APPENDIX

TABLE OF CONTENTS

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
No. 23-2975

IAN BRENNER,
Appellant
v.
SUPERINTENDENT FOREST SCI;
ATTORNEY GENERAL PENNSYLVANIA;
DISTRICT ATTORNEY OF YORK COUNTY,
PENNSYLVANIA

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(No. 3-22-cv-00157)
District Judge: Honorable Daryl F. Bloom

PETITION FOR REHEARING

BEFORE: CHAGARES, *Chief Judge,* and JORDAN, HARDIMAN, SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, PHIPPS, FREEMAN, MONTGOMERY-REEVES, and CHUNG, *Circuit Judges*

The petition for rehearing filed by appellant Ian Brenner in the above-captioned matter has been submitted to the judges who participated in the decision of this Court and to all other available circuit judges of the Court in regular active service. No judge who concurred in the decision asked for rehearing, and a majority of the circuit judges of the Court in regular active service who are not disqualified did not vote for rehearing by the Court en banc. It is now hereby **ORDERED** that the petition is **DENIED.**

BY THE COURT s/ Paul B, Matey Circuit Judge
Dated: March 21, 2024

CJG/cc: J. Andrew Salemme, Esq.
James E. Zamkotowicz, Esq.
Susan E. Affronti, Esq.
Ronald Eisenberg, Esq.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

C.A. No. **23-2975**

IAN BRENNER,
Appellant
V.
SUPERINTENDENT FOREST SCI;
ATTORNEY GENERAL PENNSYLVANIA;
DISTRICT ATTORNEY OF YORK COUNTY, PENNSYLVANIA
(M.D. Pa. Civ. No. 3:22-cv-00157)

Present: BIBAS, MATEY, and CHUNG, *Circuit Judges.*

Submitted:

(1) By the Clerk for possible dismissal due to a jurisdictional defect;
(2) Appellant's jurisdictional response; and
(3) Appellant's request for a certificate of appealability under 28 U.S.C. § 2253(c)(1)

in the above-captioned case.

Respectfully,

Clerk

ORDER

Petitioner Ian Brenner's request for a certificate of appealability ("COA") is denied. Brenner has raised three habeas claims in his COA application, arguing that his trial counsel was ineffective for failing to: (1) call an expert witness on eyewitness identification; (2) argue that prosecution witness Daniek Burns was not fully and fairly cross-examined at his first trial; and (3) object to expert evidence on gunshot residue presented by the prosecution. Brenner also argues that he did not consent to having his case considered by the Magistrate Judge who was ultimately reassigned to the case after the parties signed their consent form.

After careful review of the record and the parties' filings, we conclude that jurists of reason would not dispute the conclusion that Brenner's claims lack merit because he was not prejudiced by his trial counsel's actions. *See Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003); *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Even if Brenner's trial counsel should have presented an expert witness on eyewitness identification, the jury had sufficient information about the potential flaws in Burns' identification from other witnesses to be able to evaluate the credibility of his testimony, considering the other evidence. Next, the jury was aware of Burns' criminal history and of several incidents where law enforcement agents chose not to charge him with a crime after the shooting; learning of an additional incident would not have affected the outcome. Finally, even if counsel should have objected to the admission

of the expert report authored by A.J. Schwoeble, expert witness Allison Murtha testified to the same conclusion at retrial, and her testimony and report were admissible because she presented an independent opinion from the same raw data analyzed by Schwoeble, making Schwoeble's conclusions duplicative at best. Because the COA requirement is jurisdictional, *see Gonzalez v. Thaler*, 565 U.S. 134, 142 (2012), and there is no mandatory "sequencing of jurisdictional issues," *see Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 584 (1999), there is no need to reach the issue of whether we lack jurisdiction because of the Magistrate Judge consent issue raised by Brenner in his COA application.

By the Court,
s/ Paul B. Matey
Circuit Judge

Dated: February 28, 2024
Tmm/cc: J. Andrew Salemme, Esq.
James E. Zamkotowicz, Esq.
Susan E. Affronti, Esq.
Ronald Eisenberg, Esq.

APPENDIX C

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

IAN BRENNER, : Civil No. 3:22-cv-157
Petitioner,
v. : (Magistrate Judge Bloom)

MICHAEL OVERMEYER,
Superintendent, et al.,
Respondents.

ORDER

AND NOW, this 3d day of October 2023, for the reasons outlined in the accompanying Memorandum Opinion, IT IS HEREBY ORDERED THAT the petition for a writ of habeas corpus in this case is DENIED, and that a certificate of appealability will not issue.

S/ Daryl F Bloom
Daryl F. Bloom
United States Magistrate Judge

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

IAN BRENNER, Civil No. 3:22-cv-157
Petitioner,

v. (Magistrate Judge Bloom)

MICHAEL OVERMEYER,
Superintendent, et al.,
Respondents.

MEMORANDUM OPINION[1]

I. Introduction

Ian Brenner, the petitioner, was twice convicted of first-degree murder and related crimes arising out of a shooting in York, Pennsylvania in 2005. Brenner has filed a petition for habeas corpus pursuant to 28 U.S.C. § 2254, challenging his conviction and sentence on the basis that his second trial counsel rendered ineffective assistance. (Doc. 1). After consideration, we conclude that none of Brenner's claims warrant habeas relief. Accordingly, for the following reasons, we will deny his petition.

---

[1] We exercise plenary jurisdiction of this petition pursuant to 28 U.S.C. § 636 pursuant to the consent of all parties. (Doc. 13).

II. Statement of Facts and of the Case

The factual background of the instant case was aptly summarized by the Pennsylvania Superior Court in its decision affirming the denial of Brenner's second petition for post-conviction relief:

> On October 9, 2005, Appellant himself was the victim of a shooting. Appellant was struck in the leg and arm. N.T. Jury Trial, 8/6/14, at 23. At the hospital, Appellant refused to provide the name of the friend who had driven him to the hospital and stated that he did not know who shot him. *Id.* at 24-25. After he left the hospital, Appellant declined to respond to officers when they attempted to speak further with him about the incident and the case was closed. *Id.* at 34. A few days prior to the subsequent retaliatory shooting that led to the convictions underlying this appeal, Apollonia Snyder overheard Appellant talking on a cellphone, stating that "he was going to pop Supreme when he seen him." *Id.* at 42. During the conversation, Appellant was handling a firearm in his lap. *Id.*
>
> Ten days later, at 9:30 p.m. on October 19, 2005, shots were fired outside of Allison's Bar in the City of York, resulting in the death of Anna Witter, who was struck by a ricocheting bullet. Anthony Zawadzinski and Alfonzo King

were also shot, but survived. Alfonzo King had been standing near Jeffrey Mable a/k/a "Supreme," the person who was the shooter's apparent target. All of the victims were shot with the same firearm, which was never recovered.

Police responded quickly, detaining multiple potential eyewitnesses on scene and in the immediate vicinity. Daniek Burns identified the shooter as Appellant, the target of the first shot as Supreme, and gave a description of the shooter's appearance. *See* N.T. Jury Trial, 8/5/14, at 402, 418, 437 (identifying Appellant, describing his outfit as a hoodie with the hood up, white tee shirt underneath, blue jeans, and black shoes, and explaining that the shooter aimed at Supreme first). Other witnesses provided similar descriptions, but did not identify the shooter. *See* N.T. Jury Trial, 8/5/14, at 246 (Alfonzo King describing the shooter as tall, stocky, and wearing a dark hoodie); *see also N.T.* Jury Trial, 8/6/14, at 89- 90 (explaining that while the lighting was good, Tina Ashley could not identify the shooter because he wore a gray hoodie with the hood up and had a dark complexion, but she was certain that the shooter was not Appellant); *id.* at 124-25 (Alicia Brittner describing the shooter as wearing jeans and a hoodie over the

head, but that it was too dark to see who the shooter was); *id.* at 179-80 (Lloyd Valcarcel stating that the shooter was wearing a black hoodie with the hood up, white t- shirt, blue jeans, and black shoes. However, he could not identify the shooter because he did not get a good look at him, like Daniek Burns did); *id.* at 225 (Supreme explaining that he only had a second or two to look before he dropped to the ground and feigned death, but the shooter was wearing a big black hoodie with the hood up). While being interviewed on the scene, Tina Ashley pointed in Supreme's general direction and yelled "he knows who was shooting. They were shooting at him." N.T. Jury Trial, 8/4/14, at 141.

A warrant was issued for Appellant's arrest, and six days after the shooting, he turned himself in. Upon arrest, Appellant's black Jordan sneakers, belt, and blue jeans were taken from him and submitted for forensic testing. *See* N.T. Jury Trial, 8/5/14, at 356. The black hoodie that Appellant was wearing when arrested was later separately submitted for forensic testing. *Id.* at 295, 319-20. All of the items taken from Appellant matched some of the eyewitness accounts of what the shooter was wearing and tested either consistently with or positive for gunshot residue. *Id.*

> at 301, 325-30. Appellant's belt had by far the highest concentration of gunshot residue of all the items that were submitted, and the inside had markings consistent with "something rubbing up against it on a regular basis". *Id.* at 297, 325-26. A federal grand jury proceeding was initiated against Appellant. N.T. Jury Trial, 9/13/06, at 41-57. However, before the grand jury had finished hearing testimony, the United States Attorney's Office decided that "the first jury to hear this case should be a jury from the court of common pleas of York where the homicide allegedly took place." N.T. Jury Trial, 9/13/06, at 46. Accordingly, the inquiry was concluded and Appellant proceeded to a jury trial in the York County Court of Common Pleas.

Commonwealth v. Brenner, 256 A.3d 38, 2021 WL 1978962, at *1-2 (Pa. Super. Ct. 2021).

Brenner was ultimately convicted in 2006 of first-degree murder, aggravated assault, and attempted homicide, and was sentenced to a term of life imprisonment without the possibility of parole and an additional consecutive term of five to ten years. *Id.* at *2. At this initial trial, the jury heard testimony from Daniek Burns, the eyewitness who identified Brenner as the shooter, as well as several defense witnesses who testified that they could not identify the shooter because of various conditions, such as poor lighting, distance, and the fact that the shooter wore a hood.

After the Pennsylvania Superior Court affirmed Brenner's conviction and sentence, Brenner filed a petition under Pennsylvania's Post-Conviction Relief Act ("PCRA"), arguing a host of issues. Ultimately, the Pennsylvania Superior Court granted PCRA relief due to trial counsel's failure to discuss calling character witnesses on Brenner's behalf. *See Commonwealth v. Brenner,* 81 A.3d 1010 (Pa. Super. Ct. 2013). Accordingly, Brenner stood trial for a second time in 2014.

At this second trial, several witnesses who testified at the first trial in 2006 were unavailable to testify, and their prior testimony was read to the jury. One such witness was Daniek Burns, who was deceased at the time of trial in 2014. Prior to trial, defense counsel filed a motion *in limine to* exclude Burns' testimony, which was denied. Thus, Burns' prior testimony was read to the jury. In his testimony, Burns stated that he was, at that time, incarcerated in Rikers Island in New York for an attempted criminal possession drug charge; that he had no deals with law enforcement with respect to any pending charges; that he had various prior criminal charges and had active warrants at the time of the shooting; and that he had been smoking marijuana on the night of the shooting. (Doc. 1-3, PCRA Court Opinion, at 11-12). He further testified that he saw Brenner's face, and at the first trial, subsequently identified Brenner as the shooter in the courtroom. *(Id.* at 12).

Brenner's counsel presented the testimony of three witnesses in an attempt to rebut Burns' identification of Brenner as the shooter. Curiously, although Brenner's initial conviction and sentence

were vacated based on prior counsel's failure to discuss calling character witnesses, Brenner did not call any character witnesses at this second trial.

Apollonia Snyder, Brenner's high school friend, also testified at the second trial. She stated that she was nervous to testify, but testified that a few days prior to the shooting, she was with Brenner in a car, and he was on his phone talking to someone about how he was going to "pop" Supreme, and he had a firearm in his lap while he was talking. (Doc. 1- 3, PCRA Court Opinion, at 14-15). Ms. Snyder gave this information to Detective Fetrow after Snyder was facing open charges and Detective Fetrow had reached out to her regarding the shooting. *{Id.* at 15).

The jury also heard testimony from Allison Murtha, who provided expert testimony regarding gunshot residue analyses. (Doc. 1-3, PCRA Court Opinion, at 7). Ms. Murtha's organization had received Brenner's clothing that was taken from him upon his arrest and was tested for gunshot residue, and she testified that items of Brenner's clothing, including his belt, jeans, and sneakers, contained evidence of gunshot residue that could only have come from the discharge of a firearm. *(Id.* at 7-8). She further testified on cross examination that there is always the potential for contamination, as gunshot residue could transfer from person to person or from one item of clothing to another. *(Id.)* Additionally, Ms. Murtha testified that there was no way to confirm when the gunshot residue particles were deposited on the clothing items, as Brenner was arrested, and the clothing was confiscated, six days after the shooting. *(Id.)*

Ultimately, Brenner was again convicted of first-degree murder, attempted murder, and aggravated assault, and he was sentenced to life without parole and an additional five to ten years in prison. He appealed his conviction and sentence, arguing that the verdict was against the weight of the evidence, challenging the sufficiency of the evidence, and raising evidentiary issues. *Brenner,* 2021 WL 1978962, at *3. The Superior Court affirmed, and the Pennsylvania Supreme Court denied his petition for allowance of appeal. *Id.*

Brenner subsequently filed a counseled PCRA petition, raising 16 allegations of ineffective assistance of counsel. Relevant to the instant petition, Brenner challenged counsel's failure to: present expert testimony regarding eyewitness identification; present evidence showing that there had not been a full and fair opportunity to cross examine Daniek Burns at the first trial; object to the admission of gunshot residue evidence and expert testimony; effectively cross examine Detective Fetrow; present evidence regarding Brenner's lawful purchase of firearms and license to carry firearms, and other evidence to rebut the gunshot residue evidence; object to prejudicial statements in the prosecutor's closing argument; and present additional photographs showing the lighting at the crime scene. (*See* Doc. 1-3). After two days of evidentiary hearings, the PCRA court denied Brenner's petition. *(Id).* Brenner appealed, and the Pennsylvania Superior Court upheld the denial of this PCRA petition on May 18, 2021. (*See* Doc. 1-4).

Brenner then filed the instant habeas petition on December 6, 2021. (Doc. 1). In this counseled

petition, Brenner raises seven claims of ineffective assistance of counsel, as well as a claim that counsel's cumulative errors amounted to a denial of his right to due process. *(Id).* On this score, Brenner challenges counsel's decision not to call an expert witness regarding eyewitness identification; counsel's failure to present evidence showing that there was not a full and fair opportunity to cross examine Burns; the failure to adequately cross examine Detective Fetrow on a number of issues; counsel's failure to object to the prosecution's closing argument; counsel's decision not to present evidence which allegedly would have explained the presence of gunshot residue on the defendant's clothing; and counsel's failure to introduce additional photographs of the crime scene. Brenner additionally argues that the cumulative effect of counsel's errors denied him the right to a fair trial.

For their part, the respondents assert that Brenner's claims are without merit, as these claims were thoroughly considered and denied by the state courts. After review of the petition and the underlying state court record, we agree and find that Brenner's claims are without merit. Accordingly, we will deny Brenner's petition.

III. Discussion

A. *State Prisoner Habeas Relief-The Legal Standard.*

(1) Substantive Standards

In order to obtain federal habeas corpus relief, a state prisoner seeking to invoke the power of this Court to issue a writ of habeas corpus must satisfy the standards prescribed by 28 U.S.C. § 2254, which provides in part as follows:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.
>
> (b) (1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—
>
> (A) the applicant has exhausted the remedies available in the courts of the State;
>
> (2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

28 U.S.C. § 2254(a) and (b).

As this statutory text implies, state prisoners must meet exacting substantive and procedural benchmarks in order to obtain habeas corpus relief. At the outset, a petition must satisfy exacting substantive standards to warrant relief. Federal courts may "entertain an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). By limiting habeas relief to state

conduct which violates "the Constitution or laws or treaties of the United States," § 2254 places a high threshold on the courts. Typically, habeas relief will only be granted to state prisoners in those instances where the conduct of state proceedings led to a "fundamental defect which inherently results in a complete miscarriage of justice" or was completely inconsistent with rudimentary demands of fair procedure. *See e.g., Reed v. Farley,* 512 U.S. 339, 354 (1994). Thus, claimed violations of state law, standing alone, will not entitle a petitioner to § 2254 relief, absent a showing that those violations are so great as to be of a constitutional dimension. *See Priester v. Vaughan,* 382 F.3d 394, 401-02 (3d Cir. 2004).

(2) Deference Owed to State Courts

These same principles which inform the standard of review in habeas petitions and limit habeas relief to errors of a constitutional dimension also call upon federal courts to give an appropriate degree of deference to the factual findings and legal rulings made by the state courts in the course of state criminal proceedings. There are two critical components to this deference mandated by 28 U.S.C. § 2254.

First, with respect to legal rulings by state courts, under § 2254(d), habeas relief is not available to a petitioner for any claim that has been adjudicated on its merits in the state courts unless it can be shown that the decision was either: (1) "contrary to" or involved an unreasonable application of clearly established case law; *see* 28 U.S.C. § 2254(d)(1); or (2) was "based upon an unreasonable determination of the facts," *see* 28 U.S.C. § 2254(d)(2). Applying this deferential standard of review, federal courts

frequently decline invitations by habeas petitioners to substitute their legal judgments for the considered views of the state trial and appellate courts. *See Rice v. Collins,* 546 U.S. 333, 338-39 (2006); *see also Warren v. Kyler,* 422 F.3d 132, 139-40 (3d Cir. 2006); *Gattis v. Snyder,* 278 F.3d 222, 228 (3d Cir. 2002).

In addition, § 2254(e) provides that the determination of a factual issue by a state court is presumed to be correct unless the petitioner can show by clear and convincing evidence that this factual finding was erroneous. *See* 28 U.S.C. § 2254(e)(1). This presumption in favor of the correctness of state court factual findings has been extended to a host of factual findings made in the course of criminal proceedings. *See e.g., Maggio v. Fulford,* 462 U.S. Ill, 117 (1983) (per curiam); *Demosthenes v. Baal,* 495 U.S. 731, 734-35 (1990). This principle applies to state court factual findings made both by the trial court and state appellate courts. *Rolan v. Vaughn,* 445 F.3d 671 (3d Cir.2006). Thus, we may not re-assess credibility determinations made by the state courts, and we must give equal deference to both the explicit and implicit factual findings made by the state courts. *Weeks v. Snyder,* 219 F.3d 245, 258 (3d Cir. 2000). Accordingly, in a case such as this, where a state court judgment rests upon factual findings, it is well-settled that:

> A state court decision based on a factual determination, ..., will not be overturned on factual grounds unless it was objectively unreasonable in light of the evidence presented in the state proceeding. *Miller—El v. Cockrell,* 537 U.S. 322, 123 S. Ct. 1029, 154 L.Ed.2d

> 931 (2003). We must presume that the state court's determination of factual issues was correct, and the petitioner bears the burden of rebutting this presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); *Campbell v. Vaughn,* 209 F.3d 280, 285 (3d Cir. 2000).

Rico v. Leftridge—Byrd, 340 F.3d 178, 181 (3d Cir. 2003). Applying this standard of review, federal courts may only grant habeas relief whenever "[o]ur reading of the PCRA court records convinces us that the Superior Court made an unreasonable finding of fact." *Rolan,* 445 F.3d at 681.

(3) Ineffective Assistance of Counsel Claims

These general principles apply with particular force to habeas petitions that are grounded in claims of ineffective assistance of counsel. It is undisputed that the Sixth Amendment to the United States Constitution guarantees the right of every criminal defendant to effective assistance of counsel. Under federal law, a collateral attack of a sentence based upon a claim of ineffective assistance of counsel must meet a two- part test established by the Supreme Court in order to survive. Specifically, to prevail on a claim of ineffective assistance of counsel, a petitioner must establish that: (1) the performance of counsel fell below an objective standard of reasonableness; and (2) that, but for counsel's errors, the result of the underlying proceeding would have been different. *Strickland v. Washington,* 466 U.S. 668, 687-88, 691-92 (1984). A petitioner must satisfy both of the *Strickland* prongs in order to maintain a claim of

ineffective counsel. *George v. Sively,* 254 F.3d 438, 443 (3d Cir. 2001).

At the outset, *Strickland* requires a petitioner to "establish first that counsel's performance was deficient." *Jermyn v. Horn,* 266 F.3d 257, 282 (3d Cir. 2001). This threshold showing requires a petitioner to demonstrate that counsel made errors "so serious" that counsel was not functioning as guaranteed under the Sixth Amendment. *Id.* Additionally, the petitioner must demonstrate that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms. *Id.* However, in making this assessment "[t]here is a 'strong presumption' that counsel's performance was reasonable." *Id.* (quoting *Berryman v. Morton,* 100 F.3d 1089, 1094 (3d Cir. 1996)).

But a mere showing of deficiencies by counsel is not sufficient to secure habeas relief. Under the second *Strickland* prong, a petitioner also "must demonstrate that he was prejudiced by counsel's errors." *Id.* This prejudice requirement compels the petitioner to show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* A "reasonable probability" is defined as "a probability sufficient to undermine confidence in the outcome." *Id.*

Thus, as set forth in *Strickland,* a petitioner claiming that his criminal defense counsel was constitutionally ineffective must show that his lawyer's "representation fell below an objective standard of reasonableness." *Strickland,* 466 U.S. at 688. "A fair assessment of attorney performance requires that every effort be made to eliminate the

distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Thomas v. Varner,* 428 F.3d 491, 499 (3d Cir. 2005) (quoting *Strickland,* 466 U.S. at 689). The petitioner must then prove prejudice arising from counsel's failings. Moreover,

> [I]n considering whether a petitioner suffered prejudice, "[t]he effect of counsel's inadequate performance must be evaluated in light of the totality of the evidence at trial- a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support."

Rolan, 445 F.3d at 682 (quoting *Strickland,* 466 U.S. at 696) (internal quotations omitted).

Although sometimes couched in different language, the standard for evaluating claims of ineffectiveness under Pennsylvania law is substantively consistent with the standard set forth in *Strickland. See Commonwealth v. Pierce,* 527 A.2d 973, 976—77 (Pa. 1987); *see also Werts v. Vaugh,* 228 F.3d 178, 203 (3d Cir. 2000) ("[A] state court decision that applied the Pennsylvania [ineffective assistance of counsel] test did not apply a rule of law that contradicted *Strickland* and thus was not 'contrary to' established Supreme Court precedent"). Accordingly, a federal court reviewing a claim of ineffectiveness of counsel brought in a petition under 28 U.S.C. § 2254 may grant federal habeas relief if the petitioner can show that the state court's adjudication of his claim was an "unreasonable application" of *Strickland.*

Billinger v. Cameron, 2010 U.S. Dist. LEXIS 63759, at *11, 2010 WL 2632286 (W.D. Pa. May 13, 2010). In order to prevail against this standard, a petitioner must show that the state court's decision "cannot reasonably be justified under existing Supreme Court precedent." *Hackett v. Price,* 381 F.3d 281, 287 (3d Cir. 2004); *see also Waddington v. Sarausad,* 555 U.S. 179, 190 (2009) (where the state court's application of federal law is challenged, "the state court's decision must be shown to be not only erroneous, but objectively unreasonable") (internal citations and quotations omitted).

This additional hurdle is added to the petitioner's substantive burden under *Strickland,* as the Supreme Court has observed a "doubly deferential judicial review that applies to a *Strickland* claim evaluated under the § 2254(d)(1) standard." *Knowles v. Mirzayance,* 556 U.S. Ill, 123 (2009); *see also Yarborough v. Gentry,* 540 U.S. 1, 6 (2003) (noting that the review of ineffectiveness claims is "doubly deferential when it is conducted through the lens of federal habeas"). This doubly deferential standard of review applies with particular force to strategic judgment like those thrust upon counsel in the instant case. In this regard, the Court has held that-

> "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Id.,* at 688, 104 S. Ct. 2052. "Judicial scrutiny of counsel's performance must be highly deferential," and "a court must indulge a strong presumption that counsel's conduct falls within the wide range of

> reasonable professional assistance." *Id.,* at 689, 104 S. Ct. 2052. "[Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Id.,* at 690, 104 S. Ct. 2052.

Knowles v. Mirzayance, 556 U.S. Ill, 124, 129 S. Ct. 1411, 1420, 173 L. Ed. 2d 251 (2009). The deference which is owed to these strategic choices by trial counsel is great.

> Therefore, in evaluating the first prong of the *Strickland* test, courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " *Id.* The presumption can be rebutted by showing "that the conduct was not, in fact, part of a strategy or by showing that the strategy employed was unsound." *Thomas v. Varner,* 428 F.3d 491, 499-500 (3d Cir. 2005) (footnote omitted).

Lewis v. Horn, 581 F.3d 92, 113 (3d Cir. 2009).

It is against these legal benchmarks that we assess Brenner's petition.

B. This Petition Will Be Denied.

As we have noted, Brenner asserts seven claims of trial counsel's ineffectiveness at his second trial which he asserts entitle him to habeas relief.

However, after a review of the petition and the state court records, we find that Brenner's claims lack merit, and thus, do not entitle him to habeas relief. Accordingly, this petition will be denied.

1. Failure to Call an Expert Witness

Brenner's first claim asserts that his trial counsel was ineffective for failing to call an expert witness to testify regarding the vagaries of eyewitness identification. Indeed, in *Commonwealth v. Walker,* 92 A.3d 766 (Pa. 2014), which was decided before Brenner's second trial, the Pennsylvania Supreme Court held that expert testimony on this subject was no longer *per se* inadmissible but was admissible at the discretion of the trial court. At the PCRA hearing, Brenner called Dr. Dery Strange, who was qualified as an expert in eyewitness identification. (Doc. 1-3, PCRA Court Opinion, at 23). Dr. Strange testified to several conclusions regarding eyewitness identification. These conclusions included that misidentification accounted for 70-75% of wrongful convictions,' that short periods of time and dim lighting can prevent an accurate identification; and that the accepted measures for a reliable identification were lacking in Brenner's case. *(Id.* at 23-24). Brenner asserts that the jury would likely have disbelieved Burns' testimony and his identification of Brenner if his trial counsel would have called an expert to testify to such conclusions.

The PCRA court first found that this claim had arguable merit, as the eyewitness identification of Brenner was a highly contested issue in the case. (Doc. 1-3, PCRA Court Opinion, at 23). The court further determined that a finding could be made that counsel lacked a reasonable basis for failing to call

such an expert. *(Id.)* However, the court ultimately determined that Brenner could not show prejudice such that the outcome of his case would have been different had an expert witness testified. *(Id.* at 24-25). On this score, the court discussed the "other damning testimony" elicited at trial, such as Ms. Snyder's testimony that she heard Brenner threaten to "pop" Supreme several days before the shooting and testimony that indicated Supreme was likely the target of the shooting. *(Id.* at 25-26). In addition, the Court noted the evidence indicating that there was gunshot residue on Brenner's clothing, as well as several descriptions of the shooter by various witnesses, some of which matched Brenner's build. *(Id.* at 26). Thus, the PCRA court found that Brenner did not suffer prejudice and denied this claim.

The Superior Court agreed. (Doc. 1-4, Superior Court Opinion, at 16-20). In affirming the denial of this claim, the Superior Court reasoned that while trial counsel made no attempt to call an expert on this subject despite the fact that the eyewitness identification was contested, counsel "did not rely solely on cross-examination and closing argument to convey the relevant eyewitness factors to the jury." *(Id.* at 19). In addition, counsel called three fact witnesses, all of whom were standing near Burns during the shooting and testified that they could not identify the shooter due to various conditions, such as the lighting, distance, and the short time in which they had to see the shooter. *(Id.)* As the court pointed out, one of these witnesses testified that Burns stated after-the-fact that he was actually unable to identify the shooter. *(Id.)* The court then went on to note the other evidence of Brenner's guilt, including the

testimony of his motive to shoot Supreme and the gunshot residue on his clothing. *(Id.* at 19-20). Ultimately, the court concluded that Brenner suffered no prejudice from counsel's failure to call an expert witness. *(Id.* at 20).

After consideration, we cannot conclude that the state courts' determinations were contrary to law or based on an unreasonable determination of the facts. Rather, the state courts carefully considered this claim and determined that, although counsel could have been found to have rendered ineffective assistance by failing to call an expert, Brenner suffered no prejudice. At the outset, while *Walker* permitted the use of expert testimony regarding eyewitness identification, it does not follow that counsel is *per se* ineffective when counsel fails to call an expert in this setting.

Moreover, as the courts noted, Burns was an imperfect witness. The jury was aware of his prior criminal history, his active warrants at the time of the shooting, and the circumstances surrounding his identification of Brenner, including that he had smoked marijuana and was some distance from the shooter. To rebut his identification of Brenner, trial counsel called three fact witnesses, all of whom testified that they were near Burns during the shooting yet could not identify the shooter. In addition, circumstantial evidence presented by the Commonwealth indicated that Brenner had a motive to shoot Supreme, that Supreme was likely the target of the shooting, and that Brenner had gunshot residue on his clothing. Given this other evidence of Brenner's guilt, the state courts found that there was no real probability that the outcome of his trial would have

been different had an expert been called. We find no error in the state court decisions here. Accordingly, this claim does not afford Brenner relief.

2. Failure to Ensure a Full and Fair Cross Examination of the Eyewitness

Brenner next asserts that his trial counsel was ineffective for failing to argue that Burns had not been fully and fairly cross examined at the first trial, and thus, his testimony should have been precluded at the second trial because he was unavailable. This claim is premised on Brenner's belief that Burns was receiving favorable treatment by the Commonwealth at the time of Brenner's first trial, as Burns had allegedly been stopped with drugs in York and subsequently fled from police, but no charges were ever filed. Detective Fetrow testified to Burns' flight in front of a federal grand jury, but this testimony was never introduced. Burns did not testify to this incident at the first trial, and second trial counsel failed to elicit this information from Detective Fetrow on retrial or introduce evidence of the grand jury testimony. Thus, Brenner contends that the admission of Burns' prior testimony violated his rights under the Confrontation Clause, and that both initial counsel and retrial counsel were ineffective for failing to preclude Burns' testimony or otherwise bring the issue to light.

The state courts determined that Brenner suffered no prejudice from the failure to elicit the testimony regarding Burns' flight from police or lack of charges brought, and further found that Burns' testimony was properly admitted in the second trial. At the PCRA level, the court found that while there was some merit to the claim that counsel failed to

elicit testimony from either Burns or Detective Fetrow regarding the lack of charges for a drug stop, the court further found that Brenner suffered no prejudice:

> We cannot say that it would have for the simple fact that, unlike in the cases cited by the defense, the jury was aware of numerous involvements that Mr. Burns had with law enforcement and Mr. Burns testified that he had no deals with any law enforcement agents. The jury was arguable deprived of just one instance, which may well have been an oversight by all defense counsel and the Commonwealth in light of the surfeit of crime that Mr. Burns was involved in. However, as we recounted in the facts section, defense counsel did elicit from Mr. Burns that he was selling drugs in York. And, critically, we note that Mr. Burns' testimony indicated that he told the authorities where he could be located if he did not show up, which, seemingly, addresses Detective Fetrow's questioning regarding the reason Mr. Burns had to run from authorities.
>
> .....
>
> While the preceding does not directly address Mr. Burns fleeing from police on a particular day when he was found to possess drugs, to this Court's mind, it addresses his flight from police in general as a desire to safeguard himself in York as a result of the case

> *sub judice.* Mr. Burns had provided authorities with a description of where he could be found if he did not show up and Mr. Burns testified that this flight was caused by his fear of street reprisal related to the case in question. There could be no greater chance of success were the jury to have been aware of Detective Fetrow's revelation that he was unsure of why Mr. Burns fled. Mr. Burns already provided the reason in an unrelated answer to the jury.

(Doc. 1-3, PCRA Court Opinion, at 34-35).

Additionally, the court noted that the jury was already aware that investigators failed to arrest Burns on either of the two active warrants he had at that time, or for his new criminal conduct of possessing a bulletproof vest. (Doc. 1-3, PCRA Court Opinion, at 36). The court further recounted the circumstantial evidence that supported Brenner's conviction, including evidence of motive and several descriptions of the shooter matching Brenner's build and clothing. (*Id.)* Accordingly, the court concluded that the failure to elicit another instance of the Commonwealth potentially overlooking Burns' criminal activity would not have led to a different outcome for Brenner. *(Id.)* Thus, the court held that initial trial counsel was not ineffective, and retrial counsel was not ineffective for failing to incorporate Detective Fetrow's statement into the record to support a claim of trial counsel's ineffectiveness. *(Id.)*

On appeal, the Superior Court agreed that Brenner had failed to establish that trial counsel was ineffective in his cross examination of Burns. On this

score, the court noted that Brenner had not called initial trial counsel at the evidentiary PCRA hearing, and thus, counsel was never given the opportunity to explain his trial strategy. (Doc. 1-4, Superior Court Opinion, at 15). Accordingly, the Superior Court held that because Brenner failed to establish trial counsel's ineffectiveness, the trial court did not err in permitting Burns' testimony at the second trial. *(Id.* at 15-16). The court further held that because initial trial counsel was not shown to be ineffective, retrial counsel was not effective for failing to raise this issue in his initial PCRA petition. *(Id.* at 16).

Given this thorough discussion and reasoning by the state courts, we cannot conclude that the state courts' determinations were contrary to law or based on an unreasonable determination of the facts. Rather, the state courts engaged in a thorough analysis and concluded that Brenner's attorneys were not ineffective, and that the trial court did not abuse its discretion when it permitted Burns' testimony on retrial. Accordingly, this claim does not warrant habeas relief.

3. Failure to Adequately Cross Examine Detective Fetrow

Brenner also challenges his counsel's cross examination of Detective Fetrow regarding several other matters in addition to the matter of Burns' flight from police and his motive to lie. On this score, Brenner asserts that counsel failed to adequately cross examine Detective Fetrow regarding Tina Ashley's identification of the shooter's target, as well as the timeline in which Brenner's sweatshirt was seized by authorities.

With respect to the claim that counsel failed to cross examine Detective Fetrow regarding Burns' motive to lie, we conclude as we did above that Brenner has not demonstrated his counsel was ineffective on this score. Indeed, as we have noted, the state courts thoroughly considered this claim and found that, given the myriad of other evidence against him, the failure to cross examine Detective Fetrow regarding Burns' motive to lie would not have led to a different outcome. In fact, the state courts explained that the jury had heard evidence regarding Burns' motive to lie, including the fact that he had active warrants at the time he was questioned about this incident. Accordingly, this claim has no merit.

The courts also considered Brenner's claim that counsel failed to cross examine Detective Fetrow about Tina Ashley's identification of the shooter's intended target. On retrial, Detective Fetrow testified that Ms. Ashley identified the target as Supreme, or Jeffrey Mable. Brenner contends that Ashley's excited utterance, which was omitted on retrial, actually indicated that she was pointing toward a group of people and not Mr. Mable specifically. Accordingly, he argues that counsel should have cross examined Detective Fetrow regarding his certainty that Ms. Ashley identified Mr. Mable as the target.

The PCRA court considered this claim and found that counsel was not ineffective on this score:

> The potential targeting of Mr. Mable is but one fact in the trial and not a determinative one. The use of a firearm to target *someone* is sufficient to undergird transferred intent for a first-degree murder charge. There is evidence

> of the Defendant's intent to target Mr. Mable, via Apollonia Snyder's testimony that the Defendant stated he was going to kill Mr. Mable. And there is evidence of the Defendant's motive to target Mr. Mable, via testimony that the Defendant was evasive regarding who shot him prior to the murder of Ms. Witter. Detective Fetrow's testimony merely supplied Ms. Ashley's excited utterance that Mr. Mable, amongst others, knew they were being shot at. Detective Fetrow seems to have narrowed Ms. Ashley's identification of targets down to just one; however, the other evidence of the trial points to the Defendant having motive and intent regarding Mr. Mable. We do not believe arguable merit has been sufficiently made out.

(Doc. 1-3, PCRA Court Opinion, at 40). The court went on to find that given the other evidence of Brenner's guilt, Brenner suffered no prejudice from counsel's failure to cross examine Detective Fetrow about this matter. *(Id.,* at 40-41).

The Superior Court agreed. (Doc. 1-4, Superior Court Opinion, at 31-32). In its decision affirming the denial of Brenner's PCRA petition, the court additionally noted that Mable testified at the second trial that he did not know who was the shooter's target. *(Id.* at 31). Thus, the court concluded that this testimony significantly reduced the probative value of Ashley's excited utterance that Mable was the target, and habeas relief was not warranted. *(Id.* at 32).

The state courts similarly found no merit to Brenner's claim concerning the failure to cross examine Detective Fetrow about the sweatshirt and the timeline in which it was seized. Regarding this claim, Brenner asserts that counsel should have questioned Detective Fetrow regarding his passing admission that Brenner's sweatshirt was not seized and tested until sometime after it had been handled by correctional staff following Brenner's arrest, which could have allowed for contamination. In support of this claim, Brenner submitted articles that discussed the apparent ease of contamination in cases involving gunshot residue.

The PCRA court held that Brenner did not show a substantially greater chance of success had the jury been aware of the conclusions set forth in these articles. (Doc. 1-3, PCRA Court Opinion, at 42). The court noted that the expert who testified at trial, Ms. Murtha, testified that there was not a substantial amount of gunshot residue on the sweatshirt, and further testified that particulate loss could occur with temporal delays. *(Id.)* The court further recognized that, disregarding the sweatshirt, Brenner's other items of clothing were covered in gunshot residue and associated particles. *(Id.)* Accordingly, the court found that counsel's actions did not lack a reasonable basis, and moreover, that Brenner was not prejudiced. *(Id.* at 42-43).

On appeal, the Superior Court agreed. On this score, the court recounted the evidence of gunshot residue on Brenner's shoes and belt, which was collected within minutes of him being taken into custody. (Doc. 1-4, Superior Court Opinion, at 33). The court further noted Ms. Murtha's testimony

regarding the dissipation of gunshot residue after time. *(Id.)* However, the court reasoned that the jury was aware the sweatshirt did not have three-component gunshot residue, and thus, its main relevance was that it matched the description of the sweatshirt the shooter wore, rather than the presence of gunshot residue. *(Id.)* Accordingly, the court found that it was not likely that cross examining Detective Fetrow on this issue would have led to a different outcome. *(Id.)*

Given the thorough treatment of these issues by the state courts, we cannot conclude that their determinations were contrary to law or based on an unreasonable determination of the facts. Indeed, the record supports the state courts' conclusions that counsel was not ineffective for failing to cross examine Detective Fetrow about these matters, and further, that Brenner suffered no prejudice. On this score, the record indicates that the jury was aware of Burns' motive to lie and the Commonwealth's purported overlooking of his criminal conduct; of Ms. Ashley's purported identification of Mable as the target and Mable's testimony that he was unaware of who the target was; and of the potential for contamination of gunshot residue. Armed with this knowledge, the jury nonetheless found that there was enough evidence presented at trial to convict Brenner of first-degree murder. We find no error in the state courts' decisions, and as such, this claim does not entitle Brenner to habeas relief.

4. Failure to Object to the Admission of Gunshot Residue Reports and Expert Testimony

Brenner's next claim asserts that counsel failed to object to the admission of two expert reports regarding gunshot residue and the testimony of Ms. Murtha as a gunshot residue expert. This claim is premised on Brenner's assertion that the first gunshot residue report was written by someone other than Ms. Murtha, and thus, it should not have been admitted at the second trial because the initial expert was unavailable. Further, Brenner argues that counsel should have objected to Ms. Murtha's report and her testimony as an expert witness because her findings and testimony were based on the prior expert's reports rather than her own, and thus, the admission of this evidence violated his rights under the Confrontation Clause.

The PCRA court considered this claim and found that the initial expert report rendered by A. J. Schwoeble, who did not testify at the first trial and was unavailable at the time of the second trial, should not have been admitted. (Doc. 1-3, PCRA Court Opinion, at 91). Regarding Ms. Murtha's testimony and report, the court analyzed the admission of this evidence under *Bullcoming v. New Mexico,* 564 U.S. 647 (2011) and *Commonwealth v. Yohe,* 79 A.3d 520 (Pa. 2013), and ultimately found that Murtha's testimony and report were admissible and did not violate the Confrontation Clause.

In *Bullcoming,* the Supreme Court of the United States found that the use of a "surrogate analyst" with no connection to the report at issue to testify to another analyst's findings violated the Confrontation Clause. *Bullcoming,* 564 U.S. at 652. The testifying analyst in *Bullcoming* did not perform the tests contained in the certification introduced at

trial and did not sign the certification; he merely read another analyst's findings into the record. *Id.* In *Yohe,* which the PCRA court ultimately relied on, the Pennsylvania Supreme Court distinguished *Bullcoming* from the facts of its case. *Yohe,* 79 A.3d at 541. In that case, a toxicology report containing the defendant's blood alcohol content was introduced into evidence, and an expert testified as to the contents and results of the report. *Id.* at 539-40. While the expert did not collect the raw data used to ultimately determine the defendant's blood alcohol content, he "reached the conclusion in the Toxicology Report based on his analysis of the raw data, certified the results, and signed his name to them." *Id.* at 540. The *Yohe* court held that this testimony was different from that in *Bullcoming* because the expert in *Yohe* reached his own independent conclusions and wrote his own report. *Id.* at 541. Thus, this expert was the appropriate witness to testify and be cross examined at trial. *Id.*

In light of *Yohe,* while the PCRA court opined that Murtha's testimony seemed more akin to the disallowed "surrogate" in *Bullcoming,* it nonetheless held that because Murtha created her own report and testified to her own conclusions, there was no Confrontation Clause violation in Brenner's case. (Doc. 1-3, PCRA Court Opinion, at 94). On appeal, the Superior Court agreed that the initial expert report prepared by Mr. Schwoeble should not have been admitted, but that there was no Confrontation Clause violation with respect to Murtha's report and testimony. (Doc. 1-4, Superior Court Opinion, at 22-26). The Superior Court opined that Murtha's report and testimony fit squarely into the *Yohe* analysis, in

that although she did not collect the raw data underlying the report, she performed an analysis and came to her own independent conclusions that she then testified to. *(Id.* at 24-25). The court further held that Brenner had not shown that his counsel was ineffective for failing to object to the admission of Schwoeble's report because the report was merely cumulative of Murtha's report, which was properly admitted. *(Id.* at 26-27).

After consideration, we cannot conclude that the state courts' decisions were contrary to law or based on an unreasonable determination of the facts. The courts explained that based on *Yohe,* because Ms. Murtha's report contained her own independent conclusions and opinions and did not simply parrot Mr. Schwoeble's report, the report and her testimony were admissible. Further, although the courts found that the admission of Schwoeble's report was error, the error was deemed harmless because his report was cumulative of Murtha's report, and thus he suffered no prejudice from its admission. Accordingly, given this thorough discussion by the state courts, we cannot conclude that this claim entitles Brenner to habeas relief.

5. Failure to Present Evidence to Explain Gunshot Residue on the Defendant's Clothing

Brenner further asserts that his counsel was ineffective for failing to introduce evidence at trial that would have, in his view, innocently explained the presence of gunshot residue on his clothing. Brenner contends that counsel should have introduced evidence showing that he was a lawful gun owner, that he had a license to carry a firearm, and evidence of a second sweatshirt owned by Brenner that that

also had gunshot residue particles on it. Brenner argues that this evidence would have innocently explained why his clothing contained particles of gunshot residue.

The PCRA court addressed this claim and found that it did not afford Brenner relief. As to the evidence of Brenner's lawfully purchased firearms, counsel testified at the PCRA hearing that he did not introduce this evidence because he did not want to put a gun in Brenner's hands. (Doc. 1-3, PCRA Court Opinion, at 44). Counsel further testified that he had not considered the issue of presenting the second sweatshirt, but that he could see it cutting both ways and could not guess what a jury would have done with that evidence. (*Id.*) The PCRA court found that counsel had a reasonable basis for not introducing these items into evidence, reasoning that the evidence had the potential to either provide an innocent explanation for the gunshot residue or cause harm to the defendant's case. (*Id.)* The court further found that Brenner suffered no prejudice given the other evidence of his guilt. *(Id.* at 46). The Superior Court agreed, finding that counsel's decision to not introduce these items was a reasonable strategy. (Doc. 1-4, Superior Court Opinion, at 34-35).

We cannot conclude that these decisions were contrary to law or based on an unreasonable application of the facts. The state courts thoroughly explained that counsel had a reasonable basis for not introducing these pieces of evidence, and thus was not ineffective. Indeed, retrial counsel stated that he chose not to introduce these items— evidence of legally-owned firearms and a sweatshirt containing gunshot residue particles—into evidence because he

thought they had the potential to harm Brenner's case. Accordingly, we cannot conclude that the state courts unreasonably applied *Strickland,* and this claim does not afford Brenner relief.

6. Failure to Object to the Prosecution's Closing Argument

Brenner next asserts that his retrial counsel was ineffective for failing to object to several statements made by the prosecutor in closing argument. Specifically, the defendant points to seven comments made by the prosecutor in his closing, which Brenner claims were false statements or statements regarding the credibility of the witnesses. The state courts addressed these claims and found no merit. We will address each claim in turn.

a. Statements characterizing Apollonia Snyder's Testimony

First, Brenner takes issue with the prosecutor's statements characterizing Snyder as "nervous" while testifying. He also argues that the prosecutor improperly stated that Snyder volunteered information about Brenner to the police. In his closing argument, the prosecutor remarked that Snyder was nervous because she was "facing a guy who's now on trial for a murder that she knows did it." (Doc. 1-3, PCRA Court Opinion, at 59). At the PCRA level, Brenner argued that this statement was inconsistent with Snyder's testimony regarding the threat she heard while in the car with Brenner.

The PCRA court found no merit to this claim. The court recognized that Snyder indicated that she was nervous and found that the prosecutor was asking the jury to draw a reasonable inference that she was nervous because she had heard Brenner

threaten Supreme's life while handling a firearm. (Doc. 1-3, PCRA Court Opinion, at 59). The court also recognized that Snyder testified that coming forward was "the right thing to do," implying that she believed Brenner was the shooter. (*Id.*) The court held the prosecutor's statement was a permissible inference given Snyder's testimony. *(Id.)* The Superior Court agreed, finding that the prosecution's statement was a reasonable inference drawn from Snyder's testimony, and Brenner's counsel was not ineffective for failing to object. (Doc. 1-4, Superior Court Opinion, at 40).

We cannot conclude that the state courts' determinations were erroneous. Snyder testified that she heard Brenner threaten Supreme's life while holding a firearm and stated that she was nervous to testify. The prosecutor's statement to the jury that Snyder knew who the killer was constituted a permissible inference drawn from Snyder's own testimony. Accordingly, counsel was not ineffective for failing to object, and Brenner is not entitled to relief.

Brenner also argues that the prosecutor made false statements to the jury about Snyder volunteering information to the police. He contends that this statement mischaracterized the facts to the jury because Snyder did not volunteer information until Detective Fetrow reached out to her. The PCRA court first acknowledged that this statement was likely in response to defense counsel's statement that Snyder never came forward to the police. (Doc. 1-3, PCRA Court Opinion, at 62). The court also noted that Detective Fetrow's cross-examination revealed that he contacted Snyder, who then volunteered

information about Brenner. *(Id.* at 61-62). Thus, the court found that counsel was not ineffective for failing to object to this statement, and Brenner suffered no prejudice because the jury was instructed that counsel's statements were not evidence. *(Id.* at 63). The Superior Court agreed. (Doc. 1-4, Superior Court Opinion, at 41). The court reasoned that the prosecutor's remark was not the type of intentional misstatement that Brenner claimed, and that Brenner had not shown how this comment had prejudiced the jury against him. *(Id.* at 41-42).

We find no error here. The state courts explained that the prosecutor's characterization of Snyder coming forward was a permissible statement in response to defense counsel's attempt to make it appear that Snyder was coaxed into coming forward. Moreover, Brenner has not shown that he suffered any prejudice because of counsel's failure to object to this statement. Accordingly, this claim affords Brenner no relief.

b. Statements regarding Tina Ashley's Testimony

Next, Brenner challenges statements made by the prosecution concerning Tina Ashley's testimony. Specifically, he argues that the prosecution made false statements concerning Ashley's ability to see Supreme during the shooting; made a false statement that Ashley saw Burns run past her after the shooting; and improperly commented on her familiarity with Brenner.

The PCRA court found that none of these claims warranted relief. (Doc. 1-3, PCRA Court Opinion, at 63-70). Regarding the statement that Ashley was able to see Supreme during the shooting,

the court found that the prosecutor was simply characterizing the evidence based on inferences that could be drawn from Ashley's testimony. *(Id.* at 64). With respect to the statement that Ashley saw Burns running past her, the court found that this statement was also a reasonable inference drawn from the testimony of both Ashley and Burns. *(Id.* at 65-67). The court further found that the prosecutor's remark regarding Ashley's friendly demeanor toward Brenner during the trial was permissible, as it highlighted conflicting testimony that suggested Ashley did not know Brenner that well. *(Id.* at 69-70). On appeal, the Superior Court agreed, finding that these statements by the prosecution in its closing argument were permissible, and accordingly, counsel was not ineffective for failing to object. (Doc. 1-4, Superior Court Opinion, at 42-44).

Given this thorough analysis by the state courts, we cannot conclude that these decisions were contrary to law or based on an unreasonable determination of the facts. Rather, the courts found that these statements by the prosecution were permissible, in that they were based on reasonable inferences that could be drawn from the testimony elicited at trial. Accordingly, counsel could not be deemed ineffective for failing to object to these statements, and Brenner is not entitled to relief on this claim.

c. Statement pertaining to Lloyd Valcarcel's Testimony

Next, Brenner challenges his counsel's failure to object to the prosecutor's characterization of Lloyd Valcarcel's testimony. In his closing, the prosecutor recounted Valcarcel's testimony and regarded

Valcarcel as someone who "couldn't tell the truth if his life depended on it." (Doc. 1-3, PCRA Court Opinion, at 72) (citations to the record omitted). The prosecutor went on to highlight Valcarcel's testimony in which he definitively stated that Brenner was not the shooter, which conflicted with his written statement to police that he did not know if Brenner even knew about the shooting. *(Id.* at 72-73). Brenner contends that this statement by the prosecutor impermissibly spoke to Valcarcel's credibility.

The PCRA court found that this claim was without merit. (Doc. 1- 3, PCRA Court Opinion, at 73). The court emphasized that this statement by the prosecutor merely highlighted what the jury already knew based on the evidence produced at trial—that Valcarcel either lied in his written statement or lied when he definitively stated that Brenner was not the shooter. *(Id.)* Accordingly, based on the relevant caselaw, the court found that this statement was not unduly prejudicial to Brenner. *(Id.)* (discussing *Commonwealth v. Carpenter,* 515 A.2d 531, 536 (Pa. 1987)). The Superior Court agreed, finding that the conclusion of the PCRA court was supported by caselaw and by the record. (Doc. 1-4, Superior Court Opinion, at 45).

We cannot conclude that the state courts erred in their determinations. The courts' well-reasoned opinions set forth the relevant caselaw and established that the prosecutor's remarks regarding Valcarcel's testimony were permissible. Accordingly, Brenner's counsel could not be deemed ineffective for failing to object to the remark. This claim does not afford Brenner relief.

d. Statement characterizing Brenner as "about as Cold a Killer as there Exists"

Finally, Brenner argues that the prosecutor's statement characterizing Brenner as "about as cold a killer as there exists" amounted to inflammatory name-calling and was inherently prejudicial. The PCRA court, applying the relevant law, determined that this statement was based upon the underlying facts and related to an underlying element of the crime Brenner was charged with—specific intent to kill. (Doc. 1-3, PCRA Court Opinion, at 77) (discussing *Commonwealth v. Clancy,* 192 A.3d 44 (Pa. 2018)). Thus, while the court recognized that such characterizations are not always permissible, in the instant case, the prosecutor's remark comported with the facts presented and highlighted Brenner's premeditation and specific intent to kill. *(Id.)* Accordingly, the court concluded that counsel was not ineffective for failing to object to this statement. *(Id.)* The Superior Court agreed, reasoning that this remark was permissible under *Clancy* and characterizing the prosecutor's remark as "an isolated use of oratorical flair." (Doc. 1-4, Superior Court Opinion, at 47-49).

Based on the foregoing, we cannot conclude that these state court determinations were erroneous. Rather, applying relevant caselaw, the courts found that this remark by the prosecutor was permissible under the circumstances. Accordingly, Brenner's counsel was not ineffective for filing to object, and this claim affords him no relief.

7. Failure to Present Additional Photographs of the Crime Scene

Brenner's final substantive challenge concerns his counsel's failure to introduce additional photographs into evidence to depict the lighting at the crime scene. At the PCRA level, the court first noted that there were several photographs admitted into evidence showing the lighting at the crime scene, and several witnesses gave conflicting accounts of the lighting at the scene. (Doc. 1-3, PCRA Court Opinion, at 55-56). Accordingly, after viewing the photographs in question the court found that the additional photographs would have been cumulative and introducing them at trial would not have led to a substantially greater chance of success at trial. *(Id.)* The court further found that Brenner suffered no prejudice given the other evidence of his guilt, including eyewitness testimony and gunshot residue evidence. *(Id.* at 57). The Superior Court agreed, reasoning that the jury heard testimony from various witnesses regarding the lighting conditions at the scene and saw photographs of the scene, and thus, the additional photographs would have been cumulative. (Doc. 1-4, Superior Court Opinion, at 53-54).

We find no error in the state courts' determinations. The record supports the courts' conclusions that additional photographs of the crime scene would have been cumulative, as there were photographs introduced and several witnesses who testified as to the lighting conditions. Thus, it was within the province of the jury to determine who to credit to determine the lighting conditions the night of the shooting, and additional photographs would not have resulted in a different outcome for Brenner. Accordingly, his counsel cannot be deemed ineffective on this score, and this claim does not warrant relief.

8. Cumulative Errors

As a last-ditch effort, Brenner asserts that the cumulative effect of counsel's errors prejudiced him such that he was denied a fair trial. However, this claim also fails as a matter of law, as we have found that Brenner's counsel did not render ineffective assistance. *See Aponte v. Eckard,* 2016 WL 8201308, at *20 (E.D. Pa. June 3, 2016) ("The cumulative error doctrine requires the existence of 'errors' to aggregate. Absent such errors by counsel, the cumulative error doctrine does not apply"). Accordingly, because we have concluded that Brenner's counsel was not ineffective, this claim of cumulative errors does not entitle him to habeas relief.

Finally, we have carefully considered whether Brenner is entitled to a certificate of appealability under 28 U.S.C. § 2253. As the Supreme Court observed "the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel,* 529 U.S. 473, 484, (2000). Here, we conclude that Brenner has made no such showing, nor can he in light of the state court findings and clear evidence of his factual guilt. Accordingly, a certificate of appealability will not issue in this case.

IV. Conclusion

Accordingly, for the foregoing reasons, the petition for a writ of habeas corpus in this case will be DENIED, and a certificate of appealability will not issue.

An appropriate order follows.

s/Daryl F. Bloom

Daryl F. Bloom
United States Magistrate Judge

DATED: October 3, 2023

APPENDIX D

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA
v.
IAN CHRISTOPHER BRENNER
Appellant
No. 610 MDA 2020

Appeal from the PCRA Order Entered March 23, 2020
In the Court of Common Pleas of York County Criminal Division at No(s): CP-67-CR-0002170-2006

BEFORE: BOWES, J., OLSON, J., and KING, J.
MEMORANDUM BY BOWES, J.:
FILED MAY 18, 2021

Ian Christopher Brenner appeals from the order that denied his Post Conviction Relief Act ("PCRA") petition. Upon careful review, we affirm.

On October 9, 2005, Appellant himself was the victim of a shooting. Appellant was struck in the leg and arm. N.T. Jury Trial, 8/6/14, at 23. At the hospital, Appellant refused to provide the name of the friend who had driven him to the hospital and stated that he did not know who shot him. *Id.* at 24-25. After he left the hospital, Appellant declined to respond to officers when they attempted to speak further with him about the incident and the case was closed. *Id.* at 34. A few days prior to the subsequent retaliatory shooting that led to the convictions underlying this

appeal, Apollonia Snyder overheard Appellant talking on a cellphone, stating that "he was going to pop Supreme when he seen him." *Id.* at 42. During the conversation, Appellant was handling a firearm in his lap. *Id.*

Ten days later, at 9:30 p.m. on October 19, 2005, shots were fired outside of Allison's Bar in the City of York, resulting in the death of Anna Witter, who was struck by a ricocheting bullet. Anthony Zawadzinki and Alfonzo King were also shot, but survived. Alfonzo King had been standing near Jeffrey Mable a/k/a "Supreme," the person who was the shooter's apparent target. All of the victims were shot with the same firearm, which was never recovered.

Police responded quickly, detaining multiple potential eyewitnesses on scene and in the immediate vicinity. Daniek Burns identified the shooter as Appellant, the target of the first shot as Supreme, and gave a description of the shooter's appearance. *See* N.T. Jury Trial, 8/5/14, at 402, 418, 437 (identifying Appellant, describing his outfit as a hoodie with the hood up, white tee shirt underneath, blue jeans, and black shoes, and explaining that the shooter aimed at Supreme first). Other witnesses provided similar descriptions, but did not identify the shooter. *See* N.T. Jury Trial, 8/5/14, at 246 (Alfonzo King describing the shooter as tall, stocky, and wearing a dark hoodie); *see also* N.T. Jury Trial, 8/6/14, at 89-90 (explaining that while the lighting was good, Tina Ashley could not identify the shooter because he wore a gray hoodie with the hood up and had a dark complexion, but she was certain that the shooter was not Appellant); *id.* at 124-25 (Alicia Brittner describing the shooter as

wearing jeans and a hoodie over the head, but that it was too dark to see who the shooter was); *id.* at 179-80 (Lloyd Valcarcel stating that the shooter was wearing a black hoodie with the hood up, white t-shirt, blue jeans, and black shoes. However, he could not identify the shooter because he did not get a good look at him, like Daniek Burns did); id. at 225 (Supreme explaining that he only had a second or two to look before he dropped to the ground and feigned death, but the shooter was wearing a big black hoodie with the hood up). While being interviewed on the scene, Tina Ashley pointed in Supreme's general direction and yelled "he knows who was shooting. They were shooting at him." N.T. Jury Trial, 8/4/14, at 141.

A warrant was issued for Appellant's arrest, and six days after the shooting, he turned himself in. Upon arrest, Appellant's black Jordan sneakers, belt, and blue jeans were taken from him and submitted for forensic testing. *See* N.T. Jury Trial, 8/5/14, at 356. The black hoodie that Appellant was wearing when arrested was later separately submitted for forensic testing. *Id.* at 295, 319-20. All of the items taken from Appellant matched some of the eyewitness accounts of what the shooter was wearing and tested either consistently with or positive for gunshot residue. *Id.* at 301, 325-30. Appellant's belt had by far the highest concentration of gunshot residue of all the items that were submitted, and the inside had markings consistent with "something rubbing up against it on a regular basis". Id. at 297, 325-26.

A federal grand jury proceeding was initiated against Appellant. N.T. Jury Trial, 9/13/06, at 41-57. However, before the grand jury had finished hearing

testimony, the United States Attorney's Office decided that "the first jury to hear this case should be a jury from the court of common pleas of York where the homicide allegedly took place." N.T. Jury Trial, 9/13/06, at 46. Accordingly, the inquiry was concluded and Appellant proceeded to a jury trial in the York County Court of Common Pleas.

At the trial, the Commonwealth presented Charles Maner, who testified that Appellant discussed the shooting with him while they were housed together in the York County Prison. *See* N.T. Jury Trial, 9/12/06, at 209-12. According to Maner, Appellant accidentally shot a woman and felt bad about it, because he had intended to hit the person who had shot him earlier that month. *Id.* at 212-14. The defense countered with Tawanna Chavis, who testified that Appellant was at her house the entire night of the shooting. *See* N.T. Jury Trial, 9/14/06, at 135.

The jury convicted Appellant of the first-degree murder of Anna Witter, aggravated assault—serious bodily injury of Alfonso King, aggravated assault—bodily injury with a deadly weapon of Anthony Zawadzinski, and the attempted homicide of Jeffrey Mable. *See* N.T. Jury Trial, 9/14/16, at 120. In total, Appellant was sentenced to serve life imprisonment without the possibility of parole ("LWOP"), plus a consecutive term of five to ten years. On direct appeal, we affirmed Appellant's judgment of sentence and our Supreme Court denied his petition for allowance of appeal. *Commonwealth v. Brenner*, 998 A.2d 998 (Pa.Super. 2010) (unpublished memorandum), appeal denied, 13 A.3d 474 (Pa. 2010).

Appellant filed a timely, counseled PCRA petition. During the PCRA proceedings, Appellant was represented by Joseph Sembrot, Esquire. After two evidentiary hearings, at which PCRA counsel called former Assistant District Attorney ("ADA") Bill Graff, trial counsel Mark Keenheel, Charles Manor's trial counsel, two character witnesses, his private investigator, Appellant, and multiple fact witnesses, the PCRA court denied his petition. An appeal followed, wherein Appellant reiterated the many allegations of ineffective assistance of counsel and asserted that the Commonwealth had committed a *Brady*[1] violation by failing to disclose alleged consideration afforded to Charles Maner in exchange for his testimony against Appellant. We reversed the PCRA court order, vacated Appellant's convictions, and remanded for a new trial after finding that trial counsel was ineffective when he failed to discuss the possibility of calling character witnesses with Appellant pre-trial. *See Commonwealth v. Brenner*, 81 A.3d 1010 (Pa.Super. 2013) (unpublished memorandum). Due to the resolution of this issue, we did not reach the *Brady* issue or the other remaining issues. Appellant filed a petition for allowance of appeal, which was denied. *See Commonwealth v. Brenner*, 80 A.3d 774 (Pa. 2013).

Upon remand in a new trial court, Appellant proceeded with pre-trial motions, including an omnibus pretrial motion seeking to suppress the photographic identification of Appellant by Daniek Burns as unduly suggestive. After a hearing and submission of a brief on the remaining issues, the trial court denied Appellant's omnibus pretrial motion.

---

[1] *Brady v. Maryland*, 373 U.S. 83 (1963).

Appellant also filed a motion in limine attempting to preclude the Commonwealth from admitting the prior testimony of now-deceased, and therefore unavailable, Daniek Burns. The Commonwealth countered that Attorney Keenheel was not found ineffective due to any alleged deficiencies in his handling of Burns. Since Appellant had a full and fair opportunity for cross examination while represented by counsel, the Commonwealth maintained that Daniek Burns's prior testimony should be admitted. The trial court agreed, denying Appellant's motion in limine.

Appellant proceeded to his second jury trial in August of 2014. Attorney Sembrot continued to represent Appellant. At re-trial, the Commonwealth admitted and placed before the jury the prior trial testimony of Daniek Burns, Anthony Zawadinski, and Detective Troy Cromer. Unlike the first trial, the Commonwealth did not call Charles Maner or an Assistant United States Attorney to explain the federal grand jury proceeding that preceded the filing of these charges in state court. Appellant did not present an alibi defense or any character witnesses. Instead, he called three fact witnesses in an attempt to discredit Daniek Burns's identification of Appellant as the shooter. The witnesses testified that the conditions did not allow for an accurate identification of the shooter, beyond basic descriptors. At the conclusion of the second trial. Appellant was again convicted of first-degree murder, attempted murder, aggravated assault—serious bodily injury, and aggravated assault—deadly weapon.

The trial court imposed a sentence of LWOP plus a consecutive five to ten years of imprisonment,

which was the same sentence that Appellant received after his first trial. A direct appeal followed, wherein Appellant raised eleven claims of trial court error which fell into three categories: weight of the evidence, sufficiency of the evidence, and evidentiary challenges. We affirmed Appellant's judgment of sentence and our Supreme Court denied his petition for allowance of appeal. *See Commonwealth v, Brenner*, 156 A.3d 347 (Pa.Super. 2016) (unpublished memorandum), appeal denied, 165 A.3d 897 (Pa. 2017).

Appellant submitted a timely counseled PCRA petition raising sixteen allegations of ineffective assistance of Attorney Sembrot, who was original PCRA and re-trial counsel. The PCRA court held two days of evidentiary hearings, during which PCRA counsel called Nathanial "Man" Williams, an expert witness on eyewitness identification, Attorney Sembrot, Appellant, and Yolanda Dorman. Appellant submitted a substantial post-hearing brief, which the PCRA court closely scrutinized before issuing an order and opinion denying the petition. This timely appeal followed. Both Appellant and the PCRA court complied with the mandates of Pa.R.A.P. 1925, and thus, this appeal is ready for our disposition.

Appellant raises the following issues for our review:

1. Whether counsel was ineffective in neglecting to present evidence which would have demonstrated that a full and fair opportunity to cross-examine Daniek Burns did not occur?
2. Whether counsel was ineffective in failing to present expert testimony on the fallability [sic]

of eyewitness identifications where counsel could not cross-examine the key eyewitness?

3. Whether counsel was ineffective in failing to object to the admission of gun shot residue evidence, which violated [Appellant's] confrontation clause rights under the federal and Pennsylvania constitutions?
4. Whether counsel was ineffective for failing to adequately cross-examine Detective Fetrow?
5. Whether counsel was ineffective in declining to present evidence that [Appellant] had legally purchased firearms, was licensed to carry a firearm, and that another sweatshirt not alleged to have been used in the crime had the same alleged gun-shot residue particles as other clothing introduced, which would have demonstrated legitimate reasons for gun-shot residue being on his belt?
6. Whether counsel was ineffective in neglecting to investigate, interview, and present witnesses that [sic] would have directly undermined Apollonia Snyder Johnson's testimony?
7. Whether counsel was ineffective in failing to object to myriad instances of prosecutorial misconduct during closing arguments, including calling [Appellant] as "cold a killer as there exists"?
8. Whether counsel was ineffective in failing to question Tina Ashley and call Officer Randy Searfoss regarding statements Ms. Ashley made at the scene that the Commonwealth misleadingly used to imply that the shooter's target was Jeffrey Mable?

9. Whether counsel was ineffective in failing to introduce photographs demonstrating the poor lighting conditions at the scene?
10. Whether counsel was ineffective in declining to file a pre-trial motion to bar re-trial based on double jeopardy under the Pennsylvania and federal constitutions, due to egregious prosecutorial misconduct related to Commonwealth witness Charles Maner?
11. Based on all of the aforementioned claims, the cumulative errors in this matter were so significant that they deprived [Appellant] of a fair trial in violation of his due process rights and his state and federal constitutional right to a fair trial.

Appellant's brief at 10-11.[2]

We begin with the pertinent legal principles. Our "review is limited to the findings of the PCRA court and the evidence of record" and we do not

---

[2] We cannot overemphasize the importance of focused appellate advocacy. Experienced advocates find that selecting the few most important issues presents the greatest likelihood of success. *See Jones v. Barnes*, 463 U.S. 745, 751-52 (1983) ("Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues."); *Commonwealth v. Robinson*, 864 A.2d 460, 480 (Pa. 2004) ("Legal contentions, like the currency, depreciate through over-issue."); *Commonwealth v. Ellis*, 626 A.2d 1137, 1140-41 (Pa. 1993) ("Appellate advocacy is measured by effectiveness, not loquaciousness."). *See also* RUGGERO J. ALDISERT, J. WINNING ON APPEAL: BETTER BRIEFS AND ORAL ARGUMENT, 129 (2d ed. 2003) ("When I read an appellant's brief that contains more than six points, a presumption arises that there is no merit to any of them." (emphasis in original)).

"disturb a PCRA court's ruling if it is supported by evidence of record and is free of legal error." *Commonwealth v. Rykard*, 55 A.3d 1177, 1183 (Pa.Super. 2012). "We grant great deference to the factual findings of the PCRA court and will not disturb those findings unless they have no support in the record. However, we afford no such deference to its legal conclusions." *Id.* "[W]here the petitioner raises questions of law, our standard of review is de novo and our scope of review is plenary." *Id.* When examining a mixed question of law and fact, the level of deference afforded to the PCRA court is analyzed on an issue-by issue basis. *See Commonwealth v. Martin*, 5 A.3d 177, 197 (Pa. 2010). "The more fact intensive the determination, the more deference a reviewing court should afford that conclusion." *Id.*; *see e.g. Commonwealth v. Cox*, 983 A.2d 666, 689 (Pa. 2009) (concluding that the PCRA court did not commit an abuse of discretion when it rejected appellant's IAC claim for failure to object to a prosecutor's closing argument since the remark constituted a fair response to trial counsel's closing argument). Finally, we "may affirm a PCRA court's decision on any grounds if the record supports it." *Id.*

Appellant alleges many claims of ineffective assistance of counsel ("IAC"). In reviewing IAC claims, counsel is presumed to be effective, and a PCRA petitioner bears the burden of proving otherwise. *See Commonwealth v. Becker*, 192 A.3d 106, 112 (Pa.Super. 2018). To do so, a petitioner must plead and prove that: (1) the legal claim underlying his ineffectiveness claim has arguable merit; (2) counsel's decision to act (or not) lacked a reasonable basis designed to effectuate the petitioner's interests;

and (3) prejudice resulted. *Id.* The failure to establish any of the three prongs is fatal to the claim. *Id.* at 113.

Where a petitioner asserts a layered IAC claim, he must plead and prove each prong of the three-prong ineffectiveness test for each of the attorneys involved. *Commonwealth v. Chmiel*, 30 A.3d 1111, 1128 (Pa. 2011). As we have explained:

> Layered claims of ineffectiveness are not wholly distinct from the underlying claims, because proof of the underlying claim is an essential element of the derivative ineffectiveness claim .... In determining a layered claim of ineffectiveness, the critical inquiry is whether the first attorney that the defendant asserts was ineffective did, in fact, render ineffective assistance of counsel. If that attorney was effective, then subsequent counsel cannot be deemed ineffective for failing to raise the underlying issue.

Rykard, *supra* at 1190 (citations and quotations omitted).

With these principles in mind, we address Appellant's IAC claims seriatim.

I. Confrontation Clause: Prior Trial Testimony

In Appellant's first layered IAC claim, Appellant attacks the admission of Daniek Burns's prior trial testimony as a violation of the confrontation clause. He alleges that Attorney Keenheel's[3] ineffectiveness denied him a full and fair opportunity for cross-examination, and that Attorney Sembrot[4] was ineffective for not seeking to exclude this testimony from Appellant's re-trial on that basis.

---

[3] Attorney Keenheel was Appellant's counsel at his first trial.

[4] Attorney Sembrot was Appellant's counsel at his first PCRA proceeding and subsequent re-trial.

Specifically, Appellant alleges that Attorney Keenheel's failure to question Daniek Burns about an incident where he was allegedly stopped for possession of a small amount of drugs, fled the scene, and was never charged, denied him of a fair and full cross-examination of Daniek Burns. This incident was discussed by Detective Fetrow during the federal grand jury proceeding as a possible reason why Daniek Burns may have absconded. While Detective Fetrow speculated that the reason for flight was Burns's fear that "he would be next" for identifying Appellant, the detective also opined that Burns's fear of potential criminal prosecution could have also played a role in the decision. *See* N.T. Grand Jury Proceeding, 2/15/06, at 20. The Commonwealth provided Appellant with the transcript prior to the first trial, and Attorney Keenheel referenced the proceeding in his opening statement.

Whether the trial court's admission of Daniek Burns's prior trial testimony violated Appellant's constitutional right to confront the witnesses against him is a question of law, as to which our review is de novo and plenary. *See Commonwealth v. Mitchell*, 152 A.3d 355, 358 (Pa.Super. 2016). Generally, an unavailable witness's prior recorded testimony is admissible at trial, and will not offend the right of confrontation, where the defendant had counsel and a "full and fair opportunity" to cross-examine that witness at the prior proceeding. *Commonwealth v. Bazemore*, 614 A.2d 684, 687 (Pa. 1992). Relying on *Commonwealth v. Mangini*, 425 A.2d 734 (Pa. 1981), Appellant contends that Attorney Keenheel was ineffective in his cross-examination of Burns and therefore, Appellant was denied his right to full and

fair cross-examination at the re-trial. Therefore, he contends that his right to confrontation has been violated. For the following reason, we disagree.

In *Mangini*, a new trial was granted after original trial counsel was declared ineffective due to his failure to request a competency hearing for a key Commonwealth witness. Prior to the retrial, a competency hearing was held and the Commonwealth's key witness was found incompetent. At the second trial, the trial court allowed the Commonwealth to admit the now-unavailable witness's prior trial testimony over defense objection. Mangini was re-convicted. On appeal, Mangini argued that prior counsel's ineffectiveness in failing to ask for a competency hearing had tainted the key witness's prior testimony, so that its later admission violated the confrontation clause. Our Supreme Court agreed, and reversed the admittance of the prior trial testimony. In doing so, the *Mangini* Court explained that the use of "the very testimony which has been indelibly stamped with prior counsel's ineffectiveness [was] offensive to our sense of justice and the notion of fair play." *Id.* at 738. However, the Court also cautioned against construing its holding too broadly, explaining that:

> our holding today is not a per se rule requiring the exclusion of any testimony from a prior trial wherein trial counsel had been ineffective. All of the factual variables of each case must be examined to determine if the ineffectiveness so tainted the testimony sought to be introduced as to affect its reliability or to

> otherwise render its subsequent use unfair.

Id. at 739.

Here, Attorney Keenheel was found ineffective solely for failing to consult with Appellant about whether he wished to call character witnesses. However, Attorney Sembrot did not allege and Attorney Keenheel was never found to be ineffective due to any alleged deficiencies in his handling of Daniek Burns, a fact witness. Therefore, *Mangini* is distinguishable from this case because there was no prior IAC ruling on the issue that would have necessitated exclusion. As *Mangini* found, simply because trial counsel was ineffective in one area does not necessarily taint his entire representation of Appellant. Therefore, Appellant cannot rely solely on the previous ineffectiveness finding to prove his claim of Attorney Keenheel's ineffectiveness. Instead, he must plead and prove that Attorney Keenheel was ineffective in his cross-examination of Daniek Burns on these newly asserted grounds.

Since Appellant did not challenge Attorney Keenheel's cross- examination of Daniek Burns in his first PCRA petition, this allegation is waived unless he proves that Attorney Keenheel was ineffective in his cross- examination and that Attorney Sembrot was ineffective for failing to raise it. *See Commonwealth v. Mason*, 130 A.3d 601, 618 (Pa. 2015) ("A PCRA claim is waived if the petitioner could have raised it but failed to do so before trial, at trial, during unitary review, or on appeal or in a prior [PCRA] proceeding"); *see also Commonwealth v. Dennis*, 950 A.2d 945, 954 (Pa. 2008) ("Where claims of trial counsel ineffectiveness . . . could previously

have been litigated . . . the only way a petitioner can successfully mount a challenge to the effectiveness of counsel is to assert a "layered" claim of ineffectiveness").

Here, Appellant has failed to establish that Attorney Keenheel was ineffective in his cross-examination of Daniek Burns. While Appellant called Attorney Sembrot[5] at the PCRA hearing and questioned him regarding his trial strategy with regard to this claim, Appellant did not attempt to introduce the testimony of Attorney Keenheel. Attorney Sembrot cannot be found ineffective for failing to pursue this confrontation clause claim, unless Attorney Keenheel was first ineffective in his handling of Daniek Burns's cross-examination. *See Commonwealth v. Reaves*, 923 A.2d 1119, 1127-28 (Pa. 2007) (explaining that to prevail upon a layered IAC claim a petitioner must present argument on the three prongs of the IAC test as to each relevant layer of representation). By not calling Attorney Keenheel at the evidentiary hearing at issue herein, Attorney Keenheel was never given the opportunity to explain his strategy, or lack of it, to permit us to determine whether counsel had a reasonable basis designed to effectuate Appellant's interests.

The burden of production and persuasion of a PCRA petition rests squarely on the petitioner's shoulders. *See Commonwealth v. Jones*, 596 A.2d 885, 888-89 (Pa.Super. 1991). In the absence of any evidence as to what original trial counsel's strategy may have been, we cannot find that the PCRA court abused its discretion in denying relief on this issue.

---

[5] PCRA counsel Attorney Sembrot also served as re-trial counsel.

Jones, *supra* at 888-89 (declining to find the reasonable basis prong satisfied after Appellant failed to call the alleged ineffective attorney as a witness at his PCRA hearing). Accordingly, this deficiency is fatal to his ineffectiveness allegations surrounding Daniek Burns's cross-examination.

Since Appellant has failed to persuade us that a confrontation clause violation occurred, the trial court did not err when it admitted the prior testimony of Daniek Burns at the retrial. Further, since Appellant has failed to establish that Attorney Keenheel's cross-examination of Burns was constitutionally ineffective, Attorney Sembrot cannot be held ineffective for waiving this claim by failing to pursue it in Appellant's original PCRA petition. *See Commonwealth v. Spotz*, 896 A.2d 1191, 1214 (Pa. 2006) ("[C]ounsel will not be deemed ineffective for failing to raise a meritless claim[.]"). Accordingly, Appellant's first claim fails.

II. Eyewitness Expert Testimony

In his second IAC claim, Appellant asserts that Attorney Sembrot as re-trial counsel was ineffective for failing to call an expert in eyewitness identification at his re-trial. While it had long been the law of Pennsylvania that such expert testimony was not admissible, the law changed shortly before Appellant's re-trial, allowing for such an expert. *See Commonwealth v. Walker*, 92 A.3d 766 (Pa. 2014).

In *Walker*, our Supreme Court recognized the potential advantages of expert testimony in the eyewitness arena and held that such testimony was no longer per se inadmissible. *Id.* at 792-93. In reaching this conclusion, the *Walker* Court expressly rejected reliance upon cross-examination and closing

argument alone as sufficient to convey the relevant eyewitness factors to the jury. Id. at 786. Henceforth, expert eyewitness testimony would be admissible, at the discretion of the trial court, in cases where the Commonwealth's proof of identity was solely or primarily dependent upon eyewitness testimony. *Id.* at 787-88.

We agree with the PCRA court that the testimony of an expert on eyewitness misidentifications would have been admissible. *See* PCRA Court Opinion, 3/19/20, at 23. The Commonwealth's primary evidence identifying Appellant as the shooter came from Daniek Burns's eyewitness identification. Accordingly, the Commonwealth introduced photographs of the scene, and asked officers who responded to the scene, as well as an emergency management specialist for the City of York, to testify about the favorable lighting conditions present in an attempt to buttress Daniek Burns's identification. In contrast at re-trial, the defense aggressively sought to discredit Daniek Burns's identification in opening and closing statements, through use of the prior cross-examination of Daniek Burns, and by calling three eyewitnesses. The three eyewitnesses were standing near Daniek Burns at the time that the shooting started. All three witnesses testified that they were unable to make an accurate identification of the shooter.

At the PCRA hearing, Dr. Dery Strange was qualified as an expert in eyewitness identification and testified that eyewitness misidentification is responsible in seventy to seventy-five percent of cases where DNA has exonerated people. *See* N.T. PCRA

Hearing, 7/2/18, at 19-20. The amount of time needed to identify another person accurately is greatly influenced by the quality of lighting and distance. *Id.* at 22-24. She went on to describe accepted measures for distance and lighting conditions necessary to make an accurate identification and opined that, based on her review of scene photographs and witness testimony, the conditions here fell below acceptable thresholds. *Id.* at 25. She also testified to other factors that can impact the validity of an identification, such as drug use, wearing a head covering, or "weapon focus," wherein crime victims focus exclusively on the weapon present instead of other forensically useful information. *Id.* at 27-31. Dr. Strange also described a study in which the results indicated that mis-recognition of familiar faces is much more likely under bad lighting conditions or shorter durations of time. *Id.* at 35-37.

After observing the witnesses at the trial and the PCRA hearing, the PCRA court held that Dr. Dery Strange's testimony would have been admissible at trial.[6] *See* PCRA Opinion, 3/19/20, at 23-24. Additionally, the court found that Attorney Sembrot had no reasonable basis for failing to seek the admission of this type of evidence. *Id.* However, the PCRA court still denied the claim due to a lack of prejudice, finding "no meaningful probability, nor even any real possibility of a different verdict resulting from a presentation of Dr. Strange's proffered testimony." *Id.* at 25. We find no basis to disturb the court's finding.

---

[6] The Honorable Michael E. Bortner served as the re-trial and PCRA judge.

While Attorney Sembrot made no attempt to call an expert on eyewitness testimony, unlike in *Walker*, he also did not rely solely on cross-examination and closing argument to convey the relevant eyewitness factors to the jury. Attorney Sembrot also sought to discredit Daniek Burns's identification of Appellant through the testimony of three eyewitnesses who were standing near Daniek Burns at the time of the shooting. Each testified that he could not see the shooter clearly due to the hoodie partially covering his head and various combinations of light, distance, and timing constraints. One of the witnesses even stated that he spoke with Daniek Burns after the shooting and Burns stated that he was not able to identify the shooter. *See* N.T. Jury Trial, 8/6/14, at 130-31. Finally, Attorney Sembrot argued that Burns's identification was not believable in closing argument.

Further, Burns's identification of Appellant was not the only evidence of his guilt. The Commonwealth presented evidence of Appellant's motive to shoot Supreme, i.e., his belief that Supreme was responsible for the shooting where he was injured ten days earlier than the shooting in question. *See* N.T. Jury Trial, 8/6/14, at 21-57. In support of this theory, the Commonwealth submitted the testimony of Apollonia Snyder, who overheard Appellant threating to "pop" Supreme while stroking a firearm, along with the officer who attempted to interview Appellant about the earlier shooting with limited success. *Id.* Witnesses from the scene also identified Supreme as the target. *See* N.T. Jury Trial, 8/4/14, at 141-42; N.T. Jury Trial, 8/5/14, at 257; *id.* at 437. Finally, Appellant's clothing tested positive for

gunshot residue and the inside of his belt contained markings consistent with a gun holster. *See* N.T. Jury Trial, 8/5/14, at 297; *id.* at 325-26. Thus, in light of the other testimony adduced, we find no abuse of discretion in the PCRA court's determination that Appellant was not prejudiced by the absence of expert testimony on eyewitness identification.

III. Confrontation Clause: Gunshot Residue Experts

In his third claim, Appellant alleges that Attorney Sembrot was ineffective at the re-trial for failing to object to the admission of A.J. Schwoebel's expert report, Allison Murtha's expert testimony, and Ms. Murtha's expert report regarding gunshot residue found on Appellant's clothing. The following legal principles pertain to our review.

Whether Appellant's rights under the confrontation clause were violated by the admission and use of the gunshot residue reports and testimony from Ms. Murtha is a question of law, for which our standard of review is de novo and our scope of review is plenary. *See Commonwealth v. Brown*, 185 A.3d 316, 409 (Pa. 2018) (plurality). The United States Supreme Court has held that forensic reports are testimonial in nature when their "primary purpose" is to establish or prove past events for purposes of proof at a criminal trial. *See Davis v. Washington*, 547 U.S. 813, 822 (2006). Therefore, the right to confrontation is violated when a testimonial forensic report is offered into evidence without the analyst's corroborating testimony. *See Brown*, *supra* at 417-18 (holding that an autopsy report was testimonial in nature, so the report could only be introduced into evidence without its author's testimony if the author

was "unavailable" and defendant "had a prior opportunity to cross-examine" him).

A.J. Schwoebel was the former manager and director of the forensic laboratory for the R.J. Lee Group. *See* N.T. Jury Trial, 8/5/14, at 307, 323- 24. After the particle extraction samples were taken from each article and submitted for testing, A.J. Schwoebel analyzed the results and generated a report. *Id.* at 321-22. A.J. Schwoebel did not testify at the first trial and was unavailable to testify at the second one. *Id.* at 336. Ms. Murtha held Mr. Schwoebel's previous position as of the date of the second jury trial. *Id.* at 307. Accordingly, Ms. Murtha took the results from Mr. Schwoebel's reports and re-analyzed them in accordance with the current standard operating procedures, memorializing her findings in a supplemental report. Ms. Murtha testified at trial, and both her report and Mr. Schwoebel's report were admitted as evidence. *Id.* at 307-54.

The PCRA court found that A.J. Schwoebel's report should not have been admitted into evidence because its primary purpose was testimonial in nature, Mr. Schwoebel was unavailable for trial, and he did not testify previously. *See* PCRA Opinion, 3/19/20, at 91. However, Appellant was not prejudiced by this error, since the report was cumulative of Ms. Murtha's testimony and expert report, which admission did not violate the confrontation clause. *Id.* at 90- 94. We agree.

As the PCRA court accurately observed, the gunshot residue report prepared by Mr. Schwoebel was testimonial in nature, Mr. Schwoebel did not testify at the previous trial, and he was unavailable to testify at Appellant's second trial. Therefore,

Appellant never had the opportunity to cross-examine him and the admission of his report into evidence was error. *See Bullcoming v. New Mexico*, 564 U.S. 647, 655 (2011) (holding that the admission of a missing analysist's report through a "surrogate" analysist who merely introduced the findings of the missing analyst violated the confrontation clause). However, his report was cumulative of Ms. Murtha's testimony. Therefore, the impact of this error necessarily depends on our resolution of Appellant's allegations concerning the admissibility of Ms. Murtha's testimony and expert report.

The High Court has held that the testimony of a surrogate analyst who merely "parrots" the original unavailable analyst's testimony is insufficient to vindicate the right to confrontation, since such testimony cannot expose any errors in the testing process employed by the analyst who authored the report. *See Bullcoming*, *supra* at 662. Our Supreme Court interpreted the *Bullcoming* holding to mean that the confrontation clause is not implicated where a surrogate analyst renders an "independent opinion" interpreting the results. *See Brown*, *supra* at 420-22. Additionally, it previously considered what constitutes an "independent opinion" that satisfies the confrontation clause. *See Commonwealth v. Yohe*, 79 A.3d 520 (Pa. 2013).

The *Yohe* Court addressed whether the admission of a toxicology report in a driving under the influence ("DUI") case violated a defendant's rights under the confrontation clause. After the defendant's blood sample was tested three times by several analysts from one lab, a toxicologist received the raw data, analyzed the three tests, and arrived at a blood

alcohol concentration ("BAC") result, which the toxicologist set forth in a report. The toxicologist signed the report, certifying its content and his own role in reviewing the data and ensuring its accuracy. At the defendant's trial, the BAC result was admitted into evidence through the toxicologist's expert testimony. The defendant objected that his right to confrontation was violated because the specific lab technicians who performed the tests did not testify. His objection was overruled.

On appeal, our Supreme Court found that the lab report was testimonial and that the toxicologist had not performed any of the tests. However, our Court nevertheless held that the defendant's confrontation clause rights were not violated. While the toxicologist relied on raw data produced by lab technicians in reaching an expert opinion, he was the only individual who engaged in the critical comparative analysis of the results of the testing, which was needed in order to generate a BAC. *Id.* at 539-40 ("[The toxicologist] was at the top of the inferential chain, and utilized the data that preceded his analysis in reaching his conclusion."). The Court highlighted the toxicologist's unique role. As the lab supervisor, he was generally familiar with standard procedures and able to identify any deviations from his procedure or any problems with a particular lab technician. Accordingly, he was able to evaluate the entire record and was the proper object of the defendant's right to confrontation.

Here, like the toxicologist in *Yohe*, Mr. Schwoebel and Ms. Murtha do not appear to have played any role in extracting the particle samples from the articles and submitting them for testing. *See*

N.T. Jury Trial, 8/5/14, at 321. Instead, Mr. Schwoebel took the raw data from the testing and analyzed it in accordance with the standard operating procedures that were in place at the time. *Id.* Ms. Murtha then reviewed Mr. Schwoebel's report to ensure that everything was done according to those standard operating procedures, before taking the data and applying it under the updated format applicable at the time of the re-trial, which caused her to reach a different and independent conclusion. *Id.* at 324-25. Ms. Murtha also testified that she had performed approximately 600 to 700 of these types of analyses, had been a member of the forensic science department since 2008, was mentored by Mr. Schwoebel, and had been the manager of the forensic science department since Mr. Schwoebel retired. Like the toxicologist in *Yohe*, she was familiar with standard operating procedures and able to identify deviations from those procedures. After Mr. Schwoebel's departure, Ms. Murtha was the only individual available who had engaged in a critical analysis of the results of the tests performed. Therefore, in line with the *Yohe* analysis, Ms. Murtha was the witness at the top of the inferential chain whom Appellant had the right to confront. Thus, the admission of Ms. Murtha's testimony and expert report did not violate the confrontation clause.

Appellant argues that Ms. Murtha could not have produced an independent report because she relied on information contained in Mr. Schwoebel's report in order to generate her own findings. *See* Appellant's brief at 58-62. Appellant fails to account for the distinction between results and opinions. The results are raw data concerning the chemicals found

on the tested specimens, whereas opinions are formed from an analyst's interpretation of the raw data. This distinction is best exemplified by the fact that Ms. Murtha reached a different opinion than Mr. Schwoebel. While Ms. Murtha's report necessarily incorporates the results of the testing conducted by Mr. Schwoebel, it does not contain anyone's opinion but her own. Therefore, in contrast to *Bullcoming*, Ms. Murtha's report did not simply "parrot" the prior analysis of Mr. Schwoebel. *See Yohe*, *supra* at 390.

Mr. Schwoebel's report was inadmissible absent Mr. Schwoebel's testimony. However, even without the report, Pa.R.E. 703 and 705 would still have permitted the type of expert opinion testimony given by Ms. Murtha. The rules allow expert opinion testimony based in part on otherwise inadmissible facts and data contained in a report upon which experts in the field would reasonably rely in forming an opinion. *See also Commonwealth v. Ali*, 10 A.3d 282, 306 (Pa. 2010) ("[A] medical expert who did not perform the autopsy may testify as to cause of death as long as the testifying expert is qualified and sufficiently informed[.]") (citation omitted).

Ultimately, Ms. Murtha's testimony was admissible because she formed an independent conclusion and testified to that conclusion based on her review of both inadmissible facts and data contained in Mr. Schwoebel's report. Since Ms. Murtha synthesized that information, formed an independent opinion, and was available to be cross-examined regarding the basis of that opinion, we conclude there was no confrontation clause violation with respect to her opinion regarding the presence of gunshot residue on Appellant's clothing. Further, we

determine that any error that arose from Ms. Murtha revealing Mr. Schwoebel's opinion, or the Commonwealth admitting Mr. Schwoebel's report as an exhibit, was harmless beyond a reasonable doubt because her own independent opinion testimony satisfied the confrontation clause.

With the preceding in mind, we turn to the IAC analysis. Since Ms. Murtha's testimony did not violate the confrontation clause, Appellant's ineffectiveness claim based on Attorney Sembrot's[7] failure to object to the admission lacks arguable merit. Since Mr. Schwoebel's report was cumulative of Ms. Murtha's testimony, Appellant was not prejudiced by counsel's failure to object to its admission or the references to it throughout Ms. Murtha's testimony. Accordingly, Appellant's claim was properly denied.

IV. Cross-Examination of Detective Fetrow

Appellant's fourth claim contains three subparts. Appellant alleges that Attorney Sembrot was ineffective for failing to cross-examine Detective Fetrow regarding: (1) Daniek Burns's drug stop and flight from apprehension, (2) Tina Ashley's knowledge about whether Supreme was the shooter's intended target, and (3) the time lapse between Appellant's arrest and the seizure of his sweatshirt. *See* Appellant's brief at 73-75. We address each argument individually below.

Detective Fetrow was the lead detective assigned to Appellant's case and he testified at Appellant's federal grand jury proceeding. *See* N.T. Grand Jury Proceeding, 2/15/06, at 20. At that

[7] Attorney Sembrot was Appellant's counsel at the re-trial.

proceeding, he was questioned about Daniek Burns and where he was currently located. Detective Fetrow responded that he was "on the run right now. He's scared. At the time he was scared. He didn't want to be next is one of the things he told us. I don't know all his reasons." *Id.* He went on to opine that an additional possibility existed for why Burns had fled, explaining: "I know there was another incident involving Daniek and some of our patrol officers and a small amount of drugs. When they found the drugs, Daniek took off running and I haven't seen him since. Neither has anybody else." *Id.* Ultimately, he was not sure if Burns's reason for running was the possibility of getting in trouble for a criminal charge or his fear of Appellant. *Id.*

At re-trial, Detective Fetrow testified and was cross-examined multiple times. *See* N.T. Jury Trial, 8/4/14, at 135-47; N.T. Jury Trial, 8/5/14, at 293- 306; *Id.* at 355-58. However, he was never asked about his grand jury testimony by either the Commonwealth or Attorney Sembrot. Appellant alleges that Attorney Sembrot was ineffective for failing to cross-examine Detective Fetrow about Burns's uncharged criminal conduct. *See* Appellant's brief at 73. Appellant further argues that he was prejudiced by this omission because the incident implied that the Commonwealth would treat Burns favorably due to his identification testimony. *Id.* The PCRA court agreed that this claim had arguable merit and that counsel admitted to having no reasonable basis for this omission at the PCRA hearing. *See* PCRA Opinion, 3/19/20, at 37-38. However, the court denied the claim because it found that there was no prejudice suffered. *Id.* at 38-39. We find no abuse of discretion.

First, Daniek Burns was questioned extensively regarding his criminal history, so the jury was aware of his potential motive to lie in that regard. Despite only being seventeen years old at the time of his testimony, Burns admitted to being a "career criminal," and told the jury about his prior criminal convictions and charges in New York and York County. *See* N.T. Jury Trial, 8/5/14, at 390-410. While he testified that he had not received anything in exchange for his testimony, Burns conceded that the night of the shooting he had been smoking marijuana and wearing a bulletproof vest. *Id.* at 397, 405, 410. Despite the vest, marijuana, and active warrants for his arrest, Burns was not arrested that night. *Id.* at 430. Instead, the officers allowed Burns to leave with a family member after he finished giving his statement identifying Appellant as the shooter. *Id.* at 397, 405-06. Burns fled the York area, but was later picked up on a material witness warrant. *Id.* at 408. At the time of his testimony, Burns was serving a sentence at Rikers Island Prison, an adult facility, because of a drugs charge. *See* N.T. Jury Trial, 8/5/14, at 390.

Second, even Appellant concedes that the alleged uncharged drug incident occurred after Burns had already identified Appellant as the shooter and Appellant had been arrested. *See* Appellant's brief at 34. Therefore, it could not have played a role in Burns's motivation to make an earlier identification. Finally, the questioning of Detective Fetrow about the uncharged criminal conduct occurred in the context of explaining why Daniek Burns fled the area. The main reason Detective Fetrow thought that Daniek Burns fled was his fear of retribution, i.e., that "he would be

next" because he identified Appellant. N.T. Grand Jury Proceeding, 2/15/06, at 20. Therefore, if Attorney Sembrot had questioned Detective Fetrow about the uncharged conduct, the jury could have also heard about Daniek Burns's fear of retribution from Appellant. Such testimony could have hurt Appellant. Since Appellant has failed to convince us that he suffered prejudice, his first sub-claim merits no relief.

Next, Appellant alleges that Attorney Sembrot was ineffective for not cross-examining Detective Fetrow about the validity of Tina Ashley's excited utterance in which she identified Supreme as the shooter's intended target. *See* Appellant's brief at 73. At re-trial, Detective Fetrow testified that when he arrived on scene, Tina Ashley was very emotional and loud. *See* N.T. Jury Trial, 8/4/14, at 140. While she was talking to Officer Randy Searfoss, Detective Fetrow heard her yell, "He knows who was shooting. They were shooting at him." *Id.* at 141. As she yelled, he noticed that she was directing her comments at two males that were walking down the street, Jeffrey "Supreme" Mable and Valentine Bonilla, but then she specifically referred to one by the name "Supreme," and pointed him out. *Id.* After overhearing this exchange. Detective Fetrow detained Supreme and Bonilla, keeping them separate until he could interview each of them at the station. *Id.* at 141-42. At the first trial, Tina Ashley testified that she did not know if Supreme was the shooter's target, only that the shooter appeared to be aiming for Supreme's group. *See* N.T. Jury Trial, 9/13/06, at 132. Testimony about this excited utterance was omitted at the retrial.

The PCRA court explained its reasoning for not believing that this omission amounted to ineffective assistance of counsel as follows:

> The potential targeting of Mr. Mable is but one fact in the trial and not a determinative one. The use of a firearm to target someone is sufficient to undergird transferred intent for a first-degree murder charge. There is evidence of [Appellant's] intent to target Mr. Mable, via Apollonia Snyder's testimony that [Appellant] stated he was going to kill Mr. Mable. And there is evidence of [Appellant's] motive to target Mr. Mable, via testimony that [Appellant] was evasive regarding who shot him prior to the murder of Ms. Witter. Detective Fetrow's testimony merely supplied Ms. Ashley's excited utterance that Mr. Mable, amongst others, knew they were being shot at. Detective Fetrow seems to have narrowed Ms. Ashley's identification of targets down to just one; however, the other evidence of the trial points to [Appellant] having motive and intent regarding Mr. Mable. We do not believe arguable merit has been sufficiently made out.
>
> We look at whether retrial counsel's actions lacked any reasonable basis. The alternative strategy offered is that retrial counsel should have cross-examined Detective Fetrow and ferreted out this inconsistency between his report

> and Ms. Ashley's prior statements and Detective Fetrow's certainty at trial. We cannot find a substantially greater chance of success had this strategy been pursued. Mr. Mable was, at the very least, identified as a possible target by Ms. Ashley. [Appellant] matched some descriptions of the shooter in stature and in the clothing worn by the shooter and, seemingly, by [Appellant] at the time of his arrest. [Appellant's] clothes were covered in gunshot residue and its components. We do not believe that there was a substantially greater chance of success if this line of questioning had been pursued. A similar analysis persists for the third prong, which is prejudice. There was too much other evidence indicating [Appellant] to have been the shooter for this supposed error by retrial counsel to have been determinative. It is therefore denied.

PCRA Opinion, 3/19/20 at 40-41

Our review reveals that the PCRA court's findings are supported by the record and not the result of any abuse of discretion. Notably, Supreme testified at the re-trial that he did not know who the shooter's intended target was. *See* N.T. Jury Trial, 8/6/14, at 232-33. Therefore, the probative value of Tina Ashley's excited utterance was reduced considerably by his testimony. Accordingly, no relief is due on the second sub-part of Appellant's fourth claim.

Finally, Appellant challenges counsel's effectiveness for not parsing out a passing comment by Detective Fetrow that the sweatshirt was not seized at the same time as Mr. Brenner's other items. *See* Appellant's brief at 75. Since Appellant's sweatshirt was taken from the York County prison at a later time, Appellant argues that this increased the probability of contamination and Attorney Sembrot was ineffective for not pointing this out. *Id.* The PCRA court did not find this allegation persuasive, explaining:

> We cannot find a substantially greater chance of success had the jury been aware of the conclusions drawn in the proffered articles. The jury was already aware from the testimony of the GSR expert, Ms. Allison Murtha, that there was very little evidence of GSR on the sweatshirt in question. Rather, the majority of the GSR located on [Appellant's] clothing was found on items that were seized almost immediately upon [Appellant] surrendering to authorities. Detective Fetrow testified to the continual use of latex gloves to handle these articles of clothing, which acted as a safeguard to contamination. The GSR on items aside from the sweatshirt militates towards [Appellant] being a shooter - even if this is not conclusive when one considers lawful means of GSR being deposited. It is noteworthy that Ms. Murtha testified to the very high levels of GSR and

> related particulate on [the belt] as compared to the many other thousands [of articles] she has tested in her career. The low levels of GSR - indicated particles on [Appellant's] hoodie comport with Ms. Murtha's testimony that particulate loss can occur with increased motion and temporal delays from deposit to collection. We do not see that the articles supplied by the defense would have swayed a jurying regarding GSR evidence. The [Appellant] was covered in GSR and associated particles on all items of clothing save the sweatshirt.

See PCRA Opinion, 3/19/20, at 42.

We agree with the PCRA court's apt analysis. Appellant's shoes, belt, and sneakers, which contained the probative GSR evidence, were collected within minutes of his being taken into custody. *See* N.T. Jury Trial, 8/5/14, at 356. However, even with this evidence, the jury was made aware that contamination was an issue because Appellant was not arrested until six days after the shooting. *Id.* at 293. Ms. Murtha testified that gunshot residue can easily dissipate from clothing by simply moving around, sweating, or even exposing it to wind. *Id.* at 334. Therefore, the jury was well-aware of the potential contamination issues present for even the most probative of the gun shot residue evidence. The sweatshirt, which the jury was aware was collected later than the other items, did not have any three-component gunshot residue on it. *Id.* at 330. Therefore, its main relevance was not the presence of particles consistent with gunshot residue, but that it

matched the one worn by the shooter according to some of the eyewitness descriptions. Thus, it is not likely that the outcome would have changed if Detective Fetrow had been cross-examined about the exact time and location that the sweatshirt was seized, and no relief is due.

V. Failure to Present Legitimate Reason for Gun-Shot Residue

In his fifth claim, Appellant alleges that Attorney Sembrot was ineffective for declining to present evidence that would have shown legitimate reasons for the gunshot residue found on his clothing at re-trial, namely: that Appellant had legally purchased firearms in the past, that Appellant was licensed to carry a firearm, and that Appellant owned clothing with gunshot residue on it that was not alleged to have been involved. See Appellant's brief at 78. Appellant argues that because these pieces of evidence would have provided the jury with an alternate and legitimate explanation for why there was gunshot residue on his belt, shoes, and clothing, he was prejudiced by its omission. *Id.* at 80. The PCRA court disagreed, finding Attorney Sembrot's testimony at the PCRA hearing credible and persuasive evidence of a reasonable trial strategy. See PCRA Opinion, 3/19/20, at 44-45. The PCRA court's findings are supported by the record.

"In determining whether counsel's action was reasonable, we do not question whether there were other more logical courses of action which counsel could have pursued; rather, we must examine whether counsel's decisions had any reasonable basis." *Commonwealth v. Washington*, 927 A.2d 586, 594 (Pa. 2007) (citations omitted). At the PCRA

hearing, Attorney Sembrot testified that he was aware that Appellant had a license to carry and legally owned firearms. *See* N.T., 8/27/18, at 73. While he discussed the possibility of presenting this evidence to the jury with Appellant, he ultimately took the position that "[he] didn't want to put a gun in [his] client's hands for the jury to consider that fact. I wanted to distance my client from any gun." *Id.* at 74. Attorney Sembrot explained that because he could see the evidence "cutting both ways" and could not anticipate how the jury would have accepted such evidence, he chose to omit it. *Id.* Since Attorney Sembrot's decision was based upon a reasonable strategy to effectuate Appellant's interests, this claim fails.

VI. Failure to Contradict Apollonia Snyder's Testimony

In Appellant's sixth claim, he alleges that Attorney Sembrot was ineffective for failing to present two witnesses whom he alleges would have contradicted Apollonia Snyder's re-trial testimony. See Appellant's brief at 84-85. At re-trial, Apollonia Snyder testified that, a couple of days before the shooting, she was bar hopping with Appellant, who had been a friend of hers since high school. *See* N.T. Jury Trial, 8/6/14, at 40-41. One of the bars they went to that day was called "Cheers." *Id.* While they were driving between bars, Appellant made a phone call. *Id.* at 42. Accordingly to Ms. Snyder, Appellant told the person on the other end of the line, someone whom he referred to as "Man," that he was going to "pop Supreme when he seen him," using "a very aggressive tone." *Id.* at 42, 51. While he was talking to "Man," Appellant was also playing with a gun in his lap. *Id.*

at 42. She testified that no one else was in the car with them when this conversation occurred. Id. at 46.

At the PCRA hearing, Appellant called two witnesses who he claimed would have contradicted Snyder's testimony. Nathaniel "Man" Williams testified that he knew Appellant and would have been willing to testify at Appellant's re-trial, but that he did not have Appellant's phone number and never had a conversation with him about shooting Supreme. *See* N.T. PCRA Hearing, 7/2/18, at 9-13. Yolanda Dorman testified that she knew both Appellant and Apollonia Snyder and that she would have been willing to testify at Appellant's re-trial. *See* N.T. PCRA Hearing, 8/27/18, at 46-47. Around the time that the alleged bar hopping happened, she was a frequent patron of Cheers bar. *Id.* However, she never saw Appellant and Apollonia Snyder at Cheers or any other bar together. *Id.* In fact, she was unsure whether Appellant and Ms. Snyder knew each other. *Id.*

The PCRA court found that, while there was arguable merit to Appellant's claims, he did not demonstrate prejudice by either witness's absence. First, the PCRA court did not find credible Man's testimony that he was friends with Appellant but did not have a cell phone and never spoke with Appellant on the phone. *See* PCRA Court Opinion, 3/19/20, at 47. Therefore, this testimony would not have impacted the credibility of Apollonia Snyder's testimony. *Id.* Next, the PCRA court found that the probative value of Ms. Dorman's testimony was questionable, since she did not seem to possess knowledge as to whether Appellant and Ms. Snyder were even acquaintances. *Id.* In light of the totality of

the other evidence, and the fact that Attorney Sembrot found other ways to challenge Ms. Snyder's credibility on cross-examination, the PCRA court concluded that no relief was due. *Id.* at 49-50.

Since the PCRA court sits as the fact finder at the PCRA hearing, we grant great deference to its credibility findings where, as here, they are supported by the record. *See Commonwealth v. Johnson*, 966 A.2d 523, 532 (Pa. 2009) ("Our standard of review in PCRA appeals is limited to determining whether the findings of the PCRA court are supported by the record and free from legal error."). Even if believed, the proposed testimony of these witnesses would not necessarily preclude the jury from also finding Ms. Snyder's testimony credible. Appellant could have been speaking on the phone to someone else that he referred to as "Man" and they could have been at the "Cheers" bar when Ms. Dorman was not present.

Additionally, Attorney Sembrot found another way to challenge the credibility of Ms. Snyder's testimony. Counsel pointed out that, despite her alleged concern regarding Appellant's statements, she did not reach out to the police with this information. *See* N.T. Jury Trial, 8/6/14, at 47. Instead, she waited until the authorities contacted her, which was at a time when she was serving probation. *Id.* at 48. Although she testified that she did not receive any favorable treatment for her involvement in this case, she did admit to working as an informant for the police at the time that she provided this information about Appellant. *Id.* at 53. Accordingly, the PCRA court did not abuse its discretion when it concluded that Appellant had

failed to prove that he was prejudiced by counsel's failure to call these two witnesses at trial.

VII. Prosecutorial Misconduct

In his seventh issue, Appellant asserts that Attorney Sembrot was ineffective in failing to object to prosecutorial misconduct after the prosecutor made "multiple intentional comments that were not consistent with inferences from the record" in his closing remarks to the jury. *See* Appellant's brief at 90. Appellant's eight allegations of misconduct, that he alleges Attorney Sembrot was ineffective for failing to object to, encompass the following statements made by the prosecutor during his closing argument: (1) "[Apollonia Snyder's] facing a guy who's now on trial for a murder that she knows did it;" (2) "nor is there any indication from [Apollonia Snyder] that in any way Detective Fetrow, when he called, even mentioned the name of [Appellant]. This was from her;" (3) Tina Ashley was "sitting on her porch stoop watching Jeffrey Mable dodge bullets;" (4) Tina Ashley saw Daniek Burns running past her after the second shot; (5) Ms. Ashley had Anna Witter between herself and the shooter; (6) Ms. Ashley "claims she doesn't know, doesn't know [Appellant], but did you see her waving and smiling to him when we were up at sidebar with the judge?"; (7) "then there's Lloyd Valcarcel. What do you say about Lloyd Valcarcel? The man who couldn't tell the truth if his life depended on it;" and (8) "[Appellant]'s conduct was the direct cause of the death of three innocent people . . . [Appellant] is about as cold a killer as there exists." Appellant's brief at 90-95.

The following principles guide our review:

> [A] claim of ineffective assistance grounded in trial counsel's failure to object to a prosecutor's conduct may succeed when the petitioner demonstrates that the prosecutor's actions violated a constitutionally or statutorily protected right, such as the Fifth Amendment privilege against compulsory self-incrimination or the Sixth Amendment right to a fair trial, or a constitutional interest such as due process. To constitute a due process violation, the prosecutorial misconduct must be of sufficient significance to result in the denial of the defendant's right to a fair trial. The touchstone is fairness of the trial, not the culpability of the prosecutor. Finally, not every intemperate or improper remark mandates the granting of a new trial; reversible error occurs only when the unavoidable effect of the challenged comments would prejudice the jurors and form in their minds a fixed bias and hostility toward the defendant such that the jurors could not weigh the evidence and render a true verdict.

Commonwealth v. Koehler, 36 A.3d 121, 144 (Pa. 2012). With respect to the range of permissible comments in closing arguments, this Court has stated:

> It is axiomatic that during closing arguments the prosecution is limited to making comments based upon the

> evidence and fair deductions and inferences therefrom. Indeed, given the critical role that the Commonwealth plays in the administration of justice, a prosecutor has been historically prohibited from expressing a personal belief regarding a defendant's guilt or innocence or the veracity of the defendant or the credibility of his witnesses.
>
> However, because trials are necessarily adversarial proceedings, prosecutors are entitled to present their arguments with reasonable latitude. Moreover, it is well settled that defendants are entitled to a fair trial, not a perfect one. Thus, a prosecutor's remarks do not constitute reversible error unless their unavoidable effect [was] to prejudice the jury, forming in their minds fixed bias and hostility toward the defendant so that they could not weigh the evidence objectively and render a true verdict.

Commonwealth v. Ligon, 206 A.3d 515, 519-20 (Pa.Super. 2019) (citations and internal quotation marks omitted). As discussed infra, none of the prosecutor's statements preluded the jury from weighing the evidence objectively.

First, Appellant asserts that the prosecutor improperly characterized Ms. Snyder as being nervous on the stand because "she's facing a guy who's now on trial for a murder that she knows did it." N.T. Jury Trial, 8/7/14, at 338. The trial court found no

merit to this allegation. See PCRA Opinion, 3/19/20, at 59. Instead, it determined that this was a fair inference from Ms. Snyder's testimony. *Id.* at 59. We agree. Ms. Snyder testified that she overheard Appellant make a threat upon Supreme's life in a "very aggressive tone" while manipulating a gun. N.T. Jury Trial, 8/7/14, at 42. She later came forward with this information "because it was the right thing to do." *Id.* at 45. Accordingly, the record supports the PCRA court's conclusion that the prosecutor's comment regarding Ms. Snyder's fear and belief that Appellant committed the crime was a reasonable inference from the evidence adduced at trial. See PCRA Opinion, 3/19/20, at 59. Therefore, Attorney Sembrot was not ineffective for failing to object to it.

Second, Appellant alleges that the prosecutor misrepresented the record when he claimed that Ms. Snyder volunteered Appellant's name to Detective Fetrow. *See* Appellant's brief at 90-91. Appellant asserts that this was error because at the first trial, Ms. Snyder testified that Detective Fetrow called her to discuss her involvement with gang activity and, at that time, asked her if she knew Appellant. *Id.* citing to N.T. Jury Trial, 9/13/06, at 80-81. Ms. Snyder responded that she did know Appellant and then brought up the shooting in which she believed Appellant was involved. *Id.*

The PCRA court agreed that the prosecutor's remark was a misstatement of Ms. Snyder's testimony at the re-trial, in which she did not discuss whether it was Detective Fetrow or herself who had initially brought up Appellant's name. Counsel did not object to it. However, the court found that Appellant was not prejudiced by this misstatement

because the court cautioned the jury right before closing arguments were delivered that counsel's arguments should only be considered to the extent that the inferences counsel asked them to draw were supported by the evidence. *See* PCRA Court Opinion, 3/19/20, at 61; N.T. Jury Trial, 8/7/14, at 307-08. The jury is presumed to follow the trial court's instructions. *See Commonwealth v. Cash*, 137 A.3d 1262, 1280 (Pa. 2016). Moreover, the court determined that the prosecutor's remark was fair response to Attorney Sembrot's closing argument, wherein he questioned Ms. Snyder's credibility, reasoning that "Apollonia never came forward, okay, never." N.T. Jury Trial, 8/7/14, at 319.

The record supports the PCRA court's conclusion. Simply put, "not every intemperate or uncalled for remark by the prosecutor requires a new trial." *Commonwealth v. D'Amato*, 526 A.2d 300, 309 (Pa. 1987). This fleeting remark is plainly not the type of intentional misrepresentation that Appellant claims. *See* Appellant's brief at 90-91. Further, Appellant has not explained how this remark had the unavoidable effect of prejudicing the jury such that the jury could no longer render a fair verdict, particularly in light of the court's directive to disregard remarks that are not supported by the evidence. Accordingly, we discern no abuse of discretion in the trial court's conclusion that Appellant was not prejudiced by counsel's failure to object to it.

Appellant's third, fourth, and fifth sub-claims allege various misstatements by the prosecutor regarding what Tina Ashley did or did not see during the shooting. *See* Appellant's brief at 91 (citing N.T.

Jury Trial, 8/7/14, at 347). Attorney Sembrot did not object to any of these comments. The PCRA court aptly summarized why the first of these three claims lacked arguable merit as follows:

> Appellant complains that the ADA described Ms. Ashley as watching Mr. Mable dodge bullets and duck. The defense opines that this is inconsistent with Ms. Ashley's testimony that she was pulled inside of her building after the first shot. This claim is inconsistent with the later claim that the shooter stopped shooting as his six-shooter was out of bullets. This is so because Ms. Ashley indicated that she heard the first shot, entered her building, and then, as she claimed to have heard three shots total, she heard two more shots. Thus, by [Appellant's] own reckoning, Ms. Ashley's memories were faulty or one could infer that she was outside for more shots than she testified to, which would have allowed an inference of her watching Supreme dodge bullets or ducking. It was for the jury to determine what the facts were and who was credible. [Appellant] is engaging in the very sort of absolutist characterization of evidence that the Commonwealth did in its closing. This is what litigants in an adversarial system do. They characterize evidence and it is a competitive and heated process.

PCRA Court Opinion, 3/19/20, at 64. The PCRA court went on to conclude that the defense claim that the prosecutor's insinuation that Ms. Ashley's excited utterance meant that Supreme was the intended target was also meritless because it, too, was properly derived from Detective Fetrow's testimony. *Id.* at 65. Finally, the PCRA court concluded that the prosecutor's remark that Ms. Ashley saw Daniek Burns flee the scene was also a permissible inference from the record. *Id.* at 66.

The PCRA court's conclusions are supported by the record. What Ms. Ashley did or did not see, how she was positioned in relation to the shooter and Anna Witter, how quickly she fled inside her house, and at what point in the shooting Daniek Burns fled were all contested points at re-trial. Ms. Ashley testified that she saw Daniek Burns there that night. Id. at 97. She also made conflicting statements about what she saw, the quality of the lighting, and her ability to describe the physical features of the shooter. *Id.* at 87-91. However, while she could not identify the actual shooter, she was certain that it was not Appellant. *Id.* at 93-94. As the re-trial court noted, it was for the jury to determine the witness's credibility based on the evidence presented. Accordingly, we discern no abuse of discretion in the PCRA court's resolution of Appellant's third, fourth, and fifth sub-claims as lacking arguable merit because they were all fair inferences from the evidence adduced at trial. Accordingly, Attorney Sembrot was not ineffective for failing to object to any of them.

In his sixth sub-claim, Appellant asserts that Attorney Sembrot was ineffective for failing to object to "another egregious instance of prosecutorial

overreach," which was when the prosecutor claimed that Ms. Ashley acted like she did not know Appellant, but later waved to him from the witness stand while the attorneys were at sidebar. See Appellant's brief at 94. The remark conflicts with Ms. Ashley's general testimony that she had known Appellant for sixteen years. *See* N.T. Jury Trial, 8/6/14, at 93. However, upon closer examination of Ms. Ashley's re-trial testimony, the PCRA court concluded that the prosecutor's statement was still a fair inference from her testimony indicating that they were not closely acquainted. *See* PCRA Court Opinion, 3/19/20, at 70 (citing id. (explaining that she knew Appellant in the sense that she would sometimes see him on the back patio of their building)). Ms. Ashley, by detailing that she knew Appellant from seeing him occasionally around her apartment complex, plainly implied that she was only a casual acquaintance. This level of familiarity is consistent with the prosecutor's closing argument. Thus, we agree with the PCRA court that no relief is due.

In his seventh sub-claim, Appellant attacks the prosecutor's characterization of Lloyd Valcarcel as follows:

> Then there's Lloyd Valcarcel. What do you say about Lloyd Valcarcel? The man who couldn't tell the truth if his life depended on it. Yes, yesterday he definitively said it wasn't [Appellant]. Yet, in his handwritten statement, he said, "I don't know if he knew about it, let alone did it." And in the same statement to the defense, he says, "Well,

> when I gave the shoe ID, I then named the color of my shoe because I was being smart, due to the fact that he was trying to place a drug sell [sic] on me," meaning Detective Fetrow. He wasn't even being interviewed by Detective Fetrow, but by Detective Nadzom, who got pulled out of bed and knew nothing about this case. Fetrow wasn't even in the room. There's no other way to put it, ladies and gentlemen he's lying.

N.T. Jury Trial, 8/7/14, at 348. *See also* Appellant's brief at 94-95. Appellant asserts that the prosecutor improperly expressed his personal belief about the falsity of Lloyd Valcarcel's testimony. *Id.* at 95.

The PCRA court disagreed. When viewed in its proper context, the court concluded that the prosecutor "merely highlighted what the jury knew already[,j" namely, that "Mr. Valcarcel had either lied when he wrote his statement that he could not say whether [Appellant] was the shooter or when Mr. Valcarcel testified that [Appellant] was not the shooter." PCRA Opinion, 3/19/20, at 73. The PCRA court cited relevant case law and concluded that the prosecutor's comments were neither "unfair nor unduly prejudicial." *Id.* Again, the well-reasoned conclusion of the PCRA court was supported by the record and consistent with relevant precedent. *Id.* (citing *Commonwealth v. Carpenter*, 515 A.2d 531, 536 (Pa. 1987)). Accordingly, we discern no abuse of discretion and Appellant's seventh sub-claim fails.

In his final allegation of prosecutorial misconduct. Appellant attacks the prosecutor's characterization of him as "about as cold a killer as

there exists." Appellant's brief at 95 (citing N.T. Jury Trial, 8/7/14, at 354). Appellant relies heavily on factually distinguishing his case from *Commonwealth v. Clancy*, 192 A.3d 44 (Pa. 2018), in order to support his contention that the statement was impermissible. Appellant's brief at 98. However, like the PCRA court, we find Appellant's argument unpersuasive.

The murder in *Clancy* arose out of a street fight where the defendant shot and killed an unarmed man. *Id.* at 47. The Commonwealth charged the defendant with criminal homicide and, at trial, the defendant did not dispute that he killed the victim. Instead, he argued that he lacked the necessary intent to kill because he acted in the heat of passion, discharging his firearm accidentally. *Id.* at 48, 65. In a PCRA petition, Clancy unsuccessfully challenged his trial counsel's ineffectiveness for failing to object to the prosecutor's closing remarks, which characterized him as a "dangerous man" and a "cold blooded killer." *Id.* at 47.

Our Supreme Court affirmed the denial of PCRA relief, finding that the term "cold blooded murder" directly related to the premeditation element of the crime charged. *Id.* at 66-67. Therefore, the *Clancy* Court concluded that the prosecution's use of the term "cold blooded killer" "constituted permissible (if aggressive) oratorical flair." *Id.* at 67. The High Court went on to find that the prosecutor's statement was also a fair response to Appellant's heat of passion defense. Our Supreme Court thereafter instructed courts faced with similar issues that:

> Prosecutorial remarks do not constitute permissible oratorical flair simply because they are based upon the

> underlying facts of the case or because they relate to an underlying element of the crime. Both requirements must be met. To fulfill his duty as an advocate, a prosecutor has numerous tools in his arsenal. Recourse to inappropriate invective is not one of them.

Id. at 68.

In the instant case, the prosecutor's characterization of Appellant as "as cold a killer as there exists," when viewed in its proper context, is tethered to the premeditation element of the crime charged, first-degree murder, and the evidence adduced at trial. In closing, the prosecutor stated the following:

> Certainly, when you kill or harm three people, [Appellant]'s conduct was the direct cause of the death of three innocent people at the time he had the specific intent to kill, you don't get a free pass just because you're a bad shot. [Appellant] is about as cold a killer as there exists. He used a deadly weapon that evening. The court will tell you that you can infer, based on that alone, that he had the specific intention to kill. He wantonly fired into a crowd of people on a busy York City street, multiple shots. What does that say about his intention, his specific intention? And he did so with callous disregard for anyone's safety for his own personal vengeance. He is guilty of murder in the first degree. Thank you.

N.T. Jury Trial, 8/7/14, at 354.

A conviction for first-degree murder requires malice, which can be demonstrated by evidence of "wickedness of disposition, hardness of heart, wanton conduct, cruelty, recklessness of consequences and a mind regardless of social duty." *Commonwealth v. Hall*, 701 A.2d 190, 200 (Pa. 1997) (holding that the statements that "the only thing colder than the grave of [the victim] is this guy's heart" and that "he walked out coolly, calmly, and collected" were permissible to demonstrate malice). Throughout the trial the Commonwealth alleged that, acting in revenge for an earlier shooting, Appellant decided to open fire on a crowded street, aiming at one person, but instead hitting three innocent victims, killing one of them. Appellant's misidentification defense centered on discrediting the one eyewitness who identified him as the shooter, showing that the GSR evidence was contaminated, and disproving the Commonwealth's motive for the shooting with Jeffrey Mable's testimony that he did not have a dispute with Appellant. The prosecutor's remark was merely suggesting the conclusion that the jury should reach based upon the evidence, namely that the Commonwealth had established the necessary mens rea required to convict Appellant of first- degree murder of a bystander.

Appellant counters that his case is distinguishable from *Clancy* because he pursued a mistaken-identity defense, instead of Clancy's heat of passion defense. *See* Appellant's brief at 98. While discussing fair response in the context of closing argument, the Clancy Court considered the relevance of Clancy's heat of passion defense. In doing so, the court commented that "it may not be proper to refer

to a defendant as a "cold blooded killer" where the defense argument does not warrant that reference. For example, where the defense in first-degree murder trial is mistaken identity, rather than heat of passion, the term "cold blooded killer" may not be appropriate." *Clancy*, *supra* at 68.

Although this is a mistaken identity case, not a heat of passion defense, we cannot agree with Appellant's rote, self-serving interpretation of the *Clancy* decision. Our Supreme Court did not forbid the use of the term "cold blooded killer" in a mistaken identity case, but rather stated that it might not be proper. *Id.* In order to determine the propriety of such a label, the *Clancy* Court instructed future courts to inquire whether that phrase was based upon underlying facts and related to an underlying element of the crime. If so, then such a remark was permissible. The particular defense asserted, while relevant to the Court's analysis, was not outcome determinative.

In light of the foregoing, we conclude that the prosecutor's use of the term "as cold a killer as there exists" constituted an isolated use of oratorical flair that does not require reversal in the particular factual and elemental context presented here. The evidence outlining Appellant's actions supported the statement, which helped explain the necessary mens rea where the murder victim was not the intended target. The PCRA court did not err when it concluded that Appellant's ineffectiveness claim lacked merit, since the prosecutor's closing argument was not impermissible, and thus Attorney Sembrot was not ineffective for failing to object.

VIII. Tina Ashley and Officer Randy Searfoss

In his eighth claim, Appellant asserts that Attorney Sembrot was ineffective for failing to question Tina Ashley and call Officer Randy Searfoss to testify about an excited utterance Ms. Ashley made at the crime scene. *See* Appellant's brief at 103-107.

At the first trial, Tina Ashley was asked about the excited utterance and she clarified that she was actually referring to the group of four men, which included Supreme, as the shooter's target. *See* N.T. Jury Trial, 9/13/06, at 131-32. She did not intend to single out Supreme as the shooter's only target. *Id.* At the re-trial, Tina Ashley was not asked about her excited utterance. Instead, Detective Fetrow provided the sole testimony regarding Tina Ashley's excited utterance. He testified that, while at the crime scene, he overheard Tina Ashley yell at Officer Searfoss, and in the direction of Jeffrey "Supreme" Mable and Valentine Bonilla, that "He knows who was shooting. They were shooting at him." N.T. Jury Trial, 8/4/14, at 141. He then explained that she named Supreme and pointed at him as the target of her frustration. *Id.*

The PCRA court found that this claim had arguable merit, as Appellant had identified a conflict between Detective Fetrow's testimony at the re-trial and Tina Ashley's testimony at the first trial, which Attorney Sembrot did not bring to the jury's attention. See PCRA Opinion, 3/19/20, at 50. However, the PCRA court did not find that Appellant suffered prejudice from this discrepancy, reasoning:

> We cannot find that [Appellant] suffered prejudice. Even if a jury found that Ms. Ashley had not identified Supreme as the shooter's target, the Commonwealth

> still would have had Daniek Burns'[s] identification of [Appellant] as the shooter. And, though weakened, the jury still would have had the ability to infer motive based upon the earlier shooting of [Appellant] and his statements threatening Supreme's life. In spite of the supposed error, [Appellant's] clothes and accessories were still covered in GSR and its components. To our mind, the jury would likely still conclude that [Appellant] was the shooter, that [Appellant] intended to murder Supreme, or someone in the group of four that included Supreme, and that this intent transferred to the victim, Ms. Witter. We cannot conclude that there was any reasonable probability of a different outcome save retrial counsel's supposed error in failing to re-elicit the exact meaning of Ms. Ashley's excited utterance. Not relief is due for this claim.

Id. at 51-52.

We discern no abuse of discretion in the PCRA court's analysis. Given that Tina Ashley's excited utterance went to motive, not the shooter's identification, and was not the only evidence of motive, we cannot see how exposing this discrepancy would have altered the outcome of Appellant's case. Accordingly, no relief is due on the first sub-part of Appellant's seventh claim.

Next, Appellant argues that Attorney Sembrot should have called Officer Searfoss to testify about a

supplemental report he authored, wherein he indicated that Tina Ashley told him that the shooter was aiming at a group of four men which included Supreme. *See* Appellant's brief at 73-74. Officer Searfoss testified consistently with the contents of his report at the first trial, corroborating Tina Ashley's testimony. See N.T. Jury Trial, 9/12/06, at 184.

The PCRA court found that this claim lacked arguable merit, explaining:

> Turning to our test for ineffectiveness, we do not believe that there is arguable merit as Ms. Ashley clearly contradicted herself when she variously claimed to Officer Searfoss, at the time that he took the initial report, that she did not get a good look at the shooter and, at the retrial, that the shooter could not have been [Appellant] who[m] she had known for years .... Had retrial counsel called Officer Searfoss and re-elicited the requested testimony, it would have necessarily undercut the credibility of Ms. Ashley who was called as a defense witness at the retrial to state, in part, that the shooter could not have been [Appellant]. The defense would surely counter that the jury would have a right to pick and choose testimony from the various witnesses. We would not find this persuasive and so we do not believe that there is any arguable merit to this claim.

PCRA Court Opinion, 3/19/20, at 52-53.

The record supports the PCRA court's conclusion. Furthermore, testimony from Officer Searfoss or defense witness Tina Ashley suggesting that the four individuals knew the identity of the shooter, not just Supreme, could have actually harmed Appellant as Daniek Burns was one of the four individuals with Supreme that night. A defense witness indirectly asserting that Daniek Burns knew the shooter's identity, if believed by the jury, could have bolstered Burns's eyewitness identification of Appellant as the shooter to Appellant's detriment. Accordingly, we agree that Appellant's second sub-claim merits no relief.

VIV. IAC Failure to Introduce Photographs

In his ninth claim, Appellant alleges that Attorney Sembrot was ineffective for failing to introduce photographs demonstrating poor lighting conditions at the scene during the re-trial. See Appellant's brief at 109. While Appellant concedes that the jury saw several photographs of the scene, he nonetheless argues that further photographs were required to demonstrate accurately how poor the lighting conditions actually were. *Id.*

The PCRA court found that this claim failed all three prongs of the ineffectiveness test since the jury saw photos of the scene and heard differing accounts of the lighting from various witnesses. See PCRA Court Opinion, 3/19/21, at 55. While there were additional photographs that could have been shown, the PCRA court examined them and concluded that they were cumulative of the ones already introduced at trial. *Id.* at 55-56. In fact, the PCRA court did not agree that the unintroduced photographs actually demonstrated poor lighting. *Id.* at 56.

The record supports the PCRA court's conclusion that additional photographs of the crime scene would not have altered the outcome of trial. The lighting conditions were a heavily contested point. Almost every person who testified that they were present at the scene that night, whether eyewitness or officer, was questioned about his or her perception of the lighting conditions. The Commonwealth admitted photographs of the scene and the majority of the witnesses testified that the lighting conditions were good. *See* N.T. Jury Trial, 8/4/14, at 151-52 (Detective Scott Hose testifying that he photographed the scene without any additional light sources because it was clear and mild outside and the block was "very well lit"); N.T. Jury Trial, 8/5/14, at 217-25 (emergency management specialist testifying about the location of traffic lights, street lights, and building lights present at the crime scene); *id.* at 248 (Alfonzo King testifying that there was a light above the shooter when he was shooting); *id.* at 418 (Daniek Burns testifying that he saw the shooter when he came under a street light on the corner of Newton Street); N.T. Jury Trial 8/6/14, at 88-89 (Tina Ashley testifying that there was a light pole that illuminated the shooter as he came out of the alleyway, a light across the street, and a light up the street towards the corner).

Only two defense witnesses testified to the contrary—that the lighting conditions were poor. *See* N.T. Jury Trial, 8/6/14, at 179 (Lloyd Valcarcel could not identify the shooter, in part, because it was dark outside); *id.* at 226 (Jeffrey Mable testifying that there was a light across the street from the shooter, but he could not identify the shooter because it was not that

bright). Given the extensive attention that the lighting conditions received and the admission of multiple crime scene photographs demonstrating those conditions, we concur that additional photographs would have been unnecessarily cumulative. Accordingly, we find that the PCRA court did not err when it denied this claim.

X. Double Jeopardy: Charles Maner

In his tenth allegation of error. Appellant argues that former first ADA Bill Graff engaged in "egregious prosecutorial misconduct," such that a re-trial should have been prohibited on double jeopardy grounds. Appellant's brief at 112. Purportedly, there was an agreement between ADA Graff and Charles Maner that if Maner testified against Appellant, he would not be sentenced on two pending felony drug cases. *Id.* at 114. Since ADA Graff never revealed the existence of this agreement to Attorney Keenheel, ADA Graff committed an "outrageous Brady violation" and Attorney Sembrot was ineffective when he failed to file a pretrial motion to bar retrial on double jeopardy grounds. *Id.* at 119. The PCRA court disagreed, finding that a double jeopardy motion on these grounds would not have succeeded since there was no evidence that such an agreement existed. *See* PCRA Court Opinion, date at 80.

"An appeal grounded in double jeopardy raises a question of constitutional law. This court's scope of review in making a determination on a question of law is, as always, plenary. As with all questions of law, the appellate standard of review is de novo." *Commonwealth v. Vargas*, 947 A.2d 777, 780 (Pa.Super. 2008) (internal citations omitted). If the factual findings of the PCRA court impact its double

jeopardy ruling, we apply a deferential standard to review those assessments. *Commonwealth v. Wood*, 803 A.2d 217, 220 (Pa.Super. 2002).

Prosecutorial misconduct can implicate the double jeopardy clause. In assessing such a claim, we are guided by the following:

> The Double Jeopardy Clauses of the Fifth Amendment to the United States Constitution and Article 1, § 10 of the Pennsylvania Constitution protect a defendant from repeated criminal prosecutions for the same offense. Ordinarily, the law permits retrial when the defendant successfully moves for mistrial. If, however, the prosecution engages in certain forms of intentional misconduct, the Double Jeopardy Clause bars retrial. Article I, § 10, which our Supreme Court has construed more broadly than its federal counterpart, bars retrial not only when prosecutorial misconduct is intended to provoke the defendant into moving for a mistrial, but also when the conduct of the prosecutor is intentionally undertaken to prejudice the defendant to the point of the denial of a fair trial. An error by a prosecutor does not deprive the defendant of a fair trial. However, where the prosecutor's conduct changes from mere error to intentionally subverting the court process, then a fair trial is denied.

Commonwealth v. Graham, 109 A.3d 733, 736 (Pa.Super. 2015) (cleaned up). Thus, where a

defendant alleges prosecutorial misconduct as a basis for double jeopardy protection, the critical inquiry concerns the nature of the alleged misconduct. *Commonwealth v. Minnis*, 83 A.3d 1047, 1052 (Pa.Super. 2014). Dismissal of the charges is only appropriate where the actions of the Commonwealth are "egregious" and it is "demonstrable [that] prejudice will be suffered by the defendant if the charges are not dismissed." *Commonwealth v. Adams*, 177 A.3d 359, 372 (Pa.Super. 2017). *See also Commonwealth v. Wilson*, 147 A.3d 7, 13 (Pa.Super. 2016) ("[D]ismissal of charges is an extreme sanction that should be imposed sparingly and only in cases of blatant prosecutorial misconduct.").

Charles Maner testified to the following at Appellant's first trial. Appellant approached him in the York County prison and told him that he felt bad about accidentally shooting a woman. *See* N.T. Jury Trial, 9/12/06, at 205, 209-11. Appellant explained that he was aiming at a man who had previously shot him and that the woman was hit by a stray bullet. *Id.* Appellant stated that he would get away with the crime if no one identified him as the shooter. *Id.* at 219.

After the jailhouse conversation, Maner contacted a state trooper he had worked with in the past, who passed along the information to ADA Graff. *Id.* at 238. While out on bail, Maner spoke with ADA Graff before leaving for Florida, where he was arrested and began serving a sentence for drug possession. *Id.* at 218. At trial, Maner testified that although he had not yet been sentenced on his pending forgery conviction, he had not been promised anything in exchange for his testimony and expected

to serve time on that case once he finished his sentence in Florida. *Id.* at 218-221. On cross-examination, Maner agreed that he had many prior convictions for his "dealings with drugs over the years and up to the present," and that he had provided information to the police in the past on other individuals who were involved with drug charges. *Id.* at 238-40, 250-51.

During Appellant's first PCRA proceeding, Attorney Sembrot discovered the existence of two felony convictions for possession with intent to deliver to which Maner had pled guilty prior to the shooting in this case. At the time of Appellant's first trial, however, Maner had not yet been sentenced on those crimes. Attorney Sembrot's investigations revealed that Maner was, in fact, never sentenced at either case. Based on the foregoing, Attorney Sembrot concluded that an agreement must have been reached between the Commonwealth and Maner to avoid sentencing in these cases and counsel raised a *Brady* violation in Appellant's PCRA petition for the Commonwealth's failure to disclose the existence of this alleged plea agreement.

At the subsequent evidentiary hearing, former first ADA Graff testified that he was aware that Charles Maner had two felony drug cases pending when he testified at Appellant's first trial and that Maner had pled guilty in exchange for a sentence that would be "no worse than a county sentence." N.T. PCRA Hearing, 4/13/12, at 10-15. However, the reason for the plea negotiated sentence was that Maner was an informant who "was setting up drug dealers all over the place, and we expected him to continue to do that." *Id.* at 18. ADA Graff explained

that he never turned over the plea agreement to Attorney Keenheel because it was negotiated and entered into four months before the shooting happened, so he did not think that its existence was relevant to Appellant's case. Id. at 15-19.

ADA Graff conceded that Maner was never sentenced, but denied that this inaction was the result of an agreement in Appellant's case. *Id.* at 41, 93. Instead, he explained that Maner was not sentenced because he fled to Florida upon his release on bail. *Id.* at 37. A bench warrant was issued for his arrest, but Maner was mistakenly transported from Florida to testify against Appellant only at a grand jury proceeding in 2006. *Id.* While he was here for the grand jury proceeding, the Commonwealth tried to serve the outstanding warrants for the drug sentencing cases. Id. at 37-39. However, attempts were unsuccessful because they did not use the Interstate Compact Act properly. Id.; see also Order, 9/6/06 (vacating the service of the warrants without prejudice to be reissued in the future).

ADA Graff left the district attorney's office in 2009 and was unsure why Maner was never brought back for sentencing on the outstanding drug cases. *Id.* While he had no specific recollection of what happened, he agreed that he probably did not pursue Maner once he finished serving his sentence in Florida because he had assisted with the prosecution of Appellant. *Id.* at 90-94. Therefore, ADA Graff thought he would "pay him his dues" by ignoring the pending charges. *Id.* The original PCRA court found ADA Graff's testimony credible and denied Appellant's *Brady* claim on the grounds that Appellant had not proven that Maner was offered a

deal in exchange for his testimony. *See* PCRA Court Opinion, 6/26/12, at 15-16.

Almost two years later, and before the start of Appellant's re-trial, Charles Maner appeared for sentencing on the pending drug charges. At Maner's sentencing hearing, ADA Graff reiterated the decision-making process he testified to at Appellant's PCRA hearing, explaining that the delay in sentencing was due to his intention to "let [the cases] disappear and go away" after Maner testified against Appellant. *See* N.T. Sentencing Hearing, 4/22/14, at 19. While the plea agreement was based on information Maner provided on other drug dealers, after he testified against Appellant, ADA Graff decided on his own that he wanted to show Maner his appreciation by making these two cases go away. *Id.* at 17. Maner also testified at the hearing, consistent with the testimony of ADA Graff, that he was not offered anything in exchange for his testimony against Appellant. It was only after his testimony was completed, and he inquired about his pending drug cases, that ADA Graff told him to return to Florida and not worry about the cases. The sentencing court found that an agreement between the Commonwealth and Maner was entered into after he testified against Appellant, and dismissed the charges with prejudice. *Id.* at 41-43.

Based upon our review of the certified record in this matter, we discern no error on the part of the PCRA court in concluding that Appellant failed to prove the existence of an agreement between the Commonwealth and Charles Maner in exchange for his testimony against Appellant. To the extent that any tacit or express agreements between Maner and

ADA Graff existed, they preceded the commission of Appellant's crimes and were related to Manor's activity as a confidential informant in unrelated drug cases. There is support in the record for that position based on ADA Graff's testimony at two separate hearings, which the original PCRA court and a separate sentencing court deemed credible. Appellant counters that he is entitled to relief because *Commonwealth v. Smith*, 615 A.3d 321 (Pa. 1992), presents a contrary result in a "scenario [that] is identical to the facts herein." Appellant's brief 112-13.

In *Smith*, the defendant was convicted of murdering a woman and her children, but was granted a new trial based upon the erroneous admission of hearsay. After the award of the new trial, Smith discovered that the Commonwealth deliberately withheld material exculpatory evidence. Specifically, the prosecutor intentionally did not inform the defendant about a plea agreement that it reached with its chief witness, who had actually lied on the witness stand when he denied that the Commonwealth had promised him favorable treatment in return for his testimony. Furthermore, the district attorney deliberately withheld physical evidence that he knew was exculpatory to the defendant because it supported the defendant's theory of the case. Indeed, when a police officer testified about the existence of the evidence, the prosecutor presented testimony from other police witnesses suggesting that the first officer was fabricating his testimony.

The *Smith* Court characterized the actions of the district attorney as egregious and clearly undertaken in bad faith. It discharged the defendant

and ruled that "the double jeopardy clause bars retrial following intentional prosecutorial misconduct designed to secure a conviction through the concealment of exculpatory evidence." *Id.* at 322. It concluded that, when the record demonstrates the presence of "prosecutorial misconduct undertaken in bad faith to prejudice or harass the defendant," as opposed to "prosecutorial error," double jeopardy prevents a second trial because there is a "breakdown of the integrity of the judicial proceeding[.]" *Id.* at 324. Under Smith, discharge is warranted only when "the conduct of the prosecutor is intentionally undertaken to prejudice the defendant to the point of the denial of a fair trial." *Id.* at 325.

In this case, the prosecution's actions did not come close to the type of clearly egregious misconduct that occurred in *Smith*. Unlike in *Smith*, no agreement existed between the Commonwealth and Charles Maner for his testimony. Therefore, the Commonwealth did not suborn perjury when it allowed Maner to testify that he had not been offered anything in exchange for his testimony. The only agreement that existed was negotiated and entered into before Appellant committed his crimes. Regardless of whether the Commonwealth should have informed defense counsel of the existence of this prior agreement, this "prosecutorial error" was not directly linked to Appellant's case. Therefore, it did not amount to a breakdown in the judicial proceeding. While the jury was not aware of the specific parameters of this plea agreement, the jury was told about Maner's extensive criminal history and cooperation with the Commonwealth in the past. Since a double jeopardy motion would have been

unsuccessful, counsel was not ineffective for failing to file one. *See Commonwealth v. Spotz,* 896 A.2d at 1191, 1222 (Pa. 2006). Accordingly, Appellant's tenth claim is without merit.

XI. Cumulative prejudice

In his final allegation of error, Appellant raises a cumulative prejudice claim, contending that all of the alleged instances of ineffectiveness asserted in his brief, when viewed together, render an even stronger case that he should be granted a new trial. See Appellant's brief at 120-25. The PCRA court denied Appellant's claim of cumulative effect based on its findings that none of Appellant's individual claims warranted relief. *See* PCRA Opinion at 97.

Our Supreme Court has recognized that "no number of failed [ineffectiveness] claims may collectively warrant relief if they fail to do so individually." *Commonwealth v. Johnson*, 966 A.2d 523, 532 (Pa. 2009) (quoting Commonwealth v. Washington, 927 A.2d 586, 617 (Pa. 2007)). However, our Supreme Court has clarified that this principle applies to claims that fail because of a lack of merit or arguable merit. *Commonwealth v. Sattazahn*, 952 A.2d 640, 671 (Pa. 2008). When the failure of individual claims is grounded in lack of prejudice, then "[the] cumulative prejudice from individual claims may be properly assessed in the aggregate." *Commonwealth v. Hutchinson*, 25 A.3d 277, 319 (Pa. 2011).

We have affirmed the denial of Appellant's first, third, fifth, seventh, ninth, and tenth claims based on a lack of merit or a finding that Appellant's attorney had a reasonable basis for his inaction. Therefore, there is no basis for a claim of cumulative

error with regard to these claims. With regard to the few claims that we concluded were properly denied based on a lack of prejudice, we are satisfied that prejudice is lacking on a collective basis relative to those claims as well. These claims involved the absence of expert testimony on eyewitness identification, the allegedly inadequate cross-examination of Detective Fetrow, choice of impeachment for Apollonia Snyder, and the failure to clarify to whom Tina Ashley was referring when she identified the shooter's target. These claims are factually and legally independent, except for the ones referring to Tina Ashley's excited utterance. We previously concluded that Tina Ashley's excited utterance was but a small piece of the evidence used to convict Appellant, and that further examination of it could have actually bolstered Daniek Burns's eyewitness identification. Viewing these two issues together does not alter our view that the alleged ineffectiveness did not change the outcome of the trial.

Having reviewed all of Appellant's issues and concluding that none warrant relief, we affirm the order of the PCRA court denying Appellant's petition.

Order affirmed.

Judgment Entered.

/s/Joseph D. Seletyn, Esq.

Prothonotary

Date: 05/18/2021

APPENDIX E

IN THE COURT OF COMMON PLEAS OF YORK COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA
v.
IAN CHRISTOPHER BRENNER,
Defendant

COUNSEL OF RECORD:
Scott A. McCabe, Esquire
Counsel for the Commonwealth
J. Andrew Salemme, Esquire
Counsel for the Defense

ORDER & OPINION IN SUPPORT OF ORDER

Defendant Ian C. Brenner, by and through his counsel, filed a Post-Conviction Relief Act (hereinafter: PCRA) petition. A series of PCRA hearings were initiated and, upon their conclusion, we took the matter under advisement. After consideration of all relevant testimony, evidence, briefs, and case law, this Court, for the reasons cited infra, hereby, DENIES the defendant's PCRA petition.

I. Factual and Procedural Background

Due to the large volume of evidence at issue in this case, we dispense with a typical narrative format for the facts. Instead, we proceed with a consecutive recounting of witness testimony.

Officer Derrick Millhouse, a patrolman, took the stand and testified that, while on patrol, he heard four shots. (Notes of Testimony, Volume 1,8/4/14, at 92.) He interdicted wo subjects he had seen running. *Id.*, at 94. One in a white shirt was Lloyd Valcarcel. *Ibid.* Valcarcel indicated that he had been running from the shots. *Id.,* at 98. Valcarcel did not respond when asked if he had seen the shooter. *Id.,* at 98.

Officer Richard Kehler testified that he heard Officer Millhouse's call regarding the shooting and responded to a large group of hysterical people gathered at the scene. *Id.,* at 103-04. He then proceeded to the hospital to speak with victims. *Id.,* at 104. Upon Officer Kehler's arrival, he discovered that Anna Witter had passed away. *Id.,* at 105. Officer Kehler interviewed Anthony Zawadzinski who had received a through-and-through bullet wound to his leg. *Id.,* at 108. Mr. Zawadzinski heard the shots and believed that the third one had hit him. *Ibid.* Officer Kehler then responded to Memorial Hospital to interview the third victim, Alfonzo King. *Id.,* at 108-09. An X-ray was shown to the officer and it revealed a bullet lodged in Mr. King's wrist. *Id.,* at 110. This bullet was recovered and delivered to authorities as evidence. *Ibid.* Mr. King told Officer Kehler that as he was headed to Allison's Bar for a drink, he ran into a friend. *Id.,* at 112. Mr. King related that he had heard four or five shots and believes he was struck by the second one. *Id.,* at 113.

Officer Shannon Miller testified that she responded to a call of shots fired and received a description of a black male in a long-sleeved red shirt running in the area of King and Queen Streets. *Id.,* at 117. She observed a male in that area, who matched

the description, slowly jogging then a fast-paced walk. *Id.,* at 118-19. The subject, Daniek Burns, complied when ordered to the ground and was discovered to be wearing a bulletproof vest under his shirt. *Id.,* at 119. Burns was shaking, nervous, and scared. *Id.,* at 119. Mr. Burns indicated he had nothing to do with what had happened, but that he had seen it happen. *Id.,* at 119-20. Admitted as a *res gestae* exception,[1] Officer Miller related the following:

> [Burns] said he was talking to his friend, Alicia, outside, and he had seen a male, who he later described as light-skinned with a goatee and a gray hooded sweatshirt, come out of an alley and stare at him. He stood there looking at them, and then the male pulled out a gun, yelled something, and started shooting at them, and that's why he had been running.

Id., at 120-21.

It was clarified that Burns had given a description of the shooter to Officer Miller and that it was a "[l]ight-skinned male with a goatee and a gray hooded sweatshirt." *Id.,* at 122. Burns indicated to Miller that he knew the name of the shooter, but that he was too afraid to utter the name as he feared reprisal. *Id.,* at 123-24.

Detective Anthony Fetrow was called and he testified that the incident occurred two blocks south and one block east of the York County Judicial Center. *Id.,* at 138. Detective Fetrow described the

---

[1] See *Commonwealth* v. *Brenner,* 1675 MDA 2014, at 13-14.

conditions as a mild night, clear, and about 58 degrees. *Id.,* at 138-39. Tina Ashley was still upset some twenty minutes after the shooting and she directed Detective Fetrow to Jeff Mable, a.k.a. "Supreme," and Valentine Bonilla and indicated that they knew who the shooter was as Supreme had been the target. *Id.,* at 140-42. Specifically, Detective Fetrow remembered observing Ms. Ashley pointing to Supreme and stating things like "'He knows who was shooting. They were shooting at him[.]'" *Id.,* at 141-42. Detective Fetrow indicated that the shots were determined to have been fired a little north of the intersection of Newton and Duke Street, on the east side of the street. *Id.,at* 146-47.

Deputy Scott Hose, formerly a detective with York City Police, arrived on scene as the crime scene investigator. *Id.,* at 150. Deputy Hose indicated that while additional lighting is sometimes utilized to illuminate a scene, it was not necessary in this case as the block was very well lit. *Id.,* at 152. The extent of the lighting was described in detail and included numerous sources of light. *Id.,* at 156. On cross-examination, the defense called into question the direction of those lights and the extent of their illumination. *Id.,* at 194-97. Deputy Hose disputed any assertion that the lighting was so poor as to have affected his collection of evidence. *Id.,* at 200. On redirect, Deputy Hose indicated that, despite his use of a flash to take photos of the scene, he had no trouble discerning objects with his naked eye. *Id.,* at 204- 05. Deputy Hose described how a revolver does not eject shell casings, as a semi-automatic firearm would, and that no shell casings were located. *Id.,* at 159.

Michael Shanabrook, employed as an emergency management specialist by the City of York, testified that one of the street lights was added to the area in 2006. *Id.,* at 218. Mr. Shanabrook testified that from the intersection of Newton and Duke Street to the shot up vehicle was eighty to ninety feet and from the intersection in question to Allison's Bar was in the range of one-hundred-and-ninety feet. *Id.,* at 232-33.

Alfonzo King, Sr., a construction worker, testified that he had gotten off of work and le called a friend for a ride to get a six pack at Allison's. *Id.,* at 237-38. Mr. King indicated that he did not know the Defendant at the time. *Id.,* at 238. King knew Supreme from playing basketball and proceeded to speak with him outside of Allison's Bar. *Id.,* at 239-40. Then, "as 'King] was talking to [Supreme], [King] heard someone scream, 'Hey, yo. 'When [King] heard somebody scream, 'Hey, yo, '[he] went to turn around, and the next thing you know, I saw flashes from, like, a gun." *Id.,* at 245. It was a male voice that had screamed. *Id.,* at 246. King saw a person with a dark hoodie on and then the flash from the gun. *Ibid.* King testified that there was light above the shooter. *Id.,* at 248. However, King could not identify the shooter or the shooter's race. *Id.,* at 249. King described being hit, fleeing to a stoop where he cowered in the fetal position, joining up with a white male who had been shot, and about how he was then treated by the paramedics or firefighters. *Id.,* at 251-53. Mr. King indicated his belief that the second shot hit him and that Supreme was crouching down and using Mr. King like a wall. *Id.,* at 249-50. King described the shooter as tall and stocky. *Id.,* at 256. On cross-

examination, King testified that he did not hear any expletives and that he could not say for certain that the shooter uttered the "Hey, yo" that he had heard. *Id.,* at 263-64. King also indicated that his view of the shooter was limited by the street lights available to him; however, he also stated that he did not recollect any shadow over the shooter's hooded face. *Id.,* at 265-56. Defense counsel then confronted him with his prior testimony from 2006 wherein he described the shooter's face as obscured by a shadow, like that of the Grim Reaper. *Id.,* at 270-71.

The prior recorded testimony of Anthony Zawadzinski, deceased at the time of retrial, was then read to the jury. *Id.,* at 280-82. On the evening in question, Mr. Zawadzinski was in the area of Allison's Bar on South Duke Street. *Id.,* at 284. Mr. Zawadzinski's condensed story was as follows:

> I was walking down the street towards Sunrise Restaurant. I guess that the one man run by, and he was bleeding from the wrist, so I started running for the car to get behind the brick building. As I turned the corner, I got shot through the leg.

Id., at 284. Mr. Zawadzinski's back was towards the shooter. *Id.,* at 285. This witness never turned towards the shooter. *Id.,* at 288.

Detective Fetrow was recalled and he testified that the Defendant was arrested on October 25, 2005, approximately six days after Anna Witter's murder. *Id.,* at 293. Detective Fetrow testified that, at the time of the killing, the Defendant was six-feet and four inches tall, two-hundred and fifty pounds, and that the Defendant had a light beard and a light mustache.

Id., at 294. On the day of his arrest, the Defendant had on a black hooded sweatshirt, a brown belt, a pair of dark blue jeans, and a pair of black and gray Michael Jordan sneakers. *Id.,* at 295. Detective Fetrow described his interest in the belt as an item most individuals wear every day without swapping out and how there were vertical scratches on the inside of the belt where some object was rubbing on a regular basis. *Id.,* at 297. The jeans also matched descriptions of the shooter's attire. *Id.,* at 299-300. The black zip-up sweatshirt also matched some witness descriptions of the shooter. *Id.,* at 300-01. In response to defense questioning, on redirect, Detective Fetrow offered that in his time as an officer, individuals have been arrested wearing the same clothes that were worn during the crime and even possessing items stolen or involved in the crime. *Id.,* at 306.

Allison Murtha was qualified as an expert in gunshot residue analysis. *Id.,* at 312. On December 9, 2005, Ms. Murtha's organization received a Trafalgar belt, Rocawear jeans, and Jordan sneakers. *Id.,* at 320. On January 24, 2006, a Koman sweatshirt was received. *Ibid.*

Ms. Murtha reported that the Trafalgar belt had "a total of at least 42 characteristic gunshot residue particles, at least 29 two-component or consistent particles, and at least 19 one- component particles." *Id.,* at 325-26. Ms. Murtha informed the jury that she had worked on between seventy-five-hundred and ten thousand samples of gunshot residue. *Id.,* at 326. The Trafalgar belt contained "a very large population of gunshot residue." *Ibid.* Moreover, Ms.

Murtha offered that "[t]his is a sample that has one of the heavier counts on it than - - in the amount of samples that I have seen." *Ibid.* Ms. Murtha then testified about the jeans:

> There were two samples that were taken from the jeans. Two of those stub samples, one was taken from the right leg, and one was taken from the left leg. On the right leg, there was a total of 11 one-component particles. On the left leg, there was a total of 3 characteristic gunshot residue particles and at least 13 one-component particles.

Id., at 329. As for the sneakers,

> Two samples were taken from the sneakers, one from the right sneaker and one from the left sneaker. On the right sneaker, there was a total of 1 two-component particle and at least 19 one-component particles. On the left sneaker, there was a total of 1 two-component particle and at least 17 one-component particles.

Id., at 329-30. As for the sweatshirt,

> The sweatshirt - - from the sweatshirt, there were four stub samples taken. One was taken from the right sleeve, one from the right side of the sweatshirt, one from the left side, and one from the left sleeve. On the right sleeve of the sweatshirt there was a total of 1 two-component particle and 18 one-component particles. On the right side, there was a total of 7 one-component

> particles. On the left side, there was a total of at least 13 one-component particles. And on the left sleeve, there was a total of at least 14 one- component particles.

Id., at 330. Ms. Murtha also offered that the lab does everything in their power to report only gunshot residue and to exclude particulate that could have emanated from a source besides a firearm. *Id.,* at 332. In this case, Ms. Murtha opined that the *only* potential source of the particles was from the discharge of a firearm. *Id.,* at 332-33. And, Ms. Murtha stated the following:

> Whenever the three-component particles are found, we can say one of three things happened. We can say the individual wearing this clothing discharged a firearm, was in proximity or close to somebody who discharged a firearm, or came into contact with something that had gunshot residue on it, like a recently discharged firearm.

Id., at 335-36. On cross-examination, Ms. Murtha admitted that there is always the potential for contamination of samples and she agreed that gunshot residue could be transferred from person to person or from one item to another. *Id.,* at 342. And Ms. Murtha seemingly admitted that if clothing were collected after it was left unobserved by the police then no one could say what it had come into contact with and an analysis could only show what was present and not how it was deposited. *Id.,* at 344. Ms. Murtha further admitted that, with the six day discrepancy between the shooting and the collection

of the items of clothing, she could not date when the gunshot residue was deposited on the items tested. *Id.,* at 346. The jury heard Ms. Murtha testify that the sweatshirt contained no particles that were "characteristic of GSR, gunshot residue[.]" *Id.,* at 347. Ms. Murtha confirmed for the defense that gunshot residue could be present on clothing through lawful activities such as hunting. *Id.,* at 350. On redirect, Ms. Murtha stated the following:

> When three-component particles are also found, it is more likely that those one and two-component particles came from the discharge of a firearm. I can't say for certainty [sic] that they did, but it's more likely that they did when you also have the three-component particles present.

Id., at 352. And,

> [i]f it's just the sweatshirt - -I apologize. If it's just the sweatshirt, then there are no three-component particles there on that sweatshirt, so the most I can say is that they could have come from the discharge of a firearm.

Id., at 354. Finally, Ms. Murtha also testified to the following:

> . .. Movement, motion, or activity are some of the biggest contributors to particulate loss. So if I were to discharge a firearm and then wash my hands or put my hands in and out of my pockets or run my hands through my hair, I could potentially lose all particles that could be on my hands. The same would

> go for other clothing or other items. The more movement or motion or activity there are with those items, the more potential there is to lose particulate from those items.
>
> Time is also a factor. If I were to discharge a firearm and collect samples immediately after I discharged that firearm, there would be a greater possibility that I would find particulate on those items as opposed to if I waited five, six, seven, eight days and then collected samples, because that time could allow for more motion and movement, and that could affect particulate loss.

Id., at 334-35.

Detective Fetrow retook the stand and testified, regarding the items of evidence seized from the Defendant on October 25, 2005, when he turned himself in, that sterile latex gloves were utilized to place the clothing into paper bags within minutes of the Defendant being taken into custody. *Id.,* at 356. Any time the items were handled a new pair of latex gloves was utilized. *Id.,* at 357. Detective Fetrow stated he could not say what the items of clothing came into contact with prior to the Defendant's surrender. *Id., at* 358.

David Krumbine, an enlisted member of the Pennsylvania State Police, was qualified as an expert in firearms and tool mark identification. *Id.,* at 367. Mr. Krumbine identified the bullet recovered from Anna Witter's body as being of the .38 or .357 class and possessing characteristics that Mr. Krumbine used to generate a list of manufacturers or marketers

of firearms from which the bullet could have been discharged. *Id.,* at 373-75. A second bullet fragment was recovered and Mr. Krumbine determined it too was fired by the same weapon. *Id.,* at 379. A third fragment of evidentiary value was connected to the first two. *Id.,* at 382. The bullets were determined to have been, most likely, discharged from a .38 special or a .357 magnum cartridge, which is commonly found chambered in revolvers. *Id.,* at 383. Moreover, the lack of casings found at the scene is consistent with the possible use of a revolver. *Id.,* at 383-84.

The testimony of Daniek Burns, who was deceased at the time of retrial, was read into the record. *Id.,* at 386-88. Mr. Burns indicated that he was then incarcerated at Rikers Island in New York on an attempted criminal possession drug charge. *Id.,* at 390. Burns indicated that he had, at the time of the initial trial, no deals with any law enforcement agency to dismiss charges, get out early, or to do anything for him. *Id.,* at 395. On October 19, 2005, Mr. Burns was in the area of Allison's bar with a female named Alicia. *Ibid.* Burns observed a man known to him as Mable or Supreme standing "over there" speaking to someone else. *Id.,* at 396-97. Burns then sat on a car. *Id.,* at 397. Burns saw someone ducking or crouching as they moved across the street from the Salvation Army building. *Id.*, at 399.

When this individual got to the corner, he stood up yelled something like "Bitch ass nigger" before firing the first shot. *Id.,* at 399-400. Mr. Burns took off running before being apprehended by the police. *Id.,* at 400. The window of the car that Mr. Burns had been sitting on was shot out. *Id.,* at 401. However,

when queried whether he believed that he had been the target, Mr. Burns stated the following:

> Well, **the first shot he didn't let off at me.** ***He let it off in Supreme direction.*** He - - when Supreme started walking away, he said something. That's when Supreme looked back, and **he shot at *him.***
>
> …
>
> When [the shooter] said something, Supreme was already walking away. I looked and Supreme was like walking away, 'cause when I looked at him, he was standing, and he said something. When I looked, Supreme was walking away, and that's when Supreme turned back when he heard him too. And he shot the first shot, boom, **and** shot *another* shot *at him,* and that's when I ran.

Id., at 437. Mr. Burns testified that he saw the shooter's face before identifying the Defendant in court. *Id.,* at 401. Mr. Burns indicated that he knew the Defendant from having seen him around places like the barbershop over the couple of years that Mr. Burns had been in York and that Mr. Burns knew the Defendant as Brenner. *Id.,* at 402. Mr. Burns initial refused to identify the shooter out of fear. *Id.,* at 404. Mr. Burns said that, after speaking with his uncle, he offered up the initials "LB." and then was shown a picture lineup from which he identified the Defendant. *Id.,* at 405. Mr. Burns testified that, at the time he was at the police station, he was aware of a warrant for his arrest out of New York, but that none of the police officers indicated that they were aware,

nor did they offer him any deals. *Ibid.* Burns then informed the jury about the various charges that had been lodged against him over the years and explained that one of the cases was dismissed for lack of evidence and not because he was a key witness in the case *sub judice. Id.,* at 408-10. On cross-examination it was established that Mr. Burns was smoking marijuana on the night in question. *Id.,* at 410. The defense probed whether Mr. Burns story had changed regarding which shot he fled after and Mr. Burns settled on that he had stood in place after the first shot, the shooter began walking towards him, and then at the second shot Mr. Burns was running. *Id.,* at 413-14. Burns described the shooter as having a hoodie on that was zipped up to where you could just see a white t-shirt, blue jeans, and black shoes or boots. *Id.,* at 418. It was later clarified that Mr. Burns considered shoes to mean sneakers. *Id.,* at 439. First trial counsel elicited that, at the time of his statement to police, Burns had a warrant from New York City for failing to appear at sentencing, an active warrant for a robbery charge that was later dismissed, and Burns was not arrested for the bullet proof vest despite having provided his correct name and birth date. *Id.,* at 429-30. Burns went on to testify that the shooter had his hoodie up, but that it was not over his face like the Grim Reaper. *Id.,* at 432. Burns also testified that he was self-employed as a drug dealer in York. *Id.,* at 433. Burns testified about refusing to press charges against Boobie Johnson who had shot at him previously and that on the night in question he was unsure if the shooter was firing at him. *Id.,* at 435-36. Finally, Mr. Burns lived in fear after the incident and after identifying the Defendant for the

police, which led Mr. Burns to hide at an Uncle's house. *Id.,* at 407. Upon his reemergence, Mr. Burns was confronted about the incident, which he hinted amounted to retaliation, which led Mr. Burns to flee to North Carolina. *Id.,* at 407-08.

Doctor Samuel Land, a forensic pathologist, was qualified an expert in the field of forensic pathology. (Notes of Transcript, Volume 2, 8/4/14, at 9.) Dr. Land performed an autopsy on Anna Witter on October 21, 2005. *Ibid.* Ms. Witter received a penetrating gunshot wound to her left chest, which passed through the upper lobes of her lungs, through the esophagus, and lodged in her right upper back. *Id.,* at 12. The bullet had ricocheted before striking Ms. Witter. *Id.,* at 13.

Officer Terry Seitz took the stand and testified that he spoke with the Defendant at the hospital, on October 9, 2005, following the Defendant having been shot. *Id.,* at 22-23. The Defendant had been struck in his right arm and in his right leg. *Id.,* at 23. The Defendant told Officer Seitz that he did not know who had shot him. *Id.,* at 24. The Defendant refused to provide the name of the friend that he claimed had driven him to the hospital. *Id.,* at 25.

As Detective Troy Cromer was unavailable for trial, his prior recorded testimony was read into the record. *Id.,* at 30-31. Detective Cromer was assigned to investigate the October 9, 2005 shooting of the Defendant; however, owing to the Defendant's unwillingness to participate in that investigation, Detective Cromer cleared the case out by exception. *Id.,* at 34. Detective Cromer had gone to the scene in an attempt to collect evidence and look for witness,

but these attempts were in vain, which led to the closing of the case. *Id.,* at 35-37.

Apollonia Snyder,[2] the Defendant's friend since high school, took the stand and testified that she was nervous about testifying. *Id.,* at 40. Ms. Snyder relayed that, a couple of days before the murder, she had been hanging out with the Defendant. *Id.,* at 40-41. They had met up at Allison's Bar before Ms. Snyder drove them in a van to bar-hop. *Id.,* at 41-42. Ms. Snyder and the Defendant were alone in the van when the following events, which she recounted, occurred:

> [The Defendant] was on his phone talking to somebody about how he was going to pop Supreme when he seen him, and in the midst of them talking, he had a gun in his lap, and he was playing with it.

Id., at 42. Ms. Snyder described the Defendant's tone as "aggressive, very aggressive." *Ibid.* Ms. Snyder knew Supreme and knew him to hang out at Allison's Bar and around Princess and Pine Streets. Id., at 43. Ms. Snyder later relayed the Defendant's threat to Detective Tony Fetrow. Ibid. At the time that Ms. Snyder gave Detective Fetrow this information, Ms. Witter had already been murdered and Ms. Snyder had open charges. *Id.*, at 44-45. On cross-examination, the defense elicited that Detective Fetrow was the one who reached out to Ms. Snyder. *Id.,* at 48. However, Ms. Snyder also engaged in the following exchange with defense counsel:

---

[2] By the time of the retrial, Ms. Snyder had become Ms. Johnson, (Notes of Testimony, Volume 2, 8/4/14, at 19); however, for the sake of clarity, we refer to her as Ms. Snyder.

> Defense: Now, did it cause you concern when you supposedly saw Ian with this gun?
> Snyder: It caused me concern, but after I found out about the murder, you know what I mean, it took me a while to come up, but it was the right thing to do. It was on my conscience, and it was the right thing for me to do.

Id., at 47. Ms. Snyder admitted to having dated Boobie Johnson, but could not remember *when* she had done so. *Id.,* at 56-57. Following this testimony, the Commonwealth closed their case.

The defense called Tina Ashley who was sitting with Ms. Witters on that fateful day when one of their companions, Tony, said "'Oh, shit[.]'" *Id.,* at 87. This caused them all to turn whereupon they saw a person standing at the alleyway who then began shooting. *Id.,* at 37-88. Ms. Ashley described the shooter as wearing a gray hoodie and standing approximately five-foot-seven. *Id.,* at 90. Ms. Ashley said she could only see that the person had a dark complexion. *Ibid.* As the shooting occurred, Tony pulled Ms. Ashley into the vestibule and Ms. Ashley pulled Ms. Witters in after her. *Id.,* at 91. Ms. Witters slid down the vestibule wall and proclaimed that she had been hit. *Ibid.* Ms. Ashley testified that she had known the Defendant for some sixteen years by the time of the shooting and that he could not have been the shooter who had a thin build and a dark complexion as opposed to the Defendant's light complexion and stocky build. *Id.,* at 93-94. Ms. Ashley testified that she was a regular of Allison's Bar and never saw the Defendant there. *Id.,* at 96-97. On cross- examination,

Ms. Ashley reiterated how little she had seen in that she could not even identify the gender of the shooter; however, she continued to refer to the shooter as a male. *Id.,* at 103-04. Ms. Ashley testified that, at the time, she kept telling Detective Fetrow that all she knew was that the shooter was black. *Id.,* at 109. In response to Commonwealth questioning, she stated that when she saw the shooter he was standing under a lamp post and that she did not see where he came from. *Id.,* at 112. When the defense confronted Ms. Ashley with a photo showing a post with no light on it she said that there had been a light. *Id.,* at 116.

Alicia Brittner took the stand and testified that, on the night in question, she had been out front of Allison's Bar with Jeffrey Mable and a couple of his friends. *Id.,* at 120. As Ms. Brittner made a phone call, she was walking away from Mr. Mable's group towards Newton Street when she claims to have seen brake lights from a vehicle as it entered Newton Street on the opposite side of Duke Street from her location. *Id.,* at 123. A person alighted from the vehicle, crossed Duke Street to where Duke met the alley way of Newton Street, turned, and pulled a gun. *Id.,* at 123-24. Ms. Brittner described this person as average height and she assumed average height based upon his hoodie and clothes being baggie. *Id.,* at 124. She described the hoodie as light gray. *Id.,* at 124. Ms. Brittner stated that, despite the lighting, it was dark out and, with the hoodie being up, she could not identify the shooter's gender or race, but could say that the gun was black. *Id.,* at 125-26. Ms. Brittner, her memory refreshed by Detective Fetrow's report, indicated that she could say the hoodie was light tan *or* light gray because it had been dark out. *Id.,* at 149-

50. Following a significant back-and-forth on cross-examination, Ms. Brittner agreed that she had only gotten a brief glimpse of the shooter before she took cover. *Id.,* at 160. On redirect, Ms. Brittner testified that she considered the fact that the shooter was wearing a hoodie to be a big detail, but she included the color of the hoodie in a list of things she considered little details that were hard for her to remember. *Id.,* at 161.

Lloyd Valcarcel testified that he had been at Allison's Bar on October 19, 2005 around 9:30 p.m. *Id.,* at 173. He was with Jeffrey Mable, Daniek Burns, his cousin, and Ms. Brittner. *Id.,* at 173-74. Mr. Valcarcel was leaning on a car when a person came out of the alleyway with a gun. *Id.,* at 176. In contravention of Ms. Brittner's testimony, Mr. Valcarcel indicated that the shooter wore a *black* hoodie, with a white t-shirt, blue jeans, and Jordan sneakers that were gray, yellow, and black. *Id.,* at 78-79. Mr. Valcarcel indicated that he could not see the shooter's face, as the shooter wore the hoodie up. *Id.,* at 179. Mr. Valcarcel indicated that the lighting in the area was dark and, "[y]ou just know you're in a bad neighborhood." *Ibid.* Mr. Valcarcel testified that he realized the person displaying a firearm must have been in earnest, which caused him to loudly exclaim "Oh, shit, he got a gun." *Id.,* at 181. Mr. Valcarcel indicated that the shooter was tall and slim, which a complexion a little darker than Mr. Valcarcel's own. *Id.,* at 184. Mr. Valcarcel indicated that he had known the Defendant prior to the shooting and the Defendant was "husky as shit." *Id.,* at 184. The shooter was described as "no big" in comparison to the Defendant's "fitness magazine big[.]" *Id.*, at 185. Mr.

Valcarcel went on to indicate that he does not pay attention to the height of individuals and, if asked to later recall heights, he would describe a person as being like his own size. *Ibid.* In fact, Mr. Valcarcel also compared the shooter's build to his own, which calls into question his ability to judge sizes retrospectively. *Ibid.* Mr. Valcarcel was sure the shooter was not white, but he could not say if the shooter was African American or the dark Spanish man he had suggested. *Id.,* at 185. Mr. Valcarcel indicated that the shooter could have been mixed race and he then went on to distinguish the Defendant, who he said was clearly black and white but not Spanish, from the shooter. *Id.,* at 186. Mr. Valcarcel then listed a passel of crimes he was involved in and stated that the investigators offered to assist him if he cooperated with them. *Id.,* at 188. He indicated that he could not identify the shooter out of a lineup as he could not tell something that he did not know. *Id.,* at 191. Mr. Valcarcel testified that he did not tell Detective Scott Nadzom that the shooter had a stocky build. *Id.,* at 194-95. Mr. Valcarcel said that everything in Detective Nadzom's report was accurate *except* for Mr. Valcarcel's supposed statement that the shooter had a stocky build. *Id.,* at 196. Mr. Valcarcel indicated that Detective Nadzom's report was accurate insofar as Mr. Valcarcel had identified the shooter to Nadzom as black. *Id.,* at 198. Mr. Valcarcel went on to indicate to the jury that he told Detective Nadzom what he wanted to tell Nadzom in response to his perception of a threat from Detective Nadzom. *Id.,* at 199. Mr. Valcarcel engaged in a quibbling back-and-forth with the Commonwealth regarding whether he had accurately described the shooter's footwear to

Detective Nadzom, or if he had merely replied sarcastically to Detective Nadzom's inquiries on the subject. *Id.,* at 203-205. Mr. Valcarcel, confronted with a written statement of his, indicated that he was testifying at trial that the Defendant was not the shooter, but that at an earlier time he had indicated that he did not know if the Defendant had information about the shooting or if the Defendant even was the shooter. Perhaps clarifying, the Defendant later stated that he knew the Defendant was not the shooter, but he could not provide the Defendant with an alibi. *Id.,* at 217.

Jeffrey Mable testified that he was in the area of Allison's Bar on October 19, 2005 around 9:30 p.m. *Id.,* at 220-21. Mr. Mable indicated that he was known by the street name of "Supreme." *Id.,* at 222. Mr. Mable recounted how he had been walking back into the bar when he heard some unremembered thing uttered, which caused him to turn and see an individual up the street pointing a gun. *Id.,* at 224. Mr. Mable described a split-second view of someone wearing "a big black hoodie, like real big" with the hood up. *Id.,* at 225. Mr. Mable could not see the face of the shooter. *Ibid.* Mr. Mable could not describe the shooter's height or build but he recalled hearing at least five shots with pauses in between them. *Id.,* at 226. Mr. Mable testified that he had not seen the Defendant on the night in question, had not had any disagreements with the Defendant, nor had he shot at the Defendant prior to October 19, 2005. *Id.,* at 229-30. Mr. Mable testified that he did not think of himself as a victim in this case, that he cannot say that he was being shot at, and that he did not believe that the shooter singled him out. *Id.,* at 233. Mr. Mable

claimed to have recognized Alfonzo King by face, but not to have known his name or to have been friendly enough to talk to him. *Id.,* at 248-49. Incredibly, Mr. Mable persisted in claiming that with shots fired he only walked up to the point when he played dead. *Id.,* at 249-50. Mr. Mable insisted that though he was arrested wearing a bulletproof vest on October 11,2005, he only wore the vest to protect himself from stray bullets. *Id.,* at 251-52, 256. Mr. Mable indicated that he never gave the police any names of persons who might have been shooting at him. *Id.,* at 255-56. Mr. Mable was confronted with a letter in which he indicated he would testify to help the Defendant and then went on, for seventy-five to eighty percent of the letter, to request the help of defense counsel with his own legal woes. *Id.,* at 258-59. Mr. Mable sent a second entreaty to defense counsel to help Mr. Mable with his legal issues and does not even mention the Defendant. *Id.,* at 260. The defense then presented a letter in which Mr. Mable testified that he was told that the defense could not help him. *Id.,* at 263-64.

Detective Scott Nadzom was called as a rebuttal witness and he testified that he had interviewed Lloyd Valcarcel. *Id.,* at 289. Detective Nadzom testified that Mr. Valcarcel was neither threatened, nor promised anything during questioning. *Id.,* at 290.

Dustin Keiser, a former juvenile probation officer and Mr. Valcarcel's officer, testified that he answers to the Court of Common Pleas of York County and that he cannot be directed to take action by the District Attorney's Office, nor by the police. *Id.,* at 299-300. Mr. Keiser indicated that, during the time he sought to have Mr. Valcarcel detained for his own

safety, he never threatened Mr. Valcarcel or made him any promises. *Id.,* at 301-02.

II. PCRA Motions

As the defendant's PCRA petition alleges ineffective assistance of counsel in numerous respects, we begin with a brief overview of relevant PCRA law. It is stated in *Strickland v. Washington* that, "the benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." 466 U.S. 668, 686 (1984). Pennsylvania codified this principle in the Post-Conviction Relief Act, which provides post-conviction relief for "[i]neffective assistance of counsel which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place." 42 Pa.C.S.A. §9543(a)(2)(ii). Pennsylvania's Supreme Court has interpreted this to mean that to show ineffective assistance of counsel, a petitioner must show that:

> (1) the claim underlying the ineffectiveness claim has arguable merit; (2) counsel's actions lacked any reasonable basis; and (3) counsel's actions resulted in prejudice to petitioner.

Commonwealth v. Cox, 983 A.2d 666, 678 (Pa. 2009) (citing *Commonwealth* v. *Collins,* 957 A.2d 237, 244 (Pa. 2008)); See also, *Commonwealth v. Rollins,* 738 A.2d 435, 441 (Pa. 1999) (citations omitted). "A chosen strategy will not be found to have lacked a reasonable basis unless it is proven 'that an alternative not

chosen offered a potential for success substantially greater than the course actually pursued.'" 983 A.2d 666, 678 (Pa. 2009) (quoting *Commonwealth* v. *Williams,* 899 A.2d 1060, 1064 (Pa. 2006) (quoting *Commonwealth v. Howard,* 719 A.2d 233, 237 (Pa. 1998))). And, "[t]his Court has held that bald assertions and boilerplate allegations of the lack of a reasonable basis for trial decisions cannot satisfy the appellant's burden to establish ineffectiveness." *Commonwealth v. Sepulveda,* 55 A.3d 1108, 1144 (Pa. 2012) (citing *Commonwealth v. Pulksar,* 951 A.2d 267, 293-94 (Pa. 2008)). In *Commonwealth v. Pierce,* the Pennsylvania Supreme Court wrote that, "[p]rejudice in the context of ineffective assistance of counsel means demonstrating that there is a reasonable probability that, but for counsel's error, the outcome of the proceeding would have been different." 786 A.2d 203, 213 (Pa. 2001) (citing *Commonwealth* v. *Kimball,* 724 A.2d 326, 332 (Pa. 1999)), *abrogated on other grounds, Commonwealth v. Grant,* 813 A.2d 726 (Pa. 2002); See also, *Commonwealth v. Fletcher,* 986 A.2d 759, 772 (Pa. 2009) (citations omitted). Lastly, "the law presumes that counsel was effective and the burden of proving that this presumption is false rests with the petitioner." 983 A.2d 666, 678 (Pa. 2009) (citing *Commonwealth* v. *Basemore,* 744 A.2d 717, 728 (Pa. 2000)).

A. **Failure to Call Experts On Eyewitness Testimony**

The Defendant's first PCRA claim is that his retrial counsel was ineffective for failing to call an expert to testify regarding the fallibility of eyewitness testimony, pursuant to *Commonwealth v. Walker,* 92 A.3d 766 (Pa. 2014). We disagree.

Walker, supra, held that "in Pennsylvania, the admission of expert testimony regarding eyewitness identification is no longer *per se* impermissible, and [we] join the vast majority of jurisdictions which leave the admissibility of such expert testimony to the discretion of the trial court." *Id.,* at 769. Defendant is correct in his assertion that the testimony of Dr. Dery Strange, on the science of eyewitness misidentifications, would have been admissible. Moreover, this Court has *no trouble* finding that the first two prongs of the test for ineffectiveness have been met. Where an available expert could have aided a jury in understanding a technical topic of great import to a case, it is axiomatic that there is merit to the claim. And we believe a finding that counsel's actions lacked a reasonable basis can be made. The alternative strategy Defendant wishes to have been pursued was the presentation of an expert on eyewitnesses, such as Dr. Strange to testify to conclusions such as the incomplete list that follows: Eyewitness misidentification accounts for 70-75% of known wrongful convictions. (Notes of Testimony, 7/2/18, at 20.) It takes an appreciable amount of time with a subject to accurately identify them and that dim lighting can prevent such encoding. *Id.,* at 24. Dr. Strange described accepted measures for conditions, such as distance and lighting, that are necessary for accurate identifications to occur and which she opined were lacking in the case *sub judice. Id.,* at 24-25. Though, it must be stressed that Dr. Strange admitted that she was making assumptions based upon the information she believed she had gleaned from her review of the evidence. *Id.,* at 25. The eyewitness, Mr. Burns, may well have been affected

by "weapon focus," which is an observable phenomenon wherein crime victims focus on the weapon present to the exclusion of wielder's visage or other descriptions. *Id.,* at 27. Dr. Strange also described a study in which the results indicated that a passing acquaintance with someone that an eyewitness has not formally met can result in the eyewitness incorrectly placing that stranger within the context of events. *Id.,* at 37. We do not wish to belabor Dr. Strange's testimony beyond what is necessary to establish that she could describe potential failure points for any eyewitness. The possible presentation of her testimony to a jury meets the prong of the test for ineffectiveness that calls upon a PCRA court to determine whether there was a substantially greater chance of success had the alternative course been pursed. The Defendant has met two of the three prongs of the test for ineffectiveness of trial counsel. This is where his success ends.

The third prong of the test for ineffective assistance of counsel calls upon a reviewing court to determine whether counsel's actions resulted in prejudice to the petitioner. We do not forget that, per *Pierce,* "[p]rejudice in the context of ineffective assistance of counsel means demonstrating that there is a reasonable probability that, but for counsel's error, the outcome of the proceeding would have been different." 786 A.2d 203, 213 (Pa. 2001). Mr. Burns was an imperfect witness and his identification of the Defendant as the shooter in question *might* be impugned to the satisfaction of jurors by the testimony of an expert such as Dr. Strange-— especially in light of his usage of marijuana.

Nonetheless, the Superior Court has already approved of the use of Mr. Burns' testimony from the Defendant's first trial in the second trial in light of Mr. Burns' untimely demise by the advent of the retrial. *Commonwealth* v. *Brenner,* unpublished opinion, 1675 MDA 2014, at 8-9. The Commonwealth had every right to present Mr. Burns' testimony and Mr. Burns identified the Defendant as the shooter. In light of the other damning testimony adduced, we find no meaningful probability, nor even any real possibility of a different verdict resulting from a presentation of Dr. Strange's proffered testimony.

The Defendant's acquaintance, Ms. Apollonia Snyder, overheard a phone call, in the days leading up to the shooting, in which the Defendant, whilst stroking a firearm, threatened Mr. Mable's life to someone named "Man." Mr. Marble was shortly thereafter targeted and fired upon, which fulfilled the Defendant's threat. The Defendant attempted during the pendency of this PCRA process to demonstrate that he could impeach Ms. Snyder's testimony. In our view, he failed. Nathaniel Williams, an inmate of SC1 Fayette, was called to the stand and he testified that his nickname in 2005 was "Man." (N.T., 7/2/18, at 9.) Mr. Williams indicated that he had never had a cell phone conversation with Defendant, nor had he heard Defendant threaten anyone. *Id.,* at 10-11. On cross-examination, Mr. Williams reiterated that he had never had a conversation with Defendant over the telephone. *Id,* at 12. Unprompted, Mr. Williams professed the following:

Yes. I have known - -I have known [Defendant], but we never had each other's number. I never had his number. He never had my number.

Id., at 13. Mr. Williams' testimony was incredible to this Court. It beggars belief that Ms. Snyder would have made a story up out of whole cloth to implicate the Defendant and that she utilized a real individual—with all the attendant risks of that individual being called to challenge her recounting. After all, "Man" indicated that he was willing to have testified at the Defendant's trial. The additional circumstantial evidence of the gunshot residue on the Defendant's clothing, greatly diminishes any possibility that Mr. Burns 'identification was in error. Moreover, as will be developed later, the Defendant's build matched the shooter's according to at least *some* other witnesses. The Defendant cannot meet the third prong of a test in which he must satisfy all three prongs to succeed and, therefore, we deny this claim for relief.

B. **Daniek Burns 'Motive to Fabricate**

The Defendant's second and third PCRA motions involve the testimony of Daniek Burns. In the interests of judicial economy, we dispense with them simultaneously. The Defendant alleges that Mr. Burns had a motive to testify favorably for the Commonwealth in that Detective Anthony Fetrow's grand jury testimony detailed an incident in which Mr. Burns was connected to illicit drugs and Mr. Burns fled from police and, yet, was not charged. Proposed Findings of Fact and Conclusions of Law, at 16. The Defendant then, in his second and third PCRA motions, goes on to detail, in layered PCRA fashion, how initial trial counsel and retrial counsel were *both* ineffective for, in the case of the former, failing to elicit testimony regarding this specific motive for Mr. Burns to fabricate his testimony against the

Defendant and, in the case of the latter, failing to provide evidence of trial counsel's ineffectiveness on this count. *Id.,* at 15-16; 25-26. For the reasons cited *infra,* we disagree.

Ab initio, there is a sub-issue in that the Defendant finds a possible *Brady* violation in the Commonwealth not having turned over the grand jury testimony in question until two or three days before the Defendant's first trial. We see no violation where the evidence was indeed turned over and, moreover, it was available to retrial counsel *and the Defendant* prior to the retrial. See Proposed Findings of Fact and Conclusions of Law, at 18 (citing N.T., 7/2/18, at 55.). Without delay, then, we turn to the issue of ineffective assistance of counsel vis-a-vis Mr. Burns 'potential motive to lie.

In *Commonwealth v. Leak,* our Superior Court provided the following excellent synopsis of relevant law;

> Our Supreme Court has made clear that the admission at trial of previously [recorded] testimony depends upon conformity with applicable evidentiary ules and the defendant's constitutional right to confront witnesses against him. *Commonwealth v. Rizzo, 126* A.2d 378, 380 n. 2 (Pa. 1999) ("Pennsylvania law permits the admission of prior recorded testimony from a preliminary hearing as an exception to the hearsay rule when the witness is unavailable, the defendant had counsel, and the defendant had a full and fair opportunity for cross-examination [sic]

at the preliminary hearing."); *see also Commonwealth v. Allshouse,* 985 A.2d 847, 853 (Pa. 2009) ("Where testimonial evidence is at issue [. ..], the Sixth Amendment demands what the common law required; unavailability and a prior opportunity for cross[-]examination.") (citing *Crawford v. Washington,* 541 U.S. 36 (2004); *Commonwealth v. Bazemore,* 614 A.2d 684, 687 (Pa. 1992) ("Whether prior testimony was given at trial or at any other proceeding, where, as here, admission of that prior testimony is being sought as substantive evidence against the accused, we conclude that the standard to be applied is that of *full and fair opportunity* to cross-examine.") (emphasis in original); Pa.R.E. 804(b)(1).

In *Bazemore,* the defense was unaware that the prosecution's sole witness at the preliminary hearing had given a prior inconsistent statement to the police, had a criminal record, and was under investigation for the same incident for which the defendant was facing charges. *[Bazemore,* 614 A.2d at 685]. The witness was central to the prosecution's case, and therefore his credibility was of vital importance. *[Id.* At 687-88], The Supreme Court concluded that the Commonwealth could not introduce the witness 'testimony at trial because the

> defense was deprived of a full and fair opportunity for cross examination. *[Id.* At 688-89]. Citing *Bazemore,* this Court has explained that a defendant asserting a lack of full and fair opportunity for cross examination must establish that he or she was deprived of "vital impeachment evidence." *Commonwealth* v. *Cruz-Centeno,* [668 A.2d 536, 543 (Pa. Super. Ct. 1995)].

22 A.3d 1036, 1043-1044 (Pa. Super. Ct. 2009) (some citations omitted).[3] The Defense appropriately cites to *Commonwealth v. Smith,* 647 A.2d 907 (Pa. Super. Ct. 1994) and *Commonwealth v. Murphy,* 591 A.2d 278 (Pa. 1991) for the proposition that trial counsel failed in his duty to confront Mr. Burns about a potential deal with the Commonwealth and retrial counsel failed to prove trial counsel's ineffectiveness. Additionally, *Smith, supra,* at 914, adds the wrinkle that a stipulation to potential bias is an inadequate substitute for testing a witness 'potential bias to the test under cross-examination. This stated, we next reproduce what the jury would have heard from the reading of Mr. Burns 'prior testimony. Mr. Burns testified that he had no deal to testify with *any* law enforcement agency of any kind. (Notes of Testimony, 8/4/14, at 395.) Mr. Burns also testified, in response

---

[3] We would note that some of our stylistic decisions were borrowed from the unpublished opinion of *Commonwealth v. Armstrong,* 2013 Pa. Super. Unpub. Lexis 3210, which, per Pa.R.A.P. 126(b) is not cited for precedential, nor, based upon date of publication, persuasive, value.

to Commonwealth questioning, that, at the time he was being questioned about the shooting, he knew that he had a warrant out for his arrest from New York. *Id.,* at 405. Mr. Burns stated that his leaving the police station was not premised upon his identifying the Defendant. *Id.,* at 405-06. The following exchange then occurred:

> Cmwlth: Now, it's been said to the jury that you are a career criminal. Can you tell the jurors about your career in crime? How many charges have you ever had against you?
> Burns: I have one in York, about - - it was about November 2003. I got a possession with intent to deliver crack cocaine charge.
> Cmwlth: And then a charge in New York would have been the next one?
> Burns: Yes.
> Cmwlth: There was a allegation or suggestion that there was a robbery charge against you?
> Burns: Yes.
> Cmwlth: What happened to that robbery charge?
> Burns: It was - - it was dismissed.
> Cmwlth: Was it dismissed because the police in York or the DA's office called and said drop those charges against Daneik because he's our key witness?
> Burns: No.

Cmwlth: Do you know why they were dismissed?
Burns: The DA had said it was insufficient evidence.

Id., at 408-09. On cross-examination, the following exchange, which the Defendant finds deficient, occurred:

Defense: Okay. Now, just so I got this straight, at the time that you gave this statement, you had an outstanding warrant for your arrest in New York City?
Burns: Yes.
Defense: And that's because you didn't appear there for sentencing?
Burns: Yes.
Defense: You were already convicted, you just didn't go back for sentencing?
Burns: Yes.
Defense: And you also had an outstanding - -I heard counsel say that it was dismissed, but at that time, you had an outstanding warrant for a robbery charge?
Burns: It wasn't an outstanding warrant, it was an active warrant. It was under investigation.
Defense: Now, and you -- you gave them your right name?
Burns: Yes.
Defense: And you gave them your right birth date?
Burns: Yes.

Defense: Okay. And after you gave the statement, you weren't arrested for the bulletproof best, were you?
Burns: No.
Defense: When you said you - - after you gave the statement, you just went home with your uncle?
Burns: Yes.
Defense: Now, was it your understanding that once you gave the statement, you would go home, you would be finished?
Burns: Yes.
Defense: Okay. And who told you that?
Burns: The officers that was there.
Defense: Okay. So they told you to give this statement and you would be able to go home?
Burns: Yes.

Id., at 429-430. We continue on to what the jury might not have known. The Defendant argues that the jury would not have been aware of another incident of Mr. Burns being involved in the drug trade. The excerpt of Detective Fetrow's grand jury testimony that the Defendant finds so damning is the following:

> I know there was another incident involving Daniek and some of our patrol officers and a small amount of drugs. When they found the drugs, Daniek took off running and I haven't seen him since. Neither has anybody else. Whether his real purpose for running is the possibility of getting in trouble for a

> criminal charge or whether its fear of this, I'm not sure at this point.

Proposed Findings of Fact and Conclusions of Law, at 17 (quoting Defendant's PCRA Exhibit 14, N.T., Grand Jury Transcript, 2/15/06). Though it could be speculated that the lack of charging might be special treatment, there were no actual charges brought. Officers make charging decisions all the time and Detective Fetrow's grand jury testimony, in the excerpt pointed to by the Defendant, does not indicate any desire by authorities to bring such charges. Nonetheless, this uncharged conduct raises a question. As recounted above, a full and fair cross examination for potential bias is required. So, turning to the test for ineffectiveness of *both* trial and retrial counsel, we cannot help but find that there is merit to the claim and proceed on.

Under the second prong of the test for ineffectiveness, we examine whether counsels' actions lacked any reasonable basis. We remember that we are to inquire whether an alternative course—here, querying Mr. Burns about *all* potential motives for bias—would have led to a *substantially* greater chance of success. We cannot say that it would have for the simple fact that, unlike in the cases cited by the defense, the jury was aware *of numerous* involvements that Mr. Burns had with law enforcement and Mr. Burns testified that he had no deals with *any* law enforcement agents. The jury was arguable deprived of just one instance, which may well have been an oversight by all defense counsel and the Commonwealth in light of the surfeit of crime that Mr. Burns was involved in. However, as we recounted in the facts section, defense counsel did elicit from Mr.

Burns that he was selling drugs in York. And, critically, we note that Mr. Burns' testimony indicated that he told the authorities where he could be located if he did not show up, which, seemingly, addresses Detective Fetrow's questioning regarding the reason Mr. Burns had to run from authorities. Mr. Burns testified regarding the emotions that ultimately caused him to run to North Carolina:

> Cmwlth: And did you stay in the York area?
> Burns: Yes.
> Cmwlth: For how long?
> Burns: About three months, like, about two months.
> Cmwlth: And did you leave the area?
> Burns: Yes.
> Cmwlth: Where did you go?
> Burns: North Carolina.
> Cmwlth: And who did - - who in particular did you stay with, if anybody?
> Burns: My grandfather.
> Cmwlth: And why did you go there?
> Burns: Because somebody had approached me in the street about the situation, and somebody intervened and, like, gave me a chance to get away, and I - - when I got away, the next day after that, I got on a bus and left.
> Cmwlth: So you left York for your own safety?
> Burns: Yes.

(N.T., 8/4/14, at 407-08.)

Mr. Burns also addressed his absenting himself from York on cross-examination:

Defense: Okay. Now, at what point did you go to North Carolina?
Burns: A couple months after - - a couple months after - - after this took place.
Defense: Did you call Mr. Graff and tell him you were going to North Carolina?
Burns: No.
Defense: Did you tell anybody you were going to North Carolina?
Burns: At the - - at the - - ***when I was at the police station, I gave them the address of my family that I might be at if I didn't show up.***

Id., at 431-32 (emphasis added). While the preceding does not directly address Mr. Burns fleeing from police on a particular day when he was found to possess drugs, to this Court's mind, it addresses his flight from police in general as a desire to safeguard himself in York as a result of the case *sub judice.* Mr. Burns had provided authorities with a description of where he could be found if he did not show up and Mr. Burns testified that this flight was caused by his fear of street reprisal related to the case in question. There could be no greater chance of success were the jury to have been aware of Detective Fetrow's revelation that he was unsure of why Mr. Burns fled. Mr. Burns already provided the reason in an unrelated answer to the jury. Admittedly, there is room for a persistent argument that the depth of Mr. Burns' motive to fabricate was not plumbed to a sufficient degree; however, again, the jury heard Mr. Burns state that he had no deals with anyone in law enforcement *and*

first trial counsel elicited that Mr. Burns was involved in the drug trade in York. We do not believe that the Defendant has established that Mr. Burns was not subject to cross-examination about the incident raised by Detective Fetrow's grand jury testimony. Though we do not believe that there was any greater likelihood of success if trial counsel had delved deeper, we continue on.

The final prong of the test for ineffectiveness makes inquiry into prejudice and whether it accrued to the Defendant as a result of trial and retrial counsel's supposed ineffectiveness. We ask whether, absent the supposed errors, the outcome would have been any different. For the following reasons, we answer in the negative. As stated, the jury was well aware of Mr. Burns being a "career criminal." (N.T., 8/4/14, at 408.) More importantly, independent evidence outweighed the accrual of any prejudice on this score. See *Commonwealth* v. *Simpson,* 1.12 A.3d 1194 (Pa. 2015). Per his first PCRA claim, the jury was aware of the lighting issues, if not the issues of memory, that might have affected Mr. Burns. Again, per the first PCRA claim, the jury was aware that Mr. Burns was under the influence of marijuana at the time of the incident. Per Mr. Burns 'testimony from the first rial that was read into the record of the second trial, the jury was aware that Mr. Burns had provided investigators with his correct name and birthdate and yet those investigators had not arrested him for *two* arrest warrants for different cases, nor for the *new* criminal conduct of possessing a bulletproof vest. We cannot see that the addition of yet another instance of the authorities potentially overlooking criminality would have swayed the jury. Of

paramount importance, there was ample supporting evidence in the circumstantial evidence provided by Apollonia Snyder of the Defendant's conversation with "Man" about shooting Mable, which accurately portrayed the mechanism of the attempt on Mr. Mable's life. Moreover, the

Defendant's clothing being covered in gunshot residue supported the assertion that the Defendant had shot a firearm in close time to the murder. And *some* witnesses established that the Defendant's build matched that of the shooter's. There was also evidence indicating that the Defendant's shoes at the time of arrest matched those of the shooter. The prejudice prong of the test for ineffectiveness is not met. Trial counsel was not ineffective and retrial counsel was not ineffective for failing to incorporate Detective Fetrow's statement into the record regarding trial counsel's ineffectiveness. Mr. Burns was far from a perfect witness. The retrial jury was well aware of this fact and yet they convicted the Defendant. The Defendant garners no relief on this claim.

C. **Ineffective Cross-Examination of Detective Fetrow**

The Defendant's fourth matter complained of contains three subparts. The Defendant alleges that trial counsel was ineffective for failing to cross examine Detective Fetrow regarding Daniek Burns 'potential motive to lie. The Defendant further alleges that trial counsel was ineffective for failing to elicit from Detective Fetrow that Ms. Ashley did not actually know that Mr. Mable was the shooter's intended target. The Defendant also alleges that trial counsel failed to cross-examine Detective Fetrow regarding the time that elapsed between the

Defendant's arrest and the seizure of the Defendant's sweatshirt. We take each subpart in turn.

1. *Cross-Examination of Detective Fetrow Regarding Daniek Burns 'Motive*

The Defendant challenges trial counsel's examination of Detective Fetrow on Daniek Burns 'motive to lie regarding his drug dealing. As our earlier analysis of Daniek Burns' motive to lie addresses this matter, we abbreviate our analysis to what is minimally necessary. We proceed to the test for ineffectiveness.

We ask if there is arguable merit to the claim. We believe that this can be answered affirmatively as the Defendant has provided sufficient case law to support the contention that counsel should ferret out any bias premised upon a witness 'subjective belief regarding any potential deals with the Commonwealth.

We inquire whether counsel's actions lacked a reasonable basis through the lens of whether an alternative strategy is proven to have had a *substantially* greater chance for success. The alternative strategy proffered would have been, owing to Mr. Burns ' unavailability, for trial counsel to have examined Detective Fetrow regarding Daniek Burns ' motive to lie. The Defendant asserts that this would have called into question the veracity of Mr. Burns 'testimony that was read into the record of the second trial. As we earlier indicated, Mr. Burns *was* questioned regarding drug dealing in York *and* Mr. Burns had indicated that he had no deals with any law enforcement agencies. The jury was already on notice regarding this potential motive to fabricate. Thus, there is no *substantially* greater chance for

success in repeating the same information that might well have drawn a challenge regarding cumulative evidence. However, even if counsel's actions did lack a reasonable basis, in this respect, we do not believe that there was prejudice.

Reviewing the prejudice prong of the test for ineffectiveness, Ms. Apollonia Snyder's testimony provided evidence that the Defendant intended to shoot Mr. Mable. There was gunshot residue (hereinafter: GSR) and suspected gunshot particles on *multiple* pieces of the Defendant's clothing. Alfonso King described the shooter as tall and stocky, which fit with

Detective Fetrow's description of the Defendant as being, at the time, six-foot-four and two-hundred-and-fifty pounds. The Defendant's outfit at arrest, which, again, was covered in GSR, or component parts of GSR, substantially comported with the shooter's outfit as described by witnesses like Alfonso King, Daniek Burns, and Lloyd Valcarcel. Moreover, Daniek Burns described the shooter as wearing black shoes, which he clarified meant sneakers. And Lloyd Valcarcel described gray, yellow, and black Jordan sneakers. Detective

Fetrow testified that the Defendant was arrested wearing black and gray Jordan's. We do not find that the jury premised their verdict upon a whim or imagined evidence. Rather, a number of pieces of evidence pointed at the Defendant. There was eyewitness testimony, direct testimony regarding a threat made by the Defendant, the Defendant's build matched the shooter's according to at least some witnesses, the Defendant's clothing at arrest was lousy with GSR and its constituent parts, and the

Defendant's outfit at arrest matched the description of the shooter's in all major respects as described by most witnesses. We cannot find that the result of the proceedings would have been different but for counsel's supposed failure to cross-examine Detective Fetrow regarding Daniek Burns' motive to lie. The Defendant cannot meet all of the prongs of the test for ineffectiveness on this claim and it necessarily fails.

2. *Cross-Examination of Detective Fetrow Regarding Tina Ashley s Identification of the Shooter's Target*

The Defendant challenges trial counsel's alleged failure to cross-examine the Detective regarding the veracity and certitude of Tina Ashley's identification of Jeffrey Mable as the shooter's target in light of Ms. Ashley identifying him as being part of a group including Valentine Bonilla. We do not believe this amounts to ineffective assistance of counsel.

The potential targeting of Mr. Mable is but one fact in the trial and not a determinative one. The use of a firearm to target *someone* is sufficient to undergird transferred intent for a first-degree murder charge. There is evidence of the Defendant's intent to target Mr. Mable, via Apollonia Snyder's testimony that the Defendant stated he was going to kill Mr. Mable. And there is evidence of the Defendant's motive to target Mr. Mable, via testimony that the Defendant was evasive regarding who shot him prior to the murder of Ms. Witter. Detective Fetrow's testimony merely supplied Ms. Ashley's excited utterance that Mr. Mable, amongst others, knew they were being shot at. Detective Fetrow seems to have narrowed Ms. Ashley's identification of targets down to just one; however, the other evidence of the trial

points to the Defendant having motive and intent regarding Mr. Mable. We do not believe arguable merit has been sufficiently made out.

We look at whether retrial counsel's actions lacked any reasonable basis. The alternative strategy offered is that retrial counsel should have cross-examined Detective Fetrow and ferreted out this inconsistency between his report and Ms. Ashley's prior statements and Detective Fetrow's certainty at trial. We cannot find a *substantially* greater chance of success had this strategy been pursued. Mr. Mable was, at the very least, identified as a possible target by Ms. Ashley. The Defendant matched some descriptions of the shooter in stature and in the clothing worn by the shooter and, seemingly, by the Defendant at the time of his arrest. The Defendant's clothes were covered in gunshot residue and its components. We do not believe that there was a substantially greater chance of success if this line of questioning had been pursued. A similar analysis persists for the third prong, which is prejudice. There was too much other evidence indicating the Defendant to have been the shooter for this supposed error by retrial counsel to have been determinative. It is therefore denied.

3. *Cross-Examination of Detective Fetrow Regarding the Timeline of the Seizure of the Defendant s Hoodie*

The Defendant believes his retrial counsel was ineffective for not having seized upon Detective Fetrow's passing admission that the Defendant's sweatshirt, from the time of his arrest, was not seized until some time after it had been handled by corrections officers with the attendant potential for

contamination. We do not find this allegation persuasive.

Owing to the constraints of judicial resources and the fusillade of PCRA claims—and the great likelihood of bullets—fired by the Defendant, we will not tarry regarding the arguable merit of this claim. The Defendant has submitted a list of articles regarding the potential for contamination in cases involving gunshot residue and the apparent ease of such contamination. These articles appear to be self-authenticating and we do not find any need to question their conclusions or seek out any countervailing articles that might exist. Rather, we find arguable merit and proceed on.

We cannot find a *substantially* greater chance of success had the jury been aware of the conclusions drawn in the proffered articles. The jury was already aware from the testimony of the GSR expert, Ms. Allison Murtha, that there was very little evidence of GSR on the sweatshirt in question. Rather, the majority of the GSR located on the Defendant's Nothing was found on items that were seized almost immediately upon the Defendant surrendering to authorities. Detective Fetrow testified to the continual use of latex gloves to handle these articles of clothing, which acted as a safeguard to contamination. The GSR on items aside from the sweatshirt militates towards the Defendant being a shooter—even if this is not conclusive when one considers lawful means of GSR being deposited. It is noteworthy that Ms. Murtha testified to the very high levels of GSR and related particulate on these articles as compared to the many other thousands she has tested in her career. The low levels of GSR-indicated

particles on the Defendant's hoodie comport with Ms. Murtha's testimony that particulate loss can occur with increased motion and temporal delays from deposit to collection. We do not see that the articles supplied by the Defense would have swayed a jury regarding GSR evidence. The Defendant was covered in GSR and associated particles on all items of clothing save the sweatshirt. Counsel's actions did not lack a reasonable basis.

Just as counsel's actions did not lack a reasonable basis, we cannot find that prejudice accrued from the supposed error. Not wishing to perpetually recount the same facts *ad nauseum,* we believe it is sufficient to state that the sweatshirt, by the Commonwealth's own expert's testimony, did not have any three-component GSR on it. The sweatshirt seized was only important insofar as its potential match to the one worn by the shooter. The Defendant's clothing, *other than the sweatshirt,* demonstrated the GSR evidence. Cross-examination on the possibility of contamination of the sweatshirt would not have changed the outcome of this case and, thus, no PCRA relief can be granted as to this matter raised.

D. **Failure to Present Evidence of Defendant's Legally Purchased Firearms and Failure to Present an Unrelated Sweatshirt Also Retaining GSR-Related Particles**

The Defendant's fifth allegation of ineffectiveness is that his retrial counsel was ineffective for failing to present evidence that the Defendant possessed legally purchased firearms and that the Defendant owned a second sweatshirt, unrelated to the case, which, like the hoodie

introduced as evidence, *also,* had GSR-related particles on it. The Defendant believes that these pieces of evidence, if introduced, would have bolstered the contended contamination theories premised upon lawful sources of GSR. In the interest of judicial economy, we dispense with them simultaneously.

We will not spend inordinate time on the arguable merit prong of the test for ineffectiveness. It is almost axiomatic that unpresented examples of potential GSR contamination would be of arguable merit as they provide an innocent explanation for the presence of GSR or its constituent parts upon the Defendant's person. We proceed to the second prong of the test for ineffectiveness.

For the second prong, we inquire whether counsel's actions lacked a reasonable basis n that an alternative strategy provided a *substantially* greater chance of success. The alternative strategies would be to have presented evidence of the lawfully possessed firearms is potential GSR contributors and for defense counsel to have presented a supposedly unrelated hoodie that also possessed GSR. Retrial counsel testified that he did not seek to present evidence of the Defendant's lawfully-owned firearms because he did not wish to place a gun in the Defendant's hands. (Notes of Testimony, 8/27/18, at 54.) Retrial counsel also indicated, regarding the second hoodie, that he had not considered the issue prior to the PCRA hearing; however, sitting on the stand, retrial counsel indicated that he could see it cutting both ways and that he could not guess at how a jury would have accepted such evidence. *Id.,* at 55. Regarding the legal firearms and the second hoodie, we cannot say that the alternative strategies of

presenting such evidence would have had a *significantly* greater chance of success than not doing so. Though both pieces of evidence had the *potential* to provide innocent explanations for the presence of GSR on the Defendant's clothing, they also had the potential, acknowledged by retrial counsel, for harm. Where a defendant is accused of murdering someone with a firearm, it is unwise to place a firearm in the defendant's hands as a jury might interpret this as proving means and probability for the defendant to have committed the murder. As for the sweatshirt, to begin, we did not find the Defendant credible when he testified to instructing an unnamed female friend with money and instructing her to purchase a second "black or dark-blue" sweatshirt *after* the murder. *Id.,* at 17. This self serving statement was clearly contrived in anticipation of the requisite testimony to satisfy the PCRA requirements.[4]

Additionally, the Commonwealth's expert testified at trial regarding the possibilities of contamination. A jury may well have concluded, based upon the Defendant's own view of the ease of contamination, that the hoodie not presented at trial, which also appears to have been a dark hoodie, *Id.,* at 17-18, might have been contaminated following the

[4] We wish to make it clear that we do not believe that PCRA counsel is in any way involved in the Defendant's deceit. Rather, it is clear that PCRA counsel simply presented evidence as he gathered it for this Court to weigh. We have weighed that evidence and have determined it to be a falsehood based upon its self-serving nature, lack of specificity, and the manner in which the information was conveyed by the Defendant. There have been numerous instances where this Court has believed PCRA petitioners' testimony. This was not one of those occasions.

Defendant having murdered someone with a firearm and his clothes mixing with other clothes he owned. Moreover, as outlined earlier, per the Commonwealth's expert, motion and time lead to particle loss. The Defendant's theory regarding innocent sources of GSR on clothing does not explain why there would be GSR all over his possessions as it strains credulity to believe that he owned so many pieces of GSR-stained clothes that were never washed. That said, we cannot, of course, preclude the possibility of the strategies offered by the defense succeeding. Rather, we merely indicate that we see no *substantially* greater chance of their success. The Defendant cannot meet the second prong of a test in which he must meet all three. The claim fails.

In the interest of completeness, we would also offer that there was no prejudice suffered by the Defendant as a result of retrial counsel's supposed error. For all of the reasons already stated throughout this opinion, there was sufficient other evidence to convict he Defendant even without the testimony of Daniek Burns. Moreover, as we did not find the testimony of Mr. Burns to have been infirm, it too is added to the scales and it helps to militate against any finding of prejudice. The Defendant is owed no relief on this PCRA claim.

E. **Failure to Investigate, Interview, and Present Nathaniel "Man" Williams and Yolanda Sease**

The Defendant's sixth PCRA claim is that retrial counsel was ineffective for failing to investigate Nathaniel "Man" Williams (hereinafter: Man) and Yolanda Sease as potential witnesses to counter Apollonia Snyder's testimony. The Defendant submitted that retrial counsel should have been

aware of the existence of these potential witnesses from the supplemental police reports pertaining to Ms. Snyder. Defendant's Proposed Findings of Fact and Conclusions of Law, at 38. We turn to the test for ineffectiveness.

During the PCRA process, the Defendant presented Man and Ms. Sease who indicated that they would have testified for the Defendant at trial. (N.T., 7/2/18, at 10; N.T., 8/27/18, at 47.) As discussed earlier, "Man" would have been willing to testify that the defendant and he had known one another, but that the Defendant did not even have Man's lumber, which would have negated any possibility of the conversation Ms. Snyder testified o having heard occurring. The Defendant believes that Ms. Sease can establish that Ms. Sease knew the Defendant and Ms. Snyder, but that she never saw the Defendant and Ms. Snyder together at Cheers Bar. (N.T., 8/27/18, at 46.) Further, Ms. Sease testified that she had never seen them together at any bar. *Ibid.* Clearly, the testimony of one or both of these individuals would have arguably undermined Ms. Snyder's credibility. Ergo, there is arguable merit to the claim.

We inquire whether retrial counsel's actions lacked any reasonable merit and, specifically, we plumb whether an alternative strategy would have been *substantially* more likely to succeed. The alternative strategy would have been to present the testimony of Man and Ms. Sease. We first look at Man's testimony. We have already indicated that we found Man's testimony to be incredible. The jury was already aware that Ms. Snyder's testimony was called into question by the fact that, rather than Ms. Snyder reaching out to the police, the authorities reached out

to her when Ms. Snyder had open charges. Ms. Snyder's motive to lie or at least to be less-than altruistic was on full view for the jury. We do not believe that the addition of Man's incredible testimony would have offered a *substantially* greater chance at success for the Defendant. The jury was aware of things such as the Defendant fitting the basic description of *some* of the witnesses, the Defendant owning and wearing to his surrender clothes similar to or the same as the shooter's, the Defendant's clothing being covered in GSR and GSR-associated particles, and Daniek Burns' eyewitness identification of the Defendant as the shooter. We cannot find a substantially greater chance of success if Man's testimony had been presented, but we must also examine Ms. Sease's testimony.

Regarding Ms. Sense's testimony, we would note that what was presented at the PCRA hearing was not as clear as the Defendant characterizes it. We reproduce the relevant portion of the transcript:

> Defense: Do you know my client?
> Sease: Yes.
> Defense: Did you know a woman named Apollonia Snyder?
> Sease: Yes.
> Defense: In 2005, where did you live, just generally?
> Sease: In York, Pennsylvania.
> Defense: What about it 2014?
> Sease: In York, Pennsylvania.
> Defense: And can you tell us whether or not you ever saw Mr. Brenner with Ms. Snyder at a bar?
> Sease: No.

Defense: Did you ever see them together at Cheers Bar?
Sease: No.
Defense: *Do you knowif they knew each other?*
Sease: ***I'm not sure.***
Defense: *Have you ever seen Ian at Cheers?*
Sease: ***Not that I recall. I don't remember*** seeing Ian in Cheers before.
Defense: But you have been there?
Sease: Yes.

N.T., 8/27/18, at 46.) (emphasis added). Granted, Ms. Sease indicated that she knew both the Defendant and Ms. Snyder; however, she was unaware whether the Defendant and Ms. Snyder knew one another, nor could Ms. Sease recall if she had ever even seen Ian in Cheers before. Ms. Sease's memories are questionable and she does not seem to possess knowledge)f whether the Defendant and Ms. Snyder were even acquaintances. As with Man's testimony, we are called upon to determine whether this evidence would have sufficiently undercut Ms. Snyder's credibility such that there would have been a *substantially* greater chance of success for the Defendant. We cannot do so. As recounted regarding Man's potential testimony, there was other credible evidence tying the Defendant to the murder and, in light of that evidence, we do not believe that a further challenge to Ms. Snyder's credibility would have led to a *substantially* greater chance of success. We nonetheless consider the third prong of the test for ineffectiveness.

We inquire whether counsel's actions resulted in prejudice to the petitioner such that here is a reasonable probability that a different outcome would have resulted but for counsel's supposed error. Considering the other evidence adduced by the Commonwealth, we cannot find that there is any reasonable probability of a different outcome. It is possible that he testimony of Man and/or Ms. Sease could weaken Ms. Snyder's credibility in the eyes of the jury; however, we believe that a jury would find that the totality of the remaining evidence would undergird Ms. Snyder's testimony and still weigh in favor of conviction. We cannot grant PCRA relief for this claim.

F. **Tina Ashley's Excited Utterances**

The Defendant's seventh PCRA claim is that retrial counsel was ineffective for failing to probe Tina Ashley's excited utterance regarding the shooter's target. For the following reasons, we do not find trial counsel to have been ineffective.

There is arguable merit to this claim. The Defense cites to Ms. Ashley's testimony in the *first* trial wherein she seemingly clarified that, when she made her excited utterance identifying the target of the shooter, she was referring to a *group* of four, which included Supreme. (N.T., 9/13/06, at 131-32.) This, obviously, conflicts with Detective Fetrow's testimony that Ms. Ashley identified Supreme as the target. Moreover, it could make some headway in undermining the connection between the Defendant's threat to kill Supreme, which he stated in front of Ms. Snyder, and the shooting. If Supreme was not the target then evidence tending to show that the Defendant had a motive to kill him, such as having

been shot at by someone and the Defendant, thereafter, making a threat on Supreme's life is less inculpatory. We believe that there is arguable merit to the claim.

We next examine whether an alternative strategy offered a *substantially* greater chance for success. The alternative strategy would have been for retrial counsel to question Ms. Ashley and elicit that, in contravention of what Detective Fetrow testified he had heard Ms. Ashley say, she had not specifically identified Supreme as the shooter's target. This, of course, presupposes that Ms. Ashley would testify in accordance with her testimony in the first trial. Assuming, *arguendo,* that she would or that she would face confrontation with that testimony, then there would be a chance of undermining Detective Fetrow's testimony that Ms. Ashley identified Supreme as the target. This Court has trouble finding that this would be a *substantially* greater chance; however, we will treat this prong as having been established in order to reach the determinative prong.

The third prong of the test for ineffectiveness calls upon a court to determine whether, but for counsel's supposed error, the outcome of the trial would have been different. *Id est,* did the Defendant suffer prejudice? We cannot find that the Defendant suffered prejudice. Even if a jury found that Ms. Ashley had not identified Supreme as the shooter's target, the Commonwealth still would have had Daniek Burns 'identification of the Defendant as the shooter. And, though weakened, the jury still would have had the ability to infer motive based upon the earlier shooting of the Defendant and his statements threatening Supreme's life. In spite of the supposed

error, the Defendant's clothes and accessories were still covered n GSR and its components. To our mind, the jury would likely still conclude that the Defendant was the shooter, that the Defendant intended to murder Supreme, or someone in the group of four that *included* Supreme, and that this intent transferred to the victim, Ms. Witter. We cannot conclude that there was any reasonable probability of a different outcome save retrial counsel's supposed error in failing to re-elicit the exact meaning of Ms. Ashley's excited utterance. No relief is due for this claim.

G. **Failure to Call Officer Randy Searfross**

The Defendant's eighth PCRA claim is that retrial counsel was ineffective for failing io subpoena and question Officer Randy Searfross. The Defendant claims that Officer Searfross should have been questioned regarding his testimony in the first trial and about the contents of his supplemental report, which the Defendant states would have clarified that Tina Ashley did not identify Supreme as the shooter's target. Rather, the Defendant points to Officer Searfross' report that indicates Ms. Ashley told the officers that there was a group of four persons who the shooter had been shooting at. Defendant's Proposed Findings of Fact and Conclusions of Law, at 46. And that Officer Searfross had previously testified that Ms. Ashley had indicated that Supreme and a person standing next to him were the ones being shot at. *Ibid.*

Turning to our test for ineffectiveness, we do not believe that there is arguable merit as Ms. Ashley clearly contradicted herself when she variously claimed to Officer Searfross, at the time that he took the initial report, that she did not get a good look at the shooter and, at the retrial, that the shooter could

not have been the Defendant who she had known for years, which is a point we develop *infra.* Had retrial counsel called Officer Searfross and re-elicited the requested testimony, it would have necessarily undercut the credibility of Ms. Ashley who was called as a defense witness at the retrial to state, in part, that the shooter could not have been the Defendant. The defense would surely counter that the jury would have had a right to pick and choose testimony from the various witnesses. We would not find his persuasive and so we do not believe that there is any arguable merit to this claim. Nonetheless, we continue on.

We next inquire whether counsel's actions lacked a reasonable basis and whether an alternative strategy offered a *substantially* greater chance for success. The proposed alternative strategy was to re-elicit testimony from Officer Searfross that Ms. Ashley had not been so specific in identifying Supreme as the target; but, rather, Ms. Ashley had identified a group of two or four individuals who had been shot at and who knew who the shooter was. Interestingly, the Defendant highlights Officer Searfross' testimony that "Tina stated that here is ***one*** *of the guys* that they was shooting at; those guys know who did it." (Notes of Testimony, 9/12/06, at 184.) (emphasis added). The Defendant goes on to emphasize that Officer Searfross added that "[Ms. Ashley] - - she - - she basically stated see *those* ***two*** that said they were - - they were shooting at them; they know who did it." *Id.,* at 184-85. What is interesting about this is that the defense believes that retrial counsel should have re-elicited his testimony at the retrial, which would bolster the testimony of

Daniek Burns. This is so because Ms. Ashley, as highlighted by the Defendant's seventh PCRA complaint, dealt with above, had indicated that Daniek Burns was part of the group of four she had indicated were the targets. (Notes of Testimony, 9/13/06, at 131-32.) If the Defendant expected the jury to find Ms. Ashley credible then they may well have found her credible in identifying Daniek Burns as a person who knew who the shooter was. Moreover, it bears mentioning that there is a seeming contrast between the Defendant's desire to have Ms. Ashley and Officer Searfross testify in a future retrial considering, as noted in our facts section, Ms. Ashley testified that he shooter could not have been the Defendant, yet Officer Searfross testified at the original trial that Ms. Ashley had told Officer Searfross on the date of the shooting that she did not get a good enough look at the shooter to describe the shooter. (N.T., 9/12/06, at 184.) So, in a nutshell, had retrial counsel re-elicited the proffered testimony, the jury would have been left with Officer Searfross telling them that Ms. Ashley could not identify the shooter and reinforcing Ms. Ashley's testimony that those in the group of four, which included Daniek Burns, *did* know who the shooter was. And not only did Mr. Burns know who the shooter was, but he testified that the shooter had ***started*** **shooting at** ***Supreme*** and Mr. Burns relieved that at least the second shot was also fired at Supreme. This undercuts any of the PCRA claims regarding lighting and memory experts. It undercuts the testimony of defense witnesses such as Supreme who instantly appear to have perjured themselves for fear of the same sort of reprisals that Mr. Burns indicated he

feared, encountered, and fled from. We see no greater likelihood of success had Officer Searfross been questioned by retrial counsel, further, we see a distinct likelihood of the Defendant's cause being harmed by the potential testimony. Suffice it to say, there is no substantially greater chance of success in Officer Searfross being questioned anew.

The third prong of the test for ineffectiveness tests for prejudice and whether there is a reasonable probability of a different outcome save counsel's supposed error in not examining Officer Searfross. We will not make a very long opinion even longer. Instead, this Court relies upon all of the other evidence adduced by the Commonwealth and already highlighted by this Court. When the claimed error, which we have not found to have been an error, is weighed against that other evidence, we find there is *no probability* of a different outcome. This claim for relief fails.

H. **Failure to Introduce Photos of Lighting**

The Defendant's ninth claim for relief is that retrial counsel was ineffective for failing to introduce *specific* photos to demonstrate the claimed poor lighting of the scene. We do not find this claim persuasive.

We begin our analysis with the arguable merit prong of the test for ineffectiveness. As retrial counsel correctly noted, lighting was an issue at trial *and* there were photographs admitted at trial. (N.T., 7/2/18, at 89-90.) The various witnesses presented differing accounts regarding the lighting conditions. *Id.,* at 90. Thus, while the jury might not have seen the particular photos highlighted by current PCRA counsel, the jury saw photos of the scene. Moreover,

the jurors heard differing accounts of the lighting from various witnesses. There are *always* more photos that can be shown and that are likely to be objected to as being cumulative. Future PCRA counsel will inevitably claim that the unintroduced photos are more or less revealing than those actually admitted. The jury saw photos of the scene and, as a result, we believe that the jury was able to weigh credibility of witness accounts regarding lighting. Thus, there is no arguable merit to the claim. Nevertheless, we continue on.

We next consider whether counsel's actions lacked any reasonable basis. We have already agreed with retrial counsel that the jury saw photos of the scene and we have determined that additional photos would likely be superfluous. Still, we consider whether the alternative strategy proposed, of offering PCRA Exhibits 9-11 for jury review, would have ed to a *substantially* greater chance of success. This Court has a differing view from PCRA counsel and does not view the photos in question, PCRA Exhibits 9-11, as demonstrating poor lighting. Rather, this Court finds that they demonstrate adequate to good nighttime lighting. This, of course, is a matter of perspective and it would be for a jury to ultimately divine what utility, if any, those images provide. We would note that it is well within the ambit of laymen to know that photos rarely if ever demonstrate lighting conditions to have been *better* than what a person present at the scene could have observed. Rather, we believe that you average layman is familiar with the disappointment of a photo depicting a scene as *darker* than what would be perceived by a person present. We suspect that this is why the Defendant has not challenged this

Court's denial of the Commonwealth's request for a site visit during the retrial. (N.T., Vol. 2, 8/4/14, at 58-59.) Of course, it may well be that this was previously challenged and the Court is overlooking the resolution. Nonetheless, we see no *substantially* greater chance of success if the jury had seen the photos in question. The jury would still have to determine whether Daniek Burns saw the Defendant and we do not believe that PCRA Exhibits 9-11 would have had a substantially greater chance of altering the conclusion the retrial jury clearly arrived at. The Defendant has failed to meet the first two prongs of a test in which he must meet all three. Still, we continue on.

Finally, we ask if any prejudice accrued to the Defendant as a result of retrial counsel's supposed error. We ask if there was any reasonable probability of a different outcome *sans* alleged error. Again, even if the jury was more apt to question Mr. Burns ' dentification of the Defendant, there was still evidence of motive, the likely or certain targeting of Supreme, the GSR and GSR-particles on the Defendant's clothing, the fact that he Defendant matched the descriptions of the shooter by *some* of the witnesses, and the

Defendant's attire being so similar to what numerous witnesses described the shooter as wearing. We see no probability of a different outcome even if the photos in question had been introduced to shake juror's faith in those witnesses who described the area as well-lit. This claim for PCRA relief necessarily fails.

I. Prosecutorial Misconduct

The Defendant's tenth PCRA claim[5] asserts numerous instances of prosecutorial misconduct during closing arguments, which he believes his trial counsel should have objected to. The defendant believes that this unchecked misconduct resulted in an unfair trial and, therefore, he asks this Court to declare his trial counsel ineffective for failing to raise objections to the alleged prosecutorial misconduct. We take each allegation in turn, but begin with a recitation of law relevant to each.

In *Commonwealth* v. *Koehler,* the Supreme Court of Pennsylvania stated the following regarding prosecutorial misconduct:

> [A] claim of ineffective assistance grounded in trial counsel's failure to object to a prosecutor's conduct may succeed when the petitioner demonstrates that the prosecutor's actions violated a constitutionally or statutorily protected right, such as the Fifth Amendment privilege against compulsory self incrimination or the Sixth Amendment right to a fair trial, or a constitutional interest such as due process. To constitute a due process violation, the prosecutorial misconduct

---

[5] We would note that the Defendant's Proposed Findings of Fact and Conclusions of Law labels this the eleventh claim; however, we believe that it is either misnumbered or the Defendant inadvertently left out a claim. We presume the former and treat this as the tenth claim and not the eleventh.

> must be of sufficient significance to result in the denial of the defendant's right to a fair trial. The Touchstone is fairness of the trial, not the culpability of the prosecutor. Finally, **not every intemperate or improper remark mandates the granting of a new trial; *reversible error occurs only when the unavoidable effect of the challenged comments would prejudice the jurors and form in their minds a fixed bias and hostility toward the defendant such that the jurors could not weigh the evidence and render a true verdict.***

36 A.3d 121, 144 (Pa. 2012) (internal citations and quotation marks omitted). This law in mind, we turn to the specific allegations of misconduct.

1. Apollonia Snyder s State of Mind While Testifying

Amongst the passel of allegations of prosecutorial misconduct raised by the Defendant is that the prosecutor mischaracterized Apollonia Snyder as being nervous because "[s]he's facing a guy who's now on trial for a murder that she *knows* did it." The Defendant asserts that this is inconsistent with Ms. Snyder's testimony which only relayed her having heard the Defendant make a threat upon Supreme's life. Defendant's Proposed bindings of Fact and Conclusions of Law, at 51. This, of course, leaves out that the Defendant made the threat in a very aggressive tone while playing with a gun.

There is *no* arguable merit to this claim. The prosecutor was likely asking the jury to infer that Ms.

Snyder knew that the Defendant was the killer.[6] To our mind, this is a totally permissible inference considering Ms. Snyder testified that she knew the Defendant had threatened Supreme's life and that Supreme was present at the shooting in question. Further, though it took the investigators reaching out to Ms. Snyder, Ms. Snyder testified that she offered up the Defendant's threat regarding Supreme because it was the right thing to do. This implies, at least in one part of her testimony, a belief that the Defendant was the likely shooter. Moreover, Ms. Snyder indicated she was nervous about testifying. Granted, there are myriad reasons to be worried about testifying; however, it is a logical conclusion that Ms. Snyder was nervous about testifying against someone she believed was a killer. There is no merit to this claim.

For the reasons stated regarding merit, there is no possibility at all of a *substantially* greater chance at a different outcome to the case had retrial counsel objected to the statement in question. The challenge would not have succeeded and, even if it had, a jury likely would have believed that Ms.

---

[6] Of course, we would note that neither party saw any utility in presenting the assistant district attorney who prosecuted the case for PCRA examination—thus depriving this Court of any explanation beyond what is evident on the record. We are aware of no legal duty the parties had to present the A.D.A., beyond the Defendant presenting sufficient evidence to meet his burden. Thus, we do not hold our questions against either party; however, the lack of presentation of the prosecuting A.D.A. has been one of the multiple actions, or lack thereof, that has hampered the decision in this matter. We presume the parties presented what they considered to have been sufficient.

Snyder, testifying *nervously* in a murder case, likely believed that the defendant was a killer. There was no prejudice as the outcome would not have been different. We cannot see how this would amount to forming a fixed bias and hostility in the minds of the jurors. The claim fails in regard to this sub-part.

2. Apollonia Snyder's Supposed Volunteering of Ian Brenner's Name

The Defendant brings a second sub-claim, in the vein of prosecutorial misconduct via misstatements, that the assistant district attorney (hereinafter: A.D.A.) erroneously stated to the jury that Ms. Snyder volunteered Mr. Brenner's name to Detective Fetrow. Defendant's Proposed Findings of Fact and Conclusions of Law, at 51. In actuality, the Defendant states, in the first trial, Ms. Snyder indicated that Detective Fetrow had called Ms. Snyder in regarding her involvement with gang activity and, at that time, asked Ms. Snyder if she knew the Defendant.[7] *Id.* (citing (Notes of Testimony,

[7] Though it plays no part in our review of this claim, the Defendant, in citing to the record of the first case, utilizes the Bluebook citation *"Cf."* which, of course, pertains to analogizing via synthesis. Were the Defendant to gain a new trial and Ms. Snyder were presented again, a newly empaneled jury would also likely hear that, while Detective Fetrow brought up the Defendant, Ms. Snyder brought up the shooting that she believed the Defendant was involved in. (Notes of Testimony, 9/13/06, at 80-81.) This, of course, further undercuts the Defendant's claim regarding the A.D.A.'s statement about Ms. Snyder's state of mind *and* it would undermine any supposed wrong in the thrust or import of the A.D.A.'s statement about what Ms. Snyder volunteered on her own. Again, we do not believe that this line of thinking is appropriate at this point, but the Defendant has created a path to supporting, at a third trial, the very statements he believes the A.D.A. should not have made in his second trial.

9/13/06, at 80-81)). Ergo, the A.D.A.'s statement was incorrect and the Defendant believes that it caused him prejudice. We disagree.

We ask if there is any arguable merit to the claim. The jury heard the following charge regarding closing arguments:

> The next step is for counsel to give their closing arguments. Now, even though **those arguments do not constitute evidence,** you should consider them very carefully. In their argument, counsel will call your attention to the evidence which they consider material and will ask you to draw certain inferences from that evidence.
>
> **Keep in mind that you are not bound by their recollection of the evidence. It is your recollection of the evidence, and your recollection alone, which must guide your deliberations. If there's a discrepancy between counsel's recollection and your own, you are bound by your own recollection**.
>
> You are not bound by the consideration of only the evidence mentioned by counsel.[8] [sic] You must

[8] We believe this to be an error by the stenographer as it does not comport with the written charge that this Court reads in every case. The sentence should read: "Nor are you limited to consideration of only the evidence mentioned by counsel." Nonetheless, even if this Court did misspeak, the tortured sentence written conveys the same basic meaning.

> consider all of the evidence which you consider to be material to the issues.
>
> ***To the extent*** **that the inferences counsel ask you to draw are *supported by the evidence*** and appeal to your reason and judgment, you may consider them in your deliberations.

N.T., Vol. 2, 8/4/14, at 307-08.) (emphasis added).

The jury was well aware that counsel's statements characterizing facts were not evidence. That is the very purpose of the afore-mentioned instruction. And the jury knew from Ms. Snyder's cross-examination that it was actually Detective Fetrow who contacted Ms. Snyder about the Defendant. *Id.,* at 47-48.

Moreover, this comment by the prosecution seems responsive to the Defendant's closing in which the defense states, *inter alia,* that "Apollonia never came forward, okay, never." *Id.,* at 319. From the Defendant's own citations, it is clear that Detective Fetrow asked about the defendant but that Ms. Snyder *did* come forward about the Defendant's statements regarding Supreme. All of this, of course, occurred in the first trial and were not facts in evidence at the trial *sub judice.* Though not directly analogous, the instance bears some similarity to that of *Commonwealth v. Green,* in which defense counsel asked the jury to consider why the Commonwealth had not introduced certain evidence and the Commonwealth's closing went so far as to introduce facts not in evidence that occurred at a sidebar. 581 A.2d 544, 560-61 (Pa. 1990).

In *Green,* our Supreme Court reaffirmed their stance in *Commonwealth v. D'Amato,* wherein they stated that "'not every intemperate or uncalled for remark by the prosecutor requires a new trial.'" *Id.,* at 561 (quoting 526 A.2d 300, 309 (Pa. 1987)). And it was noted that context matters. *Ibid.* The Green Court went on to quote Chief Justice Burger who stated:

> [Our] standards reflect a consensus of the profession that the courts must not lose sight of the reality that "[a] criminal trial does not unfold like a play with actors following a script." *Geders v. United States,* 425 U.S. 80, 86 (1976).
>
> It should come as no surprise that "in the heat of argument, **counsel do occasionally make remarks that are *not justified by the testimony,* and which are, or may be, prejudicial to the accused."** *Dunlop v. United States,* 165 U.S. 486, 498 (1897). . . . Nevertheless, a criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone, for the statement 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 561-62 (quoting *United States* v. *Young,* 470 U.S. 1 (1985) (citation omitted)) emphasis added). While we do not see arguable merit to this claim, we continue on.

We ask if counsel's actions lacked a reasonable basis and we consider the alternative strategy of retrial counsel objecting as PCRA counsel believes he

should have. For the aforementioned reasons, we do not believe that there was a *substantially* greater chance of success where the defense's closing implied that Ms. Snyder was coaxed and cajoled into making up a story, which does not align with the facts as elicited in the first trial. Rather, Ms. Snyder, supplied with the Defendant's name, offered up, of her own volition, a story to Detective Fetrow. We next examine if there was any prejudice.

We ask if the unavoidable effect of the challenged comment was to cause prejudice in the minds of the jurors such that they formed a fixed bias and hostility towards the defendant. In light of the Court's instruction that the arguments of counsel were not evidence and that the jury's recollection of evidence was the correct recollection, we do not believe that a fixed bias could have formed in the mind of jurors. No relief is due on this sub-claim.

3. *Mischaracterizations of Tina Ashley's Testimony*

The Defendant's next set of sub-claims involve the A.D.A. mischaracterizing and potentially manufacturing evidence regarding Tina Ashley's testimony. We deal with each claim in term, but, owing to the inordinate amount of time the review of this PCRA has garnered, as efficiently as possible.

The Defendant complains that the A.D.A. described Ms. Ashley as watching Mr. Mable dodge bullets *and* duck. The defense opines that this is inconsistent with Ms. Ashley's testimony that she was pulled inside of her building after the first shot. Defendant's Proposed Findings of Fact and Conclusions of Law, at 52 (citations omitted). This claim is inconsistent with the later claim that the

shooter stopped shooting as his six-shooter was out of bullets. This is so because Ms. Ashley indicated that she heard the first shot, entered her building, and then, as she claimed to have heard three shots total, she heard two more shots. (N.T., Vol. 2, 8/4/14, at 90-91.) Thus, by the Defendant's own reckoning, Ms. Ashley's memories were faulty or one could infer that she was outside for more shots than she testified to, which would have allowed an inference of her watching Supreme dodge bullets or ducking. It was for the jury to determine what the facts were and who was credible. The Defendant is engaging in the very sort of absolutist characterization of evidence that the Commonwealth did in its closing. This is what litigants in an adversarial system do. They characterize evidence and it is a competitive and heated process, which Chief Justice Burger acknowledged in the passage quoted *supra.* We see no possibility that this caused fixed bias or hostility in the minds of jurors such that they were prejudiced against the Defendant to such an extent that they could not weigh the evidence and render a true verdict.

The next Tina-Ashley-related sub-claim is that the prosecutor consistently insinuated that Ms. Ashley's excited utterance meant that Supreme was the intended target. Defendant's Proposed Findings of Fact and Conclusions of Law, at 53. We have already, previously, dealt with the substance of this claim—namely, that Ms. Ashley had not specifically identified supreme as *the* target. There is simply no merit to this claim where the prosecutor was likely basing his statement off of Detective Fetrow's belief that Ms. Ashley had specifically identified Supreme

as the shooter's target. We have already described why this Court does not believe that counsel was ineffective for failing to elicit further testimony that might have undermined this contention. What is important regarding *this* claim is that the A.D.A., from Detective Fetrow's testimony, had a factual basis for his statement. Moreover, there was ample other evidence indicating that Supreme was the target from Apollonia Snyder's testimony and Mr. Burns' indication that Supreme was targeted. Especially in light of the other damning evidence, we cannot fathom that the jury would have formed a fixed bias or hostility from this that would have rendered the verdict untrue.

Next, the Defendant objects to the prosecutor having, supposedly falsely, indicated that Ms. Ashley saw Mr. Burns running past her after the second shot had been fired. Defendant's Proposed Findings of Fact and Conclusions of Law, at 53. Ms. Ashley had indicated that, at the time, she lived at 111 S. Duke Street and that she was sitting in front of her residence on the evening in question. (N.T., Vol. 2, 8/4/14, at 85-86.) Ms. Ashley indicated that she had observed that there was one guy standing and then she quickly added that there were four total. *Id.,* at 98-99. Ms. Ashley indicated she was closer to the shooter than at least one of the persons she had just described. *Id.,* at 99. Ms. Ashley indicated that she had not seen anyone sitting on a car; but, rather, Ms. Ashley saw the individuals, including Mr. Burns, standing around and leaning on a car, but, following her warning to hem regarding police presence, they had moved towards Allison's Bar. *Id.,* at 100-01. The testimony of Mr. Mable, a.k.a. "Supreme," established

that Allison's Bar existed at 105 and 107 S. Duke Street. (N.T., Vol. 2, 8/4/14, at 245; 250.) Daniek Burns had indicated that he ran from the car he had been sitting on to King Street. (N.T., Vol. 1, 8/4/14, at 399-400.) The car Burns claimed to have been sitting on was in front of 115 South Duke Street. *Id.,* at 166. Taking all of this evidence together, if Ms. Ashley was believed in total then Mr. Burns night have been north of her residence at 111 S. Duke Street and closer to Allison's Bar at 105 and 107 S. Duke Street. Thus, Mr. Burns could not have run past Ms. Ashley under any circumstance—no matter how many bullets had been fired before she was inside her residence. On the other hand, if Mr. Burns was credited then he was sitting on a car in front of 115 South Duke Street to the *south* of Ms. Ashley's residence *and* King Street, which would mean that Mr. Burns would have run by Ms. Ashley's residence. Assuming, *arguendo* that the jury made similar conclusions as PCRA counsel regarding the shooter's firearm being a six-shooter that stopped firing after six rounds, which only comports with Ms. Ashley's testimony if she was outside for more rounds than she was recounting or if she was totally wrong about the number of shots fired, then the A.D.A.'s statement was not false. And, a close but plain reading of the evidence makes this clear. The objected-to statement was not so incorrect as to blind the jury as to sense and reason. We cannot find that the jury formed a fixed bias and hostility and, as a result, that denied them the ability to fairly weight the evidence. No relief is due for this claim.

The Defendant's next claim of prosecutorial misconduct points to the A.D.A.'s claim that the

victim was sitting between herself and the shooter. Defendant's Proposed Findings of Fact and Conclusions of Law, at 53. The assertion is that the A.D.A. made this statement to imply that Ms. Ashley, who testified favorably for the defense, could not have made certain statements describing the shooter. *Id.,* at 54. The Defendant correctly asserts that Ms. Ashley testified that Ms. Witter was between herself and a person identified as Tony. *Ibid,* (citing T.T., Vol. 2, 8/4/14, at 100.) However, we believe that Ms. Ashley's testimony was confusing and easily could have been interpreted as supporting the Commonwealth's statement for two reasons.

First, Ms. Ashley's description of the seating orientation of herself, Ms. Witter, and Tony is confusing. One reading of the transcript is that Ms. Ashley was, despite her testimony presented *infra,* sitting on the northern side of the steps in front of her home. This is so because she described Tony as sitting on her left, (citing N.T., Vol. 2, 8/4/14. at 87), which, assuming the parties seated are facing the street, based upon the orientation of the street, would have placed Tony on the south side of the porch and Ms. Ashley on the northern side. Thus, Ms. Ashley and Tony were between Ms. Ashley and the alley around which the shooter fired from, which was Newton Alley. *Id.,* at 89. *Or,* Ms. Ashley had her back to the street and was facing the residence, which would have allowed Tony to be on Ms. Ashley's left. This accords with Ms. Ashley's statement that her side of the steps was the side towards Newton Alley. *Id.,* at 99. Oddly, she claims that her legs would have been towards Newton. *Id.,* at 100. Thus, Ms. Ashley was either facing the shooter, and not Ms. Witter who she

claimed to have been comforting betwixt herself and Tony, or she might have been mistaken about where she had been sitting. This is all the more perplexing in that Tony is alleged to have seen the shooter first, which implies Ms. Ashley was not facing the alley as her statement about the direction of her legs implied. *Id.,* at 87. Despite the fact that Ms. Ashley left the stand and pointed to where she had been sitting, we do not see that an exhibit was marked, *Id.,* at 97, and, even if Ms. Ashley had marked where she had been sitting, her testimony was garbled enough that the Commonwealth could have asked a jury to draw the inference that Ms. Witter was between Ms. Ashley and the shooter.

There is a second spot in Ms. Ashley's testimony from which the Commonwealth could have asked the jury to infer that Ms. Ashley's view was obstructed by the victim's presence. The defense has asserted that it is well-established that Ms. Witter was seated between Ms. Ashley and Tony. However, Ms. Ashley also testified that, after the first shot, Tony grabbed Ms. Ashley who, in turn, grabbed Ms. Witter. *Id.,* at 91, 105. This implies a shuffling of persons. If we credit Ms. Ashley here, then Tony had to have reached around Ms. Witter to grab Ms. Ashley. The Defendant cites Ms. Ashley's testimony that, prior to the shooting, Ms. Witter had to move to unblock the doorway for Ms. Ashley's daughter to enter the residence. Defendant's Proposed Findings of Fact and Conclusions of Law, at 54 (citing N.T., Vol. 2, 8/4/14, at 87.) So, for Tony to have pulled Ms. Ashley into the doorway and for Ms. Ashley to have pulled Ms. Witter after her implies either a reshuffling of persons or that Ms. Ashley was

incorrect in stating where Ms. Witter had been seated at the time of the shooting. The Commonwealth could reasonably have asked the jury to infer that Ms. Witter was between Ms. Ashley and the shooter. We cannot find that the jury formed a fixed bias and hostility and, as a result, that denied them the ability to fairly weight the evidence. No relief is due for this claim.

The next claim of prosecutorial misconduct during closing regards the Commonwealth's statement that Ms. Ashley claimed not to have known the Defendant, but that Ms. Ashley was waving and smiling at the Defendant during a sidebar. (N.T., Vol. 2, 11/4/14, at 347.) This conflicts with the testimony elicited by retrial counsel that Ms. Ashley had known the Defendant for approximately sixteen years. *Id.,* at 93. However, it does not conflict with the *degree* of knowledge that was seemingly established. The 2006 testimony provides little insight in that Ms. Ashley only stated that she knew the Defendant. (N.T., 9/l3/06, at 122.) We reproduce the following relevant testimony:

> Defense: And tell the Jury how you knew him?
>
> Ashley: **I knew him *because we lived in the same building,*** you know, for years.
>
> Defense: And over the course of that 16 years, how often would you see **him?**
>
> Ashley: ***If*** **he was out on his back patio, I would see him, you know, out in the back.** ***Wouldn't see him outside too much.***

N.T., Vol. 2, 8/4/14, at 93.) (emphasis added). These excerpts imply a casual knowledge of the Defendant which is at odds with the moment of familiarity the prosecutor described and contrasted in his closing arguments. The Defendant sees misconduct where there is none. Nothing in this complained-of excerpt from the Commonwealth's closing can be construed as creating bias or hostility and certainly not the extent that it precluded jurors fairly weighing the evidence presented.

The Defendant next complains that the Commonwealth, in closing, stated that the shots stopped after Mr. Mable purportedly played dead. There is absolutely no merit to this claim. We turn to a relevant exchange wherein Mr. Mable, a.k.a. "Supreme," was cross- examined by the Commonwealth:

> Cmwlth: After you fell down and played dead, the shots stopped, right?
> Supreme: No, I think I heard about two more shots after that.
> Cmwlth: **Right after you fell down and played dead, *within a second or two,* those shots stopped, right?**
> Supreme: **Give or take a second or *two, yeah.***
> Cmwlth: It worked, didn't it? Opossum can play dead, and it causes bullets to stop firing. Isn't that what happened?
> Supreme: I don't know.

Id., at 250-51 (emphasis added). It does not matter that Supreme could not exactly say why he bullets stopped. The Commonwealth elicited that the shooting stopped within seconds of Supreme playing

possum. There was absolutely evidence adduced to support the Commonwealth's contention that the shooting stopped after Supreme played possum. This Court has spent an inordinate amount of time reviewing the evidence of this case and it ^orders on chicanery for the Defendant to bring this claim when the mere fact that Supreme testified that "like I played like I was hit or dead," *Id.,* at 227, supports a contention that Supreme believed he was the target. Playing dead is only a strategy where a person believes they are *the* target or a target. By his own words. Supreme's testimony clearly supported a contention that Supreme was the target of the shooting. The Commonwealth was well-within the bounds of acceptable practice to ask the jury to make this inference and no untoward bias or hostility could have inured against the Defendant as a result. There is neither merit nor even basis for this claim and it fails accordingly.

The Defendant's next claim, that the limited ammunition of a revolver was the real reason that the shooting stopped and *not* Supreme having played dead, has already been dispensed with by the immediately preceding analysis. Supreme testified that he played dead. Only those who believe they are targets will believe that a strategy of playing dead will pay dividends. Moreover, Supreme admitted that the shooting stopped within one or two seconds, give or take a second or two, of his having played dead. The prosecutor's argument was well-founded in the evidence and could not have fostered improper bias or hostility within the jury. There is no merit to this claim.

The Defendant's next claim is that the prosecutor engaged in misconduct when he asserted the following:

> Then there's Lloyd Valcarcel. What do you say about Lloyd Valcarcel? The man who couldn't tell the truth if his life depended on it.

Id., at 348. We will parrot the Defendant's own excellent research back at him. "[T]he 'prejudicial effect of the district attorney's remarks must be evaluated in the context in which they occurred.'" *Commonwealth* v. *Carpenter,* 515 A.2d 531,536 (Pa. 1987) (quoting *Commonwealth* v. *Smith,* 416 A.2d 986, 989 (Pa. 1980)). The *full* paragraph, from which the Defendant excerpts the supposedly offensive statement, bears reproducing:

> Then there's Lloyd Valcarcel. What do you say about Lloyd Valcarcel? The man who couldn't tell the truth if his life depended on it. Yes, yesterday he definitively said it wasn't Mr. Brenner. Yet, in his handwritten statement, he said, "I don't know if he knew about it, let alone did it." And in the same statement to the defense, he says, "Well, when I gave the shoe ID, I then named the color of my shoe because I was being smart, due to the fact that he was trying to place a drug sell [sic] on me," meaning Detective Fetrow. He wasn't even being interviewed by Detective Fetrow, buy by Detective Nadzom, who got pulled out of bed and knew nothing about this case. Fetrow wasn't even in the room. There's

> no other way to put it, ladies and gentlemen, he's lying.

N.T., Vol. 2, 8/4/14, at 348.) In *Carpenter, supra,* our Supreme Court, in weighing the potential impropriety of a prosecutor's characterization of the defendant, in a trial for murder, is a murderer and a liar stated the following:

> Given the evidence that was presented to the jury which proved that only one of two people could have stabbed the victim (appellant or his girlfriend, Ms. Emmil) the prosecutor's comments were neither unfair nor *unduly* prejudicial, and **merely highlighted what the jury knew already - -** that one of these two was the murderer and one of these two lied.

15 A.2d, at 536 (italicized emphasis in original and emphasis added in bold). The supposedly offensive lines, in context, merely highlighted what the jury knew already. Mr. Valcarcel had either lied when he wrote his statement that he could not say whether or not the Defendant was the shooter or when Mr. Valcarcel testified that the Defendant was not the shooter. Additionally, Mr. Valcarcel gave confused testimony regarding the shoes that seemed clearly designed to obfuscate. The prosecutor simply told the jury what they already knew. The comments were not unfair, nor where they *unduly* prejudicial.

Finally, the Defendant claims misconduct when the prosecutor erroneously stated that Ian Brenner's conduct was the direct cause of the death of three innocent people ... Ian Brenner is about as cold a killer as there exists." (N.T., Vol. 2, 8/4/14, at 354.) The Defendant correctly notes that three persons did

not die. Defendant's Proposed Findings of Fact and Conclusions of Law, at 56. However, as with other portions of his brief, the Defendant cherry-picked the offending statement and denudes it of context. In closing, the Commonwealth stated the following:

> Certainly when you kill *or harm* three people, and Ian Brenner's conduct was the direct cause of the death of three innocent people at the time he had the specific intent to kill, you don't get a free pass just because you're a bad shot. Ian Brenner is about as cold a killer as there exists. He used a deadly weapon that evening. The Court will tell you that you can infer, based on that alone, that he had the specific intention to kill. He wantonly fired into a crowd of people on a busy York City street, multiple shots. What does that say about his intention, his specific intention? And he did so with callous disregard for anyone's safety for his own personal vengeance. He is guilty of murder in the first degree. Thank you.

(N.T., Vol. 2, 8/4/14, at 354.) (emphasis added). In light of the words that *directly precede* the misstatement that three persons were killed, it is *clear* that the prosecutor merely misspoke. What is more, it beggars belief that we are to find a jury capable of parsing complicated testimony and counter-testimony, but that the Defendant finds the jury incapable of sifting out a clear misstatement that immediately followed a correct recitation of the very same facts. We cannot find that there was any chance of bias or ill-will resulting from this clear

misstatement. The jury's fair weighing of the evidence was certainly not disturbed or affected by it. The portion of this claim related to labeling the Defendant as a cold killer is a much weightier claim deserving of more attention.

The Defendant cites to *Commonwealth v. Clancy,* 192 A.3d 44 (Pa. 2018), decided during the pendency of this PCRA petition, as supporting a contention that the statement made by the prosecutor that Ian Brenner was "about as cold a killer as there exists" was impermissible. Specifically, the Defendant highlights the portion of *Clancy* wherein our supreme Court wrote that "when statements deteriorate into impermissible characterizations and inflammatory name-calling that are divorced from the record or irrelevant to the dements of the crime at issue, they are substantially unwarranted and must be scrutinized for prejudicial effect." *Id.,* at 65. Indeed, *Clancy* is instructive on this point; however, not, in our mind, to the support of the Defendant. In addition to the quoted portion, the *Clancy* Court also wrote the following:

> Consistent with our clear departure from *Capalla's* rigid standard, and mindful of our concomitant allowance of oratorical flair, we hold that offense--centric statements generally are permissible. These are statements that speak to the elements of the particular charges levelled against the defendant and the evidence necessary to prove those elements at trial, such as those at issue in *Hall* and *Chamberlain.* The prosecutor must be free to argue that the

> facts of record establish every element of the crime charged, and must be free to respond fairly to the arguments of the defense. Thus, we should not preclude or condemn a prosecutor's characterizations of the defendant that are both based upon the record and that inherently inform elements of an offense at issue, especially where the remarks constitute a fair response to defense counsel's argument. However, when statements deteriorate into impermissible characterizations and inflammatory name-calling that are divorced from the record or irrelevant to the elements of the crime at issue, they are substantially unwarranted and must be scrutinized for prejudicial effect.

Ibid, (internal citations omitted). The Court then went on to indicate that the prosecutor in *Clancy* had to prove specific intent to kill, which means showing willful, deliberate, and premeditated action. *Ibid,* (citations omitted). The Supreme Court sanctioned the granting of some latitude to prosecutors in meeting this evidentiary challenge. *Ibid.* The Supreme Court also described the delicate balance they sought to achieve between not hamstringing prosecutors and not allowing prosecutors to ride roughshod across the accused. *Id.,* at 67. This brings us to the line the Defendant relies upon in distinguishing his own case from that of *Clancy,* wherein heat of passion, rather than mistaken-identity, was the issue. *Id.,* at 68. The Supreme Court wrote, that

> [I]t ***may*** not be proper to refer to a defendant as a "cold blooded killer" where the defense argument does not warrant that reference. For example, where the defense in a first-degree murder trial is mistaken identity, rather than heat of passion, the term "cold blooded killer" may not be appropriate.

Ibid, (emphasis added). The Defendant, correctly, submits that his case deals with a mistaken identity defense. Defendant's Proposed Findings of Fact and Conclusions of Law, at 59. The Supreme Court went on, in *Clancy* to state the following:

> Prosecutorial remarks do not constitute permissible oratorical flair simply because they are based upon the underlying facts of the case *or* because they relate to an underlying element of the crime. Both requirements must be met. To fulfill his duty as an advocate, a prosecutor has numerous tools in his arsenal. Recourse to inappropriate invective is not one of them.

Ibid, (emphasis in original). Though the defense is correct that this case is a mistaken identity case and not a heat of passion defense, the *Clancy* Court did not forbade the use of the term "cold blooded killer" in such cases; but, rather, the Court stated it *might* not be proper. We are called upon to inquire whether that label is based upon underlying facts *and* if it relates to an underlying element of the crime. From the *Clancy* Court's discussion of the element of specific intent in first degree murder cases, such as the one *sub judice,* we know that "cold blooded killer" speaks

to the element of specific intent. *Id.,* at 66-67. Not being as sophisticated as our learned betters on the Supreme Court, it is not for this Court to parse the semantics of "cold blooded killer" versus *"about* as cold a killer as there exists." We cannot divine how a jury would distinguish between the two. Thus, the objected-to statement relates to an underlying element of the crime. As for whether the statement is based in the facts, we need only look at the context. The prosecutor points to the usage of a deadly weapon and the Defendant having fired into a crowd with callous disregard for the safety of others in order to exact what he deemed vengeance. This all comports with the facts presented. From the Defendant's own unsolved shooting in proximity to the murder, to the Defendant's threat against Supreme, to the Defendant's usage of surprise attack to reach a target within a crowd. We do not believe it was beyond the pale for the prosecutor to describe the Defendant, for these actions, as *"about* as cold a killer as there exists" in that the lack of concern for bystanders does speak to the extreme degree of specific intent possessed by the shooter. We do not believe that *Clancy, supra,* disallows the prosecutor's aggressive characterization of the Defendant. Of course this Court would have preferred that the prosecutor display more professionalism and concern for decorum. The ugliness of the display is not the question. The question is whether the bounds of acceptable behavior were breached and this Court cannot, in light of *Clancy, supra,* state that they were.

For the preceding reasons, there is no merit to the claims that retrial counsel, was ineffective for failing to object to the prosecutor's highlighted

statements during closing. And, for the reasons stated *supra,* even if there had been merit, the alternative strategy of objecting did not have a *substantially* greater chance of succeeding. And finally, there was no prejudice in that, even if the objections had been made, the jury still would have reached the same conclusions except that they might have viewed the defense as unyielding to the point of absurdity, which could have further harmed the Defendant. A trial attorney must always strike a delicate balance between making objections that are of merit and will materially advance the client's interests and forgoing objections that, though possessing merit, are unlikely to advance to the client's interest and may well engender ill feelings amongst the jury towards the Defendant. These claims do not garner relief.

J. Double-Jeopardy

The Defendant's eleventh claim for PCRA relief is that trial counsel was ineffective for failing to file a pretrial motion to bar retrial on double jeopardy grounds due to prosecutorial misconduct related to the handling of Commonwealth witness Charles Maner. For the following reasons, we disagree.

Before proceeding any further, we would note that this case has taken up a significant amount of this Court's resources, which are already stretched due to the heft of our docket.[9] As a result of the delays occasioned by the thoroughness of PCRA counsel's well-drafted and well-argued petition and brief, it was not until very late in the process that this Court arrived at the Defendant's eleventh PCRA complaint

[9] We do not mean to indicate that this is a unique problem that faces this Court; but, we merely offer some background explanation.

and discovered that the supporting documentation includes the name of this Court's son, Seth Bortner, Esquire. Assistant District Attorney Seth Bortner handled a dismissal hearing involving a previously key witness in the Defendant's first trial, Charles Maner. The Defendant has submitted the transcript of that proceeding in support of his contention that there was a *Brady*[10] violation by one of the former assistant district attorneys who was involved in the Defendant's first trial, William Graff, Jr., Esquire. See Defendant's Proposed Findings of Fact and Conclusions of Law, at 60. As noted, PCRA counsel is a very thorough counselor; yet, we do not observe that a recusal motion was ever made, nor do we even see that the Defendant takes any exception to the attenuated connection of A.D.A. Seth Bortner to this case. As no motion is before the court, we continue on; however, we did not wish to bury this detail in a footnote.

With the caveat regarding A.D.A. Bortner stated, we proceed to the case law supplied by the Defendant. In *Smith,* our Supreme Court stated:

> We now hold that the double jeopardy clause of the Pennsylvania Constitution prohibits retrial of a defendant not only when prosecutorial misconduct is intended to provoke the defendant into moving for a mistrial, but also when the conduct of the prosecutor is intentionally undertaken to prejudice the defendant to the point of the denial of a fair trial.

15 A.2d 321, 325 (Pa. 1992). We state this law first

---

[10] *Brady v. Maryland,* 373 U.S. 83 (1963)

that it might be borne in mind as we consider the transcript offered in support of this claim.

Turning to the first prong of the test for ineffectiveness, we ask if there is any merit to the claim. For the following reasons, we do not believe that there is. The Defendant cites to three portions of the transcript from Charles Manor's dismissal hearing as supporting a contention that there existed a deal between Attorney Graff and Charles Maner for Mr. Maner's testimony that was not revealed to the Defendant, nor the Defendant's first jury. Defendant's Proposed Findings of Fact and Conclusions of Law, at 60. The Defendant argues that, per *Smith, supra,* this amounted to a *Brady* violation so severe as to bar retrial, If there had existed a deal of this nature and its existence had been kept from the defense then, under the guidance of *Smith, supra,* this Court would agree with the Defendant that there is merit to the claim. However, our review of the proffered transcripts does not reveal the same conclusions reached by the Defendant. We turn next to those excerpts.

The Defendant hangs his hat on one excerpt from Mr. Maner's cases, docketed at CP-67-CR-0000195-2005 and CP-67-CR-0005496-2005, wherein Attorney Graff indicates that he probably told Mr. Maner, following his testimony in the Defendant's first trial, to just go back to Florida as Mr. Maner's own case was going to die on the vine. (Notes of Testimony, 80 4/22/14, at 13.) Additionally, Mr. Manor testified that, following his testimony against the Defendant, he was told that he could return to Florida and forget about his cases, which Mr. Maner

promptly did. *Id.,* at 33-34. And, finally, the Defendant points to our colleague, the Honorable Richard K. Renn's, order in Mr. Manor's dismissal hearing which reads as follows:

> In this case, the court has before it sentencing in these cases for Mr. Maner. We note that *his plea was entered on or about June 15th, 2005.*[11] Sentencing was scheduled after some delay ostensibly to enable him to continue to cooperate with the Commonwealth.
>
> Unrelated to these cases, the Defendant then became a witness in a homicide case that was tried here in York County, and, *thereafter,* after having conversations with the Senior Assistant District Attorney who was involved in that homicide case and familiar with Mr. Maner was led to believe that the charges for which he is facing sentencing would be dismissed or nolle prosed or otherwise disposed of.
>
> Given that belief, Mr. Maner then returned to Florida where he remained until he was subsequently picked up on the bench warrant that remained outstanding, but not served.

---

[11] This was *prior* to Ian Brenner's trial in September of 2006.

We realize this is an extremely capsulized version of the facts in this case. Given that he went back to Florida under the assumption that the charges against him would be dismissed, we find it difficult to believe that he undertook a lifestyle or acts down there which we could deem prejudiced since he was obviously under the assumption that the charges against him would be dismissed.

We note that one of the factors in considering a motion to dismiss or delay in sentencing is prejudice to the Defendant, and we are not to presume prejudice merely by the delay in sentencing, and, as we said, it's difficult to conclude that the Defendant suspended or did not do anything that he otherwise would have done because he thought these charges would at some point result in his incarceration. He thought that the charges against him would be dismissed.

If we were to decide this case and the motion to dismiss filed by the Defendant based on traditional delay in sentencing analysis, we would have difficulty concluding that the Defendant has carried his burden.

We note parenthetically that if we would deny his motion to dismiss, the

> Commonwealth concedes that the Defendant at most would be subject to a period of incarceration of not less than 11 ½ nor more than 23 months *pursuant to the plea bargain that was struck at the time that the plea was entered.*
>
> That said, we do have testimony from the attorney for the Commonwealth that essentially the agreement or *reward* that Mr. Maner would be facing is dismissal of the charges *because of his cooperation as being a witness in a homicide case.*
>
> We agree with counsel that that issue is a fundamental fairness issue, and under the circumstances and considering the testimony, we are inclined to enforce *the understanding or agreement that was made with the Defendant when he went back to Florida,* that being that the charges against him would be dismissed.
>
> Under the circumstances, therefore, we will grant the Defendant's motion to dismiss the charges with prejudice. The Defendant is charged in these cases.

Id., at 41-43 (emphasis added). It seems clear to this Court that Judge Renn was acknowledging that there was no agreement prior to Mr. Maner's testimony against the Defendant in the first trial. The rest of the transcript supports this finding. Attorney Graff was asked if he remembered a bench warrant being served

on Mr. Maner that Attorney Graff then lad, our former colleague. Judge John H. Chronister vacate. *Id.,* at 14. Queried why that warrant was never lifted, Attorney Graff responded that this was a question for the clerk. *Id.,* at 14-15. Shortly thereafter, the following exchange occurred:

> Defense: Potentially could that have been to have it hanging over his head to come back to testify in the Brenner File?[12]
>
> Graff: No. He already testified in the Brenner trial and *he got no consideration for doing that.* I mean, I was very clear that he got no deals for testifying. The drug case happened long before Ian Brenner did whatever he allegedly did, so when I found out that Maner testified against him while he was in jail, then I brought him in, but I clearly gave him no deals for testifying.
>
> Defense: I understand that. But ***after*** he testified - -
>
> Graff: Yeah, out of sight, out of mind, bye.

Id., at 15 (emphasis added). Mr. Graff was probed again about the nature of any deal:

---

[12] In fact, it appears that the warrant was not lifted as Mr. Maner had been returned to Pennsylvania under a material witness warrant and not for his sentencing, which had denied him the right to fight or waive extradition. Therefore, the warrant was left in place. (Notes of Testimony, 4/22/14, at 17.)

Defense: Was that because of his testimony in the homicide or because other things that he had done?
Graff: I think because of his testimony in the homicide. *The initial agreement was just with drugs, but then when he testified in the homicide he was a crucial witness, it was sort of, okay, 17/**pay him his dues.** I mean, **he had nothing to do with it. That was in my mind, not his. He and I never had a conversation. I said no deals. I offered him nothing to testify.***
Defense: You're saying when he testified he hadn't been promised withdrawal of the case?
Graff: ***I didn't promise him anything ever. In** my mind, 1 was just going to let it disappear and go away.*
Cmwlth: That's all.
Defense: If I may argue on that point. Your Honor?

May it please the Court. I think based on - - Mr. Graff was the representative. He was the senior representative in the office. He explained what his intentions were.

Mr. Maner did everything that he was supposed to do. He was told to go back to Florida and we'll get rid of it. And then we're here eight years, nine years - - whatever it is - - nine years later and he's

> facing - -1 saw the presentence investigation report and it almost knocked me off my chair.
>
> I mean, this guy did everything that he was asked to do and then some and now he's got to face sentencing? And this was the guy who held the power who told him to go back to Florida.
>
> Court: *He wasn't supposed to do anything.* ***He voluntarily did it, testified.***
> Defense: Yes, Your Honor.
> Court: ***There was [sic] no deals in place.***
> Graff: Right.
> Defense: But Mr. Graff has explained what his intention was and he was told just go back. So I'm not - -
> Court: With two outstanding warrants still against him.

Id., at 19-20. Judge Renn went on to find that there was an agreement premised upon *prior* consideration:[13]

> Cmwlth: I think the consideration part would be what was missing here. If that would have been said, if you testify

[13] We will not comment upon this statement of the law by our learned colleague, the Honorable Richard K. Renn, beyond noting our base belief that prior consideration is not generally considered to be adequate to found a new agreement. We certainly do not challenge the result reached by Judge Renn in Mr. Manor's cases.

> then I would do this, we'd have a binding agreement. But because it was done afterwards, and to sort of paraphrase Attorney Graff s testimony, I don't mean to speak for him, but almost in appreciation for what he had done for him, I don't know that it has the same binding aspect that it might have had that been the agreement, you testify, I'll get rid of the cases.
>
> Court: *Didn't the consideration arise before the offer and acceptance*? He performed something. He gave something that he didn't ordinarily have to do. He testified.

Id., at 24. The transcript from Mr. Maner's cases makes clear that there was no agreement in place for Mr. Maner's testimony against the Defendant. Moreover, during the Defendant's *first* PCRA, Attorney Graff reiterated that his decisions regarding Mr. Maner's cases occurred after Mr. Maner's testimony in the Defendant's trial. (Notes of Testimony, 4/13/12, at 91.) his case is distinguishable from *Commonwealth v. Smith,* 615 A.2d 321 (Pa. 1992), because Mr. Maner did not have open charges for his drug offense; but, rather, Mr. Maner had pleaded guilty to those charges *and* negotiated a cap to his maximum sentence that reduced his maximum exposure from thirty ***years*** to a max-county sentence of eleven and one-half to twenty three months. (N.T., 4/22/14, at 10-11.) Mr. Maner's counsel presented a copy of that agreement and garnered Attorney Graff s consent that the agreement in the drug cases

contained a notation that the deal might get better depending on cooperation that was totally unrelated to the homicide case, which had not even occurred when Mr. Maner pleaded guilty. *Id.*, at 11-12. And, the prosecution in *Smith* left behind a trail of clear evidence that they had acted to suborn justice and conceal their actions. 615 A.2d, at 324. Moreover, again, *Smith* stands for the proposition that dismissal is appropriate where "the conduct of the prosecutor is intentionally undertaken to prejudice the defendant to the point of the denial of a fair trial." 615 A.2d, at 325. Our reading of the facts does not reveal any intent to prejudice the Defendant to the point of denying him a fair trial. Mr. Maner already had a deal for his outstanding drug charges. Additionally, as the Supreme Court reaffirmed in *Commonwealth '. Burke,* dismissal goes beyond punishing the prosecutor and punishes the public and should only be done where the actions of the prosecution are egregious and where prejudice will be suffered by the defendant if charges are not dismissed. 781 A.2d 1136, 1144 (Pa. 2001) (quoting *Commonwealth v. Shaffer,* 712 A.2d 749, 752 (Pa. 1998)). We do not believe the actions of the prosecution, at issue in this claim, were as egregious as those in *Smith.* Moreover, the Defendant was convicted a second time *sans* Mr. Manor's testimony, which belies any contention that the Defendant would suffer prejudice if the charges were not dismissed as a result. There is no merit to the claim. The Defendant cannot meet the first prong of the test for ineffectiveness—a test in which he must meet all three to succeed. We briefly analyze the other two prongs out of an abundance of caution.

For the second prong of the test for ineffectiveness we inquire into whether the alternative strategy of retrial counsel filing for dismissal under double-jeopardy grounds posed a *substantially* greater chance of success. For the foregoing reasons, we cannot say that it would have. As for the third prong, we cannot say that, but for retrial counsel's supposed error in not filing for dismissal, the Defendant was likely to have succeeded. There was no agreement with Mr. Maner prior to the testimony and Mr. Manor's sentence was already capped as a result of an earlier deal. The Defendant did not suffer prejudice. This claim fails.

K. **Ineffectiveness for Failing to Object to Gunshot Residue Report Under Confrontation Clause**

The Defendant's twelfth PCRA claim is that his retrial counsel was ineffective for failing to object to the introduction of A.J. Schwoeble's gunshot residue report as being violative of the Defendant's confrontation rights. We are constrained to disagree.

The relevant facts are as follows. The items in question were previously examined by A.J. Schwoeble. (N.T., Vol. 1, 8/4/14, at 321.) Mr. Schwoeble generated a report involving a belt jeans, and sneakers on December of 2005. *Id.,* at 322. Mr. Schwoeble generated a report on a sweatshirt in January of 2006. *Id.,* at 323. Mr. Schwoeble had, at the time of his involvement in this case, held the job that Ms. Murtha did at the time of retrial, which is to say that Mr. Schwoeble was the manager and director of the forensics laboratory at RJ Lee Group. *Ibid.* Ms. Murtha created a supplemental report, "which was based off a review that she] did on the case that Mr.

Schwoeble worked." *Id.,* at 324. The following exchange occurred:

> Cmwlth: Ms. Murtha, what I'd like you to do now is go through your report, and if you could tell the Jury what your conclusions were to each of the items that were submitted to RJ Lee Group.
>
> Murtha: Sure. First and foremost, I'll just state that upon my review of the [sic] Mr. Schwoeble's reports and his case files, I found that everything was done according to the standard operating procedure that was in place at the time. And in my report, I took the results of his reports and put them in the format that is used today when preparing gunshot residue analytical reports.

Id., at 325. The following exchange also occurred:

> Cmwlth: And let's just - - one final question here. We've mentioned a Mr. Schwoeble through the course of your testimony. Was he available today to testify as to his previous reports?
>
> Murtha: Mr. Schwoeble is currently retired, and he is no longer of good health to travel such a long distance.
>
> Cmwlth: And the report that we've - - the findings that were talked about today, this is your report that you're testifying to today, correct?
>
> Murtha: Yes, sir. This is my report based off of my review.

Id., at 336. On cross-examination, the following exchange took place:

> Defense: Ms. Murtha, the clothe [sic] items that are in front of you were sent to your lab separately in 2005 and 2006, correct?
> Murtha: Yes, sir.
> Defense: And those items were analyzed by Mr. Schwoeble?
> Murtha: Yes, sir. He was the lead analyst on the case.
> Defense: And he prepared his reports, which have been marked as exhibits, and they're in front of you?
> Murtha: Yes, sir.
> Defense: And you were not a part of the original examination and testing of these items, correct?
> Murtha: That's correct, sir.
> Defense: 2014 you were asked to relook at this matter, correct?
> Murtha: Yes, sir.
> Defense: So am I correct to assume that you did not reanalyze the particular items that are in front of you?
> Murtha: Yes, sir, that's correct. My review was based off of the case notes and the automatic printouts from the SEM during the time of the actual analysis.
> Defense: So is it fair for me to say and to ask you that you basically looked over what Mr. Schwoeble did to see if you

agreed or disagreed with his analysis and conclusions?
Murtha: Yes, sir.

Id., at 337-38. Then the following exchange occurred regarding differing numbers between the original report and the one Ms. Murtha prepared:

Defense: Can you tell me why the numbers are different? These are the same items, correct?
Murtha: Yes, these are the same items. And if you recall, I mentioned in the beginning of my testimony that I created my report based on today's standards, what RJ Lee Group's standard operating procedures are for preparing reports as of today.

During the time of Mr. Schwoeble's report and analysis, there was a different way of reporting. What they used during the time was an extrapolation. So basically 20 particles were looked at, 19 particles ended up being - - 19 of the 20 were gunshot residue particles. If the instrument actually , found 40 gunshot residue particles, there would be a calculation factor, so what that would extrapolate out to, which would end up being 38 gunshot residue particles. So that's why, in Mr. Schwoeble's report, it says approximately 38, because there could be more, there could be less.

> Today's standard, what we do is we write what we actually have confirmed, and that greater than or equal to number or symbol indicates that there could be more. So the reason why we made the change is because, although Mr. Schwoeble estimated approximately 55 particles, I confirmed, based on his prior analysis, there were 42. Even though my number is less, it's actually a more accurate number than what Mr. Schwoeble's would be.
>
> Regardless of what the number is, however, that does not change the conclusion of what they mean.
>
> Defense: So what you're saying is, your report, because of the science, is more accurate?
>
> Murtha: Based on what the standard for preparing reports on today is more accurate. The way we actually count particles is more accurate. The analysis, the way the particles are analyzed, is exactly the same.

Id., at 348-50. The relevant facts produced, we turn to the law that we must apply.

To begin, both the Sixth Amendment of the United States Constitution and Article I, Section 9 of the Pennsylvania Constitution guarantee the accused the right to be confronted with the witnesses against him. This includes the right to confront those who make testimonial statements against the accused. *Commonwealth v. Yohe,* 79 A.3d 520, 530-31 (Pa. 2013) (citations omitted). A.J. Schwoeble's report was

clearly testimonial. The primary purpose of the creation of Mr. Schwoeble's report was to test for the presence of gunshot residue and to memorialize the findings in anticipation of trial. See *Id.,* at 531-32 (citations omitted). Testimonial evidence is only admissible where the person or analyst making the statement is unavailable *and* there has been a prior opportunity for cross-examination. *Michigan v. Bryant, 562* U.S. 344, 354 (2011); see also *Melendez-Diaz* v. *Massachusetts,* 557 I J.S. 305, 311 (2009) (citation omitted). Per Allison Murtha's testimony, A.J. Schwoeble was unavailable at the time of trial due to his inability to travel for reasons related to his health. (N.T., Vol. 1, 8/4/14, at 336.) Moreover, the Defendant did not, insofar as this Court can determine, have a prior opportunity to cross-examine Mr. Schwoeble. As such, Mr. Schwoeble's report should have been inadmissible under the most basic interpretation of the confrontation clause. However, *Commonwealth v. Yohe, supra,* which this Court is intimately familiar with, as having been the trial court involved therein, allows a route around the confrontation clause.

In *Yohe,* a DUI case, a Dr. Blum did not perform specific tests on the defendant's blood; however, Dr. Blum "analyzed the data in the case file, determined the validity of the tests by comparing them to the others, decided which of the three tests results to report, (certified the results, and signed the Toxicology Report." 79 A.3d, at 538. Our Supreme Court found that Dr. Blum's actions charted a permissible course through the confrontation clause.

The Court wrote the following about Dr. Blum's involvement as an "analyst" in *Yohe:*

This is a circumstance that is factually distinct from either *Melendez-Diaz, [supra,]* which involved no live testimony in support of the certificate of analysis, or *Bullcoming* [v. *New Mexico,* 564 U.S. 647 (2011)], which involved the use of surrogate testimony by another analyst in the same lab with no connection to the laboratory report, in that here, two lab technicians collaborated with and provided raw data on the three tests to the testifying expert, their supervisor, who examined this data and formed his own independent expert opinion, and expressed this opinion in both the Toxicology Report and his live, in-court testimony.

Indeed, the facts presented herein fall within one of the scenario identified by Justice Sotomayor as being outside the "limited reach" of the Majority Opinion in *Bullcoming-.* where the person testifying is a supervisor, reviewer, or someone with a personal but limited connection with the scientific test at issue. 131 S.Ct. at 2719 (Sotomayor, J., concurring in part) ("It would be a different case if, for example, a supervisor who observed an analyst conducting a test testified about the results or a report about such results.").

. . . .

According to Dr. Blum's trial testimony, he reviewed the case folder, verified the chain of custody information and examined the personal identification information. Additionally, he checked the testing that was performed and the data that resulted, evaluated the analytical data from the duplicate gas chromatography and the enzymatic assay, compared the results of the two gas chromatography tests, compared the result of the enzymatic assay rest to the two gas chromatography tests, ensured that these numbers supported each other, and reported the lowest of the two gas chromatography test results as Appellant's BAC.

Dr. Blum reduced his findings to writing by electronically signing the Toxicology Report. Consistent with his conclusion in the Toxicology Report, he testified that Appellant's BAC was .159%.

Based on these facts, we hold that Dr. Blum is the analyst who determined the Appellant's BAC. Although he relied on the raw data produced by the lab technicians and utilized this raw data in reaching an expert opinion premised on his evaluation of the case file, he is the only individual who engaged in the critical comparative analysis of the results of the gas chromatograph tests

> and the enzymatic assay and determined Appellant's BAC. **Dr. Blum was at the top of the inferential chain, and utilized the data that preceded his analysis in reaching his conclusion.** He reached the conclusion in the Toxicology Report based on his analysis of the raw data, certified the results, and signed his name to them. As lab supervisor, moreover, Dr. Blum was generally familiar with standard procedures and able to identify any deviations from his procedure or any problems with the particular lab technician. Accordingly, Dr. Blum supervised Ms. Chacko and Ms. Silcox, evaluated and validated the entire record, decided which number to report as Appellant's blood alcohol content, and signed his name to the report. He was, therefore the certifying analyst who authored the Toxicology Report, and the analyst whom Appellant had a right to confront.

Id., at 539-540 (emphasis added). Thus, Dr. Bloom took a far more active role than the "surrogate" in *Bullcoming* who merely introduced the findings of the missing analyst. 564 U.S. 647, 655 (2011). As the Court that was overturned in *Yohe*, it is unlikely to surprise a reader that, in our view, to permit the course of action pursued by the Commonwealth in this case would create a loophole to *Bullcoming* wherein an uninvolved analyst of requisite skill s imply reviews a file and signs a second report. We do not question Ms. Murtha's skills in her field; but,

rather, we find that she did not perform similar independent verification work in this case as Dr. Blum did in *Yohe.* Again, we would emphasize that Dr. Blum performed acts that were a final analysis to select the final result to be reported *and he* certified the results with his signature. Ms. Murtha reviewed the findings of Mr. Schwoeble, wrote out and updated Mr. Schwoeble's results using a newer reporting method, and then signed her "report." To this Court's mind, Ms. Murtha's status was more akin to the disallowed "surrogate analyst" in *Bullcoming* than to the independent analyst in *Yoke.* One might counter that Ms. Murtha could not arrive at differing results because she agreed with Mr. Schwoeble's work; however, she was not Mr. Schwoeble's superior who would have been able to testify to the quality of his work. The preceding notwithstanding, we believe that, in light of *Yohe,* a reviewing court would be unlikely to agree with our analysis as explicated. Rather, we find that the law of *Yohe* almost certainly allows for the actions undertaken by the Commonwealth in this case. Ms. Murtha, unlike the surrogate in *Bullcoming,* created her own report and was testifying to her own conclusions, which were merely based upon the gathering of Mr. Schwoeble's findings.

With the preceding in mind, we turn to the tests for ineffectiveness. We cannot find that there is any arguable merit to the claim as Ms. Murtha produced the report that, ultimately, was presented against the Defendant. Per, *Yohe,* Ms. Murtha was the analyst that the Defendant had a right to confront. Thus, there was no confrontation issue and there is no arguable merit to the claim. Nonetheless,

under the second prong of the test for ineffectiveness, the alternative strategy of objecting to the reports and Ms. Murtha's testimony had no *substantially* greater chance of succeeding where Ms. Murtha's testimony vas admissible. Finally, the Defendant suffered no prejudice as we can find no likelihood of different result had the challenge been made. The Defendant's twelfth claim fails.

L. **Accrual of Cumulative Errors Necessitating Retrial**

The Defendant's thirteenth and final claim is that there were so many errors of arguable merit that a new trial is necessitated. The Defendant cites *Commonwealth* v. *Washington,* 927 A.2d 586, 617 (Pa. 2007) (internal citations omitted in Defendant's brief) for the proposition that "no number of failed [ineffectiveness] claims may collectively warrant relief if they fail to do so individually." Defendant's Proposed Findings of Fact and Conclusions of Law, at 76. The Defendant also cites to *Commonwealth v. Johnson,* 966 A.2d 523, 532 (Pa. 2009), which states that "if multiple instances of deficient performance are found, the assessment of prejudice may be premised upon cumulation." Defendant's Proposed Findings of Fact and Conclusions of Law, at 76 (citation omitted). The Defendant goes on to cite and quote *Johnson* to the effect that if the petitioner's claims have arguable merit then the PCRA court must consider "each specific lapse as pertaining to a single, overarching ineffectiveness claim based on trial counsel's failure to adequately investigate and prepare for trial." *Id.*

A close reading of this opinion will reveal that, as to a number of claims, this Court found arguable merit because of the necessity addressing an

inordinate number of claims that took PCRA counsel some **seventy-seven pages of *brief*** to cover. The costs on judicial resources at this level have been enormous. This Court, like all courts, strives to provide all due process to Defendants. Though all cases are important, we work with redoubled effort when analyzing the claims of a Defendant who is facing a life sentence *and* who has had success on post-conviction review in the past. It would be sophistry to argue that the time and attention paid to this case has not detracted from time and attention spent on other cases. For all this, we do not accuse PCRA counsel of abusive filings; however, we wish it to be clearly emphasized that many of the findings of arguable merit were made in order to advance to the main considerations of a claim. To this end; though the facts are entirely different in the rectitude and correctness of presentation of the issues, we would quote the following from *Commonwealth v. Rivers*:

> Twenty years ago, in *Commonwealth v. Watlington,* 420 A.2d 431 (Pa. 1980), this court struggled with the problem of endless post-conviction claims brought pursuant to the Post-Conviction Hearing Act, the predecessor to the current PCRA. We were concerned with whether a petitioner could file endless post-conviction petitions simply by alleging that every lawyer before present counsel was ineffective in failing to raise the present claims. The fear was that in cutting off petitions for post-conviction relief, injustice might be done. My view was that in not cutting off post-

> conviction proceedings at some point, an injustice would be done, and that at the post-conviction stage, our real concern is not technical error, but whether the petitioner is innocent:
>
> On subsequent PCHA petitions, our interest is to prevent the incarceration of innocent persons, not, as at earlier stages, to prevent law enforcement agencies from abusing their authority, [citations omitted] It may be that a person convicted of a crime has had several lawyers and that the performance of these lawyers was in some respect imperfect. **But a criminal defendant is not entitled to a perfect trial** and it seems likely that if the accused were to be represented by fifty lawyers, some aspect of the performance of each could be decried as "ineffective." Both the accused and society are entitled to a final determination, and end to the proceedings that will be opened only in the case of a colorable due process claim significantly implicating the truth determining process, which, were it unaddressed by the Court, could have the effect of imprisoning an innocent person.

86 A.2d 923, 932 (Pa. 2001) (underlined emphasis in original; bold emphasis added). The Defendant would surely rejoin that *Rivers* was in a different procedural posture where the Defendant, *sub judice,* is on his first PCRA following his retrial after a successful

first, but separate, PCRA. The Defendant still cites to the prior case and, in fact, for this claim, cites the successful PCRA in the first case as evidence that the case against the Defendant is weak. Defendant's Proposed Findings of Fact and Conclusions of Law, at 77. We would opine that it can also be argued that two juries have convicted the Defendant on what the Defendant considers almost identical facts. *Ibid.* And that ties into the excerpt we cite from *Rivers, supra.* This Court is very concerned with the possibility of any innocent person being wrongfully convicted and the horror of an unjust penalty compounding the wrong. We do not, however, agree with the Defendant's conclusions regarding his PCRA claims and we therefore do not find that any cumulated claims of arguable merit rise to the requisite level to overturn the verdict. We did not find any instances of prejudice accruing to the Defendant. Even considering all the Defendant's claims *in toto,* we cannot conclude that the Defendant suffered prejudice. We reject the Defendants final claim for PCRA relief.

III. Conclusion

Based upon the reasons stated above, this Court **DENIES** the Defendant's claims for PCRA relief. The Defendant has made numerous claims that have been well-argued by PCRA counsel. We would note that the Defendant, as requested, filed a brief. The Commonwealth chose not to avail itself of the opportunity to file a brief. We would make it dear that this played no role in our decision; however, we are certain that the Defendant will avail himself of

appellate review—as is his right—and the Commonwealth might wish to make a response to the Superior Court. Again, the Defendant's brief is well-argued. Despite the thoroughness of the Defendant's efforts, after thorough review and careful consideration, we are constrained to deny him the relief sought.

BY THE COURT,

/s/Michael E. Bortner
MICHAEL E. BORTNER, JUDGE

DATED: March 19th, 2020

APPENDIX F

[LETTERHEAD OF THIRD CIRCUIT COURT OF APPEAL]
January 23, 2024

Kenneth W. Mishoe, Esq.
Tucker Arensberg
300 Corporate Center Drive
Suite 200
Camp Hill, PA 17011
J. Andrew Salemme, Esq.
Tucker Arensberg
One PPG Place
Suite 1500
Pittsburgh, PA 15222
RE: Ian Brenner v. Superintendent Forest SCI, et al
Case Number: 23-2975
District Court Case Number: 3-22-cv-00157

Dear Counsel:

Upon further review of the appeal as docketed above, please be advised that the appeal will be submitted to a panel of this Court for possible dismissal due to a jurisdictional defect, as well as for consideration whether a certificate of appealability should issue. It appears that this Court may lack appellate jurisdiction for the following reason(s):

The order that you have appealed may not be reviewable at this time by a court of appeals. Only final orders of the district courts may be reviewed. 28 U.S.C. Section 1291 (enclosed). Absent consent of the

parties to proceed before a Magistrate Judge, appeal of an order issued by a Magistrate Judge is to a District Judge. 28 U.S.C. Section 636(b)(1) & (c)(1). In your case, where the parties consented to proceed before a specific Magistrate Judge and the case was later reassigned to a different Magistrate Judge, it is unclear whether the Court of Appeals can review an order of that Magistrate Judge absent evidence of the parties' consent to proceeding before that Judge.

Jurisdictional defects cannot be remedied by the court of appeals. The parties may submit written argument in support of or in opposition to dismissal of the appeal for lack of appellate jurisdiction. Any response must be received in the Clerk's Office within twenty-one (21) days from the date of this letter. Please submit to the Clerk an original copy of any response, and a certificate of service indicating that all parties have been served with a copy of the response.

Upon expiration of the response period, this case will be submitted to a panel of this Court for consideration of the jurisdictional question and for consideration of the issuance of a certificate of appealability.

The parties will be advised of any Order issued in this matter.

Very truly yours,
/s/ Laura L. Greene
LAURA L. GREENE Staff Attorney
cc: James E. Zamkotowicz, Esq.
Susan E. Affronti, Esq.
Ronald Eisenberg, Esq.