

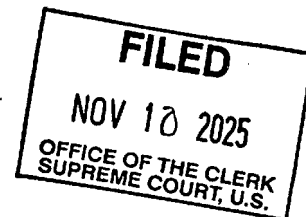
No. 25-6346

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

COREY GAYNOR,  
Petitioner  
vs.

SUPERINTENDENT KENNETH HOLLIBAUGH, ET AL  
Respondents



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

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**PETITION FOR WRIT OF CERTIORARI**

By: Corey Gaynor, pro se  
ID # MK-6411  
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1590 Walters Mill Road  
Somerset, PA 15510

## QUESTIONS PRESENTED

1. Whether trial counsel was ineffective and the trial court's unconstitutional jury instruction derived from Pennsylvania's consolidated statute 18 Pa.C.S.A. § 6104 violated the 6th and 14th Amendments?

2. Whether the Third Circuit Federal District Courts' decisions rejecting Petitioner's claims raising violations of his constitutionally-protected rights to due process, a fair trial, and the effective assistance of counsel by the Commonwealth of Pennsylvania's use at jury trial of unnecessarily suggestive pretrial identification evidence clearly resulting in substantial risk of misidentifications, and the trial witnesses' own self-admitted misidentifications of him as the shooter in a murder case, were erroneous and involved an unreasonable determination of facts and/or resulted in decisions that are contrary to, or involved an unreasonable application of, federal law or conflict with the U.S. Supreme Court decisions and progeny of *Neil v. Biggers*, 409 U.S. 188(1972)?

## LIST OF PARTIES

All parties do not appear in the caption of the case on the cover page.

A list of all parties to the proceedings in the court whose judgment is the subject of this petition, with all respondents being represented by the Assistant District Attorney of Philadelphia County, Pennsylvania, is as follows:

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IN THE SUPREME COURT OF THE UNITED STATES  
PETITION FOR WRIT OF CERTIORARI

Petitioner prays that a writ of certiorari issue to review the judgments below.

OPINIONS BELOW

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FEDERAL COURT OPINIONS  
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The opinion of the U.S. District Court for the Eastern District of Pennsylvania appears at APPENDIX A. It is reported at 2025 U.S. Dist. LEXIS 22983 (E.D. Pa. 2025).

The "Report and Recommendation" by Federal District Magistrate for the Eastern District of Pennsylvania is APPENDIX B. It is reported at 2024 U.S. Dist. LEXIS 90169 (E.D. Pa. 2024).

Certificate of Appealability was denied by the Third Circuit Court of Appeals on August 19, 2025. APPENDIX C.

Rehearing was denied. APPENDIX D.

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STATE COURT OPINIONS  
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The judgments for review have denied federal habeas corpus relief based on issues occurring in the state courts of Pennsylvania. The Appendix therefore includes the state court decisions of the PCRA Court and the Superior Court of Pennsylvania. APPENDIX F and APPENDIX G.

## **JURISDICTION**

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Pursuant to Rule 12.4, Corey Gaynor seeks review of consolidated dockets for the same case, Nos. 25-1434 and 25-1444 (same case). Pursuant to Rule 12.4, when two or more judgments are sought to be reviewed on a writ of certiorari to the same court and involve identical or closely related questions, a single petition for a writ of certiorari covering all the judgments suffices.

On August 18, 2025, the Third Circuit Court of Appeals denied this petitioner a certificate of appealability seeking review of denial of a habeas petition with two docket numbers consolidated by the lower court for the same case, Nos. 25-1434 and 25-1444 (same case). It is from those orders this petitioner now seeks review and a writ of certiorari. See ORDERS, APPENDIX C & D.

(GAYNOR v. SUPERINTENDENT SOMERSET, ET AL., 2025 US App LEXIS 233392025 U.S. App. LEXIS 23339; 2025 LX 3161892025 LX 316189 C.A. No. 25-1444, August 18, 2025 --- ORDER, denying COA).

The U.S. District Court of the Eastern District of Pennsylvania adopted the magistrate's report and recommendation and denied the habeas petition on February 10, 2025. It denied a certificate of appealability. APPENDIX A. This was timely appealed to the Third Circuit Court of Appeals. On August 18, 2025, the Third Circuit Court of Appeals denied a certificate of appealability.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pennsylvania Uniform Firearms Act, 18 Pa.C.S. § 6104

Evidence of intent.

In the trial of a person for committing or attempting to commit a crime enumerated in section 6105 (relating to persons not to possess, use, manufacture, control, sell or transfer firearms), the fact that that person was armed with a firearm, used or attempted to be used, and had no license to carry the same, shall be evidence of that person's intention to commit the offense.

### SIXTH AMENDMENT TO U.S. CONSTITUTION

Amendment 6 Rights of the accused.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

### FOURTEENTH AMENDMENT TO U.S. CONSTITUTION

Amendment 14 Sec. 1. [Citizens of the United States.]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.



FEDERAL WRIT OF HABEAS CORPUS STATUTE

28 u.s.c. § 2254 State custody; remedies in Federal courts

(d) 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 with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 u.s.c. § 2254(d) (1-2)

## STATEMENT OF THE CASE

Corey Gaynor-currently serving a life sentence for first-degree murder-seeks a writ of habeas corpus under 28 U.S.C. § 2254. Gaynor was convicted by a jury on March 2, 2016 for the April 14, 2014 murder of Timothy Cary.

Evidence at trial showed that Cary had engaged Gaynor (and random others) in a verbal altercation in a bar, and that after leaving the bar Cary again aggressively confronted Gaynor; he then shot Cary. Timothy McElveen subsequently identified Gaynor near the scene but under highly suggestive circumstances during which police told him that they had caught the shooter and had the murder weapon. At trial, McElveen expressed much less certainty about the shooter's identity.

Kareema Burton, who knew neither Gaynor nor Cary before the night in question, testified that a man was standing about three feet from her backside, and that although she did not actually see him pull the trigger, she heard the gunshots ring out from where she knew he was standing. She had been taken by police to the location where police had seized Gaynor. She was told by police that he was the shooter, and she admittedly identified him because of the police influences.

Upon conviction, the trial court sentenced Gaynor to life imprisonment without the possibility of parole. The Pennsylvania Superior Court affirmed the judgment on appeal, *Commonwealth v. Gaynor*, No. 2654 EDA 2016, 2017 WL 4679670, at \*1 (Pa. Super. Ct. Oct. 18, 2017), and the Supreme Court of Pennsylvania denied allocatur, *Commonwealth v. Gaynor*, 654 Pa. 131, 212 A.3d 1003 (Pa. 2019).

On October 14, 2019, Gaynor subsequently filed a petition pursuant to Pennsylvania's Post-Conviction Relief Act and raised claims of ineffective assistance of trial counsel based on counsel's failure to (1) object to an instruction permitting the jury take Gaynor's use of an unregistered firearm as evidence that Gaynor intended to kill Cary; (2) raise various objections to McElveen's and Burton's identification of Gaynor on the ground that they were the product of unduly suggestive circumstances; (3) object to evidence of McElveen's fear of testifying for the Commonwealth and comments in the prosecutor's closing about the same; and (4) object as a violation of the Confrontation Clause to the introduction of a photograph of Gaynor that McElveen retrieved from Instagram and gave the police. See (Pet'r.'s Super. Ct. Br., ECF No. 12-18.) The PCRA Court denied all four claims and the

Superior Court affirmed. See *Commonwealth v. Gaynor*, No. 1726 EDA. 2021, 283 A.3d 372, 2022 WL 2764814, at \*3, \*12 (Pa. Super. Ct. 2022). The Supreme Court of Pennsylvania again denied allocatur.{2025 U.S. Dist. LEXIS 6} *Commonwealth v. Gaynor*, 288 A.3d 1293 (Pa. 2022).

On September 12, 2023, Petitioner filed a pro se habeas petition; on September 24, 2023, his attorney raised the same four claims in a habeas petition. The court considered ONLY the counseled filing. The Commonwealth has responded and argues that all claims were reasonably rejected by the state court. On May 5, 2024, Judge Wells's R&R recommended denying all four claims on the ground that the Superior Court's resolution of the claims was not contrary to, nor involved an unreasonable application of, clearly established federal law. See (R&R.) Gaynor objected to Judge Wells's conclusions with respect to his first three claims, but not the fourth. See (Objs., ECF No. 14.) On February 10, 2025, the District Court judge adopted the R&R - denied all relief. A COA was timely filed, and denied on March 13, 2025. Gaynor filed a timely petition for rehearing, which was denied on September 9, 2025.

#### PRESENTLY

Gaynor presently seeks review of the claims presented regarding both that:

(1) his trial counsel was Constitutionally ineffective for failing to object on due process grounds to the following jury instruction given pursuant to 18 Pa.C.S. § 6104:

If you find that the defendant used a firearm in committing the acts that are charged in this case, which is murder, and that the defendant did not have a license to carry that firearm as required by law, you may regard that as one of the items of circumstantial evidence on the issue of whether the defendant intended to commit the crime of murder as is charged in this case. It is for you to determine what weight, if any, you will give to that item of circumstantial evidence. Evidence of non-licensure alone is not sufficient to prove that the defendant intended to commit the offense of murder.

(2) that his trial counsel was ineffective for failing to seek suppression of McElveen's and Burton's out-of-court identification pursuant to *Manson v. Brathwaite*, 432 U.S. 98, 114, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977) and *Neil v. Biggers*, 409 U.S. 188, 199-200, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972).

## REASONS FOR GRANTING THE WRIT

The state and federal courts adjudications of the claims presented herein involved an unreasonable determination of facts and further resulted in decisions that are contrary to, or involved an unreasonable application of, federal law clearly established by both the U.S. Constitution and the U.S. Supreme Court. The lower court decisions permitted use of a legislatively unsanctioned and otherwise unconstitutional jury instruction to prove an element of the offenses charged and that diminished the burden of proof by the state. The lower court decisions further conflict with the decision and progeny of *Neil v. Biggers*, 409 U.S. 188 (1972).

The legal questions involved necessarily involve questions whether:

1. Trial counsel was ineffective and the Pennsylvania trial court's unconstitutional jury instruction derived from Pennsylvania's consolidated statute 18 Pa.C.S.A. § 6104 violated the 6th and 14th Amendments.

In Petitioner Gaynor's case, a jury convicted him of possession of an instrument of crime, firearms not to be carried without a license, and first-degree murder. He was sentenced to life without the possibility of parole. During trial the jury was instructed that if they find that Gaynor was unlicensed to use a firearm they can regard that as evidence he intended to commit murder. N.T. Trial 2/26/2016, p.87.

At trial the following pertinent facts were alleged by witness testimony. Timothy Carey (victim) and Leticia Samuels went to the restaurant bar Copabanana. The victim had several altercations with various other people including at some point Corey Gaynor (Petitioner). At around 1:30 am, the victim and Samuels stepped outside of the bar. Gaynor and other random

patrons were also gathered outside. On the sidewalk in front of the bar, the victim again had an altercation with Gaynor during which the victim escalated and menacingly stated to Gaynor: "So what do you want to do?" (A prelude to assault in street language). Petitioner responded to this new altercation by fatally shooting the victim, and then he walked southbound on 40th Street. Laticia Samuels stayed with the victim. Before she went to the hospital she told police the shooter is a black male with shoulder length dreadlocks. Police then broadcast the description over the radio. Shortly thereafter police arrested Gaynor. Subsequently, Ms. Samuels and Timothy McElveen saw Gaynor in a highly-suggestive police "show-up" with Gaynor handcuffed and clearly in police custody. Both then purportedly identified Gaynor as the shooter. When police searched Gaynor he didn't have a gun. Afterwards, police recovered a handgun from a nearby walkway. N.T. 2/23/2016 - 2/26/2016.

During jury instructions the trial court instructed jurors that if they find that Gaynor was unlicensed to use a firearm they can regard that as evidence he intended to commit murder (N.T. 2/26/2016, p.87). Habeas Petition, pp. 7-18. In Pennsylvania, first-degree murder can only be found if prosecutors prove beyond a reasonable doubt that (1) the victim is dead, (2) defendant killed him, and (3) defendant did so with malice and a specific intent to kill. Commonwealth v. Koehler, 737 A.2d 225, 233-34 (Pa. 1999). Pivotaly, a specific intent to kill must specifically be found decisively. This distinguishes first-degree murder from all other grades of murder. Id.

To find a specific intent to kill, the court instructed:

If you find that the defendant used a firearm in committing the acts that are charged in this case, which is murder, and that the defendant did not have a license to carry that firearm as required by law, you may regard that as one of the items of circumstantial evidence on the issue of whether the defendant intended to commit the crime of murder as is charged in this case. It is for you to determine what weight, if any, you will give to that item of circumstantial evidence. Evidence of non-licensure alone is not sufficient to prove that the defendant intended to commit the offense of murder. (N.T. 2/26/2016 at 87).

The judge's instruction revised the language of 18 Pa.C.S.A. § 6104.

The actual language states:

"In the trial of a person for committing or attempting to commit a crime enumerated in section 6105 (relating to persons not to possess, use, manufacture, control, sell or transfer firearms), the fact that that person was armed with a firearm, used or attempted to be used, and had no license to carry the same shall be evidence of that person's intention to commit the offense."

18 Pa.C.S.A. § 6104.

In Pennsylvania this statute when employed in legislatively enacted language has unquestionably been held to be unconstitutional. *Commonwealth v. Kelley*, 724 A.2d 909 (Pa. 1997). To sneak around that obvious unconstitutionality, trial courts are reciting a legislatively unsanctioned version changing the statutorily constructed language from stating that unlicensure of a firearm "shall be evidence of that person's intention to commit the offense" to the legislatively unsanctioned version stating "you may regard that as" evidence. But that revision is not an accurate statement of law.

Because § 6104 created an unconstitutional mandatory presumption it cannot be redrafted by judges or be employed or enforced against Gaynor. Lawmakers must redress the unconstitutionality by redrafting Section 6104. But lawmakers have elected not to redraft its language to eliminate the unlawful mandatory presumption and to instead authorize a permissible inference. Therefore, Gaynor was denied due process by being subjected to enforcement of permissible inferences not authorized by any legally-enacted statute.

In Pennsylvania no statute exists authorizing a permissive inference that unlicensed use of a firearm may be regarded as evidence in finding a specific intent to kill (premeditation). Judicially expanding § 6104's breadth and scope to permit prosecutors to exploit an unconstitutional mandatory presumption in § 6104 by now giving a legislatively unsanctioned revised version of that statute's language under the guise of being a permissible inference denied Gaynor a fair trial and due process.

Enforcement of an unconstitutional statute itself is an act of unconstitutionality. And Pennsylvania courts can only apply to this petitioner statutes lawfully enacted by lawmakers. Section 6104 is unconstitutional, and lawmakers did not redraft the statute's language to conform constitutionally. No statute comporting with constitutional law otherwise authorizes a permissible inference that unlicensed use of a firearm may be regarded as evidence of a premeditated specific intent to kill as required to convict of first-degree murder. Application of the unconstitutional jury instruction, which has no statutory authorization for a permissive inference of premeditated intent to kill, is not cured by any probability that jurors still would have determined he had a premeditated intent to kill. The U.S. Supreme Court has concluded "that the possibility that the jury reached its decision in an impermissible manner requires reversal even though the jury may also have reached the same result in a constitutionally acceptable fashion." Connecticut v. Johnson, 460 U.S. 73, 85 n.13 (1983)(citation omitted).

Fatally, the jury instruction is also unconstitutional as applied to the facts in this case because it did not admonish or direct jurors that regardless of whether unlicensed use of a firearm may infer intent to commit a crime, the jurors must still separately determine whether he formed a premeditated specific intent to kill (killing not the product of serious provocation or unreasonable belief self-defense). See N.T. 2/26/2016, p.87. The instruction permitted jurors to instead generally find that by unlicensed use of firearm he had an ordinary general intent. First-degree murder cannot be based on general intent to commit a crime; it must be uniquely based on requisites of malice with a specific premeditated intent to kill. E.g. Commonwealth v. Chamberlain, 30 A.3d 381, 394 (Pa. 2011).

The inference applied to Gaynor violated his rights of due process.

Because Gaynor acted under immediate direct threat of yet another altercation attack by the victim, he overzealously shot the victim in the heat of passion and/or an unreasonable belief of self-defense. Inferences of premeditated intent to murder in those circumstances cannot be ascribed to Gaynor. Acting under heat of passion constitutes only Voluntary Manslaughter (18 Pa.C.S.A. § 2503). Voluntary manslaughter occurs if "[a] person who kills an individual without lawful justification commits voluntary manslaughter if at the time of the killing he is acting under a sudden and intense passion resulting from serious provocation by ... the individual killed." See statute 18 Pa.C.S.A. § 2503(a) and (a)(1). Voluntary manslaughter also occurs when "[a] person who intentionally or knowingly kills an individual commits voluntary manslaughter if at the time of the killing he believes the circumstances to be such that, if they existed, would justify the killing under Chapter 5 of this title (relating to general principles of justification), but his belief is unreasonable." 18 Pa.C.S.A. § 2503(b).

The jury instruction, however, unconstitutionally and impermissibly permitted the jury to use a standard of general intent based on Gaynor being unlicensed for firearms to override the heightened standard for first-degree murder that requires a specific finding of premeditation, malice and specific intent to kill. (See e.g., *Commonwealth v. Koehler*, 737 A.2d at 233-34; *Commonwealth v. Chamberlain*, 30 A.3d at 394)(reciting those elements of first-degree murder). Because the jury instruction failed to direct jurors that they must still separately and decisively find the requisite heightened proof of premeditation, malice and specific intent to kill, this lessened the State's burden of proof in an impermissible manner in violation of the 14th Amendment. The 14th Amendment's Due Process Clause requires the state to prove beyond a reasonable doubt all elements of the offense of first-degree murder. In *re Winship*, 397 U.S. 358, 364 (1970).



The end result is that the jury rendered its decision to convict of first-degree murder in an impermissible manner. This requires reversal of his conviction of first-degree murder because the U.S. Supreme Court has concluded "that the possibility that the jury reached its decision in an impermissible manner requires reversal even though the jury may also have reached the same result in a constitutionally acceptable fashion." Connecticut v. Johnson, 460 U.S. 73, 85 n.13 (1983)(citation omitted).

Lastly, the probative value permitted by the jury instruction is unconstitutional. The inference it permitted has no probative value with respect to the ultimate issue of whether Gaynor possessed the requisite mens rea for first-degree murder yet it permitted the jury to override the first-degree murder offense's heightened mens rea requisites of premeditation by simply finding that Gaynor generally had an intention to commit a murder. A premeditated intent to kill the victim does not however flow from the fact of firearms unlicensure. Gaynor's gun was for self-defense (a lawful purpose). But jurors were affirmatively instructed they may regard unlicensed use of a firearm to infer intent to commit criminal conduct of murder. Jurors are not thereupon instructed that this permissible inference does not relieve them of their duty to still separately and decisively find that Gaynor also acted with the heightened requisite intent to kill required for first-degree murder (premeditated intent).

Critically important here is that whether he was unlicensed to possess and use handguns is not constitutionally sufficient nor probative enough to warrant any inferences with respect to proving beyond a reasonable doubt the ultimate issue of whether Gaynor had the requisite premeditated, malicious, and specific intent to kill for first-degree murder. The end result violated the U.S. Constitution.

"Simply put, the issue of whether one happened to be carrying an unlicensed firearm has little probative value with respect to the ultimate issue of whether one possessed the requisite intent to be convicted of a crime stemming from an act of violence that the person committed. If the fact of carrying an unlicensed firearm is probative at all, it certainly does not rise to the level of sustaining the Commonwealth's burden of proving beyond a reasonable doubt that the accused acted deliberately. We need not decide today just how lacking in probative value we believe the fact of carrying an unlicensed firearm is with regard to proving intent; it is enough to say that it is sufficiently lacking as to have resulted in a due process violation when it formed, by itself, the basis of a mandatory presumption of intent..." Kelley, 724 A.2d at 913 (emphasis added).

While in Gaynor's case the jury instruction on unlicensure didn't create a mandatory presumption of premeditated murder, it permitted the jury to unconstitutionally and impermissibly find that he committed a malicious premeditated murder based on a constitutionally insufficient finding of only a general intention to commit a crime. This unconstitutionally relieved the State of proving the heightened intent requiring malice and premeditation to sustain a conviction for first-degree murder in violation of the 14th Amendment. The 14th Amendment's Due Process Clause requires the state to prove beyond a reasonable doubt all elements of the offense of first-degree murder. In re Winship, 397 U.S. 358, 364 (1970).

Had no instruction been given under 18 Pa.C.S.A. § 6104, there's a reasonable probability that the outcome would have been different at trial (and during direct appeal and habeas proceedings). Gaynor shot the victim in what he believed to be justifiable self-defense while acting under a sudden and intense passion resulting from ongoing serious provocations by the victim.

The victim was inexplicably repeatedly engaging in serious unprovoked altercations and violent conduct against totally random nightclub bar patrons. Twice the victim engaged in such unprovoked unlawful conduct towards Gaynor. During the second instance of provocations Gaynor shot the victim. If not outright self-defense, such shooting only constitutes a Voluntary Manslaughter (max sentence 10-20 years). At worst pursuant to 18 Pa.C.S.A. § 2502(c) it constituted a murder of the Third Degree (maximum 20-40 years).

Based on the foregoing, trial counsel had no reasonable basis for failing to properly object (further causing waiver of these claims on appeal). Prejudicially counsel's ineffectiveness had permitted the Commonwealth to unconstitutionally apply a jury instruction allowing a permissible inference not authorized by statute or law, that lessened the State's burden of proof, and created strong likelihood that the jury reached its decision in an impermissible manner. Consequently, Gaynor was denied both the effective assistance of counsel and a fair trial guaranteed by the 6th Amendment and his right to due process guaranteed by 14th Amendment.

Pursuant to Strickland v. Washington, 466 U.S. 668 (1984), counsel renders ineffective assistance if his performance fell below an objective standard of reasonableness and there is a reasonable probability that but for counsel's conduct the result of the proceeding would have been different. Strickland, 466 U.S. at 688, 694. Gaynor's case meets this standard. The district court adjudication of these claims thusly resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law under 28 U.S.C. § 2254(d)(1).

WHEREFORE, a writ of certiorari should be granted on this aspect. Gaynor demonstrated a substantial showing of the denial of constitutional rights adequate to deserve encouragement to proceed further. Furthermore, jurists of reason could disagree with the district court's resolution of these constitutional claims. Miller-El v. Cockrell, 123 S.Ct. 1029, 1034 (2009).

2. The lower court decisions regarding use at trial of unnecessarily suggestive pretrial identification evidence are erroneous and involved unreasonable determination of fact resulting in violation or an unreasonable application of federal law and *Neil v. Biggers*, 409 U.S. 188 (1972).

Witnesses Timothy McElveen and Kareema Burton made out-of-court and subsequent in-court identifications violating Gaynor's rights. Both witness statements were sufficiently unreliable and the product of a widely-condemned suggestive identification "show-up." Trial counsel therefore rendered ineffective assistance by failing to seek suppression and raise trial objections to their testimony. Counsel was further ineffective by failing to request an identification-related cautionary instruction pursuant to *Commonwealth v. Kloiber*, 106 A.2d 820 (Pa. 1954). Habeas Petition, pp. 18-29.

A. FAILURE TO SUPPRESS AND RAISE OBJECTIONS TO  
KAREEMA BURTON AND TIMOTHY MCELVEEN IDENTIFICATIONS OF GAYNOR.

To determine whether out-of-court identifications violated due process a two-step inquiry is conducted into whether it was unnecessarily suggestive and created a substantial risk of misidentification. *Manson v. Braithwaite*, 432 U.S. 98, 114 (1977). A "show-up" procedure where police show an individual fitting the perpetrator's description to a witness for identification is inherently suggestive because, by its very nature, it suggests that police think they have caught the perpetrator of the crime. *United States v. Brownlee*, 45 F.3d 131, 138 (3d Cir. 2012); *Stovall v. Denno*, 388 U.S. 293, 302 (1967) (recognizing that this practice has been widely condemned").

The Court must look to various factors to determine whether the result of the suggestive identification renders it unreliable. Those factors include: (1) opportunity of the witness to view the perpetrator at the time of crime, (2) the witness' degree of attention, (3) the accuracy of the witness' prior description, (4) the level of certainty of the witness at the confrontation, and (5) the length of time between the crime and the "show-up" confrontation. *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972) ("Biggers factors").

KAREEMA BURTON

At trial Kareema Burton testified that she was at the bar Copabanana. Inside the bar she was seated next to a woman (Laticia Samuels). To the left of the woman is that woman's boyfriend who later got shot (Tim Cary). At some point she goes outside. While talking to her friends Kaseem and Linda, gunshots were fired from about three feet behind her. She immediately ran and hid behind a car. She didn't actually see the shooter or perpetrator. She repeatedly said she didn't see his face. Police later took her and Linda nearby to identify the shooter. A guy was pulled out of a police vehicle for display. She testified that she didn't remember what he looked like. Burton said the police suggested to her that [Gaynor] is the shooter. Consequently, influenced by these facts she identified this man as the shooter even though she didn't actually know if he's the perpetrator. N.T. 2/23/2016, pp. 99-120.

TIMOTHY MCELVEEN

At trial Timothy McElveen testified that he was at the bar Copabanana. Inside the bar he briefly spoke to his friend Tim Cary (victim). Kareema Burton had told him that Cary had been involved in some type of dispute with a man. N.T. 2/23/2016, at 65. "Somebody who had dreds. Don't look like him [Gaynor], but he had dreds. Id. at 39 lines 19-25 (quoting McElveen). Soon they exited the club. Outside the victim had his shirt off preparing to initiate a fight with Gaynor. The victim is the aggressor, he called Gaynor over to him to attack (Explaining victim Tim Cary wanted to rumble Gaynor). Id. at 42, 70-80. McElveen then turned and started talking to girls, he had his back turned, felt someone brushing up against his back. Right then gunshots are fired, he turned and ran. At a safe distance away, McElveen looked back after the initial gunshots and saw somebody with his face covered by a hoodie recommence shooting. Id. at 40, 42-43. McElveen never saw the shooter's face, only his hairstyle of dreadlocks. He took a cellphone photo of

the shooter walking away; however, the outside lighting was dark (id. at 81) and he was at a distance of about one-half to one full block. Id. at 62, 63, 68. He then got into his car and tried to locate the shooter. Id. at 43.

Shortly thereafter he saw police on Pine Street. Police had custody of a man with dreadlocks. McElveen watched. Id. at 43-44. Police grabbed Gaynor, put him facedown on ground, handcuffed him. Police told him they had recovered "the murder weapon." Id. at 86. Influenced by this McElveen said "That's him." [Gaynor]. He couldn't see the guy's face, just his dreadlocks. Id. at 86, 92. He testified that he wasn't actually sure if it was the shooter. Id. at 45. He never saw the shooter's face. Id. at 43, 86, 92 (line 20) - 93. The best he can identify the shooter is a person wearing a face-covering hoodie with dreadlocks, a very common hairstyle, including at Copabanana. (Notably, Kareema Burton testified she was at Copabanana with her male friend Kaseem; he fits the shooter's description with dreadlocks. N.T. 2/23/2016, p.114 lines 5-7). Throughout his testimony he can only relate Gaynor to the shooter because he had dreadlocks. See id. at pp. 39, 42-44, 86, 92-93. At trial his prior out-of-court identification statements are called into question along with his in-court equivocations and failure to affirmatively identify Gaynor.

The police show-up was unduly suggestive at Pine Street. McElveen only identified the suspect in custody as the shooter because he had dreadlocks, police had him handcuffed in custody facedown on the ground, and police told him that they recovered "the murder weapon." See supra. McElveen was unduly influenced by the highly suggestive police conduct that clearly indicated that the police unquestionably believed they had caught the perpetrator and murder weapon. Based thereon, McElveen excitedly misidentified the man in police custody as the shooter (Gaynor) and overlooked the other men with similar appearances and dreadlocks at Copabanana. The circumstances created a substantial likelihood of misidentification which later influenced his in-court testimony.

Ultimately, this prejudicially tainted the reliability of McElveen's out-of-court "identification" and his in-court testimony. Gaynor's trial counsel had no reasonable basis for failing to present these circumstances in motions seeking suppression of all identification-related statements and testimony by McElveen. Somewhat similar circumstances resulted in suppression of victim/eyewitness testimony in *United States v. Malcolm*, No. 22-00114, 2022 U.S. Dist. LEXIS 204727 (E.D. Pa. Nov. 10, 2022).

In *Malcolm*, a Black man wearing a black hooded jacket (aka "hoodie") committed a string of commercial robberies in Philadelphia. "Flash information" was broadcast over police radio to lookout for a Black male wearing a hooded jacket. That evening there is another robbery at gunpoint. The cashier showed the police security surveillance video of the incident depicting a Black man with a black hooded jacket and camouflage sleeves. While still on scene another robbery alarm was broadcast for a business one block away with identical suspect description. Shortly thereafter police saw a man fitting the exact description standing on the sidewalk by that business (Michael Malcolm). Malcolm fled police but was quickly captured, handcuffed, and placed in a police vehicle. The victims from various robberies were then brought to the arrest scene to identify whether the robber was Malcolm. Police removed him from the vehicle and had him stand, stooped over, at the vehicle. Malcolm was presented in a show-up for identification by all three victims (identified as J.P., C.K., and A.K.). Witness J.P. immediately identified him as the robber and jacket. At suppression hearing, however, J.P. said he couldn't identify Malcolm because it was hard to see on the night of the arrest even though police testified that it was dark outside but a police spotlight illuminated Malcolm.

The Malcolm Court deemed those facts sufficient to suppress all pretrial identifications and precluded testimony at trial pursuant to Biggers.

Like Malcolm, Gaynor circumstances warrant suppression and preclusion.

Neither Kareema Burton nor Timothy McElveen had seen the shooter's face. McElveen only saw a Black male, dreadlocks, whose face is covered by a hoodie. McElveen at night, "dark" outside and one-half to one full block away, took a poor quality cellphone photo of the suspected shooter walking away from the scene (not shown to police at scene). Afterward, police arrived and "flash information" was broadcast over police radios to lookout for a Black male wearing a hoodie. Shortly thereafter police saw Gaynor on a nearby sidewalk, put him facedown on the ground, handcuffed then confined him inside a police vehicle. He was then displayed in two separate highly suggestive show-ups. (Worse, police announced they found the "murder weapon" to McElveen; and suggested he's the perpetrator to Burton.) At trial neither could identify the shooter as Gaynor. (Similarly, Malcolm's face was unseen and police flashed information to lookout for a Black male wearing a distinctive black hooded jacket with camouflage sleeves, aka "hoodie." Security video captured his image [cellphone photo for Gaynor]. Shortly thereafter police saw man fitting description standing on the sidewalk, quickly captured, handcuffed, and place him in a police vehicle to be later displayed to three victims who immediately positively identified.)

In Gaynor's case, Burton and McElveen both had only identified Gaynor as the shooter in response to the above-stated circumstances at the overly suggestive police show up. Even at trial they couldn't specifically identify Gaynor. See all supra. All Biggers factors except perhaps the time lapse weigh heavily in favor of Court finding their identifications prejudicially suggestive and unreliable with a substantial risk of being misidentification. The state and federal court resolutions denying these claims were therefore based on an unreasonable determination of facts resulting and/or unreasonable application of *Manson v. Braithwaite*, 432 U.S. 98 (1977) and *Neil v Biggers*, 409 U.S. 188 (1972).



As the Supreme Court has recognized, eyewitness identifications and evidence are widely considered to be one of the least reliable forms of evidence. *United States v. Wade*, 388 U.S. 218, 288 (1967). See also, *United States v. Brownlee*, 454 F.3d 131, 141-43 (3d Cir. 2001) (extensively discussing same). And the risk of misidentification increases when "the police indicate to the witness that they have other evidence that ... the person [] committed the offense." *Simmons v. United States*, 390 U.S. 377, 383 (1968). Police exacerbate the unreliability of a single-person show-up by telling witnesses that they had already caught the perpetrator. E.g. *Salter v. City of Detroit*, 133 F.4th 527 (6th Cir. 2025).

Here, Petitioner Corey Gaynor was misidentified under prohibited and necessarily suggestive circumstances during which police themselves told the witnesses that police had "recovered the murder weapon" and caught the perpetrator/shooter - Gaynor. At trial, witnesses testified that they don't know if Gaynor was the shooter, and that they previously misidentified him because of the improper police identification procedures, influences and circumstances during which the police told them they got the weapon and caught the shooter. See *supra*. at 11-12 & citations to transcripts; See also at APPENDIX H (Timothy McElveen, N.T. 2/23/2016, pp. 36-97) and APPENDIX H (Kareema Burton, N.T. 2/23/2016, pp. 98-124).

Gaynor's trial counsel prejudicially failed pretrial and during trial to seek exclusion of the evidence related to the pretrial unduly suggestive identifications of him by both McElveen and Burton.

Trial counsel had no reasonable basis for not seeking pretrial suppression of any identification-type statements nor for failing to raise objections to the out-of-court identification and in-court testimony of Burton and McElveen. But for counsel's ineffectiveness the jury would not have heard the identification evidence (like in Malcolm). This would further have weakened any testimony proffered as identification evidence from other witnesses and reasonable doubt would have existed as to the identity of the shooter being Gaynor. A substantial showing has been made demonstrating that Gaynor was denied constitutional rights (due process, fair trial, and effective assistance of counsel).

Clearly as shown above jurists of reason could disagree with the district court's resolution of the constitutional claims or those jurists of reason could conclude that the issues presented are adequate to deserve encouragement to proceed further. Furthermore, the state and federal court adjudications of the claims resulted in decisions that are contrary to, or involve an unreasonable application of, clearly established federal law and Neil v. Biggers.

#### B. FAILURE TO REQUEST A KLOIBER CHARGE

This claim also involves counsel's ineffectiveness by failing to request a cautionary instruction pursuant to Commonwealth v. Kloiber, 106 A.2d 820 (Pa. 1954). Pursuant to Kloiber a court must instruct jurors that the accuracy of witness testimony is so doubtful that the jury must receive it with caution where the witness (1) did not have a clear opportunity to view the perpetrator, (2) equivocated on the identification of the perpetrator, or (3) had problems with identification in the past. Kloiber, 106 A.2d at 826-27.

Timothy McElveen did not have a good opportunity to see the shooter's face and equivocated at trial. Furthermore, his in-court identification testimony was prejudicially tainted by the circumstances at the out-of-court show-up (especially that police said they found "murder weapon"). As stated above, McElveen heard gunshots but didn't observe the shooting. After he ran away to safety he looked back from a distance of one-half to one full block in the dark of night: Shooter's face is covered by a hoodie. See all, supra. Observations at such distance and lighting requires a Kloiber charge. Commonwealth v. McKnight, 453 A.2d 1 (Pa.Super. 1982); Commonwealth v. Mouzon, 318 A.2d 703 (Pa. 1974)(reversing conviction because evidence upon which jury can find poor lighting condition requires charge under Kloiber).

In McKnight, three men covering their heads with stockings robbed a bar. The bartender couldn't clearly see their faces because of the stockings. Afterwards a passerby drove into the area as the three robbers removed their masks in "broad daylight." He saw them from behind, and at a distance of only twenty feet. The McKnight court declared this sufficient to mandate an instruction pursuant to Kloiber (vacating the convictions).

Under Kloiber, McKnight and Mouzon (and their progeny) Gaynor was entitled to a cautionary instruction that would have vitally served to dispel prejudice from the out-of-court identification that carried over into trial. Trial counsel therefore had no reasonable basis for not requesting a cautionary instruction pursuant to Kloiber. This denied Gaynor his constitutional rights to effective counsel, a fair trial, and due process.

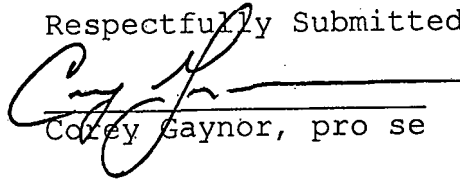
WHEREFORE, a writ of certiorari should be granted on Gaynor's claims.

**CONCLUSION**

The petition for writ of certiorari should be granted.

Date: 10.27.25

Respectfully Submitted,

  
Corey Gaynor, pro se