

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

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**UNITED STATES**

**v.**

**JAKE KELLY**

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**CRIMINAL ACTION**

**NO. 04-605**

**DuBois, J.**

**November 21, 2014**

**MEMORANDUM**

**I. INTRODUCTION**

On July 21, 2005, petitioner Jake Kelly was convicted of possession of a weapon by a convicted felon in violation of 18 U.S.C. § 922(g)(1) and § 924(e). On August 1, 2005, Kelly filed a Motion for New Trial and Leave to Supplement pursuant to Federal Rule of Criminal Procedure 33(a). By Order dated August 3, 2005, this Court granted Kelly leave to supplement his Rule 33 Motion. On October 6, 2005, Kelly filed “Supplemental Post-Verdict Motions” (hereinafter Kelly’s Supplemental Motion for New Trial), which included new grounds for Kelly’s Motion for New Trial under Federal Rule of Criminal Procedure 33(a) and a motion for new trial under Federal Rule of Criminal Procedure 33(b) based on newly discovered evidence. The Court held an evidentiary hearing on the Motion for New Trial on June 8, 2006, and, by Order dated August 29, 2006, granted in part, denied in part, and dismissed in part Kelly’s Motion for New Trial and Supplemental Motion for New Trial. The government appealed that ruling to the U.S. Court of Appeals for the Third Circuit, which, on August 14, 2008, reversed and remanded to this Court for entry of judgment of conviction and for sentencing. On June 22, 2009, this Court sentenced Kelly to the

mandatory minimum sentence of 180 months of imprisonment, a \$1,000 fine, five years of supervised release, and a \$100 special assessment. Kelly appealed to the Third Circuit, which affirmed the judgment of conviction on January 20, 2011.<sup>1</sup>

Kelly filed the pending Motion to Vacate, Set Aside or Correct a Sentence pursuant to 28 U.S.C. § 2255 on April 16, 2012. The government filed a response on October 15, 2012, and Kelly filed a reply on November 21, 2012. In his Motion, Kelly argues that trial counsel was ineffective in failing to: (1) interview prospective defense witnesses, which “would have led trial counsel to learn” of Victor Jones’s testimony and to present Jones as a witness at trial; (2) present evidence of petitioner’s excited utterance that “someone threw the gun at [him]”; (3) conduct a reasonable investigation which “would have led trial counsel to learn” that Victor Jones threw the gun toward Kelly; and (4) request the District Court to instruct the jury concerning mere proximity to a firearm. The Court held an evidentiary hearing on Kelly’s § 2255 Motion on August 8, 2014.

For the reasons set forth below, the Motion to Vacate, Set Aside or Correct a Sentence is denied as to all claims.

## **II. BACKGROUND**

The background of this case is set forth in detail in previous opinions. See United States v. Kelly, 406 Fed. App’x 676 (3d Cir. 2011) (affirming the District Court’s judgment of conviction); United States v. Kelly, 539 F.3d 172 (3d Cir. 2008) (reversing the Order of the District Court granting Kelly’s motion for a new trial and remanding for entry of judgment of conviction and for sentencing); United States v. Kelly, No. 04-605, 2006 WL 2506353 (E.D. Pa. Aug. 29, 2006) (granting in part, denying in part, and dismissing in part Kelly’s Motion for New Trial).

Accordingly, the Court recites in this Memorandum only those facts necessary to explain its ruling

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<sup>1</sup> On appeal, Kelly challenged his conviction, but not his sentence. (See Br. Appellant, June 23, 2010.)

on the pending motion.

A. Kelly's Jury Trial

Kelly's jury trial began on July 19, 2005. Before trial, the government moved in limine to exclude Kelly's exculpatory statement that "someone threw the gun at [him]." (Mot. Limine Exclude Def.'s Self-Serving Decl. as Hearsay, 2.) Following argument in open court on July 19, 2005, the Court instructed defense counsel Jack McMahon that at trial he could not introduce evidence of the statement either as an excited utterance or present sense impression unless he laid a proper foundation. (Trial Tr., July 19, 2005, 8–17.) Among other things, the Court told defense counsel that, before introducing the statement, he would have to present evidence of the time lapse between the alleged throwing of the gun and Kelly's statement. Id. at 12–15. At trial, defense counsel neither attempted to develop evidence concerning the time lapse, nor attempted to introduce the statement into evidence. The Court thus denied the government's Motion in Limine as moot by Order dated July 20, 2005.

The government presented four witnesses at trial: Philadelphia Police Corporal Raymond Drummond, Police Officer Donna Stewart, Police Officer Brant Miles, and Police Officer Ernest Bottomer. Officers Drummond, Stewart, and Miles testified that during the early hours of May 1, 2004, they participated in an open inspection to determine whether there was any illegal activity at Café Breezes, a bar located at 5131 Columbia Avenue, Philadelphia, Pennsylvania. Officer Stewart testified that, sometime after she entered Café Breezes, she observed Kelly sitting at the bar, "leaned over, crunched over in his seat with his hands below the bar where I couldn't see them...." (Trial Tr., July 20, 2005, 76.) Officer Stewart testified that, shortly thereafter, she saw Kelly "reach[] quickly towards his back." Id. at 77. She continued:

At that point, I stopped him, I put my hands on him, I had him put his hands on the bar. I walked around behind the defendant so I was standing between the defendant and the female to his left and at that

point I had him stand up. As he stood up the gun fell from his lap, it was about mid-thigh. It fell down along his left leg, it hit the brass chair rail at the base of the bar with a loud metal clang and then it landed on the floor.

Id. at 77–78. Officer Stewart then yelled “gun,” and other officers rushed over and handcuffed Kelly while Officer Stewart recovered the weapon from the floor. Id. at 78. Officer Bottomer testified that the gun at issue was a firearm as defined by federal law and that the serial number on the gun was obliterated. Id. at 169–71.

Only Officer Stewart’s testimony connected Kelly with the gun at issue. No other officer or patron at Café Breezes testified to seeing Kelly with a gun. Kelly did not testify at trial.

At trial, the parties entered into two stipulations: (1) prior to May 1, 2004, Kelly had been convicted of a crime punishable by imprisonment for more than one year within the meaning of 18 U.S.C. § 922(g), and (2) the firearm in question was manufactured outside Pennsylvania. On July 21, 2005, the jury found Kelly guilty of possession of a weapon by a convicted felon.

#### B. Post-Trial Proceedings

On August 1, 2005, newly-retained counsel Mark E. Cedrone entered an appearance for Kelly. On the same date, Kelly filed a counseled Motion for New Trial and Leave to Supplement pursuant to Federal Rule of Criminal Procedure 33(a). By Order dated August 3, 2005, this Court granted Kelly leave to supplement his Rule 33 Motion. On October 6, 2005, Kelly filed a Supplemental Motion for New Trial, which included new grounds for Kelly’s Motion for New Trial under Federal Rule of Criminal Procedure 33(a) and a motion for new trial under Federal Rule of Criminal Procedure 33(b) based on newly discovered evidence. In support of his motion, Kelly attached a statement by Kemahsiah Gant — a friend of Kelly’s girlfriend, Jacqueline Cephas — recounting her conversation with her friend, a man named Victor Jones, about the gun that Kelly was convicted of possessing. According to Gant, Jones admitted that, during the early hours of May

1, 2004 at Café Breezes, he “had the gun” at issue and that he, not Kelly, threw it on the floor when the police entered. (Def.’s Supplemental Post-Verdict Mots., Ex. A.) The Court held an evidentiary hearing on Kelly’s claim of newly discovered evidence on June 8, 2006.

(a) Evidentiary Hearing of June 8, 2006

At the evidentiary hearing, Jones testified, along with Kemahsiah Gant; Kelly’s girlfriend, Jacqueline Cephas; and Philadelphia Police Officer Clarence Clark. As the credibility of Jones’s testimony is central to the determination of Kelly’s Motion, the Court discusses Jones’s testimony in some detail below along with the relevant portions of Gant’s and Officer Clark’s testimony.

(i) Testimony of Kemahsiah Gant

Gant testified that sometime in late July 2005, after Kelly was convicted, Gant and Jones had a conversation in which Jones admitted to Gant that the gun the police seized in Café Breezes did not belong to Kelly. Gant testified that, during this conversation she told Jones that Kelly had been convicted and sentenced for possession of a gun, after which Jones paused and said, “I have something to tell you.” (Hearing Tr., June 8, 2006, 27.) According to Gant, Jones’s “exact words” were that “it wasn’t Jake’s gun,” and that “he [Jones] had the gun and threw it on the floor” of the bar when the police entered because he was nervous. Id. at 29, 52. Gant further testified that Jones “didn’t get into details of the incident, period.” Id. at 52–53.

About three weeks later, Gant told Jake Kelly’s girlfriend, Jacqueline Cephas, about her conversation with Jones. Id. at 31–34. Cephas asked Gant to speak to Kelly’s attorney, but Gant refused because she did not want to get involved with the case. Id. at 33, 34–35. Gant later changed her mind and spoke with an investigator from defense counsel’s office. Id. at 35. Gant provided the investigator with a written statement in which she said that Jones told her the gun the police found

did not belong to Jake, that Jones “had the gun,” and that when the police came into Café Breezes he “got nervous and threw it down on the floor.” (Def.’s Supplemental Post-Verdict Mots., Ex. A.)

(ii) Testimony of Victor Jones

Jones testified that he was a close friend of Cephas and Gant, and that he became friends with Kelly as a result of his friendship with Cephas. (Hearing Tr., June 8, 2006, 95–96.) He explained that Café Breezes was the “hang-out spot” for the four of them during some period of time before Kelly’s arrest. Id. at 97.

Jones was at Café Breezes during the early morning hours of May 1, 2004 “trying to get [him]self together” after spending a “couple hours, maybe two hours,” drinking. Id. at 98, 118. He admitted that he “was drunk and the room was spinning.” Id. at 122. At some time “past midnight,” he became aware that the police had entered Café Breezes because there was some “commotion.” Id. at 98, 101–02. At the time the police entered, Jones had his elbow on the bar and was sitting next to Kelly. Id. at 100, 119. The bar was in the shape of a backward “L,” with the short side of the bar positioned closest to the front door. Jones’s bar stool was at the long end of the bar, at the corner closest to the door, and Kelly’s bar stool was located on the left side of Jones’s stool at the short end of the bar. Id. at 99–100. According to Jones, “all the seats were filled. There were some, there was people standing in between the seats, there was people standing behind me. I didn’t know the person who was sitting next to me [on the right side].” Id. at 100.

Jones testified that after he noticed the police in the bar, the following sequence of events occurred:

I was sitting at the bar. I had pretty much done drinking. I didn’t want to drink any more, I was ready to go. There was a little bit of pushing, somebody pushed my shoulder, kind of like my back but people were brushing into me all night. Somebody brushed into me and somebody put

something in my lap and it was a gun. And I pushed it off of my lap onto the floor.

Id. at 102. Jones then clarified that the weight of the gun “landed...in [his] crotch area.” Id. at 103. Jones initially said he was unsure about whether the gun had been dropped onto his lap from his right or left side, but finally said the gun came “from probably the right side of me, more so than the left side of me.” Id. at 102–03, 119. Jones “instantly recognized it was a gun” and “immediately pushed it off [his] lap.”<sup>2</sup> Id. at 103, 120. Jones did not recall the exact direction in which he pushed the gun. Id. at 103, 132. Jones assumed that because he pushed the gun with his left hand, which is dominant, the gun fell in front of him and slightly to the left. Id. at 121. The gun hit the wood of the bar, and then “made a click, a clackety sound” as it first hit the wooden bar and then the tile floor. Id. at 118, 121–22. When Jones turned around to spot the person who had dropped the gun into his lap, he “didn’t perceive” “a facial reaction like acknowledgment that somebody did it.” Id. at 123–24.

Jones testified that he watched the police seize the gun from the floor and arrest Kelly for possessing the gun that he, Jones, had pushed onto the floor. Id. at 103–04 (testifying that he saw the police seize the gun, that he was “pretty sure” that they picked up the gun he had pushed off his lap, and that he believed Kelly was arrested for possession of the same gun). Jones believed that

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<sup>2</sup> Jones testified about why his immediate response to the gun in his lap was to push it away. He explained that when he was about nineteen years old, as he stood outdoors:

a guy walked up really fast to me and tried to hand me a gun. And when I realized what he was handing me I put my hands up and he handed it to the guy standing right next to me and he was shortly thereafter arrested....I think the other guy got away.

(Hearing Tr., June 8, 2006, 104–05.) This experience impressed upon Jones the importance of pushing the gun away immediately when it landed on his lap on May 1, 2004.

Kelly “was wrongly arrested,” but did not say anything to the officers because he “didn’t want to have anything to do with [it].” Id. at 106.

Thereafter, Jones saw Kelly on two or three occasions, but they did not discuss the incident of May 1, 2004. Id. at 124–25. Jones testified that during those times, “I didn’t know that he [Kelly] still had a case. When I saw him after that incident I assumed that it was over.” Id. at 125. Because Jones observed Kelly “doing his regular thing,” Jones “didn’t feel a need to discuss [the gun incident].” Id.

Jones learned of Kelly’s conviction from Gant. Id. at 107, 117. Jones testified that Gant visited his apartment, and during their conversation, she asked whether he had heard what had happened to Kelly. Id. at 108–10. When Jones replied that he did not know what had happened, Gant reported that Kelly was in jail on the gun charge. Id. at 110, 117. Jones responded that was “fucked up because it [the gun] wasn’t his.” Id. at 110. When Gant asked how Jones knew that, Jones told Gant “exactly what happened”:

And I told her [Gant] that I was sitting at the bar pretty much next to Jake and when the cops came in, which I didn’t really see when the cops came in. I didn’t realize that the cops were actually in there behind me until somebody dropped that [gun] in my lap. And once it got dropped in my lap I pushed it off...and that’s in fact how I knew it wasn’t [Kelly’s]. I knew that he didn’t do it. And that’s pretty much what I told her.

Id.

Jones testified that he did not feel comfortable talking with Kelly’s girlfriend, Cephas, about the situation. Id. at 110. Cephas instead learned about Jones’s statement through Gant and asked Jones to speak to an investigator, but Jones initially refused. Id. at 111. Thereafter, an investigator telephoned Jones and then visited him. Id. at 112. Jones told the investigator that he would refuse to “give a comment” in court if he were subpoenaed and said he “would plead the Fifth [Amendment]” because he “didn’t want to discuss it.” Id.

Jones testified, “I really didn’t feel comfortable doing this [i.e., testifying] and I didn’t really want to involve myself,” id. at 113, but “[t]he more I thought about it, the more I felt that I really didn’t have anything to hide so I decided to say exactly what happened....” Id. at 126.

(iii) Testimony of Philadelphia Police Officer Clarence Clark

Philadelphia Police Officer Clarence Clark, a member of the Vice Squad, testified that he entered Café Breezes with Officer Fairbanks on an undercover operation at approximately midnight or 1:00 a.m. on May 1, 2004. Id. at 136–37. Officer Clark sat down on a bar stool directly to the right of Jones and ordered a beer. Id. at 137–39. After some time passed, Officer Clark notified his supervisor to come to Café Breezes. Id. at 140. His supervisor, Corporal Drummond, arrived, announcing that he and members of the Vice Squad would “do open inspection on the bar.” Id. Officer Clark testified that there was no one standing behind him or the person to his left — i.e., Jones — when the police entered. Id. at 141. Officer Clark denied hearing a gun drop to the floor. Id. at 141, 143–44. All he remembers hearing is someone yelling “gun.” Id. at 143.

(b) District Court’s Order Granting in Part Kelly’s Motion for New Trial

On August 29, 2006, this Court granted Kelly’s Motion for New Trial on the ground that Kelly had met his burden of establishing the requirements for a new trial based on newly discovered evidence — i.e., the prospective testimony of Victor Jones — pursuant to Federal Rule of Criminal Procedure 33(b)(1).<sup>3</sup> The Court concluded that Kelly had established all five elements of the test

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<sup>3</sup> This Court dismissed without prejudice Kelly’s claim of ineffective assistance of counsel and denied the claims that the verdict was against the weight of the evidence and that the Court erred in its evidentiary ruling.

laid out in United States v. Iannelli, 528 F.2d 1290, 1292 (3d Cir. 1976), for granting a new trial on the basis of newly discovered evidence, namely: (1) that the evidence was in fact newly discovered since trial; (2) that defendant was diligent in bringing the evidence before the Court; (3) that the evidence was not merely cumulative or impeaching; (4) that the evidence was material to the issues involved; and (5) that the newly discovered evidence would probably produce an acquittal upon a new trial. Kelly, 2006 WL 2506353 at \*10.

The government appealed. On August 14, 2008, the Third Circuit reversed and remanded to this Court for entry of judgment of conviction and for sentencing. The Third Circuit concluded that Kelly had not satisfied the diligence prong of the Iannelli test, reasoning that Jones's testimony could have been discovered before or at the time of trial with the exercise of reasonable diligence on Kelly's part and that Kelly had made no effort prior to his conviction to speak with Jones about what had happened at Café Breezes the morning of May 1, 2004. Kelly, 539 F.3d at 182–83. According to the Third Circuit, “such inaction simply does not qualify as reasonable diligence.” Id. at 183.

The Third Circuit also noted, with respect to the fifth prong of the Iannelli test, that whether Jones's testimony was sufficiently credible to produce an acquittal upon a new trial was an issue to be determined by the District Court. In considering Kelly's Motion for New Trial, this Court “decline[d] to make...a credibility determination,” with respect to Jones's testimony, and instead concluded that “Jones's prospective testimony, if believed, would probably produce an acquittal, and the jury is the appropriate fact-finder.” Kelly, 2006 WL 2506353 at \*12 (emphasis added). On review, the Third Circuit stated that, “it is the job of the district court, either on affidavits or after an evidentiary hearing...to decide whether the newly discovered evidence is credible, and, if so, whether it would probably produce an acquittal if a new trial were held.” Kelly, 539 F.3d at 188

(quoting United States v. Grey Bear, 116 F.3d 349, 350 (8th Cir. 1997)) (internal quotation marks omitted). The Third Circuit further said that, in making a credibility determination, the District Court must “weigh the testimony against all of the other evidence in the record, including the evidence already weighed and considered by the jury in the defendant’s first trial.” Kelly, 539 F.3d at 189. However, because the Third Circuit concluded that Kelly had not satisfied Iannelli’s diligence requirement, it declined to reach the issue of whether the fifth prong of the Iannelli test had been satisfied. Id. at 186.

Upon remand, this Court sentenced Kelly to the mandatory minimum sentence of 180 months imprisonment. Kelly appealed his conviction to the Third Circuit, which affirmed on January 20, 2011.

C. Kelly’s Habeas Motion Under 28 U.S.C. § 2255

Kelly filed the pending Motion to Vacate, Set Aside or Correct a Sentence pursuant to 28 U.S.C. § 2255 on April 16, 2012. On August 8, 2014, the Court held an evidentiary hearing on the first three claims of Kelly’s § 2255 Motion. Trial counsel, Jack McMahon, and petitioner Jake Kelly testified.

(a) Testimony of Jack McMahon

i. First and Third Claims: Failure to Conduct a Reasonable Investigation

McMahon testified that he had hired Wayne Schmidt to investigate Kelly’s case prior to trial. (Section 2255 Evidentiary Hearing Tr., August 8, 2014, 21.) McMahon did not recall Kelly giving him the names of any potential witnesses, but he assumed that Kelly had given him the witness names listed in Schmidt’s investigative report. Id. at 20–21 (“Q: Do you remember the names of anybody that he [Kelly] told you? A: ...I mean, off the top of my head, no. In referencing the file that you showed me, I saw that my investigator was given names and researched names...so I would assume...that those names and information came from Mr. Kelly to me to my

investigator.”). Victor Jones’s name did not appear in the investigative report, and McMahon testified that Kelly did not tell him that Jones was a potential witness. Id. at 21–22, 39–40.

ii. Second Claim: Failure to Present Evidence of Kelly’s Statement as an Excited Utterance

McMahon testified that he made a strategic decision not to attempt to establish a foundation to introduce Kelly’s statement that “someone threw the gun at [him]” into evidence as an excited utterance. In explaining that decision, McMahon stated that he was following the Court’s pre-trial instructions regarding the admissibility of Kelly’s statement. During the pre-trial proceedings, the Court instructed McMahon that, to lay a foundation for introducing the statement, he would have to establish that Kelly made the statement contemporaneously with the gun being thrown at him. Id. at 47; see also Trial Tr., July 19, 2005, 12 (“The Court: If [the statement was made] as the gun was being thrown,...it might very well qualify as an excited utterance. But if the gun was thrown before the police officers got there, and the statement is made as they are arresting him...then I think there is a problem [with admitting the statement as an excited utterance].”).<sup>4</sup> McMahon testified that, as he understood it, Kelly did not make the statement until he was being arrested by the police, and thus McMahon knew he would not be able to develop the required factual basis to introduce the statement into evidence. (Section 2255 Evidentiary Hearing Tr., August 8, 2014, 47.) McMahon also testified that, prior to trial, he thought the statement was admissible as an excited utterance under the theory that the statement was made contemporaneously with the startling event of Kelly being arrested for a gun that was not his. Id. at 48 (“...that’s what I argued in my pretrial [sic] that the startling event of being arrested and being confronted with [the fact that he was being arrested

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<sup>4</sup> The Court did not rule on the government’s Motion in Limine during the pre-trial proceedings so as to give trial counsel an opportunity to develop the factual foundation for admitting Kelly’s statement into evidence. As defense counsel did not attempt to lay such a foundation, the Court denied the Motion in Limine as moot by Order dated July 20, 2005.

for a gun that was not his] would be sufficient for the contemporaneous requirement....”). As this position was inconsistent with the Court’s pre-trial instructions, however, McMahon did not attempt to lay the foundation to admit the statement into evidence. Id. According to McMahon:

[T]he evidence did not develop in a fashion that was consistent with the Court’s understanding...[of] what the law was. So, therefore, obviously, I didn’t go into it and ask those questions...or asked [sic] the Court to revisit the issue because I knew factually it was inconsistent with what the Court wanted or required to admit it.

Id.

(b) Testimony of Jake Kelly

i. First and Third Claims: Failure to Conduct a Reasonable Investigation

Kelly testified that prior to trial he told McMahon that a man named “Vic Dimone” was sitting to his right at Café Breezes the morning of his arrest on May 1, 2004. Id. at 64–65. Kelly said Victor Jones had been introduced to him as “Vic Dimone,” and that was why he gave McMahon that name. Id. at 55–56, 65. Kelly further testified that he had not asked McMahon why Vic Dimone/Victor Jones’s name did not appear on Schmidt’s investigative report or why McMahon did not call Jones as a witness at trial because, “I figured he [McMahon] knew what he was doing because he’s the lawyer.” Id. at 78–79. He added that McMahon had never shown him a list of persons with whom McMahon or Schmidt had spoken during the investigation. Id. at 78.

ii. Second Claim: Failure to Present Evidence of Kelly’s Statement as an Excited Utterance

With respect to his statement that “someone threw the gun [at him],” Kelly testified that when he was inside Café Breezes, he never saw a gun, and though he heard something hit the floor, he did not know what it was. Id. at 80 (“...I heard something hit the floor. I thought it was a cell phone or something.”). Kelly stated, “that’s when the officer said it was a gun and then she asked me to stand up.” Id. Kelly did so and was then handcuffed by another officer. Id. At that time, he

asked the officers “what’s going on” and they replied that the gun was his. Id. Kelly replied, “Man, somebody threw that over here.” Id. According to Kelly, he made the statement “instantaneously” upon being handcuffed. Id. at 60.

### **III. DISCUSSION**

In his Motion to Vacate, Set Aside or Correct a Sentence pursuant to 28 U.S.C. § 2255, Kelly argues that trial counsel was ineffective in failing to: (1) interview prospective defense witnesses, which “would have led trial counsel to learn” of Victor Jones’s testimony and to present Jones as a witness at trial; (2) present evidence of petitioner’s excited utterance that “someone threw the gun at [him]”; (3) conduct a reasonable investigation which “would have led trial counsel to learn” that Victor Jones threw the gun toward Kelly; and (4) request the District Court to instruct the jury concerning mere proximity to a firearm. As claims one and three are essentially the same, the Court considers them together in its analysis.

“Strickland v. Washington supplies the standard for addressing a claim of ineffective assistance of counsel.” United States v. Smack, 347 F.3d 533, 537 (3d Cir. 2003). “The benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial court cannot be relied on as having produced a just result.” Strickland v. Washington, 466 U.S. 668, 686 (1984).

The Strickland standard requires a two-part inquiry. “First, the defendant must show that counsel’s performance was deficient,” id. at 687, that is, “that counsel’s representation fell below an objective standard of reasonableness.” Id. at 688. The measure for counsel’s performance under the first prong is “whether counsel’s assistance was reasonable considering all the circumstances,” including “[p]revailing norms of practice.” Id. “Second, the defendant must show that [counsel’s] deficient performance prejudiced the defense.” Id. at 687. With respect to the prejudice prong, the

defendant is required to demonstrate 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 one that is “sufficient to undermine confidence in the outcome.” Id. Furthermore, “[t]he effect of counsel’s inadequate performance must be evaluated in light of the totality of the evidence at trial: ‘a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support.’” United States v. Gray, 878 F.2d 702, 711 (3d Cir. 1989) (quoting Strickland, 466 U.S. at 696).

A. First and Third Claims: Failure to Conduct a Reasonable Investigation

Kelly’s first and third ineffective assistance of counsel claims are based on trial counsel’s alleged failure to conduct a reasonable investigation that would have led trial counsel to discover Victor Jones as a witness to the events at Café Breezes on May 1, 2004 and to present his testimony at trial. The Court need not address the first prong of the Strickland test with respect to these claims because Kelly cannot meet the second prong, namely, that there is a reasonable probability that the outcome of Kelly’s trial would have been different had trial counsel presented Jones as a witness. Strickland, 466 U.S. at 670 (“[A] court need not determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies.”).

In determining whether counsel’s failure to identify Jones and secure his testimony at trial was prejudicial to Kelly, the Court must examine Jones’s testimony in light of the “totality of evidence at trial.”<sup>5</sup> Gray, 878 F.2d at 711. In doing so, the Court concludes that Jones’s testimony

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<sup>5</sup> The Court addressed a similar issue with respect to Jones’s testimony when considering Kelly’s Motion for New Trial; in considering that Motion, the Court determined that, if a jury found Jones’s testimony to be credible, it would likely acquit Kelly. United States v. Kelly, No. 04-605, 2006 WL 2506353, \*12 (E.D. Pa. Aug. 29, 2006) However, the Court declined to make a credibility determination with respect to Jones’s testimony at that time, concluding instead that the “jury is the

was not sufficiently credible that it likely would have produced an acquittal, in particular because of the numerous inconsistencies between Jones's testimony and the evidence in the record.

First, Jones's testimony at the 2006 evidentiary hearing contrasts sharply with the statements he made to Kemahsiah Gant in the summer of 2005 regarding what happened at Café Breezes the night Kelly was arrested. According to Gant, Jones told her that the gun was not Kelly's because Jones "had the gun" that night.<sup>6</sup> In contrast, at the evidentiary hearing, Jones testified, not that he had the gun, but that it was placed onto his lap by an unknown person and that he "immediately pushed it off [his] lap" onto the floor. While Jones's initial statement to Gant indicates that the gun was in his possession, the shift in his story at the evidentiary hearing suggests an effort by Jones to distance himself from the events of that night. Furthermore, Gant testified that Jones did not tell her any details of the events at Café Breezes, only that he had the gun and threw it on the floor. Jones, however, testified that he told Gant "exactly what happened," specifically that the gun was placed onto his lap by an unknown person and that he pushed it onto the floor. These inconsistencies call into serious question the credibility of Jones's testimony — testimony that would go to the very heart of Kelly's defense.

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appropriate fact-finder." Id. Thus, the Court considers this question for the first time in this Memorandum.

<sup>6</sup> At trial, Gant would be permitted to testify as to Jones's earlier statements under Federal Rule of Evidence 613(b) as extrinsic evidence of Jones's prior inconsistent statements. While Gant's testimony regarding Jones's prior inconsistent statements would not be admissible as substantive evidence, it would be admissible to impeach Jones's testimony as long as Jones had the opportunity to explain or deny the statements and the prosecution was given an opportunity to examine him about them. FED. R. EVID. 613(b). See United States v. Stevens, 935 F.2d 1380, 1393 (3d Cir. 1991) (concluding that a witness's testimony at trial, introduced as extrinsic evidence of a declarant's prior inconsistent statement, was properly admitted to impeach the declarant's testimony at trial under Federal Rule of Evidence 613); see also United States v. Pridgen, 518 F.3d 87, 91 (1st Cir. 2008) (concluding that a witness's testimony at trial, introduced as extrinsic evidence of a declarant's prior inconsistent statement, was admissible to impeach the declarant's testimony at trial under Federal Rule of Evidence 613(b) since the declarant was given an opportunity to explain or deny the out of court statement).

Furthermore, Jones's version of events that evening directly contradicts the testimony of Officer Stewart at trial. Jones testified that he pushed the gun from his lap and that it landed on the floor just in front of him, slightly to his left. This would mean that the gun fell around the corner of the bar, to Kelly's right. In contrast, Officer Stewart testified at trial that she saw the gun fall from Kelly's lap, and that it fell to the floor along Kelly's left leg. Thus, while Jones's testimony exculpates Kelly, Officer Stewart's testimony directly implicates him. A jury could not credit both Jones's testimony and Officer Stewart's testimony regarding the gun and, given the inconsistencies in Jones's version of events, it is unlikely that Jones's testimony would have resulted in an acquittal.

Finally, in describing his state of mind on the morning of May 1, 2004, Jones first testified that he had not been drinking much but later testified that he was "drunk and the room was spinning." (Hearing Tr., June 8, 2006, 98, 122.) Not only is Jones's testimony inconsistent, but his testimony that he was intoxicated suggests that he may not have been able to perceive the events of that morning clearly — undermining his testimony that he saw the police recover the gun and that he was sure that Kelly was arrested for the gun that he pushed onto the floor.

In sum, Jones's testimony at the 2006 evidentiary hearing is neither consistent with his prior version of events that night nor with the testimony of the officers in Café Breezes the morning of May 1, 2004. Given these issues, the Court concludes that there is not a reasonable probability that if Jones's testimony had been introduced at trial, the jury would have credited this testimony and acquitted Kelly. Thus, the Court denies the Motion with respect to these claims.

**B. Second Claim: Failure to Offer Evidence of Kelly's Excited Utterance**

Kelly next argues that trial counsel was ineffective in failing to offer evidence of his statement, "someone threw the gun at me," as an excited utterance. The government contends, in response, that Kelly's statement does not qualify as an excited utterance and thus "[t]rial counsel

was not ineffective in not renewing Kelly's request to admit a hearsay statement that did not qualify for any hearsay exception." (Government's Resp. Pet.'s Mot. 28 U.S.C. § 2255, 20.) The Court agrees with the government that Kelly's statement was not admissible at trial, and thus Kelly cannot satisfy either prong of Strickland with respect to this claim.

'Hearsay' is a statement that: "(1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement." FED. R. EVID. 801(c). Hearsay is inadmissible unless an exception to the rule against hearsay applies. See FED. R. EVID. 802. Kelly claims that his statement was admissible under Federal Rule of Evidence 803(2), namely the excited utterance exception to the rule against hearsay. A hearsay statement may be introduced into evidence as an excited utterance if it relates to "a startling event or condition, made while the declarant was under the stress of excitement that it caused." FED. R. EVID. 803(2). A statement is only admissible under Rule 803(2) when there is "(1) a startling occasion, (2) a statement relating to the circumstances of the startling occasion, (3) a declarant who appears to have had opportunity to observe personally the events, and (4) a statement made before there has been time [for the declarant] to reflect and fabricate." United States v. Mitchell, 145 F.3d 572, 576 (3d Cir. 1998).

The touchstone of the excited utterance exception is whether the declarant was still under the stress and excitement of the startling event such that the "excitement suspends the declarant's powers of reflection and fabrication, consequently minimizing the possibility that the utterance will be influenced by self interest and therefore rendered unreliable." United States v. Brown, 254 F.3d 454, 458 (3d Cir. 2001). Thus, under the fourth prong of the test, a statement must be "contemporaneous...with the excitement caused by the event." Id. at 460. In making this determination, the Court must examine whether sufficient time passed between the occurrence of

the startling event and Kelly's statement for him to consciously reflect on his statement and to fabricate it.

The Court concludes that Kelly had sufficient time between the alleged throwing of the gun and when he made his statement to reflect and fabricate and thus cannot satisfy the fourth prong of the excited utterance test.<sup>7</sup> Kelly's statement that "someone threw the gun" at him was made after the gun was allegedly thrown, after he heard Officer Stewart yell "gun," and after he was told by the officers that the gun was his. The timing of Kelly's statement demonstrates that he had an opportunity to reflect on the officers' statements about the gun and to formulate a response that would distance himself from possession of the gun. Indeed, "[w]here incriminating evidence is discovered in one's possession, it requires only the briefest reflection to conclude that a denial and plea of ignorance is the best strategy." United States v. Sewell, 90 F.3d 326, 327 (8th Cir. 1996) (concluding that defendant's statement that the gun the police found in his car belonged to his brother and he did not know it was in his trunk was not admissible as an excited utterance when defendant made it contemporaneously with being confronted by the police). Thus, the Court concludes that Kelly cannot establish the fourth prong of the excited utterance test.

Kelly argues that the startling event was not the throwing of the gun but his arrest for a gun that he did not possess, and, since he made the statement contemporaneously with being handcuffed, his statement was made under the excitement caused by that event. (See Reply to

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<sup>7</sup> The record also indicates that Kelly did not observe the alleged startling event, namely the gun being thrown toward him, and thus cannot satisfy the third prong of the excited utterance test. Kelly testified that he never saw the gun at issue, and although he heard something hit the floor, he thought it was a cell phone or a similar item. (Section 2255 Evidentiary Hearing Tr., August 8, 2014, 80.) As Kelly never saw the gun, much less the gun being thrown at him, he cannot be said to have personally observed the startling occurrence. See Miller v. Keating, 754 F.2d 507, 511 (3d Cir. 1985) ("When there is no evidence of personal perception, apart from the declaration itself, courts have hesitated to allow the excited utterance to stand alone as evidence of the declarant's opportunity to observe.").

Government's Resp. Pet.'s Mot. § 2255, 5.) This argument, however, is also unavailing. Kelly's testimony makes clear that his statement about the gun was the result of a dialogue with the police officers: Kelly testified that he heard something hit the floor but did not know what it was; that he heard Officer Stewart say it was a gun; and that he was asked to stand up and was handcuffed, at which time he asked the officers what was going on. According to Kelly's testimony, it was only after the officers told him it was his gun that he stated someone threw it at him. The Court concludes that, assuming arguendo this is what happened, this chain of events demonstrates that Kelly's statement was an effort to explain the situation and to exculpate himself, not one made under the "sway of excitement," that caused him to "lose the capacity of reflection and thus produce[] statements free of fabrication." Miller v. Keating, 754 F.2d 507, 512 (3d Cir. 1985). Although Kelly testified that he made the statement at the moment he was being handcuffed, only the "briefest reflection" was required for Kelly "to conclude that a denial and plea of ignorance is the best strategy." Sewell, 90 F.3d at 327. Kelly had sufficient time to reflect on his statement and thus cannot satisfy the fourth prong of the excited utterance test under this alternate theory.

Kelly's statement does not qualify as an excited utterance under either theory of the startling event — the alleged throwing of the gun or the arrest — and thus was not admissible at trial. As it was not objectively unreasonable for trial counsel to decline the lay the foundation for evidence that was inadmissible, the Court concludes that counsel did not perform deficiently in failing to do so.

Finally, Kelly was not prejudiced by trial counsel's failure to attempt to lay a foundation for admission of the statement. As Kelly's statement was not admissible into evidence in the first place, it would not have been presented to the jury even if trial counsel had attempted to introduce it. Therefore, there is not a "reasonable probability that, but for" counsel's performance, "the results of the proceeding would have been different." For these reasons, the Court denies the Motion with

respect to this claim.

C. Fourth Claim: Failure to Request the District Court to Instruct the Jury on Mere Proximity

Finally, Kelly argues that trial counsel was ineffective in failing to request a jury instruction concerning mere proximity to firearms. The government counters that the jury instructions given at trial adequately covered a “mere presence” instruction and that, because the instructions precluded the jury from finding Kelly guilty based on mere presence alone, Kelly suffered no prejudice and trial counsel cannot be held to have been ineffective.

The Court agrees with the government. Kelly raised a related argument on direct appeal of his conviction to the Third Circuit, contending that the Court erred in not giving a jury instruction on mere proximity.<sup>8</sup> The Third Circuit concluded, however, that the Court’s instruction on possession<sup>9</sup> was not plain error and that “[a]ssuming, as we do, that the jury followed these instructions, it could not have found Kelly guilty if he was only in ‘mere proximity’ to the firearm.” Kelly, 406 Fed. App’x at 680. Furthermore, the Third Circuit observed that “[t]here is no suggestion in the record that the fact that the Court did not give the ‘mere proximity’ instruction had any

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<sup>8</sup> On direct appeal, petitioner argued that the Court erred in failing to give the following optional instruction from the Third Circuit model: “Mere proximity to the firearm or mere presence on the property where it is located or mere association with the person who does control the firearm or the property, is insufficient to support a finding of possession.” United States v. Kelly, 406 Fed. App’x 676, 679 (3d Cir. 2011) (internal quotations omitted).

<sup>9</sup> The Court gave the following instruction to the jury: “To possess means to have something within a person’s control. This does not necessarily mean that the defendant must hold the firearm or ammunition physically, that is, have actual possession of them. As long as the firearm or ammunition is within the defendant’s control, he possesses them. The defendant’s control may be direct, as by actually holding the firearm or ammunition, or indirect, by having the intent and the power to exercise dominion or control over the gun and ammunition, either directly or through others. The possession may be for some time or it may be just momentary or fleeting. If you find that the defendant had either actual or — actual possession of the firearm or ammunition described in the indictment, or that he had the power and intention to exercise control over the firearm or ammunition described in the indictment, even though it was not in his physical possession, you may find that the Government has proven possession. Proof of ownership of the firearm or ammunition is not required.” (Trial Tr., July 21, 2005, 63–64.)

impact, much less a prejudicial one, on the jury's deliberations." Id. at 679.

Kelly has not raised any new arguments with respect to the "mere proximity" instruction. Thus, the Court concludes that there is not a reasonable probability that, but for trial counsel's failure to request a mere proximity jury instruction, the outcome of Kelly's trial would have been different. The Motion with respect to this claim is denied.

#### **IV. CONCLUSION**

For the reasons stated above, the Court denies Kelly's Motion as to all claims. An appropriate order follows. A certificate of appealability will not issue for any of petitioner's claims because reasonable jurists would not debate whether the petition states a valid claim of the denial of a constitutional right as required under 28 U.S.C. § 2253(c)(2). See Slack v. McDaniel, 529 U.S. 473, 484 (2000).

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

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**UNITED STATES**

**v.**

**JAKE KELLY**

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**CRIMINAL ACTION**

**NO. 04-605**

**ORDER**

**AND NOW**, this 21st day of November, 2014, upon consideration of the counseled Motion to Vacate, Set Aside or Correct a Sentence by a Person in Federal Custody under 28 U.S.C. § 2255 filed by petitioner Jake Kelly (Document No. 155, filed April 16, 2012), the Response in Opposition to Petitioner's Motion Under 28 U.S.C. § 2255 (Document No. 168, filed October 15, 2012), and Petitioner's Reply to Government's Response to Petitioner's Motion Under 28 U.S.C. § 2255 (Document No. 173, filed November 21, 2012), **IT IS ORDERED**, for the reasons stated in the accompanying Memorandum dated November 21, 2014, that the Motion to Vacate, Set Aside or Correct a Sentence by a Person in Federal Custody is **DENIED** as to all claims.

**IT IS FURTHER ORDERED** that a certificate of appealability will not issue for any of petitioner's claims because reasonable jurists would not debate whether the petition states a valid claim of the denial of a constitutional right as required under 28 U.S.C. § 2253(c)(2). See Slack v. McDaniel, 529 U.S. 473, 484 (2000).

**BY THE COURT:**

/s/ Hon. Jan E. DuBois  
**JAN E. DUBOIS, J**