

IN THE SUPREME COURT OF THE UNITED STATES

NO. 17-681

ROBERT GILMORE, Superintendent, State Correctional Institution
at Greene, et al.,

Petitioners,

v.

SALEEM BEY,

Respondent.

**SALEEM BEY'S BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI**

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Swarthmore, Pennsylvania

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COUNTER-STATEMENT OF THE CASE¹

A. Introduction

In his state court jury trial, in which Mr. Bey's identity as the shooter was the primary contested issue, the trial court instructed the jury that the testimony of the sole identification witness "**may not be received with caution**" if that witness remained certain of his identification "even after cross-examination." This portion of the instruction was an erroneous variant of Pennsylvania's so-called *Kloiber* instruction,² which is designed to advise jurors when they may, or must, receive an identification witness' testimony with caution – no version of that instruction permits the court to tell the jury that it "may not" receive a witness' identification with caution.

Trial counsel did not object to this grossly erroneous instruction. Direct appeal counsel could not raise the substantive instructional error, nor could it be

¹ Petitioners, the prison officials who have custody of Respondent, are represented by the District Attorney of Philadelphia, Pennsylvania -- they are referred to as the "Commonwealth." The Commonwealth's *Petition for a Writ of Certiorari* will be cited and referred to as *Petition*. Respondent, Saleem Bey, is a prisoner in the custody of the Commonwealth. He was the habeas corpus petitioner below, and is referred to by name or as Respondent.

Mr. Bey filed a five-volume appendix in the Court of Appeals that is available on PACER. Documents from that appendix are cited at "A" followed by a page number.

All emphasis herein is supplied unless otherwise noted.

² *Commonwealth v. Kloiber*, 106 A.2d 820 (Pa. 1954).

raised on direct appeal via a claim of ineffective assistance of counsel.³ State post-conviction counsel raised three challenges to the *Kloiber* instruction, but made no argument about the above-cited may-not-be-received-with-caution language, and, because no argument respecting it was made in state post-conviction, no state court ever ruled on the propriety of this language.

The may-not-be-received-with-caution language, along with a related claim of ineffectiveness, was raised for the first time in federal habeas proceedings. Because this claim was not exhausted in the state courts, and no further state court remedy was available, Mr. Bey acknowledged that the claim was procedurally defaulted. He further argued that he overcame the default per *Martinez v. Ryan*, 566 U.S. 1 (2012), because his initial state post-conviction counsel ineffectively failed to raise this obvious claim.

The Commonwealth's argument that the claim was exhausted, substantially elides the actual litigation that occurred in state post-conviction proceedings. Without question, no claim based on the may-not-be-received-with-caution language was presented to the state courts, and no ruling upon it was ever made. Its

³ The substantive claim was waived by trial counsel's failure to object. Because direct appeal was filed after *Commonwealth v. Grant*, 813 A.2d 726 (Pa. 2002) (claims of ineffectiveness of trial counsel cannot be raised on direct appeal, but must await post-conviction proceedings), any claim of trial counsel ineffectiveness could only be raised in state post-conviction proceedings.

other argument that the instruction did not violate due process of law, is irrelevant to these proceedings. Counsel's ineffective failure to object to this instruction, that so obviously deviated from a proper *Kloiber* instruction, constitutes a ground for relief even if the instruction did not violate due process. The Court of Appeals recognized this separate ground for relief in its *Opinion*. Therefore, even if the Commonwealth is correct that the instruction did not violate due process of law -- which it did -- certiorari would be inappropriate as the judgement of the lower court can be sustained on this separate ground. Finally, the Commonwealth's argument that there was no due process violation is based on word-play and a misreading of the Court of Appeals *Opinion* and the record.

B. Statement of Trial Facts Relevant to the Questions Presented

Contrary to the Commonwealth's assertion that the evidence against Mr. Bey was "overwhelming" (*Petition*, i), and that this was an open and shut case; *id.*, at 26 ("Bey shot one of his victims **directly in front of a police officer**") (emphasis in original), the testimony of the sole witness to identify Mr. Bey at trial was riddled with inconsistencies and left a number of significant open questions. In fact, the jury in his first trial was unable to reach a verdict. The jury in the second trial asked for read-backs of the officer's testimony and of his pre-trial statements (explained below).

Mr. Bey, was arrested and charged with the November 24, 2001 shooting of Kenneth Thompson and Terry Swanson – Mr. Swanson died, and Thompson was wounded. He was convicted following his second trial on December 15, 2005, and was subsequently sentenced to life imprisonment without parole.

Philadelphia Police Officer Daniel Taylor was assigned to traffic and crowd control near 6th and Spring Garden Streets in Philadelphia at about 3:20 a.m. on November 24, 2001, along with his partner, Sergeant Michael Walton. Crowds and traffic was exiting two after-hours clubs (the Transit and the Palmer) and parking lots in the area of the intersection. The Transit is on the southwest corner and the Palmer is on the northwest. NT 12/9/05, 52-53; A-148-A-149.⁴

Just before the shooting, Taylor and Walton were standing at the mouth of the driveway adjacent to Spring Garden Street, when Philadelphia Eagles quarterback Donovan McNabb left the Palmer Club at about 3:22 and crossed Spring Garden Street diagonally. The two officers greeted him as he passed, and watched him, standing side-by-side, as he proceeded south through the parking area. *Id.*, 58-60, 63; A-154-A-160, A-159. As the police waited for “the crowd to come and clear out,” Taylor heard a shot. *Id.*, 64; A-160. The shot was “in front of” Taylor as he

⁴Commonwealth trial exhibit C-1 is a diagram of the area. It was marked as an exhibit (NT 12/9/2005, 56; A-152), and was admitted (NT 12/14/2005, 24; A-786) It is included in the Appendix (A-76) as an aid to understanding the movement and observations of the witnesses. As explained by Officer Taylor, Spring Garden Street is on the “top” of the diagram, which is north. Sixth Street (not depicted on the diagram) is to the “right of the diagram or to the east” running north-south. NT 12/9/2005, 57-58; A-153-A-154.

faced south. *Id.* He did not see who fired the first shot, although he saw the muzzle flash. *Id.*, 64, 69; A-160-A-165.

Taylor moved towards the shot (south) and to his left (east), took cover near a parked car and drew his weapon. Walton moved to the right (west). *Id.*, 66; A-162. Cars were parked on both sides of the driveway. *Id.* Although five cars were marked on C-1, there were other parked vehicles at the time not depicted on the diagram. *Id.* As Taylor took his position near the parked car he heard four to six more shots and saw the muzzle flashes. *Id.*, 70; A-166. About 20 to 30 people at the time were running away. *Id.*, 71; A-167.

Taylor then saw two men running northbound toward him. One was wearing blue jeans and the other a gray sweat suit. *Id.*, 72; A-168. Taylor claimed that he saw the man in the gray sweat suit shoot the man in the blue jeans in the back of the head. The shooter was identified as Saleem Bey. *Id.*, 74; A-170. The witness claimed that Mr. Bey then continued to run northbound and Taylor “ran right past him” and to his (Mr. Bey’s) left and crouched near that vehicle depicted on the diagram as the “Toyota [sic] Maxima,” located near the entrance to Spring Garden Street. *Id.*, 75-76; A-171-A-172.

Despite then being near the exit to the lot onto Spring Garden, and a likely escape, according to Taylor, Petitioner began to move southbound along the wall. *Id.*, 82; A-178. He then noticed two other officers (Ferrero and Sweeney) moving

toward him. *Id.*, 86; A-182. As all of the officers moved toward Petitioner, he was arrested. *Id.*, 90; A-186.

Sergeant Walton testified that Taylor was in a position to see the shooting because of an encounter with the Eagles' quarterback, Donovan McNabb: while the two officers were on an island in the middle of Spring Garden Street directing traffic, they followed McNabb as he exited the Palmer Club (on the north side of Spring Garden), crossed Spring Garden, and headed south into a driveway behind the Transit Club. The two officers stopped at the northern mouth of the driveway with Taylor facing south toward the driveway and Walton facing north, just second before shots rang out further south in the driveway. NT 12/12/05; A-429.

The defense pointed out multiple inconsistencies that called into question the accuracy of Taylor's identification testimony. In closing argument, defense counsel framed the impact of these inconsistencies on the accuracy of the identification:

I don't doubt for a second that today, as Officer Taylor sits here, he believes, his perception is that Saleem Bey is the shooter, that the events that occurred in the exciting, confusing way and where the gun being found and where Mr. Bey ran to, it is his belief and perception that Mr. Bey is the shooter.

NT 12/14/05, 87; A-855. Thus, the defense argued that despite Officer Taylor's expression of certainty, his identification was not reliable because of the various inconsistencies in his testimony and in the testimony of other police witnesses who

were present at the scene.⁵ Significantly, counsel's argument was directly undercut by the flawed instruction that told jurors that if the witness remained certain of his identification, even after cross examination, then the identification may-not-be-received-with caution. In other words, the flawed instruction gutted Mr. Bey's defense.

The inconsistencies in the testimony and overall prosecution presentation were multiple and significant.

First, Taylor testified inconsistently about which victim he saw get shot. In his statement to the detectives, he said that the person he saw get shot was later pronounced dead. Taylor Statement, 11/24/01. In his preliminary hearing testimony, Taylor was also clear that the person he saw get shot was the deceased victim. NT 12/12/01, 9; A-105. **However**, at the 2005 trial, on direct examination, Taylor said only that he saw a man in a black jacket and blue jeans get shot. NT 12/9/05, 73-74; A-169-A-170. When cross-examined on this point, Taylor said that he could not say for certain which victim he saw shot because they were wearing similar clothing and both got shot in the back. *Id.*, 140-141; A-236-A-237. Taylor was certain that whomever he saw get shot was shot in the back of the head. *Id.*, 135-136; A-231-A-

⁵ The Court of Appeals correctly noted that "Taylor was the only eyewitness who identified Bey as the shooter. Other officers on the scene at the time of the shooting testified that they understood Bey to be the shooter because Taylor identified him as such." *Bey v. Superintendent*, 856 F.3d 230, 234 (3d Cir. 2017).

232. The identity of the victim would not be particularly critical, except that trial evidence suggested that if Taylor was accurate about not seeing the first victim get shot and seeing the second victim get shot as he was chased northbound, then the only person whom Taylor could have seen shot was Thompkins.⁶ But, Thompkins did not get shot in the back of the head.

Second, Taylor repeatedly testified that he heard one shot, then a series of shots coming from further south in the driveway but that he did not see any aspect of these first two series of shots except for the muzzle flashes. NT 12/9/05, 63-65, 68-70, 13-135, 137; A-381, A-383, A-386-A-388, A-452-A-453, A-455. The only shot that Taylor saw fired was the last bullet, which he said struck a man running northbound about 15-30 feet in front of him. *Id.*, 72-75, 134, 161; A-168-A-171, A-230, A-257. Among the many questions about his testimony, it is hard to fathom how Taylor did not see any of the earlier shots when he was facing in that direction before the shots began. He testified that the driveway was clear of other people, he and others testified that the lighting was good and the victims were found lying about 15 feet from each other. NT 12/9/05, 99-101; A-195-A-197 (Taylor on lighting); NT 12/13/05, 195-207; A-727-A-739 (Officer Trenwith on lighting); Taylor Statement,

⁶ Mr. Swanson's body was found next to the *southernmost* bullet casing -- further south than where Taylor said he saw the shooting. NT 12/13/05, 8-9; A-541, A-542 (crime scene testimony).

11/24/01, A-306 (victims found 15 feet apart); Bevidas Statement, 11/24/01 (victims 10 feet apart); Sweeney Statement, 11/24/01 (15 feet).

Third, yet another inconsistency arose from Taylor's statement to homicide detectives' hours after the shooting. Officer Taylor said that he did see aspects of the first series of shots: "It happen [sic] so fast, it appeared that the male who I saw get shot was facing my direction, and the shooter came up from behind him. When I first heard the gunshots, I observed the black male, who was transported to Jefferson Hosp., laying on the ground with blood near him." Taylor Statement, 11/24/01; A-306. This of course contradicts the sequence of events to which he testified that he did not see anybody shooting or being shot until the end of the incident.

Fourth, there were also inconsistencies in Taylor's description of the events with respect to his encounter with the suspect immediately after the last shot. On direct examination, he testified that "Bey continued to run north in my direction. I ran right past him," and that the suspect was not looking at him. NT 12/9/05, 75; A-171. The prosecutor ignored Taylor's testimony about running past the suspect as he ran north past Taylor. Instead, he asked Taylor again what he did while the suspect ran north, and Taylor responded: "[A]s he got within 15 feet of me, I had my weapon already drawn. I was in uniform. I began to shout at him, police, drop the gun. . . He immediately looks up . . . That was the initial first eye contact that I had. He looks right at my face . . . As I looked up, as I was yelling at him, he made like an

expression of surprise. His eyes got really big. . . We made complete eye contact. He immediately ran to his left . . . Away from me [toward] vehicles parked [along a wall].” *Id.*, 76-78; A-172-A-174. Thus, from one page to the next, Taylor’s testimony was again highly inconsistent with respect to eye contact and the direction of flight. This was inconsistent with Officer Ferrero’s testimony that he saw Taylor chase the suspect southbound through the driveway before the suspect cut west toward the parked cars along the wall. NT 12/12/05, 16-18; A-334-A-336.

Fifth, there was inconsistent testimony on whether the suspect went to the location where the murder weapon, a .380-caliber handgun, was later found: the driver’s side of a Nissan Maxima. Officer Taylor was certain that when the suspect went behind the parked cars and crouched behind the passenger side of the Nissan Maxima, “He never made it to the other [driver’s] side of the car.” NT 12/9/05, 161; A-257.

This is consistent with Sergeant Walton’s testimony that he watched from behind the driver’s side of the Maxima as the suspect crouched northbound toward him behind the parked cars but at some point, lost sight of him. NT 12/12/09, 122-123; A-440-A-441. However, it is inconsistent with Officer Ferrero’s testimony that he watched the suspect crouch his way from the passenger’s side to the driver’s side of the Maxima. *Id.*, 23; A-341.

Sixth, neither Taylor's preliminary hearing testimony nor his statement to homicide detectives on the night of the shooting made reference to seeing or following McNabb, thus ending up at the mouth of the driveway just seconds before the shooting began. In both accounts, Taylor said that he was directing traffic out of the driveway when he heard gunshots. NT 12/12/01, 6-7; A-82-A-83 (preliminary hearing); NT 12/9/05, 117; A-213 (statement). Moreover, Sergeant Walton's statement to the detectives on the night of the shooting said:

At about 3:25 a.m. myself and Officer Taylor were on crowd and traffic control for the clubs at 6th and Spring Garden Streets. Both east and westbound traffic on Spring Garden Street were closed. We heard one and then a series of gunshots coming from the rear parking lot of Transit Club which is located at 600 Spring Garden Street. I notified Police Radio of the reports of gunshots. We proceeded to the opening of the parking lot and we still heard gunshots as we entered the parking lot.

Walton Statement, 11/24/01; A-308-A-309; NT 12/12/05, 133-135; A-451-A-453.

At trial, Walton testified that his statement meant that he and Taylor proceeded to the mouth of the parking lot, after hearing gunshots. NT 12/12/05, 135; A-453. Taylor's statement, given just hours after the shootings, was ambiguous about his location when he heard the shots, and Walton's statement placed the two in a completely different location. The McNabb story, placing Taylor in a prime location to view the shooting, did not appear until the 2004 trial.

Seventh, there was inconsistency as to whether any civilian witnesses to the

shootings remained on the scene. Taylor said that after securing Petitioner, he went back up the driveway, noticed the two victims, but that in terms of civilian witnesses “everybody that was there was pretty much gone . . .” NT 12/9/05, 148; A-244. Officer Ferrero said that after Petitioner was taken into custody, police closed off the driveway, not letting anyone enter or exit, and that there were civilians around but when asked if they saw anything “most of them just said no.” NT 12/12/05, 34-35, 48-50; A-352-A-353, A-366-A-368. Officer Michael Givens testified that he arrived on the scene after Petitioner was taken into custody and that there were about 50 civilians gathering around, though “[everyone] that [he] talked to didn’t want to be involved.” *Id.*, 98, 104-105; A-416, A-422-A-423. Sergeant Wilson, who transported Kenneth Thompkins to the hospital, provided a statement, which said, “I spoke to a black female, her name was Shanice, I recognized her from being at the crime scene. She told me she was there when the shooting happened. She said I saw [the performer] Beanie Sigal pulling away in his Bently [sic] from the parking lot when the shooting happened. I informed the detective that Shanice was a witness.” Sergeant Wilson also said that when he arrived on the scene, after the suspect had been taken into custody, “[t]here was a large crowd and people were in every direction and the vehicle traffic was heavy.” *See* Wilson Statement.

Eighth, the police investigation left a number of gaps that raised questions about the accuracy of the identification. Several police officers testified about trying

to locate civilian witnesses among the crowd that gathered right after the shooting, but that “most of the [civilians] just said no [they hadn’t seen anything], NT 12/12/05, 49- 50; A-367-A-368 (Ferrero), [or gave] a negative response,” *id.*, 128; A-446 (Walton), or “didn’t want to be involved” *id.*, 104-105; A-422 (Officer Givens). Allowing potential homicide witnesses to depart under these circumstances is problematic, but pales in comparison to Ferrero’s testimony that there was an occupied SUV parked right in front of and facing the shootings that was blocking his and Officer Sweeney’s approach. But nobody stopped the SUV from departing, even though Ferrero recalled that Sweeney removed a baseball cap from the hood of the SUV as it began to pull away. *Id.*, 10, 35, 67; A-328, A-353, A-385; *see also*, NT 12/9/05 87, 170; A-183, A-265 (Taylor).

Another potential witness who was permitted to leave the scene was a man who ran into Walton while the Sergeant was on the driver’s side of the Nissan Maxima watching the shooter crouch behind the passenger side. Walton testified that he lost sight of the shooter so he headed back east toward the front of the car to look for the suspect when a man who was running west collided with him with such force that two of Walton’s teeth were knocked out. NT 12/12/05, 123-124; A-441-A-442. Walton threw this man to the ground, but once he believed it was not the shooter, he let the man go. Considering that only Taylor claims to have seen Petitioner with a gun, the identity of this unknown man was critical, particularly since his collision

with Walton occurred in proximity to where the murder weapon was recovered. *Id.*, 124-148, 153; A-442-A-466, A-471.

The police also neglected to test for the presence of gunpowder residue on Mr. Bey because, according to Crime Scene Unit Detective Wilson, such testing was of no utility because Petitioner's hands were not bagged, and there was therefore a chance of a false positive. NT 12/12/05, 206; A-523. Wilson stated that the testing was not done to protect the rights of Mr. Bey. NT 12/13/05, 37-38; A-570-A-571.

C. The Flawed Jury Instruction

Against this backdrop, where the sole identifying witness Officer Taylor said he was certain of his identification, yet his testimony, as summarized above, was marked with inconsistencies, the trial court ostensibly instructed the jury on how it should evaluate this testimony.⁷

The Pennsylvania Suggested Standard Criminal Jury Instructions, Pa-SSJI-Criminal, provide two instructions on eyewitness identification testimony: (1) § 4.07A, "Identification Testimony – Accuracy Not in Doubt," and (2) 4.07B, "Identification Testimony – Accuracy in Doubt." The latter instruction, 4.07B, "is

⁷The Commonwealth asserts that the *Kloiber* instruction was "gratuitous." Commonwealth's *Petition*, i. But, as the Commonwealth well knows, a trial court's decision to provide or deny a *Kloiber* instruction is reviewed by the state courts for abuse of discretion. *See e.g. Commonwealth v. Saunders*, 42 A.3d 325, 332-333 (Pa. Super. Ct. 2012) ("We evaluate whether a *Kloiber* instruction is necessary under an abuse of discretion standard. *Commonwealth v. Jones*, 954 A.2d 1194, 1198 (Pa.Super. 2008)"). Given the chaotic scene confronting the police at the time of shooting, with dozens of people running away from gunshots, it was certainly a sound exercise of discretion for the trial court to give a *Kloiber* instruction.

dictated by the principles set forth in *Commonwealth v. Kloiber*, 106 A.2d 820 (Pa. 1954)” (§ 4.07B, Advisory Committee Note), and is called a *Kloiber* instruction.

As demonstrated herein, the instruction given by the trial court bore little resemblance to a *Kloiber* instruction.

Pennsylvania has long held that a jury should be provided with a cautionary instruction, *i.e.*, a *Kloiber* instruction, when the trial court believes there may be infirmities in the identification testimony of a witness:

Where the witness is not in a position to clearly observe the assailant, or he is not positive as to identity, or his positive statements as to identity are weakened by qualification or by failure to identify defendant on one or more prior occasions, the accuracy of the identification is so doubtful that the Court should warn the jury that the testimony as to identity must be received with caution.

Commonwealth v. Kloiber, 106 A.2d 820, 826–27 (Pa. 1954). The Pennsylvania Supreme Court has recently reaffirmed the circumstances under which such an instruction is required:

A *Kloiber* charge is appropriate where there are special identification concerns: a witness did not have the opportunity to clearly view the defendant, equivocated in his identification of a defendant, or had difficulty making an identification in the past. *Commonwealth v. Rollins*, . . . 738 A.2d 435, 448 n. 14 (Pa. 1999); *Commonwealth v. Gibson*, . . . 688 A.2d 1152, 1163 (Pa. 1997).

Commonwealth v. Reid, 99 A.3d 427, 448 (Pa. 2014).⁸

⁸ See also *Commonwealth v. Ali*, 10 A.3d 282, 303 (Pa. 2010) (quoting *Commonwealth v. Gibson*, 688 A.2d 1152, 1162 (Pa. 1997); *Commonwealth v. Walker*, 93 A.3d 766, 795 (Pa. 2014) (Castille, CJ, *dissenting*: in response to majority opinion permitting use of expert testimony to challenge identification testimony, referring to the *Kloiber* instruction as “time-tested”).

Pennsylvania Suggested Jury Instructions, §4.07B sets forth two potential *Kloiber* instructions: 1) when the witness' identification "must" be considered with caution; and, 2) when the need for caution is a jury question. The circumstances of this case invokes the second – the trial court meant to instruct the jury that it was its determination as to whether caution was required. The following side-by-side comparison of a proper *Kloiber* instruction to be given when the exercise of "caution" is left to the jury, with that provided by the trial court (NT 12/15/05, 15-16; A-1025-A-1027), demonstrates the flaws in the trial court's instructions:

Pa. Suggested Jury Instr. §4.07B

1. In [his] [her] testimony, [name of witness] has identified the defendant as the person who committed the crime. There is a question of whether this identification is accurate.

2. A victim or other witness can sometimes make a mistake when trying to identify the criminal. If certain factors are present, the accuracy of identification testimony is so doubtful that a jury must receive it with caution. . . . [the instruction then lists a number of factors]

3. If you believe that [this factor is] [one or more of these factors are] present, then you must consider with caution [name of witness]'s testimony identifying the defendant as the person who committed the crime. If, however, you do not believe that [this factor] [at least one of these factors] is present, then you need not receive the testimony with caution; you may treat it like any other testimony. . . .

Trial Instruction

Where a witness is positive of his identification, such as where the opportunity for positive identification is good and the witness is positive in his identification and the identification has not been weakened by any prior failure to identify but remains even after cross-examination positive and unqualified, **the testimony as to identification may not be received with caution.** Indeed, positive testimony as to identity may be treated as a statement of fact. On the other hand, if you believe that a witness is not in a position to clearly observe and was not in a position because of lighting and/or conditions, then you may use that as a factor in determining whether or not that the person actually had the opportunity to observe that which he testified to and a positive identification of a defendant by one witness is sufficient for a conviction.

The instruction given by the trial court also did not resemble even the suggested instruction when “Accuracy is not in Doubt” per §4.07A.⁹

⁹ § 4.07A (Crim) Identification Testimony – Accuracy Not in Doubt, states:

1. In [his] [her] testimony, [name of witness] has identified the defendant as the person who committed the crimes. In evaluating [his] [her] testimony, in addition to the other instructions I will have provided to you for judging the testimony of witnesses, you should consider the additional following factors:

D. The Jury's Questions

Given the inconsistencies in the testimony of the eyewitness, it is not surprising that during deliberations, the jury sent out two notes related to the identification testimony of Officer Taylor. The notes read:

- May we have or hear the transcript of Officer Taylor's testimony describing from the time the officer heard the first shot to when defendant ran west towards the wall? NT 12/15/01, 30; A-1041;
- May we also have [the] statement where Officer Taylor says he saw the defendant shoot Swanson? *Id.*, 37; A-1048.

-
- a. Did the witness have a good opportunity to observe the perpetrator of the offense?
 - b. Was there sufficient lighting for [him] [her] to make [his] [her] observations?
 - c. Was [he] [she] close enough to the individual to note [his] [her] facial and other physical characteristics, as well as any clothing [he] [she] was wearing?
 - d. Has [he] [she] made a prior identification of the defendant as the perpetrator of these crimes at any other proceeding?
 - e. Was [his] [her] identification positive or was it qualified by any hedging or inconsistencies?
 - f. During the course of this case, did the witness identify anyone else as the perpetrator?
2. In considering whether or not to accept the testimony of [name of witness], you should consider all of the circumstances under which the identifications were made. Furthermore, you should consider all evidence relative to the question of who committed the crime, including the testimony of any witness from which identity, or non-identity of the perpetrator of the crimes may be inferred. You cannot find the defendant guilty unless you are satisfied beyond reasonable doubt by all the evidence, direct and circumstantial, not only that the crime was committed but that it was the defendant who committed it.

These notes show that at least a portion of the jury was not certain of the identification. The court did not comply with these requests and the jury returned a verdict several hours later, on the same day. NT 12/15/05, 34-37; A-1045-1048.

Without mentioning that the court never answered the jury's queries, the Commonwealth asserts that the jury notes show that the jury did not "automatically accept Officer Taylor's identification of Bey as the shooter, but instead gave the officer's testimony careful scrutiny." *Petition*, 8. This assertion is rank speculation. The critical question is whether any of the jurors reasonably believed that it could not debate the merits of the identification, because of the court's instruction that it may not receive the identification with caution. The fact that some were responsible for the note, does not mean that others were following the court's improper instruction.

E. Litigation of the May-Not-Be-Received-With-Caution Instruction in State Post-Conviction Proceedings and in Federal Habeas Proceedings

Initial state post-conviction (hereafter, SPC) counsel challenged the *Kloiber* instruction in three ways: (1) that the trial court failed to instruct the jury that if it found a factor impinging upon the identification's accuracy, then it must receive the identification testimony with caution, *SPC Petition*, at 25, A-61; (2) that it was improper to place a burden on the defendant to prove the existence of the factors that required the jury to exercise caution; *id.*, 30-31; A-64-A-65; and (3) the instruction

created an improper presumption by advising jurors that it may treat the identification as a “statement of fact” if no such factors are found, *id.*, 26-30; A-61-A-65.

SPC counsel failed to highlight the may-not-be-received-with-caution language, and failed make any argument about it at all.

The trial court addressed only a truncated version of the third argument, *i.e.*, whether the “statement of fact” language was proper. It held that this portion of the instruction had been repeatedly upheld by Pennsylvania appellate courts and accordingly denied the claim. The trial court did not address the other arguments presented by SPC counsel. In any event, the fact that the trial court rejected the claim because each of the three aspects of the *Kloiber* instruction had been upheld by Pennsylvania appellate courts, shows conclusively that SPC counsel failed to raise the may-not-be-received-with-caution language, as there are no appellate decisions addressing this language that diverged wildly from the standard *Kloiber* instruction.

The Pennsylvania Superior Court endorsed the trial court’s opinion in full. *Commonwealth v. Bey*, 771 EDA 2011 (Pa. Super. Ct. June 1, 2012), at 7, A-75.

In federal habeas proceedings in the district court, Mr. Bey raised a portion of SPC’s first argument, and an amplified version of the third argument. Mr. Bey also raised for the first time, a claim that trial counsel ineffectively failed to object specifically to the may-not-be-received-with-caution claim. He argued that this

language created an unconstitutional mandatory presumption and that trial counsel was ineffective under the Sixth Amendment for failing to object to this portion both on state-law grounds and because it violated due process of law. He also argued that initial SPC counsel ineffectively failed to raise it in initial SPC proceedings.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

I. The Commonwealth at Most Seeks Error Correction that is Not Worthy of Exercise of Certiorari Review

Mr. Bey submits that the decision of the Court of Appeals was free of any error. It correctly applied the exhaustion doctrine. It properly found that Mr. Bey overcame the procedural default of the may-not-be-received-with-caution claim, per *Martinez v. Ryan*, 566 U.S. 1 (2012). Finally, it correctly applied this Court’s Sixth Amendment ineffectiveness-of-counsel precedents related to trial counsel and initial post-conviction counsel’s failure to raise this obvious charging error and found that the instruction created an unconstitutional presumption against Mr. Bey.

However, even if the Commonwealth's claimed errors did exist, none warrant this Court's exercise of certiorari review. Supreme Court Rule 10 (“A petition for a writ of certiorari will be granted only for compelling reasons.”). This Court's certiorari jurisdiction is “exercised sparingly, and only in cases of peculiar gravity and general importance,” *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916), not to correct purported error by a lower court. *See Watt v. Alaska*,

451 U.S. 259, 275 n.5 (1981) (Stevens, J., concurring) (“certiorari jurisdiction is designed to serve purposes broader than the correction of error in particular cases”); Stem, Gressman, Shapiro, Bishop & Arnett, SUPREME COURT PRACTICE (9th ed. 2007), at 238 (“Rule 10, like all its predecessor rules, warns at the outset that, since review on writ of certiorari is a matter of judicial discretion rather than of right, certiorari will be grant ‘only for compelling reasons.’”).

As demonstrated below, the errors complained of by the Commonwealth are factual intensive questions related to application of the habeas corpus exhaustion doctrine. Thus, at most, the Commonwealth's *Petition* amounts to a request for a highly fact-specific error correction. The Commonwealth's arguments regarding the substantive instructional error also do not implicate a compelling question meriting review.

II. The May-Not-Be-Received-With-Caution Instructional Error and Related Claim of Ineffectiveness of Counsel Were Not Exhausted

The Commonwealth asserts that the may-not-be-received-with-caution issue, and the related trial counsel ineffectiveness claim, were exhausted when SPC counsel presented a different set of ineffectiveness claims related to different alleged flaws in the *Kloiber* instruction. This is demonstrably false.¹⁰

¹⁰ The Commonwealth makes the baseless argument that the Court of Appeals engaged in a “result-driven misapplication of the exhaustion doctrine.” *Petition*, 12. As “evidence” of the Court’s result-driven motive, the Commonwealth desperately and repeatedly references a wise-crack made by undersigned counsel -- the “AEDPA-shmedpa” comment. *Id.*, 11, 15. While the undersigned greatly regrets making this inappropriate remark, there is nothing of record to show that the panel

The Commonwealth does not dispute that the may-not-be-received-with-caution claim was not presented to the state courts. Instead it argues that the claim presented in federal habeas proceedings constituted a “slight variation” from what was presented in state post-conviction proceedings. *Petition*, 14. The may-not-be-received-with-caution claim that was presented in federal habeas proceedings was not a “slight variation” -- it was an entirely different claim.

Based on this indisputable fact, the Commonwealth resorts to arguing that the offending language was presented in SPC counsel’s presentation of the different instructional claims. That the instructions were the subject of a different challenge in state post-conviction proceedings, does not mean that the may-not-be-received-with-caution instruction, was the subject of a challenge.

In support of its “slight variation” argument, the Commonwealth cites four decisions of this Court, none of which are helpful to it. *Petition*, 13. *O’Sullivan v. Boerckel*, 526 U.S. 838 (1999) adds nothing to the Commonwealth’s slight variation argument. It simply articulates black-letter exhaustion law that a claim is exhausted when it is “fairly” presented to the state courts. Here, where the claim is not presented at all, it adds nothing to the Commonwealth’s position.

of the Court agreed with it, much less was motivated by disdain for the federal statute. To the contrary, the Panel noted and applied the relevant AEDPA doctrines.

Duncan v. Henry, 513 U.S. 364 (1995) also fails to support the Commonwealth's position. Indeed, *Duncan* -- in which a petitioner's presentation of a state law claim to the state courts without including a federal constitutional predicate to the state courts, was held to not have exhausted the federal claim -- demonstrates the unforgiving nature of the exhaustion doctrine:

If state courts are to be given the opportunity to correct alleged violations of prisoners' federal rights, they must surely be alerted to the fact that the prisoners are asserting claims under the United States Constitution. If a habeas petitioner wishes to claim that an evidentiary ruling at a state court trial denied him the due process of law guaranteed by the Fourteenth Amendment, he must say so, not only in federal court, but in state court.

Duncan, 513 U.S. at 365-366. Applying *Duncan* to the Mr. Bey's case, there is no question that the may-not-be-received-with-caution claim was unexhausted as state post-conviction counsel never argued that this language offended the federal constitution or that his trial counsel was ineffective for failing to object to it.

The Commonwealth also cites *Picard v. Connor*, 404 U.S. 270 (1971), but it too does not advance its position. In fact, *Duncan* said "*Picard* control[s] the outcome in this case. Respondent did not apprise the state court of his claim that the evidentiary ruling of which he complained was not only a violation of state law, but denied him the due process of law guaranteed by the Fourteenth Amendment." *Duncan*, 513 U.S. at 366. Like the prisoners in *Duncan* and *Pickard*, Mr. Bey's state post-conviction counsel failed to apprise the state courts of the constitutional

infirmity in the offending language, or of his trial counsel's ineffective failure to object to this language.

Finally, the Commonwealth cites *Sanders v. United States*, 373 U.S. 1 (1963). This federal criminal case addressing the ability of a federal prisoner to litigate a successive petition under 28 U.S.C. § 2255 petition, pre-AEDPA, has nothing to do with the exhaustion doctrine, which applies only to petitions under 28 U.S.C. § 2254.

III. The May-Not-Be-Received-With-Caution-Instruction Violated Mr. Bey's Constitutional Rights

The Commonwealth argues that the Court of Appeals incorrectly found a due process constitutional violation in the trial court's instructions. This argument is based on word-play, and a strained application of this Court's precedent. Like the exhaustion argument, these arguments strain any fair reading of the record and the law.

A. The Commonwealth Makes No Argument Regarding Trial Counsel's Ineffective Failure to Object to the Erroneous Instruction

Initially, it is notable that the Court of Appeals did not just find trial and initial SPC counsel ineffective because they failed to raise a due process violation, but rather for failing to object at all to this erroneous instruction. *See Bey v. Superintendent*, 856 F3d at 239-40:

Jurors were basically told that they had to accept the only eyewitness identification of the defendant as fact; they were not free to question it if they found Officer Taylor had a good opportunity to observe and was

certain of his identification. Those are clearly relevant factors in evaluating the identification, but they were certainly no guarantee as to the accuracy of Taylor's identification of Bey. The charge removed the discretion that the jury could otherwise have exercised that may have raised a reasonable doubt in the mind of one or more jurors about the identity of the shooter. **Moreover, as we explain below, the instruction's deviation from Kloiber reaches constitutional dimensions.**

Thus, the Court found a constitutional violation based on trial counsel's failure to object to the flawed version of a *Kloiber* instruction, **and** counsel's ineffectiveness based on the instruction's violation of due process of law.

Despite the presence of this alternative ground for relief, the Commonwealth makes no argument regarding trial counsel's ineffective failure to object to the offending language on state-law grounds, even if it did not rise to the level of a due process violation.

The Commonwealth fails to make any argument about the Court of Appeals alternative holding that trial and SPC counsel were ineffective for failing to object or to litigate the flawed *Kloiber* instruction.¹¹ Because the finding of ineffectiveness for failing to object to the flawed instruction on state-law grounds, even if it did not

¹¹ The Commonwealth's suggestion that the instructions may have been improperly transcribed, *Petition*, 21 & n.6, has no basis in the record. Even the suggestion that the Commonwealth attempted to obtain the "original stenographic rolls" is an extra-record assertion. Of course, the Commonwealth, as any party to a proceeding, waived any objection to any alleged error in the transcript when it proceeded through direct appeal without attempting a correction. This argument is rank speculation.

rise to the level of violating due process, would provide an alternative basis for sustaining the Court of Appeals decision, certiorari review is not warranted.

B. The Instruction Violated Due Process of Law

The Commonwealth engages in word-play. It says that the word “may” connotes discretion. *Petition*, 21. This argument is utterly beside the point. The jury here was not told that it “may” receive the identification testimony with caution. It was told it “may not.” Thus, if “may” connotes discretion to act, all discretion is removed by the inclusion of the word “not.”

Mr. Bey argued and the Court of Appeals correctly found that the instruction in this case established an impermissive presumption:

A jury instruction deprives a defendant of his or her Fourteenth Amendment due process rights when it suggests a conclusive presumption that removes the prosecution's burden of proving an element of an offense beyond a reasonable doubt. If a “reasonable juror could have understood the [instruction] as a mandatory presumption that shifted to the defendant the burden of persuasion on [an] element” of the offense, the instruction is constitutionally defective.

Bey, 856 F.3d at 240.

The Commonwealth argues that the Court only considered the error in isolation and without due regard to other portions of the instructions. Again, the Commonwealth is grasping. The Panel Opinion, citing *Boyde v. California*, 494 U.S. 370, 378 (1990), recognized the need to scrutinize the remainder of the instruction to see if the error was cured. *Bey*, 856 F.3d at 240 (“However, a single

jury instruction ‘may not be judged in artificial isolation, but must be viewed in the context of the overall charge.’”). The Panel next explained why no other portion of the instructions adequately cured the offending language. *Id.*, 240-242.

In the final analysis, the jury in this trial was told that it had to accept the validity of the police witness’ testimony, if, after cross-examination, that witness remained sure of his identification. *Bey*, 856 F.3d at 241: “this instruction could be reasonably understood as requiring the jury to accept an eyewitness’s identification of Bey as the shooter.” None of the Commonwealth’s argument change that fact.

Conclusion

Despite the Commonwealth’s arguments to the contrary, this was a close case. Mr. Bey’s first trial resulted in a hung jury. During his second trial, the jury sent out two questions about the accuracy of the identification testimony -- neither was answered by the court and a conviction ensued within a few hours. Overlaying this hotly contested trial, was the erroneous instructions that told the jury that it may-not-receive the testimony with caution. Counsel ineffectively failed to object to this instruction; initial post-conviction counsel likewise ineffectively failed to litigate this error.

Accordingly, the Commonwealth’s *Petition for a Writ of Certiorari* should be denied.

Respectfully Submitted,

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