No. _____

IN THE SUPREME COURT OF THE UNITED STATES

Corey Gaynor
Petitioner

vs.

Kenneth Hollibaugh, et al
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES DISTRICT COURT FOR EASTERN DISTRICT OF PENNSYLVANIA

APPENDIX

By: COREY GAYNOR, pro se
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1590 Walters Mill Road
Somerset, PA 15510

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APPENDIX

A

ALD-198

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **25-1444**

COREY GAYNOR,
Appellant

VS.

SUPERINTENDENT SOMERSET, ET AL.

(E.D. Pa. Civ. No. 2:23-cv-03562)

Present: BIBAS, PORTER, and MONTGOMERY-REEVES, Circuit Judges

Submitted is Appellant's request for a certificate of appealability under 28 U.S.C. § 2253(c)(1) in the above-captioned case.

Respectfully,

Clerk

ORDER

The request for a certificate of appealability is denied. See 28 U.S.C. § 2253; Slack v. McDaniel, 529 U.S. 473, 484 (2000). Jurists of reason would agree that the Superior Court of Pennsylvania reasonably applied Strickland v. Washington, 466 U.S. 668 (1984) to Gaynor's ineffective assistance of counsel claims and correctly concluded that Gaynor demonstrated neither deficient performance nor prejudice from trial counsel's decisions not to make otherwise meritless motions or objections. See Cnty. Ct. of Ulster Cnty., New York v. Allen, 442 U.S. 140, 157 (1979); Neil v. Biggers, 409 U.S. 188, 199-200 (1972); Darden v. Wainwright, 477 U.S. 168, 181 (1986); Crawford v. Washington, 541 U.S. 36, 54 (2004). Reasonable jurists would further agree with the District Court's denial of his claim regarding trial counsel's failure to object to the prosecution's introduction of evidence of Timothy McElveen's fear of testifying, as such an objection would also have been meritless.

By the Court,

s/ Tamika R. Montgomery-Reeves
Circuit Judge

Dated: August 18, 2025
Amr/cc: all counsel of record

A True Copy:

Patricia A Dodszuweit

Patricia S. Dodszuweit, Clerk
Certified Order Issued in Lieu of Mandate

ALD-197

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **25-1434**

COREY GAYNOR,
Appellant

VS.

DISTRICT ATTORNEY PHILADELPHIA, ET AL.

(E.D. Pa. Civ. No. 2:23-cv-03708)

Present: BIBAS, PORTER, and MONTGOMERY-REEVES, Circuit Judges

Submitted is Appellant's request for a certificate of appealability under 28 U.S.C. § 2253(c)(1) in the above-captioned case.

Respectfully,

Clerk

ORDER

The request for a certificate of appealability is denied. See 28 U.S.C. § 2253; Slack v. McDaniel, 529 U.S. 473, 484 (2000). Jurists of reason would agree that the Superior Court of Pennsylvania reasonably applied Strickland v. Washington, 466 U.S. 668 (1984) to Gaynor's ineffective assistance of counsel claims and correctly concluded that Gaynor demonstrated neither deficient performance nor prejudice from trial counsel's decisions not to make otherwise meritless motions or objections. See Cnty. Ct. of Ulster Cnty., New York v. Allen, 442 U.S. 140, 157 (1979); Neil v. Biggers, 409 U.S. 188, 199-200 (1972); Darden v. Wainwright, 477 U.S. 168, 181 (1986); Crawford v. Washington, 541 U.S. 36, 54 (2004). Reasonable jurists would further agree with the District Court's denial of his claim regarding trial counsel's failure to object to the prosecution's introduction of evidence of Timothy McElveen's fear of testifying, as such an objection would also have been meritless.

APPENDIX C

By the Court,

s/ Tamika R. Montgomery-Reeves
Circuit Judge

Dated: August 19, 2025
Gch/cc: Corey Gaynor
All Counsel of Record

A True Copy:

Patricia S. Dodszuweit, Clerk
Certified Order Issued in Lieu of Mandate

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 25-1444

COREY GAYNOR,
Appellant

v.

SUPERINTENDENT SOMERSET SCI; DISTRICT ATTORNEY PHILADELPHIA;
ATTORNEY GENERAL PENNSYLVANIA

(D.C. Civil Action No. 2:23-cv-03562)

SUR PETITION FOR REHEARING

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

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

BY THE COURT,

s/ Tamika R. Montgomery-Reeves
Circuit Judge

Dated: September 9, 2025
Amr/Cc: All counsel of record

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

Corey Gaynor,

Petitioner,

v.

Kenneth Hollibaugh, et al.,

Respondents.

CIVIL ACTION
Nos. 23-3562; 23-3708

Pappert, J. **February 10, 2025**

MEMORANDUM

Corey Gaynor—currently serving a life sentence for first-degree murder—seeks a writ of habeas corpus under 28 U.S.C. § 2254. Magistrate Judge Carol Sandra Moore Wells issued a Report and Recommendation recommending denial of Gaynor's petition, to which Gaynor objected. After thoroughly reviewing the record, the Court overrules the objections, adopts the R&R and denies the petition.

I

A

Gaynor was convicted by a jury on March 2, 2016 for the April 14, 2014 murder of Timothy Cary. (Tr. Verdict/Sentencing, ECF No. 12-11.) Evidence at trial showed that Gaynor and Cary engaged in a verbal altercation in a bar, and that after briefly leaving the bar (apparently to retrieve a handgun), Gaynor returned and confronted Cary before shooting him repeatedly. (Tr. Jury Trial Feb. 23, 2016 No. 2, 41:1–8, ECF No. 12-5); (Tr. Jury Trial Feb. 24, 2016, 13:17–14:15, 54:23–55:1 ECF No. 12-6); (Tr. Jury Trial Feb. 25, 2016, 37:17–25, 94:21–25, ECF No. 12-7.)

APPENDIX A

Three eyewitnesses identified Gaynor as the shooter. Cary's girlfriend, Leticia Samuels, witnessed the initial verbal altercation between Cary and Gaynor. (Tr. Feb. 25 at 34:20–35:22.) She also witnessed Gaynor and Cary speaking to one another outside the bar; she testified that Cary eventually said to Gaynor, "So what you wanna do?" (*Id.* at 37:12–16.) Samuels then witnessed Gaynor pull out a gun and shoot Cary repeatedly, including after Cary had already fallen to the ground. (*Id.* at 37:17–25.) After the shooting, she and Gaynor looked directly at one another from about fifteen feet apart before Gaynor fled the scene. (*Id.* at 38:24–39:18.) Later that same night, Samuels identified Gaynor as the shooter to the police. (*Id.* at 40:23–41:9.)

Timothy McElveen, an "associate" of Cary's, also witnessed the initial verbal dispute and the shooting. (Tr. Feb. 23 No. 2, at 37:14, 41:1–8, 40:21–23.) Following the shooting, McElveen drove after Gaynor and took a picture of him fleeing the scene. (*Id.* at 43:21, 62:1-2.) When McElveen eventually tracked Gaynor down, the police had apprehended him. (*Id.* at 45:1–3.) McElveen immediately told the police "that was him." (*Id.*)

At trial, McElveen expressed much less certainty about the shooter's identity. *See, e.g.*, (Tr. Feb 23 No. 2 at 42:7–10.) Gaynor's appearance had apparently changed between the night of the shooting and the trial. *See* (Tr. Feb. 24 at 97:25–98:12); (Tr. Feb. 25 at 41:19–42:6); (Tr. Feb. 26 No. 1 at 16:16–17:4.) McElveen also testified that he was drunk on the evening in question. (Tr. Feb. 23 No. 2 at 45:14.) And at the end of his direct examination, McElveen testified that he was fearful of being labeled a snitch for testifying and that he would not have done so had the prosecution not subpoenaed him. (*Id.* at 45:18–46:3.) During their closings, defense counsel and the

prosecutor both spoke about whether McElveen's fear was well-founded and whether the jury should credit his new uncertainty about the shooter's identity. (Tr. Feb. 26, 2016 No. 3, 12:6–15, 18:8–19:2, ECF No. 12-10); (Tr. Feb. 23, 2016 No. 1, 18:8–22:2, ECF No. 12-4.)[1]

The third testifying eyewitness was Kareema Burton, who knew neither Gaynor nor Cary before the night in question. (Tr. Feb. 23 No. 2 at 100:5–9.) She testified that Gaynor was standing about three feet from her, 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. (*Id.* at 103:24–104:17, 121:2–122:5.) She also testified that she was able to see his face before he started shooting. (*Id.* at 121:2–122:5.) Shortly after the shooting, Burton identified Gaynor as the shooter to the police. (*Id.* at 122:3–5.)

The police arrested Gaynor within minutes of the shooting in a location consistent with the flight path described by the eyewitnesses. (Tr. Feb. 24 at 97:12–24); (Tr. Feb 23 No. 2 at 61:7–13.) Gaynor matched the description given by the eyewitnesses, and his sweatshirt was covered in gunshot residue. (Tr. Feb. 23 No. 2 at 64:8–11); (Tr. Jury Trial Feb. 26, 2016 No. 1, 22:1–6, ECF No. 12-8); (Tr. Feb. 25 at 133:19–134:2.) The police also recovered along Gaynor's route a semi-automatic .45 caliber Glock firearm, which, according to forensic testing, matched the murder weapon. (Tr. Feb. 24 at 130:11–14, 147:12–148:15, 169:14–170:21.)

B

Upon conviction, the trial court sentenced Gaynor to life imprisonment without the possibility of parole. (Tr. Verdict/Sentencing 7:9–17.) The Pennsylvania Superior

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1 The transcript of the prosecutor's closing arguments is misdated as February 23, 2016, which is before most of the evidence was presented, but the Court will cite the transcript as labeled.

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*, 212 A.3d 1003 (Pa. 2019).

Gaynor then 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, 2022 WL 2764814, at *3, *12 (Pa. Super. Ct. 2022). The Supreme Court of Pennsylvania again denied allocatur. *Commonwealth v. Gaynor*, 288 A.3d 1293 (Pa. 2022). Gaynor then filed this petition and raised the same four claims as in his PCRA petition.[2] Judge Wells's R&R recommends denying all four on the ground that the Superior Court's resolution of the

[2] Gaynor filed a *pro se* petition under Civ. A. No. 23-3562 and a counseled petition under Civ. A. No. 23-3708. Each petition raised the same claims, so Judge Wells consolidated the cases, ordered the parties to file all documents under case 23-3562, and disposed of the petitions in a single R&R. *See* (Order, Nov. 15, 2023, ECF No. 8 in Case 23-3562 and ECF No. 3 in Case 23-3708); (R&R, ECF No. 13.) Gaynor never objected to the consolidation, so the Court also disposes of both petitions in this memorandum and accompanying order. Unless otherwise noted, all citations to ECF Numbers correspond to the docket in case 23-3562.

claims was not contrary to, nor involved an unreasonable application of, clearly established federal law. *See* (R&R.) Gaynor objects to Judge Wells's conclusions with respect to his first three claims, but not the fourth. *See* (Objs., ECF No. 14.)

II

A

28 U.S.C. § 2254 bars the Court from granting habeas relief on any claim that a state court has already adjudicated on the merits unless the state court's adjudication (1) "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the" United States Supreme Court; 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). "Clearly established" federal law consists only of "the holdings, as opposed to the dicta, of [the Supreme] Court's decisions." *Andrew v. White*, No. 23-6573, 604 U.S. ----, slip op. at 5 (Jan. 21, 2025) (per curiam) (quoting *White v. Woodall*, 572 U.S. 415, 419 (2014)). A legal principle upon which the Supreme Court relies to decide a case is a "holding" for AEDPA purposes. *Id.* at 6.

The "contrary to" clause permits a court to grant the writ if "the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 413 (2000). The "unreasonable application" clause permits a court to grant the writ if "the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.*

Whether a state court's application of federal law is "unreasonable" is judged objectively. *Id.* at 409–10. "[A]n application may be incorrect but still not unreasonable," *Duncan v. Morton*, 256 F.3d 189, 196 (3d Cir. 2001), so a petitioner must show that the state court's error is "well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Metrish v. Lancaster*, 569 U.S. 351, 357–58 (2013). But a federal habeas court generally must also review the state court's opinion on its own terms and "may not speculate as to theories that 'could have supported' the state court's decision." *Dennis v. Sec'y, Pa. Dep't of Corrs.*, 834 F.3d 263, 283 (3d Cir. 2016) (en banc).[3]

Finally, a decision is not based on an unreasonable determination of facts "merely because the federal habeas court would have reached a different conclusion in the first instance." *Wood v. Allen*, 558 U.S. 290, 301 (2010). If "'[r]easonable minds reviewing the record might disagree' about the finding in question, 'on habeas review that does not suffice to supersede the trial court's ... determination.'" *Id.* (quoting *Rice v. Collins*, 546 U.S. 333, 341–342 (2006) (alteration in original)).[4] But "[e]ven in the context of federal habeas, deference does not imply abandonment or abdication of judicial review," and "does not by definition preclude relief." *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003).

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[3] Only when the federal court "cannot be sure of the precise basis for the state court's ruling" may the federal court "gap fill[]" and speculate about reasonable theories. *Dennis*, 834 F.3d at 283.

[4] In the Third Circuit, § 2254(d)'s "reasonableness" standard applies to a federal habeas court's review of "ultimate factual determination[s]" by the state court. *Williams v. Beard*, 637 F.3d 195, 204 n.7 (3d Cir. 2011). For "subsidiary" factual determinations, a habeas court may only overturn the state court's conclusion upon a showing by the petitioner "that there is clear and convincing evidence to the contrary." *Id.* And "even if a state court's individual factual determinations are overturned, what factual findings remain to support the state court decision must still be weighed under the overarching standard of section 2254(d)(2)." *Id. (quoting Lambert v. Blackwell*, 387 F.3d 210, 235–236 (3d Cir. 2004).

If a federal habeas court determines that a petitioner meets one of § 2254(d)'s exceptions, the court "must then resolve the claim without the deference [§ 2254(d)] otherwise requires." *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007).

B

To succeed on a claim for ineffective assistance of counsel, a petitioner must show that (1) his "counsel's performance was deficient," and (2) he suffered prejudice as a result. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Both prongs are "mixed questions of law and fact." *Id.* at 698.

Counsel's performance is deficient when it falls "below an objective standard of reasonableness." *Id.* at 687–88. In cases where a state court has already passed on the merits of an ineffective-assistance claim, the federal habeas court's review is "doubly" deferential, so as "to afford both the state court and the defense attorney the benefit of the doubt." *Woods v. Donald*, 575 U.S. 312, 316 (2015).

To establish prejudice, the petitioner must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* "The likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 112 (2011). Counsel cannot be found to be ineffective for failing to pursue a meritless claim. *See United States v. Bui*, 795 F.3d 363, 366–67 (3d Cir. 2015).

III

The Court reviews *de novo* the specific portions of the R&R to which Gaynor objects. 28 U.S.C. § 636(b)(1); *see also Cont'l Cas. Co. v. Dominick D'Andrea, Inc.*, 150 F.3d 245, 250 (3d Cir. 1998).[5]

A

Gaynor claims his trial counsel was Constitutionally ineffective for failing to object on due process grounds to the following jury instruction:

> 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.

(Tr. Feb. 26 No. 1 at 87:3–17.) The Superior Court rejected Gaynor's claim, holding that an objection on due process grounds would have been meritless. *Gaynor*, 2022 WL 2764814, at *5. Gaynor says the Superior Court's analysis involved an unreasonable application of the rule set forth in *County Court of Ulster County, New York v. Allen*, 442 U.S. 140, 157 (1979): an instruction containing a permissive inference[6] only violates

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5 For portions of the R&R to which no objection is made, "a district court is not required to determine *de novo* whether a magistrate judge erred" in denying such claims. *Medina v. Diguglielmo*, 461 F.3d 417, 426 (3d Cir. 2006) (citing Fed. R. Gov. § 2254 Cases 8(b)). As a matter of good practice, however, courts generally review unobjected-to claims for clear error. *See, e.g., Harris v. Mahally*, No. 14-2879, 2016 WL 4440337, at *4 (E.D. Pa. Aug. 22, 2016). The Court reviewed Judge Wells's conclusion with respect to Gaynor's fourth claim, to which Gaynor did not object, and perceives no clear error.

6 A "permissive inference suggests to the jury a possible conclusion to be drawn if the State proves predicate facts [] but does not require the jury to draw that conclusion." *Francis v. Franklin*, 471 U.S. 307, 314 (1985). A mandatory presumption, by contrast, "instructs the jury that it must infer the presumed fact if the State proves certain predicate facts." *Id.* Gaynor briefly argues that the Superior Court erred in concluding that the challenged instruction involved a permissive

a defendant's due process rights "if, under the facts of the case, there is no rational way the trier could make the connection permitted by the inference." *Id.* This "rational inference" rule requires the court to consider the whole factual record developed at trial, including "evidence in the record other than the presumption to support a conviction." *Id.* at 160. The *Ulster County* rule is a general one, so state courts have substantial leeway in "case-by-case determinations." *See Harrington*, 562 U.S. at 101 (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)).[7]

The Superior Court first explained that the trial evidence supported the basic facts necessary for the inference to be applicable; *i.e.*, that Gaynor shot Cary with a firearm he was not licensed to carry. *Gaynor*, 2022 WL 2764814, at *5. The Superior Court also analogized to the Pennsylvania Supreme Court's opinion in *Commonwealth v. Hall*, 830 A.2d 537, 549 (2003), which explained that the use of an unlicensed firearm "suggests the stealth by which many criminal objectives are furthered and achieved." *Id.* at 253–54; *see also id.* at 254 (quoting *Com. v. Sattazahn*, 631 A.2d 597, 606 n.6 (1993) ("[o]ne who envisions no criminal purpose for the firearm is unlikely to refuse, if required, to declare his ownership of that weapon to the proper authorities, while one who harbors criminal intentions will").

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inference rather than a mandatory presumption, but the instruction's use of the word "may" renders Gaynor's argument meritless. *See, e.g., Kress v. New Jersey*, 455 F. App'x 266, 272 (3d Cir. 2011).

7 The *Ulster County* rule is somewhat paradoxical in that it requires courts to determine whether one fact rationally implies another by, at least in part, evaluating the extent to which other facts independently support the fact to be inferred. But that analysis is what *Ulster County* instructs courts to undertake. *See Ulster County*, 442 U.S. at 159–60 (explaining that the amount of evidence in the record other than the presumption is relevant to analysis of a permissive presumption); *id.* at 164–65 (holding that the inference in question did not violate due process because the fact to be inferred was supported by numerous facts other than the fact on which the presumption was based).

And finally, the Superior Court recited numerous other facts supporting the conclusion that Gaynor intended to kill Cary. For one, Gaynor's trip to his car and back were consistent with retrieving a gun before the fatal confrontation. Additionally, eyewitnesses testified that Gaynor fired multiple shots at Cary's vital organs and continued shooting even after Cary had fallen to the ground. *Gaynor*, 2022 WL 2764814, at *5. The Superior Court's analysis was reasonable; it followed the dictates of *Ulster County* and comports with other courts' application of the rule. *See McCandless v. Beyer*, 835 F.2d 58, 61–63 (3d Cir. 1987) (upholding a permissive-inference instruction after explaining that (1) the inference in question was generally a sensible one and (2) the factual record contained ample independent evidence of the fact to be inferred).

Upon concluding that the permissive inference was rational, the Superior Court reasonably concluded that a due process objection to the instruction would have been meritless and that trial counsel therefore could not have been ineffective for failing to raise it. *Gaynor*, 2022 WL 2764814, at *5. That was a reasonable application of *Strickland*. *Bui*, 795 F.3d at 366–67.

B

Gaynor next claims that his trial counsel was ineffective for failing to move to suppress McElveen's out-of-court and in-court identifications of Gaynor and Burton's out-of-court identification of Gaynor, and for failing to request a cautionary instruction about those identifications pursuant to *Commonwealth v. Kloiber*, 106 A.2d 820 (Pa. 1954).

1

Gaynor claims that trial counsel should have moved to suppress McElveen's out-of-court identification because the police had already apprehended Gaynor by the time McElveen identified him. *See* (Pet. 22); (Objs. 5–6). These circumstances, Gaynor argues, created unduly suggestive circumstances and a substantial likelihood that McElveen misidentified Gaynor as the shooter. *Id.* He also claims that counsel should have objected to any in-court identification by McElveen, ostensibly because the unduly suggestive circumstances of the out-of-court identification rendered the likelihood of misidentification irreparable. *See* (Pet. 22–23); *see also Simmons v. United States*, 390 U.S. 377, 384 (1968). According to Gaynor, McElveen's identification of him was "primarily" a product of McElveen seeing Gaynor in police custody close to the crime scene, rather than McElveen's own independent recollection of the shooter's physical appearance. (Pet. 22–23.)

The Superior Court first concluded that any objection to McElveen's out-of-court identification would have been meritless. *Gaynor*, 2022 WL 2764814, at *6. Gaynor argues that the Superior Court's analysis involved an unreasonable application of the rule set out in *Manson v. Braithwaite*, 432 U.S. 98, 114 (1977). *See* (Objs. 4.) In *Manson*, the Supreme Court reiterated the rule it previously announced in *Neil v. Biggers*, 409 U.S. 188, 198–99 (1972): an out-of-court identification violates a defendant's due process rights if (1) it resulted from an unnecessarily suggestive procedure, and (2) the identification is insufficiently reliable. *See Perry v. New Hampshire*, 565 U.S. 228, 238–240 (2012). Whether an out-of-court identification is insufficiently reliable—or, in other words, there is a "substantial likelihood of

misidentification"—is judged by a totality-of-the-circumstances approach, weighing at least the five following factors: (1) "the opportunity of the witness to view the criminal at the time of the crime," (2) the witness's "degree of attention," (3) the accuracy of the witness's description of the criminal, (4) the witness's "level of certainty," and (5) the length of time between the crime and identification. *Biggers*, 409 U.S. at 200–01. The *Biggers* test for reliability is a general one, so the Superior Court's application of it to this case must be given substantial leeway. *See Harrington*, 562 U.S. at 101.

The Superior Court accurately recited the *Biggers* rule and weighed the relevant factors. *See Gaynor*, 2022 WL 2764814, at *6. Specifically, the court emphasized that "McElveen had ample time to observe [Gaynor] inside and outside the bar," that McElveen chased after Gaynor and took a picture of him as he fled, and that McElveen confidently volunteered, without prompting from police, that Gaynor was the perpetrator. *Id.* This analysis reflects that at least the first, second, fourth, and fifth *Biggers* factors cut in favor of reliability. Gaynor says this analysis was unreasonable because at trial, McElveen testified to being drunk at the time of the identification and was less certain than he had been on the night of the shooting that Gaynor was the perpetrator. (Objs. 4 (citing Tr. Feb. 23 No. 2 at 39:19–25, 42:11–16, 45:10–14.)) But nearly two years had passed since the night of the shooting, and witnesses testified that Gaynor's appearance had changed in the interim. *See* (Tr. Feb. 24 at 97:25–98:12); (Tr. Feb. 25 at 41:19–42:6); (Tr. Feb. 26 No. 1 at 16:16–17:4.) McElveen was also fearful about the consequences of "snitching." *See* (Tr. Feb 23 at 45:15–46:3.) Reasonable jurists could thus give McElveen's professed uncertainty at trial little weight in determining the reliability of his prior identification of Gaynor as the shooter.

The Superior Court also concluded that because the out-of-court identification was sufficiently reliable, it could not have tainted any in-court identification and therefore an objection to McElveen identifying Gaynor in court would have been meritless. *Gaynor*, 2022 WL 2764814, at *7 n.3. The *Biggers* test for reliability would govern the question of whether the out-of-court identification tainted any in-court identification, so the Superior Court's conclusion was reasonable. *See Manson*, 432 U.S. at 106 n.9; *see also Lunsford v. Adm'r New Jersey State Prison*, No. 21-2134, 2024 WL 3356993, at *2 (3d Cir. July 10, 2024) ("An in-court identification can be suppressed under the Due Process Clause only if it was influenced by a suppressible out-of-court identification."). And because it reasonably concluded that Gaynor's proffered objections would be meritless, the Superior Court also reasonably concluded that his trial counsel could not have been ineffective for failing to raise them. *Bui*, 795 F.3d at 366–67.

2

Gaynor next claims that his trial counsel was ineffective for failing to seek suppression of Burton's out-of-court identification. Burton identified Gaynor to the police as the shooter pursuant to a "show up" procedure—the police took Burton to the police car in which they were holding Gaynor and then pulled Gaynor out of the car in handcuffs and asked Burton if he was the shooter. (Tr. Feb. 23 No. 2 at 117:1–21.) Gaynor thus argues that Burton only identified him as the shooter because she saw him "being taken from a [police] vehicle." (Objs. 6.)

The Superior Court concluded that any objection to the out-of-court identification by Burton would have been meritless. *Gaynor*, 2022 WL 2764814, at *6. Again

applying the rule from *Biggers* and *Manson*, the Superior Court concluded that whatever "corrupting effect" the show-up procedure may have had, that effect was outweighed by "other indicia of reliability." *Id.* Specifically, the court noted that, immediately before the shooting, Burton viewed Gaynor's face while standing right next to him in a well-lit area outside the bar, and that Burton identified Gaynor mere minutes after the shooting. *Id.*; *see also* (Tr. Feb. 26 No. 1 at 14:21–15:4, 20:23–25.) Accordingly, the Superior Court reasonably determined that at least the first, fourth, and fifth *Biggers* factors weighed in favor of reliability.

Gaynor makes much of the fact that Burton did not actually see Gaynor pull out the gun and shoot Cary,[8] (Pet. 20); (Objs. 4), but a reasonable jurist could deem that irrelevant to the reliability analysis under *Manson* and *Biggers*. That analysis asks whether an identification was rendered unreasonable by undue suggestion by law enforcement; it does not turn on whether the witness actually saw the crime unfold. *See, e.g.*, *Grayer v. McKee*, 149 F. App'x 435, 438, 446 (6th Cir. 2005) (holding state court's application of *Biggers* factors to identification by witness who did not see the crime unfold was reasonable).

Because the Superior Court reasonably concluded that an objection to Burton's identification would be meritless, it also reasonably concluded that his trial counsel could not have been ineffective for failing to raise it. *Bui*, 795 F.3d at 366–67.

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[8] Burton formed her opinion about the shooter's identity because Gaynor was standing "right next to" her at the same time she heard gunshots from "right next to" her. *See* (Tr. Feb. 23 No. 2 at 118:10–14, 120:12–14).

3

Gaynor also claims his trial counsel was ineffective for failing to request a so-called "*Kloiber* charge" with respect to the identifications by McElveen and Burton. (Objs. 7–9.) A *Kloiber* charge is a cautionary instruction about eyewitness testimony available in some circumstances under Pennsylvania law. *See Commonwealth v. Ali*, 10 A.3d 282, 303 (Pa. 2010). The Superior Court concluded that a request for a *Kloiber* charge with respect to either witness would have been meritless because none of the circumstances for which such a charge is warranted were present. *Gaynor*, 2022 WL 2764814, at *7–8. This Court cannot review that state-law determination. *Priester v. Vaughn*, 382 F.3d 394, 402 (3d Cir. 2004). The Superior Court then reasonably concluded that Gaynor's trial counsel could not have been ineffective for failing to raise a meritless request. *Id.*

C

Gaynor next claims that his trial counsel was ineffective for failing to object to the admission of evidence and argument by the prosecutor suggesting that McElveen was afraid he would be labeled a snitch for testifying in favor of the Commonwealth. (Pet. 29–37.) Specifically, McElveen and a police officer testified that McElveen would not have appeared in court had he not been subpoenaed, that he was afraid of being "branded a snitch," and that "people in the neighborhood" had called him a snitch. (Tr. Feb. 23 No. 2 at 29:10–20, 45:15–23, 45:25–46:3, 67:12–25); (Tr. Feb 26 No. 1 at 28:14–29:20.) The prosecutor revisited this evidence during closing argument, describing McElveen as a "hero" for identifying Gaynor on the night of the shooting and arguing that McElveen only expressed uncertainty about the shooter's identification in court

because he was scared that people from his neighborhood would watch his testimony and learn that he "gave evidence to the Commonwealth." *See* (Tr. Feb 23 No. 2 at 18:8–22:2.) The prosecutor's comments were in response to a statement in the defense's closing that McElveen "didn't look [scared] to [him]." (Tr. Feb 26 No. 3 at 12:6–15, 18:8–19:2.)

1

The Superior Court held that the evidence of McElveen's fear was admissible on state-law grounds. *Gaynor*, 2022 WL 2764814, at *8. The Court may not review that conclusion. *Priester*, 382 F.3d at 402. But Gaynor also argued to the Superior Court that admission of the evidence violated his due process rights. (Pet'r.'s Super. Ct. Br. 36.) The Superior Court did not address the due process argument, so the Court reviews it *de novo*. *Simmons v. Beard*, 590 F.3d 223, 231 (3d Cir. 2009).

The Due Process Clause prohibits the admission of evidence "that is so unduly prejudicial that it renders the trial fundamentally unfair." *Andrew*, 604 U.S. ----, slip op at 1 (quoting *Payne v. Tennessee*, 501 U.S. 808, 825 (1991)). Factors that help guide the inquiry include "the relevance of the disputed evidence to the charge," "the degree of prejudice" caused by the evidence, and "whether the trial court provided any mitigating instructions." *Id.* at 9–10. "The ultimate question ... is whether the evidence 'so infected the trial with unfairness' as to render the resulting conviction ... 'a denial of due process.'" *Id.* at 10 (quoting *Romano v. Oklahoma*, 512 U.S. 1, 13 (1994)); *see also Collins v. Warden James T. Vaughn Corr. Ctr.*, No. 23-1797, 2024 WL 4357221, at *4 (3d Cir. Oct. 1, 2024) ("to establish a due process violation," the petitioner must show

that the evidence "was of such magnitude as to undermine the fundamental fairness of the entire trial") (quoting *Keller v. Larkins*, 251 F.3d 408, 413 (3d Cir. 2001).

For example, a trial is fundamentally unfair where "the principal pillar of proof" of a defendant's guilt is expert testimony based on methods later shown to be unreliable. *See Han Tak Lee v. Houtzdale SCI*, 798 F.3d 159, 166–69 (3d Cir. 2015). By contrast, a trial with significant inculpatory evidence is not fundamentally unfair merely because a detective's false testimony about what date he transcribed a statement precluded defense counsel from impeaching him. *See Collins*, No. 23-1797, 2024 WL 4357221, at *4.

Gaynor's trial was not fundamentally unfair because the prosecutor introduced evidence that McElveen was afraid of being labeled a snitch if he testified. The prosecution's stated purpose for eliciting the testimony was to demonstrate a possible motive for McElveen's lessened certainty at trial than when he initially told the police that Gaynor was the shooter. *See* (Tr. Feb 23 No. 1 at 21:8–22:2.) And the law recognizes that evidence of a witness's motive for giving certain testimony is often crucial to help a factfinder accurately weigh the witness's credibility. *See, e.g.*, McCormick on Evidence § 39 (8th Ed. 2020). So there was nothing fundamentally unfair about admitting evidence that McElveen feared the consequences of testifying in the prosecution's favor. To be sure, Gaynor contends that the evidence of McElveen's fear did not merely explain McElveen's motive; he says the questioning suggested to the jury that Gaynor and/or those associated with him were the ones causing McElveen's fear. (Pet. 34.) The Court perceives no such suggestion from any of the prosecutor's

questions or answers thereto.[9] To the contrary, the police officer who first learned of McElveen's fear testified that he had no reason to believe that the people calling McElveen a snitch were associated with Gaynor. (Tr. Feb. 26 No. 1 at 31:18–32:16.)

And even if the prosecution did not have a proper purpose for introducing the "snitch" testimony, any unfair effects that flowed from it would not have "infected" the whole trial, given the substantial evidence of Gaynor's guilt. As explained, Gaynor's movements immediately before the shooting were consistent with retrieving a gun from his car; three eyewitnesses identified Gaynor as the shooter, including one of whom Gaynor "looked dead in [the] face" as soon as he finished shooting; and the police recovered a gun matching the murder weapon along Gaynor's route of flight and detected gunshot residue on the sweatshirt he was wearing when they apprehended him. (Tr. Feb. 24 at 13:17–14:15, 54:13–55:1); (Tr. Feb 25 at 39:3–8); (Tr. Feb. 23 No. 2 at 45:1–3, 122:3–5); (Tr. Feb. 24 at 130:11–14, 147:12–148:15, 169:14–170:21); (Tr. Feb. 25 at 133:19–134:2.) Accordingly, the admission of evidence that McElveen feared being labeled a snitch did not deprive Gaynor of due process, and Gaynor's trial counsel was not ineffective for failing to object on those grounds. *Bui*, 795 F.3d at 366–67.

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Gaynor also argues that the prosecutor's comments during the closing constituted prosecutorial misconduct and violated his right to due process. The

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9 Even if the prosecutor had elicited testimony that Gaynor was intimidating or threatening McElveen, that would have been entirely permissible if done in good faith. Courts frequently admit evidence of a defendant's threats toward a witness to show the defendant's consciousness of guilt. *See United States v. Lingala*, 91 F.4th 685, 693 (3d Cir. 2024).

Superior Court rejected this argument on the merits,[10] and Gaynor appears[11] to argue that the Superior Court's conclusion involved an unreasonable application of the rule set out in *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974): a prosecutor has violated a defendant's due process rights if her conduct "infected the trial with unfairness." *Id.* at 643. Examples of conduct that rises to that level include "vouch[ing] for the credibility of witnesses[] or offer[ing] [a] personal opinion as to the defendant's guilt," *United States v. Robinson*, 485 U.S. 25, 33 n.5 (1988), or "suggesting by his questions that statements had been made to him personally out of court," *Berger v. United States*, 295 U.S. 78, 84 (1935). Courts examine a prosecutor's statements in context to determine their probable effect on the jury. *United States v. Young*, 470 U.S. 1, 11–14 (1985). The *Donnelly* rule is a general one, so the Superior Court has substantial leeway in its application of the rule. *See Harrington*, 562 U.S. 86 at 101.

The Superior Court concluded that the closing remarks about McElveen's professed fear of testifying did not constitute prosecutorial misconduct for at least two reasons. First, the comments "were made in fair response" to defense counsel's argument that McElveen did not appear scared. *Gaynor*, 2022 WL 2764814, at *10. And second, "the trial court instructed the jury that the arguments of counsel were not evidence." *Id.*

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10 The Superior Court applied the "unavoidable prejudice" test, *Gaynor*, 2022 WL 2764814, at *9, which courts in this circuit generally treat as "materially indistinguishable" from the *Donnelly* rule, *Reid v. Beard*, 420 F. App'x 156, 160 (3d Cir. 2011).

11 The Court would likely be within its authority to conclude that Gaynor has not objected to this portion of the R&R, warranting *de novo* review. *See, e.g.*, *Woodward v. Debalso*, No. 2:17-CV-224, 2019 WL 5677700, at *6 (E.D. Pa. Nov. 1, 2019) (refusing to conduct *de novo* review where the petitioner "fail[ed] to identify what is wrong with [the Magistrate Judge's] analysis on [the relevant] issue"). Gaynor merely complains that Judge Wells's analysis was too "businesslike and methodical" and that it was "long on the legal principles and short on the passions on display at trial." (Objs. at 9–10.) While hardly a specific objection, the Court will nevertheless review the claim *de novo*.

In his objections, Gaynor correctly identifies that the following statement from the prosecutor is cause for concern: "[McElveen] knows there are going to be relatives of people [in the courtroom] ... people are going to be here and they're going to know people." (Tr. Feb 23 No. 1 at 21:16–24.) A juror could have reasonably understood the prosecutor to be suggesting that the people McElveen was afraid of were associated with Gaynor. That implication was improper because, as explained, there was no evidence that Gaynor or anyone associated with him was threatening McElveen. *See United States v. Rivas*, 493 F.3d 131, 139 (3d Cir. 2007) ("one cannot make arguments unsupported by the record evidence").

But as the Superior Court noted, the trial court instructed the jury that "the speeches of counsel are not a part of evidence and ... you should not consider them as such," (Tr. Feb 26 No. 1 92:20–22), which is useful to cure improper behavior because we trust juries to follow their instructions, *see Darden v. Wainwright*, 477 U.S. 168, 182 (1986) (holding prosecutor's conduct did not create due process violation in part because "the trial court instructed the jurors several times that their decision was to be made on the basis of the evidence alone, and that the arguments of counsel were not evidence"). Plus, as previously explained, the evidence of Gaynor's guilt was substantial, so a reasonable jurist could conclude that any improper implication by the prosecutor was insignificant in the context of the trial as a whole. *See Marshall v. Hendricks*, 307 F.3d 36, 69 (3d Cir. 2002) ("the stronger the evidence against the defendant, the more likely that improper arguments or conduct have not rendered the trial unfair").

The Superior Court reasonably concluded that any objection on due process grounds to the prosecutor's closing remarks would have been meritless, and trial

counsel could not have been ineffective for failing to raise meritless objections. *Bui*, 795 F.3d at 366–67.

IV

A certificate of appealability should only be issued if the petitioner "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). 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). Gaynor has made no such showing, so no certificate should issue.

An appropriate Order follows.

BY THE COURT:

/s/ Gerald J. Pappert

Gerald J. Pappert, J.

APPENDIX

B

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

COREY GAYNOR	:	CIVIL ACTION
	:	
v.	:	
	:	
KENNETH HOLLIBAUGH, *et al.*	:	NOS. 23-3562, 23-3708

REPORT AND RECOMMENDATION

CAROL SANDRA MOORE WELLS
UNITED STATES MAGISTRATE JUDGE May 17, 2024

Presently before this court is a Petition for a Writ of Habeas Corpus, Corey Gaynor ("Petitioner") filed, *pro se*, and a counseled petition filed pursuant to 28 U.S.C. § 2254. Petitioner is serving a life term of incarceration at the State Correctional Institution-Somerset. He raises claims of ineffective assistance of counsel. The Honorable Gerald J. Pappert referred this matter to the undersigned for preparation of a Report and Recommendation, pursuant to 28 U.S.C. § 636(b)(1)(B). For the reasons set forth below, it is recommended that Petitioner not be afforded habeas relief.

I. FACTUAL AND PROCEDURAL HISTORY[1]

The Superior Court summarized the evidence leading to Petitioner's conviction and sentence:

> On April 14, 2014, at approximately 10:30 p.m., Timothy Cary ("Victim") and his paramour Laticia Samuels ("Samuels") went to the Copacabana, a restaurant and bar located at 40th and Spruce Streets in Philadelphia. During the evening Samuels and Timothy McElveen ("McElveen"), witnessed Victim engage in a verbal altercation with [Petitioner]. ***See*** N.T. Jury Trial, 2/25/16, at 34-36; N.T. Jury Trial, 2/23/16, at 40.
>
> Immediately following his argument with Victim,

[1]The information set forth in this factual and procedural history was gleaned from Petitioner's Habeas Corpus Petition, the counseled Petition, the Commonwealth's Response, and the exhibits attached to the parties' filings.

APPENDIX B

[Petitioner] left the bar and surrounding area. Victim also stepped outside. Samuels joined Victim outside the bar after a few minutes. Also on the street were McElveen and Kareema Burton ("Burton"), who were talking to each other near where Victim was standing. ***See*** N.T. Jury Trial, 2/23/16, at 37-42, 99-102; N.T. Jury Trial, 2/24/16, at 11-18, 54, 62-64; N.T. Jury Trial, 2/25/16, at 11, 31-36. [Petitioner] returned to the immediate area of the bar and approached Victim. They engaged in a brief conversation before Victim looked at [Petitioner] and said, "So what do you want to do?" N.T. Jury Trial, 2/25/16, at 37. [Petitioner] did not reply. Instead, he took a step back, drew a handgun from his waistband, and shot Victim twelve times. Victim was transported to the hospital, where he was pronounced deceased at 1:42 a.m.

Following the shooting, Samuels, Burton, and McElveen watched [Petitioner] walk southbound on 40th Street toward Pine Street. Samuels stayed with victim and was present when officers of the Philadelphia Police Department responded to the scene. She provided the officers with a description of the shooter as a black male, light complexion, five feet eight inches tall, with shoulder length dreadlocks, wearing a gray jacket and dark pants. The description was broadcast over police radio along with information regarding the direction of [Petitioner's] flight. Samuels then followed the vehicle transporting Victim to the hospital, where she met with different police officers and repeated her earlier description. ***See*** N.T. Jury Trial, 2/25/16, at 105, 107-08. Within minutes, Petitioner was spotted on Pine Street, a short distance from the crime scene and in a location consistent with Samuels's description of the suspect's flight.

Meanwhile, McElveen took a picture of [Petitioner] walking away from the shooting, ran to his own vehicle, and attempted to pursue [Petitioner]. While officers were in the process of arresting [Petitioner], McElveen arrived on the scene, jumped out of his vehicle, and spontaneously identified [Petitioner] as the shooter by yelling: "That's the Mother . . . that shot Victim." He needs to go to jail." ***See*** N.T. Jury Trial, 2/24/16, at 121. Officers at the hospital transported Samuels to the scene of [Petitioner's] detention. As soon as [Petitioner] was visible, Samuels screamed, "That's who did it, that's who shot my boyfriend." N.T. Jury Trial, 2/25/16, at 107. Burton was also able to "immediately," identify [Petitioner] as "the shooter." ***See*** N.T. Jury Trial, 2/26/16, at 27.

After he made the spontaneous identification of [Petitioner], officers transported McElveen to the homicide unit to be interviewed. McElveen was hesitant to give a statement, explaining that he was concerned that a formal interview would be turned over to [Petitioner]. N.T. Jury Trial 2/26/16, at 37. However, he did turn over two photographs of the shooter to the police. N.T. Jury Trial

2/23/16, at 62; ***see also*** N.T. Jury Trial 2/26/16, at 37, 39. The first was the one McElveen had taken as the shooter walked away. ***See*** N.T. Jury Trial 2/26/16, at 39. Depicted in the photograph was the back of a person wearing a gray top and black pants with beyond shoulder length hair. ***Id.*** at 48. The second picture was recovered from McElveen after his interview concluded and he was seated in the lobby. ***Id.*** at 50. McElveen approached the officers to show them a photograph that he procured from Instagram, which was posted by one of his friends approximately forty-five minutes prior to the shooting. ***See*** N.T. Jury Trial, 2/23/16, at 93-95. McElveen told police that he recognized the man in the photo as the person who shot Victim. ***Id.***, at 67, 93.

After [Petitioner] was arrested, police recovered a semi-automatic .45 caliber Glock firearm from a nearby walkway on [Petitioner's] flight path from the crime scene. ***See*** N.T. Jury Trial, 2/24/16, at 129, 133-34. Forensic testing confirmed that the firearm was the murder weapon, since all the fired cartridge casings found at the scene were fired by that gun. ***Id.*** at 158, 169-71. The projectiles recovered from Victim's body also had markings consistent with having been fired by the firearm. ***Id.*** at 160-69. Gunshot residue was recovered from the sleeves of [Petitioner's] gray sweatshirt. ***See*** N.T. Jury Trial, 2/25/16, at 133-35. [Petitioner] did not have a license to carry and the serial number on the firearm had been obliterated. ***Id.*** at 147-48, 158-60.

Police also recovered University of Pennsylvania video surveillance of a man fitting [Petitioner's] description running northbound on 40th Street approximately fifteen minutes prior to the shooting. ***See*** N.T. Jury Trial, 2/24/16, at 13-14. The man entered a parked car on 41st Street, moved ten spaces, and re-parked the vehicle. ***Id.*** The man then exited the vehicle and walked eastbound on Spruce Street towards the Copacabana. ***Id.*** When the shooting happened minutes later, officers of the University of Pennsylvania Police Department determined that the vehicle was registered to [Petitioner] and alerted Philadelphia police. ***Id.*** at 21, 53. Upon approaching the vehicle officers noticed that the center console was open, which was consistent with the eyewitnesses' stories about [Petitioner] briefly leaving the Copacabana, before returning with a firearm. ***Id.*** at 54-55.

One week before trial, McElveen met with a Philadelphia police officer and the prosecutor. ***See*** N.T. Jury Trial, 2/26/16, at 29-29. During the meeting, McElveen stated that "word was out on the street that he was a snitch" and expressed fear of people that would be attending [Petitioner's] trial. ***Id.*** at 29. McElveen informed the Commonwealth's representatives that he would not voluntarily testify at [Petitioner's] trial. ***Id.*** After the meeting, the Commonwealth secured a bench warrant to compel McElveen's

> attendance and participation. N.T. Jury Trial, 2/23/16, at 45.
>
> On February 23, 2016, [Petitioner] proceeded to a jury trial. Therein, Samuels reaffirmed her earlier identification of [Petitioner]. ***See*** N.T. Jury Trial, 2/25/16, at 37-39, 42, 44, 69. However, Burton declined to explicitly identify [Petitioner] as the shooter. Instead, she stated that [Petitioner] was standing right next to her before the shooting and the shooting happened right next to her, but asserted she did not witness it. ***See*** N.T. Jury Trial, 2/23/16, at 103, 115, 117-21. McElveen also initially failed to make an in-court identification of [Petitioner], testifying that [Petitioner] looked like the shooter but that he was too intoxicated during the shooting to make a valid identification. ***Id.*** at 39, 45. However, on redirect examination he conceded that he "knew what he was doing" when he unequivocally identified [Petitioner] as the shooter but was afraid of testifying and "being labeled a snitch." ***Id.*** at 46, 50. At the conclusion of the trial, [Petitioner] was convicted of first-degree murder, carrying a firearm without a license, and possession of an instrument of crime.
>
> The trial court sentenced [Petitioner] to serve life in prison without the possibility of parole for his first-degree murder conviction. No further penalty was imposed on the remaining counts. [Petitioner] filed a post sentence motion that was denied by operation of law. On direct appeal, [Petitioner] raised a due process challenge to the trial court's first-degree murder instruction. However, since trial counsel failed to lodge a specific objection to the charge when it was read to the jury, we found the issue was waived and affirmed [Petitioner's] judgment of sentence. ***See Commonwealth v. Gaynor***, 179 A.3d 574 (Pa. Super. 2017) (unpublished memorandum at *2). Alternatively, we held that, if the claim had been properly preserved, it still would have failed because it was meritless. ***Id.*** at 2 n.5. [Petitioner] submitted a petition for allowance of appeal to our Supreme Court, which was denied. ***See Commonwealth v. Gaynor***, 654 Pa. 141 (Pa. 2019).

Commonwealth v. Gaynor, No. 1726 EDA 2021, slip op. at 1-6 (Pa. Super. Ct. July 15, 2022) (footnote omitted) ("2022 Super. Ct. Op.").

On October 14, 2019, Petitioner filed a *pro se* petition for relief under the Post Conviction Relief Act ("PCRA"), 42 Pa. Cons. Stat. Ann. §§ 9541-46; appointed counsel later filed an amended petition. 2022 Super. Ct. Op. at 6. The PCRA court gave notice of its intent to dismiss the petition without a hearing, pursuant to Pa. R. Crim. P. 907, and, subsequently, dismissed the

petition. 2022 Super. Ct. Op. at 6. The Superior Court affirmed the dismissal, on July 15, 2022.[2] *Id.* at 27. On December, 22, 2022, the Pennsylvania Supreme Court denied allowance of appeal. Counseled Petition ("CP") at 5.

On September 12, 2023, Petitioner filed a *pro se* habeas petition; on September 24, 2023, his attorney filed a habeas petition.[3] The court will consider the counseled filing, which claims that trial counsel rendered ineffective assistance by failing to: (1) timely object to an allegedly unconstitutional jury instruction; (2)(a) file a pre-trial motion to suppress out-of-court identifications of Petitioner by McElveen and Burton, (b) object to his in-court identification by McElveen, and (c) request a cautionary instruction, pursuant to *Commonwealth v. Kloiber*, 106 A.2d 820 (Pa. 1954); (3)(a) object to the prosecutor questioning McElveen about his fear to testify and (b) failing to object to the prosecutor commenting on McElveen's fear of testifying during closing argument; and (4) move to suppress or object to introduction of a photograph that was taken by a non-testifying individual. CP at 8-40. The Commonwealth has responded and argues that all claims were reasonably rejected by the state court. Resp. at 5-27. This court agrees that Petitioner cannot obtain habeas relief, because the Superior Court's rejection of his claims was reasonable.

II. DISCUSSION

A. The AEDPA Standard of Review

Any claims denied on the merits by the state courts must be reviewed under the deferential

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[2] On PCRA appeal, Petitioner claimed trial counsel was ineffective for failing to: (1) timely object to an allegedly unconstitutional jury instruction; (2)(a) file a pre-trial motion to suppress the pre-trial identification of him by McElveen and Burton, (b) object to McElveen's in-court identification, and (c) request a cautionary *Commonwealth v. Kloiber*, 106 A.2d 820 (Pa. 1954) instruction; (3) object to (a) prosecutor questioning McElveen about his fear of testifying and (b) commenting on McElveen's fear during closing argument; and (4) move to suppress or object to introduction of a photograph that was taken by a non-testifying person. 2022 Super. Ct. Op. at 7.

[3] The *pro se* petition was docketed as Civ. A. No. 23-3562; the counseled petition was docketed as Civ. A. No. 23-3708. By order dated November 15, 2023, the cases were consolidated and the parties were to file all documents under the Civ. A. No. 23-3562 caption.

standard established by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which provides that habeas relief is precluded, unless the state court's adjudication of a 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 proceedings.

28 U.S.C. § 2254(d). The habeas statute further provides that any findings of fact made by the state court must be presumed to be correct; Petitioner bears the burden of rebutting the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

A state court's adjudication of a claim is contrary to U.S. Supreme Court precedent, if the state court has applied a rule that contradicts the governing law set forth in Supreme Court precedent or if the state court confronts a set of facts which are materially indistinguishable from a decision of the Supreme Court and the state court arrives at a different result from the Supreme Court. *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000). The governing law consists of the holdings of Supreme Court decisions, not *dicta*. *Id.* at 412.

When determining whether a state court's decision was contrary to U.S. Supreme Court precedent, the habeas court should not be quick to attribute error. *See Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (*per curiam*). Instead, state court decisions should be "given the benefit of the doubt." *Id.* In this regard, it is not necessary that the state court cite the governing Supreme Court precedent or even be aware of the governing Supreme Court precedent. *Early v. Packer*, 537 U.S. 3, 8 (2002) (*per curiam*). All that is required is that "neither the reasoning nor the result of the state-court decision contradicts" Supreme Court precedent. *Id.*

If, however, the state court correctly identifies the governing U.S. Supreme Court

precedent, unreasonable application analysis, rather than contrary analysis, is appropriate. *Williams*, 529 U.S. at 406. A state court decision constitutes an unreasonable application of Supreme Court precedent if the state court correctly identifies the governing legal rule but applies it unreasonably to the facts of the petitioner's case. *Id.* at 407-08.

In making the unreasonable application determination, the habeas court must ask whether the state court's application of Supreme Court precedent was objectively unreasonable. *Williams,* 529 U.S. at 409. The habeas court may not grant relief simply because it believes the state court's adjudication of the petitioner's claim was incorrect. *Id.* at 411. Indeed, so long as the state court's decision was reasonable, habeas relief is barred, even if state court's application of U.S. Supreme Court precedent was incorrect. *See Harrington v. Richter*, 562 U.S. 86, 101-02 (2011). Further, when applying § 2254(d)(1), the habeas court is limited to considering the factual record that was before the state court when it ruled, *Cullen v. Pinholster*, 563 U.S. 170, 185 (2011), and the relevant U.S. Supreme Court precedent that had been decided by the date of the state court's decision. *Greene v. Fisher*, 565 U.S. 34, 38 (2011).

It is permissible to consider the decisions of lower federal courts which have applied clearly established Supreme Court precedent, when deciding whether a state court's application of U.S. Supreme Court precedent was **reasonable**. *See Fischetti v. Johnson*, 384 F.3d 140, 149 (3d Cir. 2004). However, the § 2254(d)(1) bar to habeas relief cannot be surmounted solely based upon lower federal court precedent, *i.e.,* lower federal court precedent cannot justify a conclusion that a state court's application of U.S. Supreme Court precedent was **unreasonable**; only U.S. Supreme Court precedent may be the authority for that conclusion. *See Renico v. Lett*, 559 U.S. 766, 778-79 (2010).

The Supreme Court, addressing AEDPA's factual review provisions in *Miller-El v.*

Cockerell, 537 U.S. 322 (2003), interpreted § 2254(d)(2) to mean that "a decision adjudicated on the merits in a state court and based on a factual determination will not be overturned on factual grounds, unless objectively unreasonable in light of the evidence presented in the state-court proceeding." *Id.* at 340. A clear example of an unreasonable factual determination occurs where the state court erroneously finds a fact that lacks any support in the record. *Wiggins v. Smith*, 539 U.S. 510, 528 (2003). In that extreme circumstance, the presumption of correctness under § 2254(e)(1) is also clearly and convincingly rebutted. *Id.* If the state court's decision based on a factual determination is unreasonable in light of the evidence presented in the state court proceeding, habeas relief is not barred by § 2254(d)(2). *Lambert,* 387 F.3d at 235.

B. Ineffective Assistance of Counsel Standard

Federal habeas ineffective assistance of counsel claims are measured against the two-part test announced in *Strickland v. Washington*, 466 U.S. 668 (1984). First, the petitioner must show that "counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. In making this determination, the court's scrutiny of counsel's performance must be "highly deferential." *Id.* at 689. The court should make every effort 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." *Id.* In short, the "court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the [petitioner] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* (quotation omitted).

Second, the petitioner must show that counsel's deficient performance "prejudiced the defense" by "depriv[ing] the [petitioner] of a fair trial, a trial whose result is reliable." *Id.* at 687. That is, the petitioner must show that "there is a reasonable probability that, but for counsel's

unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome," *id.*, but it is less than a preponderance of the evidence. *Id.* at 693, 694.

If the petitioner fails to satisfy either prong of the *Strickland* test, there is no need to evaluate the other part, as his claim will fail. *Id.* at 697. Further, counsel will not be found ineffective, that is, his performance will not be deficient, for failing to present an unmeritorious claim or objection. *Preston v. Supt. Graterford SCI*, 902 F.3d 365, 379 (3d Cir. 2018).

C. Claim One – Counsel's Failure to Object to Jury Instruction

Petitioner first claims that trial counsel rendered ineffective assistance by failing to timely object to an allegedly unconstitutional jury instruction; said instruction purportedly violated due process, because it permitted the jury to infer Petitioner's intent to kill merely from his use of a firearm which he was not licensed to carry. CP at 8-18. The Commonwealth counters that the Superior Court reasonably rejected the claim. Resp. at 6-10. This court agrees.

In denying relief on claim one, the Superior Court first determined that the instruction in question created a permissive inference that Petitioner intended to kill the victim because he had used a firearm, which he was not licensed to carry. 2022 Super. Ct. Op. at 10. Next, the state court rejected Petitioner's argument that a jury could not reasonably infer his intent, because no evidence linked him to the murder weapon. *Id.* at 11-12. Rather, the Superior Court found ample record evidence to allow the jury to infer that Petitioner did, in fact, use the murder weapon to shoot the victim, therefore, the permissive inference did not violate due process. *Id.* at 12. Accordingly, trial counsel was not ineffective for failing to preserve the claim.

First, the Superior Court's conclusion that trial counsel could not be ineffective for omitting a meritless claim is consistent with Third Circuit precedent, *see Preston*, 902 F.3d at 379, hence it

is a reasonable application of *Strickland*. *See Fischetti*, 384 F.3d at 149. Next, this court must determine if the Superior Court's rejection of the omitted due process claim was reasonable.

The U.S. Supreme Court has explained that a permissive inference is one in which the jury is told that it may, but need not, infer a fact necessary for guilt, *i.e.*, they may infer an element of an offense, from the existence of some other fact. *County Court of Ulster County, New York v. Allen*, 442 U.S. 140, 157 (1979). This type of inference only affects due process, if "there is no rational way the trier of fact could make the connection permitted by the inference." *Id.* Furthermore, in the case of a permissive inference, there is no due process violation, if ample evidence exists in the record, other than the permissive inference, to support the conviction. *Id.* at 160.

The instruction[4] in question was clearly permissive. It instructed the jury that, if it found Petitioner had used a firearm to commit the murder, it could, but need not, infer that his failure to have a license to carry the firearm was circumstantial evidence to infer he intended to commit murder. The use of "if" in the instruction, the instruction to the jury that it was permitted, not required, to infer intent from the fact on non-licensure, and the instruction that it was up to the jury to decide what weight, if any, to accord to the fact of non-licensure, makes it abundantly clear that there no mandatory presumption. Hence, the state court reasonably concluded that the instruction raised a permissive inference.

Next, the state court found that there was a rational connection between the fact of non-

[4] The instruction at issue stated:

> 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 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.

CP at 9 (quoting N.T. 2/26/16 at 87).

licensure and Petitioner's intent, because there was ample evidence from which a jury could infer that Petitioner had used the gun in question. This conclusion does not answer the question of whether the fact of non-licensure could rationally permit the inference that the user of the firearm had the requisite intent. However, *Ulster* also makes it clear that, if the record contains ample evidence of the element in question, there is no due process violation. 442 U.S. at 160. The Superior Court did consider this question, summarizing the abundance of evidence of Petitioner's intent, including evidence that he went to his car moments prior to the shooting to retrieve an item (likely the firearm), multiple witnesses identified Petitioner as firing several shots into the victim's body, and, once the victim fell, standing over the victim and shooting into his body again. 2022 Super. Ct. Op. at 12. Furthermore, the murder weapon was found along the path Petitioner took to flee the crime scene. *Id.* Faced with this compelling body of independent evidence demonstrating that Petitioner intended to kill the victim, the permissive inference he challenges could not possibly violate due process. *Ulster*, 442 U.S. at 160. Hence, the state court's determination was reasonable. *See Weeks v. Angelone*, 528 U.S. 225, 237 (2000) (holding that, if a claim lacks merit under *de novo* review, it necessarily lacks merit under AEDPA review).

D. Claim Two – McElveen and Burton Identifications

Petitioner claims that trial counsel rendered ineffective assistance for failing to: (a) file a pre-trial motion to suppress the out-of-court identifications of him by McElveen and Burton, (b) object to the in-court identification of him by McElveen, and (c) request a cautionary instruction, pursuant to *Commonwealth v. Kloiber*, 106 A.2d 820 (Pa. 1954), for McElveen's in-court identification.[5] The Commonwealth argues that the state court reasonably rejected these claims.

[5] A *Kloiber* instruction informs the jury that, witnesses sometimes make identification errors and, if certain factors are present, the accuracy of the identification is so doubtful that the jury must receive it with caution. 2022 Super. Ct. Op. at 13 n.2 (citing *Kloiber*, 106 A.2d at 826-27).

Resp. at 10-17. This court agrees.

The Superior Court addressed each subclaim as follows: (a) the out-of-court identifications by McElveen and Burton were not unduly suggestive, (b) as such, there was no need to separately address the in-court identification by McElveen, and (c) under Pennsylvania law, a *Kloiber* charge was not warranted. 2022 Super. Ct. Op. at 12-19. The court will address the last subclaim first.

The Superior Court's determination that a *Kloiber* charge was unwarranted under state law, is binding upon this court. *Bradshaw v. Richey*, 546 U.S. 74, 76 (2005) (*per curiam*). Hence, claim two (c) becomes an assertion that trial counsel was ineffective for failing to pursue a futile course of action. This is untenable under Third Circuit law, *see Preston*, 902 F.3d at 379, hence the state court's rejection of claim two (c) was a reasonable application of *Strickland*. *See Fischetti*, 384 F.3d at 149.

In rejecting Petitioner's assertions that the out-of-court identifications by McElveen and Burton were so suggestive that they ought to be suppressed, it applied a "a totality of the circumstances test," which considers "'(1) the opportunity of the witness to view the perpetrator at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of his prior description of the perpetrator at the confrontation; (4) the level of certainty demonstrated at the confrontation; and (5) the time between the crime and the confrontation.'" 2022 Super. Ct. Op. at 13 (quoting *Commonwealth v. Milburn*, 191 A.3d 891, 899-900 (Pa. Super. Ct. 2018)). The court concluded that Burton had ample opportunity to view Petitioner outside the bar, in a well-illuminated area and, minutes after the shooting, immediately identified Petitioner as the shooter. *Id.* at 15. Hence, her identification was reliable. *Id.* As to McElveen, the state court found that he had ample opportunity to view Petitioner outside the bar, took a photo of Petitioner right after the shooting, pursued Petitioner in his car, and, when he arrived at the scene of Petitioner's

apprehension, spontaneously announced that Petitioner was the shooter. *Id.* at 15-16. Hence, McElveen's identification, not prompted by the police, was reliable. *Id.* at 16. Inasmuch as both identifications were reliable and would not have been suppressed, trial counsel was not ineffective for failing to seek suppression. *Id.* at 15-16.

The Superior Court's determination that trial counsel was not ineffective for failing to pursue meritless challenges to the McElveen and Burton's out-of-court identifications followed Third Circuit precedent, *see Preston*, 902 F.3d at 379, hence it is a reasonable application of *Strickland*. *See Fischetti*, 384 F.3d at 149. This court must next consider whether the state court's reliability determinations were reasonable.

The U.S. Supreme Court, as does the state court, applies a totality of the circumstances test to decide if an out-of-court identification is unduly suggestive so that due process requires that the identification be suppressed. *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977). *Manson* identifies the same five factors as the Pennsylvania Superior Court utilized. *Compare* 432 U.S. at 114, *with* 2022 Super. Ct. Op. at 13. Burton's unobstructed and close view of Petitioner in a well-lit area and her "immediate" identification of him as the shooter, merely minutes after the shooting implicate the first, fourth and fifth *Manson* factors and are quite favorable to the Commonwealth. Hence, the Superior Court's application of *Manson* to determine that Burton made a reliable out-of-court identification was reasonable. McElveen drove himself to the confrontation without police involvement. Furthermore, McElveen had a good opportunity to view Petitioner both inside and outside the bar; he followed Petitioner after the incident and spontaneously identified Petitioner as the shooter. These facts favorably impact the first, fourth and fifth *Manson* factors concerning reliability and render the state court's application of the *Manson* test reasonable. Hence, the AEDPA standard requires that this court accept the Superior Court's holding that a

challenge to use of McElveen and Burton's out-of-court identifications would have failed.

Finally, the Superior Court determined that it was not necessary to determine if McElveen's in-court identification had an independent basis, since his out-of-court identification was not unduly suggestive. 2022 Super. Ct. Op. at 16 n.3 (citing *Commonwealth v. DeJesus*, 860 A.2d 102, 113 (Pa. 2004)). This court finds that result to be a reasonable application of *Manson*, because the *Manson* test would apply to McElveen's in-court identification and the weight the court afforded the *Manson* factors would be identical. Furthermore, the omitted claim lacks merit, hence, trial counsel was not ineffective for omitting it. *See Preston*, 902 F.3d at 379.

E. Claim Three – Prosecutor's Questions to McElveen and Comment about McElveen's Fear of Testifying

Petitioner claims that trial counsel rendered ineffective assistance, because he failed to object to the prosecutor: (a) questioning McElveen about his fear of testifying and (b) commenting on McElveen's fear of testifying during closing argument. CP at 29-37. As to claim three (a), Petitioner argues that the prosecutor's questions violated due process, as no basis exists in the record to conclude that Petitioner was the cause of McElveen's fear. *Id.* at 30. The Commonwealth counters that the Superior Court reasonably determined that trial counsel's performance was reasonable, despite omitting these arguments. Resp. at 18-23. This court agrees that the AEDPA standard bars relief.

The Superior Court decided that the prosecutor's questions were proper, under Pennsylvania evidentiary law, because McElveen's fear of testifying would help explain his motive to give false testimony. 2022 Super. Ct. Op. at 20 (citing *Commonwealth v. Collins*, 702 A.2d 540, 544 (Pa. 1997)). Hence, any ineffective assistance claim for failing to challenge that line of questioning would lack merit. *Id.* The Superior Court further found the prosecutor's closing appropriate, in that it was made in response to Petitioner's closing argument, wherein counsel

suggested that McElveen feared no one; moreover, the state court presumed that the jury had followed the trial court's instructions that the arguments of counsel do not constitute evidence. *Id.* at 23. Given these circumstances, trial counsel was not ineffective for failing to object. *Id.*

When resolving claim three (a), the Superior Court determined that, under state law, the questions the prosecutor posed to McElveen about his fear of testifying were proper; therefore, the state court's determination in this regard is binding on this court. *Bradshaw*, 546 U.S. at 76. Further, since the challenged questioning was proper under state law, there is no basis to find that the prosecutor violated due process by pursuing that line of questioning. *See Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974) (citation omitted) (explaining that, to find a due process violation at a state criminal trial, there must be an antecedent legal error to trigger the due process analysis). Hence, it was reasonable for the state court to find no due process violation. Furthermore, under Third Circuit precedent, trial counsel could not be ineffective for omitting a meritless due process claim. *See Preston*, 902 F.3d at 379. Therefore, it was a reasonable application of *Strickland* for the state court to find that claim three (a) lacked merit. *See Fischetti*, 384 F.3d at 149.

As to claim three (b), the state court applied a test similar to the U.S. Supreme Court test for allegations of prosecutorial misconduct during closing argument. Notably, the Superior Court relied upon (1) its finding that the prosecutor's closing was made in fair response to Petitioner's closing remarks concerning McElveen's fear of testifying and (2) the trial court's jury instruction that the arguments of counsel do not constitute evidence. The U.S. Supreme Court's prosecutorial misconduct cases endorse the same factors. *See Greer v. Miller*, 483 U.S. 756, 766 n.8 (1987) (explaining that the Supreme Court presumes that the jury will follow its instructions, even in cases of prosecutorial misconduct); *Darden v. Wainwright*, 477 U.S. 168, 182 (1986) (noting that a

prosecutor is entitled to respond to the defendant's closing argument). Hence, the Superior Court's decision was a reasonable application of U.S. Supreme Court precedent concerning alleged prosecutorial misconduct during closing argument. Moreover, since the state court's conclusion that there was no due process violation was reasonable, it was also reasonable for it to conclude that trial counsel was not ineffective for failing to object to the challenged portion of the prosecutor's closing argument. *See Preston*, 902 F.3d at 379.

F. Claim Four – Counsel's Failure to Move to Suppress or Object to Photograph

Finally, Petitioner alleges that trial counsel was ineffective for failing to move to suppress, or object to, introduction of a photograph that was taken by a non-testifying individual. CP at 37-40. McElveen received the photo, which he stated depicted Petitioner, several hours after the shooting; McElveen, in turn, provided the photo to the police. *Id.* at 37-38. Petitioner argues that admission of the photograph violated his Confrontation Clause rights, hence, trial counsel was ineffective for failing to attempt to prevent its use at trial. *Id.* at 38. The Commonwealth counters that the Superior Court reasonably rejected this claim. Resp. at 24-26. This court agrees.

The Superior Court resolved Petitioner's claim by finding that the photograph did not constitute a testimonial statement, hence, admission of the photograph did not violate Petitioner's Confrontation Clause rights. 2022 Super. Ct. Op. at 25-26. In doing so, the state court found that there was no evidence that the photograph, which was posted on Instagram, was captured in anticipation of a trial or to accuse Petitioner of any wrongdoing. *Id.* The Superior Court also relied upon a state supreme court plurality opinion which had found that photographs are non-testimonial in nature. *Id.* at 25 (citing *Commonwealth v. Brown*, 185 A.3d 316, 331 (Pa. 2018)).

The U.S. Supreme Court has held that testimonial statements are only admissible if the person making the statement appears at trial, or the defendant had a prior opportunity to cross-

examine the person. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 309 (2009) (citing *Crawford v. Washington*, 541 U.S. 36, 54 (2004)). Whether a statement is testimonial, and, hence, implicates the defendant's Confrontation Clause rights, is a crucial question. The Court has explained:

> Various forms of this core class of "testimonial" statements exist: *ex parte* in-court testimony or its functional equivalent – that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially; extrajudicial statements contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.

Crawford, 541 U.S. at 51-52 (citations omitted).

The U.S. Supreme Court has never held that a photograph could be a testimonial statement. It seems unlikely that it ever would, because a photograph is not a statement at all, but, rather, the depiction of a scene, or as in this case, a person. There is no declarant, when a photograph is introduced. No U.S. Supreme Court precedent establishes the rule Petitioner would rely upon, *i.e.*, that a photograph is a testimonial statement; therefore, the AEDPA standard necessarily bars relief on Petitioner's underlying Confrontation Clause claim. *See Knowles v. Mirzayance*, 556 U.S. 111, 122 (2009) (explaining that it is not an unreasonable application of federal law for a state court to decline to apply a specific legal rule that the U.S. Supreme Court has not squarely established). Since Petitioner cannot demonstrate a meritorious Confrontation Clause claim, trial counsel was not ineffective for omitting one. *Preston*, 902 F.3d at 379.

III. CONCLUSION

All four of Petitioner's claims were reasonably rejected by the state courts. Reasonable jurists would not debate this court's dispositions of Petitioner's claims; therefore, a certificate of appealability should not issue for any claim. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Accordingly, I make the following:

RECOMMENDATION

AND NOW, this 17th day of May 2024, for the reasons contained in the preceding Report, it is hereby **RECOMMENDED** that all of Petitioner's claims be **DENIED,** without an evidentiary hearing. Petitioner has not demonstrated that any reasonable jurist could find this court's rulings debatable, nor shown denial of any federal constitutional right; hence, there is no probable cause to issue a certificate of appealability.

Petitioner may file objections to this Report and Recommendation within fourteen (14) days of being served with a copy of it. *See* Local R. Civ. P. 72.1(IV). Failure to file timely objections may constitute a waiver of any appellate rights.

It be so **ORDERED**.

/s/ Carol Sandra Moore Wells
CAROL SANDRA MOORE WELLS
United States Magistrate Judge

APPENDIX

C

APPENDIX

D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 25-1444

COREY GAYNOR,
Appellant

v.

SUPERINTENDENT SOMERSET SCI; DISTRICT ATTORNEY PHILADELPHIA;
ATTORNEY GENERAL PENNSYLVANIA

(D.C. Civil Action No. 2:23-cv-03562)

SUR PETITION FOR REHEARING

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

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

BY THE COURT,

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Cory Gaynor, Petitioner	:	Case No. 25-1444
v.	:	(District Court No. 2:23-cv-03526)
Kenneth Hollibaugh, et al. Respondent	:	

PETITION FOR HEARING

PETITIONER Corey Gaynor request a rehearing on application for Certificate of Appealabilty and the Court Order denying the same entered on August 18, 2025,

Reason For Rehearing

1. The panels decison conflicts with the decison of In re: Winship, 397 U.S. 358, 364 (1970). The Winship court held that the *14th Amendment Due Process Clause* requires the state to prove beyond a reasonable doubt all elements of the offenses in Gaynor's case. The trial judge's jury instructions relived the state of this burden through an unconstitutional jury instuction. During jury instuction the trial court instructed the jury that if they find that Gaynor was unlicensed to a firearm they can regard that as evidence he intened to commit murder. In Pennsylvania, first-degree murder can only be found if prosecutor's prove beyond reasonable doubt that the defendent killed the victim with malice and specific intent to kill. The trial courts instruction not only lessened the burden of proving a specific intent to kill. It failed to admonish jurors and/or direct them that regardless of whether an unlicensed use of a firearm may infer an

intent to commit a crime, the jury must still seperately determine whether Gaynor formed the necessary premeditated specific intent to kill. See pp. 2-9, *Application for Certificate of Appeal Ability*. The state was effectively relived of its burden to prove the specific intent to kill merely because Gaynor had no license to use a firearm. That violates the *14th Admend.* In re Winship, 397 U.S. 358, 364 (1970).

The panel overlooked that vital distinction.

2. The panels decision conflicts with the decision of Neil v. Biggers, 409 U.S. 188, 199-200(1972) and Stovall v. Denno, 388 U.S. 293, 302 (1967). The panel overlooked or misapprehended Gaynor's second claim. Gaynor's second claim asserts thast two witnesses were subjected to unconstitutional on-scence suggestive identifications. Kareema Burton and Timothy McElveen both testified that police conducted an unduly suggestive police show-up. They saw Gaynor removed from a police vehicle, handcuffed, and even placed face down on the ground. Police even told McElveen that they recoverd "the murder weapon". Both witnesses were unduly influenced by police under circumstances creating a substantial likelihood of misidentification, which later influenced their in-court testimony. Both witnesses were uncertain at trial whether the shooter was Gaynor. Burton said, "she did not actually see the shooter" but police took her to a man in handcuffs and that influenced her to identify him as the shooter even though she didn't actually know him as the perpetrator. McEleen likewise only indetifed Gaynor because police had him in handcuffs, in custody, facedown on the ground, and said they recovered "the murder weapon" - at trail neither could indentify Gaynor.

These types of police "show up" practices were specifically condemned by Stovall v. Denno, 388 U.S. 293, 302 (1967) and Neil v. Bigger, 409 U.S. 188, 199-200 (1972) See pp. 10-15, *Cert. of Appealabilty*.

The order denying a certificate of appealabilty overlooked this claim, instead indicating only that there was no error introducing "evidince of Timothy McEveen's fear of testifying..." See Order (August 18,2025). But Gaynor did not raise a claim challenging admissibility on McEveen's testimony about his fear of testifying. Gaynor raised specific claims challenging (A) suggestion police identifications and (B) failure to request identification cautionary instuction. See claim 2 (parts A and B), pp.10-17, *Certificate of Appealabilty*.

For the forgoing reasons , the court should grant rehearing and any other further relief the court may deem just and proper under the circumstances.

Respectfully Submitted, Date: 8/24/25

Corey Gaynor, *pro se*
#MK-6411
SCI-Somerset
1600 Walters Mill Road
Somerset PA, 15510

Certificate of Service

I, hereby Certify that on this 24th day of August, I am serving to the District Attorney's Office of Philadelphia County by first Class U.S. Mail, postage pre-paid, with a true and correct of the foregoing "Petition for Rehearing", that shall be deemed filed according to the "Prison Mail Box" rule:

MAILED TO:

Andrew Metzger
Assistant District Attorney
Federal Litigation Unit
Office of the District Attorney
3 South Penn Square
Room 1313
Philadelphia PA 19107

Office of The Clerk
United States Court of Appeals
21400 U.S. Courthouse
601 Market Street
Philadelphia PA 19106

Respectfully Submitted,

Date: 8/24/25

Corey Gaynor, *pro se*
#MK-6411
SCI-Somerset
1600 Walters Mill Road
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APPENDIX

E

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

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
COREY GAYNOR	:	
Appellant	:	No. 1726 EDA 2021

Appeal from the PCRA Order Entered August 4, 2021
In the Court of Common Pleas of Philadelphia County Criminal Division at No(s): CP-51-CR-0005932-2014

BEFORE: BENDER, P.J.E., BOWES, J., and DUBOW, J.

MEMORANDUM BY BOWES, J.: **FILED JULY 15, 2022**

Corey Gaynor appeals from the denial of his Post-Conviction Relief Act ("PCRA") petition. We affirm.

On April 14, 2014, at approximately 10:30 p.m., Timothy Cary ("Victim") and his paramour Laticia Samuels ("Samuels") went to the Copabanana, a restaurant and bar located at 40th and Spruce Streets in Philadelphia. During the evening, Samuels and Timothy McElveen ("McElveen"), witnessed Victim involved in a verbal altercation with Appellant. ***See*** N.T. Jury Trial, 2/25/16, at 34-36; N.T. Jury Trial, 2/23/16, at 40.

Immediately following his argument with Victim, Appellant left the bar and surrounding area. Victim also stepped outside. Samuels joined Victim outside the bar after a few minutes. Also on the street were McElveen and Kareema Burton ("Burton"), who were talking to each other near where Victim was standing. ***See*** N.T. Jury Trial, 2/23/16, at 37-42, 99-102; N.T. Jury Trial,

Appendix E

2/24/16, at 11-18, 54, 62-64; N.T. Jury Trial 2/25/16, at 11, 31-36. Appellant returned to the immediate area of the bar and approached Victim. They engaged in a brief conversation before Victim looked at Appellant and said, "So what do you want to do?" N.T. Jury Trial, 2/25/16, at 37. Appellant did not reply. Instead, he took a step back, drew a handgun from his waistband, and shot Victim twelve times. Victim was transported to the hospital, where he was pronounced deceased at 1:42 a.m.

Following the shooting, Samuels, Burton, and McElveen watched Appellant walk southbound on 40th Street towards Pine Street. Samuels stayed with Victim and was present when officers of the Philadelphia Police Department responded to the scene. She provided the officers with a description of the shooter as a black male, light complexion, five feet eight inches tall, with shoulder length dreadlocks, wearing a gray jacket and dark pants. The description was broadcast over police radio along with information regarding the direction of Appellant's flight. Samuels then followed the vehicle transporting Victim to the hospital, where she met with different police officers and repeated her earlier description. ***See*** N.T. Jury Trial, 2/25/16, at 105, 107-08. Within minutes, Appellant was spotted on Pine Street, a short distance from the crime scene and in a location consistent with Samuels's description of the suspect's flight.

Meanwhile, McElveen took a picture of Appellant walking away from the shooting, ran to his own vehicle, and attempted to pursue Appellant. While officers were in the process of arresting Appellant, McElveen arrived on the

scene, jumped out of his vehicle, and spontaneously identified Appellant as the shooter by yelling: "That's the motherfucker that shot [Victim]. He needs to go to jail." ***See*** N.T. Jury Trial, 2/24/16, at 121. Officers at the hospital transported Samuels to the scene of Appellant's detention. As soon as Appellant was visible, Samuels screamed, "[T]hat's who did it, that's who shot my boyfriend." N.T. Jury Trial, 2/25/16, at 107. Burton was also able to "immediately" identify Appellant as "the shooter." ***See*** N.T. Jury Trial, 2/26/16, at 27.

After he made the spontaneous identification of Appellant, officers transported McElveen to the homicide unit to be interviewed. McElveen was hesitant to give a statement, explaining that he was concerned that a formal interview would be turned over to Appellant. N.T. Jury Trial, 2/26/16, at 37. However, he did turn over two photographs of the shooter to police. N.T. Jury Trial, 2/23/16, at 62; ***see also*** N.T. Jury Trial, 2/26/16, at 37, 39. The first was the one McElveen had taken as the shooter walked away. ***See*** N.T. Jury Trial, 2/26/16, at 39. Depicted in the photograph was the back of a person wearing a gray top and black pants with beyond shoulder length hair. ***Id.*** at 48. The second picture was recovered from McElveen after his interview had concluded and he was seated in the lobby. ***Id.*** at 50. McElveen approached the officers to show them a photograph that he procured from Instagram, which was posted by one of his friends approximately forty-five minutes prior to the shooting. ***See*** N.T. Jury Trial, 2/23/16, at 93-95. McElveen told police

that he recognized the man in the photo as the person who shot Victim. ***Id.*** at 67, 93.

After Appellant was arrested, police recovered a semi-automatic .45 caliber Glock firearm from a nearby walkway on Appellant's flight path from the crime scene. ***See*** N.T. Jury Trial, 2/24/16, at 129, 133-34. Forensic testing confirmed that the firearm was the murder weapon, since all the fired cartridge casings found at the scene were fired by that gun. ***Id.*** at 158, 169-71. The projectiles recovered from Victim's body also had markings consistent with having been fired by the firearm. ***Id.*** at 160-169. Gunshot residue was recovered from the sleeves of Appellant's gray sweatshirt. ***See*** N.T. Jury Trial 2/25/16, at 133-35. Appellant did not have a license to carry and the serial number on the firearm had been obliterated. ***Id.*** at 147-48, 158-60.

Police also recovered University of Pennsylvania video surveillance of a man fitting Appellant's description running northbound on 40th Street approximately fifteen minutes prior to the shooting. ***See*** N.T. Jury Trial, 2/24/16, at 13-14. The man entered a parked car on 41st Street, moved ten spaces, and re-parked the vehicle. ***Id.*** The man then exited the vehicle and walked eastbound on Spruce Street towards the Copabanana. ***Id.*** When the shooting happened minutes later, officers of the University of Pennsylvania Police Department determined that the vehicle was registered to Appellant and alerted Philadelphia police. ***Id.*** at 21, 53. Upon approaching the vehicle officers noticed that the center console was open, which was consistent with

the eyewitnesses' stories about Appellant briefly leaving the Copabanana, before returning with a firearm. ***Id.*** at 54-55.

One week before trial, McElveen met with a Philadelphia police officer and the prosecutor. ***See*** N.T. Jury Trial, 2/26/16, at 28-29. During the meeting, McElveen stated that "word was out on streets that he is a snitch" and expressed fear of people that would be attending Appellant's trial. ***Id.*** at 29. McElveen informed the Commonwealth representatives that he would not voluntarily testify at Appellant's trial. ***Id.*** After the meeting, the Commonwealth secured a bench warrant to compel McElveen's attendance and participation. N.T. Jury Trial, 2/23/16, at 45.

On February 23, 2016, Appellant proceeded to a jury trial. Therein, Samuels reaffirmed her earlier identification of Appellant. ***See*** N.T. Jury Trial, 2/25/16, at 37-39, 42, 44, 69. However, Burton declined to explicitly identify Appellant as the shooter. Instead, she stated that Appellant was standing right next to her before the shooting and that the shooting happened right next to her, but asserted that she did not witness it. ***See*** N.T. Jury Trial 2/23/16, at 103, 115, 117-21. McElveen also initially failed to make an in-court identification of Appellant, testifying that Appellant looked like the shooter but that he was too intoxicated during the shooting to make a valid identification. ***Id.*** at 39, 45. However, on redirect examination he conceded that he "knew what he was doing" when he unequivocally identified Appellant as the shooter but was afraid of testifying and "being labeled a snitch." ***Id.*** at 46, 50. At the conclusion of the trial, Appellant was convicted of first-

degree murder, carrying a firearm without a license, and possession of an instrument of crime.

The trial court sentenced Appellant to serve life in prison without the possibility of parole for his first-degree murder conviction. No further penalty was imposed on the remaining counts. Appellant filed a post-sentence motion that was denied by operation of law. On direct appeal, Appellant raised a due process challenge to the trial court's first-degree murder jury instruction. However, since trial counsel failed to lodge a specific objection to the charge when it was read to the jury, we found the issue was waived and affirmed Appellant's judgment of sentence. ***See Commonwealth v. Gaynor***, 179 A.3d 574 (Pa.Super. 2017) (unpublished memorandum at *2). Alternatively, we held that, if the claim had been properly preserved it still would have failed because it was meritless. ***Id.*** at *2 n. 5. Appellant submitted a petition for allowance of appeal to our Supreme Court, which was denied.[1] ***See Commonwealth v. Gaynor***, 654 Pa. 141 (Pa. 2019).

On October 4, 2019, Appellant filed the timely PCRA petition that is the subject of this appeal. Appointed counsel submitted an amended petition, alleging multiple claims of trial counsel ineffectiveness. After issuing Pa.R.Crim.P. 907 notice, the PCRA court dismissed the petition without a hearing. This timely appeal followed.

Appellant raises the following issues for our review:

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[1] Appellant filed his petition for allowance of appeal *nunc pro tunc* following a PCRA proceeding wherein his appellate rights were reinstated.

I. Was Appellant denied his rights under the Sixth and Fourteenth Amendments of the U.S. Constitution and Article 1, [§] 9 of the Pennsylvania Constitution when trial counsel ineffectively failed to timely object and/or renew his objection to an unconstitutional jury instruction thereby waiving it and precluding appellate review?

II. Was Appellant denied his rights under the Sixth and Fourteenth Amendments of the U.S. Constitution and Article 1, [§] 9 of the Pennsylvania Constitution when trial counsel ineffectively failed to file a pre-trial motion to suppress the initial identification of Appellant by McElveen and Burton, did not object to the in-court identification by McElveen and then failed to request that the jury be given a [charge pursuant to ***Commonwealth v. Kloiber***, 106 A.2d 820 (Pa. 1954)]?

III. Was Appellant denied his rights under Article 1 § 9 [of] the Constitution of the Commonwealth of Pennsylvania and the Sixth and Fourteenth Amendments to the Constitution of the United States of America to effective assistance of counsel in that trial counsel failed to object to the prosecutor's questioning of McElveen and comments during closing argument that McElveen feared testifying when there was no evidence of record of any nexus between those fears and the Appellant?

IV. Was Appellant denied his rights under Article 1 § 9 [of] the Constitution of the Commonwealth of Pennsylvania and the Sixth and Fourteenth Amendments to the Constitution of the United States of America to effective assistance of counsel in that trial counsel failed to move to suppress and/or object to introduction of a photograph taken by an unidentified person who was not called to testify at the trial, violating Appellant's rights under the Confrontation Clause?

Appellant's brief at 3-4.

We begin with a discussion of the pertinent legal principles. Our "review is limited to the findings of the PCRA court and the evidence of record," and we do not "disturb a PCRA court's ruling if it is supported by evidence of record

and is free of legal error." ***Commonwealth v. Diggs***, 220 A.3d 1112, 1116 (Pa.Super. 2019). Similarly, "[w]e 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.*** "It is an appellant's burden to persuade us that the PCRA court erred and that relief is due." ***Commonwealth v. Stansbury***, 219 A.3d 157, 161 (Pa.Super. 2019) (citing ***Commonwealth v. Miner***, 44 A.3d 684, 688 (Pa.Super. 2012)).

All of Appellant's arguments raise allegations of trial counsel ineffectiveness. 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.

I. First Degree Murder Jury Instruction

In his first claim Appellant argues that trial counsel was ineffective when he failed to object to an unconstitutional jury instruction. ***See*** Appellant's brief at 12. To assess the merits of the underlying claim, we review the trial court's jury instruction as follows:

> [T]he reviewing court must consider the charge as a whole to determine if the charge was inadequate, erroneous, or prejudicial. The trial court has broad discretion in phrasing its instructions, and may choose its own wording so long as the law is clearly, adequately, and accurately presented to the jury for its consideration. A new trial is required on account of an erroneous jury instruction only if the instruction under review contained fundamental error, misled, or confused the jury.

Commonwealth v. Fletcher, 986 A.2d 759, 762 (Pa. 2009) (citations and quotations omitted).

At issue in the case *sub judice* is the following jury instruction:

> 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. Jury Trial, 2/26/16, at 87 (emphases added). This instruction was drawn directly from a standard jury instruction based on 18 Pa.C.S. § 6104, which provides as follows:

> 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.

See also Pa. SSJI (Crim) 15.6104. Murder is one of the crimes enumerated in § 6105. ***See*** 18 Pa.C.S. § 6105(b).

Appellant alleges that the jury instruction violated his due process rights. Our Supreme Court has held that an instruction based on § 6104 violates due process "when it form[s], **by itself**, the mandatory basis of a mandatory presumption of intent." ***Commonwealth v. Kelly***, 724 A.2d 909, 913 (Pa. 1999) (emphasis in original). However, instructions that create a permissive inference of intent have been upheld. ***See Commonwealth v. Hall***, 830 A.2d 537, 549-50 (Pa. 2003). This is because a permissive inference leaves the fact-finder free to accept or reject the inference. ***Id.*** at 547-48. Accordingly, due process is only implicated in those permissive inference circumstances where, "under the facts of the case, there is no rational way the trier [of fact] could make the connection permitted by the inference." ***Id.*** at 546.

Here, the PCRA court properly found that the relevant instruction was permissive. ***See*** PCRA Court Opinion, 10/22/21, at 5-6. The trial court did not instruct the jury that it was required to view the use of an unlicensed firearm as evidence of Appellant's intent to commit homicide. Rather, the trial court advised the jury that, **if** they found Appellant used a firearm in the commission of the murder, then they **could** regard that fact as an item of circumstantial evidence supporting an inference that Appellant intended to commit the crime. ***See*** N.T. Jury Trial, 2/26/16, at 87. The trial court also cautioned the jury that evidence of Appellant's non-licensure, alone, would be insufficient to prove such intent. ***Id.*** Accordingly, we agree that the trial court

issued a permissive instruction and, therefore, Appellant's due process claim turns upon whether, "under the facts of the case, there [was] no rational way the trier [of fact] could make the connection permitted by the inference." ***Hall, supra*** at 546.

Appellant contends that the permissive inference was unconstitutional because there was "absolutely no evidence linking [him] to the gun." Appellant's brief at 16. In support of his position, Appellant points out that the gun was not recovered upon his person and that no fingerprints or DNA linked the weapon to him. ***Id.*** at 16-17. In contrast, the Commonwealth and PCRA court found ample circumstantial support for the inference that Appellant possessed the unlicensed firearm and did so with the specific intent to kill the victim. ***See*** Commonwealth's brief at 13. We agree with the Commonwealth and PCRA court that Appellant has failed to establish that the facts of this case did not support such an inference.

Here, as in ***Hall***, Appellant "was not simply detected in possession of an unlicensed firearm; he was caught in the act of firing it at another man." ***Hall, supra*** at 549. Prior to the crime, the video evidence showed Appellant running to, entering, and hurriedly re-parking his vehicle before returning to the scene of the murder within minutes of the shooting. ***See*** N.T. Jury Trial, 2/24/16, at 13-14, 20-21. This suspicious movement, along with the fact that he left the center console open, was consistent with the Commonwealth's theory that Appellant hid an unlicensed firearm in his car which he then

retrieved to kill Victim. ***Id.*** at 54-55. After the shooting, multiple eyewitnesses identified Appellant as the perpetrator who fired multiple shots that struck Victim's vital organs, including his heart. N.T. Jury Trial, 2/23/16, at 44-45, 48-49, 52, 102-04, 121; ***see also*** N.T. Jury Trial, 2/25/16, at 37, 41-42. Furthermore, after Victim fell to the ground, eyewitnesses observed Appellant step over him and continue firing directly into Victim's body. ***See*** N.T. Jury Trial, 2/25/16, at 37. While the firearm was not located on Appellant's person, it was discovered along Appellant's flight path and forensically linked to the recovered casings and bullet fragments. ***See*** N.T. Jury Trial, 2/23/16, at 129, 140, 152; ***see also*** N.T. Jury Trial, 2/24/16, at 129-30, 158, 160-71. Forensic testing also revealed gunpowder residue on Appellant's sleeves. ***See also*** N.T. Jury Trial, 2/25/16, at 133-35.

Based upon this evidence, the jury could reasonably infer that Appellant possessed a firearm and shot it at Victim with the intent to kill him. Since the trial court gave a permissive inference instruction that was rationally connected to the evidence, Appellant's argument is meritless. Accordingly, trial counsel was not ineffective for failing to assert a meritless objection and no relief is due on Appellant's first claim.

II. Eyewitness Identification

In his second issue, Appellant alleges that trial counsel was ineffective when he failed to seek pretrial suppression of the out-of-court identifications of Appellant by McElveen and Burton as unduly suggestive. ***See*** Appellant's

brief at 21. Further, Appellant contends that trial counsel was also ineffective for failing to object to McElveen's in-court identification of Appellant. ***Id***. at 23. Alternatively, Appellant suggests that counsel was ineffective for failing to request a ***Kloiber*** instruction regarding the poor lighting conditions.[2] ***Id***.

In evaluating whether an out-of-court identification should be suppressed, the suggestiveness of the underlying identification procedure is but one factor to be considered. Overall, "the central inquiry is whether, under the totality of the circumstances, the identification was reliable." ***Commonwealth v. Moye***, 836 A.2d 973, 976 (Pa.Super. 2003). As this Court has explained, the following factors are to be considered in determining the propriety of admitting identification evidence: "(1) the opportunity of the witness to view the perpetrator at the time of the crime; (2) the witness'[s] degree of attention; (3) the accuracy of his prior description of the perpetrator at the confrontation; (4) the level of certainty demonstrated at the confrontation; and (5) the time between the crime and confrontation." ***Commonwealth v. Milburn***, 191 A.3d 891, 899-900 (Pa.Super. 2018) (citing ***Moye, supra***). The corrupting effect of the suggestive identification, if any, must be weighed against these factors. ***Commonwealth v. Wade***, 33 A.3d 108, 114 (Pa.Super. 2011).

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[2] A ***Kloiber*** instruction advises the jury that witnesses sometimes make mistakes in identification, and that, if certain factors are present, the accuracy of the identification is so doubtful that a jury must receive it with caution. ***See Commonwealth v. Kloiber***, 106 A.2d 820, 826-27 (Pa. 1954).

Absent some special element of unfairness, a prompt "one[-]on[-]one" identification is not so suggestive as to give rise to an irreparable likelihood of misidentification. ***Id.*** Indeed, "we have regularly held that a prompt one-on-one identification enhances the reliability of the identification." ***Commonwealth v. Hale***, 85 A.3d 570, 574 (Pa.Super. 2014) (affirming denial of suppression where the defendant was handcuffed and police asked the victim to identify defendant as the perpetrator, because the victim had a sufficient opportunity to view the defendant and the period between the crime and her identification was brief); ***see also Commonwealth v. Armstrong***, 74 A.3d 228, 239 (Pa.Super. 2013) (affirming conviction where the police asked the victim to make a one-on-one identification of a handcuffed defendant less than ten minutes post-attempted break-in, after police picked up the defendant "running" through victim's apartment complex). Accordingly, an out-of-court identification should only be suppressed where "the facts demonstrate that the identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." ***Commonwealth v. Kendricks***, 30 A.3d 499, 504 (Pa.Super. 2011).

Appellant alleges that Burton's identification procedure was unduly suggestive because it was one-on-one: Appellant was handcuffed and officers asked Burton to identify him. Also, Burton later recanted portions of her initial statement, testifying at trial that she did not see a gun or the shooting. ***See***

Appellant's brief at 23-24. The PCRA court declined to find counsel was ineffective concluding that the out-of-court identification was admissible. ***See*** PCRA Court Opinion, 10/22/21 at 7. We agree with the PCRA court that the substantive claim lacks merit.

Considering the totality of the circumstances surrounding Burton's identification, we conclude that any corrupting effect of the handcuffs and officer suggestion were outweighed by the other indicia of reliability. Prior to the shooting, Burton had sufficient time to view Appellant outside the bar since she was standing right next to him and the area was well-illuminated from the bar lights. ***See*** N.T. Jury Trial, 2/23/16, at 119-20, 130. Minutes after the shooting, Burton "immediately" identified Appellant as the shooter to the police, exclaiming "we was standing right there and we could've been killed." N.T. Jury Trial, 2/26/16, at 15-16, 27. Accordingly, Burton's identification was similar to those this Court upheld in ***Hale*** and ***Armstrong***, rendering this aspect of Appellant's second ineffectiveness claim devoid of arguable merit. Therefore, trial counsel was not ineffective for failing to file a pretrial motion to suppress Burton's identification of Appellant.

We also agree with the PCRA court that Appellant's challenge concerning McElveen's out-of-court identification is meritless. Prior to the shooting, McElveen had ample time to observe Appellant inside and outside the bar. ***See*** N.T. Jury Trial, 2/23/16, at 39-40. Afterwards, McElveen took a picture of Appellant and pursued him as he fled. ***Id***. at 61-62. McElveen eventually

caught up with Appellant while he was being detained by the police, volunteering to the arresting officers that Appellant was indeed the perpetrator they sought. ***Id***. at 62-63. McElveen's confident identification was not prompted by the police. ***Id***. at 63. Accordingly, a suppression motion challenging this identification would also have been unsuccessful.

Appellant also relies on certain inconsistencies between McElveen's initial on-scene statements and his trial testimony to allege that the identification should have been suppressed. ***See*** Appellant's brief at 25-26. However, trial counsel would have had no reason to anticipate that McElveen would revise his pre-trial version of events at trial and there is no guarantee he would have done so at a pre-trial suppression hearing. Thus, trial counsel was not ineffective for failing to challenge the admissibility of McElveen's identification of Appellant and no relief is due.[3]

In his final sub-claim, Appellant argues that trial counsel was ineffective for failing to request a ***Kloiber*** charge with respect to these identifications. ***See*** Appellant's brief at 31. It is well-established that a ***Kloiber*** charge is only appropriate when the accuracy of the testimony of an eyewitness's

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[3] Since we find that the out-of-court identification was not unduly suggestive, it is not necessary to determine whether McElveen's subsequent in-court identification had an independent basis to support admissibility. ***See Commonwealth v. DeJesus***, 860 A.2d 102, 113 (Pa. 2004) (explaining that where an appellant fails to establish that an out-of-court identification was impermissibly tainted, it is not necessary for the reviewing court to address the derivative assertion that an in-court identification should have been suppressed).

identification is "so doubtful that the Court should warn the jury that the testimony as to identity must be received with caution." ***Kloiber, supra*** at 826-27; ***see also Commonwealth v. Rios***, 920 A.2d 790, 804 (Pa. 2007). Specifically, a trial judge must provide the instruction "where the eyewitness: (1) did not have an opportunity to clearly view the defendant; (2) equivocated on the identification of the defendant; or (3) had a problem making an identification in the past." ***Commonwealth v. Ali***, 10 A.3d 282, 303 (Pa. 2010). A ***Kloiber*** charge is not appropriate where an eyewitness had "protracted and unobstructed views" of the defendant and consistently identified the defendant "throughout the investigation and at trial." ***Id.***; ***see also Commonwealth v. Upshur***, 764 A.2d 69, 77 (Pa.Super. 2000).

First, Appellant alleges that the ***Kloiber*** instruction was required because McElveen was intoxicated. ***See*** Appellant's brief at 30-31. The PCRA court held that the claim was meritless because other evidence corroborated McElveen's identification. ***See*** PCRA Court Opinion, 10/22/21, at 10. Meanwhile, the Commonwealth contends that there was no basis for counsel to request a ***Kloiber*** charge as to McElveen, since intoxication does not warrant a ***Kloiber*** instruction. ***See*** Commonwealth's Brief at 18-19. We agree with the Commonwealth. ***See Commonwealth v. Dozier***, 208 A.3d 1101, 1103 (Pa.Super. 2019) ("[W]e may affirm a PCRA court's decision on any grounds if the record supports it.").

It is well-established that an eyewitness's level of intoxication relates to the credibility of their testimony, not their actual physical ability to observe the perpetrator from their respective position. ***See, e.g., Commonwealth v. Reid***, 99 A.3d 427, 449 (Pa. 2014) ("[T]he need for a ***Kloiber*** charge focuses on the **ability** of a witness to identify the defendant." (emphasis in original)). Accordingly, McElveen's testimony about his level of intoxication did not warrant a ***Kloiber*** charge and trial counsel was not ineffective for failing to request one on that basis. ***See Commonwealth v. Paolello***, 665 A.2d 439, 455 (Pa. 1995) (finding counsel was not ineffective for failing to request a ***Kloiber*** charge where the eyewitnesses were intoxicated).

Appellant also avers that trial counsel should have requested a ***Kloiber*** charge because Burton testified that she did not see the shooting and did not identify Appellant as the shooter at trial. ***See*** Appellant's brief at 30-33. Since this testimony contradicted her initial statement to police in which she did positively identify Appellant as the shooter, Appellant argues that a ***Kloiber*** instruction was warranted. ***Id***. We disagree.

Since Burton did not actually identify Appellant as the shooter in court, a ***Kloiber*** instruction was unnecessary. ***See Commonwealth v. Sanders***, 42 A.3d 325, 335 (Pa.Super. 2012). The facts in ***Sanders*** are similar to the facts herein. In ***Sanders***, a shooting victim identified the defendant as the shooter twice, in a photo array and a written statement. However, at trial the victim did not identify the defendant and stated that he could not recall making

a prior identification. The defendant requested a ***Kloiber*** instruction, but his request was denied. On appeal, we agreed with the trial court, finding that "[u]nlike the typical ***Kloiber*** situation, where there is a damaging in-court identification of the accused, the same type of concerns [were] not present where a witness decline[d] to identify the defendant in court." ***Id***. Thus, as in ***Sanders***, Appellant's claim that trial counsel was ineffective due to his failure to request a ***Kloiber*** instruction pertaining to Burton had no merit, because the circumstances that warrant a ***Kloiber*** charge were not present.

III. Direct Examination of McElveen and Closing Argument

In his third PCRA claim, Appellant argues that trial counsel was ineffective when he failed to object to the prosecutor improperly questioning McElveen and making inflammatory remarks in her closing argument. ***See*** Appellant's brief at 36. We consider each argument in turn.

Appellant's first sub-claim of this issue refers to the portion of McElveen's direct examination in which the jury learned that the Commonwealth obtained a warrant to secure McElveen's presence at trial. The warrant was necessitated after McElveen told the prosecutor that he would not voluntarily appear at Appellant's trial because people had approached him in the neighborhood and he was afraid of being branded a "snitch." ***See*** N.T. Jury Trial, 2/23/16, at 45-46, 67-68. The PCRA court held that this claim was meritless because Appellant "failed to prove that any of these questions asked by the prosecution were based on lies or any untrue information." ***See*** PCRA

Court Opinion, 10/22/21, at 11. The Commonwealth contends that this line of questioning was permissible to explain inconsistencies between McElveen's trial testimony and prior statements. ***See*** Commonwealth's brief at 21. We agree with the Commonwealth. ***See Dozier, supra*** at 1103 (reiterating the principle that we may affirm a PCRA court's decision on any grounds if the record supports it). Our Supreme Court has held that a prosecutor's questioning of a witness concerning his fear of testifying is permissible to explain a witness's motive to testify untruthfully. ***See Commonwealth v. Collins***, 702 A.2d 540, 544 (Pa. 1997) (recognizing well-established precedent in Pennsylvania that third-party threats are admissible to explain a witness's prior inconsistent statement). Accordingly, Appellant's first sub-claim lacks merit and the PCRA court properly denied it.

Next, Appellant argues that trial counsel was ineffective when he failed to object to prosecutorial misconduct in closing argument. ***See*** Appellant's brief at 40. The legal standard for an ineffectiveness claim arising out of an allegation of prosecutorial misconduct is as follows:

> A prosecutor may make fair comment on the admitted evidence and may provide fair rebuttal to defense arguments. Even an otherwise improper comment may be appropriate if it is in fair response to defense counsel's remarks. Any challenge to a prosecutor's comment must be evaluated in the context in which the comment was made. . . .
>
> Not every unwise, intemperate, or improper remark made by a prosecutor mandates the grant 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. Hairston, 249 A.3d 1046, 1067 (Pa. 2021) (quoting ***Commonwealth v. Chmiel***, 30 A.3d 1111, 1181-82 (Pa. 2011)) (internal citations omitted).

Appellant contends that the prosecutor's comments regarding McElveen's fear of testifying should have been inadmissible because they were not supported by the evidence. ***See*** Appellant's brief at 41. However, the PCRA court found that the Commonwealth's closing remarks constituted a fair response to trial counsel's closing argument. ***See*** PCRA Court Opinion, 10/22/21, at 13. We agree.

The record reflects that trial counsel attacked the credibility of McElveen in his closing remarks, including his fear of testifying as follows:

> What did McElveen tell you? Let's get to this right away about being afraid. Did this guy look afraid to you[? H]e didn't look like it to me. Again, you're the fact-finders. You could tell by his manner of testifying he ain't afraid of nobody. He wasn't afraid of anything.

N.T. Jury Trial, 2/26/16, at 12. In response, the prosecutor argued:

> Now, Counsel says we know what kind of guy Tim McElveen is. He's rough. He uses bad language. You know, Tim McElveen – I don't know what – he's under pressure – he's under pressure. He lives in the neighborhood. He says to you quite honestly it's not good to be seen as a snitch. He told [Detective John Harkins] that he was fearful about the safety of his mother; safety of his

family and himself.[4] He knows that he's a snitch, but he lives in that neighborhood and that's where he has to stay; that's where he likes it.

So, he tells you that he has reservations. That even when he spoke to the police he said, "I thought I was doing what I had to do when I pointed him out and I would be done."

You can say what you want about Tim McElveen. Counsel can s[n]e[e]r at the way he addresses you or the way he speaks, but Tim McElveen would in another era had [sic] been a hero.

He would have been a hero the night [Victim] was murdered, and you can't take that away from him. No matter what happens to him, if he succumbs to pressures now; that he doesn't want to testify consistently to what he saw because he's scared.

. . . .

Now, unfortunately the pressures of life in the last two years have gotten to a point where he's scared. He's scared to come here. He looks, you know, Counsel is looking at him, and it doesn't look like he's afraid of anything, and he doesn't. He says, "How does he know who's going to be in the courtroom? Why would he be afraid to come to the 8th floor?"

Well, he's not stupid. He knows there are people that are going to be in the courtroom. He knows that there are relatives of people. He knows that people are all going to be here and they're going to know people – they're going to know that he, Tim McElveen, appeared in a homicide case and gave evidence for the Commonwealth, and he's afraid what that's going to mean when he goes back home. What it's going to be for people he knew,

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[4] At trial, Detective Harkins testified that he interviewed McElveen at 3:35 a.m. on April 15, 2014. ***See*** N.T. Jury Trial, 2/26/16, at 35. At the beginning of the interview, McElveen indicated that he did not understand why he needed to be involved further since he had already made an identification and told the police what happened on scene. ***Id.*** at 37. McElveen also expressed concern about giving a formal statement because it would be turned over to Appellant. ***Id.*** at 37.

> they know, or related to them; whether their safety is going to be challenged.

N.T. Jury Trial, 2/26/16, at 17-22.

Since the at-issue remarks were made in fair response to trial counsel's argument, no misconduct occurred, and Appellant's underlying claim of prosecutorial misconduct is baseless. Furthermore, Appellant was not prejudiced since the trial court instructed the jury that the arguments of counsel were not evidence, and the jury is presumed to have followed the court's instruction. ***See*** N.T. Jury Trial, 2/26/16, at 92; ***see also Commonwealth v. Tedford***, 960 A.2d 1, 37 (Pa. 2008). Since the underlying claim lacks merit, the PCRA court did not err in dismissing the derivative ineffective assistance of counsel claim.

IV. Admission of Photograph

Finally, Appellant attacks trial counsel's effectiveness for failing to object when the Commonwealth sought to introduce a photograph that was taken and posted to Instagram by a person who did not testify. ***See*** Appellant's brief at 45. Appellant alleges that absent testimony from the photographer, Kareema,[5] this admission violated his Sixth Amendment right to confront

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[5] Kareema's last name was not revealed at trial. However, McElveen did specify that this was a different Kareema than Kareema Burton, who testified at trial and was present for the shooting. ***See*** N.T. Jury Trial, 2/23/16, at 94-95.

adverse witnesses because it implied that an absent witness had important information about the shooting. ***Id***. at 46.

The PCRA court found the claim was meritless since McElveen did not testify that Kareema told him anything that could be considered a testimonial statement, Appellant's allegation that Kareema had information about Appellant's involvement in the crime was "mere speculation," and the "court was unable to locate any legal authority that has held that a photograph, in and of itself, [was] testimonial in nature." ***See*** PCRA court opinion, 10/22/21, at 17. Furthermore, the PCRA court found that Appellant suffered no prejudice from the absence of Kareema's testimony, since she was not the one who provided the police with the photo or described the man depicted as the shooter. ***Id***. at 18. We agree with the PCRA court.

Whether a defendant has been denied his right to confront a witness 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 Confrontation Clause of the Sixth Amendment prohibits out-of-court testimonial statements by a witness, unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness. ***See Crawford v. Washington***, 541 U.S. 36 (2004). Thus, the threshold question is whether the at-issue evidence constituted a testimonial statement.

In analyzing whether a statement is testimonial, and, therefore, subject to the protections of the Confrontation Clause under ***Crawford***, a court must determine whether the primary purpose of the evidence was to establish or prove past events relevant to a later criminal prosecution. ***See Commonwealth v. Allhouse***, 36 A.3d 163, 175 (Pa. 2012). Our courts have described the class of testimonial evidence covered by the Confrontation Clause as:

> *ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially; extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.

Commonwealth v. Dyarman, 73 A.3d 565, 568 (Pa. 2013) (quoting ***Melendez-Diaz v. Massachusetts***, 557 U.S. 305, 309-10 (2009)). Accordingly, our courts have generally construed testimonial evidence as a written or oral statement. ***Id***. Appellant has not provided a case where a photograph was considered a testimonial statement and we have not been able to locate one. ***See, e.g. Brown, supra*** at 331 (upholding testimony by medical examiner who did not conduct the autopsy because the doctor's opinion relied on autopsy photographs, which were non-testimonial).

Based on our review of the record, we find that the photograph was non-testimonial since the evidence did not reveal that the image was captured in

anticipation of trial or for the purpose of proving Appellant committed the shooting. Instead, trial testimony revealed that Kareema posted the photograph to Instagram forty-five minutes prior to the shooting. ***See*** N.T. Jury Trial, 2/26/16, at 50. The image depicted a man and a woman standing side-by-side and was captioned "look who grew up." ***See*** Commonwealth Exhibit 49. While trial testimony did not reveal any information regarding the circumstances surrounding where or when the image was captured, McElveen testified that he did not see Kareema at the Copabanana or outside the bar on the night of the shooting. ***See*** N.T. Jury Trial, 2/23/16, at 93-95. McElveen testified that, although his friend Kareema sent him the posting through Instagram, McElveen was the one who provided it to the police and identified the man depicted as the person who shot Victim. ***See*** N.T. Jury Trial, 2/23/16, at 93-95. Accordingly, the testimonial statement was made by McElveen, not Kareema.

To the extent that the fact that Kareema sent McElveen the photograph could be considered a testimonial statement, no relief would be due. As the PCRA court aptly pointed out, the photograph was merely cumulative evidence that corroborated the earlier on-scene identifications of Appellant by McElveen, Burton, and Samuels. ***See*** PCRA Court Opinion, 10/22/21, at 18. Accordingly, Appellant was not prejudiced by the admission of the photograph and the PCRA court did not err when it denied relief on Appellant's final issue.

V. Conclusion

For the foregoing reasons, Appellant has failed to convince us that the PCRA court erred in denying his PCRA petition and that relief is due. Consequently, we affirm.

Order affirmed.

Judgment Entered.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/15/2022

APPENDIX

F

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
CRIMINAL TRIAL DIVISION

COMMONWEALTH	:	CP-51-CR-0005932-2014
	:	
v.	:	
	:	
COREY GAYNOR	:	

OPINION

Brandeis-Roman, J. October 22, 2021

Appellant Corey Gaynor has filed an appeal from this court's Order dismissing his petition which sought relief pursuant to the Post-Conviction Relief Act, 42 Pa.C.S. § 9541 *et seq.*, Appellant's first PCRA Petition.

PROCEDURAL HISTORY AND FACTS

On April 14, 2014, Timothy Cary (the "victim") and his date went to the Copabanana, a restaurant and bar located at 40th and Spruce Streets in Philadelphia. During the evening, the victim was involved in altercations with several people, including Appellant. At some point before 1:30 A.M., the victim stepped outside and stood on the sidewalk in front of the bar with his date. The victim and Appellant began talking again and the victim said "So, what do you want to do?" Appellant took a step back, pulled out a gun, and shot the victim a total of twelve times. The victim was taken to the Hospital of the University of Pennsylvania, where he was pronounced dead at 1:42 A.M. Following the shooting, Appellant walked southbound on 40th Street. Appellant was ultimately stopped and arrested on the 4000 block of Pine Street. Police recovered a firearm, a

APPENDIX F

Glock Model 37 semi-automatic handgun with obliterated serial numbers, from a nearby walkway. Appellant did not have a license to carry a firearm.

From February 22, 2016 through February 26, 2016, Appellant had a jury trial before the Honorable Lillian H. Ransom during which he was ultimately found guilty of first degree murder, carrying a firearm without a license, and possession of an instrument of crime. On March 2, 2016, Appellant was sentenced to life imprisonment for first-degree murder and given no further penalty on his other charges. Appellant filed a post-sentence motion which was denied by operation of law on July 13, 2016. On August 8, 2016, Appellant subsequently filed a timely Notice of Appeal. The Pennsylvania Superior Court affirmed Appellant's judgment of sentence on October 18, 2017.

On February 6, 2018, Appellant filed his first timely PCRA Petition, seeking reinstatement of his appellate rights *nunc pro tunc* because his appeal attorney, Shawn Kendricks Page, Sr., failed to file a Petition for Allowance of Appeal. On May 16, 2018, Stephen O'Hanlon, Esquire, entered his appearance on Appellant's behalf and filed an Amended PCRA Petition on July 1, 2018, bringing this same claim on Appellant's behalf. On December 20, 2018, Appellant had his appellate rights reinstated.

On January 1, 2019, Appellant filed a Petition for Allowance of Appeal to the Pennsylvania Superior Court, which was denied on June 3, 2019. Appellant filed a timely PCRA Petition on October 4, 2019. On October 21, 2019, a Request for Appointment of Counsel was filed, and between that date and December 4, 2019, Teri Himebaugh, Esquire, entered her appearance on this matter. Attorney Himebaugh filed an Amended PCRA Petition on July 8, 2020.[1] The Commonwealth filed a Motion to Dismiss on November 12, 2020.

[1] At some point, Douglas Dolfman, Esquire, became Appellant's attorney in this matter and filed a *Finley* letter of no merit. This appears to have been an error as Attorney Himebaugh had never stopped representing Appellant.

At some point prior to May 4, 2021, this court became aware that there was evidence missing from the record and, on May 4, 2021, contacted both Assistant District Attorney Kevin Frankel and Defense Counsel Teri Himebaugh to request the missing evidence. This evidence included two photographs and a video of the shooting. On May 13, 2021, ADA Frankel delivered the requested photographs and video to this court for review. After reviewing both the photographs as well as the video, this court sent all parties a 907 Notice of Dismissal on June 17, 2021, and formally dismissed Appellant's PCRA Petition on August 4, 2021. On August 21, 2021, Appellant filed a timely Notice of Appeal to the Pennsylvania Superior Court.

This opinion follows.

ISSUES RAISED BY APPELLANT ON APPEAL

I. The PCRA Court erred in finding that there was no merit to Appellant's claim that trial counsel ineffectively failed to timely object and/or renew his objection to an unconstitutional jury instruction thereby waiving it and precluding appellate review.

II. The PCRA Court erred in finding no merit to Appellant's claim that trial counsel ineffectively failed to file a pre-trial motion to suppress the in-court identification of Appellant by McElveen and Burton and then failed to request that the jury be given a *Kloiber* charge.

III. The PCRA Court erred in finding no merit to Appellant's claim that trial counsel ineffectively failed to object to the prosecutor's questioning of McElveen and comments during closing argument that McElveen feared testifying when there was no evidence on the record of any nexus between those fears and Appellant.

IV. The PCRA Court erred in finding no merit to Appellant's claim that trial counsel failed to move to suppress and/or object to introduction of a photograph taken by an unidentified person who was not called to testify at the trial, violating Appellant's rights under the Confrontation Clause.

DISCUSSION

"It is well-settled that the PCRA is intended to be the sole means of achieving post-conviction relief." Commonwealth v. Taylor, 2013 PA Super 89, 65 A.3d 462, 465 (Pa.Super. 2013) (citing Commonwealth v. Haun, 613 Pa. 97, 32 A.3d 697 (Pa. 2011)). When reviewing the denial of PCRA relief, the appellate court's review is "limited to determining whether the PCRA

court's findings are supported by the record and without legal error". Commonwealth v. Edmiston, 619 Pa. 549, 65 A.3d 339, 345 (Pa. 2013) (citing Commonwealth v. Breakiron, 566 Pa. 323, 781 A.2d 94, 97 n. 4 (Pa. 2001)). The court's scope of review is limited to the findings of the PCRA court and the evidence on the record of the PCRA court's hearing, viewed in light most favorable to the prevailing party. Commonwealth v. Fahy, 598 Pa. 584, 959 A.2d 312, 316 (Pa. 2008) (citing Commonwealth v. Duffey, 585 Pa. 493, 889 A.2d 56, 61 (Pa. 2005)). The burden is on the petitioner in the PCRA petition to demonstrate by a preponderance of the evidence that he or she is eligible for PCRA relief. 42 Pa.C.S.A. § 9543.

Because Appellant filed a timely PCRA Petition, this court reviewed Appellant's PCRA issues. This court determined Appellant's issues to be meritless.

1) **APPELLANT'S ATTORNEY WAS NOT INEFFECTIVE FOR FAILING TO OBJECT AND/OR RENEW HIS OBJECTION TO AN UNCONSTITUTIONAL JURY INSTRUCTION THEREBY WAIVING IT AND PRECLUDING APPELLATE REVIEW.**

Appellant alleged that his attorney was ineffective for failing to object to a jury instruction and thereby waive the issue for appellate review. This issue is meritless. It should be noted that the Pennsylvania Superior Court has already determined that this issue would have been meritless.

"Even if Gaynor had preserved his claim for our review, we would conclude that it is without merit. The Pennsylvania Supreme Court has held that an instruction based on Section 6104 violates due process "when it form[s], *by itself*, the basis of a mandatory presumption of intent[.]" ***Commonwealth v. Kelly***, 724 A.2d 909, 913 (Pa. 1999) (emphasis in original). However, instructions that create a *permissive* inference of intent have been upheld. ***See Commonwealth v. Hall***, 830 A.2d 537, 549–50 (Pa. 2003). The trial court's instruction, ***see*** FN 4, ***supra***, created a permissive inference of intent, and Gaynor failed to establish that the facts of this case did not support the inference. ***See Hall***, 830 A.2d at 547 (stating that "in the case of mere permissive

inferences, the constitutional challenge cannot be raised in the abstract; the defendant must demonstrate that the inference as applied to him violated his rights of due process." (citation omitted)); ***see also id.*** (noting that due process is implicated "only if, under the facts of the case, there is no rational way the trier could make the connection permitted by the inference." (citation omitted))." Commonwealth v. Gaynor, No. 2654 EDA 2016, 2017 WL 4679670, at *2 fn. 5 (Pa.Super.Ct. Oct. 18, 2017).[2]

Appellant quotes said jury instruction in his Amended PCRA Petition:

> "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."
>
> *Amended PCRA Petition page 7: see also Commonwealth's Motion to Dismiss page 7; see also N.T. February 26, 2016, page 87 lines 3-17.*

As can be seen, the very last line of the jury charge instructs the jury that evidence of non-licensure, in and of itself, is insufficient to prove that the Appellant intended to commit the offense of murder, undercutting the claim that this jury charge lessened the Commonwealth's burden of proving that Appellant committed the offense of murder.[3] It must also be noted that it is not entirely

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[2] It should be noted that in his PCRA, Appellant did not address the Pennsylvania Superior Court's previous analysis of this jury instruction, instead only stating that this issue was waived.

[3] It should be noted that the jury charge given is the instruction listed at 15.6104 of the "Pennsylvania Suggested Standard Criminal Jury Instructions". This comes from the 3rd Edition, released in 2019, and is the current instruction as of 2021. For the sake of accuracy, the actual charge is the following: "If you find that the defendant used a firearm in committing [or attempting to commit], the acts constituting the violation of the offense of *[specify offense from list in section 6105(b)]*, and that the defendant did not have a license to carry that firearm as required by law, you may regard that as one item of circumstantial evidence on the issue of whether the defendant intended to commit the crime of *[crime]* as otherwise charged in count *[count]*. It is for you to determine what weight, if any, you will give to that item of circumstantial evidence. Evidence of nonlicensure alone is not sufficient to prove that the defendant intended to commit the offense of *[offense]*." The only noticeable differences between the suggested jury instruction and the one given by Judge Ransom is that she filled in the spots for the appropriate offense.

accurate that Appellant's attorney failed to object to this jury charge. Appellant addressed this on page eleven of his Amended PCRA Petition, stating that trial counsel should have objected a second time in front of the jury, even though during his first objection the Honorable Lillian H. Ransom stated that she noted his objection and that it would be overruled. In fact, Judge Ransom stated the following:

> **THE COURT**: "This morning Ms. Fairman presented the instruction, instruction 15.6104, evidence of intent, unlicensed firearms possession. It says, 'If you find that the defendant committed a crime at the time that he was carrying an unlicensed firearm, that you may be' – the jury may use that as intent. I don't see any reason not to give that, Mr. Harrison. Do you have any objection."
> **ATTORNEY HARRISON**: "I will object for the record. I don't think that's necessary. All evidence in a criminal case is prejudicial, but this is an instruction that, in my opinion, is onerous – I don't think it's necessary for this case."
> **THE COURT**: "That's fine. You made your record in that record, but the court would overrule your objection."
> *N.T. February 26, 2016, page 62 line 20 to page 63 line 12.*

A simple review of the record revealed that Appellant's trial counsel objected to the charge and was overruled. Even if Appellant's trial counsel objected before the jury so that this issue was preserved for Appeal, the Pennsylvania Superior Court would not have considered it. Trial counsel cannot be found ineffective for not objecting again to this jury charge or appealing it since it is evident that the Pennsylvania Superior Court discussed how they would have determined this issue would be meritless. Although Appellant alleged that this jury instruction "created a mandatory instruction" that shifted the burden away from the Commonwealth to prove that Defendant committed the shooting, nothing in this instruction shifted the burden of proof.

Therefore, Appellant's first issue is meritless.

2) **APPELLANT'S ATTORNEY WAS NOT INEFFECTIVE FOR FAILING TO FILE A PRE-TRIAL MOTION TO SUPPRESS THE IN COURT IDENTIFICATION OF APPELLANT BY WITNESSES MCELVEEN AND BURTON, NOR WAS HE INEFFECTIVE FOR FAILING TO REQUEST A KLOIBER INSTRUCTION.**

Appellant alleged that his trial attorney was ineffective for failing to file a motion to suppress the identification made by witnesses McElveen and Burton and for not requesting a *Kloiber* instruction regarding the low light conditions surrounding both witnesses' perception of the crime scene. Because this particular issue can be analyzed in three separate ways this court analyzed each interpretation. Regardless of how it is analyzed, it is meritless.

First, this issue can be interpreted as "trial counsel ineffectively failed to file a pre-trial motion to suppress the prior identification of Petitioner by McElveen and Burton". If this is how the issue should be interpreted, it is meritless for two reasons. First, as far as witness McElveen is concerned, even if his pre-trial identification of Appellant could be considered less reliable by the fact that he was intoxicated, that lack of reliability becomes irrelevant due to the fact that witness McElveen took a photograph of the shooter at the time of the shooting with his cell phone and permitted police to download that photo from his phone. *N.T. February 23, 2016, pages 61-62.* Second, despite Appellant's claim that Kareema Burton never witnessed any portion of the shooting, this is not entirely accurate. At trial, Ms. Burton testified that she was on the side of 40th and Spruce Street when "a guy came up and started shooting" and that she "seen the guy go down". She also testified that, other than the guy who was shooting, she had not seen anyone else with a gun that night. *N.T. February 23, 2016, page 102 lines 6-19.* Although Ms. Burton does state she did not witness the shooting, on re-direct examination, she states that the guy she saw earlier came up next to her as she was outside and that when she first heard the shots and was asked where they were coming from, she said they were coming from "right next to me." *N.T. February 23, 2016, page 120 lines 2-20.* This appears to be an argument of semantics: even if it is absolutely true that

Ms. Burton did not witness the actual shooting, she testified that she saw Appellant come up next to her and almost immediately after that she heard shooting coming from next to her. *N.T. February 23, 2016, page 104 lines 6-17.* Assuming this to be accurate, this would be different from hearing a shooting occurring a block away.

Second, the issue can be interpreted as "trial counsel ineffectively failed to file a pre-trial motion to suppress the in-court identification of Petitioner by McElveen and Burton". If this is how the issue should be interpreted, it is meritless. As stated *supra*, McElveen had taken a photo of Appellant on the night of the incident, which helped confirmed Appellant's identity. Further, witness Burton did not directly identify Appellant, but rather testified that Appellant had exited the bar, walked right by her, and heard gunshots very shortly after Appellant walked by her.

Third, this issue can be interpreted as "trial counsel ineffectively failed to object to the in-court identification of Petitioner by McElveen and Burton". McElveen, upon identifying Appellant at trial, physically pointed at him and stated that he looked different because, on the night of the shooting, "he had dreadlocks". *N.T. February 23, 2016, page 40 lines 1-10.*

"To determine whether due process prohibits the introduction of an out-of-court identification at trial, the Superior Court said, this Court's decisions instruct a two-step inquiry. First, the trial court must decide whether the police used an unnecessarily suggestive identification procedure. *Id.*, at 85a. If they did, the court must next consider whether the improper identification procedure so tainted the resulting identification as to render it unreliable and therefore inadmissible." Perry v. New Hampshire, 565 U.S. 228, 235 (2012). "Perry's challenge, the Superior Court concluded, failed at step one: Blandon's identification of Perry on the night of the crime did not result from an unnecessarily suggestive procedure "manufacture[d] ... by the police." *App. 86a–87a.* Blandon pointed to Perry "spontaneously," the court noted, "without any inducement

from the police." *Id.*, at 85a–86a. Clay did not ask Blandon whether the man standing in the parking lot was the man Blandon had seen breaking into Clavijo's car. *Ibid.* Nor did Clay ask Blandon to move to the window from which she had observed the break-in." *Id.*

Burton, technically, did not appear to have identified Appellant at trial. Instead, her testimony revolved around her identification from the night the shooting occurred. This is because at trial, when she was asked if she remembered what he looked like, she said no. *N.T. February 23, 2016, page 117 lines 15-16.*

Neither identification is objectionable. Burton's testimony does not directly identify the shooter but instead leaves the jury to determine if he was the person next to her shooting Cary. McElveen testified that the only thing different about Appellant from the night of the shooting was that he had dreadlocks that night but not at trial.

Therefore, this part of the issue, regardless of how it is interpreted, is meritless.

Regarding the *Kloiber* instruction, this is meritless.

"The *Kloiber* charge alerts the jury where a witness might be physically incapable of making a reliable observation. This inquiry is distinct from the credibility determination a fact-finder must make. Our Supreme Court has found that even where witnesses were 'under the influence of alcohol, the room was dark, they had been awakened from sleep, and the events being observed were confusing ... Appellant's objections relate to the credibility of the eyewitness testimony, not to the actual physical ability of the witnesses to observe.... Accordingly, a *Kloiber* charge was not required.' *Commonwealth v. Paolello,* 542 Pa. 47, 665 A.2d 439, 455 (1995)." Commonwealth v. Collins, 70 A.3d 1245, 1255 (Pa.Super. 2013).

It certainly is true that witness McElveen admitted he was intoxicated at the time he witnessed the shooting, but even if his pre-trial identification of Appellant could be considered

less reliable by the fact that he was intoxicated, that lack of reliability becomes irrelevant due to the fact that witness McElveen took a photograph of the shooter at the time of the shooting with his cell phone and permitted police to download that photo from his phone. *N.T. February 23, 2016, pages 61-62.* This was one of the photos that the district attorney provided to this court which, along with the video from that night, sufficiently proved that Appellant was the shooter to the point where no *Kloiber* instruction was necessary.

It should also be noted that as part of Appellant's PCRA Petition, Appellant mentioned a witness named Ken Schindler who witnessed the shooting from the window of his apartment right above the Copabanana. Witness Schindler stated that he witnessed the initial shooting and backed away from the window for safety. Witness Schindler then went back to the window where he saw Appellant standing there for a short time before fleeing the scene while being chased by bicycle police. Witness Schindler's account bolsters the identification of Appellant as witness Schindler was not intoxicated, saw Appellant commit the shooting, and saw Appellant being chased by police. It should also be noted that although Appellant discussed witness Schindler in his PCRA Petition, Appellant did not appear to dispute witness Schindler's testimony.

Finally, surveillance video reviewed by this court verified the accounts of both witness McElveen and witness Schindler. The footage confirmed that Appellant shot the victim and left no doubt that the result would not have changed even if a *Kloiber* instruction had been given.

Therefore, Appellant's second issue is meritless.

3) APPELLANT'S ATTORNEY WAS NOT INEFFECTIVE FOR FAILING TO OBJECT TO THE PROSECUTOR'S QUESTIONING OF WITNESS MCELVEEN OR TO HIS CLOSING ARGUMENT.

Appellant alleged that his trial attorney was ineffective for failing to object to the prosecutor's questioning of witness McElveen and commenting during closing arguments that

McElveen feared testifying "when there was no evidence of record of any nexus between those fears and the Petitioner". This issue is meritless.

Appellant cited to Section 3-6.8 (a) & (c) of the American Bar Association Standards which read that a prosecutor "may argue all reasonable inferences from the evidence in the record, unless the prosecutor knows an inference to be false", and then discussed the inflammatory questioning of witness McElveen. This appeared to be a red herring. It is certainly true that the jury could be inflamed by asking witness McElveen if he had to be subpoenaed to appear to testify, asking if a warrant was needed to bring witness McElveen to trial to testify, and asking witness McElveen if he was afraid of being labelled a snitch if he testified. However, Appellant failed to prove that any of these questions asked by the prosecution were based on lies or any untrue information. Rather, Appellant instead argued that the Commonwealth asked these questions in order to deceive defense counsel into addressing these issues during closing argument so that the Commonwealth could similarly address these points in closing argument.

Appellant also accuses the Commonwealth of using leading questions on witness McElveen. However, the Commonwealth asked open ended questions such as "Mr. McElveen, did we subpoena you to come here to testify" to which a yes or no answer could have been given. The fact that witness McElveen was subpoenaed to testify may have caused this to be a leading question since the only honest answer was yes, but by this logic that would cause any question answered honestly to become a leading question. This can be seen from how the Commonwealth questioned witness McElveen:

> **ADA FAIRMAN:** "Mr. McElveen, you told us that you were reluctant to come to court to testify. Have people in the neighborhood where you live spoken to you about being a witness?"
> **WITNESS MCELVEEN:** "Yea."
> **ADA FAIRMAN:** "What have they called you, sir?"

WITNESS MCELVEEN: "I ain't worrying about that. We talking about this trial right now."
ADA FAIRMAN: "Did you tell us that you have been called a snitch in the neighborhood?"
WITNESS MCELVEEN: "That what happened when you go on the stand, right?"
ADA FAIRMAN: "I'm asking you."
WITNESS MCELVEEN: "Yes."
N.T. February 23, 2016, page 67 lines 20-25.

If the Commonwealth has asked this question in such a way that witness McElveen only could have answered by saying "yes", then this court would have determined the question to be leading. However, the Commonwealth made witness McElveen answer in his own words. As mentioned, Appellant attempts to frame the remaining portion of this issue as the Commonwealth deceiving Appellant's trial attorney into addressing what witness McElveen said in order to discuss it during closing argument. This court found no issue with the Commonwealth's closing argument as the Commonwealth simply addressed what was raised during trial and during Attorney Harrison's closing argument.[4]

During closing argument, Attorney Harrison stated "What did McElveen tell you? Let's get to this right away about being afraid. Did this guy look afraid to you he didn't look like it to me. Again, you're the fact-finders. You could tell by his manner of testifying he ain't afraid of nobody. He wasn't afraid of anything." *N.T. 02/26/2016, page 12 lines 6-12.* Appellant attempted to frame this as unnamed individuals trying to intimidate McElveen, yet what was testified to at trial was that McElveen did not want to be labeled a "snitch", not that he was being intimidated into not testifying. Assuming even that being labelled a "snitch" and being intimidated to not testify are the same, the testimony provided by witness McElveen separated both concepts. McElveen

[4] Closing arguments occurred on February 26, 2016. For whatever reason, the Defense's closing and the Commonwealth's closing were split into separate transcripts. Further complicating review was that, for some unexplained reason, the date of the Commonwealth's closing was listed as February 23, 2016.

testified that he was not worried about what people in his neighborhood called him, but rather that he had been called a snitch in the neighborhood. *N.T. February 23, 2016, page 67 lines 17-25.* Attorney Harrison did not explore this on cross-examination but instead during closing argument. On cross-examination witness McElveen was asked about the events of that night and testified that he was less than half a block away from the shooter when he took a photo of him and that he took a photo of the shooter before losing sight of the shooter. Regardless of being labeled a snitch or of any potential witness intimidation occurring, the timing of when the photo was taken bolsters witness McElveen's credibility.

Appellant's argument regarding prosecutorial misconduct is unconvincing. Attorney Harrison addressed any potential witness intimidation during closing argument, permitting the Commonwealth to similarly address this point. Appellant failed to explain how the Commonwealth's closing argument regarding potential witness intimidation was prosecutorial misconduct as opposed to properly addressing the closing argument made by Attorney Harrison. Appellant's accusation amounted to citing to the notes of testimony and alleging prosecutorial misconduct, which did little to convince this court that prosecutorial misconduct occurred.

Further, although Appellant disputes the testimony of witness McElveen, he fails to address that McElveen was not the only witness. Appellant fails to address testimony from witnesses such as Kenneth Schindler or P/O Tyrone Harding, both of whom testified at trial regarding Appellant. Mr. Schindler testified that he heard the shooting, saw Appellant standing over the victim, and saw police give chase to the Appellant around a corner. P/O Harding testified that he arrived on the scene, saw a man pointing out Appellant as the shooter, and testified that he put that man (McElveen) in his vehicle for questioning. P/O Harding also testified that he apprehended Appellant shortly after and identified Appellant in open court. If the case rested solely upon

McElveen and McElveen was the only witness, perhaps this claim may have merit. However, even if the Commonwealth's closing argument about McElveen was erased from this case, it does not appear that Appellant would have obtained a different result.

Therefore, Appellant's third issue is meritless.

4) APPELLANT'S ATTORNEY DID NOT FAIL TO MOVE TO SUPPRESS AND/OR OBJECT TO THE INTRODUCTION OF A PHOTOGRAPH TAKEN BY AN UNIDENTIFIED PERSON NOT CALLED TO TESTIFY AT TRIAL.

Appellant alleged that his trial attorney was ineffective for failing to file a motion to suppress or object to the introduction of a photo provided to witness McElveen by an unidentified individual in violation of the confrontation clause. This issue is meritless.

"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 defense." United States Constitution, Amendment VI. "While it is unclear when petitioner first learned that the State did not intend to call any of the patrons as witnesses, petitioner through his attorney neither served subpoenas upon the patrons before the hearing nor requested an adjournment of the hearing to permit the serving of such subpoenas. Inasmuch as petitioner made no attempt to call the patrons as witnesses in his behalf, I find that his right to confront witnesses under the Sixth Amendment and his right to due process under the Fourteenth Amendment were not violated by the court's refusal to require the State to produce any of the three patrons. In addition, my review of the testimony at trial shows that the patrons' descriptions of the photographic display procedures are

supportive of the court's finding that such procedures were not impermissibly suggestive." Sutton v. Butler, 469 F. Supp. 937, 939 (W.D.N.Y. 1979).[5]

Appellant alleged that according to McElveen, an unidentified woman named "Kareema" learned about the shooting from his Instagram post, sent McElveen a photo of Appellant with dreadlocks, and that McElveen identified this photograph as the shooter and gave it to police. In his Amended PCRA Petition, Appellant wrote the following:

> "Defense counsel failed to file a pre-trial motion to suppress McElveen's testimony about the photograph and/or object to the photograph's admission during the trial on the basis that [Defendant]'s Sixth Amendment right to confront witnesses would be violated."
>
> *Amended PCRA Petition, page 29, filed July 8, 2020.*

The Confrontation Clause bars the admission of a non-testifying witness's out-of-court testimonial statement against a criminal defendant unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness. This court considered two possibilities for this issue.

First, this court considered Appellant's issue to be that Attorney Harrison failed to object to McElveen's testimony about the photo he received. This argument outright fails: McElveen testified at trial and was thus available for cross-examination. McElveen, despite not finding the Instagram photo in question by himself, received it on his phone and, of his own initiative, showed it to police during the night of the shooting. Thus, McElveen made the identifying statement to police, not someone who was unavailable to testify. Assuming this to be Appellant's issue, it must fail for the reason that McElveen was available to testify at trial.

[5] This court found no case law that held a photograph, in and of itself, to be testimonial in nature.

Second, this court considered Appellant's issue to be that Attorney Harrison failed to object to any testimonial statement made by the "Kareema" who sent the photo to McElveen.[6] Although this was a more proper claim under the Confrontation Clause, Appellant never said what, if any, testimonial statement was provided to McElveen when he received this photo. In fact, Appellant himself stated that after Kareema sent the Instagram photo to McElveen that "McElveen identified this photograph as the shooter and gave it to police." Amended PCRA Petition, page 29, filed July 8, 2020. Appellant's argument regarding the photograph Kareema sent to McElveen being testimonial was unconvincing:

> "The highly prejudicial influence was clear: Had this 'Kareema' been called to testify, she would have told the jury that she had knowledge of Petitioner's involvement in the crime. Otherwise, why would she have sent McElveen that specific photograph and not a photograph of some other man with dreadlocks? Dreadlocks were quite common. The jury would conclude that she had key, *independent*, evidence linking Petitioner to the crime. The photograph provided the definitive identification of Petition as the person with dreadlocks that McElveen told police he had seen. Importantly, it also served to rehabilitate McElveen's trial testimony that he could not definitively testify that the man with the dreads who he saw shooting the victim was the same man as Petitioner. 'Don't look like him, but he had dreads'" (N.T. 2/23/16 pg 39-40, 42-43, 45)."
>
> *Amended PCRA Petition, pages 30-31, filed July 8, 2020.*

It must be noted that Appellant's use of the notes did not include the context of McElveen's testimony.

> **ADA FAIRMAN**: "You spoke with him. Then where did you go?"
> **WITNESS MCELVEEN**: "I was in the middle about to order a drink. Him and my man right here got into whatever whatever. I don't know what happened. I left out."
> **ADA FAIRMAN**: "You indicated a man right here. Could you point out who you are referring to?"
> **WITNESS MCELVEEN**: "Somebody who had dreads. Don't look like him, but he had dreads."

[6] This Kareema was not the same person as witness Kareema Burton and this Kareema's last name was never identified at trial.

ADA FAIRMAN: "You said the man right there is what you said; is that right?"
WITNESS MCELVEEN: "He look like it."
ADA FAIRMAN: "You said he looked different then. He pointed to the defendant, for the record. How did he, the defendant, look different that night, the night of the 15th?"
WITNESS MCELVEEN: "He had dreadlocks."
N.T. February 23, 2016, page 39 line 17 through page 40 line 10.

This court is uncertain as to why McElveen initially said Appellant did not look like the shooter, but the transcripts from trial clearly show that McElveen identified Appellant as the shooter from that night. It must be noted that although McElveen testified about the photo sent to him by Kareema, McElveen did not testify that Kareema told him anything that could be considered a testimonial statement. *N.T. February 23, 2016, pages 93-97.* In fact, when testifying as to why Kareema sent him the Instagram photo, McElveen testified "The reason why was because we all follow each other [on Instagram]. That day I put on my Instagram I was going to the Copabanana and a lot of people thought it was me that got shot."[7] *N.T. February 23, 2016, page 96 lines 4-7.* Nothing mentioned at trial could be interpreted as being a testimonial statement made by Kareema.

Further, Appellant's allegation that Kareema had information about Appellant's involvement in the crime is mere speculation. At no point did McElveen testify that Kareema identified Appellant as the shooter. Due to Kareema's absence from the scene, any statement Kareema made regarding the shooting would not be credible. Because there was no testimonial statement made by Kareema regarding Appellant being the shooter, the question then becomes whether or not the Instagram photo, in and of itself, is testimonial in nature. This court was unable to find any legal authority that has held that a photograph, in and of itself, is testimonial in nature.

[7] This Instagram photo came from an unspecified account and it is unclear whether this photo was taken from Appellant's Instagram account or the account of the woman posing with Appellant in the photo.

Even if a photo could be considered testimonial in nature, it would not have changed the outcome of Appellant's trial. The photo was provided to police by McElveen, not by Kareema. McElveen, not Kareema, showed this photo to police and described the man in the photo as the shooter. McElveen was available to testify at trial, meaning that he could be cross-examined by Attorney Harrison, and as a result Appellant's 6th Amendment rights under the Confrontation Clause were not violated.

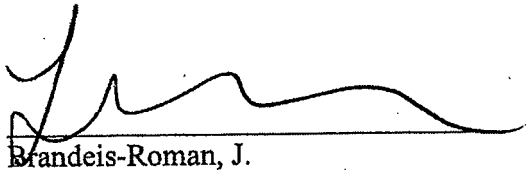
Even if the provided Instagram photo could be considered a testimonial statement made by Kareema, its exclusion from this case would not have changed the result. As already discussed *supra*, two other witnesses identified Appellant as the shooter. Further, the Commonwealth made use of surveillance footage that clearly portrays Appellant committing the murder. The footage shows Appellant outside of the Copabanana firing at the victim while other people in the area run away from the scene. Appellant fires at the victim on the ground before walking away as other people attempt to help the victim. The video matches the testimony of witnesses McElveen, Burton, and Schindler, and provides overwhelming evidence as to Appellant's guilt. Even if this court had determined that McElveen was unconscious from drinking at the time of the shooting and that the Instagram photo could be considered the very definition of a testimonial statement, the surveillance footage absolutely shows Appellant shooting the victim, as was testified to at trial.

Therefore, Appellant's fourth issue is meritless.

CONCLUSION

For the foregoing reasons, Appellant's motion for post-conviction collateral relief was properly dismissed as meritless. Accordingly, judgment of sentence should be affirmed.

BY THE COURT:



Brandeis-Roman, J.

APPENDIX

G

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

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
COREY GAYNOR,	:	
Appellant	:	No. 2654 EDA 2016

Appeal from the Judgment of Sentence March 2, 2016
in the Court of Common Pleas of Philadelphia County,
Criminal Division, No(s): CP-51-CR-0005932-2014

BEFORE: PANELLA, SOLANO and MUSMANNO, JJ.

MEMORANDUM BY MUSMANNO, J.: **FILED OCTOBER 18, 2017**

Corey Gaynor ("Gaynor") appeals from the judgment of sentence imposed following his convictions of first-degree murder, firearms not to be carried without a license, and possession of an instrument of crime.[1] We affirm.

On the night of April 14, 2014, Timothy Cary ("Cary") and his date went to the Copabanana, a restaurant and bar located at 40th and Spruce Streets in Philadelphia. During the evening, Cary was involved in altercations with several people, including Gaynor.

At some time before 1:30 a.m., Cary stepped outside and stood on the sidewalk in front of the bar with his date. Cary and Gaynor began talking again, and Cary said, "So what you want to do?" Gaynor took a step back, pulled out a gun, and shot Cary a total of 12 times. Cary was taken to the

[1] 18 Pa.C.S.A. §§ 2502(a), 6106, 907.

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Hospital of the University of Pennsylvania, where he was pronounced dead at 1:42 a.m.

Following the shooting, Gaynor walked southbound on 40th Street. Gaynor was ultimately stopped and arrested on the 4000 block of Pine Street. Police recovered a firearm, a Glock Model 37 semi-automatic handgun with obliterated serial numbers, from a nearby walkway. Gaynor did not have a license to carry a firearm.

Following a jury trial, Gaynor was convicted of the above-mentioned crimes. The trial court sentenced Gaynor to a term of life in prison without the possibility of parole on the first-degree murder conviction, and imposed no further penalty on the remaining convictions. Gaynor filed a post-sentence Motion, which was denied by operation of law on July 13, 2016. Gaynor subsequently filed a timely Notice of Appeal.[2]

Gaynor raises the following issue for our review: "Whether the trial court['s] jury instruction that [Gaynor's] carrying an unlicensed firearm may be used to infer intent for murder [was] highly erroneous[?]" Brief for Appellant at 2.

Gaynor raises a due process challenge to the trial court's instruction,

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[2] The trial court did not order Gaynor to file a Pa.R.A.P. 1925(b) concise statement of matters complained of on appeal, and no trial court opinion was filed in this matter.

based on 18 Pa.C.S.A. § 6104,[3] that the jury could infer Gaynor's intent to commit murder from his use of an unlicensed firearm.[4] Brief for Appellant at 7. Gaynor argues that "the instruction created a mandatory presumption because it undermined the fact finder's responsibility at trial to determine whether [Gaynor] was the person who killed [] Cary." ***Id.*** at 8. Gaynor claims that the instruction lessened the Commonwealth's burden to prove, beyond a reasonable doubt, the elements of first-degree murder. ***Id.***

---

[3] Section 6104 provides as follows:

> 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.S.C.A. § 6104.

[4] The trial court instructed the jury as follows:

> 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., 2/26/16, at 87 (emphasis added).

at 8-9.

> When reviewing a challenge to jury instructions, the reviewing court must consider the charge as a whole to determine if the charge was inadequate, erroneous, or prejudicial. The trial court has broad discretion in phrasing its instructions, and may choose its own wording so long as the law is clearly, adequately, and accurately presented to the jury for its consideration. A new trial is required on account of an erroneous jury instruction only if the instruction under review contained fundamental error, misled, or confused the jury.

Commonwealth v. Fletcher, 986 A.2d 759, 792 (Pa. 2009) (citations omitted).

In order to preserve a claim that a jury instruction was erroneously given, a specific objection must be made at trial. ***See*** Pa.R.A.P. 302(b) (providing that "[a] general exception to the charge to the jury will not preserve an issue for appeal. Specific exception shall be taken to the language or omission complained of."); ***see also*** Pa.R.Crim.P. 647(C) (providing that "[n]o portions of the charge nor omissions from the charge may be assigned as error, unless specific objections are made thereto before the jury retires to deliberate."); ***Commonwealth v. Moury***, 992 A.2d 162, 178 (Pa. Super. 2010) (stating that "[a] specific and timely objection must be made to preserve a challenge to a particular jury instruction. Failure to do so results in waiver." (citations omitted)). Additionally, an objection made during the charging conference is insufficient to preserve a challenge to a jury instruction, where the appellant does not also object after the

actual instruction has been given. ***See Commonwealth v. Parker***, 104 A.3d 17, 29 (Pa. Super. 2014).

Here, Gaynor objected to the charge during the charging conference, on the basis that the charge was unnecessary and "onerous," and the trial court overruled the objection. ***See*** N.T., 2/26/16, at 63. However, Gaynor failed to lodge a specific objection to the charge after it was read to the jury. ***See id.*** at 93 (wherein, after reading the charge to the jury, the trial court asked whether either party needed a sidebar, and Gaynor's counsel responded in the negative). Because Gaynor failed to object after the charge had been given, his sole issue on appeal is waived. ***See Parker***, 104 A.3d at 29.[5] Accordingly, we affirm Gaynor's judgment of sentence.

Judgment of sentence affirmed.

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[5] Even if Gaynor had preserved his claim for our review, we would conclude that it is without merit. The Pennsylvania Supreme Court has held that an instruction based on Section 6104 violates due process "when it form[s], *by itself*, the basis of a mandatory presumption of intent[.]" ***Commonwealth v. Kelly***, 724 A.2d 909, 913 (Pa. 1999) (emphasis in original). However, instructions that create a *permissive* inference of intent have been upheld. ***See Commonwealth v. Hall***, 830 A.2d 537, 549-50 (Pa. 2003). The trial court's instruction, ***see*** FN 4, ***supra***, created a permissive inference of intent, and Gaynor failed to establish that the facts of this case did not support the inference. ***See Hall***, 830 A.2d at 547 (stating that "in the case of mere permissive inferences, the constitutional challenge cannot be raised in the abstract; the defendant must demonstrate that the inference as applied to him violated his rights of due process." (citation omitted)); ***see also id.*** (noting that due process is implicated "only if, under the facts of the

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H

but have to be taken care of so we can complete this trial.

Typically you will be asked to come to Court at 9:15.

What I want you to understand is, unlike those judges on television, I normally have several cases to handle but several other attorneys that may come in.

I try to take care of the less time consuming things first and once I am done with those, I will get you into the courtroom as soon as I possibly can.

We'll take a break for lunch and then in the afternoons we will usually -- my goal will be to finish between 4 and 4:30. There will be a couple days to adjust the schedule like we had to do today, but we will let you know far enough in advance so you can work with us on that.

During the course of the day, if you feel like you need to take a break and it doesn't look like I'm not thinking about a break, raise your hand and the Court officer will come over and tell him you need to take a break. We will accommodate you with that as quick as we can.

What I find works really well is this: I give the jurors an opportunity to stand up between witnesses. I told you the Commonwealth has an obligation to call witnesses. The witness will be called, both attorneys will have an opportunity to question that witness. That witness will leave the witness stand.

If at that point anybody wants to stand up, stretch a little bit -- we recognize that it can be tiring just to sit all day and listen -- I don't have any problem with doing that.

After the first witness I will try to remember to say to you, "If anybody wants to stand up, feel free to do that." After that you are on your own. That will be the appropriate time to do that.

Each of you has your badges. That's a good thing. Keep those on during the course of the trial. That will let people know you are involved in a trial which -- let the people in the courtroom know you are involved in a trial in which testimony is being taken.

I think that's all I need to share with you right now.

I have told you, the next step is for

counsel to give you an opening statement in which we will start with Ms. Fairman. She will tell you -- give you an outline of the case of what she thinks the Commonwealth will be able to prove.

The opening statements, as with any other statements made by counsel, are not evidence in this case; just a roadmap for you.

When Ms. Fairman has finished, I will talk with Mr. Harrison and see if he wishes to make an opening statement.

* * *

THE COURT: Under each of your chairs there should be a clipboard and notebook I told you about. This will be the time you can reach under and pull that out if you would like to use it.

MS. FAIRMAN: I left my notebook outside. If I can step outside and get that.

* * *

(Pause)

* * *

MS. FAIRMAN: Commonwealth will call Timothy McElveen.

* * *

(Whereupon Timothy McElveen, having been duly sworn)

* * *

THE COURT: Both attorneys here will ask you a series of questions about the things that happened that cause you to come to Court today.

I would like for you to speak directly into the microphone. When you were giving us your name, I could not hear you very well. It will be important in order for the jurors to hear you to use the microphone.

Please speak out loud rather than shaking your head when you answer, and answer all the questions to the best of your ability.

Will you do that?

THE WITNESS: Yes.

THE COURT: You may inquire.

* * *

DIRECT EXAMINATION

* * *

BY MS. FAIRMAN:

Q Good afternoon, sir.

A What's going on.

Q I will take you back to April 15, 2014, the date that brings you to Court.

APPENDIX H
Timothy McElveen

I will ask you, back on that date, did you know a guy named Tim Cary?
A I know him, yeah.
Q You knew him?
A Yes.
Q How did you know him?
A From 'round my way.
Q How long before that night, April 15th, did you know Tim Cary?
A I don't know. I ain't see Tim in a couple years.
Q How would you characterize your relationship? Were you friends?
A Associate, he was an associate. He was cool with me.
Q On the night of April 15th – night of April 14th, Monday going into Tuesday, where were you on that night?
A I went out, and went past Copa's.
Q Is that the Copabanana?
A Yes.
Q Where is that located?
A 40th Street.
Q In Philadelphia?
A Yes.

Q Do you know what the cross street is there, 40th and what?
A Spruce.
Q Did you go there by yourself or were you with somebody else?
A A few people.
Q Do you know about what time you got to the Copabanana that night?
A No.
Q Did you notice Tim Cary at the Copabanana?
A Yeah, because he came right up to me.
Q Was that inside the Copabanana?
A Yeah.
Q Do you know how long you were there after that happened?
A I was only in there for, like, five, ten minutes.
Q In total, five to ten minutes or until he saw you?
A Five, ten minutes.
Q That's the whole time you were in the Copa?
A Right.
Q Why didn't you stay there long?
A It was dead.

Q Did you have anything to eat or drink while at the Copa?
A No. I was already drinking. I was already twisted.
Q When you spoke to Tim Cary, how long do you think you spoke him?
A Not that long. Walk past, shake my hand, happy to see me. That was it.
Q When you walked past him and shook his hand, were you in or outside?
A Front of the door, inside.
Q Door leading to the street?
A In the bar.
Q That door leads to the street; is that right?
A No.
Q You spoke with him. Then where did you go?
A I was in the middle about to order a drink. Him and my man right here got into whatever whatever. I don't know what happened. I left out.
Q You indicated a man right here. Could you point out who you are referring to?
A Somebody who had dreads. Don't look like him, but he had dreads.

Q You said the man right there is what you said; is that right?
A He look like it.
Q You said he looked different then.
MS. FAIRMAN: He pointed to the defendant, for the record.
BY MS. FAIRMAN:
Q How did he, the defendant, look different that night, the night of the 15th?
A He had dreadlocks.
Q Do you recall what he was wearing that night?
A I didn't look at all that.
Q When you saw him on the night of the 15th, you said he and Mr. Cary got into something which you said "whatever whatever."
Could you tell us what they got into?
A I don't know. Somebody bumped. A little pre hype. I left out. Me and my friends left out, left out.
Then I came back. There was a friend at the bar. I see somebody walk up, hoody on and start shooting. I was near Tim but I hauled ass.
Q You said there was this bumping inside Copabanana, right?

A Yes.
Q Were there more than two people involved in the bumping or just two people?
A What you mean?
Q Was it one person bumped into another person?
A That's how it happened.
Q It was the person here and Tim Cary?
A Yes.
Q After the bumping happened, what happened next?
A I don't know. I said I walk outside. Tim started walking outside with us because we about to leave.
Q You referred to a bumping. Were there words said?
A I don't know. I can't recall, but most likely. Probably, yeah.
MR. HARRISON: Objection.
THE COURT: Sustained.
BY MS. FAIRMAN:
Q What happened was enough to get your attention, correct?
A Yes.
Q How long did it last?

A Wasn't that long. Like, two seconds.
Q Where did Mr. Cary go?
A Somebody left out and I left out. I don't know what the fuck going on.
Q You left --
A Dude left.
Q The defendant here left? Who left, Mr. McElveen?
A I don't know if that's him. He had dreads. Totally different, if that is him.
Q You're the one that said when you sat down, you said, "The man over there, him and Tim got into something."
A Whoever had dreads.
Q You noticed this thing between Tim and the man with the dreads, we'll call him, correct?
A Yes.
Q Who left? You left and someone else left.
A Me and my family left. Tim followed us, him and his girl, talking, just talking. Had his shirt off. About to be a fight, whatever, whatever. I just left. I left out. He followed us.
I come back, talking, talking to some broads. Somebody came up and started shooting.
Q Who came and started shooting?

A Somebody with some dreads with a hoody on.
Q Was the hoody up or down, sir?
A Over his face.
Q Mr. McElveen, what happened next? How did the shooting happen? Tell us.
A We was near each other but then a body drop and I heard gunshots and I run.
I looked down the street and I see somebody walk and that was him.
Q Was who?
A The bull with the dreads.
Q Tim Cary, where was he, sir?
A On the ground.
Q What did you do when you saw this?
A Came over to Tim and see what was up with him and he was already gone, a bunch of blood.
Q Where was the blood on Tim?
A I don't know. Everywhere. There was blood.
Q What did you do next?
A I jumped in my car and see where the bull went. That's when the cops already had him.
Q Where did you go and find the cops already had him?
A Pine Street. That's where they had him

at.
Q What did you do when you saw the man on Pine Street?
A Cops pulled me over. I was dirty. They look what going on. I was intoxicated.
Q You knew what was going on, didn't you, Mr. McElveen?
A I was going where?
Q You knew what was going on around you, right?
A I was coming from Cooper's. It was my friends party. We were all drunk.
Q You knew where you were, Mr. McElveen, correct?
A Yes.
Q You knew who was around you, correct?
A Yes.
Q You recognized Tim Cary when you saw him, correct?
A Yes.
Q When you saw the man with the police officers, what did you say?
A That was him.
Q Whom?
A The guy with the dreads.

Q Did you say that to the police, "That was him"?
A Yeah.. Didn't they find the guy?
Q When you said to him, the police, "That's him," who were you saying he was?
A The shooter.
Q The shooter of Tim Cary, correct?
A Yes.
Q Were you sure about it when you saw him on Pine Street?
A Possibly, yeah.
Q Were you sure?
A Not really. I was drunk.
Q Mr. McElveen, did we subpoena you to come here to testify?
A Yes.
Q Did you tell the police detectives that you had done your duty toward Tim Cary on the night he was killed and you would not come to testify?
A Yes.
Q Did we have to get a warrant to bring you in here?
A Yes.
Q Is that because you told us that you were

afraid of testifying in a courtroom full of people and being branded a snitch?
A Yes.
Q You gave a statement that night, the night, early morning hours that Tim Cary was killed, correct?
A Correct.
MS. FAIRMAN: If he can be shown C-48. It's been premarked. It's C-48 and C-49.

* * *

(Handed)

* * *

BY MS. FAIRMAN:
Q Showing you what's marked C-48 for identification. Could you tell us what that is?
A Picture of the bull with the dreads and some girl.
Q I am asking what is C-48?
A A statement.
Q Look through that statement. Could tell us whose statement that is?
A Mines.
Q Is that your signature at the bottom of each of those pages?
A Yes.

Q In front of you is a statement that you gave to homicide, correct?
A Yes.
Q It was given on April 15th at 3:35 a.m.
A Yes. Where is the time at?
MS. FAIRMAN: If I may approach.
BY MS. FAIRMAN:
Q Is that right, 3:35 a.m.?
A Not when I was at the Copa, it wasn't.
Q When you were at homicide, when you were at the homicide unit to give the statement.
A I'm not sure. Must be, right?
Q Do you remember being interviewed at homicide?
A Yeah.
Q Taking a look at that statement, sir, is that your signature at the bottom of each of those printed pages?
A Yes.
Q Did you sign that that night, the night you were there?
A I don't remember.
Q I will ask you a series of questions in that statement, I will ask you what you do remember. Am I correct that they told you, the

homicide detectives, that they were speaking to you about the shooting death of Tim Cary on April 15th, 2014 about 1:32 a.m., correct?
A Yes.
Q You understood that they were speaking to you about that night?
A Yes.
Q Do you recall them advising you that you were not in custody and you could go at any time; you were just a witness?
A They ain't tell me all that.
Q If you look at the statement, says, "Interviewee was advised that he or she is not" --
A Where that at?
MS. FAIRMAN: If I may approach.
THE COURT: Certainly.
BY MS. FAIRMAN:
Q Right here.
A I don't see "Yes" or "No" there.
Q You don't recall being advised that you could leave?
A Not really.
Q You knew you were a witness in the --
A No.
Q You knew you were a witness in the case;

you followed the man to Pine Street and told the police that that was the shooter, correct?
A That is correct.
Q They ask you, can we agree, "Are you known by any other names or nicknames," and you say, "Just Tim."
Do you recall that?
A I don't remember.
Q Is that true, that's the only name you're known by, just Tim?
A Yes.
Q They ask, "Can you read, write and understand the English language" and you respond, "Yes."
A I can read.
Q They asked you, "How far did you go in school?"
ANSWER: "I graduated high school."
A Yes.
Q That's what it says on the form?
A Yes.
Q That's what you told them?
A I don't remember. Yes.
Q You did graduate high school, true information, correct?

A I believe so.
Q Do you recall being asked:
"Are you currently under the influence of drugs, alcohol or prescription medications and your response: "No"?
A I was intoxicated. I was at a bar. I went to a bar before that.
How -- come on.
Q Mr. McElveen, you told us that you knew where you were, correct?
A Yes.
Q You knew who was around you, correct?
A Yes. I was on. Yes.
Q You were drinking?
A Yes.
Q But not to a point where you were stumbling around and didn't know what you were doing, correct?
A Correct. You could say that.
Q I'm asking you, sir.
A Yes.
Q Do you recall being asked:
"Do you know the decedent in this matter, Tim Cary?"
A Yes.

Q The answer:
"Yes. He is a neighborhood friends."
That's what you told the police that night.
A Yes.
Q That's what you told the jurors today. That's true, correct?
A Correct.
Q Turn to Page 2 of the statement, sir.
Do you recall this question:
"How long have you known Tim Cary?"
ANSWER: "Over ten years."
Is that correct information?
A That's correct.
Q Make sure I'm reading correctly.
QUESTION: "Were you present when Timothy was shot and killed this morning?"
ANSWER: "Yes."
Do you recall giving that answer to that question?
A I don't remember.
Q Is that true, that you were present, as you just told us, when Tim Cary was shot?
A Yes.
Q QUESTION: "Did you see who shot and killed Timothy?"

ANSWER: "Yes and I pointed him out to the police."
Did you give that answer to that question?
A Yes.
Q That is true, again, sir, isn't it?
A Yes.
Q How close were you to the shooter when they shot Timothy?
A I'm not sure. It's, like, two, three years ago.
Q Can you recall being asked this question, sir:
"Can you tell me what took place that led up to that person shooting and killing Timothy?"
ANSWER: "Yes. I went to the Copabanana Bar at 40th and Spruce Street with my friend Kareem. It was kind of dead when we got there so we stayed all of about ten, 15 minutes. When I walked in, I ran into Tim and his friend. They had been there earlier and were hanging by the door."
Did you give that information to the police on the 15th of April, 2014?

A I can't remember.
Q Did you go to the Copabanana?
A Yeah.
MS. FAIRMAN: Can I have a moment to see if my video aid can come up for a moment.
THE COURT: That's fine.
* * *
(Pause)
* * *
BY MS. FAIRMAN:
Q The question says:
"Can you tell me what took place that led up to the person shooting and killing Timothy?"
I want to ask you about the information contained in that answer.
You said: "Yes. I went to the Copabanana Bar at 40th and Spruce Street with my friend Kareem."
Is that true, that you went with Kareem?
A Yes.
Q And with other people, correct?
A Yes.
Q "It was kind of dead when we got there so we stayed all of about ten. 15 minutes,"

Is that also correct information?
A Less than that.
Q "When I walked in, I ran into Tim and his friend. They had been there earlier and were hanging by the door."
Is that also true information?
A Yes.
Q I will ask you to go to the next series of questions.
When you say Tim and his friend were there, a man or woman?
A He with a girl.
Q Had you ever seen that girl before?
A No.
Q Do you know what her name is?
A No.
Q Go back to the statement, sir:
"Do you know Tim's friend's name?"
ANSWER: "No. I didn't know her but Tim introduced her to me as his friend. She is here at homicide."
A Yes. I didn't know who she was. She had a fat ass.
Q She was the woman with Tim?
A Yes.

Q That is true information in the answer that appears on your statement?
A Correct.
Q "Do you know Tim's friends name?"
ANSWER: "No. I didn't know her but Tim introduced her to me as his friend. She is here at homicide."
A I said that?
Q Do you remember giving that answer?
A I don't remember.
Q Do you remember seeing her at homicide?
A No.
Q QUESTION: "Was Tim and his friend with anyone else?"
ANSWER: "I think Tim knew one of the bouncers at the door but that's it."
Do you recall being asked that question and answer?
A I don't remember that.
Q QUESTION: "Did anything unusual happen while you were inside of the bar?
ANSWER: "No. Like I said we weren't there all that long. It was really dead. I stayed maybe ten minutes and when I came outside, Tim was standing out front with his female friend. I was

talking to this girl Kareema and her friend when I seen the guy come walking up the block. I remembered seeing him in the bar when I first got there but didn't really pay him any mind.
"Like I said, I was talking to Kareema and that's when I felt someone brushing up against my back. Right then the gunshots started going off, I turned to run.
"I ran across 40th Street towards the pizza store and turned around and looked back. That's when I seen the guy standing over top of Tim shooting down on him. I only see the guy shoot down at Tim but there were a lot more shots that went off before I turned around. After the guy stopped shooting he just walked away like nothing happened."
Do you recall giving that information?
A I can't recall.
Q Let's look at what is in that answer for a moment.
You said that part where you say, "Like I said we weren't there all that long. It was really dead. I stayed maybe ten minutes and when I came outside, Tim was standing out front with his female friend."

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Do you recall that happening on the night of April 15th?
A I can't recall.
Q You told us that you spoke to him and his friend near a door, correct?
A That was the entrance.
Q You are telling us now you don't recall seeing them outside the bar?
A I believe Tim followed me out of that bar. When I left and I was leaving he tried to leave.
Q Do you recall talking to the girl, Kareema, and her friend when you saw -- here it says, "I saw the guy walking up the block."
A I was talking to Kareema.
Q Where were you standing with Kareema?
A On the side of the pavement.
Q Is that the 40th Street side?
A Yes.
Q We can't both talk at the same time.
A Yes.
Q The 40th Street side of the Copabanana?
A Yes.
Q Were there other people outside in addition to you, Kareema and Tim Cary?
A I can't recall.

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Q What about the people you were with, where were they?
A They nowhere around.
Q You said you saw the guy walking up the block. Who did you --
A As a matter of fact, they was there. They left.
Q Your friends were outside and then they left before this happened?
A No. At the time when the shooting started everybody left.
Q You said the guy came walking up the block. What guy?
A Some guy with the dreads.
Q Where did he come walking from and what block were you talking about?
A My back was turned towards Spruce Street.
Q He came on 40th Street from Spruce Street?
A Correct.
Q It says you had seen him inside the bar. Do you remember that happening?
A Yes.
Q You say you didn't pay him enough mind but enough that you saw him again outside, correct?
A Repeat that.

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Q You said, "I saw the guy inside the bar," so you must have recognized him enough to say: "Oh, there is the guy outside," that's the same guy?
A Wasn't like that. He started shooting.
Q You recognized him enough at some point to realize you saw him in the bar?
A Correct.
Q You said he started shooting, correct?
A Yes.
Q How was he shooting?
A I don't remember that, ma'am.
Q Did you see how -- did you see the gun at all?
A No. I didn't look for it. I ran.
Q What happens as you're running, sir?
A Started shooting more.
Q You saw that happening, sir?
A No.
Q You say: "turned around and looked back. I ran across 40th Street towards the pizza store and turned around and looked back. That's when I seen the guy standing over top of Tim shooting down on him."
Is that what happened?
A Yes.

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Q You ran and looked back and saw the man shooting down on Tim, correct?
A Yes.
Q What happens next, sir, after you saw him shooting down on Tim?
A Jumped in my vehicle. And when I saw the police down the street, I ran, said that was him.
Q Before the person in the dreads came down the street from Spruce Street and started shooting, what was Tim doing?
A I don't know. Laying there.
Q Before he was shot, what was he doing right before the shooter comes back?
A I can't recall. I don't know.
Q Did you hear any confrontation between the shooter and Tim --
A No.
Q Do you know how long after you saw the man in the dreads, the shooter, come back towards the Copa that the shooting happened?
A Seconds.
Q I will ask you about the next question: "What direction did the shooter walk after the shooting?"
Do you recall being asked that

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question?
A Yeah, I believe so.
Q What direction did he go in?
A Spruce Street.
Q Down –
A Walked towards Spruce.
Q Says here, "Down 40th Street towards Pine."
A Sorry. Towards Pine.
Q Which is correct?
A He walked down towards Pine.
Q This is after the shooting, correct?
A Yeah.
Q "What did you do when the shooting stopped," is that your signature at the bottom of that page?
A Yeah.
Q Did you make that after reviewing this document when you were with homicide on the night this happened, sir?
A I can't recall.
Q The next answer, sir:
"At first I ran over to see if Tim was ok. People were coming around and someone said, "Don't touch him." I yelled for someone to call 911

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and then I took my phone out and took a picture of the guy as he was walking away."
Did you tell that to the homicide detectives, sir?
A I can't recall.
Q Is that what happened, sir?
A I can't recall. They have the photograph here and says I took it.
Q Let's skip to that.
Is that a photograph that you took with your cell phone of the shooter of Tim Cary walking away from the shooting?
A I can't recall.
Q It will be easier to see in your document.
Is that your signature at the bottom that is cut off?
A I can't see that, ma'am. It look like it. I can't really see.
Q Do you recall giving these pictures to the police detectives that night?
A Yes.
Q We were talking about this answer to this question on Page 3 of your statement:
"I wasn't gonna let the guy get away. I jumped in my car and started to follow the guy. I

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drove down 40th Street and when I got to Pine Street I lost sight of him. Penn cops were coming and one of the cops told me to back up, out of their way.
"When I started to back up, I seen the guy walking down Pine Street. The cop must have seen him and wanted me to get out of his way so he could go after dude. I backed up and let the cop go.
"Another cop was pulling up and I jumped out of my car and was pointing to the guy, telling the cop "That's him, that's him right there." Then the cops grabbed him and put him on the ground.
"I walked right up to the guy and told the cops that he was the one that shot Tim. After I pointed the guy out, I figured I was done. Then the cops told me I had to come down here for questioning as a witness."
Is that information you gave to the homicide detectives?
A All that information is not true. I pointed him out.
Q You thought when you identified the person, that is what you had to do, that was your duty to do to Tim, right?

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A Yes.
Q You didn't think you would have to testify, correct?
A Correct.
Q Do you recall being asked, sir:
"Can you describe the male that you identified as shooting Tim?"
ANSWER: "Black male, 28 to 29 yrs., brown skin, medium length dreads, wearing a gray hooded sweater and dark pants. I have a distant picture of the guy in my phone."
A Correct. I remember the dreads but not all the other stuff.
Q You gave this information to police an hour or two hours after the shooting happened. Was your memory of the events good then?
A I was intoxicated, ma'am.
Q You told us that, sir.
I will ask you to look at the next series of questions:
"Was anyone else with the male at the time of the shooting?"
ANSWER: "Not that I saw."
Is that correct information?
A Yes. I wasn't there that long. I wasn't

in there that long.
Q My question is: At the time of the shooting, was the shooter by himself or with anyone else?
A As I recall, by his self.
Q QUESTION: "You previously told me that you saw this male in the bar prior to the shooting, Was this male with anyone at that time?"
ANSWER: "I don't remember seeing him with anyone."
Is that correct?
A That's correct.
Q QUESTION: "Do you know if Tim spoke with this male prior to the shooting?"
ANSWER: "Not personally. Kareema told me that Tim had words with the guy in the bar before the shooting. Supposedly the guy was talking with the girl that Tim was with."
Is that information that you gave to the police?
A I'm not sure about if Kareema was a witness. You can ask her.
Q You told us that you remembered an encounter between --
A Over a bump.

Q That's what you remember happening.
A You then saying Kareema. I'm not sure if Kareema is a witness. You need to be asking Kareema.
Q "Would you be willing to allow me to download the photograph that you have taken of this male you identified?"
ANSWER: "Yes."
A Yes.
Q QUESTION: "Is there anything else that you can add that would be helpful in this investigation?"
ANSWER: "No. That's everything."
Is that your signature at the bottom of that page?
A Yes.
Q They have a time and date, 4/15/14, 4:30 a.m.
Does that seem right?
A Not sure, ma'am.
Q When you were with the homicide detectives, these events were fresh in your mind, correct?
A I was a little intoxicated, but I remembered what happened.

Q You were trying the best you could to give them information at that time, correct?
A Yes.
Q I will ask you to look at a photograph from Instagram.
Do you recognize the man that you see in this photograph?
A The bull with the dreads. The boy that shot.
Q This is the person that shot Tim Cary?
A I believe so.
Q Mr. McElveen, you told us that you were reluctant to come to Court to testify.
Have people in the neighborhood where you live spoken to you about being a witness?
A Yeah.
Q What have they called you, sir?
A I ain't worrying about that. We talking about this trial right now.
Q Did you tell us that you have been called a snitch in the neighborhood?
A That what happened when you go on the stand, right?
Q I'm asking you.
A Yes.

MS. FAIRMAN: No further questions.
THE COURT: Mr. Harrison, you may cross-examine.

* * *

CROSS-EXAMINATION

* * *

BY MR. HARRISON:
Q Good afternoon, sir.
A How you doing?
Q Let me make sure I got this right.
You went to the Copabanana after you left a place called Cooper's, correct?
A Correct.
Q How long had you been at Cooper's?
A Couple hours.
Q You were there with some friends of yours?
A Yes.
Q You were drinking at Cooper's?
A Yes.
Q How much did you have to drink?
A I don't remember all that.
Q You said you were there for a while, right?
A Yeah. So I had a nice couple drinks.
Q I take it they were alcoholic drinks,

right?
A Yes.
Q When you left Cooper's, were you feeling intoxicated?
A Yes.
Q I take it you drove from Cooper's to where the Copabanana was?
A Yes.
Q How many friends were with you?
A Why does that matter?
Q I'm asking the questions, sir. You answer them.
How many people were with you?
A I don't know.
Q More than two?
A Three, four.
Q At least five of you guys -- I guess all guys, right?
A I believe so. We met some girls down there.
Q You go to Copabanana and you're in there and you said it was dead in there, correct?
A Correct.
Q You said you saw somebody in there who you identified as the shooter, right?

A Correct.
Q How did you first recognize this person? How did you first notice this person?
A Recognize who?
Q This person --
A With the dreads?
Q Yes.
A Me and Tim was talking. First came in, Tim came over to me and shook my hand; happy to see me.
Q Where you're sitting now --
A I wasn't sitting or nothing.
Q Listen to the question.
Where you're sitting now, let's assume that's where you were that night in the Copabanana. Got that?
A I'm listening to you.
Q You said Tim came over to you, right?
A Correct.
Q And you and him were talking, right?
A Me, Tim and couple other people were talking, yes.
Q While this conversation was going on, did you notice anybody else in the Copabanana?
A No.

Q How and under what circumstances did you notice the person who you said was the shooter?
A Because him and Tim had words.
Q How did that happen -- let me finish the question.
How did that happen? Did the person come over to Tim or did Tim go over to the person?
A I don't know what happened. I believe they had words over the broad or a bump, a bump.
Q When you say a "bump," you mean one bumped into the other person?
A Tim had his shirt off already inside the establishment.
Q When you say he had his shirt off already, when he first came and started talking to you, was his shirt on?
A I don't remember, really. It was hot.
Q Hot inside the Copabanana?
A Was that the summertime?
Q You tell me. Do you remember when that happened?
A Let's find out. 4/15, wasn't that hot out. He had a tank top on. He didn't have no shirt on; period. Probably hot inside.
Q When he was talking to you, did he have

the tank top on, sir?
A I'm not sure.
Q When do you remember him having the tank top on?
A I remember him having the tank top on.
Q When?
A Inside.
Q At some point that tank top came off, right?
A Probably before I got there.
Q How did you see him in a tank top if he took it off before you got there?
A I'm not sure.
Q Were you that high?
A I don't get high. I drink.
Q Were you that intoxicated?
A Yeah.
Q Were you that dirty? I think that's your term?
A Dirty?
Q Wasn't that your term that you used?
A Drink and dirty is two different things.
Q At some point you don't know whether he had on a tank top?
A Yes.

Q You already looked confused about what actually happened when you went inside, correct?
MS. FAIRMAN: Objection.
THE COURT: Rephrase.
BY MR. HARRISON:
Q When you just told the ladies and gentlemen of the jury that he had on a tank top, then you said he didn't have on any shirt at all and you don't recall him taking a tank top off, aren't you a little confused about what happened that night?
A Correct.
Q When these two people bumped into one another, Tim and this other person, nothing else happened, correct; nothing else happened physically between the two.
A Tim was already hyped like something already happened when I came in. I don't know what happened when I already got there. That's what we was talking about.
Q When he was talking to you about that, you said he was hyped, right?
A Right.
Q Was he angry?
A No. He just introduced me to his woman.

Q He introduces you to his woman.
Was his woman standing there when the two people bumped?
A I don't know. You need to ask her.
Q I'm asking you about what you saw, sir.
A I'm telling you I'm not sure.
Q You're not sure about that, either, right?
A I'm not sure.
Q Let me --
A His woman, he said, "This is my girl."
I said, "Blah;" whatever, whatever.
Q As you sit here now, you don't recall whether the girl was standing there when the two people bumped into one another.
A No.
Q The guys that came there with you, were they standing around with you --
A Yes.
Q Let me finish.
Were they standing around with you as you and Tim were talking and he was introducing you to his girl?
A I'm not sure.
Q What are the names of your friends?
A What that got to do with this?

Q What are the names of your friends?
MS. FAIRMAN: Objection to relevance, your Honor.
THE COURT: Sustained.
BY MR. HARRISON:
Q You and four friends were with you, correct?
A Correct.
Q When you spoke to the police at some point, did you tell the police who was with you that night?
A I'm not sure.
Q Do you know whether the police asked you was anybody else with you when Tim introduced you to his girl?
A I'm not sure.
Q You said you weren't in the Copa very long, right?
A Right.
Q After these two people bumped into one another -- and you don't remember what that other person had on, right, do you?
A What?
Q You don't remember what that person had on that bumped into Tim, right?

A No.
Q Once this bumping took place, do you know where that person who bumped into Tim went?
A He walked off.
Q When you say "walked off," walked off into the club?
A Walked off outside the club, came back.
Q That person left the club and you said he came back?
A Yeah.
Q How much time past between the time you said he left the club and came back?
A I'm not sure. Seconds.
Q Do you see that clock up there?
A Yeah.
Q Look at it.
A I know.
Q When the hand gets to the 10, that's when he walks out. Stop me when he walks back in.
* * *
(Pause)
* * *
THE WITNESS: Now.
BY MR. HARRISON:
Q That quick; he --

A Seconds. A couple seconds, like, 10 seconds. He didn't walk back up in. He walked up on Tim.
Q He walks out and 10 seconds later he walks back in, correct?
A After the bump happened, I roll. Tim followed us, still talking.
Tim thought it -- Tim probably thought it was over with. Somebody walked up and started shooting at him.
Q Did you not just say a couple seconds ago that the person walked out and came back in 10 seconds later?
A Why would he come back in? Did he get shot inside?
Q I'm asking the questions. You answer the questions.
A Did he get shot inside?
THE COURT: You answer the questions, please.
BY MR. HARRISON:
Q Did you not just say a couple seconds ago that the person walked outside and 10 seconds later he walked back in, did you not just say that?
A I'm not sure what I said.

Q Fair enough.
After you and Tim had this little conversation, you and your friends walked outside, right?
A Correct.
Q Then you said Tim walked out behind you, correct?
A I don't know if he walked right behind me. I know Tim was outside with us.
Q He was outside with you, correct?
A Correct.
Q When he walked outside with you -- tell me if you know this: Was the girl that he introduced you to outside, as well?
A I'm not sure, but she supposed to be testifying, so you need to ask her. I believe she was there.
Q When you walked outside, how soon after you walk outside did you have this conversation with Kareem?
A Couple seconds, because that's how fast everything happened.
Q Was this right outside of the door to the club or was it further up the street, if you know?
A If you go to the Copabanana, there is a side door and it happened there.
Q It happened right at the side door?
A Yes.
Q When this person walked up, did you see where that person came from?
A My back was turned, so he had to come from up Spruce Street.
Q When you say his back was turned and he had to come from Spruce Street, where you were standing, how far was Spruce Street from you, if you know?
A Couple feet.
Q Did you hear any conversation between that person who was walking back up from the Spruce Street way and Tim, did you hear any conversation between the two of them?
A No.
Q Did you ever hear Tim invite the guy to come over and say, "What do you want to do?"
A Yes.
Q Do you know who said that?
A Who said what? Tim said, "What's up?"
Q He said, "What's up?"
A Yeah.
Q Did he also say, "What do you want to do?"

A I can't recall.
Q You can't recall?
A Basically wanted to rumble.
Q Who wanted to rumble?
A Tim.
Q Tim wanted to rumble?
A Yes.
Q Did you see him make any movement towards his waist?
A I don't know all about that. I'm talking to the female. I don't know about all that.
Q You said Tim wanted to rumble?
A Correct.
Q How did you know he wanted to rumble?
A Because the way he approach him, he said, "What's up?" He had his shirt off.
Q You mean just the way he walked up to this person?
A I don't know if he walked up or they both probably met each other. I don't know how it really went down because my back was turned.
Q Your back was turned to Tim and this other person?
A Yeah, because I was talking to Kareema.
Q When Tim did that, like he wanted to

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rumble, how many people outside, if you know?
A I'm not sure. Me and a couple women, my man, somebody else.
Q Who else?
A My hommie.
Q Was it well lit outside where you were?
A What you mean by well lit?
Q Like here; lights.
A Dark.
Q I think you were shown C-49, the picture. Did that person who is in that picture pose for you?
A Pose for who?
Q You took this picture?
A Why would I take that picture?
Q You didn't take the picture?
A Hell, no.
Q You didn't take that picture?
A Why would I take a picture of people I don't know?
Q You took a picture that you said was in your phone, correct?
A Correct.
Q That picture that was in your phone, there was a picture of somebody coming out of the door; do you remember that?

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A Correct.
MS. FAIRMAN: The picture attached to his statement?
MR. HARRISON: Yes.
BY MR. HARRISON:
Q Do you see that person in the yellow pants?
A Correct.
Q Do you know who that was?
A No.
Q When you were referring to the side door to the Copa, would that be it?
A No.
Q The side door would be out of the picture?
A It would be in the back of that picture.
Q Show us where it would be.
A It's not on there.
Q You said behind this door, right?
A There is a side door they have.
Q Are there any other people depicted in this photograph?
A The shooter walking off.
Q Which one is that?
A See it?
Q That's the person there?

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A Yeah.
Q If you know, do you know how far you were from that person?
A I was in front of Tim.
Q Right in front of Tim?
A Laying on the ground.
Q When you took that picture, would you -- say where you are now is where you were back then when you took that picture; okay? Would you point to some place in this courtroom or beyond where that person would have been, how far away.
A Far.
Q Half a block?
A No.
Q Further than that?
A Half a block or less.
Q After you took that picture, is that when you got in your car?
A Yeah.
Q Where was your car parked --
A Across the street from Copa.
Q You ran and got in your car?
A Yeah.
Q How long did it take you from the time you took that picture until you ran to your car?

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A Not far.
Q I said "how long"?
A Seconds.
Q You get in your car. Was your car pointed in the same direction as the person was walking?
A Yes.
Q You get in your car and you follow that person, right?
A I didn't follow him. I made sure the cops was out there -- there was a bike cop out there, also.
Q You said a bike cop?
A Yes.
Q When you followed that individual, how long do you follow him?
A I'm not sure, sir.
Q Throughout this whole thing you never saw a gun, did you?
A Yeah. It went off.
Q Can you describe it?
A No, I can't describe it.
Q How many shots do you recall being fired?
A A nice amount.
Q I got that.
A A whole clip, maybe 10.

Q Were these shots in succession, right behind the other?
A Yes.
Q Going back to why you were following this individual: After this incident ended, did you see the gun?
A No. He put it in his pocket and walked off.
Q You saw this person put it in his pocket?
A I believe so.
Q As this person is walking away, at some point you lose sight of this person, correct?
A Correct.
Q Does that mean that person turned the corner?
A Yes.
Q From the time you lost sight of him until you saw this person again, how much time would you say passed?
A All the cops was coming.
Q How long do you think it took?
A I'm not sure.
Q How close did you get up to this person to say this person is the shooter? How close did you get to him?

A To where that door at they had him where you are right --
Q Say that again.
A They had him where you at on the ground. The detective said was that him, I said, "Yes." They said they found the murder weapon.
Q When that happened you pointed to him and you were pointing to where you are now to that door, correct?
A Yes.
Q When you pointed at him, was this person on the ground or standing up?
A I'm not sure.
Q When you pointed at him, could you see this person's face?
A Saw his dreads.
Q Is the answer to my question you couldn't see his face; you could see his dreads?
A Yes.
Q How long did you stay out there before you went down to homicides?
A Car is parked in the middle of the street. Told me to park the car and put me in the cop car.
Q When they transported you down there, did they transport anybody else along with you?

A No, not in mines.
Q When you were giving this statement to the police, did the police talk to you first before they wrote anything down?
A Talk to me about what?
Q About what you may have seen.
A Yes.
Q They talked to you before they wrote anything down.
A Not talk to me. What do you mean by talking to me? Did I see what happened?
Q Yes.
A Yes.
Q You told them what was contained in this paper?
A Yes.
Q You said there were a couple things that you didn't say, right?
A What's that?
Q When you were being asked about looking over the statement, you said there were a couple things you didn't say.
A I didn't say I didn't say. I don't remember. Been almost two years now.
Q One thing you said, Page 2, you said, "She

is now here at homicide." You said you didn't say that.
A I don't remember saying that.
Q When you were asked, "Did anything unusual happen," same page, "Did anything unusual happen while you were inside the bar," you said you couldn't recall.
A I can't recall.
Q You mentioned something about some bouncers, right?
A Who?
Q You.
A I can't recall.
Q Let's look at Page 2, four questions from the bottom:
"Was Tim and his female friend with anyone else?"
Do you see that question?
A Yeah.
Q Do you see it?
A Right.
Q It's four Qs from the bottom. Do you see that?
A Yes.
Q Your answer was:

"I think Tim knew one of the bouncers at the door, but that's it."

Do you see that?

A I can't recall saying that.

Q Do you recall whether or not there were bouncers there that night?

A Copabanana always got bouncers on Mondays.

Q Do you recall independently whether or not there were bouncers there that night?

A I can't recall.

Q How many bouncers are usually there?

A Two, at the most.

Q If you know, are they situated near the door?

A Yes.

Q As you sit here today, you don't have an independent recollection whether or not there were bouncers at the door on this Monday night?

A It was late night when we went in there, so that's probably why.

Q Was it a little after 1:00 that you got there?

A It was real late because I just came from Cooper's.

Q Did you drink anything while in the Copabanana?

A No.

Q Did you recognize anybody else in Copabanana other than the friends you took there?

A No.

Q When you were giving your statement, were you still feeling the effects of what you were drinking?

A I was in shock that somebody that I knew got killed. That was a little hard. I was a little on.

Q When you say you were "a little on," what does that mean?

A Twisted, drunk.

Q The answer to my question, then, when you gave this account to the police, you were drunk?

A Yes.

MR. HARRISON: That's all I have.

THE COURT: Anything else?

MS. FAIRMAN: I do, your Honor.

* * *

REDIRECT EXAMINATION

* * *

BY MS. FAIRMAN:

Q The bouncers, were they patting people down when they came into the bar?

A I'm not sure because it was late night. Sometimes they do pat you down.

Q You don't recall as you sit here what they usually do?

A Yeah. It was Monday.

Q You told counsel -- I'm trying to understand the sequence of events.

You told counsel that you saw the shooter leave the Copabanana, correct, and come back outside, correct, from Spruce Street?

A Yeah.

Q Is that right?

A Yes.

Q Were you watching your watch when that was happening?

A No.

Q Were you talking to your friends?

A Yes.

Q After you noticed the guy coming back and you said he came back from Spruce Street, how much time is there -- you said there was going to be a rumble -- how much time between when the guy comes back and shooting happens?

A What you mean?

Q You said the guy comes back from Spruce Street --

A I believe Tim noticed him.

Q You could see Tim notice him, is that what you're saying?

A It had to be because he said, "What's up?"

Q Tim said, "What's up," correct?

A Right.

Q Tim is wearing that white tank top, correct?

A Correct.

Q Does the shooter say anything back to him?

A No.

Q What does the shooter do?

A Shoot.

Q Did you ever see a gun in anybody else's hand besides the guy that was shooting Tim?

A No.

Q You told counsel that when you got around to where the police had the shooter on the ground that you saw dreads, correct?

A Yes.

Q Isn't it true that you saw his face, the person they had in custody, sir?

A I'm not sure. I saw dreads. They wanted me so bad, not locking me up, but to come to homicide.
Q They wanted you to come to homicide to tell the homicide detectives what happened to Tim Cary, correct?
A Yes.
Q Isn't it true, sir, that you did see the face of the shooter clearly as he shot Tim Cary?
A That's not true, because he had dreads.
Q Isn't it true, sir, that that photograph that we marked C-49 is a photograph that you found on Instagram?
A Yeah.
Q And you gave to the homicide detectives?
A Yes.
Q Because when you saw that photograph you recognized the shooter that you had seen shoot your friend, Tim Cary?
A Yes.
MS. FAIRMAN: No further questions.
THE COURT: Any recross?
MR. HARRISON: Yes.
* * *
RECROSS-EXAMINATION

* * *
BY MR. HARRISON:
Q Do you remember being patted down that night when you went into the Copabanana?
A No.
Q Any metal detector there?
A I don't know. It was at night -- that night?
Q Yes.
A No.
Q When did you pull that photograph down from Instagram and show the police, when did you do that?
A I don't know.
Q You didn't do it that night, did you; that is, the night this interview was taken, April 15th at 3:00 in the morning?
A I can't recall.
Q How did you get to that photograph?
A Somebody I know who follow me sent it to me.
Q Who sent it to you?
A Somebody that I know.
Q I know it's somebody that you know. Who is that person that you know?

A Kareema.
Q Kareema sent you that photograph, correct?
A Not the Kareema that is supposed to be testifying tomorrow.
Q A Kareema sent you the photograph?
A Correct.
Q You don't recall when exactly she sent you that photograph?
A No. The cops was right there when I got the photograph.
Q When you say "the cops are right there," did this happen the same night?
A Yes.
Q So I'm clear: When this photograph was sent to you, had you already given this statement or before you gave the statement?
A After.
Q After you gave the statement?
A Correct.
Q When this photograph was sent to you from Kareema but not the Kareema you say you were talking to, this is some other Kareema, right?
A Yes.
Q This other Kareema that you know, was she at the bar that night?

A No.
Q Did she tell you why she sent you that photograph when she wasn't there?
A No. The reason why was because we all follow each other. That day I put on my Instagram I was going to Copabanana and a lot of people thought it was me that got shot.
Q A lot of people thought it was you who got shot?
A And killed.
Q You get a picture from Kareema who wasn't there, right?
A They wrote down my timeline and I gave it to the cops.
Q You?
A I downloaded -- I wrote down my timeline and gave it to the detectives.
Q I got that.
Correct me if I'm wrong: This photograph that you gave to the detectives you said Kareema sent to you, correct?
A Yes.
Q It's not the Kareema that you were talking to that night, correct?
A Correct.

Q This was somebody else?
A Correct.
Q That person wasn't at the bar that night, correct?
A I'm not sure if she was or not.
Q You didn't see her, did you?
A No.

MR. HARRISON: That's all I have.

THE COURT: You may step down. You may be excused.

* * *

(Witness excused)

* * *

THE COURT: I will ask you, please, if you will put your notebooks on your seats and step out into the deliberation room.

* * *

(Whereupon the jury panel, having been excused from the jury box)

* * *

(Whereupon this Court stands in recess)

* * *

(Whereupon this Court is back in session)

* * *

(Whereupon the jury panel, having been

seated in the jury box)

* * *

THE COURT: All 14 jurors are present, the defendant is here, as well as both counsel.

Call your next witness, please.

MS. FAIRMAN: Commonwealth would call Kareema Burton.

* * *

(Whereupon Kareema Burton, having been duly sworn)

* * *

THE COURT: Good afternoon, Ms. Burton.

THE WITNESS: Good afternoon.

THE COURT: Ms. Burton, both attorneys will ask you a series of questions about the things that happened that cause you to come to Court today.

What I would like for you to do is take your time, answer all of their questions to the best of your ability.

Right in front of you is a microphone. Please speak directly into the microphone and speak out loud so we can hear your answers.

Will you do that?

THE WITNESS: Yes.

THE COURT: Fine enough.

* * *

DIRECT EXAMINATION

* * *

BY MS. FAIRMAN:

Q Ms. Burton, how old are you?
A 27.
Q I want to take you back to April 15th of 2014, the day that brings you to Court.

On that date, were you in a place called the Copabanana?
A Yes.
Q Do you know about when you got to the Copabanana?
A It was around maybe 12:00, 12:00 a.m.
Q 12 midnight?
A Yes.
Q Were you with somebody else or by yourself?
A A friend; Linda Jackson.
Q When you went to the Copabanana that night, were you celebrating?
A Yes.
Q What were you celebrating?
A She just got a new job. We went out to

celebrate.
Q Did there come a time that somebody got shot at the bar?
A Yes.
Q Let me ask you about the time before that. I will give you that as a point of reference.

Did you know the man who got shot at the bar that night?
A No.
Q Had you ever seen him before the time he gets shot?
A No.
Q Did you see him inside the bar?
A Yes.
Q When did you see him inside the bar; how long before the shooting?
A I don't remember how long.
Q Was it minutes, hours? Don't guess.
A Minutes.
Q Why is it that you noticed him?
A Him and his girl friend was sitting next to me at the bar.
Q Had you ever seen her before?
A No.
Q While you're in the bar and -- maybe I

APPENDIX H
KAREEMA BURTON

asked this: Do you know how long you were in the bar that night?
A Maybe, like, an hour and a half, two hours.
Q Did you have anything to drink while you were there?
A Yes.
Q What did you drink?
A Margaritas and shots.
Q Do you know how many margaritas and shots?
A Two margaritas and one shot.
Q In the time you were in the bar celebrating that night, do you remember any trouble in the bar?
A No.
Q Does there come a time when you and Ms. Jackson decide to leave the bar?
A Yes.
Q What happens?
A We went outside and we seen mutual friends and we was standing outside talking to them.
Q You were talking to some friends outside the bar?
A Yes.
Q Do you remember if you were on the 40th

Street side of the Copabanana at that time or Spruce Street side?
A I think the Spruce Street.
Q What happens while you're talking to your friends?
A A guy came up and started shooting. I seen the guy go down.
Q The guy who came up and started shooting, had you seen him before?
A No.
Q Did you see anybody else using a gun or with a gun except for the guy who was shooting?
A No.
Q What was the guy who was shot -- do you remember seeing him right before he was shot?
A I was seeing him standing, like, on a car, I think.
Q Standing on a car?
A Standing next to a car.
Q Did you hear any words exchanged between him, the guy who was shot, and the shooter?
A No.
Q Do you know how many times the guy shot?
A No.
Q What did you do when the shooting happens?

A I ran behind a car.
Q What happens next?
A I ran behind the car and then I waited for everything -- the shots to stop. I went to go look for my friend.
Q That was Linda?
A Yes.
Q Do you find Linda?
A Yes.
Q Is she okay?
A She was okay.
Q Did you see where the man who did the shooting -- where he went after the shooting?
A No.
Q What happens next?
A The cops took us in the car and took us to a block, asked us -- he brung a guy out of the car and asked us if that was the guy.
Q What did you say?
A I said, "Yes."
Q Was it the same guy that you seen do the shooting?
A Yes.
Q When the guy did the shooting, how far from you was he?

A He was close to me.
MS. FAIRMAN: If I may, if I can approach the witness.
THE COURT: Fine.
BY MS. FAIRMAN:
Q If you are you at the time and I am the shooter, can you tell me where the shooter was standing in relation to you?
A A little further.
Q Like this?
A Further.
Q Here?
A Right there.
Q This close to you?
A Yeah.
Q About two feet?
THE COURT: Three feet.
BY MS. FAIRMAN:
Q Was there street lighting outside the Copabanana that night?
A Excuse me?
Q Were the streetlights on outside the Copabanana that night?
A I don't remember.
MS. FAIRMAN: No further questions.

KAREEMA Burton

THE COURT: Cross-examine.

* * *

CROSS-EXAMINATION

* * *

BY MR. HARRISON:

Q Good afternoon, ma'am.
A Good afternoon.
Q Ma'am, you said you went to the Copabanana on -- you went around midnight, April 15th, 2014 to the Copabanana?
A Yes.
Q You went there with your friend, Linda?
A Yes.
Q You went inside of the Copabanana?
A Yes.
Q When you went at midnight inside the Copabanana, were a lot of people in there?
A Yes.
Q How many people would you say were in there?
A I don't know.
Q 10?
A More than 10. It was a lot.
Q A lot of people?
A Yes.

Q Was it more than 20?
A It could have been, yes.
Q You go into the bar and you said you had two margaritas and a shot?
A Yes.
Q A shot of what?
A I don't remember what kind of shot it was, but I remember I had a shot.
Q How long were you in there, in the Copa, before you got a drink?
A Maybe five minutes.
Q Do you recall whether or not there were any bouncers in there?
A No.
Q That wasn't the first time you were at that bar, was it?
A No.
Q You have been there several times?
A Yes.
Q While you were at the bar you waited five minutes, you get a drink, right?
A Yes.
Q Were you at the bar itself?
A Yes.
Q You were sitting down, you said?

A I was sitting and standing up at different periods.
Q You and Linda were talking to one another?
A Yes.
Q Did you know anybody else inside of the bar?
A No.
Q You said the bar was crowded. Was music playing?
A Yes.
Q Loud music?
A Not that loud. You could talk to each other.
Q There was music playing?
A Yes.
Q While the music was playing and you were talking to Linda, you said you didn't notice anything happening inside the bar, did you?
A No, I didn't.
Q How long were you in the bar before you left?
A I don't remember how long I was there for.
Q You know you got there around midnight, correct?
A Yes.

Q This shooting that you described, can you estimate to us about how much time past between the time you first got into the bar until you heard these shots?
A Over an hour, I think.
Q At some point you said that while you were in the bar there were two people that were sitting next to you that you noticed, right?
A Yes.
Q What made you notice those two people?
A They were standing next to me and after everything had happened from the end of the day, I noticed them because they were sitting next to me.
Q What does that mean?
A After everything happened and I was at the police station and I seen the people -- I seen the victim's girl friend and I noticed her from sitting next to me.
Q When they were sitting next to you, did you speak to them at all?
A I don't remember.
Q The person who was shot, you recognized him from being inside of the bar, right?
A I recognized him being where?
Q In the bar. You said the girl friend was

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sitting next to you, correct?
A Yes.
Q I guess the person who was shot was sitting next to her, right?
A Yes.
Q That would be two stools down from where you were?
A Yes.
Q How long were they sitting next to you?
A The whole time I was there.
Q At least over an hour, right?
A Yes.
Q Did you see any other gentleman come up to the girl friend of the person who was eventually shot?
A No.
Q You said that while you were there for that hour and something you didn't notice any altercation, nobody getting angry, right?
A No.
Q The person who was sitting next to the girl who was sitting next to you, do you remember what that person had on?
A No.
Q The person who was sitting next to the

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girl, did he have on a shirt?
A I don't know.
Q If the person had on no shirt, would you have remembered that?
A Yes.
Q As you sit here today, you don't remember the person who was sitting there not having on his shirt, right?
A No.
Q That person who was sitting in the bar next to the young lady, do you know how tall he was?
A No.
Q Do you know how big he was?
A No.
Q Do you know his complexion?
A No.
Q Do you know anything about his hairstyle?
A I remember he had dreads.
Q This is the person sitting next to the girl who is sitting next to you, right?
A You have me confused.
Q You were sitting at the bar, right?
A Yes.
Q You said the guy's girl friend who you saw down at the police station was sitting next to you.

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A Yes.
Q Sitting next to her with that girl, right?
A Could you repeat?
Q There was a girl sitting next to you that you recognized down at the police station as being in the bar next to you?
A Yes.
Q There was a gentleman sitting next to her?
A Yes.
Q That person who was sitting next to her you said had dreads?
A Yes.
Q You don't know about that person's size, right?
A No.
Q You don't know how tall he is?
A No.
Q You don't know his complexion?
A No.
Q Did they remain sitting next to you the entire time you were sitting there?
A Most of the time, yes.
Q Do you know anybody by the name of Tim McElveen?
A No.

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Q At some point you came out of the bar with your friend, Linda, right?
A Yes.
Q How many doors are there to the Copabanana?
A Two doors, that I know of.
Q Front door and side door?
A Yes.
Q Which door did you come out of?
A Front door.
Q When you came out you were standing out in front of the Copa?
A Yes.
Q How close to the front door were you?
A Very close.
Q Linda was standing there with you, right?
A Yes.
Q Right next to you, right?
A I don't think she was next to me but she was around me.
Q How long were you guys talking to one another outside before something happened?
A Five minutes.
Q When you were outside talking, did the person who you saw sitting in the bar come out, the

girl who was sitting next to you?
A Yes.
Q You saw them come out?
A I didn't see them come out. I seen them outside.
Q How long were you outside before you noticed them?
A I didn't notice them outside.
Q You didn't notice them outside?
A No.
Q Fair to say you didn't actually see them come out of the Copa?
A I didn't see them come outside.
Q Other than Linda who you were talking to, did you talk to anybody else outside of the club?
A Yes.
Q Who did you talk to?
A One of my friends that I seen outside.
Q Male or female?
A Male.
Q Do you know that person's name?
A Yes.
Q What's his name?
A Kaseem.
Q You say you don't know a Tim, right?

A No.
Q The name Kaseem, is that a proper name or nickname?
A Proper name.
Q Kaseem, can you describe him for me?
A Light skinned with dreads and medium build.
Q Do you remember what he had on that night?
A No.
Q Did you see anybody that night with a hoody on?
A No.
Q You are outside, you, Linda, Kaseem and you are all talking?
A Just me and Kaseem was talking.
Q Then you heard gunshots?
A Yes.
Q You didn't see where those shots were coming from, did you?
A No.
Q When you heard the first gunshot -- by the way, how many did you hear?
A I don't remember.
Q When you heard the first gunshot, what's the first thing you did?

A I ran.
Q Where did you run to?
A Behind the car.
Q When you were running away you heard additional shots, right?
A Yes.
Q You didn't turn around to see where those shots were coming from; fair?
A Yes.
Q You run behind the car, right?
A Yes.
Q Are the shots still going off?
A Yes.
Q You didn't look out to see where those shots are coming from; fair?
A No.
Q No, that's not fair?
A I didn't look out to see where they were coming from.
Q You never actually saw a shooting; fair?
A Right.
Q I take it after the shots stopped you then came from behind the car to look for your friend, Linda?
A Yes.

Q When you were talking to Kaseem, did you ever tell Kaseem that you saw an argument anywhere?
A No.
Q From the time you came out of the bar until the shots ended, how much time would you say past?
A I don't remember.
Q After the shots stopped and you started looking for Linda, how long did it take for you to find her?
A A couple minutes.
Q Where was she when you found her?
A She was on the next block.
Q Would that be a block away from where you hid behind the car?
A Yes.
Q This car that you hid behind, where was it in relation to the door you came out of?
A On the corner of the block.
Q 40th and Spruce?
A Yes.
Q Would you say that you were half a block away from that door?
A Yes.
Q How did the police come to pick you up?

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A When I found Linda the police were there and put us in the car.
Q When the police took you to wherever they took you -- do you know where that was?
A I don't remember.
Q What did they do when they took you to wherever they took you?
A They took us and they pulled a guy out of the car --
Q Excuse me. They pulled a guy out of a car?
A Yeah.
Q They pulled a guy out of a car?
A Yes.
Q Do you remember what he looked like?
A No.
Q When they pulled this guy out of the car, what did the police say to you?
A They asked us was that the guy that did the shooting.
Q And you said, "Yes"?
A I said, "Yes."
Q Although you didn't see the shooting, right?
A No.

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Q That's not right?
A Right.
MR. HARRISON: That's all I have.
THE COURT: Redirect?
MS. FAIRMAN: Yes.

* * *

REDIRECT EXAMINATION

* * *

BY MS. FAIRMAN:

Q Ms. Burton, you said you are standing outside the bar and the man comes up next to you and you put me where he was, right next to you and a little behind?
A Yes.
Q The shooting starts, correct?
A Yes.
Q The man is still right where I am now, correct?
A Yes.
Q You see his face at that time, don't you, ma'am?
A I didn't turn around.
Q Did you see his face, ma'am?
A No.
Q You told us that when you saw the man on

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the street, you said that's the man who did the shooting, right?
A Yes.
Q I asked you, didn't I, I said was it the man that did the shooting and you said "Yes;" isn't that correct?
A Yes.
Q That's because you saw him do the shooting, ma'am, isn't it?
A I didn't turn around when the guy was shooting.
Q You told us that's the man that did the shooting when you picked him out.
A Prior to that, before the shooting, I seen the people around.
Q Ma'am, you told us that the man came up right next to you, correct?
A He was beside me, yes.
Q He starts shooting, correct?
A Yes.
Q When the police ask you who -- to look at this man and you say "Yes", that's the shooter, why did you say that, ma'am?
A I seen him on the side.
Q Next to you --

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A But I didn't see him when he was shooting.
Q When is it that you saw him come up to you?
A Before the shooting.
Q How long before the shooting?
A It guess not that long, not long at all.
Q Are you telling us that he comes up next to you, he is right here, you see him now and then the shots start?
A Yes.
Q Where are the shots coming from?
A From next to me.
Q From right next to you, aren't they?
A Yes.
Q Do you know which direction you were facing at that time?
A I was facing -- the shooter was this way and I was facing this way.
Q Where was the victim?
A In front of me somewhat.
Q Was the shooter between you and the street as he stood here? Was the street here or the Copabanana here?
A Copa was behind and he was here and I was a little further up and the guy that got shot was in

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front of me, like standing in front of a car.
Q The guy comes up next to you, correct?
A He stood next to me.
Q You see him?
A Yes, I seen him, but before the shooting.
Q A second later shooting starts?
A Yes.
Q Coming from right next to you, right?
A Yes.
Q I want to make sure of one thing: The person you had seen inside the bar with the girl friend, was that the person who gets shot?
A Yes.
Q You saw the girl friend again at homicide when you went up to homicide?
A Yes.
Q When the shooter comes up right next to you right before the shooting starts, did the victim react in any way? Did you see him do anything?
A No.
Q Did you see a gun in anybody else's hand beside the shooter's?
A No.
Q Did you see the gun in the shooter's hand?
A No.

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Q You saw his face, though?
A Yes.
Q It's the same face that you identify when you see him with the police minutes later, correct?
A Yes.
MS. FAIRMAN: No further questions.

* * *

RECROSS-EXAMINATION

* * *

BY MR. HARRISON:
Q Ma'am, you told us you were standing outside the Copabanana, correct?
A Yes.
Q Somebody came to the side of you, right?
A Yes.
Q That person didn't do anything to make you notice him, did he?
A No.
Q You didn't look at that person, right?
A I seen him but I –
Q You said the person you saw was the snap of a finger?
A Excuse me?
Q You said the person you saw from the side, side of your eye?

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A I didn't see him from the side of the eye. I turned around. I seen a lot of people. I turned to his side.
Q The people you were looking at though, you didn't look at for very long; is that fair?
A The people I was talking to?
Q The people you said you were looking at around you, you just looking just like I'm looking, not fixating on any one person; fair?
A Correct.
Q You didn't see a gun prior to the shooting, right?
A Right.
Q When you heard the gunshot, you broke camp; right or wrong?
A Right.
Q You run and hid until the shots were over, correct?
A Correct.
Q Then you were taken someplace to be shown somebody; somebody was brought out to you and you were asked what?
A Was that the guy.
Q Was that the guy that did the shooting; they suggested that to you, correct?

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A Yes.
MR. HARRISON: That's all I have.
THE COURT: The witness may step down. You may be excused. Do not discuss your testimony with anyone.
Thank you.

* * *

(Witness excused)

* * *

MS. FAIRMAN: Commonwealth would call Officer Fox.

* * *

(Whereupon Police Officer Lamont Fox, having been duly sworn)

* * *

THE COURT: Good afternoon, officer.
MS. FAIRMAN: I ask if he could be given what's premarked C-1 through C-26 and then C-29. We can go all the way down to C-36, then 27-A and 28.

* * *

(Handed)

* * *

MS. FAIRMAN: I have two placards, C-27. Smaller one is C-27-A and smaller one in your

PROOF OF SERVICE

I, Corey Gaynor, do declare that on this date I have served the foregoing APPENDIX to my Petition for Writ of Certiorari upon the attorney for all respondents, Andrew Metzger, Assistant District Attorney of Philadelphia County, Pennsylvania, by depositing the same in the prison mailbox in an envelope with prepaid postage to be mailed by first class U.S. Mail.

SERVED COUNSEL FOR ALL RESPONDENT PARTIES

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