

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

JAMES RICHARDSON,	:	CIVIL ACTION
Petitioner,	:	
	:	
v.	:	
	:	
RAYMOND LAWLER, <i>et al.</i> ,	:	NO. 11-4445
Respondents.	:	

REPORT AND RECOMMENDATION

DAVID R. STRAWBRIDGE
UNITED STATES MAGISTRATE JUDGE

April 27, 2012

Before the Court for Report and Recommendation is the *pro se* petition of James Richardson (alternatively “Richardson” or “Petitioner”) for the issuance of a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. Petitioner is presently incarcerated at the State Correctional Institution in Huntingdon, Pennsylvania serving a term of life imprisonment plus seven to thirty years, imposed by the Philadelphia Court of Common Pleas following his convictions of second-degree murder, conspiracy, aggravated assault, possessing an instrument of crime (“PIC”), and robbery.¹ In his petition, he raises claims pertaining to his Sixth Amendment right to representation by effective counsel. He also argues that he is entitled to relief based on prosecutorial misconduct. For the reasons set forth within, we conclude that the claims raised are either procedurally defaulted or were rejected by the state courts pursuant to a reasonable application of federal law. Accordingly, we **RECOMMEND** that the petition be **DENIED** and **DISMISSED**.

¹ We note that while Petitioner is currently confined within the Middle District of Pennsylvania, which includes Huntingdon County, *see* 28 U.S.C. § 118(b), venue is proper here in that his confinement grew out of a prosecution and conviction within the Eastern District of Pennsylvania. *See* 28 U.S.C. § 2241(d).

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY²

Following a lengthy trial before the Honorable M. Teresa Sarmina of the Philadelphia Court of Common Pleas, on July 29, 2004, a jury found Richardson guilty of second-degree murder, two counts of robbery, two counts of criminal conspiracy,³ two counts of possessing an instrument of crime, and one count of aggravated assault. On September 9, 2004, Judge Sarmina sentenced him to life imprisonment without the possibility of parole for the murder conviction, followed by a term of seven to thirty years for his other crimes. The state court described the events giving rise to the convictions as follows:

As of January, 2003, [Petitioner]'s brother, Jamaar Richardson, had worked at the Rite Aid store (hereinafter, the Rite Aid) located at 13th & Girard Streets in Philadelphia for about two months. Jamaar Richardson worked as a cashier and stocked store shelves. Id.

On Friday, January 17, 2003, Kiana Lyons was at [Petitioner's] house along with [Petitioner], Jamaar Richardson, and Lavar Brown. The back of Ms. Lyons's house faced the back of [Petitioner's] house. While at [Petitioner's] house, there was an ongoing discussion, during which Jamaar Richardson stated that he had to work stock early the next morning at the Rite Aid. He further stated that there was \$50,000 in the Rite Aid, and that the only people who would be there that next morning were himself, the manager, and the delivery truck

² In preparing this Report, we have reviewed Richardson's *pro se* petition for the issuance of a writ of habeas corpus (Doc. No. 4) ("Pet.") and accompanying memorandum ("Pet. Mem."); the District Attorney of Philadelphia's response to the petition (Doc. No. 9) ("Resp."), accompanying exhibits ("Resp. Ex."), and appendix ("Resp. Appx."); and the original state court record that we received from the Office of the Clerk of Courts of Philadelphia ("St. Ct. Rec."), as well as the electronic docket, *Commonwealth v. James A Richardson*, CP-51-CR-0310462-2003, available at: <http://ujportal.pacourts.us/DocketSheets/CPReport.aspx?docketNumber=CP-51-CR-0310462-2003> ("State Court Docket"). We have also reviewed the brief Richardson filed in his direct appeal to the Superior Court, which we found on Westlaw, see *Brief for Appellant*, 2005 WL 5488355 ("Pet. App. Br."), and which has also been included among the exhibits to the response ("Resp. Ex. D").

³ Petitioner was tried jointly with Lavar Brown, Christopher Kennedy, and his brother, Jamaar Richardson.

driver.

Delbert Wech was an Assistant Manager of the Rite Aid. On January 13, 2003, Mr. Wech was scheduled to be at the store at 4:00 a.m. to meet a delivery truck. Jamaar Richardson was scheduled to work at the same time. Mr. Wech was waiting in his car when the delivery truck arrived at the Rite Aid. As soon as the trailer pulled in, the truck driver backed up to the front door. Mr. Wech then exited his car to open the front doors, and began to bring the inventory into the store. Jamaar Richardson arrived shortly thereafter, and helped unload the truck. After they had finished unloading, Mr. Wech went out the back door of the store to take the empty totes to the trailer. He also grabbed some bags of trash that had been left near the back door from the night before and brought them to the dumpster. When he returned from the dumpster, as he was walking into the back of the store, he saw someone “slide into the store.” The person he had seen had a rifle or shotgun in his hand, and was motioning for Mr. Wech to go into the store. Instead, Mr. Wech turned and ran out the door, at which time he saw a second person standing approximately one car length away from him. The second man shot at Mr. Wech. Mr. Wech heard the shot, which went right behind his head. He then ran toward the delivery truck. Riley Wymer, the delivery truck driver, had been inside of the truck, and had heard what sounded like a gun shot. Mr. Wymer looked out of the back of the truck and saw a Black male, medium build, running from the store toward West Stiles Street.

On January 18, 2004, at some time during the day, Ronald Vann (a.k.a. Meatball) met up with [Petitioner] and Christopher Kennedy “in the neighborhood.” They were going to Chestnut Hill along with two unnamed women. Kennedy drove. On the way to Chestnut Hill, [Petitioner] stated that he and another individual had tried to rob the Rite Aid on Friday or Saturday, but that the manager got away. [Petitioner] further stated that, during the robbery, he fired a shot at the manager. After visiting a bar in Chestnut Hill, they drove to [Petitioner’s] cousin’s house in West Philadelphia. Additionally, Ronald Vann had “taken” a gun from a drug dealer in West Philadelphia later that night, and had sold it to Kennedy.

On Sunday afternoon, January 19, 2003, Kiana Lyons went to [Petitioner’s] house; she arrived after 3:00 p.m. Ms. Lyons, [Petitioner], Lavar Brown, Ronald Vann, Jamaar Richardson, and Christopher Kennedy were in the living room. They were talking

about robbing the Rite Aid, and about who would complete each task. Kennedy was supposed to shoot the manager in the leg, and then the others were to enter the Rite Aid. [Petitioner], Lavar Brown, and Jamaar Richardson were asking Kennedy whether he knew what the manager looked like. Jamaar Richardson then told Kennedy where the safe was and how much money would be inside. Ms. Lyons was asked to go to the Rite Aid ahead of time and advise the others of who was inside. Ms. Lyons contacted [Petitioner] via cellular telephone when she arrived at the Rite Aid to report who was inside.

Mr. Vann also testified that he took part in the plan to rob the Rite Aid on January 19, 2003. The planning took place at [Petitioner's] house. Mr. Vann indicated that, during the planning, [Petitioner] Jamaar Richardson, Lavar Brown, and Christopher Kennedy were present. Jamaar Richardson advised everyone where the alarms were located and instructed them on how to open the gate in the back of the Rite Aid. Mr. Vann had brought a 9-millimeter handgun with him to the house. Lavar Brown had an SK assault rifle. Christopher Kennedy had a gun as well. When Mr. Vann left the house, he left with [Petitioner] and Lavar Brown. When they arrived at the Rite Aid, they stood outside of the northeast corner of the store and waited for a phone call from Kiana Lyons. While they were waiting, [Petitioner] walked up to the window and looked inside. He ran back to the others and said, "Chris did it." At that point, they ran back to [Petitioner's] house.

That Sunday (January 19, 2003), Dinlitha Banks was working at the Rite Aid. Her shift was from 9:00 a.m. to 5:00 p.m. She was scheduled to work along with Manager Michael Richardson⁴ (hereinafter, also referred to as the victim), Security Guard Dwayne Parker, Jamaar Richardson, and two other employees. Ms. Banks was working as a cashier when she observed Christopher Kennedy following Michael Richardson down one of the aisles. Moments later she heard a gunshot. Then, the victim cried out, "But I didn't do anything. I didn't do anything." Ms. Banks ran out of the store to a payphone across the street, and called police.

That evening, Officer John McDonnell, of the 23rd District, and his partner, Officer Joseph Ewald, were on routine patrol on Girard Avenue. At approximately 6:35 p.m., as they proceeded westbound, near the 1200 block of Girard Avenue, the officers saw Security

⁴ Michael Richardson was not related to either Jamaar or James Richardson.

Guard Dwayne Parker running through the parking lot. Mr. Parker was waving his arms and approached the officers on Girard Avenue. He then told them that his manager had been shot. The officers pulled into the lot next to the Rite Aid; Officer McDonnell exited the vehicle and approached the store on foot. He was in front of the store, below the window, when he heard a gun shot from inside the store. He saw a Black male running out of the back door with a gun in his right hand; he also had a dark green plastic trash bag. He then observed that the male, who was later identified as Christopher Kennedy, had dropped the gun. Although Kennedy was ordered to stop, he kept running. The police pursued him, eventually catching up to and apprehending him. The trash bag was found a couple of feet away from the gun, and was found to contain approximately \$2,200.00 in United States currency.

Police Officer Rodney Anderson, of the 23rd District, proceeded to the Rite Aid in response to a radio call for assistance from Officer Ewald. Officer Anderson arrived at the Rite Aid and entered the store via the front door (along with another officer who had already arrived); his partner, Officer Michael Winkler, with other officers in foot pursuit, entered via the back of the store. When they entered the store, the officers noticed feet sticking outside of the manager's office door. The officers proceeded toward the feet and discovered the victim, laying in a lot of blood. The victim was gasping for air, and did not respond to Officer Anderson's voice; his only response was a gurgling sound. The victim had a bullet hole in the side of his head near his left ear. As the officers attempted to place the victim on a stretcher, his leg — between the ankle and knee — just flopped over. The victim was subsequently transported to the hospital.

Inside the Rite Aid there was a trail of blood from the front of the store to the manager's office. There was also what appeared to be a bone fragment on that trail. There was blood on the floor of the office where the victim was found and the safe was open.

Commonwealth v. Richardson, CP-51-CR-0310462-2003 at 2-7 (Phila. Ct. Comm. Pl. Sept. 15, 2005) [Resp. Ex. B]⁵ (internal citations and footnotes omitted). Shortly afterward, Michael Richardson passed away while undergoing surgery at Hahnemann University Hospital. *Id.* at 7 n.16.

⁵ We note that there appear to be two documents attached to the Response that have been designated as Exhibit B. This opinion is the first of those two exhibits.

At Petitioner’s trial, where he was represented by Bernard Siegel, Esquire, the Commonwealth called as witnesses, among many others, Kiana Lyons (N.T. 07/19/2004 at 66-206) and Laurie Wisniewski, a forensic scientist employed by the Philadelphia Police Department who “analyzes evidence in” criminal cases. (N.T. 07/22/2004 at 55-103). Petitioner did not testify, nor did he call any witnesses on his behalf. (*See, e.g.*, N.T. 07/26/2004 at 237, 243-246. *See also* N.T. 07/27/2004 at 299.)

Following upon sentencing and the denial of his post-sentence motions, on August 15, 2005, Richardson was granted the right to file a direct appeal of his murder conviction on a *nunc pro tunc* basis.⁶ *See* State Court Docket. On his direct appeal, which set out eight claims, Petitioner again was represented by Attorney Siegel.⁷ On March 16, 2007, the Pennsylvania Superior Court

⁶ Petitioner initially filed “post sentence motions” on September 17, 2004, which the Court of Common Pleas denied on October 26, 2004. *See* State Court Docket. On November 22, 2004, and while still represented by Attorney Siegel, Petitioner appealed his conviction, which was dismissed on September 9, 2004 due to Attorney Siegel’s failure to file an accompanying brief. *See Commonwealth v. Richardson*, CP-51-CR-0310462-2003 at 2 (Phila. Ct. Comm. Pl. Sept. 15, 2005) [Resp. Ex. B]. While still represented by Attorney Siegel, the PCRA court granted Petitioner’s request to reinstate his appeal rights, *nunc pro tunc*. *See id.*

⁷ Petitioner’s claims were as follows:

I. the evidence was insufficient to sustain the verdict of guilty of second-degree murder because the killing was not in furtherance of the underlying felony of robbery[...]

II. Judgment should be reversed on the conviction for criminal conspiracy because the Commonwealth failed to specifically allege an overt act in the bill of information[...]

III. The trial court erred in limiting cross-examination of cooperating co-conspirator Kiana Lyons concerning possible penalties that she might face if prosecuted by the Commonwealth[...]

(continued...)

dismissed his claims as either waived or lacking merit, and the Pennsylvania Supreme Court denied his petition for allowance of appeal on October 4, 2007. *See* State Court Docket. *See also Commonwealth v. Richardson*, 927 A.2d 657 (Pa. Super. March 16, 2007) (Table), No. 2633 EDA 2005 [Resp. Ex. B],⁸ *Com. v. Richardson*, 934 A.2d 73 (Pa. 2007) (Table).

On October 26, 2007, Petitioner again sought collateral relief under Pennsylvania’s Post Conviction Relief Act, 42 Pa.Cons. Stat. §§ 9541-46 (“PCRA”). Proceeding *pro se*, Richardson alleged ineffective assistance of counsel by Attorney Siegel, who represented him both at trial and on his direct appeal. (*See Motion for Post Conviction Collateral Relief*, filed 10/26/2007) [Resp. Ex. F].⁹ On January 22, 2008, while still *pro se*, he filed an amended PCRA petition and, upon the

⁷(...continued)

IV. The trial court erred in admitting prior consistent statements and testimony of Kiana Lyons and Ronald Vann[...]

V. The prosecutor committed prosecutorial misconduct in questioning witness Laurie Wisniewski in such a manner as to shift the burden of proof to the defense[...]

VI. The trial court erred in refusing to instruct the jury on ‘mere presence’ at the scene of a crime[...]

VII. The prosecutor committed various acts of serious misconduct during both the questioning of witnesses and during his closing argument to the jury[...]

VIII. The trial court erred in refusing to instruct that the jury was required to be unanimous as to the same overt act in order to find [Petitioner] guilty of conspiracy.”

See Pet. App. Br. at *1 [Resp. Ex. D].

⁸ We again note that there appear to be two documents attached to the Response that have been designated as Exhibit B . This opinion is the second of those two exhibits.

⁹ Exhibit F includes both the *pro se* petition and also the subsequently filed counseled petition
(continued...)

appointment of counsel, Peter A. Levin, Esquire, Petitioner filed an additional amended petition on June 26, 2008. (*See Amended Petition under Post-Conviction Relief Act*, filed 06/26/2008) [Resp. Ex. F]. In the counseled petition, Richardson again alleged that he had suffered violations of his Sixth Amendment right to effective assistance of both trial and appellate counsel. Specifically, he stated the following grounds for relief:

- (a) Trial counsel was ineffective for failing to file post sentence motions alleging that the verdict was against the weight of the evidence.¹⁰
- (b) Trial counsel was ineffective for telling Petitioner not to testify because of his religion.¹¹
- (c) Appellate counsel was ineffective for failing to raise the following three issues on appeal that were not raised in his Rule 1925(b) statement, thereby waiving those issues:
 - 1. The trial court erred in refusing to allow the defense to cross-examine a cooperating co-conspirator on her understanding of the penalties that she avoided because of her cooperation;
 - 2. The trial court abused its discretion in refusing to give a ‘mere presence’ instruction where the facts supported such an instruction;
 - 3. The prosecutor committed reversible misconduct during his questioning of the witnesses and in his closing argument to the jury.

(*Id.*) Petitioner further asserted that his “[a]ppellate counsel was ineffective for failing to preserve for appeal [that] [t]he prosecutor committed reversible misconduct by questioning an expert witness in such a manner as to imply that the defense had a burden of proof.” (*Id.*)

⁹(...continued)
and supplement thereto.

¹⁰ As explained below, Petitioner withdrew this claim in his subsequently filed “Supplemental Petition for Relief Pursuant to Post Conviction Relief Act.”

¹¹ Petitioner similarly withdrew this claim.

Petitioner filed yet another counseled PCRA petition on December 5, 2008, and the Commonwealth filed a motion to dismiss the amended petition on January 8, 2009. *See* State Court Docket. At a hearing on the petition, the PCRA court granted Petitioner's request to file a supplemental petition to clarify and eliminate several of the grounds asserted in his original filing. (*See Supplemental Petition Under Post-Conviction Relief Act*, filed 12/05/2008) [Resp. Ex. F]. Petitioner's *Supplemental Petition* and *Memorandum of Law* in support alleged that trial counsel was ineffective

1. For failing to request an instruction on 'mere presence' or in joining the request of co-defendant [Jamaar] Richardson for such an instruction.
2. For failing to object to the closing arguments of the prosecutor[.]
3. For failing to object to the prosecutor's questioning of an expert witness.

(*Id.*) Petitioner further alleged that he received ineffective assistance of appellate counsel based on his attorney's failure to state in his Rule 1925(b) statement that "[t]he trial court erred in refusing to allow the defense to cross-examine a cooperating co-conspirator on her understanding of the penalties that she avoided because of her cooperation." (*Id.*)

On February 5, 2009, the PCRA court filed a notice of intent to dismiss Richardson's petition, followed by an actual dismissal on February 27, 2009. *See* State Court Docket. Richardson filed his notice of appeal on March 4, 2009, and his "Statement of Matters Complained on Appeal" on March 13, 2009. *See id.* On May 28, 2009, without holding an evidentiary hearing, the PCRA court issued a memorandum opinion confirming its denial of all four of Richardson's remaining

PCRA claims as lacking merit. *See Commonwealth v. Richardson*, No. CP-51-CR-0310462-2003¹² (Phila. Ct. Comm. Pl. May 28, 2009) [Resp. Ex. G]. The Superior Court affirmed on December 3, 2009. *Commonwealth v. Richardson*, No. 639 EDA 2009 (Pa. Super. Ct. December 3, 2009) [Resp. Ex. I]. The Supreme Court denied Richardson’s petition for allowance of appeal on June 13, 2011. *Commonwealth v. Richardson*, 23 A.3d 541 (Table) (Pa. 2011) [Resp. Ex. J].

Richardson’s subsequent *pro se* petition for the issuance of a writ of habeas corpus (“Pet.”) and accompanying memorandum (“Pet. Mem.”) were docketed in our Court on August 8, 2011. (Doc. No. 1.) The District Attorney of Philadelphia (on behalf of the “Respondent,” the Commonwealth of Pennsylvania, or “the Commonwealth”) filed a response on October 21, 2011 (Doc. No. 8) (“Resp.”), with accompanying exhibits (“Resp. Ex.”) and appendices (“Resp. Appx.”), asserting that the petition should be denied in that Richardson’s claims were either procedurally defaulted or without merit. (Resp. at 16-17.)

II. STANDARD OF REVIEW

A. Exhaustion and Procedural Default

Out of a sense of comity and federalism, federal court habeas relief is available only for claims where the petitioner has exhausted the corrective processes available in the state court system to protect the rights of persons in state custody. *See* 28 U.S.C. § 2254(b)(1). In order to satisfy this obligation to exhaust available state court remedies and give these courts a full and fair opportunity

¹² We note that Petitioner’s trial at times is designated by two separate case numbers: CP-51-CR-0310462-2003 and CP-51-CR-0407442-2004. The first represents the charges and conviction that he challenges in this habeas petition (from the January 19 incident), the second from the January 18 incident, for which he was also charged and convicted, but which he does not challenge here. Although cross-listed as “Related Cases” (*see* State Court Docket), we cite only the first (CP-51-CR-0310462-2003). We are satisfied that this encompasses the entirety of the record necessary for our review.

to resolve a federal constitutional claim, the state prisoner must “fairly present” his claims in “one complete round of the state’s established appellate review process.” *O’Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999). “Fairly presenting” a federal claim to the state courts requires the petitioner to present both the factual and legal substance of the claim in such a manner that the state court is on notice that the federal claim is being asserted. *See McCandless v. Vaughn*, 172 F.3d 255, 261 (3d Cir. 1999).

Where a claim upon which the petitioner seeks habeas relief was not properly presented to the state court or was presented but not considered based upon a state procedural rule that was both independent of the federal question presented and adequate to support the denial of relief, the petitioner is considered to have defaulted that claim. *See, e.g., Coleman v. Thompson*, 501 U.S. 722, 749 (1991). Such a claim cannot provide a basis for federal habeas relief unless the petitioner can show “cause for the default and actual prejudice as a result of the alleged violation of federal law, or [unless he] demonstrates that failure to consider the claims will result in a fundamental miscarriage of justice.” *Id.* at 750. *See also Teague v. Lane*, 489 U.S. 288, 308 (1988) (plurality opinion); *Wainwright v. Sykes*, 433 U.S. 72 (1976). To establish cause, the petitioner must show “that some objective factor external to the defense impeded [his] efforts to comply with the State’s procedural rule.” *Murray v. Carrier*, 477 U.S. 478, 488 (1986). Attorney error rising to the level of a Sixth Amendment violation under *Strickland v. Washington*, 466 U.S. 668 (1994), may establish “cause.” *See Carrier*, 477 U.S. at 488; *Edwards v. Carpenter*, 529 U.S. 446, 452 (2000). To establish prejudice, the petitioner must show “actual prejudice resulting from the errors of which he complains.” *McCleskey v. Zant*, 499 U.S. 467, 494 (1991). The fundamental miscarriage of justice exception requires that the petitioner supplement his claims with a “colorable showing of factual

innocence.” *Id.* at 495. The burden is on the petitioner to show that “a constitutional violation has probably resulted in the conviction of one who is actually innocent.” *Schlup v. Delo*, 513 U.S. 298, 327 (1995).

B. Claims Adjudicated by the State Court

In cases where the claims presented in the federal habeas petition were adjudicated on the merits in the state courts, the federal court shall not grant habeas relief unless the adjudication:

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

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

28 U.S.C. § 2254(d).

The Supreme Court has made it clear that a habeas writ may issue under the “contrary to” clause of Section 2254(d)(1) only if the “state court applies a rule different from the governing rule set forth in [United States Supreme Court] cases or if [the state court] decides a case differently than [the United States Supreme Court has] done on a set of materially indistinguishable facts.” *Bell v. Cone*, 535 U.S. 685, 694 (2002). A writ may issue under the “unreasonable application” clause only where there has been a correct identification of a legal principle from the Supreme Court but the state court “unreasonably applies it to the facts of the particular case.” *Id.* This requires the petitioner to demonstrate that the state court’s analysis was “objectively unreasonable.” *Woodford v. Visciotti*, 537 U.S. 19, 25 (2002). Working from this standard, we must evaluate each of Petitioner’s five claims to determine if any were decided “contrary to or involved an unreasonable application of clearly established federal law.”

C. Standard for Claims of Ineffective Assistance of Counsel

In *Strickland v. Washington*, 466 U.S. 668 (1984), the Supreme Court established a two-prong test to evaluate claims of ineffective assistance of counsel in violation of the Sixth Amendment. Under *Strickland*, counsel is presumed to have acted reasonably and effectively unless the petitioner can demonstrate both that “counsel’s representation fell below an objective standard of reasonableness” and that there was “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 686-88, 693-94. Applying the *Strickland* standard, the federal Courts of Appeals have consistently held that counsel cannot be held ineffective for failing to raise a meritless claim. *See, e.g., United States v. Sanders*, 165 F.3d 248, 253 (3d Cir. 1999); *United States v. Kimler*, 167 F.3d 889 (5th Cir. 1999).

We note also that the Supreme Court has recognized that one of the duties of appellate counsel is to select which claims are most likely to obtain relief for their clients based upon the state of the law at that time, even if this means not presenting claims that might be meritorious if a higher court reconsiders a prior holding or repudiates an established state rule. *See, e.g., Smith v. Murray*, 477 U.S. 527, 535-36 (1986) (noting, in a case where counsel presented 13 claims on direct appeal but not a claim upon which his client later sought habeas relief, that counsel’s process of “winnowing out weaker arguments on appeal and focusing on those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy”). *See also Buehl v. Vaughn*, 166 F.3d 163, 174 (3d Cir. 1999) (noting that “[o]ne element of effective appellate strategy is the exercise of reasonable selectivity in deciding which arguments to raise”); *Sistrunk v. Vaughn*, 96 F.3d 666, 670 (3d Cir. 1996) (observing that counsel has “no duty to raise every possible claim” on appeal, that “[a]n exercise of professional judgment is required,” and that “[a]ppealing

losing issues runs the risk of burying good arguments ... in a verbal mound made up of strong and weak contentions”) (citations and quotations omitted).

When the Pennsylvania Superior Court has addressed a claim on the merits, our analysis must be guided by the deferential standard of review provided for in § 2254(d). As the *Strickland* standard itself is a “general standard,” and the Supreme Court recognizes that a state court “has even more latitude to reasonably determine that a defendant has not satisfied that standard,” our review of a state court decision on the merits of an ineffectiveness claim is “doubly deferential.” *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009). In these circumstances, we “take a highly deferential look at counsel’s performance, *Strickland, supra*, at 689, through the deferential lens of § 2254(d), *Mirzayance, supra*, at n.2.” *Cullen v. Pinholster*, --- U.S. ---, 131 S.Ct. 1388, 1403 (2011). *See also Harrington v. Richter* -- U.S. ---, 131 S. Ct. 770, (2011) (in which the Supreme Court recently reiterated that “the standards established by *Strickland* and § 2254(d) are both ‘highly deferential,’ and when the two apply in tandem, review is ‘doubly’ so.” (internal citations omitted).)

III. DISCUSSION

Richardson filed his petition under § 2254 on August 8, 2011. Initially, we note that the Commonwealth has not challenged its timeliness. Our independent review confirms that Richardson’s petition was in fact filed within the one-year statute of limitation imposed by 28 U.S.C. § 2244(d)(1). Accordingly, we turn to his particular claims for relief.

Richardson’s petition sets forth five general grounds for relief. They are:

- (1) that the prosecutor committed misconduct, “in violation of the 5th, 6th, and 14th Amendments to the United States Constitution when at trial the victim/witness was asked to pick out the actor who committed the offense [and] [t]he prosecutor, Thomas Malone (ADA) had the Petitioner stand up” to make the identification;

(2) that his trial counsel was ineffective for failing “to request an instruction on mere presence” when he did not join his co-defendant’s counsel’s request for the same, and when he “failed to object to the trial court’s jury instruction which deprived Petitioner of a fair trial”;

(3) that his trial counsel was ineffective “for failing to preserve at trial the objections that should have been made to the prosecutor[’]s closing arguments, when such closing went beyond the normal standard allowed and was what amounting to the prosecutor using his closing as a bully pulpit in violation of the 5th, 6th, and 14th Amendments”;

(4) that his trial counsel was “ineffective for failing to object to ADA Thomas Malone[’s] manner of questioning Laurie Wisniewski[,] the DNA expert for the Commonwealth and also for failing to ask for a mistrial”;

(5) that his appellate counsel was ineffective “for failing to include a meritorious issue in the Rule 1925(b) Statement.”

(Pet. Mem. at 3-4.)

Respondents urge that the petition be denied with prejudice, in that the claims are procedurally defaulted or have been reasonably rejected by the state courts as lacking merit. (Resp. at 1, 16-17.) For the reasons set out within, we agree.

A. Ground One: Ineffectiveness due to Failure to Request a Mere Presence Instruction¹³

Richardson has argued that he was deprived of his Sixth Amendment right to effective assistance of trial counsel when his attorney failed “to request an instruction on mere presence” and failed “to join with co-defendant[’]s counsel—who made such an objection at trial on behalf of co-defendant.” (Pet. Mem. at 12.) He further claims that his trial counsel was ineffective for failing to object to the “generalized instruction to the jury as applied to the co-defendants as a group,” rather

¹³ We address this claim first, followed by the rest of Richardson’s ineffectiveness claims, even though Petitioner listed the prosecutorial misconduct claim first on his habeas petition.

than allowing the jury to consider “an individual defendant’s defenses, separate and apart from his co-defendants.” (*Id.* at 13 (citing *Commonwealth v. Henderson*, 378 A.2d 393, 398 (1977), *Commonwealth v. Tyler*, 435 A.2d 1212 (1981)).) Overall, Petitioner urges that the Superior Court’s rejection of this claim was “contrary to Supreme Court precedent,” presumably referring to *Strickland*. (Pet. Mem. at 6.) Respondent does not contest that Richardson has “fairly presented” this claim to the state courts. *See O’Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999). The PCRA and Superior courts denied relief as to this claim on the merits, and thus it is now properly before us for consideration.

On PCRA review, the PCRA court rejected the notion that Petitioner’s conviction should be vacated due to this alleged ineffectiveness, concluding that “trial counsel’s failure to request such an instruction is irrelevant because one was actually given regardless of such failure by his counsel and petitioner suffered no prejudice as a result.” *Commonwealth v. Richardson*, No. CP–51–CR–0310462-2003, at 7 (Phila. Ct. Comm. Pl. May 28, 2009) [Resp. Ex. G]. The Superior Court affirmed, based on the same reasoning.¹⁴ *See Commonwealth v. Richardson*, No. 639 EDA 2009 at 10 (Pa. Super. Ct. December 3, 2009) [Resp. Ex. I] (concluding that it had “reviewed the arguments of the parties, the certified record, and the relevant legal authority,” and concluded “that there was no legal error of abuse of discretion” in the PCRA court’s handling of the claim.). Accordingly, we may find that Richardson is entitled to habeas relief on this ground only if he can demonstrate that the “state court applie[d] a rule different from the governing law set forth in [United States Supreme Court] cases or if [the state court] decide[d the] case differently than [the United

¹⁴ We observe that the Superior Court did not provide a particularly robust review of the PCRA court’s determinations, but that under recent Supreme Court case law, the court’s treatment was adequate under 28 U.S.C. § 2254. *See Harrington v. Richter*, -- U.S. ---, 131 S. Ct. 770 (2011).

States Supreme Court has] done on a set of materially indistinguishable facts.” *Bell v. Cone*, 535 U.S. 685, 686 (2002). In that the state courts did, in fact, apply clearly established federal law in rejecting this claim, we must determine only whether they unreasonably applied the *Strickland* elements in this case.

In its decision, the PCRA court set out the Pennsylvania standard for ineffectiveness claims, which requires the petitioner to prove that ““(1) that the underlying claim has arguable merit, (2) that counsel’s conduct was without a reasonable basis designed to effectuate his or her client’s interest, and (3) that counsel’s ineffectiveness prejudiced the appellant.”” *Commonwealth v. Richardson*, No. CP–51–CR–0310462-2003, at 3 (Phila. Ct. Comm. Pl. May 28, 2009) (citing *Commonwealth v. Allen*, 383 A.2d 800, 802 (Pa. Super. 2003)) [Resp. Ex. G]. The court went on to observe that the Pennsylvania “Supreme Court has noted that if a PCRA petitioner fails to demonstrate that ‘counsel’s act or omission adversely affected the outcome of the proceedings, the claim may be dismissed on that basis alone and the court need not first determine whether the first and second prongs have been met.’” *Id.* (citing *Commonwealth v. Travaglia*, 661 A.2d 352, 357 (Pa. 1995) (citing *Strickland v. Washington*, 466 U.S. 668, 697 (1984))). Applying this standard, the PCRA court rejected the notion that Petitioner’s conviction should be vacated due to this alleged ineffectiveness, pointing out that the trial court did include the concept of “mere presence” in the conspiracy instruction it provided to the jury, and that the manner in which the instruction was given made clear that it applied to any defendant, including Petitioner—accordingly, Petitioner suffered no prejudice from his counsel’s failure to request such an instruction. *Id.* at 7. The court noted specifically that, in explaining what is required to convict any defendant of engaging in a conspiracy, the trial court instructed the jury that “[a] defendant does not become an accomplice merely by being

present at the scene, or knowing about a crime.” (*Id.*)¹⁵ The Superior Court affirmed, concluding that “[t]he PCRA court’s opinion comprehensively disposes of [Petitioner’s] issues on appeal.” *Commonwealth v. Richardson*, No. 639 EDA 2009 at 10 (Pa. Super. Ct. December 3, 2009) [Resp. Ex. I]. Our independent review of the trial transcripts reveals that although the trial court did not provide a separate instruction that specifically included the phrase “mere presence,” the court’s charge on criminal conspiracy and accomplice liability adequately addressed the concept.¹⁶ (*See, e.g.*, N.T. 07/28/2004 at 188-193.)

¹⁵ As described above, Judge Sarmina provided the jury with the following admonition:

I also want to point out that if you believe that certain coconspirators committed the robbery, and that another defendant was in their company, present at this scene, and knew when they were committing that crime, you can[not] infer from those facts alone that that defendant was guilty of conspiracy.[...] Put simply, if you convict any defendant of the conspiracy charge, it must be because he was a party to a conspiracy, and not just a knowing spectator to a crime committed by his companions.

(N.T. 07/28/2004 at 189-190.) In other words, the court did provide the essence of a “mere presence” instruction, as part of a quite thorough explanation of criminal conspiracy and accomplice liability. This instruction was provided with respect to both incidents—the attempted robbery on January 18, and the robbery and murder that occurred on January 19, 2003. (*Id. See also id.* at 211-212.)

¹⁶ As Petitioner notes, counsel for his co-defendant Jamaar Richardson, Regina Coyne, Esquire, did request a charge on “mere presence.” The court initially told all defense counsel that it would be “giving mere presence as to Jamaar” (N.T. 07/27/2004 at 304), but Judge Sarmina later decided that she was “not going to give the mere presence charge because [she gave] the knowledge and intent are not sufficient, not once but twice.” (N.T. 07/28/2004 at 15.) It was the court’s ultimate view that a separate charge on “mere presence” would “just be redundant.” (*Id.*) Rather than protest the court’s decision, as Judge Sarmina invited Attorney Coyne to do, Attorney Coyne proclaimed that she thought the conspiracy charge “would be sufficient.” (*Id.* at 15-16.)

We also observe that at the time that Attorney Coyne, requested a mere presence instruction, she reported to the court that she had “conferred with Attorney Siegel [the day before] as to certain points for charge.” (N.T. 07/27/2004 at 6.)

We conclude that Attorney Siegel's actions could not be deemed to have prejudiced Petitioner in light of the fact that the essence of the instruction that Petitioner desired was in fact provided to the jury. As Petitioner himself notes, his "trial counsel argued a specific defense of mere presence, and presented evidence throughout trial in support of that defense." (Pet. Mem. at 15.)¹⁷

¹⁷ Petitioner describes that his counsel

argued both during his opening and closing arguments that Petitioner did not go into the Rite-Aid store on 1/19/03 where the events took place, didn't assist any of the events that took place inside of the store, on January 29, 2003, and that Petitioner did not cause any of the events taking place inside the store. (N.T. 7/16/04 at 82-83); & (N.T. 7/28/04 at 58). Throughout the trial counsel's limited questioning of witnesses aimed at establishing that Petitioner did not participate in a conspiracy or any other understanding to commit a robbery or murder and that Petitioner did not participate in this instant offense...[and specifically] argued that on 1/19/03 Petitioner was merely present outside the store, not a participant whatsoever in the criminal offense, and not a participant in the conspiracy.

(Pet. Mem. at 14.) Importantly, we note that Petitioner is correct that Attorney Siegel emphasized Petitioner's lack of participation in the particular acts that led to Michael Richardson's death in the course of the January 19 robbery. Attorney Siegel, did not, however take the position that his client never participated in the conspiracy. Instead, he was steadfast in his attempt to have the court instruct the jury on "abandonment of conspiracy," a variation on the more typically used "renunciation" charge. *See, e.g.*, N.T. 07/27/2004 at 17-20. By his own account, Attorney Siegel did not merely submit the standard renunciation charge, but instead submitted his own tailored point for charge in an attempt to characterize his client's behavior in a more favorable light for the jury. *See id.* at 21 (in which Siegel explains that "what I did is took the language of the statute and crafted a proposed instruction").

Although the court ultimately did not adopt Attorney Siegel's proposed jury instruction, we view Attorney Siegel's attempt as noteworthy in the context of Petitioner's ineffectiveness claim. While Petitioner claims that "when the time came for Petitioner's counsel to submit the proposed jury charges to the court, the record is void and silent...that any of the charges submitted by counsel —> was a charge on mere presence." (Pet. Mem. at 14) (emphasis in original.) In Petitioner's view, the submission of such a charge would have enabled "the jury to be fully instructed on one of the Petitioner's main defenses." (*Id.*) This contention both acknowledges that counsel *did* in fact submit proposed jury charges and simultaneously ignores the fact that those submitted aimed to capture the same concept, and have the same impact as a "mere presence" charge would have had.

Attorney Siegel therefore primed the jury to focus on that aspect of the general conspiracy instruction that described that a defendant who was merely “present at the scene” and knew of the co-conspirator’s intention to commit that crime could not be found guilty of the charge based on that fact alone.

The fact that Attorney Siegel personally did not argue for such an instruction, then, cannot be said to have prejudiced Petitioner in any way. Petitioner received the benefit of his counsel’s advocacy on his lack of involvement in the actions leading to the death of Michael Richardson, as well as the court’s instruction that conspiracy requires more than mere presence at the scene of the crime. We therefore find nothing “objectively unreasonable” in the state court’s conclusion that Petitioner’s trial counsel was not ineffective for failing to request a “mere presence” jury instruction. *See Woodford*, 537 U.S. at 25. The Superior Court reasonably carried out clearly established federal law in applying the test for ineffective assistance of counsel, and deciding not to disturb the determinations made by the PCRA court regarding counsel’s performance. *See* 28 U.S.C. § 2254(d). Therefore, this claim does not warrant habeas relief.¹⁸

¹⁸ We address separately Petitioner’s claim that “[i]n addition to all this[,] when the trial court allowed an opportunity at the conclusion of its instructions to the jury, the counsel for Petitioner did not object to the instructions given to the jury by the trial court that were misleading and confusing.” (Pet. Mem. at 14.) Ostensibly in support of this claim, Petitioner argues that the trial court used “two distinct and different types of language...in regards to two sep[e]rate theories of liability, to define one legal standard,” which “did mislead and confuse the jury to the point of not knowing what precisely was sufficient to convict Petitioner under either theory of liability.” (*Id.* at 15.) He further contends that “counsel allowed the trial court to provide a generalized instruction that applied to all four co-defendants as a group.” We interpret this as a differently-worded version of the same argument—that his counsel should have ensured that the court provided two separate sets of instructions, one regarding those actors who took active steps in the commission of the crimes, one dealing with those who were “merely present.”

Looking at the trial court’s jury instructions as a whole, moreover, as a reviewing court must, we cannot agree with Petitioner that there was a *reasonable probability* that the jury misapplied or
(continued...)

B. Ground Two: Ineffectiveness due to Failure to Object to Prosecutor’s Closing Argument

Petitioner next argues that trial counsel was ineffective for failing to object to certain alleged instances of “prosecutorial misconduct” that occurred in the context of the prosecutor’s closing argument. (Pet. Mem. at 16.) He argues that the “closing went beyond the normal standard allowed and was what amounted to the prosecutor using his closing argument as a bully pulpit in violation of the 5th, 6th, and 14th Amendments to the United States Constitution.” (*Id.* at 17.) He specifically urges us to find that “the prosecutor both expressed his personal opinion as to the co-defendants’ guilt on one of the charges and the prosecutor’s words appealed to the emotions of the jury thus prejudicing the Petitioner who was on trial with the co-defendants for the same offense.” (*Id.*) Respondents concede that this claim was properly raised in state court, but argue that the Superior Court’s disposition of it was a reasonable application of *Strickland*. It is therefore properly before us to review.

With respect to concerns of prosecutorial misconduct, we note that the Fourteenth Amendment’s due process clause would be violated where remarks made by a prosecutor “so

¹⁸(...continued)

misinterpreted the instruction and the concept of a conspiracy, nor that the jurors would have decided the case differently had the instructions been phrased in some other way that Petitioner may have preferred. The trial court did instruct the jury that the Commonwealth’s burden applied to each defendant individually (*see, e.g.*, N.T. 07/28/2004 at 194, where the court stated that “[i]f you find the elements of robbery as I just mentioned, have been established beyond a reasonable doubt, then you should find the defendant for whom that has been established beyond a reasonable doubt, guilty of this charge, otherwise you must find that defendant not guilty of this charge.”).

Ultimately, the instruction described by Petitioner did not reflect a legal principle on which the jury required a separate instruction in order to fairly resolve the case before it. The fact that Attorney Siegel failed to raise such a proposed instruction did not constitute deficient performance. As the state court did not unreasonably determine that there would have been no merit to an objection to the given instructions (beyond those already asserted by Attorney Siegel), it properly concluded that Petitioner’s *Strickland* claim premised upon this basis would fail.

infected the entire trial as to make the resulting conviction a violation of due process.” *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974)). When we assess whether a federal due process violation occurred, the allegedly improper remarks must be considered in the context of the entirety of the trial, not in isolation. *Id.* at 179. Therefore, a reviewing court must weigh the severity of any misconduct by the prosecutor, the effect of any curative instruction, and the quantum of evidence against the petitioner. *Moore v. Morton*, 255 F.3d 95, 107 (3d Cir. 2001). “[T]he stronger the evidence against the defendant, the more likely that improper arguments or conduct have not rendered the trial unfair, whereas prosecutorial misconduct is more likely to violate due process when evidence is weaker.” *Marshall v. Hendricks*, 307 F.3d 36, 69 (3d Cir. 2002).

Petitioner contends, as he did before the PCRA court and Superior Court on PCRA review, that his attorney should have objected to the comments made by the prosecutor in his closing regarding the fact that a man, Michael Richardson, was murdered over money. ADA Malone advised the jury that “Mr. Michael Richardson doesn’t have any life, he’s dead, he’s gone forever,” in contrast to the defendants, who were “all alive,” “breathing,” and able “to see their families.” (N.T. 07/28/2004 at 115.) By contrast, he emphasized to the jury, Petitioner and his co-defendants took Michael Richardson’s life, “all to get that thirty or \$40,000.” (*Id.*) In Petitioner’s view, this rhetoric constituted ADA Malone’s using “the closing argument as a bully pulpit to inflame emotions.” (Pet. Mem. at 17.) He argues that

[b]y telling the jury the defendants stole the Rite Aid manager[’s] life he was thus expressing not only his personal belief that Petitioner and co-defendants were guilty but he was also-as the ADA-firing up the emotions of that jury to be blinded by rage and find a guilty verdi[c]t because of that rage. By saying the co-defendants stole the victim[’s]

life for **money** the ADA Malone was also telling the jury the defendants were guilty of murder and robbery.

(Pet. Mem. at 18.) (emphasis in original.) According to Petitioner, Attorney Siegel’s failure to object to these remarks therefore served to “deny the Petitioner a fair trial” in violation of *Strickland*, as counsel “had no reasonable basis not to object” given that “it was counsel’s duty to ensure that Petitioner would in fact receive a fair trial.” (Pet. Mem. at 19, citing *Strickland*, 466 U.S. at 486.)

In evaluating this claim on PCRA review, the PCRA court observed that, “[c]omments are not evaluated ‘in a vacuum; rather we must look at them in the context in which they were made.’” *Commonwealth v. Richardson*, CP–51–CR–0310462–2003, at 6 (Phila. Ct. Comm. Pl. May 28, 2009) (citing *Commonwealth v. Henry*, 706 A.2d 313, 330 (Pa. 1997) [Resp. Ex. G]). Accordingly, “[f]rom this perspective, it is apparent that the prosecutor’s statement was in ‘fair response’ to a statement by co-defendant Christopher Kennedy’s attorney, David Desiderio, that freedom is a precious commodity.” (*Id.* (citing N.T. 07/28/2004 at 71-72)) The PCRA concluded, therefore, that trial counsel was not ineffective for failing to object to the comment and, further, that Petitioner was not prejudiced by it. (*Id.*)¹⁹ The Superior Court affirmed, concluding that “there was no legal error or abuse of discretion committed by the PCRA court in denying [Richardson’s] petition.” *Commonwealth v. Richardson*, No. 639 EDA 2009 at 10 (Pa. Super. Ct. December 3, 2009) [Resp. Ex. I].

As did the PCRA court, we consider the context of the complained-of comment, particularly

¹⁹ We also note, based on our independent review of the trial transcript, that Petitioner cannot allege that he suffered any prejudice based on Attorney Siegel’s failure to object, in that counsel for his co-defendant Jamaar Richardson did object, and the court sustained that objection. (*See* N.T. 07/28/2004 at 115.) Accordingly, Petitioner received the benefit of that objection and cannot demonstrate that he suffered any prejudice as a result of his counsel’s inaction.

with respect to *Strickland* and the function of a trial. Even taken in the aggregate, we do not find that a mistrial would have been warranted nor the conviction reversed on appeal had Petitioner's counsel objected to the aspects of the prosecutor's arguments about which Richardson complained in the PCRA court and Superior Court on PCRA review and about which he complains here. *Strickland* requires that a petitioner demonstrate both that counsel performed deficiently and that he was prejudiced as a result. We find nothing unreasonable in the state courts' determination that Attorney Siegel's failure to object to these comments did not meet this standard.

Our determination that this aspect of Richardson's petition does not merit habeas relief is buttressed by the "doubly" deferential standard with which we are to evaluate the state courts' conclusions on ineffectiveness claims. *See Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009). *See also Harrington v. Richter*, -- U.S. ---, 131 S. Ct. 770, 788 (Jan. 19, 2011). With that standard in mind, we are unable to find any basis upon which we could conclude that the Superior Court unreasonably interpreted and applied *Strickland* when it measured the performance of trial counsel with respect to Attorney Siegel's failure to object to the prosecutor's comments during his closing statement. We will not recommend that habeas relief be granted upon this claim.

C. Ground Three: Ineffectiveness for Failure to Object to Prosecutor's Questioning of Laurie Wisniewski

Petitioner claims that his trial counsel was "ineffective for failing to object to the prosecutor's questioning of an expert witness," Laurie Wisniewski, (Pet. Mem. at 20), a forensic scientist who works as "a civilian employee of the Philadelphia Police Department [and] analyzes evidence in" criminal cases. (N.T. 07/22/2004 at 55.) In Petitioner's view, the prosecution's questioning of Ms. Wisniewski, who served as one of the Commonwealth's witnesses, "impermissibly shifted the

burden of proof to the defense by suggesting the defense had a burden to produce evidence and perform DNA analysis on said evidence” and that “[t]his shifted the burden to the defendant rather than the State.” (Pet. Mem. at 20.)

At issue is an exchange between ADA Malone and Ms. Wisniewski, in which ADA Malone inquired as to whether Ms. Wisniewski would have analyzed blood samples presented to her by someone other than an assistant district attorney—appearing to imply that she would have tested samples from the other defendants, had they been submitted to her by any defense counsel for comparison with other samples taken from the crime scene and victim’s body. (N.T. 07/22/2004 at 76-77.)²⁰ Counsel for one of Petitioner’s co-defendants objected to this line of questioning and the

²⁰ Review of the questioning of Ms. Wisniewski is instructive: ADA Malone first walked her through the results of the materials on which she performed DNA analysis, leading Ms. Wisniewski to explain that she was asked to compare the DNA found in certain bullet fragments recovered from the scene and fluids from the tip of the murder weapon, to that from the victim, Michael Richardson. (N.T. 07/22/2004 at 57-67.) Her analysis led her to conclude that the “DNA results [were] the same” (*id.* at 62) or, in other words, that the samples found “match[ed] Michael Richardson’s DNA.” (*Id.* at 66.) Ms. Wisniewski also testified to finding that hairs found on a knit had did not match Mr. Richardson’s DNA. (*Id.* at 68-70.) After counsel for co-defendant Lavar Brown asked Ms. Wisniewski to confirm that “nothing in [her] analysis that link[ed his] client, Lavar Brown, to this incident” (*id.* at 75), on redirect ADA Malone asked the witness, “if someone other than the district attorney in the case wanted something that was submitted to [her] on this list compared against anybody else, would they have been able to ask [her] to do those tests?” (*Id.* at 76-77.) The court sustained the objection made by counsel for one of the co-defendants, Jonathan Altschuler, Esquire, at which point ADA Malone followed up by asking, “[w]ell, if there was something submitted or there was a request by a defense attorney to ask for comparisons, would have you have honored that request?” (*Id.* at 77.) The court again sustained Attorney Altschuler’s objection, at which point Attorney Altschuler requested a mistrial at sidebar. (*Id.* at 77-78.)

After a lengthy discussion at sidebar, the court asked Petitioner’s counsel, Attorney Siegel, whether he had “anything else [he] wanted to say.” (*Id.* at 86). Attorney Siegel replied, “[n]o, Your Honor. I am very interested in what has been said.” (*Id.*) He later followed up with, “[n]ot that it will matter, given other counsel want this, but on behalf of James Richardson, I am not asking for a curative instruction.” (*Id.* at 88.)

Although Attorney Siegel did not request a curative instruction, in that counsel for other defendants had made such a request, the court did provide one. Specifically, after each of the
(continued...)

court sustained the objection, but denied his subsequent request for a mistrial. (N.T. 07/22/2004 at 76-81). Judge Sarmina did, however, offer to “give the jury a cautionary instruction that the defense has no burden to request anything or do anything” (*id.* at 81), which, as Petitioner himself highlights, she did do. (*Id.* at 103-104.) In Petitioner’s view, however, “[n]o instruction could remove the damage done.” (Pet. Mem. at 22 (arguing that “[t]he jury was tainted by the improper questioning of the DNA expert by ADA Malone” and “[y]et Petitioner’s counsel did not make an objection to this line of questioning by the ADA and did not join in the objection made by co-defendant[‘s] counsel Mr. Altschuler, Esq.,” thereby failing “to preserve the issue for appellate review.”²¹)).) Petitioner alleges that “[t]he prosecution’s questioning of Wisniewski improperly shifted the burden of proof to the defendants, including Petitioner, by implying they had a duty to present exculpatory evidence and should have done so by submitting DNA samples for analysis to Wisniewski.” (Pet. Mem. at 21.)

Acknowledging that Attorney Siegel did not object to ADA Malone’s questioning of Ms.

²⁰(...continued)
attorneys had finished questioning Ms. Wisniewski, Judge Sarmina told the jury the following:

Ladies and gentlemen, I just want to reiterate for you in this case the entire burden of proof is on the Government. The defense has no burden to do anything whatsoever, not to make any requests for any tests or anything whatsoever. The entire burden of proving each defendant’s guilt beyond a reasonable doubt is on the Commonwealth and only upon the Commonwealth.

(N.T. 07/22/2004 at 103-104.)

²¹ We observe that Petitioner is correct in his assertion that Attorney Siegel’s failure to object to the line of questioning did waive the issue on direct appeal. The Superior Court in fact did decline to address the issue as a result of the waiver. *See Commonwealth v. Richardson*, CP-51-CR-0310462-2003 at 13 (Phila. Ct. Comm. Pl. Sept. 15, 2005) [Resp. Ex. B]. This does not, however, have any impact upon our prejudice analysis.

Wisniewski (*see, e.g.*, N.T. 07/22/2004 at 76), Petitioner fails to establish how this inaction prejudiced him. As Petitioner himself points out, “even Judge Sarmina...expressed that questioning was wrong[, and...] tried to erase that impact of improper examination by giving a cautionary instruction.” (Pet. Mem. at 22.) Petitioner contends that “[t]he jury was tainted by the improper questioning,” but Attorney Siegel could not have prevented ADA Malone from asking the question, nor could his objections have created a more favorable outcome, as the objection made by co-defendant’s counsel, Attorney Altschuler, was sustained, and a cautionary instruction was given to the jury. Even if Attorney Siegel had joined in Attorney Altschuler’s objection or motion for mistrial, the outcome would have been the same. For the same reasons as articulated above, Plaintiff has failed to make out the prejudice prong of *Strickland*.

On PCRA review, the PCRA court concluded that “[a]lthough this issue was [...] not addressed on appeal in petitioner’s case, the Superior Court *did* reach the merits of this precise claim in regard to co-defendant Lavar Brown,” *Commonwealth v. Richardson*, CP–51–CR–0310462-2003, at 5 (Phila. Ct. Comm. Pl. May 28, 2009) [Resp. Ex. G], and “determined that the Commonwealth’s comment was adequately addressed by the cautionary instruction given by the jury.” (*Id.* n.8.) The court further described that

During the pendency of the PCRA petition before this Court, this Court directed PCRA counsel to clarify how [James Richardson’s] claim differed from co-defendant Brown’s claim and to show a reasonable probability that the outcome would be different in Petitioner’s case. N.T. 9/19/08 at 45-56. Thereafter, PCRA counsel filed a Supplemental Amended Petition, yet in it he failed to detail how petitioner’s claim differed from co-defendant Brown’s claim, and failed to allege prejudice as a result of trial counsel’s failure to object to the prosecutor’s questioning of Ms. Wisniewski. Because petitioner benefitted from the same cautionary instruction given to the jury as a result of co-defendant Brown’s objection, petitioner suffered

no prejudice and, accordingly, this claim fails.

(*Id.* at 5-6.) The Superior Court affirmed, based on the same reasoning. *See Commonwealth v. Richardson*, No. 639 EDA 2009 at 10 (Pa. Super. Ct. December 3, 2009) [Resp. Ex. I].

We again find nothing unreasonable in the state courts' handling of this question. *Richardson* has not articulated any basis upon which Attorney Siegel's failure to object impacted the ultimate outcome of the case. *See Strickland*, 466 U.S. at 686-88, 693-94 (holding that in order to establish ineffective assistance, a party must be able to demonstrate that there was "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.") Accordingly, we cannot recommend that habeas relief be granted on this claim.

D. Ground Four: Appellate Counsel Ineffectiveness

Petitioner claims that "[a]ppellate Counsel was ineffective for failing to include a meritorious issue in the 1925(b) Statement concerning the right to confrontation[...]involv[ing] the right to a full and complete cross examination of one of the Commonwealth witnesses by the name of Kiana Lyons[,] an alleged co-conspirator of Petitioner and his co-defendants." (Pet. Mem. at 23.) Lyons was questioned at length about how her participation in the Commonwealth's case had impacted her potential liability for the crimes with which Petitioner and his co-defendants had been charged. The Court allowed defense counsel, on cross-examination, to probe quite extensively into the penalties she might have faced if charged for her participation in the conspiracy, but sustained an objection to a question about the specific sentence that could be imposed for second-degree murder (a crime for which Petitioner and several co-defendants were on trial). *See, e.g., Commonwealth v. Richardson*, No. CP-51-CR-0310462-2003, at 8 (Phila. Ct. Comm. Pl. May 28, 2009) [Resp. Ex. G]. Attorney Siegel, who continued to represent Petitioner on appeal, did include this claim in the

brief he filed with the Superior Court, but the court deemed it to have been waived because it was not previously included in his Rule 1925(b) statement. *See Brief for Appellant*, 2005 WL 5488355 (“Pet. App. Br.”) [Resp. Ex. C]. In the memorandum accompanying his habeas petition, Petitioner details why he believes the underlying issue “had serious merit,” sufficient for him to instruct his appellate counsel to raise it on appeal, and thereby rendering his appellate counsel ineffective when he failed to do so. (Pet. Mem. at 24-25.)

Petitioner first raised this ineffectiveness claim arising from counsel’s inaction on PCRA review. The PCRA court reviewed the extent to which defense counsel questioned Ms. Lyons, including “regarding the penalties for first-degree murder and robbery,” and pointed out that “[t]he jury also heard testimony of Ms. Lyons’ Letter of Immunity and Proffer Agreement.” *Commonwealth v. Richardson*, No. CP-51-CR-0310462-2003, at 8 (Phila. Ct. Comm. Pl. May 28, 2009) [Resp. Ex. G]. It also pointed out that the trial court had “clearly cautioned the jury to view accomplice testimony with disfavor because it comes from a polluted or corrupt source.” *Id.* (citing N/T/ 07/28/2004 at 225-226.)

Additionally, the PCRA court again looked to the direct appeal of a co-defendant, Jamaar Richardson, where another panel of the Superior Court “found that cross-examination was appropriately limited as to Ms. Lyons, and that her potential bias was adequately elucidated on cross examination.” *Commonwealth v. Richardson*, No. CP-51-CR-0310462-2003, at 8 (Phila. Ct. Comm. Pl. May 28, 2009) [Resp. Ex. G] (citing *Commonwealth v. Richardson*, 2678 EDA 2004, Slip. Op. at 5 (Pa. Super. Sept. 20, 2006) (unpublished Memorandum).²²) In Petitioner’s case, the

²² The PCRA court in Petitioner’s case, in describing what the Superior Court had done on Jamaar’s direct appeal, stated as follows:

(continued...)

PCRA court further noted that it had asked PCRA counsel to clarify how Petitioner’s claim differed from that offered by Jamaar Richardson: the court noted that, in response, James Richardson’s “PCRA counsel asserted only that a different panel of the Superior Court might have decided the matter differently” which circumstance the court observed “plainly does not meet the prejudice hurdle of the ineffective assistance of counsel test and petitioner’s final claim thus fails.” *Id.* at 8-9. The Superior Court affirmed, based on the same reasoning. *See Commonwealth v. Richardson*, No. 639 EDA 2009 at 10 (Pa. Super. Ct. December 3, 2009) [Resp. Ex. I].

We find nothing “objectively unreasonable” in the state courts’ conclusion that Petitioner’s appellate counsel was not ineffective for failing to raise in his 1925(b) Statement the claim regarding the cross-examination of Kiana Lyons. *See Woodford*, 537 U.S. at 25. In addition to analyzing Petitioner’s claim in the context of co-defendant Jamaar Richardson’s appeal, the PCRA court also independently addressed the substantive merits, ultimately concluding that “[d]uring cross-examination of Commonwealth witness Kiana Lyons, this Court permitted adequate questioning by defense counsel.” *Commonwealth v. Richardson*, No. CP–51–CR–0310462-2003, at 7 (Phila. Ct.

²²(...continued)

This Court’s stated reason for limiting cross-examination as to the penalty for second-degree murder was because this Court concluded it was an improper tactic on the part of defense counsel—meant only to engender sympathy—to place the penalty for the non-capital defendants before the jury. Because in non-capital cases, the jury is charged solely with the determination of guilt or innocence, *see generally Commonwealth v. Golinsky*, 626 A.2d 1224, n. 4 (Pa. Super. 1993), and not with punishment, this Court appropriately precluded defense counsel from introducing evidence as to the penalty for second-degree murder to the jury.

See Commonwealth v. Richardson, No. CP–51–CR–0310462-2003, at 8 n.10 (Phila. Ct. Comm. Pl. May 28, 2009) [Resp. Ex. G].

Comm. Pl. May 28, 2009) [Resp. Ex. G]. The court continued, noting that “Ms. Lyons was questioned at length by each defense attorney and each, in some manner, questioned the witness regarding her potential bias,” and that Attorney Siegel

even questioned the witness regarding the penalties for first-degree murder and robbery; he was only precluded from inquiring regarding the penalty for second-degree murder. The jury also heard testimony of Ms. Lyons’ Letter of Immunity and Proffer Agreement.

Furthermore, in giving the jury its instruction concerning accomplice testimony, this Court clearly cautioned the jury to view accomplice testimony with disfavor because it comes from a polluted or corrupt source. The jury is presumed to follow the instructions of the Court. Thus, it cannot be said that the jury was unaware of Ms. Lyon[s’] potential bias.

Id. at 7-8 (internal citations omitted).

Our independent review confirms that approximately seventy-five pages of notes of testimony detail the degree to which the trial court considered the admissibility and veracity of Lyons’ initial statement to police and subsequent testimony at trial, with respect to the proffer of immunity that the government provided her in exchange. (*See, e.g.*, N.T. 07/19/2004 at 148-163, 178-181, 198-256. *See also* N.T. 07/20/2004 at 5-28.) Therefore, counsel’s failure to raise this claim did not render him ineffective.²³

²³ Although the reason for Attorney Siegel’s failure to include this claim in Petitioner’s 1925(b) Statement is unclear from the record, it is possible that Attorney Siegel made a deliberate, strategic decision to leave this claim out, in recognition of the fact that it was meritless. As described above, the Supreme Court has recognized that one of the duties of appellate counsel is to select which claims are most likely to obtain relief for their clients based upon the state of the law at that time, even if this means not presenting claims that might be meritorious if a higher court reconsiders a prior holding or repudiates an established state rule. *See, e.g., Smith v. Murray*, 477 U.S. 527, 535-36 (1986). *See also Buehl v. Vaughn*, 166 F.3d 163, 174 (3d Cir. 1999); *Sistrunk v. Vaughn*, 96 F.3d 666, 670 (3d Cir. 1996). Attorney Siegel may have determined that it would be against his client’s interests not to include this claim on appeal, for fear that it might diminish the strength of the other, (continued...)

The Superior Court reasonably carried out clearly established federal law in applying the test for ineffective assistance of counsel, and deciding not to disturb the determinations made by the PCRA court regarding counsel’s performance. *See* 28 U.S.C. § 2254(d). Accordingly, we conclude that this claim does not entitle Richardson to habeas relief.

E. Ground Five: Prosecutorial Misconduct

Petitioner contends that his rights were violated when

the Prosecutor committed PROSECUTORIAL MISCONDUCT in violation of the 5th, 6th, and 14th Amendments to the United States Constitution when at trial the victim/witness was asked to pick out the actor who committed the offense and even though Petitioner was seated at the table next to his lawyer the victim/witness **could not IDENTIFY THE PETITIONER** as the actor committing the offenses.

The prosecutor, Thomas Malone (ADA) had the Petitioner stand up so that “then” the victim witness made an I.D. of the Petitioner as the actor committing the offenses.

(Pet. Mem. at 3) (emphasis in original.) Petitioner elaborates that only after the prosecutor directed him to stand could the “victim/witness for the Commonwealth identify Petitioner as the actor,” as “[p]rior to that all attempts to identify Petitioner had failed.” (*Id.* at 9.) Citing *United States v. Maynard*, among other cases, he argues that ADA Malone’s actions constituted a due process violation under the 5th, 6th, and 14th Amendments to the United States Constitution, which denied him a fair trial. (*Id.* at 11.)

²³(...continued)

more meritorious claims. The fact that Attorney Siegel subsequently briefed the issue for the Superior Court may have reflected a reaction to his client’s dissatisfaction with this decision, or may have reflected that the failure to include the claim in the 1925(b) Statement was inadvertent—in any case, Petitioner’s attempt to gain habeas relief on this ground is unwarranted, as he cannot make out the prejudice prong under *Strickland*.

Our review of the record demonstrates that Petitioner did not fairly present this issue to the Pennsylvania Superior Court either on direct appeal (*see* Pet. App. Br.) [Resp. Ex. D], or when he pursued post-conviction relief under the PCRA—neither his *Brief for Appellant* on direct appeal, nor his *Brief for Appellant* in the PCRA process contained any assertion that the prosecutor engaged in misconduct in his orchestration of an in-court identification. (*See id.* *See also* Resp. Ex. H.) Rather, the only arguments Richardson made on either appeal regarding prosecutorial misconduct were in the context of “questioning the witnesses and during his closing argument to the jury,” (*see, e.g.*, Pet. App. Br. at 21) [Resp. Ex. D], which we address below. The alleged prosecutorial misconduct based on the in-court identification was raised for the first time as a separate substantive ground in the federal habeas petition he submitted to this Court. (*See, e.g.*, Pet. Mem. at 9-11.) Given that Richardson would now be precluded from bringing this particular prosecutorial misconduct claim to the state court due to the PCRA one year time-bar and the prohibition against piecemeal litigation, *see* 42 Pa. Cons. Stat. §§ 9545(b)(1), 9543(a)(3), 9544(b), this claim is procedurally defaulted.

In light of this default, we cannot further consider this claim as a basis for habeas relief unless Petitioner satisfies either the cause and prejudice standard or the fundamental miscarriage of justice standard under *Coleman v. Thompson*, 501 U.S. 722, 749 (1991). Richardson has not, however, presented us with a basis upon which we could find, under the standards of *Coleman*, cause for the failure to have presented this claim earlier, nor is any such reason otherwise apparent from the pleadings or the state court documents we have reviewed. Similarly, Richardson does not allege or assert any new evidence tending to show his innocence such that our failure to consider the merits of this claim would result in a fundamental miscarriage of justice. Moreover, at this point in time, Petitioner is barred by the limitation provisions of the PCRA from bringing such a claim in state

court. *See* 42 Pa. Cons. Stat. § 9545(b)(1) (“Any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final.”). Accordingly, we deem the prosecutorial misconduct for the in-court identification claim to have been procedurally defaulted and find no basis either suggested by Petitioner or upon our own independent review to excuse that procedural default. We are unable to recommend that habeas relief be granted on this claim.²⁴

²⁴ Even if we did not view this claim as procedurally defaulted, and considered it on the merits, we would conclude that it does not provide a basis for relief. Our own review of the trial transcript reveals that the court properly handled the prosecution’s questionable attempts at producing an in-court identification which it excluded, and properly denied Petitioner’s request for a mistrial.

ADA Malone asked the witness, Del Wech, a series of questions about his contact with the individuals who attempted to rob the Rite Aid on January 18, 2003. Mr. Wech described the limited nature of his contact with the alleged shooter, noting that he saw him from “four or five feet” away (07/16/2004 at 170), that “he was like average build,” and that “he was a tall guy,” based on the fact that the witness, himself rather tall, “did not look down at him.” (*Id.* at 171). Further, Mr. Wech detailed that “all [he] could see of him was his eyes,” observing that he and the shooter “made eye contact for a good period of time as [Mr. Wech] backed up.” (*Id.* at 171.) ADA Malone asked Petitioner to compare the builds of the two men he saw during the course of the robbery, at which point he asked the witness to approach the defense table, where Petitioner and co-defendant Brown were asked to stand up. (*Id.* at 174.)

Richardson’s counsel, Attorney Siegel, objected and petitioned the court for a mistrial. (*Id.* at 180.) Attorney Siegel protested that “[a]sking questions of the witness and asking permission of the Court to have [the witness] come down and have [Petitioner] stand up, certainly the suggestion was made after we objected...especially when neither this witness nor the next witness can identify the two people who are involved in that, I believe that severely prejudices the defendants in this case.” (*Id.* at 180-181.)

In response, ADA Malone reminded the Court that she had

already instructed the jury—I know at least one of the attorneys mentioned that what counsel says isn’t evidence. And you’re going to say it again. The juries are presumed to follow the instructions. And that’s even if you believe that there is any prejudice in asking a person to look at the height of a defendant who is charged with a crime and who is going to be implicated as the people who committed the crime as future witnesses.

(continued...)

IV. CONCLUSION

For the reasons set out above, we find that none of Petitioner's claims warrant habeas relief, as none of the claims were denied by the state court due to an unreasonable application of federal constitutional law, several of the claims were not cognizable on habeas review, and because Petitioner has failed to establish a basis for the Court to consider his procedurally defaulted claims. Further, Petitioner has also failed to convince us that his petition warrants further development through an evidentiary hearing or that the interests of justice require that counsel be appointed. *See* 18 U.S.C. § 3006A.

Pursuant to Local Appellate Rule 22.2 of the Rules of the United States Court of Appeals for the Third Circuit, at the time a final order denying a habeas petition is issued, the district judge is

²⁴(...continued)
(*Id.* at 181.)

Our review of the transcript shows that the Court in fact provided such an instruction in a pre-charge at the beginning of trial, in which Judge Sarmina had told the jury that

Statements made by counsel do not constitute evidence, and so they are not binding on you in any way. In fact, the questions which counsel put to the witnesses are not themselves evidence. It is the witnesses' answers in the context of the questions which provide the evidence for you.

(N.T. 07/15/2004 at 32.) She further explained that

Sometimes there will be objections to the questions that are asked by counsel. If I overrule the objection to the question, you may consider the answer. If, however, I sustain the objection to the question, I will not allow an answer to be given. If one has been given, I will most likely direct you to disregard it, and you must do so.

(*Id.* at 32-33.) In her final charge to the jury, Judge Sarmina again admonished the members to "[r]emember that the evidence is what you heard and saw from the witnesses, and not the questions or the speeches of counsel, except as to the stipulations that were entered into by and between counsel." (N.T. 07/28/2004 at 217.)

required to make a determination as to whether a certificate of appealability (“COA”) should issue. A COA should not issue unless the petitioner demonstrates that jurists of reason would debate whether the petition states a valid claim for the denial of a constitutional right. Where the district court has denied a claim on procedural grounds, a COA is not appropriate as to that claim unless it appears in addition that jurists of reason would find the correctness of the procedural ruling to be debatable. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Here, for the reasons set forth above, we do not believe a reasonable jurist would find the Court to have erred in denying the present petition. Accordingly, we do not believe a COA should issue.

Our Recommendation follows.

RECOMMENDATION

AND NOW, this 27th day of April, 2012, it is respectfully **RECOMMENDED** that the petition for a writ of habeas corpus be **DENIED WITHOUT AN EVIDENTIARY HEARING**. It is **FURTHER RECOMMENDED** that a certificate of appealability should **NOT ISSUE**, as we do not believe that Petitioner has made a substantial showing of the denial of a constitutional right or that reasonable jurists would find the correctness of the procedural aspects of this Report debatable.

Petitioner may file objections to this Report and Recommendation. *See* Local Civ. Rule 72.1. Failure to file timely objections may constitute a waiver of any appellate rights.

BY THE COURT:

/s/ David R. Strawbridge
DAVID R. STRAWBRIDGE
UNITED STATES MAGISTRATE JUDGE

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

JAMES RICHARDSON,	:	CIVIL ACTION
Petitioner,	:	
	:	
v.	:	
	:	
RAYMOND LAWLER, <i>et al.</i> ,	:	NO. 11-4445
Respondents.	:	

ORDER

AND NOW, this day of , 2012, upon careful and independent consideration of the petition for writ of habeas corpus, and after review of the Report and Recommendation of United States Magistrate Judge David R. Strawbridge, IT IS ORDERED that:

1. The Report and Recommendation is **APPROVED** and **ADOPTED**;
2. The petition for a writ of habeas corpus is **DENIED** without an evidentiary hearing; and
3. There is no basis for the issuance of a certificate of appealability.

BY THE COURT:

C. DARNELL JONES, II, J.