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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 21-3171

UNITED STATES OF AMERICA

v.

LANCE GREEN,
Appellant

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(District Court No. 3:20-cr-00165-001)
Honorable Robert D. Mariani, U.S. District Judge

Submitted Under Third Circuit L.A.R. 34.1(a)
on September 12, 2022

Before: KRAUSE, BIBAS, and RENDELL, *Circuit Judges*

JUDGMENT

This cause came to be considered on the record from the United States District Court for the Middle District of Pennsylvania on September 12, 2022.

On consideration whereof, it is now **ORDERED** and **ADJUDGED** that the District Court's judgment entered on November 19, 2021 is hereby **AFFIRMED**. Costs shall not be taxed. All of the above in accordance with the Opinion of this Court.

ATTEST:

s/Patricia S. Dodszuweit
Clerk

Dated: September 15, 2022

APPENDIX "A"

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
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Before: KRAUSE, BIBAS, and RENDELL, *Circuit Judges*

(Filed: September 15, 2022)

OPINION*

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

KRAUSE, *Circuit Judge*.

Appellant Lance Green appeals his judgment of conviction for being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1) and for possessing a firearm with an obliterated serial number in violation of 18 U.S.C. § 922(k). Those convictions resulted from an indictment originally returned on January 23, 2018 and a jury trial that commenced over three years later on March 15, 2021. In between, the indictment was dismissed twice without prejudice for violations of the Speedy Trial Act, and the District Court was called upon to resolve a bevy of pretrial motions, almost all of which were filed by Green. Green now challenges the District Court's denials of his motion to dismiss the indictment with prejudice, his motion for a mistrial, and his motion for a judgment of acquittal or a new trial on speedy trial and numerous other grounds. For the reasons explained below, we will affirm the judgment of the District Court on each.

I. DISCUSSION[1]

Green takes issue with seven findings of the District Court, each of which, he contends, requires us to vacate his conviction. None of his arguments is persuasive.

a. Denial of Green's Motion to Dismiss the Indictment

On appeal, Green renews his claims of error in the grand jury proceedings that underlay his motion to dismiss the indictment before the District Court. We conduct a plenary review of a district court's legal conclusions and review its factual findings for

[1] The District Court had jurisdiction under 18 U.S.C. § 3231. We have jurisdiction under 28 U.S.C. § 1291.

clear error. *United States v. Stock*, 728 F.3d 287, 291 (3d Cir. 2013) (citation omitted). Here, we perceive no error, legal or factual.

First, Green contends that a question posed by the Assistant United States Attorney (AUSA) to a Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) agent before the grand jury contained an inaccurate premise that prejudiced him. For Green's appeal to succeed, we must find "'that the violation substantially influenced the grand jury's decision to indict,' or that there was 'grave doubt' to that effect." *United States v. Alexander*, 985 F.3d 291, 297 (3d Cir. 2021) (quoting *Bank of Nova Scotia v. United States*, 487 U.S. 250, 256 (1988)). But "misstatements of fact" in an AUSA's question in grand jury proceedings are made harmless by a subsequent guilty verdict, as we have here, regardless of their materiality, *United States v. Bansal*, 663 F.3d 634, 660 (3d Cir. 2011); *see United States v. Mechanik*, 475 U.S. 66, 70 (1986), so the District Court properly rejected this argument.

Second, Green asserts that the indictment improperly relied on hearsay evidence. But a prosecutor can introduce hearsay evidence before a grand jury without rendering an indictment invalid "unless (1) non-hearsay is readily available; and unless (2) the grand jury was also misled into believing it was hearing direct testimony rather than hearsay; and unless (3) there is also a high probability that had the jury heard the eye-witness it would not have indicted the defendant." *United States v. Ismaili*, 828 F.2d 153, 164 (3d Cir. 1987) (citing *United States v. Wander*, 601 F.2d 1251, 1260 (3d Cir. 1979)). And here, Green concedes there is "no evidence that the jury was misled into believing it was hearing direct testimony." Opening Br. at 13. Thus, we lack "grave doubt" that hearsay

influenced the grand jury's indictment. *Alexander*, 985 F.3d at 297 (quoting *Bank of Nova Scotia*, 487 U.S. at 256).

Finally, Green argues that the District Court violated the Confrontation Clause when it reviewed the AUSA's affidavit explaining the manner in which she conducted the grand jury proceedings *ex parte* and *in camera*. Because this was not raised before the District Court,[2] we review only for plain error. *United States v. Moreno*, 809 F.3d 766, 773 n.3 (3d Cir. 2016).

In this context, the Confrontation Clause would preclude only the "admission of testimonial statements" of a witness who did not appear before the grand jury. *Crawford v. Washington*, 541 U.S. 36, 53–54 (2004). To establish that a statement in an affidavit was "testimonial," a defendant must show it was made by a "'witness[] *against him*' . . . proving one fact necessary for his conviction," *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 310, 313 (2009) (emphasis in original) (quoting U.S. Const. amend. VI)—in other words, with the "'primary purpose' of 'establish[ing] or prov[ing] past events potentially relevant to later criminal prosecution.'" *Bullcoming v. New Mexico*, 564 U.S. 647, 659 n.6 (2011) (quoting *Davis v. Washington*, 547 U.S. 813, 822 (2006)). The affidavit that Green is challenging, however, was merely a description by the AUSA for the District Court of *how* the testimony of witnesses was delivered to the grand jury, and

[2] Green did not preserve this challenge. The Confrontation Clause is not cited in his motion for judgment of acquittal or motion for a new trial. When the District Court requested the government prepare the affidavit, Green did not object on Confrontation Clause grounds. Finally, when the District Court ruled on Green's motion to dismiss the indictment, it does not appear that Green objected at all.

the affidavit's "primary purpose" was not "creat[ing] a record for trial" of facts that go to any element that the government had to prove. *Michigan v. Bryant*, 562 U.S. 344, 358 (2011). The Confrontation Clause thus simply is not implicated here.

In sum, there was no error in the grand jury proceedings, and the District Court properly declined to dismiss the indictment.

b. Alleged Improper Comments by the AUSA in Closing Argument

Next, Green contends that the District Court should have granted his motion for a mistrial or new trial based on the AUSA's mischaracterization of an officer's trial testimony. Specifically, he asserts that the AUSA misrepresented that testimony by implying Nasheena Curry was on the phone with Green when she said, "bring the strap" (i.e., gun).

We review the denial of a motion for a mistrial in this context for abuse of discretion. *See United States v. Bailey*, 840 F.3d 99, 132 (3d Cir. 2016). If the AUSA's statement was improper, a new trial would be warranted unless it is "*highly probable* that the error did not contribute to the judgment." *United States v. Mastrangelo*, 172 F.3d 288, 297 (3d Cir. 1999) (emphasis in original) (citation omitted).

The error here does not clear that threshold. Not only did the timely objection of Green's counsel prevent the AUSA from finishing her statement and connecting Green to the gun, but there is also evidence in the record that Curry *did* say "bring the strap" on the phone: Neither Green nor Nakirah Williams had arrived at that point, and only Green was later seen with a gun. The District Court also instructed the jury that closing arguments are not evidence both before trial and before deliberations began. In short, the AUSA's

statements did not infect the trial with unfairness such that Green was denied due process, and the District Court did not abuse its discretion in denying Green's motion for a mistrial or a new trial on this basis. *See Bailey*, 840 F.3d at 132; *Mastrangelo*, 172 F.3d at 297.

c. Sufficiency Challenge to Knowledge Element

Green's third argument is that he should have been granted an acquittal because there was insufficient evidence for a reasonable jury to conclude he knew that the gun's serial number had been obliterated. The question on review of the sufficiency of the evidence 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." *United States v. Caraballo-Rodriguez*, 726 F.3d 418, 424–25 (3d Cir. 2013) (emphasis in original) (citation omitted).

That is a low threshold, and it is easily met here. An ATF agent testified that the serial number of the gun in question, which was conspicuously located on a silver plate on a black gun, was "directly underneath the barrel," and that ATF agent and a state police officer both testified that the scratches and gouges on the plate were easily visible. On this record, given the links between Green and the gun, a rational jury easily could have found the essential element of knowledge was satisfied beyond a reasonable doubt. *See id.* at 424–25.

d. Reasonable Suspicion for the Car Stop

Green next disputes the District Court's denial of his motion to suppress the handgun and his DNA, which he contends were the fruits of a stop for which the officers

lacked reasonable suspicion. We review the denial of a motion to suppress "for clear error as to the underlying factual findings and exercise plenary review over its application of the law to those facts." *United States v. Burnett*, 773 F.3d 122, 130 (3d Cir. 2014) (citation omitted). When assessing the legality of a traffic stop, "[w]e review objectively the officer's rationale, by looking to the facts and circumstances confronting him or her, to determine whether his or her actions during the stop were reasonable." *United States v. Clark*, 902 F.3d 404, 409 (3d Cir. 2018) (citation omitted).

The District Court's factual findings make clear that the officers here acted reasonably, because they had the requisite "particularized and objective basis for suspecting the particular person stopped of criminal activity." *Kansas v. Glover*, 140 S. Ct. 1183, 1187 (2020) (quoting *United States v. Cortez*, 449 U.S. 411, 417–18 (1981)). They knew the car's driver had arrived during the short time between the two altercations; they had reason to believe that a gun had been involved in the second altercation; and they saw Curry, whom they recognized from their investigation of the first altercation, get into that car with a man who matched the description of the person who brandished that gun. These facts and circumstances made the stop a reasonable one, especially because officers can rely, as relevant here, on their specialized training, their experience, and tips from sources whose information is proven reliable. *See United States v. Nelson*, 284 F.3d 472, 478 (3d Cir. 2002).

Green's counterarguments are not persuasive. Whether Pennsylvania law bars officers from making misdemeanor arrests if they did not witness the offense, *see* Pa. R. Crim. P. § 502(2), does not determine whether the stop was reasonable under the Fourth

Amendment. *See Virginia v. Moore*, 553 U.S. 164, 172 (2008) (citations omitted) (noting that "[w]hile '[i]ndividual States may surely construe their own constitutions as imposing more stringent constraints on police conduct . . . ,' state law did not alter the content of the Fourth Amendment"). Nor does it matter that the officers only had evidence that Green previously had been engaged in criminal activity, *Cortez*, 449 U.S. at 417 n.2 ("Of course, an officer may stop and question a person if there are reasonable grounds to believe that person is wanted for past criminal conduct."), or that they had left their jurisdiction by the time they stopped the car, *United States v. Sed*, 601 F.3d 224, 228–29 (3d Cir. 2010) (holding that a seizure by Pennsylvania state police was reasonable under the Fourth Amendment even though it took place in Ohio).

e. Dismissal of the Previous Indictments Without Prejudice

Green also argues that both dismissals of his indictments for violations of the Speedy Trial Act should have been with prejudice. Whether a district court should dismiss with or without prejudice depends on at least three factors: "the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice." 18 U.S.C. § 3162(a)(2). We review a district court's decision to dismiss a case without prejudice for abuse of discretion, and we review its factual findings for clear error. *See United States v. Stevenson*, 832 F.3d 412, 419 n.3 (3d Cir. 2016) (citation omitted).

Here, as to the first indictment, the District Court's decision to treat Green's charges as serious accords with our precedent. *See id.* at 419–20 (collecting cases

holding that drug and firearms offenses are "serious crimes for purposes of the Speedy Trial Act"). While the second factor may weigh slightly in Green's favor because the Government should have requested a trial date, this is not enough to reverse. We see no abuse of discretion, as "there was no evidence that the Government had acted in bad faith or to gain some tactical advantage." *Id.* at 420 (citations omitted). Nor was it an abuse of discretion to weigh the third factor against Green where the charges against him were serious and the delay was relatively short.

The same is true of the second dismissal. The District Court made similar findings concerning the seriousness of Green's offense, which, combined with the lengthy sentence he faced as an armed career criminal, weighed in favor of dismissal without prejudice. *Id.* at 419–20; *see also United States v. Jones*, 601 F.3d 1247, 1257 (11th Cir. 2010). On the second factor, the Court pointed out that there was still no evidence of bad faith by the Government. To the contrary, the Government had moved to set a trial date two days after the resolution of Green's pretrial motions. While the fact of a second Speedy Trial Act violation gives us pause, that alone does not amount to a "pattern of neglect" or "intentional dilatory conduct." *Stevenson*, 832 F.3d at 420 (citation omitted). And on the third factor, the Court found that although Green's lengthy pretrial incarceration seriously interfered with his liberty, much of that delay was attributable to his pretrial motions, and because there was no evidence of prosecutorial misconduct, dismissal with prejudice would serve no deterrent effect. So this was not an abuse of discretion either. *See id.* at 422.

f. Potential Violation of Green's Sixth Amendment Rights

Green also argues that the District Court should have dismissed his indictment because his Sixth Amendment speedy trial rights were violated. We review that claim *de novo* and accept the District Court's factual findings absent clear error. *See United States v. Velazquez*, 749 F.3d 161, 174 (3d Cir. 2014) (citing *United States v. Battis*, 589 F.3d 673, 677 (3d Cir. 2009)). Our determination is guided by *Barker v. Wingo*, which identifies four factors to determine if the Government violated Green's speedy trial rights: (1) the "[l]ength of delay," (2) "the reason for the delay," (3) "the defendant's assertion of his right," and (4) "prejudice to the defendant." 407 U.S. 514, 530 (1972).

In this case, the first factor, the length of the delay, weighs in Green's favor. We look at both whether the delay was long enough to trigger the *Barker* analysis and whether the delay intensified any prejudice Green suffered. *Battis*, 589 F.3d at 678 (citing *Doggett v. United States*, 505 U.S. 647, 652 (1992)). Given its similarity to the forty-five-month delay that we found triggered the *Barker* analysis and "intensif[ied] any prejudice caused by the delay" in *Battis*, Green's case satisfies both aspects of the first factor. 589 F.3d at 679.

The reason for the delay, however, weighs strongly against Green. There are three types of delays, each of which we weigh differently: (1) deliberate efforts to delay trial, (2) delays due to neutral reasons like "negligence or overcrowded courts," and (3) excusable delays. *Id.* (quoting *Barker*, 407 U.S. at 531). Green does not identify any delays in the first category, and even viewing events in the light most favorable to Green, we can only identify at most forty-four days of delay that could be blamed on the

Government.[3] On the other hand, over two years of the delay can be attributed to Green, App. I 11–12, so this factor favors the Government. *Cf. Battis*, 589 F.3d at 679–80.

The third *Barker* factor, whether and how Green asserted his speedy trial rights, weighs slightly against him. Green clearly asserted his rights each time he filed a motion to dismiss. But each one was filed later than it could have been. He filed the first over eight months after the Speedy Trial Act clock had run. The second came after some delay as well, with Green changing his mind multiple times about whether and when he would file. While the resultant delay was short, this conduct raises questions about how vigorously Green asserted his rights.

Prejudice, which is the fourth *Barker* factor, does not help Green either. The Sixth Amendment protects against three sorts of prejudice: (1) oppressive pretrial incarceration, (2) increased anxiety, and (3) most importantly, damage to one's defense. *Barker*, 407 U.S. at 532; *Doggett*, 505 U.S. at 654. On the first, much of the time Green spent incarcerated can be attributed to his pretrial motions, and pretrial delay and incarceration can be protracted without being oppressive. *See Barker*, 407 U.S. at 532–36 (finding the defendant was only minimally prejudiced even though there had been a five-year delay);

[3] In reality, and in view of our precedent, the number of days of delay attributable to the Government is likely far less, as the days that we have attributed to the Government include, for example, what appear to be brief postponements of Green's arraignment, the two days between the District Court's denial of Green's motion to suppress and the Government filing a motion to set a trial date, and the time it took to dispose of that motion around when the case was assigned to a new judge. In contrast, delays attributable to Green include multiple pretrial motions, multiple extensions of time to file those motions, and changes in counsel.

Hakeem v. Beyer, 990 F.2d 750, 760–62 (3d Cir. 1993) (finding fourteen months of pretrial incarceration did not *per se* count as oppressive pretrial incarceration). On the second, while Green has alleged cognizable harms, including health problems, losing his job, and strain on his relationships, *see Betterman v. Montana*, 578 U.S. 437, 444 (2016); *Hakeem*, 990 F.2d at 760–62, the District Court found that these were not supported with specific evidence, and its finding was not clearly erroneous. Nor does the third type of prejudice tip the scales in his favor. The delay here was not long enough to be presumptively prejudicial. *See Battis*, 589 F.3d at 682–83; *cf. Doggett*, 505 U.S. at 657–58. And Green's inability to locate two potential witnesses cannot help him, because he has not established their potential exculpatory value. *See United States v. Shulick*, 18 F.4th 91, 103 (3d Cir. 2021); *United States v. Harris*, 566 F.3d 422, 433 (5th. Cir. 2009).

g. Testimony by the Government's Expert

Finally, Green argues that the District Court should not have allowed forensic DNA analyst Ut Dinh to testify about the likelihood of a link between the DNA found on the gun and Green's DNA. We review evidentiary decisions only for an abuse of discretion, *Bailey*, 840 F.3d at 117, and in the case of expert testimony consider whether a "broad range of knowledge, skills, and training qualif[ied] [the] expert," *Pineda v. Ford Motor Co.*, 520 F.3d 237, 244 (3d Cir. 2008) (citation omitted).

For an expert to be properly qualified to testify on an issue, she must "possess specialized expertise." *Id.* (citation omitted); *see also* Fed. R. Evid. 702. Here, Dinh was plainly qualified to testify regarding the likelihood that the DNA found on the gun was Green's. She was trained on how to use the program that generated these statistics and

had used it over 100 times; her lab had been appropriately accredited and audited; and it was core to her job as a DNA analyst to quantify the potential link between a person and a DNA profile. Thus, the analysis that linked Green to the DNA found on the gun easily fell within Dinh's "broad range of knowledge, skills, and training." *Pineda*, 520 F.3d at 244 (citation omitted).

Nor did the District Court abuse its discretion when it upheld the reliability and relevance of Dinh's testimony concerning statistical likelihood analysis. At this stage, a court asks if "the testimony is the product of reliable principles and methods" and whether the expert reliably applied those principles. Fed. R. Evid. 702(c)–(d). We look at several factors, including "whether a method consists of a testable hypothesis," "whether the method is generally accepted," and "the existence and maintenance of standards controlling the technique's operation." *Pineda*, 520 F.3d at 247–48 (citations omitted).

There was more than a sufficient basis here for the District Court to conclude that Dinh's methodology was "the product of reliable principles and methods" and that she correctly applied those principles as required by Rule 702. Fed. R. Evid. 702(c). Dinh testified that statistical likelihood analysis "is a validated method," that "current laboratories still use it," and that likelihood ratios were a standard "used, generally, in the scientific community." While it is true that Dinh did not testify regarding whether likelihood ratios had been subjected to peer review or their potential error rate, she need not have addressed every factor for her testimony to be admissible. *Pineda*, 520 F.3d at 248. And when we consider such relevant factors as whether statistical likelihood

analysis is generally accepted and if there are standards controlling its operation, we cannot say that the District Court abused its discretion in admitting her testimony here about that analysis. *See id.* at 247–48.

II. CONCLUSION

For the foregoing reasons, we will affirm the District Court's judgment.

THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
	:	
v.	:	**3:20-CR-165**
	:	**(JUDGE MARIANI)**
LANCE GREEN,	:	
	:	
Defendant.	:	

MEMORANDUM OPINION

I. INTRODUCTION

Here the Court considers Defendant Lance Green's Motion for Judgment of Acquittal and Motion for a New Trial (Doc. 95) filed on March 21, 2021. Defendant filed this motion following a four-day bifurcated trial which resulted in a guilty verdict on the two counts set out in the Indictment filed on July 14, 2020, in which he was charged with a violation of 18 U.S.C. § 922(g), Prohibited Person in Possession of a Firearm, and a violation of 18 U.S.C. § 922(k), Possession of a Firearm with an Obliterated Serial Number. (Doc. 1.) On March 18, 2021, a jury found Defendant guilty of both counts. (Docs. 87, 90.)

Defendant filed his brief in support of the pending motion on May 3, 2021. (Doc. 105.) The Government filed its opposition brief on August 16, 2021. (Doc. 117.) Defendant did not file a reply brief and the time for doing so has passed. Therefore, this matter is ripe for disposition. For the reasons discussed below, the Court will deny Defendant's motion.

APPENDIX "B"

II. BACKGROUND

A. Factual Background

On October 5, 2017, Sheila Rodriguez was living in a duplex at 141 Second Avenue, Kingston, in a first-floor apartment, with her children Noelle and Andre Peele. (Doc. 100 at 42-43 (Trial Transcript ("T. Tr.") Day 2 42:1-43:13).) Nasheena Curry was residing in the same duplex at 143 Second Avenue, Kingston, in the second-floor apartment. (Doc. 101 at 3, 4 (T. Tr. Day 3 3:18-24, 4:17-18).) On that morning, Curry got into a fight with Rodriguez and her children. (*Id.* at 5 (T. Tr. Day 3 5:13-17).) After the fight, Curry called her friend Nakirah Williams and the defendant, Lance Green, for help. (*Id.* at 5, 6 (T. Tr. Day 3 5:21-25, 6:1-4).) Curry then left the residence to pick up Williams and bring her back to the Second Avenue residence. (*Id.* at 7 (T. Tr. Day 3 7:13-17).) Rodriguez called the police. (Doc. 100 at 44 (T. Tr. Day 2 44:6-12).)

Detective Robert Miller and Sergeant Sam Blaski from the Kingston Municipal Police Department responded to the call. (Doc. 101 at 38 (T. Tr. Day3 8: 13-22).) They arrived at the Second Avenue location at approximately 10:00 a.m. and spoke with Sheila Rodriguez, Noelle Peele, and Andre Peele. (*Id.* at 39, 40 (T. Tr. 39:2-4, 40:5-6).) Officers also made contact with Curry and questioned her about the incident. (*Id.* at 7, 39 (T. Tr. Day 3 7:18-22, 39:20-21).) Miller testified that, while at the scene interviewing Rodriguez and her children,

a statement was made that Curry had said "Bring the strap," which means the gun.[1] (*Id.* at 49-50 (T. Tr. Day 3 49:23-50:6).) After speaking with everyone, Officers decided to file charges through the mail and left the scene. (*Id.* at 40 (T. Tr. Day 3 40:12-15).)

After Curry and Williams arrived at Curry's residence, Green arrived in a white car. (Doc. 101 at 7-8 (T. Tr. Day 3 7:11-8:10).) Green, Williams and Curry then went downstairs and Green knocked on Rodriguez's door. (*Id.* at 8 (T. Tr. Day 3 8:17-21).) Andre Peele answered the door and shortly afterwards another fight broke out between the women. (*Id.* at 9 (T. Tr. Day 3 9:10-15).) At some point during the fight, Green pulled a gun out of his waistband and pointed it at Andre Peele. (*Id.* at 9-10 (T. Tr. Day 3 9:23-10:9).) The fight ended and Curry, Williams and Green went back upstairs. (*Id.* at 10 (T. Tr. Day 3 10:15-17).)

At approximately 10:30 a.m., Miller and Blaski were dispatched back to the scene after the second fight. (Doc. 101 at 40 (T. Tr. Day 3 40:16-18).) When they arrived back at

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[1] Defendant's Statement of Facts contains the following introductory summary which does not provide citation to the record:

> On or about October 5, 2017, officers from the Kingston Municipal Police Department responded to a neighbor dispute at 141 Second Avenue, Kingston. Officers spoke to three residents at that residence who reported that during the dispute their female neighbor, Nasheena Curry, who resides at 143 Second Avenue, told someone over the phone "to bring the strap".

(Doc. 105 at 2.) The averment that Curry's statement "to bring the strap" was stated "over the phone" is not contained in Miller's trial testimony. This discrepancy will be discussed in Section IVD of this Memorandum Opinion.

the residence, Officers noticed a white vehicle in the driveway of 143 that was not there previously. (*Id.* (T. Tr. Day 3 40:19-25).) Officers spoke with Rodriguez and her children and observed visible injuries on Noelle Peele. (*Id.* at 41 (T. Tr. Day 3 41:1-10).) They had informed Officers that they were threatened with a firearm by the heavy-set black male. (*Id.* at 43, 44 (T. Tr. Day 3 43:4-8, 44:1-5).) Officers attempted to speak with Curry and the individuals in the upstairs apartment, but no one came to the door when they knocked. (*Id.* at 10, 41 (T. Tr. Day 3 10:18-24, 41:13-18).) Officers decided to conduct surveillance. (*Id.* at 41-42 (T. Tr. Day 3 41:23, 42:2).) At some point, Curry, Williams, and Green decided to leave the upstairs apartment but, before doing so, Green took the gun out and lifted Curry up to put the gun in the attic of her bedroom closet. (*Id.* at 10-11 (T. Tr. Day 3 10:25-11:22).)

While conducting surveillance, Blaski received another call for assistance, and he left the area. (Doc. 101 at 42 (T. Tr. Day 3 42:9-10).) After Blaski left, Miller observed Curry and another female and a male leave Curry's residence and get into the white car in the driveway. (*Id.* (T. Tr. Day 3 42:11-15).) Miller began to follow the vehicle, driven by Curry, until he felt it was safe to conduct a traffic stop. (*Id.* (T. Tr. Day 3 42:23-25).) Due to a firearm potentially being involved, Miller waited to initiate the traffic stop until he had assistance from other officers. (*Id.* at 43 (T. Tr. 43:9-25).) Once the car was detained, Curry and her two passengers, who were identified as Williams and Green, were taken back to the Kingston Police Department. (*Id.* at 44 (T. Tr. Day 3 44:11-15).)

Initially Curry and Williams indicated that they did not know what the police were talking about and that nothing had happened but, later in the day, they provided statements as to what had happened. (Doc. 101 at 45 (T. Tr. Day 3 45:9-17).)

After speaking with Curry and Williams, Officers obtained a search warrant for 143 Second Avenue. (Doc. 101 at 46 (T. Tr. Day 3 46:2-).) During the execution of the search warrant, ATF Special Agent Ryan Kovach located a firearm in a crawl space in the attic of Curry's apartment. (*Id.* (T. Tr. Day 3 46:18-22).) The firearm was seized as evidence and subsequently sent to the Pennsylvania State Police Lab for testing. (*Id.* at 47 (T. Tr. Day 3 47:1-12).)

B. Procedural Background[2]

The procedural background of this case begins with Defendant's arrest on October 5, 2017, by the Kingston Municipal Police Department which led to Pennsylvania state law charges and to his Indictment on January 23, 2018, by a federal grand jury for Prohibited Person in Possession of a Firearm, 18 U.S.C. § 922(g), and Possession of a Firearm with an Obliterated Serial Number, 18 U.S.C. § 922(k), under docket number 3:18-CR-21. Defendant was arraigned on these charges before Magistrate Judge Joseph F. Saporito on February 13, 2018, and pled not guilty to the charges in the Indictment. Magistrate Judge

[2] The background information relating to 3:18-CR-21 and 3:19-CR-233 is derived from the Background section of the Court's Memorandum Opinion issued in 3:19-CR-233 regarding the Motion of Defendant, Lance Green, to Dismiss for Violation of the Speedy Trial Act and the United States Constitution (Doc. 34). (3:19-CR-233 Doc. 50 at 1-8.) The summary therein contains citations to relevant records. However, the Court omits those citations from the recitation set out in the text.

Saporito appointed CJA Attorney Gino Bartolai, Esquire, to represent Defendant and ordered Defendant detained pending trial.

Also on February 13, 2018, District Judge A. Richard Caputo scheduled the matter for trial on April 23, 2018, and set March 13, 2018, as the deadline for filing pretrial motions and briefs. On March 15, 2018, Judge Caputo granted Defendant's motion for an extension of time to file pretrial motions, extending the deadline to April 12, 2018. On April 12, 2018, Judge Caputo granted Defendant's second motion for an extension of time to file pretrial motions, extending the deadline to May 14, 2018. On May 14, 2018, Judge Caputo granted Defendant's third motion for an extension of time to file pretrial motions, extending the deadline to June 13, 2018. No pretrial motions were filed prior before that deadline.

On September 26, 2018, Defendant filed a Motion for Leave to File Motion to Suppress Evidence Obtained as Result of Illegal Arrest Nunc Pro Tunc and on the same day filed the Motion to Suppress Evidence Obtained as a Result of Illegal Arrest. Judge Caputo granted the Motion for Leave to File Motion to Suppress Evidence Obtained as Result of Illegal Arrest Nunc Pro Tunc on October 1, 2018. By Memorandum and Order of November 28, 2018, Judge Caputo denied the motion to suppress.

On November 29, 2018, he set the matter for trial to commence on December 17, 2018. On December 6, 2018, Defendant filed an unopposed motion to continue trial which Judge Caputo granted on December 13, 2018. By Order of December 13, 2018, Judge Caputo set the trial for April 30, 2019.

Attorney Bartolai filed a Motion for New Counsel on January 20, 2019, and Judge Caputo appointed Enid Harris, Esquire, on January 29, 2019. On February 21, 2019, Attorney Harris filed the Motion to Withdraw as Counsel Due to Conflict of Interest which Judge Caputo granted by Order of February 27, 2019. On March 6, 2019, Joseph O'Brien, Esquire, was appointed to represent Defendant.

On April 18, 2019, Defendant filed a motion to continue the trial. Judge Caputo granted the motion and set the trial for June 3, 2019.

On May 13, 2019, Defendant filed the Motion to Continue Trial and for Leave to File Motion to Dismiss for a Violation of the Speedy Trial Act which Judge Caputo granted by Order of May 14, 2019. On June 3, 2019, Defendant filed a motion for extension of time to file his motion to dismiss which Judge Caputo granted on June 5, 2019, setting June 10, 2019, as the deadline for filing the motion. Defendant filed the motion and supporting brief on June 10, 2019, and the Government filed its brief in opposition on June 21, 2019. Defendant filed a motion for an extension of time to file a reply which was granted, and Defendant filed his reply brief on July 15, 2019. By Memorandum of July 19, 2019, Judge Caputo agreed that more than seventy non-excludable days elapsed from June 13, 2018, until September 26, 2018, in violation of the Speedy Trial Act, 18 U.S.C. 3161(c)(1). He noted that the Government conceded that one hundred and thirty-three non-excludable days ran between Defendant's initial appearance and the filing of Defendant's Motion to Suppress on September 26, 2018. Judge Caputo then considered the statutory factors set

out in 18 U.S.C. § 3161(c)(1) relevant to the determination of whether the Indictment should be dismissed with or without prejudice and concluded that the factors weighed in favor of dismissal without prejudice. Therefore, by Order of July 19, 2019, Judge Caputo granted the Motion to Dismiss the Indictment pursuant to the Speedy Trial Act and dismissed the Indictment without prejudice.

On the same day as the dismissal of Indictment in 3:18-CR-21, the Government filed a criminal complaint and charged Defendant with the same two offenses set out in the Indictment (3:19-MJ-57 Doc. 1). A grand jury indicted Defendant on July 30, 2019, and Defendant had his initial appearance before Magistrate Judge Karoline Mehalchick on July 31, 2019, where he entered a plea of not guilty and was appointed CJA attorney Joseph O'Brien, Esquire. On motion of the Government attorney, Magistrate Judge Mehalchick ordered Defendant detained pending trial.

On August 1, 2019, Judge Caputo issued a scheduling Order directing all pretrial motions to be filed by August 20, 2019, and setting jury selection and trial for October 7, 2019. On September 27, Defendant filed a motion to amend the scheduling Order and requested an extension of time until October 21, 2019, to file pretrial motions. On October 2, 2019, Judge Caputo granted Defendant's request and indicated that a trial date would be set after the expiration of the motion deadline. On October 21, 2019, Defendant filed the Motion to Suppress Evidence as a Result of Unconstitutional Search and Seizure and supporting brief. The government filed its response in opposition on October 29, 2019. On

December 2, 2019, Judge Caputo issued a Memorandum Order denying Defendant's motion.

On December 4, 2019, the Government filed the Motion to Set Trial Date in which it indicated that "[t]he Speedy Trial time expires on December 13, 2019" and requested the Court to schedule a trial immediately. On December 18, 2019, at the request of the government, Judge Caputo held a conference call with counsel for the Government and counsel for Defendant regarding the Government's Motion to Set Trial Date. On the same day, the case was reassigned to the undersigned for all further proceedings by verbal order.

On December 19, 2019, both parties participated in a conference call with this Court. Defense counsel indicated that, by the end of the year, he would be filing a motion to dismiss based on a Speedy Trial Act violation. Government counsel reports that she contacted Defendant's counsel on January 3, 2020, because no motion had been filed and he indicated that his client no longer wanted a motion to dismiss filed. Government counsel also reports that she again spoke with Defendant's counsel on January 6, 2020, and he again stated Defendant did not want the motion filed. On the same day, Government counsel notified the Court that no motions would be filed.

The Court issued an Order on January 6, 2020, setting the case for trial on January 22, 2020.

Defendant's counsel subsequently requested a telephone conference which the Court scheduled by Order of January 13, 2020, for January 14, 2020. At the telephone

conference, Defendant's counsel informed the Court that Defendant wanted to file a Speedy Trial Act motion and move for DNA related discovery. Defendant filed his Speedy Trial Act motion on January 21, 2020. On January 22, 2020, the Court continued the trial, to be rescheduled if necessary following resolution of Defendant's motion. After the motion was fully briefed, the Court set a hearing for June 24, 2020.

On April 3, 2020, Defendant filed the Motion of Defendant, Lance Green, for Reconsideration of Detention Order seeking his release under 18 U.S.C. § 3142(i) for reasons related to the COVID-19 pandemic and the preparation of Defendant's defense. This motion was referred to Magistrate Judge Mehalchick who denied it by Memorandum and Order of April 30, 2020.

On June 18, 2020, Defendant filed the Motion of Defendant, Lance Green, for Pretrial Release. He stated that the basis for his motion was the same as that set out in his April 3, 2020, motion and relevant briefing. He also asked that the Court allow him to address the issue at the June 24, 2020, hearing.

At the hearing held on June 24, 2020, the Court heard argument on both the speedy trial and release motions. On June 25, 2020, the Court issued the Order Setting Conditions of Release with which the Court ordered that Defendant be released on personal recognizance subject to numerous specific conditions.

On July 9, 2020, the Court granted Defendant's Motion to Dismiss for Violation of the Speedy Trial act and the United States Constitution in part and denied it in part. The motion

was granted insofar as the Court concluded that the Speedy Trial Act was violated and the motion was denied insofar as the dismissal was without prejudice.

Pertaining to the above-captioned matter, on July 15, 2020, a grand jury again indicted Green with Prohibited Person in Possession of a Firearm and Possession of a Firearm with Obliterated Serial Number. (Doc. 1.) A summons was issued and Magistrate Judge Mehalchick held Green's initial appearance. (Docs. 8, 10.) Magistrate Judge Mehalchick continued Green's pretrial release with no objection from the Government.

On August 17, 2020, Green was arrested for a state probation violation and incarcerated in the Lackawanna County Prison ("LCP"). During the initial search at the LCP, officers discovered a bag of suspected marijuana in his genitals and a bag of suspected cocaine in his buttocks. On August 27, 2020, Lackawanna County Detectives filed a criminal complaint against Green for the contraband found during the search. (Magisterial District Number 45-1-06, CR 357-20.)

Green filed pretrial motions to suppress evidence and this Court held a hearing on November 23, 2020. (Docs. 17 and 18.) Also on November 23, 2020, the Government filed a motion to revoke Green's pretrial release due to the new arrest. (Doc. 28.) Magistrate Judge Mehalchick granted the government's motion and revoked Green's pretrial release. (Doc. 38.)

On January 8, 2021, this Court denied Green's pretrial motions and scheduled trial to commence March 15, 2021. (Docs. 42-44.)

On March 18, 2021, following a bifurcated jury trial, Green was convicted on all charges contained in the indictment. (Docs. 87 and 90.)

Green filed the current motion for Judgment of Acquittal and New Trial (Doc. 95) on March 31, 2021. Defendant's sentencing is currently pending.

III. STANDARD OF REVIEW

A defendant may move for a judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29. Where "the jury has returned a guilty verdict, the court may set aside the verdict and enter an acquittal." Fed. R. Crim. P. 29(c)(2).

> In ruling on a motion for judgment of acquittal made pursuant to Fed. R. Crim. P. 29, a district court must "'review the record in the light most favorable to the prosecution to determine whether any rational trier of fact could have found proof of guilty [sic] beyond a reasonable doubt based on the available evidence.'" *United States v. Smith*, 294 F.3d 473, 476 (3d Cir. 2002) (quoting *United States v. Wolfe*, 245 F.3d 257, 262 (3d Cir. 2001)). A finding of insufficiency should be "'confined to cases where the prosecution's failure is clear.'" *Smith*, 294 F.3d at 477 (quoting *United States v. Leon*, 739 F.2d 885, 891 (3d Cir. 1984)). Courts must be ever vigilant in the context of Fed. R. Crim. P. 29 not to usurp the role of the jury by weighing credibility and assigning weight to the evidence, or by substituting its judgment for that of the jury. *See United States v. Jannotti*, 673 F.2d 578, 581 (3d Cir.) (en banc) (trial court usurped jury function by deciding contested issues of fact), *cert. denied*, 457 U.S. 1106, 102 S. Ct. 2906, 73 L.Ed.2d 1315 (1982); *see also* 2A Charles A. Wright, FED. PRAC. & PRO. (Criminal 3d) § 467 at 311 (2000) ("A number of familiar rules circumscribe the court in determining whether the evidence is sufficient ... It is not for the court to assess the credibility of witnesses, weigh the evidence or draw inferences of fact from the evidence. These are functions of the jury.").

United States v. Brodie, 403 F.3d 123, 133 (3d Cir. 2005). The Third Circuit has long advised that, in considering a post-verdict judgment of acquittal, the court "must uphold the jury's

verdict unless no reasonable juror could accept the evidence as sufficient to support the defendant's guilt beyond a reasonable doubt." *United States v. Fattah*, 914 F.3d 112, 183 (3d Cir. 2019) (citing *United States v. Coleman*, 811 F.2d 804, 807 (3d Cir. 1987)). In *United States v. Tyler*, the Third Circuit again recently reiterated the well-recognized standard:

> This review is "highly deferential" to the factual findings of the jury, and we "must be ever vigilant ... not to usurp the role of the jury by weighing credibility and assigning weight to the evidence, or by substituting [our] judgment for that of the jury." *United States v. Caraballo-Rodriguez*, 726 F.3d 418, 430 (3d Cir. 2013) (en banc) (alteration and omission in original) (quoting *United States v. Brodie*, 403 F.3d 123, 133 (3d Cir. 2005)).
>
> > Thus, even if the evidence adduced is consistent with multiple possibilities, our role as a reviewing court is to uphold the jury verdict ... as long as it passes the bare rationality test. Reversing the jury's conclusion simply because another inference is possible – or even equally plausible – is inconsistent with the proper inquiry for review of sufficiency of the evidence challenges, which is that [t]he evidence does not need to be inconsistent with every conclusion save that of guilt if it does establish a case from which the jury can find the defendant guilty beyond a reasonable doubt. It is up to the jury – not the district court judge or our Court – to examine the evidence and draw inferences. Unless the jury's conclusion is irrational, it must be upheld.
>
> *Id.* at 433 (alteration in original) (internal quotation marks and citation omitted).

956 F.3d 116, 122-123 (3d Cir. 2020).

A defendant may also move for a new trial pursuant to Federal Rule of Criminal Procedure 33. Rule 33 provides in pertinent part that "[u]pon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires. . ." Fed. R. Crim. P. 33(a).

> "Unlike an insufficiency of the evidence claim, when a district court evaluates a Rule 33 motion it does not view the evidence favorably to the Government, but instead exercises its own judgment in assessing the Government's case." *United States v. Johnson*, 302 F.3d 139, 150 (3d Cir. 2002). However, even if a district court believes that the jury verdict is contrary to the weight of the evidence, it can order a new trial "only if it believes that there is a serious danger that a miscarriage of justice has occurred—that is, that an innocent person has been convicted." *Id.* (citation and quotation marks omitted). . . . Such motions are not favored and should be "granted sparingly and only in exceptional cases." *Gov't of Virgin Islands v. Derricks*, 810 F.2d 50, 55 (3d Cir. 1987) (citations omitted).

United States v. Silveus, 542 F.3d 993, 1004-1005 (3d Cir. 2008). "The discretion that federal trial courts exercise in addressing allegations of juror and prosecutorial misconduct extends to the determination of whether prejudice has been demonstrated." *United States v. Smith*, 139 F.App'x 475, 477 (3d Cir. 2005) (citing *United States v. Resko*, 3 F.3d 684, 690 (3d Cir. 1993)). Where a defendant alleges that the cumulative effect of trial errors resulted in an unfair trial, a new trial is required "only when 'the errors, when combined, so infected the jury's deliberations that they had a substantial influence on the outcome of the trial.'" *United States v. Thornton*, 1 F.3d 149, 156 (3d Cir. 1993) (quoting *United States v. Hill*, 976 F.2d 132, 145 (3d Cir. 1992)).

IV. ANALYSIS

As set out above, Defendant Lance Green's Motion for Judgment of Acquittal and Motion for a New Trial (Doc. 95) was filed on March 21, 2021. He raises six issues in his motion and the Court will address each in turn.

A. Denial of Defendant's Motion for Judgment of Acquittal on Count II of the Indictment

Defendant first asserts that the Court erred when it denied his motion for judgment of acquittal on Count II made at the close of the Government's case in chief. (Doc. 105 at 5.) At that time, Defendant's counsel, Joseph O'Brien, made the argument he puts forth here: the Government's presentation of the testimony of trained firearms experts regarding observations derived from their forensic investigation of the gun is not enough to produce an inference that Defendant knew that the serial number was obliterated and the obliterated serial number plate is on the underside of the barrel and not readily visible. (*See* Doc. 102 at 5 (T. Tr. Day 4 5:2-13), Doc. 105 at 6-7.) The Government responds, as Government's counsel, Assistant United States Attorney ("AUSA") Jenny Roberts, did at trial, that circumstantial evidence, including the firearm itself and photographs of the firearm, was sufficient evidence: it was clear that the frame of the firearm is black and the serial plate silver and the appearance of the plate and gouges and scratches on the gun were clearly visible and extended to the black frame. (*See* Doc. 102 at 4, 6 (T. Tr. Day 4 4: 9-18, 6:3-14), Doc. 117 at 17.)

Following counsels' arguments at trial, the Court concluded that the Government had presented sufficient evidence regarding Defendant's knowledge that the gun had an obliterated serial number for the case to go to the jury. (Doc. 102 at 8 (T. Tr. Day 4 8:8-15).)

The jury was instructed at the close of the case that, as an element of the Possession of a Firearm with an Obliterated Serial Number charge, they had to

unanimously find beyond a reasonable doubt that "Lance Green knew that the serial number had been removed, obliterated, or altered. However, the government is not required to prove that Lance Green removed, obliterated or altered the serial number." (Doc. 85 at 16.) Their return of a guilty verdict on this charge indicates that the jury unanimously found beyond a reasonable doubt that Green knew that he possessed a firearm with an obliterated serial number.

As set out above, the court "must uphold the jury's verdict unless no reasonable juror could accept the evidence as sufficient to support the defendant's guilt beyond a reasonable doubt." *Fattah*, 914 F.3d at 183. At trial, the Court concluded that the Government had produced sufficient evidence for a reasonable juror to find that Defendant knew the serial number on the gun had been obliterated. (Doc. 102 at 8 (T. Tr. Day 4 8:8-15).) Defendant presents no basis to support a different conclusion with his pending motion. Therefore, the Court will deny Defendant's pending motion for judgment of acquittal on Count II.

B. Speedy Trial Act Violation

Defendant contends that the Court erred when it dismissed Counts I and II of the indictment in Case Number 3:19-CR-233 without prejudice after Defendant filed the Motion of Defendant, Lance Green, to Dismiss for Violation of the Speedy Trial Act and the United States Constitution (3:19-CR-233 Doc. 34). (Doc. 105 at 7.) The Court issued the Memorandum Opinion and Order addressing this motion on July 9, 2020. (3:19-CR-233 Docs. 50, 51.) As set out in the Memorandum Opinion, the Court considered the requisite

factors pursuant to 18 U.S.C. § 3162(a)(2): the (1) the seriousness of the offense; (2) the facts and circumstances of the case which led to the dismissal; and (3) the impact of a reprosecution. (3:19-CR-233 Doc. 50 at 12.) In his current filing, Defendant takes issue with the Court's determination that the second and third factors weighed in favor of dismissal without prejudice. (Doc. 105 at 9-11.)

With this argument, Defendant seeks reconsideration of the Court's decision in the case that was closed on July 9, 2020. Defendant did not seek reconsideration before the March 31, 2021, filing under consideration here (Doc. 95) in support of which Defendant filed a supporting brief (Doc 105) on May 3, 2021, nor did Defendant appeal the Court's disposition of 3:19-CR-233. Given this procedural posture, Defendant does not complain of any decision made by the Court in this case or any matter related to the trial or jury verdict. Rather, he seeks reconsideration of a decision made in another case.

While there is no Federal Rule of Criminal Procedure specifically authorizing motions for reconsideration, "it is settled that 'Motions for reconsideration may be filed in criminal cases.'" *United States v. Fiorelli*, 337 F.3d 282, 286 (3d Cir. 2003). The law relied upon by the Court of Appeals and district courts in the Third Circuit deciding these motions in criminal cases comes from the civil sphere. *See, e.g., United States v. Gilliam*, Cr. No. 3:17-CR-258, 2020 WL 5505944, at *1 (M.D. Pa. Sept. 11, 2020). The Local Rules of Court of the Middle District of Pennsylvania, which apply to both civil and criminal cases, *see* L.R.

1.1, specifically provide that "any motion for reconsideration . . . must be accompanied by a supporting brief and filed within fourteen (14) days after the entry concerned," L.R. 7.10.

In the civil sphere, it is well recognized that the purpose of a motion for reconsideration is "to correct manifest errors of law or fact or to present newly discovered evidence." *Max's Seafood Café v. Quinteros*, 176 F.3d 669, 677 (3d Cir. 1999). Accordingly, the party seeking reconsideration must show at least one of the following grounds: "(1) an intervening change in the controlling law; (2) the availability of new evidence that was not available when the court granted the motion for summary judgment; or (3) the need to correct a clear error of law or fact or to prevent manifest injustice." *Id.* (citing *North River Ins. Co. v. CIGNA Reinsurance Co.*, 52 F.3d 1194, 1218 (3d Cir. 1995)). Moreover, "motions for reconsideration should not be used to put forward arguments which the movant ... could have made but neglected to make before judgment." *United States v. Jasin*, 292 F. Supp. 2d 670, 677 (E.D. Pa. 2003) (internal quotation marks and alterations omitted) (quoting *Reich v. Compton*, 834 F. Supp. 2d 753, 755 (E.D. Pa. 1993) *rev'd in part and aff'd in part on other grounds*, 57 F.3d 270 (3d Cir. 1995)). Nor should they "be used as a means to reargue matters already argued and disposed of or as an attempt to relitigate a point of disagreement between the Court and the litigant." *Donegan v. Livingston*, 877 F. Supp. 2d 212, 226 (M.D. Pa. 2012) (quoting *Ogden v. Keystone Residence*, 226 F.Supp.2d 588, 606 (M.D. Pa. 2002)).

Whether from a procedural or substantive perspective, Defendant presents no basis to reconsider the Court's disposition of the case which preceded this action. Procedurally, he presents no authority which suggests that a motion filed in this action can alter the disposition of the preceding action. Even if he had done so, Defendant did not seek reconsideration within the fourteen days required by Local Rule 7.10.

Assuming *arguendo* that Defendant's current request is procedurally feasible, Defendant's argument is without substantive merit in that he merely reargues matters previously decided after full briefing. (*See* 3:19-CR-233 Docs.36-38.) In the detailed Memorandum Opinion addressing Speedy Trial Act and Sixth Amendment issues, the Court addressed Defendant's arguments and determined that the relevant factors weighed in favor of dismissal without prejudice. (*See* 3:19-CR-233 Doc. 50.)

As to the second factor now disputed-- the facts and circumstances of the case which led to the dismissal, 18 U.S.C. § 3162(a)(2)--Defendant does not raise any new facts or circumstances regarding dismissal which would warrant a conclusion differing from that set out in the Court's Memorandum Opinion and Order of July 9, 2020 (3:19-CR-233 Docs. 50, 51). (*See* Doc. 105 at 9-10.)

As to the third factor--the impact of reprosecution on the administration of this chapter and the administration of justice, 18 U.S.C. § 3162(a)(2)--Defendant posits that "[t]he impact of reprosecution remains clear[,] Green remains incarcerated for an excessive

amount of time." (Doc. 105 at 10.) This assertion is disingenuous at best and distressingly, if not deliberately, inaccurate.

While the Motion of Defendant, Lance Green, to Dismiss for Violation of the Speedy Trial Act and the United States Constitution (3:19-CR-233 Doc. 34) was pending, Defendant filed the Motion of Defendant, Lance Green, for Pretrial Release (3:19-CR-233 Doc. 46). On June 25, 2020, the Court issued the Order Setting Conditions of Release and released Defendant on his own recognizance. (3:19-CR-233 Doc. 48.) When the case was closed on July 9, 2020, (*see* 3:19-CR-233 Doc. 51), Defendant was **not** incarcerated. Following arraignment in the above-captioned matter on July 22, 2020, before Magistrate Judge Mehalchick, Defendant remained free on conditional release. (*See* Doc. 11.)

On November 23, 2020, the Government filed the Motion of the United States for Revocation of Pretrial Release and a Warrant of Arrest (Doc. 28) wherein AUSA Roberts stated that

> [o]n November 19, 2020, the undersigned Assistant United States Attorney received a violation report from Federal Probation. The report indicates that on August 17, 2020, Green was arrested for a state parole violation and then subsequently charged by the Lackawanna District Attorney's Office for drug possession and trafficking violations. The report also indicates that on September 1, 2020, while incarcerated at the Lackawanna County Prison for the above referenced allegations Green had a misconduct violation.
>
> In light of Green's failure to comply with the conditions of pretrial services, it is requested that a warrant be issued and that Green's pretrial release be revoked.

(Doc. 28 at 1-2.)

Thus, the record is clear that Defendant was not reincarcerated because a new indictment was filed. Rather, he remained free on conditional release until he violated his state parole and was charged with new state court infractions. In these circumstances, the "impact of reincarceration" cannot be considered a factor that weighs in Defendant's favor.

For the foregoing reasons, Defendant is not entitled to relief related to the Court's previous Speedy Trial Act determination.

C. Sixth Amendment Violation

Defendant's claim regarding the Court's previous decision concerning a Sixth Amendment violation fails procedurally and substantively for basically the same reasons as those discussed in the previous section of this Memorandum Opinion. The Court considered Defendant's Sixth Amendment claim in the Memorandum Opinion issued on July 9, 2020, in case number 3:19-CR-233 and determined that the relevant factors weighed in favor of dismissal without prejudice (3:19-CR-233 Doc. 50 at 24-45): Defendant complains of a decision made in a previous case and he presents no procedural or substantive basis for this Court to grant relief (*see* Doc. 105 at 11-14). Like his Speedy Trial Act claim, Defendant's Sixth Amendment claim does not entitle him to relief.

D. Motion for Mistrial

Defendant next contends that the Court erred in denying his motion for a mistrial based on a statement made in the Government's closing argument. (Doc. 105 at 14.) The Government responds that the Court properly denied Defendant's motion. (Doc. 117 at 29.)

Defendant's counsel lodged an objection during the Government's closing argument and asked for a mistrial based on AUSA Roberts' reference to a statement as having been made on the telephone by Nasheena Curry when no evidence had been introduced that the statement, referenced by Detective Miller during his testimony, mentioned a telephone. (Doc. 102 at 40-41 (T. Tr. Day 4 40:17-41:18).) To give the statement related to Miller context, the Court sets out a relevant portion of the transcript.

> Ladies and gentlemen, the Government must prove its case to you beyond a reasonable doubt, not beyond all doubt, not doubt to some type of mathematical certainty, not beyond a shadow of a doubt, a reasonable doubt.
>
> So is it reasonable to believe that Sheila Rodriguez got up on the stand and lied? Is it reasonable to believe that? She clearly did not like her neighbor Nasheena Curry, her upstairs neighbor. If she was going to say that someone had a gun and she was going to place blame on someone, just because she didn't like them, it would be Nasheena. If she was out to get somebody in trouble, it wasn't going to be the individual that she never met before, when the police arrived, it was going to be Nasheena, her upstairs neighbor who attacked her daughter, who was fighting with her, who she called 911 about. But she didn't say Nasheena had the gun and pointed it and threatened us, she said, the man with Nasheena had the gun.
>
> Do you remember her demeanor on the stand when she testified? Did it look like she was vengeful or did it look like she was fearful of actually saying what happened?
>
> Is it reasonable to believe that Nasheena Curry is lying? Don't forget, she admitted on the witness stand that she called Lance Green and she called her friend Nakira for help to fight her downstairs neighbors. She called them for help.
>
> Don't forget, as well, that Detective Miller testified that, when he interviewed Sheila Rodriguez, she said Nasheena Curry was talking to someone **on the phone**, which corroborates—

MR. O'BRIEN: Your Honor, I'm going to object. Could I have a sidebar?

THE COURT: Sure.

(At this time a discussion was held on the record at sidebar.)

MR. O'BRIEN: I don't like objecting during a closing, and I apologize for doing it, but counsel just hit, I think, on one of the most important things in the case. I don't think Miller's report says that Rodriguez told him that Nasheena was talking on the phone, yelling, Get the strap. That's not what he testified, not my recollection. I asked him a question, he said she was yelling it, he didn't say, the phone, and that is a crucial element in this case, because the absence of the phone, it takes away -- my argument is that it was Nasheena's gun, she was yelling to somebody, Bring down the gun.

It's in Miller's report, I don't think it was in his testimony, and I think that that's a crucial element of this case, which I don't think was proven.

. . . [I]f she has brought in evidence outside the record that, in my opinion, goes after one of my key defenses, my most important argument, I think, a mistrial is required.

(Doc. 102 at 39-41 (T. Tr. Day 4 39:19-41:18) (emphasis added).)

In the follow-up discussion, Defendant's counsel explained that "from the moment I questioned Miller and he said she was yelling, Get the strap, and he didn't mention a telephone, I think, that's the most strongest evidence we have, because I think it tends to show that the gun was Nasheena's and not my client's." (Doc. 102 at 42 (T. Tr. Day 4 42:9-13).) He added that by bringing out the telephone on closing argument, the AUSA "arguing that [Nasheena Curry] was asking someone to bring the strap on the phone, that changes the whole thing. . . . I don't think [Miller] mentioned the phone." (*Id.* (T. Tr. Day 4 42:15-19).)

Defendant's counsel also definitively stated that "the fact that [Nasheena Curry] was yelling into a phone is not in the evidence." (*Id.* at 43 (T. Tr. Day 4 43:16-17).)

The Court Reporter then read back the relevant portion of Defendant's counsel's cross-examination of Miller:

> THE REPORTER: "QUESTION: Okay. Now, when you went there the first time, you interviewed Andre Piel, Sheila Rodriguez and Noel Piel; right?"
>
> "ANSWER: Yes, sir."
>
> "QUESTION: You talked to them. Was a statement made that Nasheena Curry had said, Bring the strap?"
>
> "ANSWER: Yes."
>
> "QUESTION: Okay, now, in your parlance, police parlance, the strap means the gun?"
>
> "ANSWER: Yes, sir."

(Doc. 102 at 43-44 (T. Tr. Day 4 43:25-44:8).)

The Court noted that there was "clearly testimony that she called the defendant . . . [but] there isn't a direct connection that it was said on the telephone." (*Id.* at 45 (T. Tr. Day 4 45:17-21).) The Court then denied Defendant's motion. (*Id.* at 46 (T. Tr. Day 4 46:18).)

In *United States v. Young,* 470 U.S. 1 (1985), the Supreme Court stated that "a criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone, for the statements or conduct must be viewed in context; only by so doing can it be determined whether the prosecutor's conduct affected the fairness of the trial." *Id.*

at 11. The Third Circuit explained the appropriate inquiry in *United States v. Brown*, 765 F.3d 278 (3d Cir. 2014).

> Improper statements made during summation may warrant a new trial when such statements "cause[ ] the defendant substantial prejudice by so infecting the trial with unfairness as to make the resulting conviction a denial of due process." *United States v. Shareef*, 190 F.3d 71, 78 (2d Cir.1999) (internal quotation marks and citations omitted). Our first task is to determine whether the prosecutor's comments were improper. *United States v. Mastrangelo*, 172 F.3d 288, 297 (3d Cir.1999). "If we conclude that a comment was improper, we must apply a harmless error analysis, looking to see if 'it is *highly probable* that the error did not contribute to the judgment.' " *Id.* (quoting *United States v. Zehrbach*, 47 F.3d 1252, 1265 (3d Cir.1995) (en banc)).

Brown, 765 F.3d at 296. *Brown* quoted *United States v. Gray*, 876 F.2d 1411, 1417 (9th Cir.1989), for the proposition that "[I]t is improper to base closing arguments upon evidence not in the record," and Charles Alan Wright *et al, Federal Practice and Procedure* § 588 (4th ed.2011), for the proposition that "[i]t is misconduct for a prosecutor to make an assertion to the jury of a fact, either by way of argument or by an assumption in a question, unless there is evidence of that fact." *Brown*, 765 F.3d at 296.

In the statement at issue, Roberts said that "Detective Miller testified that, when he interviewed Sheila Rodriguez, she said Nasheena Curry was talking to someone on the phone, which corroborates." (Doc. 102 at 40 (T. Tr Day 3 40:17-19).) The only objectionable words are "on the phone." *See supra* pp. 23-24. A review of Miller's testimony shows that he did not mention anything about a phone in connection with the information he received that Curry had been heard to say "bring the strap" after the first altercation. *See supra* p. 24. Therefore, Roberts made an assertion of fact to the jury which

was not supported by evidence of record and the Court must determine whether the error, i.e., the addition of the words "on the phone," was harmless. *Brown*, 765 F.3d at 296.

As stated in *United States v. Zehrbach*, 47 F.3d 1252, 1265 (3d Cir. 1995),

> [t]he harmless error doctrine requires that the court consider an error in light of the record as a whole, but the standard of review in determining whether an error is harmless depends on whether the error was constitutional or non-constitutional. In this instance, the alleged error, attacking the credibility of a witness with evidence not in the record, is non-constitutional. We have held that non-constitutional error is harmless when "it is *highly probable* that the error did not contribute to the judgment." *Government of Virgin Islands v. Toto,* 529 F.2d 278, 284 (3d Cir.1976). "High probability" requires that the court possess a "sure conviction that the error did not prejudice" the defendant. *United States v. Jannotti,* 729 F.2d 213, 219-20 (3d Cir.), *cert. denied,* 469 U.S. 880, 105 S.Ct. 243, 244, 83 L.Ed.2d 182 (1984).

Zehrbach, 47 F.3d at 1265.

In making the determination, a court should consider

> whether the prosecutor's remarks, taken in the context of the trial as a whole, prejudiced the defendants.
>
> In determining prejudice, we consider the scope of the objectionable comments and their relationship to the entire proceeding, the ameliorative effect of any curative instructions given, and the strength of the evidence supporting the defendant's conviction. As the Supreme Court has emphasized "a criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone, for the statements or conduct must be viewed in context." *United States v. Young,* [470 U.S. 1, 11 (1985)] (finding harmless error where the prosecutor had stated his opinion that the defendant was guilty and urged the jury to "do its job").

Zehrbach, 47 F.3d at 1265. The extent of misleading comments is a relevant consideration in the determination of prejudice. *See United States v. Boyd*, 999 F.3d 171, 184 (3d Cir. 2021) (noting prosecutor's improper comments made up only small fraction of closing

argument; quoting *Zehrbach*'s notation that "the comments at issue were but two sentences in a closing argument that filled forty pages of transcript," 47 F.3d at 1267). *Boyd* also found it relevant that the court's final instructions to the jury made clear that that statements and arguments by the lawyers were not evidence. *Id.* at 184-85.

Here, the misinformation, viewed in context, does not give rise to harmful error. Before her misstatement about the telephone, Roberts had pointed to Sheila Rodriguez's testimony that the man with Curry had the gun and Curry had testified that she had called Defendant and Nakirah Williams for help to fight her downstairs neighbors. *See supra* pp. 22-23. Roberts' statements concerning Curry and Williams are supported by the record. *See supra* pp. 2-4. Notably, Roberts' statement did not mention Defendant by name or reference and did not mention a strap or a gun. Roberts did not finish her statement or add any information connecting Defendant with a gun based on Miller's testimony before the objection was raised and the motion for a mistrial was decided.

Defendant now asserts that the basis for the objection at trial was that

> Miller did not testify that Curry had called Green on the phone and asked him to bring the strap as the United States Attorney implied. Rather, Miller testified only that Curry asked for a firearm during the first fight (Transcript March 17, 2021, [Doc. 101] at 49), at which time Green was not onsite, and could not have been the person to whom she made that request.

(Doc. 105 at 16.)

This assertion does not point to prejudice because it is fundamentally flawed: the testimony that Curry was heard to say "bring the strap" does not indicate that the statement

was made to someone onsite. First, no evidence suggested that anyone at the scene was affiliated with Curry before the arrival of Williams and Green. Thus, it would be difficult for jurors to infer that Curry had said "bring the strap" to an individual onsite who had never been mentioned or alluded to at the trial. It would also be an unrealistic and illogical stretch for jurors to infer that Curry was talking to herself in that she testified that she called Williams and Green for help because of the first altercation. *See supra* p. 2. That leaves the inference that Curry made the statement "bring the strap" to someone whom she called for help, i.e., that she called someone "on the phone." Because evidence was introduced and unrefuted that Curry called Defendant and Nakirah Williams for help (Doc. 101 at 5-6 (T. Tr. Day 3 5:18-6:25)), that both individuals participated in the second altercation (*id.* at 7-10 (T. Tr. Day 3 7:18-10:14)), and Defendant was the only individual who displayed a firearm during the altercation (*id.* at 9-10 (T. Tr. Day 3 9:23-10:12); *see also id.* at 28-29 (T. Tr. Day 3 28:20-29:14)), jurors could easily have concluded, without Roberts' comment, that the most reasonable inference was that Curry asked over the telephone for someone else to "bring the strap" and that "someone" was Lance Green.

As posited by the Government, the following testimony shows that "the finding of guilty did not hang on any suggestion made during closing argument but was firmly and overwhelmingly grounded in the evidence presented during the course of trial." (Doc. 117 at 32.)

> Shelia Rodriguez testified that the man with her upstairs neighbor had a handgun in his waistband that he removed. T.T., March 16, 2021, pg. 46, lines

> 1-22. Nasheena Curry and Nakira Williams both testified that Green had the gun. T.T., March 17, 2021, pg. 9, line 23 to pg. 10, line 12 and pg. 29, lines 6-13. Further, both the government DNA expert and Green's DNA expert both linked Green's DNA to the DNA found on the gun. Id. at 138, 17 to pg. 141, line 9 and T.T., March 8, 2021, pg. 33, line 21 to pg. 34, line 8.

(Doc. 117 at 31-32.)

Defendant also asserts that Roberts' statement substantially prejudiced the defense strategy:

> The comments which were the subject of Defendant's motion for mistrial were clearly improper, as the evidence contains absolutely no record that Detective Miller testified that Curry called Green on a cell phone during the first fight and requested that he bring the strap, which was the clear implication of her comments. Green submits that said statements substantially prejudice his position, as they were aimed directly at his prime defense strategy, i.e., the credibility of Nasheena Curry. If the jury had not heard those comments, and had concluded that the firearm belonged to Nasheena Curry, it is only logical to assume that they would have concluded that she was not telling the truth and discarded her testimony.

(Doc. 105 at 17.)

Based on the evidence discussed above, the weak link in Defendant's argument is that Roberts' closing argument comment stood in the way of the jury believing that the firearm belonged to Curry where the record shows that corroborated evidence related the gun to Defendant. In his supporting brief, Defendant's strategy of undermining Curry's credibility is otherwise supported only by the assertion that "[p]olice investigative records indicated that the testimony of Williams and Curry was inconsistent with statements they had given to police earlier that day." (Doc. 105 at 18 (citing Doc. 101 at 45 (T. Tr. Day 3)).) The cited transcript contains the following exchange between Roberts and Miller:

> Q. Did Nasheena Curry, initially, tell you what happened?
>
> A. She did not. The best way I can explain it is, as soon as we stopped the vehicle, I personally spoke with each one of the occupants -- well, each one of the females. I advised them of their Miranda rights, their Constitutional rights, that they didn't have to speak to me. They agreed to speak with me, however, both of them immediately -- both of them being Nasheena Curry and Nakirah Williams -- both of them, basically, told me, I don't know what you're talking about, nothing happened.
>
> Q. And at some point later on that day, did both Nasheena Curry and Nakirah Williams provide statements as to what happened?
>
> A. They did.

(Doc. 101 at 45 (T. Tr. Day 3 45:4-17).)

Objectively assessed, the cited testimony describes individuals who quickly decided to abandon their know-nothing strategy. Beyond that, the evidence does not show that either Curry or Williams told factually different stories or provided testimony contrary to statements previously given regarding the occurrences of October 5, 2018.

Finally, as found relevant in *Boyd*, 999 F.3d at 184-85, here the Court instructed the jury at the beginning and end of the trial that "statements and arguments of the lawyers for the parties are not evidence." (Doc. 85 at 4; Doc. 100 at 24 (T. Tr. Day 2 24:14-15.) In the preliminary instructions, the Court also explained to the jury that

> after all of the evidence has been presented, the lawyers will have the opportunity to present closing arguments. Closing arguments are designed to present to you the parties' theories about what the evidence has shown and what conclusions may be drawn from the evidence. What is said in closing arguments is not evidence, just as what was said in the opening statements is not evidence.

(Doc. 100 at 23 (T. Tr. Day 2 23:6-12).)

In sum, both the extent and the substance of Roberts' closing argument comment, viewed in the context of the whole trial and the Court's instructions to the jury, do not show that the error prejudiced the defense. Thus, applying harmless error analysis, the Court finds that "it is highly probable that the error did not contribute to the judgment," *Zehrbach*, 47 F.3d at 1265.[3]

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[3] The defense strategy's reliance on Miller's statement wherein he did not mention he was told that the "bring the strap" comment occurred during a phone call made by Curry is questionable in that the absence of any reference to a phone call in Miller's trial testimony appears to be an inadvertent omission which occurred on the third day of trial. Defendant's counsel admitted at sidebar during trial that the information concerning the phone had been in Miller's report. (Doc. 102 at 41 (T. Tr. 41:10).) Further, as previously set out in the margin, *see supra* p. 3 n.1, Defendant's "Statement of Facts" section of his brief supporting this motion contains the following introductory summary which does not provide citation to the record:

> On or about October 5, 2017, officers from the Kingston Municipal Police Department responded to a neighbor dispute at 141 Second Avenue, Kingston. Officers spoke to three residents at that residence who reported that during the dispute their female neighbor, Nasheena Curry, who resides at 143 Second Avenue, told someone over the phone "to bring the strap".

(Doc. 105 at 2.)

As discussed in the text, the averment that Curry's statement "to bring the strap" was stated "over the phone" is not contained in Miller's trial testimony. However, Miller testified at the Suppression Hearing held on November 23, 2020, where he provided more information than he did at trial:

> Q. Did Ms. Piel or any other resident at 141 bring to your attention anything that was said during that altercation?
>
> A. Yes. Prior to our arrival, our being the police department, Ms. Curry was heard outside on the sidewalk by both Piel and Ms. Rodriguez yelling to someone on the phone to, bring the strap. I'm familiar with street terminology for strap being a firearm.

(Doc. 34 at 7 (Hr'g Tr. 7:6-12).) This testimony is consistent with Miller's statement in the October 5, 2017, Incident Report wherein Miller stated that, during the initial altercation, he "was advised that CURRY **was**

D. Expert Testimony

Defendant maintains that the Court erred when it admitted the testimony of Ut N. Dinh, the Government's expert witness who testified about the likelihood that the DNA found on the firearm was Defendant's. (Doc. 105 at 18-19.) Defendant specifically takes issue with the Court's allowance of Dinh's testimony that it "was 60 trillion times more likely that the DNA found on the firearm originated from Defendant, rather than an unknown, unrelated African America individual." (Doc. 105 at 19.) The Government responds that the Court correctly allowed Dinh's testimony regarding the statistical likelihood that the DNA found on the firearm belonged to Defendant. (Doc. 117 at 33-40.)

Rule 702 of the Federal Rules of Evidence provides as follows:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods; and

---

outside on the telephone yelling for someone to 'bring the strap' and the [redaction] felt that this was CURRY calling for someone to bring a gun." (Doc. 40-1 at 4.)

Because the Court is directed to look at "whether the prosecutor's remarks, taken in the context of the trial as a whole, prejudiced the defendant[]," *Zehrbach*, 47 F.3d at 1265, what was said about "bring the strap" outside the context of trial is not relevant to whether the Court correctly denied Defendant's motion for a new trial raised during the Government's closing argument. However, Defendant's claim of prejudice and erosion of his trial strategy is somewhat undermined when Miller's omission ostensibly played a significant role in Defendant's strategy, *see supra* pp. 23-24, yet counsel knew that the omission was not consistent with Miller's prior statements and police documents.

(d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702.

The Third Circuit Court of appeals has explained that

> Rule 702 embodies a trilogy of restrictions on expert testimony: qualification, reliability and fit. [*In re Paoli R.R. Yard PCB Litigation*, 35 F.3d 711, 741-443 (3d Cir. 1994) ("*Paoli* II")], (citing *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993)). Qualification refers to the requirement that the witness possess specialized expertise. We have interpreted this requirement liberally, holding that "a broad range of knowledge, skills, and training qualify an expert." *Id.* Secondly, the testimony must be reliable; it "must be based on the 'methods and procedures of science' rather than on 'subjective belief or unsupported speculation'; the expert must have 'good grounds' for his on her belief. In sum, *Daubert* holds that an inquiry into the reliability of scientific evidence under Rule 702 requires a determination as to its scientific validity." *Paoli II,* 35 F.3d at 742 (quoting *Daubert,* 509 U.S. at 590, 113 S.Ct. 2786). Finally, Rule 702 requires that the expert testimony must fit the issues in the case. In other words, the expert's testimony must be relevant for the purposes of the case and must assist the trier of fact. The Supreme Court explained in *Daubert* that "Rule 702's 'helpfulness' standard requires a valid scientific connection to the pertinent inquiry as a precondition to admissibility." 509 U.S. at 591–92, 113 S.Ct. 2786.

Schneider ex rel. Estate of Schneider v. Fried, 320 F.3d 396, 404-05 (3d Cir. 2003).

Defendant asserts that

> Ut N. Dinh, the Government's DNA expert, was unable to testify as to whether the likelihood formula she had used to produce the testimony had been tested, or had been subject to peer review. She also did not offer any testimony as to its potential rate of error. All she could say was that it was a formula she used and could be done either through a computer or by hand. She offered no testimony as to the source of the formula, or how it was developed.
>
> Based on the above, the Defendant submits that the United States did not establish that the testimony on statistical likelihood was the produce [sic] of reliable principles and methods, as required by Rule 702. Thus, Defendant

> contends the Court erred in admitting the testimony and a new trial should be awarded to Defendant.

(Doc. 105 at 20-21.)

Defendant's Rule 702 challenge goes to the reliability requirement. Under this prong, "admissibility is not based on whether a particular scientific opinion has the best foundation, or even whether the opinion is supported by the best methodology or unassailable research. Instead, the court looks to whether the expert's testimony is supported by 'good grounds.'" *Karlo v. Pittsburgh Glass Works, LLC*, 849 F.3d 61, 81 (3d Cir. 2017) (quoting *Paoli II*, 35 F.3d at 745)). *Karlo* continued to explain that "[t]he standard for reliability is not that high. . . . It is lower than the merits standard of correctness." *Id.*

Both the Supreme Court in *Daubert* and the Third Circuit have explained that whether "good grounds" support an expert's potential testimony depends on many factors, including:

> (1) whether a method consists of a testable hypothesis; (2) whether the method has been subject to peer review; (3) the known or potential rate of error; (4) the existence and maintenance of standards controlling the technique's operation; (5) whether the method is generally accepted; (6) the relationship of the technique to methods which have been established to be reliable; (7) the qualifications of the expert witness testifying based on the methodology; and (8) the non-judicial uses to which the method has been put.

UGI Sunbury LLC v. A Permanent Easement for 1.7575 Acres, 949 F.3d 825, 833–34 (3d Cir. 2020). In *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999), the Supreme Court "makes clear that this list is non-exclusive and that each factor need not be applied in

every case." *Elcock v. Kmart Corp.*, 233 F.3d 734, 746 (3d Cir. 2000) (citing Kumho Tire, 526 U.S. at 152).

Considered within this legal framework, Defendant's challenge to the Court's admissibility determination must fail. After extensive examination, the Court admitted Dinh as an expert and specifically explored the "likelihood ratio" which was the calculation approach she used in determining the ratio regarding the DNA on the firearm being that of Defendant. (Doc. 101 at 106-132 (T. Tr. Day 3 106:16-132:13.) Dinh testified that the likelihood ratio approach is a standard that is used in the field of DNA analysis (*id.* at 121 (T. Tr. Day 3 121:19-21)); it is a validated method accepted in her field (*id.* at 122 (T. Tr. Day 3 122:16-19)); the method is based on accepted scientific principles (*id.* at 126 (T. Tr. Day 3 126:7-10)); that the calculation at issue is one she could do by hand (*id.* at 125 (T. Tr. Day 3 125:14-17)); and the mathematical foundation for the ratio is contained in the case file (*id.* (T. Tr. Day 3 126 :13-19)).

Based on Dinh's testimony, the Court found her qualified as an expert in DNA analysis:

> I find that the methodology that she used is based on reliable scientific principles, that the methodology itself is generally accepted in the scientific community, and I find that her opinion does fit, in that, it addresses relevant issues in this case, and on that basis, I'm going to allow her to testify, and she may make reference to her report, as she deems appropriate.

(Doc. 101 at 131-32.)

With the pending motion, Defendant provides no specific argument that the likelihood ratio approach used by Dinh did not meet the Rule 702 requirements and did not enjoy general acceptance within the relevant scientific community. Defendant's conclusory statement regarding the failures of Dinh's testimony do not show error. Defendant's statement that Dinh "was unable to testify as to whether the likelihood formula she had used to produce the testimony had been tested, or had been subject to peer review" (Doc. 105 at 20) is not an accurate characterization of her testimony. Dinh testified that the likelihood ratio approach was a "validated method" but she herself had not tested its accuracy. (*Id.* at 123-24 (T. Tr. Day 3 123:22-124:4).) Defendant's Counsel did not ask Dinh whether the method at issue had been subject to peer review generally but asked about her specific participation in peer review. He asked: "How about peer review? Did you participate in any peer review of this?"; and Dinh answered "I did not." (Doc. 101 at 24 (T. Tr. Day 3 24:5-7).) Regarding Defendant's assertion that Dinh did not testify as to the potential rate of error, the record does not reflect that Dinh was asked about rate of error (*see* Doc. 101 at 106-148) and, therefore, no conclusion can be drawn from her lack of testimony on the issue.

Based on the testimony reviewed above, the failings identified by Defendant regarding testing, peer review and potential rate of error (Doc. 105 at 20) do not undermine the Court's determination at trial that Dinh was qualified as an expert and could use the information in her report, including that based on the likelihood ratio approach. Therefore,

Defendant's assertion that he is entitled to a new trial based on the admission of Dinh's testimony is without merit.

F. Motion to Dismiss the Indictment

Defendant's final basis for relief is that the Court erred when it denied his oral motion to dismiss the indictment made on the day the trial in this matter was set to begin, March 15, 2021. (Doc. 105 at 21.) Therein, Defendant identified two grounds for dismissal: first, the Grand Jury testimony consisted of reading the transcripts of grand jury testimony from two previous grand jury hearings, each of which resulted in indictments which were ultimately dismissed on speedy trial grounds; and second, there was an error in a question posed in a prior hearing which, as part of the transcript of that hearing, was read to the Grand Jury in this case. (*See* Doc. 70 at 1.) The Court orally denied Defendant's motion, providing reasons for the decision, on March 16, 2021, indicating that a written Memorandum Opinion would follow. (Doc. 100 at 3-14 (T. Tr. Day 2 3:2-14:18).) The Court issued its Memorandum Opinion and Order the next day, March 17, 2021. (Docs. 70, 71.)

As with his allegations regarding the Court's Speedy Trial Act and Sixth Amendment determinations made in 3:19-CR-233, Defendant again seeks reconsideration of a Court's determination unrelated to trial proceedings and evidentiary matters which arose in that context. Defendant does not complain of any decision made by the Court during trial or any other matter related to the trial or jury verdict. Rather, he seeks reconsideration of a decision made before the trial began.

As previously discussed, the propriety of raising this issue in the context of the current motion is unsupported. *See supra* pp. 17-19. While, unlike the issues discussed in sections IVB and IVC, here the reconsideration sought relates to a decision made in the above-captioned matter, this distinction does not mean that a merits analysis of the issue is warranted. Rather, viewed as a request for reconsideration, Defendant did not file the request within fourteen days of the Court's denial of the motion—with the Court's denial of the motion on March 16, 2021, the last day for filing the motion was March 30, 2021, and Defendant filed the pending motion on March 31, 2021. Further, Local Rule 7.10 requires that a supporting brief be filed with the motion and Defendant did not seek an extension of time to file a supporting brief until April 1, 2021, and, in that motion, there is no recognition of requirements regarding motions for reconsideration. (*See* Doc. 97.) Therefore, the Court's granting of the motion cannot be construed as allowing an extension of the time required in Local Rule 7.10.

The Court denies reconsideration on this procedural basis. Further, a substantive review of the issue pursuant to authority cited in section IVB above indicates that Defendant has presented no basis to reconsider the determination previously made.

IV. Conclusion

For the reasons set forth above, the Court will deny Defendant Lance Green's

Motion for Judgment of Acquittal and Motion for a New Trial (Doc. 95). A separate Order is filed with this Memorandum Opinion.

Robert D. Mariani
United States District Judge

THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
	:	
v.	:	**3:20-CR-165**
	:	**(JUDGE MARIANI)**
LANCE GREEN,	:	
	:	
Defendant.	:	

MEMORANDUM OPINION

I. INTRODUCTION

Here the Court considers Defendant's oral motion to dismiss this case. On the day the trial in the above-captioned matter was scheduled to begin, Defendant's counsel informed the Court Deputy that there was something he wanted to bring to the Court's attention. Before potential jurors were brought to the courtroom, the Court convened and Defendant's counsel made an oral motion to dismiss the case on the basis of misconduct before the Grand Jury. He identified two grounds for dismissal. First, the Grand Jury testimony consisted of reading the transcripts of grand jury testimony from two previous grand jury hearings, each of which resulted in indictments which were ultimately dismissed on speedy trial grounds. Second, there was an error in a question posed in a prior hearing which, as part of the transcript of that hearing, was read to the Grand Jury in this case. The question involved the timing of when a search warrant was obtained for Defendant's DNA.

APPENDIX "C"

II. BACKGROUND

Defendant is currently charged under the Indictment filed on July 14, 2020. (Doc. 1.) Count 1 charges a violation of 18 U.S.C. § 922(g), prohibited person in possession of a firearm; Count 2 charges a violation of 18 U.S.C. § 922(k), possession of a firearm with an obliterated serial number. The indictment is the third filed based on events which took place on or about October 5, 2017.

On October 5, 2017, at approximately 10:00 a.m. two officers from the Kingston Municipal Police Department, Robert Miller and Sam Blaski, were dispatched to respond to a neighborhood dispute at 141-143 Second Avenue in Kingston, Pennsylvania, the addresses being the downstairs and upstairs units of one structure. (Doc. 34, Suppression Hr'g Tr. 4:19-5:13.) They arrived at the scene separately and first interviewed the downstairs residents Noelle Peele, Andre Peele, and Sheila Rodriguez who reported an altercation with the upstairs resident, Nasheena Curry.[1] (*Id.* 5:7-11, 16-17, 7:1-3.) According to Miller's testimony and a redacted Police Incident Report, officers were told that Noelle Peele and Nasheena Curry had a physical altercation and Ms. Curry, during a phone call, had been heard by Ms. Peele and Ms. Rodriguez telling someone to "bring the strap," which is street terminology for a firearm. (*Id.* 7:1-12; Incident Rpt., Doc. 40-1 at 4.) The

[1] According to Police Statements completed by Sheila Rodriguez and Noelle Peele attached to Defendant's *pro se* correspondence with the Court docketed on December 16, 2020, Sheila Rodriquez is the mother of Noelle and Andre Peele. (Doc. 39 at 4-7.) Though the transcript phonetically identifies the Peeles as Noel Piel and Andre Piel (Doc. 34 5:10-11), the Court will identify them using the spelling found in the Police Statements unless directly quoting the Suppression Hearing transcript.

officers left the scene after advising the parties that "[d]ue to the nature and circumstances, the charges would have to be filed via mail." (Doc. 34, Hr'g Tr. 7:15-17.)

At approximately 10:30 a.m., the officers were advised that another altercation had taken place, "this time, involving a taser, a hand-held taser, and a firearm." (*Id.* 8:6-9.) Upon arrival at the scene, there was no altercation taking place outside, and the officers noted a white Chevrolet parked in the driveway of the 143 side of the house which had not been there when they left thirty minutes before. (*Id.* 8:13-17.) After again interviewing Sheila Rodriguez, Noelle Peele and Andre Peele, the officers learned that the second altercation involved Nasheena Curry and two additional individuals, another black female and a heavy-set black male in a black and red shirt standing outside, and the male had displayed a firearm, which was initially concealed in his waistband, and pointed it in their direction. (*Id.* 8:19-9:12.)

Having learned that Ms. Curry and her companions had gone to the upstairs residence after the altercation, Blaski and Miller attempted to speak with the individuals but got no response when they knocked on the door. (*Id.* 10:17-11:6.) They then decided to conduct surveillance on the house to see if they could see someone leaving the house, and each officer went in a different direction about 150 yards north and south of the house. (*Id.* 11:8-15.)

At about 11:30 a.m., Miller observed Nasheena Curry, another black female, and a black male wearing a black and red shirt, individuals who matched the description given by

the Peeles and Ms. Rodriguez, leave the house and enter the white vehicle, back out of the driveway with Ms. Curry driving, and drive north. (*Id.* 11:18-12:8.) Miller immediately let Blaski know that the car had left, that he was behind it, and was going to stop the car. (*Id.* 12:10-12.) Upon learning from Miller that the car was headed toward Wilkes-Barre, Blaski ascertained that Wilkes-Barre officers would get there before he could so he let the dispatcher know that Wilkes-Barre should be notified. (*Id.* 13:1-7.) Shortly thereafter, Miller, Blaski, and Officer Roper from Wilkes-Barre stopped the vehicle and took the occupants into custody. (*Id.* 13:17-14:1.) The officers ran background checks and discovered that Defendant had several warrants against him. (*Id.* 14:24-15:1.) Defendant was arrested based on the outstanding warrants. (*Id.* 45:18-21.)

In an interview at the Kingston police station, Ms. Curry admitted that there was marijuana and a firearm at her residence and the firearm was hidden in the attic but it was not hers. (*Id.* 35:11-23.) In a videotaped interview, she acknowledged that an altercation had taken place, during the altercation the black male who was with her displayed a firearm, they went back in the house, and they would not answer the door. (*Id.* 36:23-37:1.) Ms. Curry further stated that she knew the black male, whom she knew as "Shamu," was wanted, and, when they made a decision to leave, she did not want him riding with the gun in the car so he lifted her up to hide the firearm in the attic. (*Id.* 36:25-37:5.) State charges based on the second altercation were filed against Ms. Curry. (*Id.* 37:11-14.)

After all suspects were in custody, Blaski secured Curry's residence. (Doc. 18-1 at 7.) Later that day, officers conducted a search of the residence pursuant to a warrant issued by a magistrate district justice and approved by an assistant district attorney. (*Id.*) Officers found and seized numerous bags of marijuana and a silver/black Kahr Arms 40 caliber handgun with an obliterated serial number. (*Id.*) Another search warrant resulted in the obtaining of DNA from Defendant. (Doc .41 at 3.)

III. LEGAL FRAMEWORK

In *Bank of Nova Scotia v. United States*, 487 U.S. 250, 260 (1988). the United States Supreme Court held that "as a general matter, a district court may not dismiss an indictment for errors in grand jury proceedings unless such errors prejudiced the defendants." 487 U.S. 250, 260 (1988). "The prejudicial inquiry must focus on whether any violations had an effect on the grand jury's decision to indict." *Id.* at 263. The indictment should be dismissed only "[i]f violations did substantially influence this decision, or if there is grave doubt that the decision to indict was free from such substantial influence." *Id.*

In *United States v. Wander*, 601 F.2d 1251 (3d Cir. 1979), a grand jury, in 1978, heard evidence of one live witness and the transcript testimony of other witnesses was read to the grand jury (evidence against the defendants was originally presented to a grand jury in 1976). On the defendants' claim that the district court should have dismissed the indictments on this basis, the Third Circuit stated as follows:

> The general rule concerning the propriety of the indictment procedure is that "(a)n indictment returned by a legally constituted and unbiased grand jury, . . .

> if valid on its face, is enough to call for trial of the charge on the merits." *Costello v. United States*, 350 U.S. 359, 363 (1956). It is permissible for an indictment to be based on hearsay evidence. *Id.* In addition, indictments returned after the grand jury has heard transcript testimony have been sustained. *See United States v. Chanen*, 549 F.2d 1306 (9th Cir. 1977); *United States v. Blitz*, 533 F.2d 1329, 1344 (2d Cir. 1976).
>
> In urging reversal, the defendants rely primarily on a rule developed in the Second Circuit in *United States v. Estepa*, 471 F.2d 1132 (2d Cir. 1972). That rule has been summarized as follows:
>
> > (A)n indictment based on hearsay is invalid where (1) non-hearsay evidence is readily available; (2) the grand jury is misled into believing it was hearing direct testimony rather than hearsay; and (3) there is high probability that had the grand jury heard the eye witness it would not have indicted.
>
> *United States v. Cruz*, 478 F.2d 408, 410 (5th Cir.), Cert. denied, 414 U.S. 910 (1973).

United States v. Wander, 601 F.2d 1251, 1260 (3d Cir. 1979). The Circuit Court applied the three-part test adopted by the Second and Fifth CIrcuits and concluded that the second and third requirements had not been met. On the facts of the case, *Wander* held that the reading of transcript testimony of witnesses before a prior grand jury to the grand jury in a subsequent case did not amount to an abuse of the grand jury process. *Id.*

In *United States v. Kruckel*, Crim. No. 92-611, 1993 WL 765648 (D.N.J. Aug. 13, 1993), the defendants moved to dismiss a Second Superseding Indictment in its entirety based upon certain purported irregularities in the procedures invoked by the Government before the grand jury which returned that indictment. The issue presented was whether an indictment is procedurally defective because it was obtained through a procedure of reading

back transcripts of testimony given before a previous grand jury, except for a sole live witness who testified regarding three new counts against one of the defendants. *Id.* at *2. The district court explained that

> [t]he question put to the court . . . is whether this procedure is so highly irregular that the grand jury was prevented from performing its independent investigatory functions and was thus impermissibly transformed into a rubber stamp for the Government, in a manner inconsistent with defendants' Fifth Amendment right to indictment by a grand jury.
>
> The supervisory role of a district court over a grand jury's proceedings is a very limited one. *United States v. Williams*, 504 U.S. 36, 112 S.Ct. 1735, 1744 (1992). "Because the grand jury is an institution separate from the courts, over whose functioning the courts do not preside," the Supreme Court recently cautioned that no general "supervisory" judicial authority exists over grand jury proceedings. *Id.* at 1742. Also relevant to the present discussion is the fact that the Court has upheld grand jury indictments based exclusively on hearsay evidence. *Costello v. United States*, 350 U.S. 359 (1956).
>
> Notwithstanding these limitations on the power of this district court and the fact that hearsay evidence is perfectly permissible to support a grand jury indictment, the court was troubled by the fact that the Government was unable to cite a single case in which *no* live testimony was presented to an indicting grand jury. Even in *Costello*, for example, although the grand jurors heard only hearsay testimony, they at least were presented with the live testimony of three government agents, whom they could question and evaluate. And in *United States v. Wander*, 601 F.2d 1251 (3d Cir.1979), the grand jury heard the testimony of one live witness in addition to "read-backs" of earlier testimony provided to an earlier grand jury. The Third Circuit in particular has voiced concerns over certain grand jury procedures, *see, e.g., United States v. Provenzano*, 688 F.2d 194 (3d Cir.), *cert. denied*, 459 U.S. 1071 (1982) (regarding practice of having a number of grand juries hear testimony which the indicting grand jury ultimately uses as a basis for indictment); *United States v. Helstoski*, 635 F.2d 200 (3d Cir.1980) (regarding inability of indicting grand jury to observe demeanor of all witnesses who testified), and this court was similarly disturbed by the prospect that a grand jury hearing only transcript read-backs was deprived of its ability to perform the essential evidence-gathering and evaluative functions of the grand jury system.

> For example, one could imagine a situation in which the exclusive use of read-backs of testimony from a previous grand jury proceeding might result in the later grand jury being caused to believe it was engaging in an empty exercise requiring it to simply correct some previous technical defect without exercising its evidence-gathering and deliberative functions.

United States v. Kruckel, No. CRIM. A. 92-611(JBS), 1993 WL 765648, at *3–4 (D.N.J. Aug. 13, 1993).

To ascertain whether the grand jury proceedings were sufficiently regular that a dismissal of the indictment was not in order, the presiding judge directed the Assistant United States Attorney who presided over the proceedings to provide the court with an *in camera* submission in the form of an affidavit responding to certain of the court's concerns. The court noted that "the *in camera* submission preserved the necessary secrecy of the grand jury proceedings, while inquiring beyond the level of generality in the Government's disclosures in open court." *Id.* at *4 n.4.[2]

The presiding judge ordered that the Assistant United States Attorney answer the following questions:

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[2] The court further noted that this procedure is consistent with Rule 6(e)(3)(C)(ii), Fed.R.Crim.P., which provides:

> Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made—
> (ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.

Kruckel, 1993 WL 765648, at *4 n.4. This provision is now found in Rule 6(3)(3)(E)(ii).

1. What was the new Grand Jury told regarding prior indictments in this case?

2. What was the new Grand Jury told about their functions in considering the Second Superseding Indictment with respect to their opportunity to call and cross-examine witnesses and their opportunity to accept or reject the testimony contained in the transcripts?

3. What other measures were taken to ensure the procedural regularity of the new Grand Jury proceedings?

4. Did any grand juror ask to call witnesses? If so, what happened?

5. What other information supports the regularity of the procedure used for the new Grand Jury's consideration of the evidence supporting the Second Superseding Indictment?

Kruckel, 1993 WL 765648, at *4 n.5. Ultimately the court was satisfied that the Affidavit confirmed that the proceedings were sufficiently regular that dismissal of the indictment was not appropriate, stating that the AUSA's "Affidavit sufficed to ensure that the grand jury was not a 'rubber stamp' for the prosecution such that its fundamental independent investigatory functions were abandoned." *Id.* at *4. The court also noted that the *Wander* test had not been satisfied: the grand jury was not misled into believing it was hearing direct testimony rather than hearsay and there was not a high probability that had the grand jury heard eyewitnesses it would not have indicted. *Id.* at *4 n.6. As to the latter, the court reasoned that the earlier grand jury which did hear the live witnesses returned an indictment similar in material respects to the Second Superseding Indictment. *Id.*

IV. ANALYSIS

The Court directed the Assistant United States Attorney ("AUSA") in this matter to submit the relevant transcript and to provide an affidavit addressing the questions set out in *Kruckel* for the Court's *in camera* review. The AUSA has now done so.[3]

The transcript from the July 14, 2020, Grand Jury proceeding indicates that one witness was presented, Special Agent Ryan Kovach from the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") who was involved with the investigation of the charges against Lance Green. Following a brief introduction, the AUSA informed the Grand Jury that Agent Kovach would be the only witness the Government intended to present. After he was duly sworn by the Foreperson of the Grand Jury, the AUSA indicated that Agent Kovach would "be reading two transcripts into the record from prior hearings."

Following the reading of the transcripts, the AUSA asked Agent Kovach to step out and asked the Grand Jury if anyone had questions regarding the proposed indictment and if anyone would like her to read the elements of the two counts or the indictment again. There being no response, the AUSA then left the indictment and the voting sheet with the Grand Jury. Shortly thereafter, the matter was recalled and the Grand Jury informed the AUSA

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[3] The Court notes that Defendant did not seek disclosure of any further material related to the Grand Jury proceeding of July 14, 2020. Thus, discussion of the framework within which the release of grand jury information should be disclosed is not warranted. *See, e.g., United States v. Buckner*, Crim. No. 3:18-CR-349, 2020 WL 211403, at *5 (M.D. Pa. Jan. 13, 2020).

that they had a true bill at which time the AUSA said she would take the indictment and sign it.

The Court will now turn to the AUSA's responses to the specific questions identified in *Kruckel.* 1993 WL 765648, at *4 n.5.

Regarding the first question ("What was the new Grand Jury told regarding prior indictments in this case?" 1993 WL 765648, at *4 n.5), the Affidavit indicates that the Grand Jury was not told that there was a previous indictment of Lance Green. Further, the transcript shows that only "prior hearings" were mentioned.

Regarding the second question ("What was the new Grand Jury told about their functions in considering the . . . Indictment with respect to their opportunity to call and cross-examine witnesses and their opportunity to accept or reject the testimony contained in the transcripts?" 1993 WL 765648, at *4 n.5), the Affidavit provides information about the opening instructions to the Grand Jury delivered by the Honorable Malachy E. Mannion and the United States Attorney's Office's standard procedure for the orientation of grand juries. The Grand Jury is generally advised that the grand jury alone decides how many witnesses they want to hear from, that they can direct the Government's attorney to subpoena witnesses from anywhere in the country, and that they may question witnesses. During orientation by the AUSA, the Grand Jury is informed that hearsay is admissible, that law enforcement witnesses will often summarize information obtained from witnesses and records, and that the Grand Jury may hear directly from witnesses or review evidence if

they would like to do so. The Grand Jury is also told that they may ask a witness questions and, if they have concerns about sufficiency of the evidence during deliberations, they may consider consulting with the AUSA to attempt to address their concerns through additional evidence or testimony.

Two other points are noteworthy here. First, this case did not involve a superseding indictment and no previous indictment was mentioned. Second, the Court's instruction to the grand jury emphasizes their role as an independent body and specifically instructs the Grand Jury as follows: "You would violate your oath if you merely 'rubber-stamped' indictments brought to you by the government representatives."

In her Affidavit, the AUSA indicates in response to the third question ("What other measures were taken to ensure the procedural regularity of the new Grand Jury proceedings?" 1993 WL 765648, at *4 n.5), that normal procedures were followed. Agent Kovach was a live witness who testified by reading his own prior testimony to the Grand Jury which, by all indications, is the normal procedure in this United States Attorney's office when a witness had previously testified.

Regarding the fourth question ("Did any grand juror ask to call witnesses? If so, what happened?" 1993 WL 765648, at *4 n.5), the Affidavit confirms what the transcript shows, i.e., that no grand juror asked to call witnesses and, when asked, no grand juror had any questions of Agent Kovach.

As to the fifth and final question ("What other information supports the regularity of the procedure used for the new Grand Jury's consideration of the evidence supporting the . . . Indictment?" 1993 WL 765648, at *4 n.5), the Affidavit references the transcript attached to the Affidavit which the AUSA states is the entirety of the presentation on July 14, 2020.

The Court concludes that the AUSA's submissions support a finding that the reading of transcripts from prior hearings at the the July 14, 2020, Grand Jury proceedings does not warrant dismissal of the indictment. Rather, with the witness approach adopted by the AUSA, the proceedings were sufficiently regular to support the presumption of propriety.

Having made this determination, the Court will also assess whether the circumstances of this case warrant dismissal under *Wander*. Assuming the continued validity of the three-part test identified in *Wander*,[4] the Court will now address whether "(1)

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[4] Questions regarding continued validity of the test set out in *Wander* relate to the Supreme Court's decision in *United States v. Williams*, 504 U.S. 36 (1992).

> The Supreme Court's . . . decision in *United States v. Williams*, 504 U.S. 36, 112 S.Ct. 1735, 118 L.Ed.2d 352 (1992), has cast doubt on the continuing validity of the *Estepa* line of cases [which includes *Wander*]. *Williams* held that a district court may not dismiss an otherwise valid indictment because the government failed to disclose to the grand jury exculpatory evidence that was in its possession. *Id.* at 47. In reaching this conclusion, the Court cautioned that "[b]ecause the grand jury is an institution separate from the courts, over whose functioning the courts do not preside," no general " 'supervisory' judicial authority exists" over grand jury proceedings. *Id. Williams* also noted that "over the years, we have received many requests to exercise supervision over the grand jury's evidence-taking process, but we have refused them all." *Id.* It further explained that:
>
> > [W]e reaffirmed [a principle of *Costello*] recently in *Bank of Nova Scotia*, where we held that "the mere fact that evidence itself is unreliable is not sufficient to require a dismissal of the indictment," and that "a challenge to the reliability or competence of the evidence presented to the grand jury" will not be heard. 487 U.S. at 261. It would make little sense, we think, to abstain from reviewing the evidentiary support for the grand

non-hearsay evidence [was] readily available; (2) the grand jury [was] misled into believing it was hearing direct testimony rather than hearsay; and (3) there [was] high probability that had the grand jury heard the eye witness it would not have indicted." 601 F.2d at 1260.

Some courts have defined "non-hearsay evidence" to include the reading of the transcripts "in toto" from a prior proceeding. *See, e.g., United States v. Mahoney*, 495 F. Supp. 1270 (E.D. Pa. 1980). Here, because Agent Kovach read his own testimony from prior proceedings into the record, the hearsay/non-hearsay line is somewhat blurred. However, rather than parse this issue, the Court will proceed on the assumption that Agent Kovach's testimony was hearsay. Cleary actual testimony from the witness, Agent Kovach, was readily available. Therefore, the first *Wander* requirement is satisfied.

The second requirement to overcome the presumption of regularity, "that the grand jury [was] misled into believing it was hearing direct testimony rather than hearsay," 601 F.2d at 1260, is not satisfied here. The transcript clearly indicates that the Grand Jury knew that it was being read the transcript of the testimony from two previous hearings.

> jury's judgment while scrutinizing the sufficiency of the prosecutor's presentation. A complaint about the quality or adequacy of the evidence can always be recast as a complaint that the prosecutor's presentation was "incomplete" or "misleading."

Id. at 54 (footnote omitted). The Court offered *Estepa* as an example of a case where a challenge to the quality of the evidence was styled as a challenge to the prosecutor's presentation. *Id.* at 54 n. 8. Thus, while *Williams* did not explicitly overrule *Estepa* (and *Wander*), it did seem to reject the logic of those cases and reiterate *Costello's* holding that it is inappropriate for the federal courts to scrutinize the grand jury's evidentiary process, including its use of hearsay evidence.

United States v. Jiminez, Crim. No. 99-364-08, 2005 WL 3183664, at *11-12 (E.D. Pa. Nov. 29, 2005).

Finally, a review of the transcript shows that the third requirement is not met. Nothing suggests that "there is high probability that had the grand jury heard the eye witness it would not have indicted." 601 F.2d at 1260. As in *Kruckel* where the court reasoned that the earlier grand jury which did hear the live witnesses returned an indictment similar in material respects to the Second Superseding Indictment, 1993 WL 765648, at *4 n.6, here the fact that two earlier grand juries had returned indictments the same as the one returned based on the July 14, 2020, proceeding supports a conclusion that direct testimony would have not changed the outcome. This is particularly so given the fact that Agent Kovach himself read his own prior testimony at the Grand Jury proceeding.

Thus, as in *Wander* where the Court found that the second and third requirements were not met, here the Court concludes that the reading of the transcripts of prior hearings to the Grand Jury does not amount to an abuse of the Grand Jury process.

This conclusion is bolstered by decisions in other circuits where the reading of testimony from a prior proceeding was not objectionable.

> Even if some of the testimony read to the second grand jury had been received by the first grand jury after the expiration of its term, *see United States v. Fein*, 405 F.2d 1170 (2 Cir. 1974), and therefore was hearsay, ". . . an indictment valid on its face is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence. . . ." *United States v. Calandra*, 414 U.S. 338, 345 (1974). *See United States v. James*, 493 F.2d 323, 326, and cases there cited (2 Cir.), cert. denied, 419 U.S. 849 (1974).
>
> Mindful of our concern that a prosecutor shall not put into issue at trial his credibility or professional integrity, *United States v. Spangelet*, 258 F.2d 338, 342-43 (2 Cir. 1958), we hold here that the prosecutor did not place his credibility on the line with the ministerial act of reading prior testimony to the

> grand jury any more than when counsel reads at trial properly admitted prior testimony, whether in the form of a deposition, grand jury testimony or otherwise.

United States v. Blitz, 533 F.2d 1329, 1344–45 (2d Cir. 1976).

In *United States v. Chanen*, 549 F.2d 1306, 1311 (9th Cir. 1977), confronted with the issue of whether reading transcripts of prior grand jury testimony to a subsequent grand jury warranted dismissal of the indictment, the Ninth Circuit explained that

> [o]n occasion, and in widely-varying factual contexts, federal courts have dismissed indictments because of the way in which the prosecution sought and secured the charges from the grand jury. *See, e. g., United States v. Estepa*, 471 F.2d 1132 (2d Cir. 1972); *United States v. Wells*, 163 F. 313 (D.Idaho 1908); *United States v. DeMarco*, 401 F.Supp. 505 (C.D.Cal.1975), appeal docketed, No. 75-3824, 9th Cir. Dec. 29, 1975; *United States v. Gallo*, 394 F.Supp. 310 (D.Conn.1975). These dismissals have been based either on constitutional grounds or on the court's inherent supervisory powers. *See generally United States v. Basurto*, 497 F.2d 781 (9th Cir. 1974); id. at 793 (Hufstedler, J., concurring); *United States v. Estepa, supra*, 471 F.2d 1132. Whatever the basis of the dismissal, however, the courts' goal has been the same, "to protect the integrity of the judicial process," United States v. Leibowitz, 420 F.2d 39, 42 (2d Cir. 1969), particularly the functions of the grand jury, from unfair or improper prosecutorial conduct.
>
> Almost every court dealing with the issue raised here has confronted a novel set of facts. The range of prosecutorial conduct capable of inspiring allegations of unfairness appears unlimited. Indeed, the facts of this case are unlike those of any other we have been able to find. Nevertheless, a review of the cases, with particular regard for their facts, serves to define the line between prosecutorial conduct which is inimical to "the integrity of the judicial process" and conduct which does not require dismissal of the indictment.

549 F.2d 1306 at 1309 (9th Cir. 1977). With this background, the Circuit Court applied the same test as that applied in *Wander* and concluded that "[r]eading transcripts of sworn testimony, rather than presenting live witnesses, simply does not constitute, on the facts of

this case, 'fundamental unfairness' or a threat to 'the integrity of the judicial process.'" *Id.* at 1311.

In sum, broad authority supports the Court's determination that, given the facts of this case and the information reviewed by the Court, no error occurred in the Grand Jury proceedings of July 14, 2020, regarding the reading of transcripts. Finding no error in reading the transcripts, the Court does not reach the prejudice prong of the *Bank of Nova Scotia* inquiry. *See* 487 U.S. at 260.

The Court will now turn to the claimed error regarding the DNA warrant question which, as a question posed at a prior proceeding, was read into the record at the July 14, 2020, proceeding. The AUSA concurs that the question--"Following your testimony in front of the Grand Jury, was a search warrant obtained for Lance Green's DNA?"—contains an error. The parties agree that the question is inaccurate because the search warrant for the DNA was obtained before Agent Kovach's grand jury testimony rather than after it. Thus, based on *Bank of Nova Scotia's* directive that "a district court may not dismiss an indictment for errors in grand jury proceedings unless such errors prejudiced the defendants," 487 U.S. at 260, the Court will consider whether this error prejudiced Defendant.

"The prejudicial inquiry must focus on whether any violations had an effect on the grand jury's decision to indict." *Id.* at 263. The indictment should be dismissed only "[i]f

violations did substantially influence this decision, or if there is grave doubt that the decision to indict was free from such substantial influence." *Id.*

Defendant posits that the error was prejudicial because the question implies that there was an indictment, i.e., that the search warrant was issued because there were pending charges. The Government contends that the error was a minor factual mistake that had no bearing on the Grand Jury finding of probable cause.

Here the requisite standard is not satisfied. The facts of this case and the information before the Grand Jury do not provide a basis to conclude that the error in the DNA question had an effect on the Grand Jury's decision to indict. Contrary to Defendant's argument that the question implied that there had been an indictment, the Court concludes that no reasonable inference could be drawn that a prior grand jury had issued an indictment. Further, the challenged error presents no basis for dismissal because there is no indication that the error was anything other than "'an isolated incident unmotivated by sinister ends.'" *United States v. Serubo*, 604 F.2d 807, 817 (3d Cir. 1979) (quoting *United States v. Birdman*, 602 F.2d 547, 559 (3d Cir. 1979)).

V. Conclusion

For the foregoing reason, Defendant's motion to dismiss is denied. A separate Order will be filed simultaneously with this Memorandum Opinion.

Robert D. Mariani
United States District Judge

(The following took place prior to jury selection.)

09:54AM THE COURT: I've considered the Motion to Dismiss that's been made by Mr. Green in this case. As you know, on the day of trial in this matter, when a jury selection was to commence, Defendant's counsel informed the Court that there was something he wanted to bring to the Court's attention, before potential jurors were brought to the courtroom.

The Court convened and Defendant's counsel made an oral Motion to Dismiss the case on the basis of misconduct before the Grand Jury.

He identified two grounds for dismissal. First, the Grand Jury testimony consisted of reading the Grand Jury testimony from two previous Grand Juries, each of which resulted in indictments which were ultimately dismissed on Speedy Trial grounds.

Second, there was an error in one of the prior transcripts, which was read to the Grand Jury, which involved the timing of when a search warrant was obtained for Defendant's DNA.

I've carefully considered the motion, consulted the applicable law, and on that basis, I'm going to orally announce my decision here, but there will be a formal written opinion that will be filed of record in this case, as well.

To understand my decision, there are several occasions where I need to make reference to the applicable case law, and we begin with Bank of Nova Scotia v. United States, a 1988

APPENDIX "D"

09:56AM 1 Supreme Court case. There, the United States Supreme Court held
09:56AM 2 that;
09:56AM 3 "As a general matter, a District Court may not dismiss an
09:56AM 4 indictment for errors in Grand Jury proceedings, unless such
09:56AM 5 errors prejudiced the Defendant."
09:56AM 6 It continues;
09:56AM 7 "The prejudicial inquiry must focus on whether any
09:56AM 8 violations had an effect on the Grand Jury's decision to
09:56AM 9 indict.
09:56AM 10 The indictment should be dismissed only if, "violations did
09:56AM 11 substantially influence", substantially influence this decision
09:56AM 12 or if there is grave doubt that the decision to indict was free
09:57AM 13 from such substantial influence.
09:57AM 14 In addition, in United States v. Wander, a Third Circuit
09:57AM 15 decision a Grand Jury in 1978 heard evidence of one live
09:57AM 16 witness and the transcript testimony of other witnesses was
09:57AM 17 read to the Grand Jury.
09:57AM 18 On the Defendant's claim that the District Court should
09:57AM 19 have dismissed the indictments on this basis, United States
09:57AM 20 Court of Appeals for the Third Circuit stated as follows:
09:57AM 21 "The general rule concerning the propriety of the
09:57AM 22 indictment procedure is that an indictment returned by a
09:57AM 23 legally-constituted and unbiased Grand Jury, if valid on its
09:57AM 24 face, is enough to call for trial of the charge on the merits.
09:57AM 25 It is permissible for an indictment to be based on hearsay

09:58AM 1 evidence. In addition, indictments returned after the Grand
09:58AM 2 Jury has heard transcript testimony have been sustained."
09:58AM 3 There are a number of citations in that quote, which,
09:58AM 4 again, will be in my formal opinion.
09:58AM 5 On the facts of the case, the Circuit held that the reading
09:58AM 6 of transcript testimony of witnesses before a prior Grand Jury
09:58AM 7 to the Grand Jury in a subsequent case did not amount to an
09:58AM 8 abuse of the Grand Jury process.
09:58AM 9 In United States v. Kruckel, a case I cited yesterday, the
09:58AM 10 Defendants moved to dismiss the second superseding indictment
09:58AM 11 in its entirety, based upon purported irregularities in the
09:58AM 12 procedures invoked by the Government before the Grand Jury
09:58AM 13 which returned that indictment.
09:58AM 14 The issue presented was whether an indictment is
09:59AM 15 procedurally defective because, through a procedure of reading
09:59AM 16 back transcripts of testimony given before a previous Grand
09:59AM 17 Jury, except for a sole live witness who testified regarding
09:59AM 18 three new counts against one of the Defendants.
09:59AM 19 The District Court explained, again;
09:59AM 20 "The question put to the Court is whether this procedure is
09:59AM 21 so highly irregular that the Grand Jury was prevented from
09:59AM 22 performing its independent investigatory function and was thus
09:59AM 23 impermissibly transformed into a rubber stamp for the
09:59AM 24 Government in a manner inconsistent with the Defendant's Fifth
09:59AM 25 Amendment right to indictment by a Grand Jury."

09:59AM To ascertain whether the Grand Jury proceedings were
09:59AM sufficiently regular, that a dismissal of the indictment was
10:00AM not in order, the Presiding Judge in Kruckel directed the
10:00AM Assistant United States Attorney who presided over the
10:00AM proceedings to provide the Court with an in camera submission,
10:00AM in the form of an affidavit, responding to certain of the
10:00AM Court's concerns.
10:00AM The Court noted that;
10:00AM "The in camera submission preserved the necessary secrecy
10:00AM of the Grand Jury, while inquiring beyond the level of
10:00AM generality in the Government's disclosures in open court."
10:00AM The Presiding Judge ordered the United States attorney to
10:00AM answer five questions. Those are the same questions that I
10:00AM ordered Ms. Roberts to answer for this case. In Kruckel,
10:00AM ultimately, the Court was satisfied by the affidavit submitted
10:00AM by the Assistant U.S. Attorney in that case, and satisfied that
10:01AM the affidavit confirmed that the proceedings were regular and
10:01AM sufficiently regular that the dismissal of the indictment was
10:01AM not appropriate, stating that the Assistant U.S. Attorney's
10:01AM affidavit sufficed to ensure that the Grand Jury was not a
10:01AM rubber stamp for the prosecution, such that its fundamental
10:01AM independent investigatory functions were abandoned.
10:01AM The Court also noted that the Wander test, that is to say,
10:01AM the test in U.S. v. Wander, had not been satisfied, meaning,
10:01AM the Grand Jury was not misled into believing it was hearing

10:01AM 1 direct testimony rather than hearsay, and there was not a high
10:01AM 2 probability that had the Grand Jury heard eyewitnesses, it
10:02AM 3 would not have indicted.
10:02AM 4 As to that latter point, the Court reasoned that the
10:02AM 5 earlier Grand Jury, which did hear the live witnesses itself,
10:02AM 6 returned an indictment similar in material respects to the
10:02AM 7 second superseding indictment.
10:02AM 8 Now, in this case, I directed Ms. Roberts, the Assistant
10:02AM 9 U.S. Attorney to submit an affidavit addressing the very
10:02AM 10 questions that were set out in United States v. Kruckel for
10:02AM 11 this Court's in camera review. Ms. Roberts has done so. And I
10:02AM 12 have reviewed the materials.
10:02AM 13 The transcript from the July 14, 2020 Grand Jury
10:02AM 14 proceedings indicates that one witness was presented. Special
10:03AM 15 Agent Ryan Kovach from the Bureau of Alcohol, Tobacco, Firearms
10:03AM 16 and Explosives, who was involved with the investigation of the
10:03AM 17 charges against Defendant Lance Green.
10:03AM 18 After a brief introduction, the Assistant United States
10:03AM 19 Attorney informed the Grand Jury that Agent Kovach would be the
10:03AM 20 only witness the Government intended to present. After he was
10:03AM 21 duly sworn by the Foreperson of the Grand Jury, the United
10:03AM 22 States Attorney Ms. Roberts indicated that he would be reading
10:03AM 23 two transcripts into the record from prior hearings.
10:03AM 24 Following the reading of the transcripts, Ms. Roberts asked
10:03AM 25 Agent Kovach to step out and asked the Grand Jury if anyone had

10:04AM 1 questions regarding the proposed indictment and if anyone would
10:04AM 2 like her to read the elements of the two counts of the
10:04AM 3 indictment again. There being no response, AUSA Roberts then
10:04AM 4 left the indictment and the voting sheet with the Grand Jury.
10:04AM 5 Shortly thereafter, the matter was called and the Grand Jury
10:04AM 6 informed AUSA Roberts that they had a True Bill, at which time,
10:04AM 7 AUSA Roberts said she would take the indictment and sign it.
10:04AM 8 I'll now turn to the responses given by Ms. Roberts to the
10:04AM 9 specific questions that I asked, in accordance with U.S. v.
10:05AM 10 Kruckel.
10:05AM 11 Regarding the first question, which was;
10:05AM 12 What was the new Grand Jury told regarding prior
10:05AM 13 indictments in this case?
10:05AM 14 The affidavit indicates that the Grand Jury was not told
10:05AM 15 that there was a previous indictment of Lance Green. Further,
10:05AM 16 the transcript, which I have reviewed, shows that only, quote,
10:05AM 17 prior hearings, end quote, were mentioned.
10:05AM 18 Regarding the second question;
10:05AM 19 What was the new Grand Jury told about their functions in
10:05AM 20 considering the second superseding indictment, with respect to
10:05AM 21 their opportunity to call and cross-examine witnesses and their
10:06AM 22 opportunity to accept or reject the testimony contained in the
10:06AM 23 transcripts?
10:06AM 24 The affidavit provides information about the opening
10:06AM 25 instructions to the Grand Jury delivered by Honorable Malachy

10:06AM 1 E. Mannion and the United States Attorneys Office's standard
10:06AM 2 procedure for the orientation of Grand Juries. The Grand Jury
10:06AM 3 is generally advised that the Grand Jury alone decides how many
10:06AM 4 witnesses they want to hear from, they can direct the
10:06AM 5 Government's attorney to subpoena witnesses from anywhere in
10:06AM 6 the country, and that they may ask witnesses questions.
10:06AM 7 During the orientation by the AUSA, the Grand Jury is
10:06AM 8 informed that hearsay is admissible, that law enforcement
10:06AM 9 witnesses will often summarize information obtained from
10:06AM 10 witnesses and records, and that the Grand Jury may hear
10:06AM 11 directly from witnesses or review evidence, if it would like to
10:06AM 12 do so.
10:06AM 13 The Grand Jury is also told that they may ask a witness
10:07AM 14 questions, and if they have concerns about the sufficiency of
10:07AM 15 the evidence during deliberations, they may consider consulting
10:07AM 16 with the AUSA to attempt to address the concerns that they may
10:07AM 17 have through additional evidence or testimony.
10:07AM 18 Now, two points are noteworthy here.
10:07AM 19 First, this case did not involve a superseding indictment
10:07AM 20 and no previous indictment was mentioned. Second, the Court's
10:07AM 21 instruction to the Grand Jury emphasizes their role as an
10:07AM 22 independent body and specifically instructs the Grand Jury as
10:07AM 23 follows:
10:07AM 24 "You would violate your oath if you merely rubber-stamped
10:07AM 25 indictments brought to you by the Government representatives."

10:08AM 1 In Ms. Roberts' affidavit, she indicates, in response to
10:08AM 2 the third question, which was;
10:08AM 3 What other measures were taken to ensure the procedural
10:08AM 4 regularity of the new Grand Jury proceedings?
10:08AM 5 She indicates that normal procedures were followed, Agent
10:08AM 6 Kovach was a live witness who testified by reading his own
10:08AM 7 prior testimony to the Grand Jury, which, by all indications,
10:08AM 8 is the normal procedure in the United States Attorney's Office
10:08AM 9 when a witness has previously testified.
10:08AM 10 Regarding the fourth question;
10:08AM 11 Did any Grand Juror ask to call witnesses? If so, what
10:08AM 12 happened?
10:08AM 13 The affidavit confirms what the transcript shows, that is,
10:08AM 14 that no Grand Juror asked to call witnesses, and when asked, no
10:09AM 15 Grand Juror had any questions of Agent Kovach.
10:09AM 16 As to the fifth and final question, which was;
10:09AM 17 What other information supports the regularity of the
10:09AM 18 procedure used for the new Grand Jury's consideration of the
10:09AM 19 evidence supporting the indictment?
10:09AM 20 The affidavit references the transcript attached to the
10:09AM 21 affidavit sent by Ms. Roberts, which states the entirety of the
10:09AM 22 presentation on July 14, 2020.
10:09AM 23 This Court concludes that the Assistant United States
10:09AM 24 Attorney's submission supports a finding that the reading of
10:09AM 25 transcripts from prior hearings at the July 14, 2020 Grand Jury

10:10AM 1 proceedings does not warrant dismissal of the indictment.
10:10AM 2 Rather, with the witness approach adopted by the Assistant
10:10AM 3 United States Attorney, the proceedings were sufficiently
10:10AM 4 regular to support the presumption of propriety.
10:10AM 5 Having made this determination, I also assessed whether the
10:10AM 6 circumstances of the case warrant dismissal under United States
10:10AM 7 v. Wander.
10:10AM 8 Assuming the continued validity of the three-part test
10:10AM 9 identified in Wander, the Court addresses whether;
10:10AM 10 1. Non-hearsay evidence was readily available;
10:10AM 11 2. Whether the Grand Jury was misled into believing it was
10:10AM 12 hearing direct testimony rather than hearsay;
10:10AM 13 3. That there was a high probability that had the Grand
10:11AM 14 Jury heard the eyewitness testimony, it would not have
10:11AM 15 indicted.
10:11AM 16 Here, Agent Kovach read his own testimony from prior
10:11AM 17 proceedings into the record. Clearly, actual testimony from the
10:11AM 18 witness, Agent Kovach, was readily available, therefore, the
10:11AM 19 first Wander requirement is satisfied.
10:11AM 20 The second requirement to overcome is the -- to overcome
10:11AM 21 the presumption of regularity is that the Grand Jury must have
10:11AM 22 been misled into believing it was hearing direct testimony
10:11AM 23 rather than hearsay. That requirement is not satisfied here.
10:11AM 24 The transcript clearly indicates that the Grand Jury knew that
10:11AM 25 it was being read the transcript of the testimony from two

10:12AM 1 previous hearings by Mr. Kovach.
10:12AM 2 Finally, a review of the transcript indicates that the
10:12AM 3 third requirement is not met. Nothing here suggests that there
10:12AM 4 was a high probability that had the Grand Jury heard the
10:12AM 5 eyewitness, it would not have indicted.
10:12AM 6 As in U.S. v. Kruckel, where the Court reasoned that the
10:12AM 7 earlier Grand Jury, which did hear the live witnesses itself,
10:12AM 8 returned an indictment similar in material respects to the
10:12AM 9 second superseding indictment, here, the fact that two earlier
10:12AM 10 Grand Juries had returned indictments, the same as the one
10:12AM 11 returned based on the July 14, 2020 proceedings supports a
10:12AM 12 conclusion that direct testimony would not have changed the
10:13AM 13 outcome, particularly, in light of the fact that Kovach,
10:13AM 14 himself, was present and simply read his own prior testimony.
10:13AM 15 On this basis, I conclude that the reading of the
10:13AM 16 transcripts of prior hearings to the Grand Jury on July 14,
10:13AM 17 2020 does not amount to an abuse of the Grand Jury process.
10:13AM 18 This conclusion is bolstered by decisions in other
10:13AM 19 circuits, which I will cite in a formal memorandum to be filed
10:13AM 20 in this case.
10:13AM 21 In sum, broad authority supports the Court's determination
10:13AM 22 that, given the facts of this case and the information reviewed
10:13AM 23 by this Court, no error occurred in the Grand Jury proceedings
10:13AM 24 of July 14, 2020, and, specifically, no error occurred
10:14AM 25 regarding the reading of transcripts. Finding no error in the

10:14AM 1 reading of transcripts, the Court finds no reason to reach the
10:14AM 2 prejudice prong of the Bank of Nova Scotia inquiry, as set
10:14AM 3 forth 487 U.S. 260.
10:14AM 4 I now turn to the claimed error regarding the DNA warrant.
10:14AM 5 Here, the Assistant United States Attorney admits a technical
10:14AM 6 error in the question;
10:14AM 7 "QUESTION: Following your testimony in front of the Grand
10:14AM 8 Jury, was a search warrant obtained for Lance Green's DNA?"
10:14AM 9 That question, which was read into the record at the July
10:14AM 10 14, 2020 proceeding, as a question in a prior Grand Jury
10:15AM 11 proceeding.
10:15AM 12 Based on the Supreme Court's decision in Bank of Nova
10:15AM 13 Scotia and its directive that a District Court may not dismiss
10:15AM 14 an indictment for errors in Grand Jury proceedings, unless such
10:15AM 15 errors prejudiced the Defendant. I consider whether this error
10:15AM 16 prejudiced the Defendant.
10:15AM 17 The Supreme Court made clear that the prejudicial inquiry
10:15AM 18 must focus on whether any violations had an effect on the Grand
10:15AM 19 Jury's decision to indict. The Court also makes it clear that
10:15AM 20 the indictment should be dismissed only, quote, if violations
10:15AM 21 did substantially influence this decision or if there is grave
10:15AM 22 doubt that the decision to indict was free from such
10:15AM 23 substantial influence.
10:15AM 24 The question at issue, the question posed by Ms. Roberts
10:16AM 25 was inaccurate, because the search warrant is -- the search

10:16AM 1 warrant for the DNA was obtained before Agent Kovach's Grand
10:16AM 2 Jury testimony rather than after it. The Defendant has posited
10:16AM 3 that this was prejudicial because the question implies that
10:16AM 4 there was an indictment, that the search warrant was issued
10:16AM 5 because there were pending charges.
10:16AM 6 Here, the requisite standard is not satisfied. The facts of
10:16AM 7 this case and the information before the Grand Jury do not
10:16AM 8 provide a basis to conclude that the error in the DNA question
10:17AM 9 had an effect on the Grand Jury's decision to indict.
10:17AM 10 Further, the challenged error presents no basis for
10:17AM 11 dismissal because there is no indication that the error was
10:17AM 12 anything other than an isolated incident, unmotivated by
10:17AM 13 sinister ends, which is the standard set forth in United States
10:17AM 14 v. Birdman, 602 F2d. 547 at 559, a Third Circuit decision in
10:17AM 15 1979.
10:17AM 16 For the foregoing reasons, I will deny the Motion to
10:17AM 17 Dismiss. As I indicated before, a Memorandum and Order of a
10:17AM 18 formal nature will follow.
10:17AM 19 We're now ready to begin jury selection. Bring the jury in.
10:17AM 20 (At this time jury selection took place.)
01:49PM 21 THE COURT: Counsel, I'm prepared to give my preliminary
01:49PM 22 instructions to the jury, but I would defer that if you wish to
01:49PM 23 take a break since you haven't had one since we began this.
01:49PM 24 MS. ROBERTS: If the Court would please, we would request,
01:49PM 25 approximately, a twenty-minute break.