

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

BRYAN ALAN YOUNG,	:	CIVIL ACTION
Petitioner,	:	
	:	
v.	:	
	:	
LOUIS FOLINO, <i>et al.</i> ,	:	NO. 11-4180
Respondents.	:	

**REPORT AND RECOMMENDATION**

DAVID R. STRAWBRIDGE  
UNITED STATES MAGISTRATE JUDGE

August 1, 2012

Before the Court for Report and Recommendation is the *pro se* petition of Brian Alan Young (alternatively “Young” 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 Waynesburg, Pennsylvania serving a term of life imposed by the Delaware County Court of Common Pleas for first degree murder, concurrent with a sentence of eighty to 160 months for robbery, concurrent with three years probation for possession of an instrument of crime (“PIC”) and three years probation for possession of a firearm with altered manufacturer’s number. In addition, he received concurrent sentences of twenty to forty months for two counts of aggravated assault of a police officer.<sup>1</sup> In total, Petitioner was sentenced to life plus twenty to forty months. In his petition, he raises claims under the Sixth Amendment pertaining to his right to representation by effective counsel, specifically regarding his trial counsel’s strategic decision to portray him as a

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<sup>1</sup> We note that while Petitioner is currently confined within the Western District of Pennsylvania, which includes Greene County, *see* 28 U.S.C. § 118(c), 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).

“drug dealing thug”, failure to file a motion to suppress or to object at trial to the admission of certain photographic evidence, counsel’s failure to object to what Petitioner perceives as prosecutorial misconduct, as well as his appellate counsel’s failure to raise his trial counsel’s ineffectiveness.<sup>2</sup> He also alleges a violation of his rights under the Due Process Clause of the Fourteenth Amendment, based on prosecutorial misconduct. For the reasons set forth within, we conclude that the claims raised are without merit, or were properly rejected by the state courts pursuant to a reasonable application of federal law. Accordingly, we **RECOMMEND** that the petition be **DENIED** and **DISMISSED**.<sup>3</sup>

## **I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

On January 31, 2005, following a trial before the Honorable Patricia H. Jenkins of the Delaware County Court of Common Pleas, a jury found Young guilty of murder in the first degree,

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<sup>2</sup> We note that on his actual petition, Petitioner sets out four grounds for relief, while in the accompanying memorandum, he sets out seven. As we describe in more detail below, the petition lists a due process claim based on prosecutorial misconduct, but in his memorandum and reply brief he articulates this argument as both one of trial counsel ineffectiveness for failing to object to the perceived misconduct, and one of prosecutorial misconduct. The same applies to a claim of trial court error and ineffective assistance of counsel in raising it. (*See, e.g.*, Doc. No. 17 at 9. *See also id.* Ex. 4 at 10.) In that the memorandum is more specific and provides more thoroughly supported, detailed arguments, we organize our discussion based on that document, addressing all seven claims within five subsections.

<sup>3</sup> In preparing this Report, we have reviewed Young’s *pro se* petition for the issuance of a writ of habeas corpus and accompanying “Brief in support” (“Pet.”) and exhibits (“Pet. Ex.”) (Doc. No. 1); the District Attorney of Delaware County’s response to the petition (“Resp.”) (Doc. No. 7); Petitioner’s reply (“Reply”) (Doc. No. 17) and accompanying exhibits (“Reply Ex.”); Respondents’ sur reply (Doc. No. 18); Petitioner’s “Supplemental Reply” (“Supp. Reply”) (Doc. No. 19); the original state court record that we received from the Clerk of Court of the Delaware County Court of Common Pleas (“St. Ct. Rec.”), in addition to the Supplemental Reproduced Record provided by Respondents (“Supp. Record”) (Doc. No. 14); and the electronic docket, *Commonwealth v. Brian Alan Young*, CP-23-CR-0006083-2003, available at: <http://ujportal.pacourts.us/DocketSheets/CPReport.ashx?docketNumber=CP-23-CR-0006083-2003> (“St. Ct. Docket”).

robbery, two counts of aggravated assault of a police officer, possessing a firearm with altered numbers, and possessing a criminal instrument. On April 26, 2005, Judge Jenkins sentenced him life imprisonment without the possibility of parole, the mandatory sentence for first degree murder. She also sentenced him to a concurrent term of eighty to one hundred sixty months for the robbery conviction, a concurrent term of three years probation for the PIC conviction and three years probation for possession a firearm with an altered number, as well as a term of twenty to forty months for each count of aggravated assault, imposed concurrent to each other, but consecutive to the life sentence. The state court described the events giving rise to the convictions as follows:

In the early morning of September 14, 2003, a jogger discovered Joseph Verna's corpse on train tracks near Pennell Road in Glen Riddle, Delaware County. Verna had been shot in the head. A lighter and a pack of cigarettes lay next to his body, and his pockets were pulled out and emptied. Subsequently, a trooper found a used gun cartridge four railroad ties away from the body.

Later that day, state troopers identified Verna through his fingerprints and began to retrace his steps. The troopers discovered that three days earlier, a dirt bike had been stolen from Edgar Jones in Middletown Township, Delaware County. Jones told police that he believed Verna stole the bike, because Jones knew that Verna coveted the bike.

Jones' suspicions were correct. Verna had stolen the bike and transported it to the apartment of Matthew and Andrew Bennett, two teenagers who lived with their mother at Tunbridge Apartments in Middletown. [Petitioner] was a guest at the Bennetts' apartment because he had been banished from his own house.

After Verna concealed the bike in the woods behind the apartment building, [Petitioner] and Andrew Bennett moved the bike from the woods to the train tracks and then to Shawn Boyle's house. Upon discovering that 'his' bike had been purloined, Verna became angry and opined that [Petitioner] and the Bennett boys were the culprits.

[Petitioner] murdered Verna on Saturday, September 13, 2003. On

that date, multiple individuals observed [Petitioner] repeatedly attempting to contact Verna. [Petitioner] called Verna's father and girlfriend, paged Verna's best friend numerous times, and told Verna's best friend and girlfriend that he found the bike. [Petitioner] then spoke with Verna and gave him the same information. After speaking with [Petitioner], Verna left New Jersey to meet [Petitioner] to obtain the bike.

[Petitioner] was at the Bennetts' apartment with six other persons when he spoke with Verna. David Neff and David Stout heard [Petitioner] talking to Verna on the telephone, and the Bennett boys knew that [Petitioner] called Verna. Verna came to the apartment, and [Petitioner] told Verna that he knew where Verna's bike was. Excited by the prospect of finding his bike, Verna left the apartment with [Petitioner]. Andrew Bennett heard Verna say: 'I'm going to get back something that is rightfully mine.' Bennett knew that Verna was referring to the bike.

At 6:45 p.m. on the evening of September 13<sup>th</sup>, before Verna left the apartment with [Petitioner], Verna telephoned his mother and told her he was 'going to get something that he needed to get.' According to Verna's mother, Verna 'really didn't want to go' but felt that he 'had to go.' When Verna's mother asked who he was going with, Verna replied: 'Mom, you don't know him. I'm going with my boy and you don't know him.' Verna further stated that 'his boy knew who had the bike and it was the Pagans [motorcycle gang].' His mother told Verna that the Pagans were dangerous and asked if Verna had a gun. Verna said that he did not have a gun but added: 'My boy does.'

When [Petitioner] and Verna left the apartment, [Petitioner] was wearing a blue baseball cap and baby blue shirt, and Verna was wearing a white t-shirt. Verna was five feet eight inches tall and weighted about 155 pounds. Upon his arrest, [Petitioner] listed his height as six feet and his weight as 170 pounds, but he looked heavier. Early on the evening of September 13<sup>th</sup>, a woman riding in a car driving over the SEPTA bridge at Pennell Road looked down and saw two men walking along the railroad tracks toward Pennell Road. One man was taller and broader than the other one, and the taller man was wearing a blue baseball cap. As stated above, a jogger discovered Verna's body the following morning on the tracks near Pennell Road.

After leaving the apartment with Verna, [Petitioner] returned alone.

[Petitioner] was ‘pacing’ and ‘erratic,’ and it appeared that he had been crying. [Petitioner] told one person that Verna had gotten the bike and was heading back to New Jersey, but told another person that he, [Petitioner], had taken care of the bike.

[Petitioner] confessed to Andrew Bennett that he killed Verna. After several moments of disbelief, Andrew began crying. When [Petitioner] left, Andrew told Matthew Bennett that [Petitioner] confessed to killing Verna. Matthew saw [Petitioner] get into Verna’s blue Acura and drive away. Later that evening, Andrew told Shawn Boyle about [Petitioner]’s confession and began to cry – the first time Boyle had seen Andrew cry. David Stout also saw Andrew ‘sobbing’ – the first time that Stout had seen Andrew cry.

The police discovered Verna’s Acura several days later in a Media train station less than two miles from [Petitioner]’s mother’s house. The keys to the Acura were never found.[fn: Similarly, on the morning of his death, Verna received \$300 in cash for damage that his Acura had sustained in a motor vehicle accident. Verna told [Petitioner] about the money. The cash was never recovered.]

On September 14, 2003, one night after Verna’s death, state troopers went to the Bennetts’ apartment. The Bennett boys and their mother, Ms. [Linda] Bullock, told the troopers that [Petitioner] had been staying at their apartment. Bullock showed the troopers an open linen closet where [Petitioner] kept his clothes. Bullock permitted the troopers to look inside, where they found a box of Federal brand ammunition that had the same caliber, brand and color as the shell casing found at the crime scene. The troopers thereupon decided to obtain a search warrant for the entire apartment, and Bullock and the boys agreed to go to the police barracks for interviews. The troopers executed a search warrant and recovered the ammunition and [Petitioner]’s safe.

While interviewing the Bennetts at the police barracks, the troopers learned that [Petitioner] was the last person seen with Verna, and that [Petitioner] habitually carried a .380 caliber gun that he had purchased in April or May of 2003[fn: numerous individuals testified that [they] saw [Petitioner] with the gun. One person saw him cleaning the gun the night before Verna’s death.]

On Monday morning, September 15, 2003, four troopers, including two in uniform, went to [Petitioner]’s mother’s house in Media to

interview [Petitioner]. Multiple troopers attended the interview because [Petitioner] was known to carry a gun. Uniformed troopers stationed themselves at the front and side doors to make their status as troopers clear to the occupants. [Petitioner's] mother met Trooper Miller at the side door. He identified himself and the others as troopers and stated that they were there to speak to [Petitioner]. [Petitioner]'s mother stepped aside and said: 'He's down in the basement,' pointing toward the basement door.

All four troopers entered the house and walked down the basement stairs. [Petitioner] was lying on a bed in pajama bottoms and boxer shorts with his back to the steps. Trooper Miller walked to the foot of the bed and said: 'Brian, state police, we need to talk to you.' [Petitioner] did not respond, so Trooper Miller again stated: 'State police.' [Petitioner] rolled over, glanced at Trooper Miller and 'immediately made...an aggressive move towards his waist area.' Trooper Pearson described [Petitioner] as moving 'like a cat' towards his waistband. Trooper Miller felt threatened because he knew that firearms are often kept in waistbands and because he knew that [Petitioner] carried a gun. He jumped on [Petitioner] and grabbed his wrists, and other troopers, such as Trooper Pearson, joined in the struggle. Trooper Pearson feared for his life. It took the four troopers two to three minutes to subdue [Petitioner] because he was 'strong' and 'solid.' Finally, the troopers removed a loaded .380 caliber gun from [Petitioner]'s waistband area.

The troopers transported [Petitioner] to the police station, where he waived his *Miranda* rights and stated that the last time he saw Verna was when Verna had dropped him off at this mother's house on Saturday.

Dr. Hellman, the Delaware County Medical Examiner and a forensic pathologist, performed Verna's autopsy and opined that the cause of death was a gunshot wound to the head, and that the manner of death was homicide. Based upon blood splatter on Verna's arms and legs and other injuries, Dr. Hellman concluded that Verna was standing when he was shot from a distance of one to one and a half feet, and that his hands were in a defensive position. Dr. Hellman also determined that Verna had died on Saturday evening, fifteen hours before the autopsy.

A ballistics expert determined that the spent cartridge case recovered from the train tracks was fired from [Petitioner]'s Lorcin .380 semiautomatic weapon.

[Petitioner] testified that (a) he was not working in September 2003, (b) was living with the Bennetts, and (c) sold marijuana but was not making money. He admitted that the .380 Lorcin semiautomatic and bullets were his. He stated that he contacted Verna on the day of the murder with regard to obtaining marijuana, and that they rode around trying to buy marijuana until Verna dropped him off at his mother's house at 7:00 p.m.

[Petitioner] denied calling Verna about the bike or returning alone to the Bennetts' apartment after shooting Verna. He denied telling Andrew Bennett that he killed Verna but could not think of any reason why Bennett would lie.

[Petitioner] claimed that he was in his basement on Saturday night when Bennett dropped his gun off after he called Bennett and asked him to bring the gun over.

*Commonwealth v. Brian Alan Young*, CP-23-CR-0006083-2003 at 2-8 (Delaware Ct. Comm. Pl. Nov. 23, 2005) (internal citations omitted) [St. Ct. Rec. Doc. No. D-34].

At Young's trial, where he was represented by Edward J. Weiss, Esquire,<sup>4</sup> the Commonwealth called as witnesses David Neff (N.T. 01/26/2005 at 64-94), Keith Ross, who sold Petitioner his gun (*id.* at 94-105), Andrew Bennett (*id.* at 189-240, N.T. 01/28/2005 at 167-170), Shawn Boyle (N.T. 01/26/2005 at 252-294), and David Stout (*id.* at 298-313), as well as Dr. Hellman (*id.* at 13-59), Anthony Kelly, a forensic scientist for the Pennsylvania State Police who

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<sup>4</sup> Attorney Weiss was privately retained by Petitioner, but sought to withdraw his appearance in early July 2004 (before the commencement of trial), in that he had "been paid [only] a small fraction of the agreed-upon fee for representation." Supp. Record at 74(a). The court appointed the Office of the Public Defender of Delaware County to take over Young's representation, but on October 12, 2004, Attorney Weiss was reappointed to represent Petitioner upon the court's conclusion that the Defenders had a conflict based on their representation of John McGurk, who "advised counsel of information he had knowledge of with regard to the prosecution of Brian Young" and "was then interviewed by the Office of the District Attorney with regard to statements allegedly made to John McGurk by Brian Young concerning the crimes charged" against Young. [St. Ct. Rec. Doc. No. D-14]. *See also* Supp. Record at 76(a) (letter from Attorney Weiss to Petitioner in which he declares, "I am back! Judge Jenkins has now appointed me as your attorney.")

testified about the lab reports he and a colleague generated for the case (N.T. 01/28/2005 at 3-29), Linda Bullock (*id.* at 159-166), and Patricia Verna, the victim's mother (*id.* at 170-173), among many others. As described above, Young testified on his own behalf (*See, e.g.*, N.T.04/03/2007 at 65-157), and offered his mother Judy Kirby as a witness to testify about her son's whereabouts on the night in question. (*Id.* at 37-57.) Petitioner, through counsel, argued that the Commonwealth lacked sufficient evidence linking Petitioner to the crime.

As we noted above, the jury returned a verdict on January 31, 2005, and Judge Jenkins sentenced Petitioner on April 26, 2005. Also on April 26, Attorney Weiss filed a petition to withdraw as counsel, in which he explained that Petitioner "wished to file post-verdict motions and an appeal" and that he, Attorney Weiss, did "not do appellate work." (St. Ct. Rec.) The petition also observed that Petitioner "may wish to raise issues of ineffective assistance of counsel." (*Id.*) Before the court ruled on the motion to withdraw, Attorney Weiss filed a post-sentence motion on Petitioner's behalf on April 28, 2005, which the Court of Common Pleas ordered the parties to brief on May 4, 2005. St. Ct. Docket. (*See also* St. Ct. Rec. Doc. No. D-26.) The following day, the court granted defense counsel's motion to withdraw his appearance and appointed the Office of the Public Defender of Delaware County as successor counsel. St. Ct. Docket. (*See also* St. Ct. Rec. Doc. No. D-24, D-26, D-28.) Subsequently, Daniel L. McCaughan, Esquire was appointed to represent Petitioner<sup>5</sup> and began filing pleadings related to the post-sentence motion. The court held a hearing on Petitioner's post-sentence motion on June 7, 2005, and denied it on August 22, 2005.

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<sup>5</sup> While we were unable to locate an order appointing Attorney McCaughan, based on our review of the record, including a letter he submitted to Judge Jenkins dated June 7, 2005, on letterhead that reads, "Law Offices of Daniel L. McCaughan, Esquire, P.C.," we conclude that he was not employed by the Office of the Public Defender. (St. Ct. Record Doc. No. D-35.)

St. Ct. Docket. (*See also* St. Ct. Rec. Doc. No. D-37, D-29.)

We acknowledge that the record that follows is rather convoluted and requires some perseverance and patience to construe, in that Petitioner (at times acting as though he were *pro se*) and his succession of attorneys filed many overlapping pleadings. On September 19, 2005, and while represented Attorney McCaughan, Young filed a notice of appeal to the Superior Court. *See* St. Ct. Docket. On September 7, 2006, following upon the issuance of the trial court’s memorandum opinion of November 23, 2005, the Superior Court affirmed his conviction.<sup>6</sup> *Id.* *See also* St. Ct. Docket. On January 17, 2007, Young sought relief, *pro se*, under the Pennsylvania Post-Conviction Relief Act, 42 Pa. Cons. Stat. §§ 9541-46 (“PCRA”). St. Ct. Docket. In this petition, he sought reinstatement of his direct appeal rights, alleging that his appellate counsel failed to timely appeal the Superior Court’s decision affirming his sentence to the Pennsylvania Supreme Court. (Pet. at 18. *See also* Resp. at 2.) By order of January 26, 2007, the PCRA court appointed the Office of the Public Defender—specifically William E. Ruane, Esquire—to represent Young, and granted his motion to file an appeal challenging the Superior Court’s decision on a *nunc pro tunc* basis. St. Ct. Docket. (*See also* Pet. at 18-19.) Young subsequently filed a petition for allowance of appeal to the Pennsylvania Supreme Court,<sup>7</sup> which was granted on March 19, 2007.<sup>8</sup> St. Ct. Docket. On August

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<sup>6</sup> We note that in its response, the Commonwealth states the date of the Superior Court’s decision as July 12, 2006. (*See* Resp. at 2 (citing *Commonwealth v. Young*, No. 2595 EDA 2005 (Pa. Super. Ct. July 12, 2006)).)

<sup>7</sup> This petition was filed by a different attorney from the office of the Public Defender of Delaware County, named Edward J. McMearty. (*See* St. Ct. Record Doc. No. D-33.)

<sup>8</sup> The Order was dated March 19, 2007, but did not get filed until March 22, 2007. (St. Ct. Record.) The Order noted that the relief sought by Petitioner was being granted “upon stipulation between the Public Defender of Delaware County and the District Attorney of Delaware County.” (*Id.*)

28, 2007, the Supreme Court denied his petition.<sup>9</sup> *Id.*

Petitioner filed a further *pro se* PCRA Petition on August 11, 2008.<sup>10</sup> On August 14, 2008,

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<sup>9</sup> Our review of the docket suggests that this opinion may not have posted until September 24, 2007, however both parties agree that the opinion was dated in August. (*See* Pet. at 19. *See also* Resp. at 8.)

<sup>10</sup> This petition alleged:

1. That trial counsel rendered constitutionally defective assistance in choosing to employ the malignant strategy painting Petitioner as a drug dealing thug in order to convince the jury that he was not guilty of murder.
2. That appellate counsel rendered constitutionally defective assistance in failing to raise trial counsel's ineffectiveness relating to the decision to paint Petitioner as a drug dealer.
3. That the trial court denied Petitioner a fair trial in admitting into evidence an irrelevant, inflammatory, and prejudicial tattoo photograph.
4. That trial counsel rendered constitutionally defective assistance in failing to file a motion to suppress the irrelevant, inflammatory, and prejudicial tattoo photograph.
5. That trial counsel rendered constitutionally defective assistance in failing to preserve the claim of trial court error in admission of the tattoo photograph by 'specifically' objecting to the ruling allowing its admission.
6. That appellate counsel rendered constitutionally defective assistance in failing to competently present the claim of trial court error in admission of the tattoo photography to the appellate courts.
7. That Petitioner was denied his right to due process and a fair trial by the misconduct of the prosecutor.
8. That trial counsel rendered constitutionally defective assistance in failing to both object to the misconduct of the prosecutor and request a cautionary instruction relating to the introduction of the tattoo photograph.
9. That appellate counsel rendered constitutionally defective assistance in failing to raise the claim of trial counsel's ineffectiveness relating to his failure to both object to the misconduct of the prosecutor and request that the trial court issue a cautionary instruction on the limited purpose for the admission of the tattoo photograph.

(continued...)

the PCRA Court appointed Scott D. Galloway, Esquire, to assist in preparing an amended pleading, which he filed on October 7, 2008. *Id.* (See also St. Ct. Record Doc. No. D-37.) Upon the Commonwealth's response, Petitioner filed a reply, *pro se*.<sup>11</sup> (Resp. at 3.) Judge Jenkins, sitting as the PCRA court, filed a Notice of Intent to Dismiss without Hearing on September 14, 2009, and then issued an order denying the PCRA petition on November 5, 2009. St. Ct. Docket. On November 30, 2009, and again proceeding *pro se*, Petitioner filed his notice of appeal to the Superior Court. *Id.* Despite the fact that the PCRA court had appointed Attorney Galloway, Petitioner then, proceeding *pro se*, filed a Rule 1925(b) Concise Statement of Matters Complained of on Appeal, dated November 20, 2009, which the PCRA court denied in an opinion dated December 28, 2009. [St. Ct. Record Doc. No. D-46]. Although it went on to address the claims on the merits, the opinion recommended that "Young's appeal should be quashed because he filed his notice of appeal *pro se* despite being represented by counsel. *Id.* at 1. Petitioner's counsel also had filed a timely 1925(b) statement of errors complained of on appeal on December 18, 2009. See *Commonwealth v. Young*, 3520 EDA 2009 at 3 (Pa. Super. Ct. Nov. 8, 2010) [St. Ct. Record].

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<sup>10</sup>(...continued)

(Pet. at 19-20.) Additionally, we note that the "Brief in Support of Request for Post Conviction Relief" was dated August 6, 2008, as opposed to the filing date of August 11.

<sup>11</sup> We note that the reply brief states that it was filed by "the Petitioner Brian Alan Young, through his Attorney Scott Gall[o]way" but that the certificate of service was executed by Petitioner and not by Mr. Galloway. (Pet. Reply Ex. 7 at 7, Ex. 8 at 3.) Accordingly, we agree with Respondent's characterization that the reply brief was filed *pro se*. (Resp. at 3.)

We note also that in his reply brief, Petitioner alleges that the PCRA court refused "to comply with explicitly defined Pennsylvania law" by failing "to forward any of the many documents and pleadings that it received from Petitioner to the person listed as court appointed counsel", or Attorney Galloway. (Reply Ex. 2 at 4.) Petitioner describes that two of these filings "explicitly alleged that person listed as counsel was ineffective in failing to 'brief and argue all the claims raised in the petition.'" (*Id.* See also *id.* at n.8.) This bears no significance upon our consideration of Petitioner's habeas petition.

Upon the lower court's denial of the relief he sought, Petitioner filed another 1925(b) statement on January 5, 2010.<sup>12</sup> St. Ct. Docket. Attorney Galloway filed an appellate brief on Petitioner's behalf on March 18, 2010, and Petitioner again filed his own appellate brief, along with a "reproduced record," on March 22, 2010.<sup>13</sup> (*See, e.g.*, Supp. Record Ex. P at 1-2.) In that filing, he asserted that he was being denied the effective assistance of PCRA counsel in that his court-appointed counsel had "abandon[ed] many of the meritorious claims listed in both the PCRA petition and accompanying 'Brief in Support.'" (*Id.* at 2.) On March 24, the Superior Court issued an order denying Petitioner's attempt to have his brief filed, in that he already "ha[d] court-appointed counsel." (Supp. Record Ex. O.) Petitioner then filed a "Petition for Remand", dated March 29, 2010, in which he requested that the Superior Court remand his "proceeding for appointment of new counsel."<sup>14</sup> (Supp. Record Ex. P at 1.) He explained that he had received a copy of the brief submitted by Attorney Galloway, and that it "contained only 2 (two) of the 11 (eleven) claims" that

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<sup>12</sup> The actual "Concise Statement of Matters Complained of on Appeal" is dated December 26, 2009, but was filed on January 5, 2010. (St. Ct. Record.)

<sup>13</sup> The appellate brief was dated March 14, 2010. In it, Petitioner stated the following claims: 1) denial of effective PCRA counsel for abandoning many of the claims Petitioner had listed on his PCRA petition; 2) a due process violation for not receiving a hearing on his PCRA claims; 3) ineffective assistance of counsel based on counsel's strategy to portray him as a drug dealer; 4) ineffective assistance of appellate counsel for failing to raise trial counsel's ineffectiveness; 5) trial court error for admitting the tattoo evidence; 6) ineffective assistance of trial counsel for failing to file a motion in limine to suppress the tattoo evidence; 7) prosecutorial misconduct; 8) ineffective assistance of counsel for failing to object to prosecutorial misconduct, in addition to failing to request a jury instruction regarding the limited purpose for which the jury could consider the tattoo photograph. We note that this list represents a more expansive set of claims than the three grounds presented in the appellate brief filed by counsel.

<sup>14</sup> On his habeas petition, Young describes that he "filed a 'Motion for removal of Ineffective PCRA Counsel and Appointment of New Counsel Not Affiliated with the Public Defender's Office of Delaware County'" (Pet. at 12. *See also* Pet. at 22, Pet. Ex. 1, Resp. at 9, Reply Ex. 3 at 9-10 (in which Petitioner lists the claims asserted in that motion).) We believe these to be the same motion.

he himself had raised in his *pro se* PCRA petition and, accordingly, requested a remand “for the appointment of new counsel who will brief and argue each of the claims that were raised in the PCRA petition, brief in support of” it, and the attached appendix. (*Id.* at 1-2. *See also* Pet., in which Petitioner describes the claims he included in his *pro se* motion.) On June 15, 2010, the Superior Court ordered Attorney Galloway to address Young’s ineffectiveness claims “in a Petition for Remand pursuant to *Commonwealth v. Battle*, 879 A.2d 226 (Pa. Super. 2005)”<sup>15</sup> (Resp. at 9), which

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<sup>15</sup> *Commonwealth v. Battle* established the “Battle Procedure,” which required the following:

When an appellant who is represented by counsel files a *pro se* petition, brief, or motion, this Court forwards the document to his counsel. If the brief alleges ineffectiveness of appellate counsel, counsel is required to petition this Court for remand. In the petition for remand, counsel must cite appellant’s allegations of ineffectiveness and provide this Court with an evaluation of those claims. This Court will then determine whether or not a remand for appointment of new counsel is required, based on our review of counsel’s petition and the record.

We stress that this Court does not review the *pro se* brief, but rather reviews counsel’s analysis of the issues raised *pro se*. This process has similarities to the procedures required of appointed counsel who seeks to withdraw from representing an appellant, based on a determination that the issues for appeal are totally frivolous.

The procedure [...] is based on a need to balance a *pro se* appellant’s constitutional rights with the substantial administrative burden and confusion that can arise under circumstances of hybrid representation. To require a remand for new appointed counsel every time that a *pro se* appellant made an allegation of ineffective assistance would create unreasonable administrative burdens and delays. However, the court abdicates its responsibility if it does not provide some mechanism for judicial review of *pro se* claims of ineffective assistance of counsel. Thus, we require that counsel file a petition for remand ‘so as to insure [sic] that the ineffectiveness claims are presented [to the court]...’

(continued...)

he filed on July 7, 2010. (Supp. Record Ex. Q at 1-2. *See also* Pet. Ex. 2.)

On August 18, 2010, Petitioner filed a “Response to Defective Petition for Remand” in which he described Attorney Galloway’s petition as “defective” and requested that the Superior Court “file a proper Petition for Remand”, which would address each previously asserted claim. The Superior Court declined to remand the case. (Resp. at 9.)

On November 8, 2010,<sup>16</sup> the Superior Court affirmed the denial of PCRA relief. *See Commonwealth v. Young*, No. 3520 EDA 2009 at 3 (Pa. Super. Ct. Nov. 8, 2010) [St. Ct. Record].

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<sup>15</sup>(...continued)

879 A.2d 226 at 268-269 (Pa. Super. Ct. 2005) (internal citations and footnote omitted). We observe that *Battle* has since been abrogated by the 2011 decision of *Commonwealth v. Jette*. *See* 23 A.3d 1032 (Pa. 2011). In *Jette*, the Pennsylvania Supreme Court described the holding in *Battle* as mistakenly glean[ing] such a requirement” from its own previous decisions, and “therefore f[oun]d that it is appropriate to prohibit such a tactic and to require an appellant to remain with counsel through the appeal, once counsel has filed briefs.” *Id.* at 1040. The court based this decision on a determination that “[t]he Superior Court’s *Battle* procedure pits defendants against their lawyers to contest the issues to be raised on appeal.” *Id.* The court therefore rejected the Superior Court’s “implementation of the so-called *Battle* procedure” and established that once a counseled brief is filed, “any right to insist upon self-representation has expired.” *Id.* at 1044. In other words, the court determined that the Superior Court cannot require court-appointed PCRA counsel to file a petition for remand to address any claims raised by his or her client in a *pro se* petition. *Id.* As we discuss in a subsequent section, in that this decision was issued after Petitioner’s “*Battle* procedure” had concluded, it bears no impact upon our determination of his claims.

<sup>16</sup> In its November 8, 2010 decision affirming the PCRA court’s dismissal of Petitioner’s PCRA petition, the Superior Court observed in a footnote that

In its opinion, the PCRA court *sua sponte* raises the issue that the appeal should be quashed because [Petitioner] filed his notice of appeal *pro se* despite being represented by counsel. Neither party addresses this issue. We will not quash the appeal because the notice of appeal was timely filed and counsel did not file a separate notice of appeal on behalf of [Petitioner], who clearly wanted to appeal this matter.

*See Commonwealth v. Young*, No. 3520 EDA 2009 at 3 n.1 (Pa. Super. Ct. Nov. 8, 2010) [St. Ct. Record].

On December 9, 2010, Young, through Attorney Galloway, filed a Petition for Allowance of Appeal, which the Pennsylvania Supreme Court denied on April 19, 2011. (Resp. at 4. *See also* Supp. Record Ex. S.)

Young's subsequent *pro se* petition for the issuance of a writ of habeas corpus ("Pet.") and accompanying memorandum<sup>17</sup> were docketed in our Court on June 27, 2011. (Doc. No. 1.) The District Attorney of Delaware County (on behalf of the "Respondents," the Commonwealth of Pennsylvania, or "the Commonwealth") filed a response with an accompanying memorandum of law on September 13, 2011 ("Resp.") (Doc. No. 7), asserting that the petition should be denied in that some claims were not properly exhausted and because the state court proceedings did not result in a decision that was contrary to, or involve an unreasonable application of, clearly established federal law with respect to the others. (Resp. at 18-34.) Young then filed a reply ("Reply") with accompanying Exhibits ("Reply Ex.") (Doc. No. 17), which was docketed on February 2, 2012, and Respondents filed a sur reply on February 6, 2012 (Doc. No. 18). Finally, Petitioner filed a "Supplemental Reply" ("Supp. Reply") on June 21, 2012. (Doc. No. 19.)

## **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

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<sup>17</sup> Young appended to his petition a lengthy "Brief in support of assertion of the denial of a meaningful appellate review as a result of the state courts['] failure to address the properly preserved claims relating to trial and appellate counsel's constitutionally deficient representation that were explicitly presented to both the post-conviction and Pennsylvania superior courts." (Pet. at 17.) In the ensuing Discussion section, we address the arguments contained in that memorandum as if they were made within the petition.

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 and give the state courts a full and fair opportunity 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 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). Error committed by a postconviction attorney may establish “cause” when alleged to have prevented compliance with state procedural requirements. *See Martinez v. Ryan*, 566 U.S. ----, 132 S.Ct. 1309, 1320 (2012). 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 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 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 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.

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**

Young filed his petition under § 2254 on June 27, 2011.<sup>18</sup> Initially, we note that Respondents have not challenged its timeliness. Our independent review confirms that Young’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.

The memorandum attached to Young’s petition sets forth five general claims.<sup>19</sup> They are that

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<sup>18</sup> We observe that although it was not filed in our court until June 27, Young dated the petition June 15, 2011.

<sup>19</sup> As we described above, Petitioner sets out four grounds for relief on his petition, while in the accompanying memorandum, he lists and substantiates seven. In addition to the five claims around which we organize our discussion, Young also asserts a sixth claim alleging a due process violation based on prosecutorial misconduct, and a seventh claim, in which he requests that an evidentiary hearing be held. We address all of the claims he has articulated in the ensuing  
(continued...)

he was deprived of his Sixth Amendment right to the effective assistance of counsel when: (1) his trial counsel decided to portray him as a “drug dealing thug”; (2) his trial attorney failed to object to what Petitioner perceives as prosecutorial misconduct; (3) his trial counsel did not file a motion to suppress certain photographic evidence; nor did he (4) object to its admission at trial; and (5) his appellate attorney failed to raise his trial counsel’s ineffectiveness, based on each of these grounds.

Respondents urge that the petition be denied with prejudice, in that the claims are

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<sup>19</sup>(...continued)

discussion, but in that the memorandum is more specific and provides a more thorough treatment of the arguments, we organize our analysis based on that document. We address each claim in the order in which he has fleshed them out in the memorandum, except that we group together the two claims pertaining to prosecutorial misconduct and, with respect to his argument for a hearing, we address it at the end of our analysis, but not in a separate subsection.

Additionally, while in his initial habeas petition and accompanying memorandum, Petitioner sets out his ineffectiveness claims in the manner in which we organize them here, in his reply brief, he alleges ineffective assistance of counsel based on a longer list of issues, including, but not limited to, those set out in his other pleadings. The additional issues not listed above are as follows: “failing to subject the prosecution[’]s case to an adversarial test by not objecting to the misconduct of the prosecutor in telling the jury in this opening statement that Petitioner was a drug dealer”; “failing to request the trial court to issue the [mandatory] limiting instruction to the jury to consider the tattoo photograph only for its limited evidentiary purpose; “failing to subject the prosecution[’]s case to an adversarial test by objecting to the prosecutor[’]s improper closing argument in which it misled the jury into believing that the irrelevant, inflammatory, and prejudicial tattoo photograph was actually substantive proof of Petitioner’s guilt in the murder of Mr. Verna”; “failing to subject the prosecution[’]s case to an adversarial test by not objecting to the prosecutor[’]s misconduct in improperly depicting Petitioner as a typical ‘illegal’ gun toting drug dealer willing to kill to protect his drug empire”; “failing to subject the prosecution[’]s case to an adversarial test by not objecting to the misconduct of the prosecutor in claiming that the forensic tests done on the weapon retrieved from Petitioner’s person proved it to be the actual murder weapon”; “failing to subject the prosecution[’]s case to an adversarial test by not objecting to the prosecutor[’]s improper closing argument in which it told the jury that although Petitioner told Shawn Boyle that he took care of the bike, ‘what he meant to say is that I took care of Joe’”; “abandoning Petitioner and effectively joining the prosecution and assisting it in achieving their jointly held desire to convict Petitioner”. (Reply Ex. 3 at 1-3.) In that each of these additional claims is substantially related to, or overlaps with those set out in Petitioner’s petition and memorandum, and addressed in various parts of our Discussion section, we do not create additional subsections devoted to analysis of them separately. This includes the claim regarding failure to object to the forensic test, which Petitioner has raised only once, in his reply brief. We address that claim on the merits in Subsection B.

procedurally defaulted or have been reasonably rejected by the state courts as lacking merit. For the reasons set out within, we do not recommend that any of Petitioner’s claims be denied on the basis of procedural default, but agree that none merit habeas relief.

**A. Ground One: Ineffective Assistance of Counsel based on Treatment of Evidence relating to Petitioner’s Involvement with Controlled Substances**

Young first alleges that his “[t]rial counsel’s unilateral decision to paint Petitioner as a drug dealing thug with lots of cash was defective and prejudicial,” (Pet. at 5), and rendered his performance “below an objective standard of reasonableness.”<sup>20</sup> (*Id.* at 13.) Overall, he challenges his counsel’s reference to what he deems as “irrelevant, inflammatory and prejudicial [...] hearsay evidence of Petitioner’s alleged drug kingpin status...while concomitantly portraying Petitioner as a typical gun toting, drug dealing thug.”<sup>21</sup> (Pet. at 37.) In his habeas petition, Petitioner quotes at

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<sup>20</sup> Petitioner also argues that “the alternative strategy of augmenting the weakness of the circumstantial evidence upon which the Commonwealth’s case was built offered a substantially better chance of effectuating Petitioner’s interest than the one actually employed.” (Pet. at 19.) In support of this alternative defense strategy (and his contention that it would have been more successful), Petitioner lists the various pieces of evidence that counsel should have emphasized more heavily at trial. (*Id.* at 19-20.) In that our review is limited to those claims that have been properly exhausted, we do not attempt to critique any other strategy that trial counsel may have chosen to employ.

<sup>21</sup> In a series of pleadings, but particularly in the memorandum accompanying his habeas petition and in his reply brief and memorandum, Petitioner states this argument in a variety of ways. We have thoroughly reviewed these contentions, including his position that

The fact of the matter is, is that this strategy (coupled with the prosecutor’s repeated references to drug dealing) served only to confuse the jury and inflame their passions and prejudices against Petitioner. And counsel’s repudiation of the strategy by having Petitioner admit that he was not a drug dealer clearly affected their willingness to believe his testimony.

(Pet. at 21, n. 8 (referencing an argument he makes in a subsequent portion of his habeas petition (continued...))

length from the portion of the PCRA court’s opinion dismissing this claim, in which it “concluded that Petitioner’s claim was meritless because (1) ‘the Commonwealth was the primary proponent of drug dealing evidence, which was admissible to demonstrate the natural history of the case; and (2) ‘Defense counsel merely presented rebuttal evidence of drug dealing to ‘show that Young was making plenty of money from drug sales and thus had no motive to kill Verna.’” (Pet. at 32 (quoting *Commonwealth v. Young*, CP-23-CR-0006083-2003 at 4 (Delaware Ct. Comm. Pl. Dec. 28, 2009)[St. Ct. Record Doc. No. D-46].) In support of his arguments that these conclusions were contrary to a reasonable application of federal law, Petitioner has provided us with a thorough recitation of various federal and state court legal standards to guide our analysis.

Although we appreciate Petitioner’s refutation of the facts underlying his counsel’s strategy,<sup>22</sup>

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<sup>21</sup>(...continued)

memorandum, that, later in Petitioner’s direct examination, trial counsel had Petitioner admit on the stand that he was simply a drug “user” as opposed to a large-scale drug “dealer.” Pet. at 37.)

We also have reviewed Petitioner’s contention that his trial counsel’s performance “paint[ed] Petitioner in such a negative light as to remove any objectivity relative to his constitutional right to the presumption that he was innocent”, (Pet. at 38), as well as his allegation that his counsel’s choice of strategy “concomitantly abrogated his constitutional right to remain silent during trial”, which he had planned to exercise but then, upon learning of his counsel’s strategy, decided he had to forego in order to refute the notion that he was a “drug dealer ‘making plenty of money’”. (Pet. at 39.) Finally, we acknowledge Petitioner’s contention that the prejudice created by counsel’s strategy was compounded by the fact that “he never at [any] point during the proceedings felt the need to explain his reason for offering it to the most important audience (the fact finder) in the courtroom.” (*Id.*)

Petitioner also points out what he perceives as deficiencies in the arguments that the Commonwealth made to refute this claim on PCRA review. (*See, e.g.*, Pet. at 37.) Mindful of the standard governing our review, we need not address the merits of any of these claims in this opinion. Instead, we consider only whether the state court’s treatment of those arguments was contrary to, or involved an unreasonable application of, clearly established federal law.

<sup>22</sup> Petitioner has provided a lengthy recitation of facts to show that he was not, in fact, “‘making plenty of money from drug sales.’” (Pet. at 38.) He cites, for example, that his attorney moved to withdraw based on Petitioner’s and his family’s inability to pay his fees, or for “‘investigative costs”, and that, after granting the motion, the Commonwealth appointed counsel for  
(continued...)

our review of the state courts' decisions reveals that they did not involve an unreasonable application of any constitutional principles recognized by the United States Supreme Court. Citing the Pennsylvania standard for ineffective assistance of counsel,<sup>23</sup> the Superior Court on PCRA review concluded that Petitioner failed to address two of its prongs: "how his claim either had arguable merit or how he was prejudiced." (*Commonwealth v. Young*, No. 3520 EDA 2009 at 6 (Pa. Super. Ct. Nov. 8, 2010) [St. Ct. Record].) The court further concluded that Petitioner had waived this claim in that his brief did not address the prejudice prong of the ineffectiveness standard, but went on to describe why it would have denied relief on the claim had it been properly presented. Quoting at length from the PCRA court's opinion, which it described as "appropriately explain[ing] why [Petitioner] is unable to prove either of these prongs of the ineffective assistance of counsel test,"

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<sup>22</sup>(...continued)

Petitioner as an indigent defendant. (*Id.*) Petitioner bolsters the credibility of these assertions by highlighting certain points made by the prosecutor at trial during his cross-examination of Petitioner: that, for example, he lived in the basement of his mother's house and had "'all of \$9.12'" in the safe "in which his 'so-called' stash of drugs were usually held." (*Id.*) Describing his trial counsel's strategy as "deceitful and malignant" (Pet. at 35), Young contends that counsel "seemed to be competing with the prosecutor to see which one of them could do the [best] job of convincing the jury that Petitioner was a big-time drug dealer." (Pet. at 36.)

Respondents, too, acknowledges that although Petitioner's trial counsel's strategy was "to try to take away the petitioner's motive to kill for money," that "[u]nfortunately for the petitioner[...], the Commonwealth's evidence also demonstrated the petitioner was not a very good drug dealer and he was broke." (Resp. at 22-23.)

<sup>23</sup> The Pennsylvania standard for ineffectiveness claims is substantially similar the federal *Strickland* standard, and requires a 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. Allen*, 383 A.2d 800, 802 (Pa. Super. Ct. 2003). The Pennsylvania Supreme Court has described 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." *Commonwealth v. Travaglia*, 661 A.2d 352, 357 (Pa. 1995) (*citing Strickland v. Washington*, 466 U.S. 668, 697 (1984)).

the Superior Court observed that Petitioner's

argument lacks arguable merit. He seems to suggest that defense counsel raised the subject of drug dealing on his own while the Commonwealth sat silent. The record demonstrates, however, that the Commonwealth was the primary proponent of drug dealing evidence, which was admissible to demonstrate the natural history of the case. Defense counsel merely presented 'rebuttal' evidence of drug dealing to show that [Petitioner] was making plenty of money from drug sales and thus had no motive to kill Verna. Defense counsel was not responsible for the brunt of the drug dealing evidence submitted during trial.

[...]

Confronted with this evidence, defense counsel attempted to show that [Petitioner] was making sizable profits from drug sales and therefore did not need Verna's cash – an effort to cast the drug dealing evidence in a light more favorable to [Plaintiff]. Defense counsel did not so much as mention drugs or drug dealing in [ ]his closing argument. Thus, he simply attempted to minimize the sting of the Commonwealth's drug dealing evidence. There was no undue 'emphasis' o[n Petitioner's] drug dealing.

Nor did the drug dealing evidence prejudice [Petitioner]. The evidence against [Petitioner] – particularly his possession of the murder weapon at the time of the arrest, his confession to Andrew Bennett, his possession of Verna's car after the shooting, and the fact that he was the last person seen with Verna – prove [Petitioner's] guilt beyond a reasonable doubt. Exclusion of the drug dealing evidence presented by defense counsel would not have changed the verdict.

(*Commonwealth v. Young*, No. 3520 EDA 2009 at 7-9 (Pa. Super. Ct. Nov. 8, 2010) [St. Ct. Record] (citing *Commonwealth v. Young*, CP-23-CR-0006083-2003 at 4-6 (Delaware Ct. Comm. Pl. Dec. 28, 2009)[St. Ct. Record Doc. No. D-46] (internal citations omitted).)

We find nothing unreasonable in the state courts' handling of this aspect of Petitioner's ineffectiveness claim. 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. Our independent review of the record confirms that to the extent that counsel emphasized Petitioner’s success as a drug dealer (which was minimal), it was in an effort to mitigate against any perception the jury might have had that he would have been motivated to murder Mr. Verna because he needed money.<sup>24</sup> The PCRA and Superior Courts properly concluded that defense counsel attempted “to cast the drug dealing evidence in a light more favorable to Young” or, in other words, “he simply attempted to minimize the sting of the Commonwealth’s drug dealing evidence.” *Commonwealth v. Young*, CP-23-CR-0006083-2003 at 5 (Delaware Ct. Comm. Pl. Dec. 28, 2009)[St. Ct. Record Doc. No. D-46]. Furthermore, the court was not unreasonable in

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<sup>24</sup> The trial court transcripts make clear that this evidence was not initiated first by Petitioner’s trial counsel, but was only discussed with Petitioner during his direct examination after the Commonwealth had thoroughly presented the concept, as a means to mitigate its impact. Additionally, while Petitioner rightly points out that he “was not on trial for dealing drugs”, in the context of the particular facts involved in the incident leading to Petitioner’s trial, we cannot say that the state courts’ determination that the “evidence demonstrating that Petitioner was a drug dealer was neither relevant nor admissible.” (*See* Reply Ex. 2 at 9.)

We note, as well, that both in the memorandum attached to his petition (*see, e.g.*, Pet. at 52-53) and in his reply brief, Petitioner appears, in one discreet section of one of the exhibits he attaches to that pleading, to make a due process argument resulting from misconduct on the part of the prosecutor for introducing this evidence. (*See, e.g.*, Reply at 9. *See also id.* Ex. 4 at 10.) He observes that the prosecutor’s “line of questioning[...] tended to portray [him] as a dangerous criminal, likely to commit [any] offense” or to “show a pattern of conduct.” (Reply Ex. 2 at 11.) He argues that “[q]uestions of this nature, since their effect is to [show criminal propensities], unfairly prejudice the defendant as to his guilt or innocence of the specific crime charged” (*Id.*) and further asserts that “this evidence was proffered for the purposes of besmirching the character of Petitioner and attacking his credibility based on extrinsic matters which had absolutely nothing to do with whether or not he had murdered Mr. Verna.” (*Id.* at 13.) In that Petitioner makes other assertions regarding prosecutorial misconduct, we address them all together in a subsequent section.

concluding that his counsel’s reference to drug dealing evidence did not prejudice Young.<sup>25</sup> (*See, e.g., id.*)

Our determination that this aspect of Young’s petition does not merit habeas relief is buttressed by the “doubly” deferential standard with which we are to evaluate the state court’s 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 (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 considered the performance of counsel with respect to the defense strategy pursued at trial. We will not recommend that habeas relief be granted upon this claim.

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<sup>25</sup> Young also highlights the negative impact of his counsel’s decision to discuss his drug-dealing by describing that “the trial court itself consistently displayed a visible [negative] reaction to [trial counsel’s] profligate solicitation of drug dealing/usage testimony. A fact that was acknowledged by counsel when he stated : ‘there has been a lot of talk’ about drugs, and e[very time it comes up, I see] the [Judge’s] eyebrows go up.” (Pet. at 32 n.6 (citing N.T. 01/28/2005 at 71:16-17).) Thus, in attempting to argue that drug-dealing evidence negatively impacted the outcome of his case, Petitioner implicitly concedes that his attorney did not do what he alleges as the thrust of his ineffectiveness claim—intentionally portray him, and his drug-dealing, in a light that was unfavorable to his client.

We also observe that Young himself was the first to raise his involvement with drugs on direct examination while testifying in his own defense. When asked by his counsel why he kept a safe, Petitioner responded, “[t]hat is where I would keep my weed and the scale and my money.” (N.T. 01/28/2005 at 71:16-17.) It was only in response to that answer that trial counsel stated, “[t]here has been a lot of talk about that, and every time it comes up, [I] see the Judge’s eyebrows go up.” (*Id.* at 71:18-19.) At that point, counsel gave Petitioner the opportunity to explain “what [his] connection with” weed was—Petitioner described that he “really wasn’t making a lot of money,” that he “made enough money to buy cigarettes and go get more weed, nothing major though.” (*Id.* at 71:20-25.) Thus, to the extent that trial counsel raised Petitioner’s drug dealing, it was only in reaction to the testimony of Petitioner and others on the subject.

**B. Ground Two: Ineffective Assistance of Trial Counsel based on Failure to Object to Prosecutorial Misconduct, and Due Process Claim based on Prosecutorial Misconduct**

The second aspect of Petitioner's ineffective assistance of counsel claim is that he was deprived of his Sixth Amendment right to the effective assistance of counsel when counsel failed "to object to the repeated improper remarks by the prosecutor." (Pet. at 25.) In support of this contention, he cites the prosecutor's:

(1) intentionally soliciting testimony from its witness of Petitioner's alleged possession of firearms that had absolutely no relation nor relevance to the murder of Mr. Verna[;]

(2) intentionally soliciting irrelevant testimony from its witnesses or Petitioner's alleged drug dealing[;]

(3) questioning Petitioner about his irrelevant alleged drug dealing[;]

(4) questioning Petitioner about an irrelevant, inflammatory, and prejudicial tattoo photograph[;]

(5) intentionally soliciting testimony from its witnesses of Petitioner's alleged drug dealing during 'redirect'[;]

(6) commenting that Petitioner was a typical gun toting drug dealing thug[;]

(7) intentionally misleading the jury into believing that the ballistic tests that were conducted on the weapon found on Petitioner 'proved' that 'it' was the actual murder weapon[; and]

(8) 'touting' the wholly irrelevant, inflammatory, and prejudicial tattoo photograph as [substantial] proof of Petitioner's guilt in the murder of Mr. Verna.

(Pet. at 42.) Petitioner describes his own counsel's "failure to object to" these characterizations, as well as the "'introduction' of the irrelevant testimony of Petitioner's alleged drug dealing and use" as "indefensible." (*Id.*)

In response, the Commonwealth characterizes this claim as one of prosecutorial misconduct (as opposed to ineffective assistance of counsel stemming from prosecutorial misconduct), and alleges that Petitioner failed to exhaust it.<sup>26</sup> (Resp. at 4 (“The petitioner never exhausted a claim of prosecutorial misconduct. The state courts properly determined the evidence was admissible, so there can be no prosecutorial misconduct.”) *See also* Resp. at 33.) Respondents claim that, instead, the claim “was raised by the petitioner *pro se* in Superior Court”, that “[c]ounsel addressed it in the Remand petition”, and the Superior Court denied that petition. (Resp. at 33.) Addressing the claim on the merits, the Commonwealth argues that “the state courts properly determined the evidence was relevant and admissible” and thus, “there can be no prosecutorial misconduct.” (*Id.*) Petitioner responds that he properly raised this claim, but was unable to “‘make’ the Superior Court address each of his claims.”<sup>27</sup> (Reply Ex. 1 at 18.)

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<sup>26</sup> We believe this confusion may stem from the fact that, as we have described above, Petitioner characterized his claims differently on the actual petition than he did in the memorandum that accompanies it. Respondents’ response and memorandum appear to address only those claims laid out on the petition form, and did not deal with the arguments presented in the much longer, much more coherently articulated and supported memorandum, despite the fact that Petitioner clearly stated that the reader should see the accompanying memorandum for further discussion.

<sup>27</sup> We note that in his “Supplemental Reply”, Petitioner asserts also that the recent decision by the Supreme Court in *Martinez v. Ryan* provides cause for what might otherwise be characterized as procedural default relating to several of his ineffectiveness claims. (Supp. Reply at 1 (citing *Martinez v. Ryan*, 566 U.S. ----, 132 S.Ct. 1309, 1320 (2012)).) In *Martinez*, the Court announced that

When a State requires a prisoner to raise an ineffective-assistance-of-trial-counsel claim in a collateral proceeding, a prisoner may establish cause for a default of an ineffective-assistance claim in two circumstances: the first is where the state courts did not appoint counsel in the initial-review collateral proceeding for a claim of ineffective assistance at trial; the second is where appointed counsel in the initial-review collateral proceeding, where the claim should

(continued...)

As we referenced above, on his actual habeas petition, and again in his memorandum, Petitioner states this claim somewhat differently: he alleges a violation of his “due process right to a fair trial by misconduct of prosecutor”—or, in other words, that he was prejudiced by “[p]rosecutorial misconduct in introducing Petitioner’s alleged drug dealing/use, irrelevant, inflammatory, and prejudicial photographic evidence denied Petitioner’s Constitutional right to a fair trial.” (Pet. at 9.) We address both claims.

With respect to the claim alleging a due process violation for prosecutorial misconduct (*see, e.g.*, Pet. at 53, Reply Ex. 1 at 9, Reply Ex. 4 at 10-11), we conclude that it does not merit habeas relief. Petitioner claims that the prosecutor’s misconduct began in his opening argument “when he told the jury that Petitioner was a drug dealer [a]nd didn’t end until the very last few words of his closing argument when he calculatingly misstated the evidentiary link between the tattoo and proof of Petitioner’s guilt in the murder of Mr. Verna.” (Reply Ex. 4 at 13) (internal citations omitted). He also cites other “less obvious instances of misconduct”, such as “asking Petitioner’s mother ‘was your son supporting himself as a drug dealer.’” (*Id.* at 14.) On PCRA review, the Superior Court did not address this claim.<sup>28</sup> Implicated in the lack of analysis, as far as we can tell, are issues relating

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<sup>27</sup>(...continued)

have been raised, was ineffective under *Strickland v. Washington*, 466 U.S. 688 (1984).

*Id.* at 1312. In that we address Petitioner’s claim on the merits, we need not analyze it with respect to *Martinez*.

<sup>28</sup> In his “Supplemental Reply”, Petitioner himself raises this point: he notes that

after rereading the entire record, Petitioner realized that he may have given the impression that he concedes that each claim raised in this

(continued...)

to Petitioner's having raised certain issues in his own pleadings, as compared to the brief filed by counsel, and Petitioner's unsuccessful attempt to have his case remanded pursuant to *Commonwealth v. Battle*, 879 A.2d 226 (Pa. Super. Ct. 2005).<sup>29</sup> Our review of the state court record reveals that although the Superior Court on PCRA review listed only two issues as having been raised by Young, *see Commonwealth v. Young*, No. 3520 EDA 2009 at 3 (Pa. Super. Ct. Nov. 8, 2010) [St. Ct.

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<sup>28</sup>(...continued)

Honorable Court was 'adjudicated' on its merit in the state court. Hence, he would like to make it clear that he has not, and does not acknowledge that fact. And while he strongly believes that each of his claims meet both the unreasonable application of ... and contrary to standard, he would like to make it clear that since certain claims were not adjudicated on their merit and/or assessed in accordance with federal law, as determined by the Supreme Court of the United States, they should be evaluated under the 'pre' AEDPA standard.

(Supp. Reply at 3.) The Pennsylvania Supreme Court's failure to adjudicate various claims does not bar federal habeas review here.

As we described above, in its November 8, 2010 decision affirming the PCRA court's dismissal of Petitioner's PCRA petition, the Superior Court observed in a footnote that

In its opinion, the PCRA court *sua sponte* raises the issue that the appeal should be quashed because [Petitioner] filed his notice of appeal *pro se* despite being represented by counsel. Neither party addresses this issue. We will not quash the appeal because the notice of appeal was timely filed and counsel did not file a separate notice of appeal on behalf of [Petitioner], who clearly wanted to appeal this matter.

*See Commonwealth v. Young*, No. 3520 EDA 2009 at 3 n.1 (Pa. Super. Ct. Nov. 8, 2010) [St. Ct. Record]. In that the Superior Court appeared inclined to interpret Petitioner's claims more expansively procedurally and to consider claims that may not have been properly before them but that Petitioner clearly demonstrated a desire to have heard, we, in the same spirit, consider the merits of each of the claims Petitioner has asserted in his habeas petition and accompanying briefs.

<sup>29</sup> Again, we acknowledge that *Battle* has since been abrogated, but, in that this abrogation occurred after the conclusion of Petitioner's so-called "*Battle* procedure", we conclude that the subsequent case law has no bearing upon our consideration of Petitioner's case.

Record], Petitioner’s appellate brief did list both “the misconduct of the prosecutor” and “trial counsel’s failure to [...] object to the misconduct of the prosecutor” as grounds entitling him to relief. (Supp. Record Ex. N.) In that we do not have access to the opinion issued by the Superior Court denying Petitioner’s motion for remand, we give Petitioner the benefit of the doubt and address the claims asserted in his *pro se* filings on the merits, as though they were not procedurally defaulted. Accordingly, we address the claims *de novo*, but ultimately find that this claim does not warrant habeas relief.

In addressing the claim *de novo*, as the law of our Circuit permits us to do,<sup>30</sup> we conclude from the trial transcripts that the prosecutor’s conduct with respect to the issue of drug use did not rise to the level of “misconduct”. To be entitled to habeas relief on account of prosecutorial misconduct, Young must show that the prosecutor’s remarks “so infected the trial with unfairness as to make the resulting conviction a denial of due process.” *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974). *See also Darden v. Wainwright*, 477 U.S. 168, 181 (1986). Any comments must be reviewed “in context and in light of the entire trial.” *Moore v. Morton*, 255 F.3d 95, 107 (3d Cir. 2001).

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<sup>30</sup> In *Holloway v. Horn*, the Third Circuit quoted from the United States Supreme Court, as well as its own decisions, in observing that “[i]t is ‘too obvious to merit extended discussion that whether the exhaustion requirement of 28 U.S.C. § 2254(b) has been satisfied cannot turn upon whether a state appellate court chooses to ignore in its opinion a federal constitutional claim squarely raised in petitioner’s brief in the state court.’” 355 F.3d 707, 718 (2004) (quoting *Smith v. Digmon*, 434 U.S. 332, 333 (1978) (per curiam), *McMahon v. Fulcomer*, 821 F.2d 934 (3d Cir. 1987), *Swanger v. Zimmerman*, 750 F.2d 291, 295-96 (3d Cir. 1984)). The court further held that “[a] petitioner who has raised an issue on direct appeal...is not required to raise it again in a state post-conviction proceeding.” *Id.* (quoting *Lambert v. Blackwell*, 134 F.3d 506, 519-520 (3d Cir. 1997)).

Again, although we have not been able to review the Superior Court’s decision disposing of Petitioner’s motion for remand, we observe that Petitioner appeared to have raised this, as well as many other claims, throughout his PCRA appeal process, and the state courts did not consider them. Accordingly, we review those raised in his habeas petition *de novo*.

The context of the prosecutor's remarks in Young's case is particularly important to our analysis here. As we noted above, Petitioner himself openly discussed his drug use, and small-scale sale of drugs, when on the witness stand during direct examination. (*See, e.g.*, N.T. 01/28/2005 at 71:16-17.) Additionally, during the prosecutor's cross-examination of Petitioner's mother, Judy Kirby—one of the instances he points to as evidencing the prosecutor's misconduct—the prosecutor asked Ms. Kirby about whether she knew her son owned a gun. (*Id.* at 51:9-52:6.) The gun obviously was relevant to the murder at issue, and the discussion of it led to a coherent and rationally-related line of questioning that did not overstep the bounds of prosecutorial ethics. An excerpt of the transcript is instructive, beginning with the prosecutor's questioning Ms. Kirby about her son's ownership of a gun. Upon Ms. Kirby's statement that she knew that her son owned a gun at one point, the following discussion ensued:

[Prosecutor:] For what reason?

[Ms. Kirby:] He didn't give me a reason. I told him there was no need for a gun.

[Prosecutor:] Weren't you curious about why your son owned a gun?

[Ms. Kirby:] I knew that my son was involved in drugs.

[Prosecutor:] You knew that?

[Ms. Kirby:] I knew that. Joe Verna used to come to my house. Joe Verna had stayed at my house when his parents had thrown him out on one occasion. I knew that Brian and Joe were purchasing drugs in Philadelphia and supposedly this is why they had a gun.

[Prosecutor:] Your son didn't have a job did he ma'am in September of 2003?

[Ms. Kirby:] I don't think he was still employed.

(*Id.* at 52:5-18.) It was only upon this line of questioning, and after some follow-up discussion, that

the prosecutor asked Ms. Kirby, “[w]as your son supporting himself as a drug dealer ma’am in September of 2003?” to which she responded, “I would have to say no.” (*Id.* at 54:21-23.) The prosecutor then asked, “[b]ut you knew him to buy and sell drugs?” and she responded “I am assuming that he sold them, yes.” (*Id.* at 54:24-25.) The discussion continued:

[Prosecutor:] Do you know why he sold them?

[Ms. Kirby:] I think he had the connection to get the marijuana and he sold it to his friends.

[Prosecutor:] He sold it to make money, wouldn’t he?

[Ms. Kirby:] I guess so, I never saw him with any great amount of money though.

[Prosecutor:] Would you agree that your son was supporting himself selling drugs?

[Ms. Kirby:] No I don’t think that he sold drugs to that magnitude.

[Prosecutor:] He didn’t have a job?

[Ms. Kirby:] Not at that point.

(*Id.* at 55:1-12.) While we concede that the prosecutor perhaps belabored the point a bit longer than necessary, we cannot conclude that he committed prosecutorial misconduct in cross-examining Ms. Kirby, or in his general presentation of the fact that Petitioner was involved with illegal drugs in some capacity. Both Petitioner, in the course of his pleadings before us, and his counsel, in the courtroom before the judge, are correct in pointing out that “there [was] a lot of talk” about drugs throughout Petitioner’s trial. (*See, e.g.*, N.T. 01/28/2005 at 71.) While some of the discussion may not have been directly relevant to the prosecution of the crime with which Petitioner stood charged, we cannot say as a matter of law that the prosecutor’s performance rose to the level of misconduct, in violation of Petitioner’s constitutional rights.

Additionally, with respect to Petitioner’s contention regarding “the ballistic tests that were conducted on the weapon found on Petitioner”(Pet. at 42), our review of the transcripts again does not lead us to conclude that any prosecutorial misconduct occurred. The Commonwealth called John Thomas Curtis, Jr., a trooper with the Pennsylvania State Police who was previously “assigned to the Bethlehem Regional Crime Laboratory as a firearm and toolmark examiner.” (N.T. 01/27/2005 at 15:8-25.) Trooper Curtis testified about the basic mechanics of various types of firearms and how they discharge, and then described a 2-page worksheet in which he cataloged his notes about the items he was asked to examine for Petitioner’s case—including the firearm which was on Petitioner’s person at the time he was arrested. (*Id.* at 15-31:3.) The prosecutor then proceeded to ask Trooper Curtis about the contents of that chart, and the details of how he arrived at the conclusion that the bullet jacket and bullet jacket fragments he examined “could have been discharged from this particular pistol.” (*Id.* at 31:4-36:18.) Subsequent to offering that opinion, Trooper Curtis had clarified that “ due to a lack of individual matching characteristics, I wouldn’t make a positive determination.” (*Id.*) The prosecutor followed up by asking whether Trooper Curtis could “exclude the Larson semi-automatic as the firearm that discharged that bullet fragment or that bullet jacket”, to which he responded, “No, no I could not.” (*Id.* at 36:22.) We find nothing improper about the follow up questions the prosecutor proceeded to ask regarding the other findings that Trooper Curtis made and documented on his spreadsheet.<sup>31</sup> (*Id.* at 36:23-41:6.)

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<sup>31</sup> Toward the end of the memorandum accompanying his petition, and in his reply brief, Petitioner alleged that his trial counsel was ineffective for “failing to subject the prosecution[’]s case to an adversarial test by not objecting to the misconduct of the prosecutor in claiming that the forensic tests done on the weapon retrieved from Petitioner’s person proved it to be the actual murder weapon.” (Reply Ex. 3 at 2-3. *See also* Pet. at 52.) Although Petitioner raised this issue on direct appeal in the context of a challenge to the sufficiency of the evidence upon which he was  
(continued...)

We likewise find that Petitioner's counsel was not ineffective for failing to object to the prosecutor's performance at trial. Attorney Weiss was an active participant in the examination of all witnesses,<sup>32</sup> and objected to the admission of the tattoo evidence about which Petitioner complains, as we examine in depth in the ensuing sections. With respect to the other actions and remarks of the prosecutor, we again find that defense counsel's performance was not so defective as to render his assistance ineffective.<sup>33</sup> Our review of the trial court transcripts leads us to conclude that counsel carefully weighed the options available to Petitioner, and proceeded in a well-reasoned, professional and constitutionally effective manner.

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<sup>31</sup>(...continued)

convicted, our reading of the record does not reveal that he raised this precise issue before the state courts. Accordingly, it is procedurally defaulted. Were we to analyze it on the merits, however, we would still conclude that it does not entitle Petitioner to habeas relief. Our independent review of those trial court transcripts reveals that Attorney Weiss's cross-examination of Trooper Curtis was quite thorough. Nearly fifteen pages of notes of testimony detail the degree to which Attorney Weiss clarified portions of what Trooper Curtis explained on direct examination, including the process by which the gun would have been fired, the ejection or discharge of cartridges, and the specific identification made in the case. (N.T. 01/27/2005 at 41:16-53:25.) He also elicited testimony about how common that particular gun was. (*Id.* at 52:22-25.)

<sup>32</sup> We cite as an example Attorney Weiss' cross-examination of Dr. Hellman, the Delaware County Medical Examiner who performed the autopsy on Verna. Attorney Weiss aggressively cross examined Dr. Hellman, testing each aspect of his opinion, for example regarding the time at which the murder would have taken place, based on the temperature of the victim's body. (N.T. 01/26/2005 at 50-56). Regarding the time at which the murder would have happened, he stated to Dr. Hellman, "I think you're trying to stretch it back to, in time, to conform with the DA's theory of the case, but let's look at what you testified to." (*Id.* at 56:5-7.)

<sup>33</sup> 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 Young 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 Weiss's performance did not meet this standard.

**C. Ground Three: Ineffective Assistance of Trial Counsel based on Failure to File a Motion to Suppress Petitioner’s Tattoo**

Petitioner next argues that his trial counsel’s performance fell below that of a “reasonably competent” attorney when he failed to file a motion in limine to exclude a photograph of his tattoo. (Pet. at 45. *See also* Reply Ex. 3 at 10.) As Petitioner describes in a footnote, “[t]he photograph is an enlargement of a tattoo that Petitioner has on his right shoulder. It has the words [‘]life in the fast lane[’] on top of the tattoo. And the words [‘]get rich or die trying[‘], and they are below a picture of a skull with two smoking handguns etched on his shoulder.” (Pet. at 45 n.11.) In Petitioner’s view, “[t]rial counsel’s performance in failing to file a motion to suppress the irrelevant, inflammatory, and prejudicial tattoo photograph fell outside the wide range of professionally competent assistance.” (Pet. at 45.)<sup>34</sup> Such a motion would have allowed counsel to “adjust his trial strategy to rebut, in the event that the trial court rejected the unanimous legal precedent disallowing

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<sup>34</sup> In his reply, Petitioner appears to expand his argument to include 1) trial court error in admitting the photograph; 2) misconduct by the prosecutor in introducing it; and 3) ineffective assistance of trial counsel in failing to object to that introduction. (Reply Ex. 1 at 8.) Relating to the underlying admission of evidence, he argues that “[i]n light of the fact that Respondent[s] have admitted that the jury was never instructed on the limited purpose for which this evidence was admitted, it’s clear that Petitioner’s constitutional right to due process was violated.” (Reply Ex. 4 at 16.) We note that the Superior Court dealt with the due process claim during Petitioner’s direct appeal. *See Commonwealth v. Young*, No. 2595 EDA 2005 at 9-12 (Pa. Super. Ct. July 12, 2006) [Supp. Record]. Setting out the standard for the admission of evidence and its appellate review, the Superior Court determined that

[t]he prosecution moved to admit the photograph *immediately* after [Petitioner] testified about his financial situation and testified he did not know the meaning of the subject expression. We find the trial court’s conclusion that the photograph was relevant to motive and, hence, admissible does not rise to the level of an abuse of discretion.

*Id.* at 11. Petitioner’s variously-styled claims regarding the tattoo are overlapping and thus, we address them all in the course of the ensuing discussion.

the use of this kind of evidence, [or] the Commonwealth’s theory that the tattoo was proof of Petitioner’s guilt.” (Reply Ex. 3 at 10.)<sup>35</sup>

Respondents again interpret this claim based on the underlying conduct complained of (here, the admission of the photograph), and not as a claim for ineffective assistance of counsel. (*See* Resp. at 34 (characterizing Petitioner’s claim as challenging the equity of his trial based on the court’s allowance of admission of the photograph).) In viewing the claim this way, Respondents dispense with it summarily by observing that the admissibility of evidence does not provide a grounds for habeas relief. (Resp. at 34.) While we agree with Respondents on that point, we interpret Petitioner’s claim to be one of ineffective assistance of counsel, and address it in that fashion.

As Petitioner himself highlights, the PCRA court concluded that “[s]ince this Court properly admitted the photograph into evidence, defense counsel was not ineffective for failing to move for its exclusion in limine.” (Pet. at 49 (citing *Commonwealth v. Young*, CP-23-CR-0006083-2003 at

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<sup>35</sup> He continues that

Counsel’s decision not to file a motion to exclude the photograph becomes even more baffling when considering that the prosecutor’s [stated] reason for wanting to expose the jury to it was to ask Petitioner ‘if that is the lifestyle he lives, and about his fascination with guns and his propensity to use guns to get money.’ As this reasoning was both improper and clearly motivated by a desire to directly connect the tattoo and all the alleged character malignancies associated with someone having chosen to have it printed on his body with Petitioner’s guilt in the murder of Mr. Verna.

(Pet. at 45) (internal citations omitted). In that this contention strikes us as more of a recitation of the ineffective assistance of counsel by virtue of failure to object to prosecutorial misconduct claim, we do not address a separate charge of prosecutorial misconduct again. We do analyze the admission of the photograph in the ensuing section, however.

6 (Delaware Ct. Comm. Pl. Dec. 28, 2009)[St. Ct. Record Doc. No. D-46].) On PCRA review, the Superior Court, again citing the Pennsylvania standard for ineffective assistance of counsel, observed that Petitioner “did not specifically address any of the elements of the ineffective assistance of counsel test and merely made boilerplate allegations as to why he was prejudiced”, thereby waiving substantive review of the claim. *See Commonwealth v. Young*, No. 3520 EDA 2009 at 6 (Pa. Super. Ct. Nov. 8, 2010) [St. Ct. Record]. The court went on, however, to discuss the claim on the merits, stating:

With respect to his second issue, [Petitioner] is unable to prove that his claim – that trial counsel should have filed a pre-trial motion to prevent admission of his tattoo – has arguable merit. On direct appeal, [Petitioner] contended that the trial court erred by permitting the introduction of a photograph of his tattoo into evidence. This Court specifically addressed this issue and a majority of a panel of this Court found that the trial court properly admitted this evidence. Therefore, based on our prior ruling, [Petitioner]’s claim clearly lacks arguable merit. Thus, the trial court did not err by denying [Petitioner]’s PCRA petition without a hearing.

(*Id.* at 9) (internal citations omitted). We discuss the actual admission of the photograph, including the Superior Court’s opinion on direct appeal, and our conclusion that the admission of the photograph was improper, but did not constitute more than harmless error, in the subsequent section.

**D. Ground Four: Ineffective Assistance of Trial Counsel based on Failure to Object to the Admission of Photographic Evidence**

Petitioner contends that his rights were violated when his trial counsel failed to object “to the admission of irrelevant, inflammatory, and prejudicial evidence and [failed to] request a cautionary instruction” on the same. (Pet. at 46-47 (citing *Commonwealth v. Gabrielson*, 536 A.2d 401, 405 (Pa. Super. 1988).) In substantiating this claim, he makes largely the same arguments as in Ground Three, contending that “[l]ike the decision not to file a motion to exclude this irrelevant,

inflammatory, and prejudicial evidence, counsel’s decision not to specifically object to its introduction is also indefensible.” (Pet. at 47.) Ultimately, he objects to counsel’s performance because it enabled the prosecutor “to explicitly and emphatically argue to the jury that the tattoo photograph (more specifically, the words and the smoking handguns) was proof of Petitioner’s guilt.” (*Id.*) In failing to object to the photograph’s admission at trial, counsel also failed to preserve the issue for appellate review. (*Id.* at 49.) This was particularly indefensible, in Petitioner’s view, in that counsel was on notice that the prosecution intended to introduce the photograph, since a copy of it “was turned over to him in response to his discovery request.” (Reply Ex. 4 at 4.)<sup>36</sup>

Petitioner acknowledges that trial counsel requested a sidebar discussion with the judge, in which he did object to the admission of the photograph based on its irrelevance to the proceedings. (Pet. at 47 n.12.) He notes that “while during the discussion counsel did in fact question the relevance of the evidence, he did [not] specifically object to its introduction or usage.” (*Id.*) This prevented the jury from knowing that the objection was made, or from receiving a limiting instruction regarding the purpose for which they could consider the evidence. (Reply Ex. 4 at 3 n.14 (citing N.T. 01/28/2005 at 125-128). *See also* Reply at 17.)

Our review of the trial court transcripts confirms that Petitioner’s counsel did argue to the judge that the photograph of the tattoo should not be admitted. *See* N.T. 01/28/2005 at 125-127.

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<sup>36</sup> This particular permutation of Petitioner’s ineffectiveness claim was not addressed by the state courts on PCRA review (instead, they addressed only the motion in limine aspect). Based on the Third Circuit precedent cited above, *see, e.g., Holloway v. Horn*, 355 F.3d 707, 718 (3d Cir. 2004), and based on the fact that this claim is substantially similar to the motion to suppress claim that the state court did address, as well as the fact that Petitioner raised it on his direct appeal, we consider it in turn. *See id.* (quoting *Lambert v. Blackwell*, 134 F.3d 506, 519-520 (3d Cir. 1997) (in which the court held that “[a] petitioner who has raised an issue on direct appeal...is not required to raise it again in a state post-conviction proceeding.”)).

In fact, as soon as the prosecutor asked Petitioner about the meaning of the phrase, “life in the fast lane, get rich or die trying”, Attorney Weiss requested to see the judge at sidebar. *Id.* at 125:6-15. At sidebar, Attorney Weiss stated, “[y]our Honor, [the prosecutor] has been kind enough to show me what he is about to get into. I know that [Petitioner] has some tattoos on him because I have seen that picture from his arrest with his tattoos.” (*Id.* at 125:21-126:1.) Specifically, he questioned, “[h]ow that is relevant to this case is beyond my imagination” (*id.* at 126:4-6) and urged the judge that he did not “think a tattoo shows anything except his bad judgment in getting it [as h]e might not even know what he had on the tattoo, it might have been years ago.” (*Id.* at 127:3-8.) To that, the judge responded “[y]ou can ask him about it, and if that is the explanation he gives then the Commonwealth has to live with it.” (*Id.* at 127:10-13.)

The court determined the photograph was admissible to impeach Petitioner’s credibility, after he answered, “I don’t know, it is just a statement” when asked if he could “tell the members of the jury what the expression ‘life in the fast lane, get rich or die trying’” meant. (N.T. 01/28/2005 at 125:6-9.)<sup>37</sup> The court found that “the evidence of the tattoo was admissible to impeach defendant’s credibility during his testimony”, as “[b]ecause [Petitioner] testified that he did not know what the

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<sup>37</sup> At sidebar, at which defense counsel objected to the admission of the photograph based on relevance, the judge accepted the prosecutor’s explanation that the photograph was relevant because he “want[ed] to ask [Petitioner] if that is the lifestyle he lives, and about his fascination with guns and his propensity to use guns to get money.” (N.T. 01/28/2005 at 125:21-126:1.)

We note that among Petitioner’s complaints regarding his counsel’s performance with respect to the admission of the tattoo evidence is that he failed to raise the claim within earshot of the jury, rendering the jurors incapable of registering the objection. (*See, e.g.*, Pet. at 47-48.) Specifically, he urges that “as a direct result of said failure, the prosecutor was allowed to explicitly and emphatically argue to the jury that the tattoo photograph (more specifically, the words and the smoking handguns) was proof of Petitioner’s guilt.” (*Id.* at 47.) In our estimation, counsel’s decision to raise the issue at sidebar—as opposed to in front of the jury—was likely a strategic one, made specifically to shield the jury from any and all exposure to the tattoo if his objection was successful. We conclude that Attorney Weiss did have a reasonable basis for his actions.

expression[...] meant, the photograph of the tattoo was admissible to show that he *did* know what the expression meant.” *Opinion Sur Defendant’s Post Sentence Motions*, August 22, 2005, at 3 [St. Ct. Record Doc. No. D-37]. On direct appeal of Petitioner’s conviction, the Superior Court concluded that

[t]he prosecution moved to admit the photograph *immediately* after [Petitioner] testified about his financial situation and testified he did not know the meaning of the subject expression. We find the trial court’s conclusion that the photograph was relevant to motive and, hence, admissible does not rise to the level of an abuse of discretion.

*Commonwealth v. Young*, No. 2595 EDA 2005 at 11 (Pa. Super. Ct. July 12, 2006) [Supp. Record].

In other words, in the Superior Court’s view, “there was no rationale for excluding the photograph given that it was introduced to establish motive and impeach [Petitioner’s] credibility and did not prejudice the jury such that they could not have reached a verdict based on evidence other than the photograph.” *Id.* at 12. We question this (seemingly circular) reasoning in that it fails to address why the initial inquiry regarding the statement contained on the tattoo itself was permissible. Troubling, too, is the trial court’s conclusion that “the questions asked by the prosecutor and the photograph were admissible to show defendant’s motive for committing murder.” (*Id.*) The trial court accepted the Commonwealth’s argument that “[t]he tattoo was evidence of the defendant’s state of mind”,<sup>38</sup> despite there being no testimony about when Petitioner got the tattoo (which would seem relevant to whether it might currently represent his state of mind), not to mention the validity

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<sup>38</sup> The Commonwealth’s argument that “[t]he tattoo was evidence of the defendant’s state of mind. He wanted to live life in the fast lane and was willing to kill [Verna] to ‘get rich’ or at least [get] \$300” strikes us as particularly preposterous. See *Opinion Sur Defendant’s Post Sentence Motions*, August 22, 2005, at 3 [St. Ct. Record Doc. No. D-37]. Whether or not that was the true motivation for Petitioner’s actions, a tattoo seems a rather tenuous piece of “evidence” to show it.

of the concept of a tattoo proving anything about one's "state of mind." Additionally, the tattoo evidence would seem to be character evidence, despite Petitioner's never having "opened the door" to the admission of such evidence by testifying as to his own character.

Mindful of the confines of our review of Petitioner's claims, however, we may only review the Superior Court's conclusions for an abuse of discretion or unreasonable application of federal law. On appellate review of Petitioner's PCRA claim, a majority of the Superior Court determined that the trial court properly admitted the photograph. *See Commonwealth v. Young*, No. 2595 EDA 2005 at 11 (Pa. Super. Ct. July 12, 2006) [Supp. Record]. While we find that the Superior Court's finding that the admission of this photograph was permissible was, in fact, contrary to a reasonable application of federal law, we agree with Judge Ford Elliott, who issued a "Concurring Memorandum Statement" in which she observed that "the introduction of appellant's tattoo was completely irrelevant" although she "join[ed] in the majority decision" because the introduction constituted "harmless error." *Concurring Memorandum Statement*, dated July 12, 2006 at 1 [St. Ct. Rec. Doc. No. D-30].

In the same opinion, the Superior Court addressed a challenge to Petitioner's conviction based on the weight and sufficiency of the evidence presented by the Commonwealth. In assessing that claim, the Superior Court highlighted that the record contained evidence that Petitioner was the last person to have been seen with Verna, that Petitioner's own closest friends testified that he had confessed to them that he killed Verna, that Petitioner was in possession of Verna's car keys and had been seen driving his car, and that shell casings recovered at the crime scene were shown to have come from the gun police found on Petitioner's body at the time of his arrest. *See Commonwealth v. Young*, No. 2595 EDA 2005 at 2-4, 14-17 (Pa. Super. Ct. July 12, 2006). In light of this evidence,

we cannot conclude that the admission of the photograph of Petitioner’s tattoo affected the outcome of his trial in any substantial way—accordingly, it constituted harmless error. *See, e.g., Fahy v. State of Connecticut*, 375 U.S. 85, 86-87 (1963) (describing that to determine whether an error was harmless, “[t]he question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction”), *Mayle v. Felix*, 545 U.S. 644, 672 (2005) (amplifying that such a determination requires “a careful look at the other evidence admitted at trial”). *See also Strickland*, 466 U.S. at 686-88, 693-94 (holding that 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.”) Accordingly, Petitioner cannot demonstrate that he was prejudiced by his counsel’s failure to object to its admission, both because he did, in fact, object, and because the rejection of that objection did not, as Petitioner contends, “unfairly prejudice the defendant as to his guilt or innocence of the specific crime charged.” (Pet. Ex. 2 at 11.)

**E. Ground Five: Ineffective Assistance of Appellate Counsel based on Failure to Argue the Claims raised in the Previous Four Grounds**

In his final ground Petitioner alleges that his “[a]ppellate counsel’s failure to raise, brief and argue each of the claims contained in both the habeas application and brief in support thereof in the appellate court violated Petitioner’s Sixth Amendment right to counsel.” (Pet. at 48.) He argues that “any decision by the state courts concluding that appellate counsel was not ineffective in failing to raise, brief and argue each of the claims relating to trial court error and prosecutorial misconduct delineated in the habeas application is both contrary to, and involves an unreasonable application of, clearly established federal law.” (*Id.* at 51.) Respondents appear to interpret Petitioner’s claim as

one of ineffectiveness of PCRA appellate counsel. Although we agree with the Commonwealth that there was some ambiguity in Young's petition regarding which appellate counsel's performance he contests, Petitioner clarifies in his reply that he attacks the effectiveness of his appellate counsel on direct appeal, and not on his PCRA appeal. (*See, e.g.*, Reply Ex. 3 at 10-11, in which he describes that his "'direct appeal' counsel was ineffective in failing to include" certain claims "in his pleadings in the appellate courts.") We address his claim accordingly.

The Pennsylvania Supreme Court has held that, "as a general rule, a petitioner should wait to raise claims of ineffective assistance of trial counsel until collateral review." *Commonwealth v. Grant*, 813 A.2d 726, 738 (Pa. 2002). This is based on a conclusion that "[d]eferring review of trial counsel ineffectiveness claims until the collateral review stage of the proceedings offers a petitioner the best avenue to effect his Sixth Amendment right to counsel." *Id.* As a result, Petitioner's appellate counsel cannot be deemed ineffective for failing to include any claims relating to the effectiveness of Petitioner's trial counsel.

We also consider appellate counsel's performance in relation to Petitioner's assertion of an independent claim for prosecutorial misconduct (as opposed to only ineffective assistance of counsel for failing to object to perceived prosecutorial conduct). On Petitioner's direct appeal, his appellate counsel did not in fact raise prosecutorial misconduct in his motion. *See Commonwealth v. Young*, No. 2595 EDA 2005 at 5 (Pa. Super. Ct. July 12, 2006). Petitioner did, though, include in his PCRA petition a claim that he "was denied his right to due process and a fair trial by the misconduct of the prosecutor." (Pet. at 19-20. *See also* "Brief in Support of Request for Post Conviction Relief" at 35) [St. Ct. Record]. He also listed it among the "matters complained of on appeal" in his subsequent 1925(b) statement. "Concise Statement of Matters Complained of on Appeal." [State Ct. Record].

We note, however, that any failure to raise prosecutorial misconduct on Petitioner's direct appeal by appellate counsel did not necessarily constitute deficient performance. It is possible that Petitioner's counsel 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). The United States Supreme Court has held that appellate 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." *Smith v. Murray*, 477 U.S. 527, 535-36 (1986). Petitioner's counsel 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, more meritorious claims. Thus, to the extent that Petitioner's appellate counsel chose not to present the claim of prosecutorial misconduct on his direct appeal, it does not necessarily render his performance defective. Accordingly, we do not recommend that habeas relief be granted on this ground.

#### **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. Further, Petitioner has also failed to convince us that his petition warrants further

development through an evidentiary hearing<sup>39</sup> 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 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, or that the correctness of the procedural aspects of this case could be debated. Accordingly, we do not believe a COA should issue.

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<sup>39</sup> We take note of the argument made by Petitioner throughout his memorandum and reply brief for the need for an evidentiary hearing (*see, e.g.*, Pet. at 54-55, Reply at 18-19. *See also* Reply Ex. 2 at 1, in which he urges

that Petitioner has requested-in each and every exhaustive pleading the he filed in the state courts-to be provided with an opportunity to fully develop the factual record surrounding his allegations of the denial of his constitutional right to due process and effective assistance fo trial and direct appeal counsel at an evidentiary hearing. Requests that were either denied or went unanswered.)

We appreciate Petitioner’s frustration but based on the facts and legal principles presented, and in light of our review of the extensive evidentiary record, including trial transcripts and pleadings submitted to the state courts, both on direct appeal and through the PCRA process, we conclude that an additional evidentiary hearing is not warranted.

Our Recommendation follows.

**RECOMMENDATION**

**AND NOW**, this 1<sup>st</sup> day of August, 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**

BRYAN ALAN YOUNG,	:	CIVIL ACTION
Petitioner,	:	
	:	
v.	:	
	:	
LOUIS FOLINO, <i>et al.</i> ,	:	NO. 11-4180
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 hereby **ORDERED** that:

1. The Report and Recommendation is **APPROVED** and **ADOPTED**;
2. The petition for a writ of habeas corpus is **DISMISSED WITHOUT PREJUDICE**; and
3. There is no basis for the issuance of a certificate of appealability.

BY THE COURT:

\_\_\_\_\_  
MITCHELL S. GOLDBERG, J.