identification, that the eyewitnesses were either too far away to make an accurate identification or the facial features of the shooters were covered or blocked. I think that was the theory of the defense.

Q. And based on your experience as a 30-year defense attorney lawyer, to attack eyewitness testimony, would you agree that bringing another eyewitness in to say, you know what, that's not what happened, that they didn't have their hoods up like

this, it was tied down, would that have do you think benefited Mr. Baxter's defense?

A. Well, it depends on a variety of factors. One is what is the relationship of the witness to Mr. Baxter, are they good friends, are they acquaintances, are they total strangers. Obviously if the witness is a good friend, he or she has more of a bias than a total stranger.

Second, does the witness have a criminal record. If the witness has a criminal record, the witness could be impeached with a criminal record. I can't recall whether or not Blackmon or Kyle Carter had criminal records.

Third, people see different things from different perspectives. Whether or not a hoody would have covered the face of a witness from one perspective doesn't mean it would have covered the face of a witness from a different vantage point. So the answer to your question is it depends.

Q. So you're saying from your experience that simply cross-examining eyewitness is more impactful than putting up another witness to say no, it didn't happen that way?

A. The answer is in certain instances it can. If