

which Booker agreed to pay.¹ Mark Ingram, a friend of Tamira's, arranged the ride between Booker and Rollins and was with Booker earlier in the day.² Rollins and Tamira picked up Booker in Rollins's Cadillac Escalade ("SUV"); Rollins drove, while Tamira sat in the front passenger's seat. When Booker got into the SUV, he sat directly behind Rollins in the back seat. To his immediate right was a baby car seat that held Tamira's twenty-month old son. To the baby seat's immediate right was Darrell Brown ("Brown"), Tamira's longtime friend.³

- b. According to Tamira, Booker did not pay the fair when he first entered the SUV.⁴ Tamira said Rollins asked for the fair when he neared the Blackadore Street address Booker requested. According to the Commonwealth, it was at this point when Booker supposedly pulled a concealed firearm from underneath his clothing and demanded money from Rollins and Tamira. When Rollins refused, and tried to swat away Booker's gun, Booker shot him three times before fleeing the scene.⁵
5. Using the Commonwealth's own evidence and eliciting facts via cross-examination of the Commonwealth's witnesses, Booker's defense attorney, Elizabeth DeLosa (of the Office of Conflict Counsel), presented a different narrative, one where Booker was the robbery victim and Rollins and Tamira were the aggressors. DeLosa, in other words, conceded Booker shot and killed Rollins, but argued the killing was justified because Booker feared for his life when Rollins and Tamari pulled a gun and tried to rob him.⁶ DeLosa premised her self-defense argument on the following facts:
 - a. First, Tamira and Rollins had access to a firearm because Tamira had a license to carry a firearm.⁷
 - b. Second, Tamira and Rollins likely had a gun on the night of the shooting because on April 21, 2012, little less than a month before this shooting, three men shot out the back window of Rollins's SUV at the

¹ NT, Trial, 08/20/2013, at 97.

² *Id.* at 95.

³ *Id.* at 96.

⁴ *Id.* at 97.

⁵ *Id.* at 97-102.

⁶ *Id.* at 32-39 (DeLosa's opening statement).

⁷ *Id.* at 120, 267.

BP Station on Frankstown Road in Penn Hills.⁸

- c. Third, Tamira, who kept her firearm in her purse, was not afraid to use her firearm. On May 17, 2012, five days after Rollins's death, Tamira pulled her gun on a man she believed was Booker at a Shell Station in East Liberty. With her gun drawn, she forced the man back into the Shell convenience store and called the Pittsburgh Police. When the police arrived, the man was gone, having exited the convenience store's back door.⁹
- d. Fourth, the forensic evidence suggested two firearms were fired that night. Deborah Tator, a firearms examiner with the Allegheny County Medical Examiner's Office, examined a bullet fragment (Item #9) and a bullet (Item #22) recovered from the SUV and concluded they were two different brands of bullets made by different manufacturers.¹⁰
- e. Fifth, there is evidence Tamira could have easily removed a firearm from the scene either before or after EMS and law enforcement arrived:
 - i. According to EMS records and Linda Moore, a witness who called 911, it took more than ten minutes for EMS and law enforcement personnel to arrive at the scene.¹¹
 - ii. When EMS checked Rollins's person and clothing, including his pants pocket, they found no personal belongings (*e.g.*, wallet, money, keys, etc.),¹² despite the fact Tamira said Rollins "had a lot of money on him."¹³ According to Tamira and Brown, Booker fled without taking anyone's personal belongings or money;¹⁴ thus, Booker could not have rummaged through Rollins's pockets and removed his money or other personal belongings.

⁸ *Id.* at 126-129.

⁹ *Id.* at 109-110, 126.

¹⁰ NT, Trial, 08/22/2013, at 249.

¹¹ NT, Trial, 08/21/2013, at 156.

¹² *Id.* at 58, 62, 64-65.

¹³ *Id.* at 99.

¹⁴ *Id.* at 138.

- iii. Tamira gave her son to a friend who took him out of the scene. At trial, law enforcement seemed oblivious to this fact, which is understandable because no officers or detectives searched, frisked, or patted down Tamira to determine if she had a weapon on her.¹⁵

- iv. The most telling evidence of someone possibly removing incriminating evidence from the SUV, including a firearm, are the unexplained bloodstains on the driver's side backseat and on the floor of the backseat behind the driver's seat. Only one person was shot: Rollins. According to Tamira and Brown, once Rollins opened the driver's side door, after being shot three times, he fell out of the SUV onto the ground.¹⁶ Tamira said she first checked on her son, by leaning over the center console, before exiting the SUV and assisting Rollins.¹⁷ Brown said he exited the SUV via the back passenger's side door, but reentered briefly to remove Tamira's son.¹⁸ Thus, according to Tamira and Brown, no one with blood on them touched the back driver's side seat or the floor behind the front driver's side seat. The blood evidence, therefore, contradicts their testimony because there is a pool of blood on the floor behind the driver's side seat and blood smears on the back driver's side seat.¹⁹

- f. Sixth, once Booker entered the SUV and sat directly behind the driver's side seat, Tamira manually triggered the child safety lock on the door nearest to Booker (*i.e.*, the driver's side back door).²⁰ Booker, as a result, could not have immediately exited (or retreated) the SUV if someone pulled a weapon on him.

- g. Seventh, Tamira's and Brown's credibility was lacking for three significant reasons:
 - i. Shortly before Rollins, Tamira, and Brown picked up Booker, they smoked dope.²¹

¹⁵ *Id.* at 88; NT, Trial, 08/22/2013, at 210, 257-258.

¹⁶ *Id.* at 102.

¹⁷ *Id.* at 102, 122.

¹⁸ *Id.* at 154

¹⁹ *Id.* at 265-267.

²⁰ *Id.* at 123-125.

²¹ *Id.* at 115, 116, 144.

- ii. Tamira’s and Brown’s testimony as to how the robbery occurred did not match: Tamira said when Booker allegedly pulled his gun he said, “Throw it off”;²² Brown, on the other hand, said Booker said, “Fuck you, give me everything.”²³
 - iii. When interviewed immediately after the shooting, Tamira told detectives Booker paid the fare when he initially entered the SUV; at trial, however, she said Booker did not pay the fare.²⁴
 - iv. DeLosa subpoenaed Mark Ingram, but when DeLosa called his name in court the first day of trial, Tamira said, “You will never get to talk with him.”²⁵
6. Once the Commonwealth rested, DeLosa made a motion for judgment of acquittal, which the Court denied. Prior to closing arguments, the Court informed DeLosa and ADA Berquist he was not instructing on third-degree murder, voluntary manslaughter, involuntary manslaughter, and justification/self-defense.²⁶ During a sidebar, DeLosa argued she presented sufficient evidence to charge the jury with third-degree murder, justification/self-defense, and voluntary manslaughter.²⁷ Much of her argument, though, focused on the justification/self-defense issue and whether the evidence warranted a justification/self-defense instruction.²⁸
7. According to the Court, because DeLosa *did not present* evidence of justification/self-defense, Booker was not entitled to a justification/self-defense instruction.²⁹ The Court said DeLosa had to present more than a theory; she had to *present* admissible evidence regarding the justification/self-defense issue before receiving a justification/self-defense instruction.³⁰ To illustrate its point, the Court asked DeLosa if she wanted a burglary instruction; when she said, “No,” the Court said, “Of course, I wouldn’t give such an instruction because no evidence has been presented

²² *Id.* at 99.

²³ *Id.* at 147.

²⁴ *Id.* at 118.

²⁵ *Id.* at 130.

²⁶ Ex. 1.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

justifying a burglary instruction.”³¹

8. The Court’s refusal to charge justification/self-defense and voluntary manslaughter forced DeLosa to change the PowerPoint presentation she prepared for closing arguments because much of it focused on justification/self-defense and voluntary manslaughter.³²
9. During the jury charge, the Court slightly acquiesced to some DeLosa’s of requests when it gave a third-degree murder instruction, but it did not charge justification/self-defense or voluntary manslaughter.
10. After deliberating for a few hours, the jury submitted several questions, including two regarding justification/self-defense and voluntary manslaughter. For instance, the jury asked: (1) about the elements of manslaughter under Pennsylvania law; and (2) what element of third-degree murder included self-defense.³³ Upon hearing the jury’s legal questions, DeLosa reprinted the justification/self-defense and manslaughter instructions and asked the Court to charge justification/self-defense and manslaughter.³⁴ The Court denied DeLosa’s request and again asked her what evidence she *presented* warranting these instructions.³⁵
11. When the Court called the jury back into the courtroom to answer their questions, it said the following: “I have decided that manslaughter and justification are inapplicable in this case.”³⁶ DeLosa objected.³⁷
12. On August 22, 2013, after being denied the opportunity to consider self-defense or manslaughter, the jury convicted Booker of third-degree murder (18 Pa. C.S. 2502), three counts of REAP (Pa. C.S. 2705), carrying a firearm without a license (18 Pa. C.S. 6106), and person not to possess (18 Pa. C.S. 6105). The jury acquitted Booker of robbery, and first- and second-degree murder.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

13. After rendering their verdicts, DeLosa spoke with several jurors and each said they believed Booker was the target of a robbery, not Rollins, and they believed Booker fought for his life to flee the SUV.³⁸
14. On November 26, 2013, after DeLosa presented significant mitigation evidence at Booker's sentencing hearing, the Court imposed the following sentences:
 - a. Third-degree murder: 18 ³/₄ to 37 ¹/₂ years.
 - b. Person not to possess: 5 to 10 years (consecutive with Count One)
 - c. Carrying a firearm without a license: 7 years probation.
 - d. Three REAP counts: Two years probation to run concurrently.
15. On December 6, 2013, pursuant to Pa. R. Crim. P. 720(A)(1), DeLosa filed a timely *Post-Sentencing Motion* ("PSM") on Booker's behalf, which she amended on December 6, 2013. In her initial PSM, DeLosa requested an additional 30 days, on top of the 120 days already allotted under Rule 720, *see* Pa. R. Crim. P. 720(B)(3)(b), forcing the Court to rule on Booker's PSM by **May 6, 2014**; if it does not, the PSM will be denied by operation of law. *See* Pa. R. Crim. P. 720(B)(3)(a).
16. Pursuant to Rule 720(B)(2)(b), the Court scheduled arguments for the PSM for March 27, 2014. The Office of Conflict Counsel, however, had to withdraw as counsel, and on March 20, 2014, undersigned counsel was appointed to represent Booker during his post-sentencing and appellate proceedings.
17. The Court postponed the PSM arguments until April 24, 2014 so undersigned counsel could review the case file, record, and transcripts. In terms of transcripts, undersigned counsel received all the transcripts except those that captured: (1) the jury's questions during deliberations; (2) DeLosa's request that the Court charge justification/self-defense and manslaughter; (3) the Court's instructions to the jury, informing it justification/self-defense and manslaughter were inapplicable; and (4) the jury's verdicts. On March 19, 2014, Kayleigh Shebs (of the Office of

³⁸ *Id.*

Conflict Counsel), submitted a transcript request form to the Court Reporters office requesting these transcripts.

18. By April 24, 2014, the Court Reporter's Office had yet to produce the jury deliberation/jury verdict transcripts, forcing the Court to postpone the April 24, 2014 PSM hearing.
19. Unsure whether the Court Reporter's Office will produce the jury deliberation/jury verdict transcripts by **May 6, 2014**—the date in which Booker's PSM will be denied by operation of law—counsel requested DeLosa to draft an affidavit explaining: (1) what occurred during jury deliberations; (2) the arguments she presented to the Court once the jury informed the Court of its legal questions; and (3) the Court's response to her request and its instructions to the jury regarding justification/self-defense and manslaughter. DeLosa's affidavit is attached as Exhibit 1.
20. Relying on the produced transcripts and DeLosa's affidavit, undersigned counsel felt compelled to present to the Court the arguments he intended to present at the April 24, 2014 hearing, but was unable to because of the Court Reporter's Office inability to timely produce the requested transcripts. At this point, for Booker to receive his right to meaningful appellate review, *see Commonwealth v. Shields*, 383 A.2d 844, 846 (Pa. 1978), counsel has every right to rely on DeLosa's accurate recollections.

ARGUMENTS

21. The Court committed reversible error when it refused to charge the jury on justification/self-defense and manslaughter.³⁹

I. Based on the Commonwealth’s Own Evidence and the Facts Elicited By DeLosa on Cross-Examination of the Commonwealth’s Witnesses, Booker Was Entitled To Have the Jury Instructed on Justification/Self-Defense. The Court’s Refusal To Charge Justification/Self-Defense Deprived Booker of a Fair Trial and Violated His State and Federal Constitutional Rights. U.S. Const. Amends. V, VI, VIII, XIV; Pa. Const., Art. 1, §§ 1, 6, 9, 10, 13

A. Self-Defense and the Right To Use Deadly-Force in Pennsylvania

22. Booker had a clearly-established right to present a defense. *See Holmes v. South Carolina*, 547 U.S. 319, 323 (2006); *California v. Trombetta*, 467 U.S. 479, 485 (1984). To adequately vindicate this right, Booker must not only be permitted to elicit and present facts pertaining to his defense, the fact-finder must also be required (or permitted) to consider these facts to assess the viability and credibility of his defense. *See Commonwealth v. Mayfield*, 585 A.2d 1069, 1071 (Pa. Super. 1991).
23. Here, Booker presented a justification defense because Pennsylvania recognizes the right to defend one’s self when faced with imminent bodily harm or death. *See* 18 Pa. C.S. § 505. Under § 505, a person may use deadly force if he “believes that such force is necessary to protect himself against death, serious bodily injury, kidnapping or sexual intercourse compelled by force or threat.” 18 Pa. C.S. § 505(b)(2).
24. Using deadly force, however, has two limitations: first, the person using deadly force could not have provoked the force he is now trying to defend against with deadly force; and second, the person could have avoided using such force by retreating from the danger he wished to defend against. *See* 18 Pa. C.S. §§ 505(b)(2.1)(i-ii).

³⁹ Counsel fully incorporates the sentencing argument presented in DeLosa’s initial and amended PSM, but will not address the issue in this brief so the Court’s attention can be solely focused on the two most significant trial errors.

25. Thus, to justify the use of deadly force, the slayer must show: (1) he was free from fault in provoking or continuing the difficulty that resulted in the slaying; (2) he must have reasonably believed he was in imminent danger of death or great bodily harm, and that there was a necessity to use deadly force to save him; and (3) he did not violate any duty to retreat or to avoid the danger. *See Commonwealth v. Mouzon*, 53 A.3d 738, 740 (Pa. 2012).
26. Consequently, before self-defense may be submitted to the jury, a valid self-defense claim must be made out as a matter of law, and this determination must be made by the trial judge. *See Commonwealth v. Mayfield*, 585 A.2d 1069, 1070 (Pa. Super. 1991); *accord Commonwealth v. Baker*, 963 A.2d 495, 506 (Pa. Super. 2008). A valid self-defense claim may consist of evidence from “whatever source.” *Id.* As emphasized in *Commonwealth v. Rose*, “[s]uch evidence may be adduced by the defendant as part of his case, or conceivably, *may be found in the Commonwealth’s own case in chief or be elicited through cross-examination.*” 321 A.2d 880, 884 (Pa. 1974) (emphasis added); *accord Commonwealth v. Mayfield*, 585 A.2d at 1070-1071.
27. Accordingly, the defendant has no burden or obligation to present evidence of self-defense; rather, he may base his self-defense claim on the Commonwealth’s evidence or the facts elicited during cross-examination of the Commonwealth’s witnesses. *See, e.g., Commonwealth v. Mayfield*, 585 A.2d at 1074 (“[W]e agree... that a defendant’s testimony need not be wholly consistent with that of the Commonwealth’s witnesses, and that the defendant need not present his own evidence, but rather may rely solely on the Commonwealth’s evidence as presenting a claim of justification”).
28. Thus, “[i]f there is *any evidence* from *whatever source* that will support” the three elements of self-defense, “then the decision as to whether the claim is a valid one is left to the jury and the jury *must* be charged properly thereon by the trial court.” *Commonwealth v. Mayfield*, 585 A.2d at 1071 (emphasis added); *accord Commonwealth v. Brown*, 421 A.2d 660, 662 (Pa. 1980). This is true

even though the evidence of self-defense *may appear to the trial court as not credible*, for “it is the province of the trier of fact to pass upon the credibility of witnesses and the weight to be accorded the evidence produced ...

The fact finder is free to believe all, part, or none of the evidence.”

Commonwealth v. Mayfield, 585 A.2d at 1071 (quoting *Commonwealth v. Rose*, 344 A.2d at 826) (emphasis added).

29. Moreover, in those instances “where self-defense is properly joined, the Commonwealth has the burden to disprove that defense beyond a reasonable doubt” *Commonwealth v. Mouzen*, 53 A.3d at 743; *id.* at 755 (“[T]o be clear, the burden remains upon the Commonwealth to disprove self-defense beyond a reasonable doubt”) (Todd, J., concurring).
30. A failure to charge a particular instruction, including a justification instruction, warrants relief only if the omission prejudiced the defendant. *See Commonwealth v. Woodward*, 394 A.2d 508, 510 (Pa. 1978). Further, if the error was one of law, then the Court must determine if the error was harmless. *See Commonwealth v. Mays*, 675 A.2d 724, 729 (Pa. Super. 1996); *Commonwealth v. Leshner*, 373 A.2d 1088, 1093 (Pa. 1977).

B. Application of Law to Facts

31. Here, the Court erred in at least three ways:
 - a. First, it forced DeLosa to produce or introduce evidence corroborating Booker’s self-defense claim, when the case law clearly allowed her to premise a self-defense claim on the Commonwealth’s evidence and facts elicited during cross-examination of Commonwealth witnesses.
 - b. Second, the Court failed to charge justification/self-defense despite the fact DeLosa elicited sufficient facts via cross-examination and the Commonwealth’s evidence to warrant a justification/self-defense instruction.
 - c. Third, even when DeLosa explained the basis of Booker’s self-defense claim, the Court usurped the jury’s function (of being the arbiter of credibility) by finding his self-defense claim incredible.
 - d. Fourth, the Court’s refusal to charge justification/self-defense violated Booker’s right to present a meaningful defense. While Booker elicited facts on cross-examination and relied on the Commonwealth’s

own evidence to present his justification defense, his right to present a meaningful defense was a hollow one because the Court prohibited the jury from considering the very defense Booker put forth at trial.

32. As DeLosa's affidavit makes clear, the Court refused to charge justification/self-defense because DeLosa did not present evidence of self-defense. The Court erred because the case law permitted DeLosa to premise Booker's self-defense claim on "any evidence" from "whatever source," *Commonwealth v. Mayfield*, 585 A.2d at 1071, be it from the Commonwealth's own evidence or evidence elicited through cross-examination. *See Commonwealth v. Rose*, 321 A.2d at 884. DeLosa did exactly as she was permitted: she built Booker's self-defense claim on the Commonwealth's own evidence and cross-examination.
33. The Court's erroneous understanding of the law, however, prevented it from seeing and hearing what the jurors saw and heard: DeLosa elicited enough evidence to make Booker's self-defense claim viable and credible. We know this based on the jury's questions to the Court; the questions demonstrate that several jurors believed the evidence supported DeLosa's self-defense narrative, not the Commonwealth's robbery gone wrong narrative.
34. The jury's support of the self-defense narrative is reasonable because there was sufficient evidence to convince the jury that:
 - a. Rollins and Tamira had access to a gun the night of the shooting because:
 - i. Rollins had a license to carry a firearm; and
 - ii. Rollins and Tamira were shot at only three weeks prior to this shooting at a Penn Hills gas station.
 - b. Rollins or Tamira used the gun in an attempt to rob Booker that night because:
 - i. The Commonwealth's firearms expert identified two bullets produced by two different manufacturers; and

- ii. Tamira had no problem pulling a gun on someone in public and using it against them based on her May 17, 2012 conduct when she attempted to hold an unknown man hostage at a Shell Gas station near East Liberty.
- c. Booker reasonably feared for his life because he had no immediate way to exit (or retreat from) the SUV because Tamira manually locked the child safety locks on the door nearest to Booker (*i.e.*, the back driver's side door).
- d. Booker did not provoke the violence he defended against with deadly force.
- e. Tamira removed incriminating evidence from the scene before and/or after EMS and law enforcement personnel arrived because:
 - i. Tamira had time to remove evidence due to the slow response time of EMS and law enforcement personnel;
 - ii. Rollins had no cash or personal belongings in his pockets, despite the fact Tamira said Rollins had a lot of cash on him the night of the shooting;
 - iii. Tamira removed her 20-month-old son from the scene without law enforcement noticing; and
 - iv. The SUV's back seat had smear (blood) stains on it, while the back driver's side floor had a large pool of blood on it.
- f. Tamira and Brown had credibility issues because:
 - i. They were high (on dope) when they (*i.e.*, Rollins, Tamira, and Brown) picked up Booker;
 - ii. Their testimony as to how the robbery occurred did not match: Tamira said when Booker pulled his gun he said, "Throw it off"; Brown, on the other hand, said Booker said, "Fuck you, give me everything";

- iii. When interviewed immediately after the shooting, Tamira told detectives Booker paid the fare when he initially entered the SUV; at trial, however, she said Booker did not pay the fare.
 - iv. DeLosa subpoenaed Mark Ingram, but when DeLosa called his name in court the first day of trial, Tamira said, “You will never get to talk with him.”
35. The Court’s refusal to charge justification/self-defense prejudiced Booker because it stripped him of his entire defense, *i.e.*, it prevented Booker from exercising his clearly-established right to present a meaningful defense. A defense can only be meaningful if the jury is permitted to consider the defense, especially when there is some evidence to support the defense. The Court, for all intents and purposes, directed a verdict of either first, second, or third-degree murder.
36. Booker is entitled to relief.

II. The Court Erred When It Refused To Charge The Lesser-Included Offense of Manslaughter Violating Booker’s State and Federal Constitutional Rights. U.S. Const. Amends. V, VI, VIII, XIV; Pa. Const., Art. 1, §§ 1, 6, 9, 10, 13.

A. Lesser-Included Offense Instructions

37. The general rule in Pennsylvania is that on an indictment charging a particular offense the defendant may be convicted of a lesser offense which is included within the crime charged. *See Commonwealth v. Garcia*, 378 A.2d 1199, 1202 (Pa. 1977); *Commonwealth v. Soudani*, 159 A.2d 687, 688 n.1 (Pa. 1960); *Commonwealth v. Parker*, 344, 23 A. 323 (Pa. 1892).
38. Manslaughter is a lesser included offense of murder. *See Commonwealth v. Schaller*, 426 A.2d 1090, 1095 (Pa. 1981).
39. A trial court “must charge on a lesser included offense,” like manslaughter, “if there is some disputed evidence concerning an element of the greater charge or if the undisputed evidence is capable of more than one rational inference.” *Commonwealth v. Hawkins*, 614 A.2d 1198, 1202 (Pa. Super. 1992); *accord Commonwealth v. Coleman*, 496 A.2d 1207 (Pa. 1985); *Commonwealth v. Channell*, 484 A.2d 783 (Pa. 1984). In other words, the

“trial court shall only instruct on an offense where the offense has been made an issue in the case and where the trial evidence reasonably would support such a verdict.” *Commonwealth v. Browdie*, 671 A.2d 668, 673 (Pa. 1996).

40. Where a lesser-included instruction is warranted, “failing to instruct the jury on [the] relevant lesser-included offenses can preclude a defendant from obtaining a fair trial.” *Commonwealth v. White*, 415 A.2d 399, 401 (Pa. 1980); *accord Commonwealth v. Polimeni*, 378 A.2d 1189 (Pa. 1977); *Commonwealth v. Moore*, 344 A.2d 850 (Pa. 1975).

B. Application of Law to Facts

41. In Pennsylvania, a defendant commits manslaughter if he “kills an individual without lawful justification,” but at the “time of the killing he [was] acting under a sudden and intense passion resulting from serious provocation by: (1) the individual killed; or (2) another whom the actor endeavors to kill, but he negligently or accidentally causes the death of the individual killed.” 18 Pa. C.S. 2503(a).
42. Here, the issue is whether the evidence presented at trial could lead to more than one rational inference. For instance, could the evidence rationally support a murder conviction, but also a manslaughter conviction? The answer is a resounding YES. We know this not just from the jury’s question regarding manslaughter, but from the evidence elicited by DeLosa on cross-examination. *See supra*, §§ 5 (a thru g); 34 (a thru f).
43. Based on this evidence, the jury could rationally conclude that, while Booker shot and killed Rollins, he did so under “sudden and intense passion resulting from serious provocation,” *i.e.*, Rollins and Tamira pulled a gun on him, intending to rob him.
44. Booker is entitled to relief.

REQUEST AND PRAYER FOR RELIEF

45. WHEREFORE, Booker requests the Court to vacate his convictions and to order a new trial where he can again present his self-defense theory, but this time the jury will be permitted to consider his justification defense and to acquit him based on self-defense or to convicted him on the lesser-included offense of manslaughter if it so chooses.

Respectfully submitted this the 30th day of April, 2014.

/s/Craig M. Cooley

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Certificate of Service

Undersigned counsel forwarded a copy of said motion to the following representative of the District Attorney's Office on **April 30, 2014**:

Michael Berquist
Assistant District Attorney
District Attorney's Office
Allegheny County Courthouse
436 Grant Street
Pittsburgh, PA 15219

/s/Craig M. Cooley

**IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY
CRIMINAL DIVISION**

| | | |
|---|---|------------------------------|
| COMMONWEALTH OF PENNSYLVANIA |) | |
| |) | |
| Respondent, |) | |
| |) | |
| v. |) | CP-02-CR-0008338-2012 |
| |) | |
| |) | |
| FRANK BOOKER |) | |
| Defendant-Petitioner |) | |
| |) | |

AFFIDAVIT OF ELIZABETH DELOSA, ESQ.

1. I, Elizabeth DeLosa, swear and affirm the following facts are true and accurate to the best of my recollection under penalty of perjury, and as an officer of the Court:
 - a. I represented Frank Booker (“Booker”) during his homicide trial in August 2013. The Honorable David E. Cashman presided over the jury trial. Assistant District Attorney Michael Berquist represented the Commonwealth.
 - b. The Commonwealth accused Booker of shooting and killing Calvonne Rollins (“Rollins”) during a botched robbery on May 11, 2012 in the Penn Hills section of Allegheny County.
 - c. DeLosa, on the other hand, argued self-defense and justification, claiming Rollins and the occupants in Rollins’s SUV were the aggressors who intended to rob him.
 - d. Prior to closing arguments, Judge Cashman informed me and ADA Berquist he was not instructing on third-degree murder, voluntary manslaughter, involuntary manslaughter, and justification/self-defense. During the sidebar, I argued the defense presented enough evidence to charge the jury with third-degree murder, justification/self-defense, and voluntary manslaughter. Much of the discussion, however, focused on the justification/self-defense issue and whether the evidence warranted a justification/self-defense instruction. According to Judge Cashman, because the defense did not present evidence of justification/self-defense, Booker was not entitled to a justification/self-defense instruction.
 - e. Judge Cashman said the defense had to present more than a theory; it had to present admissible evidence regarding the justification/self-defense issue before receiving a justification/self-defense instruction. To illustrate his point, Judge Cashman asked if I wanted a burglary instruction; when I said, “No,” he said, “Of

course, I wouldn't give such an instruction because no evidence has been presented justifying a burglary instruction.”

- f. Judge Cashman's refusal to charge justification/self-defense and voluntary manslaughter forced me to change, at the last minute, the PowerPoint presentation I prepared for my closing argument because much of it focused on justification/self-defense and voluntary manslaughter.
- g. During the jury charge, Judge Cashman slightly acquiesced when he gave a third-degree murder instruction, but he did not charge justification/self-defense or voluntary manslaughter.
- h. After deliberating for a few hours, the jury submitted several factual and legal questions, including two concerning justification/self-defense and voluntary manslaughter. In the first legal question, the jury asked about the elements of manslaughter under Pennsylvania law, while the second legal question asked what element of third-degree murder included self-defense. Upon hearing the jury's legal questions, I immediately reprinted the justification/self-defense and manslaughter instructions and asked Judge Cashman to instruct the jury on justification/self-defense and manslaughter. Judge Cashman denied my request and again asked me what evidence had the defense presented that warranted these instructions.
- i. When Judge Cashman called the jury back into the courtroom to answer their questions, he said the following: “I have decided that manslaughter and justification are inapplicable in this case.” I objected to his refusal to instruct as well as the language he used.
- j. After the jury convicted Booker of third-degree murder, I spoke with several jurors and each said they believed Booker was the target of a robbery, not Rollins, and that they believed Booker fought for his life to flee the SUV.

Respectfully submitted this the 29th day of April, 2014.

Elizabeth DeLosa
(electronic signature)
Elizabeth DeLosa