B. Standard of Review under AEDPA

Pursuant to 28 U.S.C. § 2254(d), an application for a writ of habeas corpus that has met the procedural prerequisites of the AEDPA:

> shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

"An 'adjudication on the merits' is one that '(1) disposes of the claim on the merits, and (2) reduces its disposition to judgment.'" Bell v. Miller, 500 F.3d 149, 155 (2d Cir. 2007) (citing Sellan v. Kuhlman, 261 F.3d 303, 312 (2d Cir. 2001)).

The Supreme Court has made it clear that "[a]s amended by AEDPA, § 2254(d) stops short of imposing a complete bar on federal court relitigation of claims already rejected in state proceedings." Harrington v. Richter, 131 S. Ct. 770, 786, 178 L. Ed. 2d 624 (2011). "Section 2254(d) reflects the view that habeas corpus is a 'guard against extreme malfunctions in the state criminal justice systems,' not a substitute for ordinary error correction through appeal." Id. (quoting Jackson v. Virginia, 443 U.S. 307, 332 n.5, 99 S. Ct. 2781, 2795 n.5, 61 L. Ed. 2d 560 (1979) (Stephens J., concurring)). A state court's "unreasonable application" of law must have been more than "incorrect or erroneous;" it must have been "objectively unreasonable." Sellan, 261 F.3d at 315 (quotations and citation omitted); see also Sorto v. Herbert, 497 F.3d 163, 169 (2d Cir. 2007).

Claims that were not adjudicated on the merits in state court are not subject to the deferential standard that applies under AEDPA. See, e.g., Cone v. Bell, --- U.S. ---, ---, 129 S. Ct. 1769, 1784, 173 L. Ed .2d 701 (2009) (citing 28 U.S.C. § 2254(d)). But where AEDPA's

deferential standard of review does apply, the "state court's determination of a factual issue is presumed to be correct, and may only be rebutted by clear and convincing evidence." Bierenbaum v. Graham, 607 F.3d 36, 48 (2d Cir. 2010), cert. denied, 131 S.Ct. 1693, 179 L.Ed.2d 645 (2011) (citing 28 U.S.C. § 2254(e)(1)). Under AEDPA's deferential standard of review, "'[f]ederal courts sitting in habeas are not an alternative forum for trying facts and issues which a prisoner made insufficient effort to pursue in state proceedings.'" Cullen v. Pinholster, --- U.S. ---, 131 S. Ct. 1388, 1401, 179 L. Ed. 2d 557 (2011) (quoting Williams v. Taylor, 529 U.S. 420, 437, 120 S. Ct. 1495, 146 L.Ed.2d 435 (2000)).

Federal habeas review is limited to determining whether a petitioner's custody violates federal law, see 28 U.S.C. § 2254(a); Swarthout v. Cooke, 131 S.Ct. 859, 861, 178 L.Ed.2d 732 (2011); Carvajal, 633 F.3d at 109, and "does not lie for errors of state law." Swarthout, 131 S.Ct. at 861 (quoting Estelle v. McGuire, 502 U.S. 62, 67, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991)); see also Wilson v. Corcoran, 131 S. Ct. 13, 16, 178 L. Ed. 2d 276 (2010).

C. Failure to Charge Claim

Petitioner's claim that the trial court erred in failing to charge the jury that McLaurin was his accomplice as a matter of law and, therefore, was an interested witness whose testimony required corroboration, does not raise a federal issue cognizable on habeas review. See Young v. McGinnis, 319 Fed. Appx. 12, 13 (2d Cir. Mar. 27, 2009) ("[R]egardless of whether there was a violation of state law in denying [the petitioner's] request for an accomplice-corroboration instruction, there was no violation of federal law, let alone of any federal constitutional right. * * * Accordingly, [the petitioner's] habeas claims * * * must fail." (citations omitted)); see also

Player v. Artus, No. 06 CV 2764, 2007 WL 708793, at * 5 (E.D.N.Y. Mar. 6, 2007) (finding that the petitioner's claim that the trial court violated his due process rights by failing to conclude that three witnesses were his accomplices, and failing to instruct the jury that a defendant may not be convicted solely upon the uncorroborated testimony of an accomplice witness, "sounds in state law exclusively, and does not present a federal due process claim.") "In spite of [the petitioner's] citation to the Due Process Clause * * * there is no federal analog to the protection afforded by [state law]. To the contrary, under federal law a defendant may be convicted based on the uncorroborated testimony of an accomplice witness without violating the Due Process Clause, so long as that testimony is not incredible on its face and is capable of establishing guilt beyond a reasonable doubt." Player, 2007 WL 708793, at * 5 (internal quotations and citations omitted); see also Cardona v. Goord, — F.Supp.2d —, 2011 WL 4375655, at * 8 (E.D.N.Y. Sept. 21, 2011). Accordingly, petitioner's claim that the trial court erred in failing to find that McLaurin was his accomplice as a matter of law, and in failing to instruct the jury that his testimony, therefore, required corroboration (Ground One of petitioner's amended petition), is denied.

D. Evidentiary Rulings

Challenges to the admissibility of evidence are cognizable on habeas review only if the petitioner can establish that the decision to admit the evidence rendered the trial so fundamentally unfair as to deny him or her due process of law. See Dunnigan v. Keane, 137 F.3d 117, 125 (2d Cir. 1998); see also McKinnon v. Superintendent, Great Meadow Correctional Facility, 422 Fed. Appx. 69, 72-73 (2d Cir. May 24, 2011) ("[A] state court's evidentiary rulings, even if erroneous under state law, do not present constitutional issues cognizable under federal

habeas review * * * unless the challenged evidentiary rulings in the state proceedings affect the fundamental fairness of those proceedings[.]") An erroneous evidentiary ruling does not amount to a constitutional violation unless the evidence in question was "so extremely unfair that its admission violate[d] fundamental conceptions of justice." Dunnigan, 137 F.3d at 125 (citing Dowling v. United States, 493 U.S. 342, 352, 110 S. Ct. 668, 107 L. Ed. 2d 708 [1990]). In order to constitute a denial of due process, the prejudicial evidence erroneously admitted "must have been sufficiently material to provide the basis for conviction or to remove a reasonable doubt that would have existed on the record without it." Id. (internal quotations and citations omitted); see also McKinnon, 422 Fed. Appx. at 73. In short, the erroneously admitted evidence, viewed "in light of the entire record before the jury," Dunnigan, 137 F.3d at 125, must have been "crucial, critical, highly significant." Collins v. Scully, 755 F.2d 16, 19 (2d Cir. 1985).

The Second Circuit has set forth the manner in which challenges to a state trial court's evidentiary rulings are to be resolved on federal habeas review as follows:

> "In order to determine whether the effect of state-law evidentiary rulings can give rise to an 'unreasonable application of [] clearly established Federal law,' 28 U.S.C. § 2254(d)(1), a district court must first 'start with "the propriety of the trial court's evidentiary ruling,"' Hawkins v. Costello, 460 F.3d 238, 244 (2d Cir. 2006) (quoting Wade v. Mantello, 333 F.3d 51, 59 (2d Cir. 2003)). A trial court does not necessarily violate AEDPA by misapplying its state's evidentiary law, but '[t]he inquiry . . . "into possible state evidentiary law errors at the trial level" assists . . . in "ascertain[ing] whether the appellate division acted within the limits of what is objectively reasonable."' Id. (alteration in original) (quoting Jones v. Stinson, 229 F.3d 112, 120 (2d Cir. 2000)).
>
> In the context of challenged evidentiary rulings, the second analytical step depends on the district court's decision regarding whether the evidentiary ruling was erroneous as a matter of state law. If it was, then the next question for the district court is 'whether "the omitted evidence [evaluated in the context of the entire record] creates a reasonable doubt that did not otherwise exist."' Justice v. Hoke, 90 F.3d 43, 47 (2d Cir. 1996) (alteration in original) (quoting United States v. Agurs, 427 U.S. 97, 112, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976)). If, however,

> the challenged ruling was correct under state law, then the district court must ask whether the evidentiary rule that was applied is 'arbitrary or disproportionate to the purposes it is designed to serve.' Hawkins, 460 F.3d at 245."

Bell v. Ercole, 368 Fed. Appx. 216, 218 (2d Cir. Mar. 4, 2010) (summary order).

1. Bolstering Claim

Petitioner claims that the trial court improperly permitted the prosecutor: (1) to elicit testimony from Leser on direct examination that bolstered McLaurin's testimony, (T. 1061-67); and (2) to introduce prior consistent statements made by Branas in his confession to police in order to bolster his credibility, (T. 416-52).

While New York law prohibits bolstering, "it is not forbidden by the Federal Rules of Evidence and is not sufficiently prejudicial to deprive a defendant of his due process rights to a fair trial." Nieves v. Fischer, No. 03 Civ. 9803, 2004 WL 2997860, at * 7 (S.D.N.Y. Dec. 28, 2004)(citations omitted); see also Ochoa v. Breslin, — F.Supp.2d —, 2011 WL 2852820, at * 7 (S.D.N.Y. July 13, 2011). Courts in this circuit have repeatedly held that "the concept of 'bolstering' really has no place as an issue in criminal jurisprudence based in the United States Constitution," Nieves, 2004 WL 2997860, at * 7, and is a state law evidentiary issue. See e.g. Glover v. Burge, 652 F.Supp.2d 373, 377 (W.D.N.Y. 2009) ("'[B]olstering' of a prosecution witness' testimony does not state a constitutional claim redressable on federal habeas review."); Lebron v. Sanders, 02 Civ. 6327, 2008 WL 793590, at * 20 (S.D.N.Y. Mar. 25, 2008) (holding that a violation of New York's "bolstering" rule does not rise to a constitutional level); Scott v. Walker, No. 01 CV 7717, 2003 WL 23100888, at * 8 (E.D.N.Y. Dec. 30, 2003)(holding that petitioner's challenge to certain bolstering testimony was not cognizable on habeas review);

Smith v. Walsh, No. 00-CV-5672, 2003 WL 22670885, at * 6 (E.D.N.Y. Oct. 20, 2003)(holding that a bolstering claim is not a cognizable basis for federal habeas relief); Diaz v. Greiner, 110 F.Supp.2d 225, 234 (S.D.N.Y. 2000) (holding that bolstering claims are not cognizable on federal habeas review).

The admission of Branas's confession and Leser's testimony, even if error under state law, did not result in any fundamental unfairness to petitioner so as to deprive him of his right to a fair trial. Considering the record as a whole, petitioner cannot demonstrate that the purported bolstering evidence had a substantial and injurious effect on the verdict. Since any error in the admission of such bolstering evidence under state law does not rise to constitutional dimensions, petitioner's claim that the trial court improperly admitted such evidence (Ground Four of the amended petition) is denied.

2. Right to Present Defense

At trial, defense counsel moved to introduce into evidence a photograph that had been taken days after petitioner's arrest depicting injuries to his groin area, but redacted so as not to show a tattoo of a man holding a gun in each hand with a bandana covering his face on petitioner's left upper thigh. The trial court ruled that petitioner could introduce the unredacted photograph into evidence. Faced with that ruling, petitioner chose not to introduce the unredacted photograph into evidence. Petitioner claims that he was denied his right to present a defense by the trial court's refusal to allow him to introduce the redacted photograph insofar as he "lost the power to show the circumstances that prompted his confession." (Pet. Mem., at 10).

"[A] criminal defendant has a constitutional right– grounded in the Sixth Amendment's Compulsory Process and Confrontation Clauses and the Fourteenth Amendment's Due Process Clause– to 'a meaningful opportunity to present a complete defense.'" Hawkins, 460 F.3d at 243 (quoting Crane v. Kentucky, 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986)). However, the right to present a complete defense "is not without limits and 'may in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process.'" Id. (quoting Chambers v. Mississippi, 410 U.S. 284, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973)); see also United States v. Al Kassar, — F.3d —, 2011 WL 4375654, at * 8 (2d Cir. Sept. 21, 2011) (holding that the right to present a complete defense is subject to reasonable restrictions); Jimenez v. Walker, 458 F.3d 130, 147 (2d Cir. 2006) ("[T]he right to present a defense is not unlimited."); Wade, 333 F.3d at 58 ("A defendant's right to present relevant evidence is not * * * unlimited; rather it is subject to reasonable restrictions." (internal quotations and citation omitted)). "A defendant 'must comply with established rules of procedure and evidence designed to assure both fairness and reliability,' * * *." Hawkins, 460 F.3d at 243 (quoting Chambers, 410 U.S. at 302, 93 S.Ct. 1038); see also Al Kassar, — F.3d—, 2011 WL 4375654, at * 8; Zarvela v. Artuz, 364 F.3d 415, 418 (2d Cir. 2004). "Even erroneous evidentiary rulings warrant a writ of habeas corpus only where the petitioner 'can show that the error deprived [him] of a *fundamentally fair* trial.'" Zarvela, 364 F.3d at 418 (quoting Rosario v. Kuhlman, 839 F.2d 918, 925 (2d Cir. 1988)) (alternations and emphasis in original).

"[T]he rigid application of state evidentiary rules prohibiting presentation of exculpatory evidence," Zarvela, 364 F.3d at 418, has been found to be unconstitutional. See Wade, 333 F.3d at 57; see also Jimenez, 458 F.3d at 147 ("The Constitution prohibits the pointless or arbitrary

exclusion of material evidence.") "In evaluating claims of violation of the right to present a complete defense, the Supreme Court has found the Constitution to be principally (but not always) concerned with state evidentiary rules leading to the 'blanket exclusion,' Crane, 476 U.S. at 690, 106 S.Ct. 2142, of categories of evidence when their application is 'arbitrary or disproportionate to the purposes the [rules] are designed to serve.'" Wade, 333 F.3d at 60 (quoting United States v. Scheffer, 523 U.S. 303, 308, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998) (internal quotations and citation omitted)). It is the petitioner's burden to demonstrate by a preponderance of the evidence that his constitutional rights have been violated. Hawkins, 460 F.3d at 246.

In denying defense counsel's request to redact the photograph, the trial court did not decide a question of law differently from the Supreme Court; and this case does not present a set of facts materially indistinguishable from a Supreme Court case. See 28 U.S.C. § 2254(d). Accordingly, the state court's determination is not "contrary to" clearly established federal law. See Hawkins, 460 F.3d at 244. Thus, habeas relief is only available if the trial court's ruling was "so plainly unconstitutional that it was objectively unreasonable for the Appellate Division to conclude otherwise." Jimenez, 458 F.3d at 147.

The trial court's denial of defense counsel's request to redact the photograph was not erroneous as a matter of New York state law since, *inter alia*, it was of merely slight or conjectural significance given that it had been taken days after the arrest, and after petitioner had previously denied having any physical injuries or major medical problems, (see T. 1755-56, 1775, 1766, 1782-83, 1796-97). See People v. Primo, 96 N.Y.2d 351, 355-56, 728 N.Y.S.2d

735, 753 N.Ed.2d 164 (N.Y. 2001); People v. Davis, 43 N.Y.2d 17, 27, 400 N.Y.S.2d 735, 371 N.E.2d 456 (N.Y. 1977).

Furthermore, petitioner has not established that admission of the unredacted photograph would have been unduly prejudicial to his defense. To the contrary, the redaction might have served to emphasize the fact that potentially harmful information had been redacted leading the jury to speculate as to what that information was. See, e.g. People v. Ames, 186 A.D.2d 747, 589 N.Y.S.2d 60 (2d Dept. 1992) (finding that a redaction of the photograph might have served to emphasize the fact that potentially harmful information had been redacted "without a sufficient, countervailing beneficial effect.")

Moreover, in determining that the photograph could only be introduced if unredacted, the trial court did not apply a state evidentiary rule leading to a "blanket exclusion" of certain categories of evidence. Rather, the trial court's ruling was "one of those 'ordinary evidentiary rulings by state trial courts' concerning the admissibility of evidence, upon which the Court is 'traditional[ly] reluctan[t] to impose constitutional constraints.'" Wade, 333 F.3d at 60 (quoting Crane, 476 U.S. at 689, 106 S.Ct. 2142) (alterations in original).

In any event, even if erroneous under state law, the trial court's ruling did not amount to a constitutional violation because the photograph was not "material," i.e., there is no reasonable doubt about petitioner's guilt whether or not the photograph is considered. See Jimenez 458 F.3d at 146-7; see also Al Kassar, — F.3d —, 2011 WL 4375654, at * 8 (finding no constitutional violation where although the excluded evidence might have marginally reinforced the defense, it was neither compelling nor integral to the defense theory). Since the photograph would not have "so plainly created reasonable doubt that a conclusion to the contrary would be objectively

unreasonable," Jimenez, 458 F.3d at 148, the state court's adjudication was not an unreasonable application of clearly established federal law. Therefore, petitioner's right to present a defense claim (Ground Three of the amended petition) is denied.

E. Trial Court Interference Claim

Petitioner challenges, *inter alia*: (1) the hearing court's "line of questioning," outside the presence of a jury, which allowed his buccal swab to be admitted into evidence, (H. 173-78); and (2) the conduct of the trial court in (a) interrupting witness testimony, (T. 338, 591, 601, 1195-97, 1171, 1258), (b) rephrasing the prosecutor's questions when defense counsel objected thereto, (T. 601, 1117, 1263-64, 1266-67, 1269-71, 1310), (c) questioning witnesses and purportedly assisting in the development of the prosecution's case, (T. 1076-78, 1357-58, 1664, 1668, 1694), and (d) eliciting otherwise inadmissible evidence regarding his "custodial status," (Pet. Mem., at 30), (T. 1451-55).

"Under the Fifth and Fourteenth Amendments, criminal prosecutions must be conducted within the bounds of fundamental fairness * * * and * * * prejudicial intervention by a trial judge [can] so fundamentally impair the fairness of a criminal trial as to violate the Due Process Clause." Daye v. Attorney General of State of New York, 712 F.2d 1566, 1570 (2d Cir. 1983); see also Gayle v. Scully, 779 F.2d 802, 805 (2d Cir. 1985). Nonetheless, "extensive questioning by a trial judge does not necessarily equate with unfairness, * * *," Garcia v. Warden, Dannemora Correctional Facility, 795 F.2d 5, 7 (2d Cir. 1986); see also Gayle, 779 F.2d at 806 ("[A] judge does not deny a defendant due process of law by merely intervening in a trial to question witnesses."); Daye, 712 F.2d at 1572 (holding that neither the quantity nor the nature of

the trial judge's questioning is determinative), and it is "well within the power of the trial judge to question witnesses * * * to test the memory of witnesses, to avoid confusion on the part of jurors, and to clarify points that are deliberately obfuscated or are simply confusing." Gayle, 779 F.2d at 813. "A state trial judge's conduct would have to be significantly adverse to the defendant before it violated the constitutional requirement of due process and warranted federal intervention." Garcia, 796 F.2d at 8; see also Gayle, 779 F.2d at 806 (holding that in order to constitute a constitutional violation, the judge's intervention in the conduct of the trial must be both significant and adverse to the defense); Daye, 712 F.2d at 1572 ("A trial judge's intervention in the conduct of a criminal trial would have to reach a significant extent and be adverse to the defendant to a substantial degree before the risk of either impaired functioning of the jury or lack of the appearance of a neutral judge conducting a fair trial exceeded constitutional limits."); see, e.g. Johnson v. Scully, 727 F.2d 222, 226-27 (2d Cir. 1984) (finding that the trial judge's conduct did not rise to the level of a constitutional violation even though his questioning of witnesses was "far more extensive that what is normally appropriate for a trial judge endeavoring to expedite proceedings and assist the jury's understanding" and he elicited certain responses perceivably adverse to the defendant). The alleged improprieties committed by the trial judge must be assessed in the context of the total trial, see Daye, 712 F.2d at 1572, and "only infrequently does intervention by a trial judge rise to the level of a due process violation." Gayle, 779 F.2d at 806.

This is not one of the rare cases in which the trial judge's, or hearing judge's, conduct can be said to have risen to the level of a due process violation warranting federal court intervention. Viewed in the context of the entire proceedings, the trial judge's, and hearing judge's, occasional

interruptions and questioning of witnesses were neither significant nor substantially adverse to petitioner so as to affect the fundamental fairness of the trial. Indeed, much of the trial court's interruptions and questioning were devoted to clarifying witness testimony, its rulings on counsel's objections and whether a proper foundation had been established for the admission of certain evidence, as well as to prevent witnesses from testifying as to inadmissible hearsay. (See, e.g. T. 339, 601, 1171, 1258). Even though certain questions by the trial judge may have elicited responses that can be perceived to have been detrimental to the defense, e.g., regarding petitioner's custodial status, they did not "convey the picture of a judge who had 'enter[ed] the lists, [or] by his ardor induce[d] the jury to join in a hue and cry against the accused" or infect "the overall conduct of the trial such that public confidence in the impartial administration of justice was seriously at risk." Daye, 712 F.2d at 1572 (quoting United States v. Marzano, 149 F.2d 923, 926 (2d Cir. 1945)). Accordingly, the state court's adjudication of this claim was not contrary to, nor an unreasonable application of, federal law, and did not result in a decision that was based upon an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. Therefore, Ground Five of the amended petition is denied.

F. Voluntariness of Confession Claim

Petitioner contends that the hearing court erred in failing to suppress his statements to police because they were involuntarily made. Specifically, petitioner contends, *inter alia*, that at the time of his first confession, he had been under the influence of drugs; "subjected to eleven sleepless hours of interrogation," (Pet. Mem., at 6); handcuffed; and assaulted by Albergo. The Appellate Division rejected this claim, finding that "[t]he hearing court properly denied that

branch of the [petitioner's] omnibus motion which was to suppress his statements to the police * * *." People v. Villafane, 48 A.D.3d at 713, 852 N.Y.S.2d 301 (citations omitted). Petitioner requests a hearing to determine the issue of the voluntariness of his confession on the basis that the state court record is ambiguous regarding, *inter alia*, the circumstances under which his confession was given.

The following facts were established at the pre-trial hearing to determine the admissibility of petitioner's statements to the police:

On June 14, 2003, at approximately 11:05 p.m., Albergo, together with four (4) other detectives, arrested petitioner as he was walking with Branas along Jennings Avenue in Patchogue, New York. (H. 105-06, 213-17, 231). Albergo testified that as the detectives approached, Branas dove to the ground, then petitioner turned, tripped over Branas and hit the ground. (H. 106-07, 217-18). According to Albergo, after he had handcuffed petitioner and placed him in an unmarked police vehicle, petitioner was told that he was under arrest for an incident that had occurred in Medford, New York. (H. 107, 218-21). No other conversation was had with, and no questions were asked of, petitioner while he was being transported to police headquarters. (H. 108-09, 221-222). Albergo denied threatening petitioner during the ride to headquarters. (H. 222).

Petitioner arrived with the detectives at police headquarters at approximately 11:20 p.m. and was taken to an interview room in the homicide squad on the second floor, where his handcuffs were removed, he was searched and seated and his possessions were seized. (H. 108-09, 224-25, 232). Albergo was not wearing latex gloves when he removed petitioner's possessions. (H. 230). According to Albergo, latex gloves were used to handle bloody evidence

and were kept in an evidence closet right next door to petitioner's interview room. (H. 231). Prior to placing petitioner in the interview room, no questions were asked of, and no answers were given by, him. (H. 224). According to Albergo, petitioner's clothing was not removed until the next morning and he was never stripped down to his underwear. (H. 229). No photographs were taken of petitioner until approximately 9:00 a.m. the next morning. (H. 230).

Twiname spoke with petitioner first and completed his prisoner activity log. (H. 109-10). Albergo was present during Twiname's conversation with petitioner and testified that petitioner was in good condition, quiet, coherent and not complaining of any injuries, and that petitioner did not appear to be intoxicated or under the influence of drugs. (H. 110-11).

Albergo testified that after Twiname had completed the prisoner activity log, Detective Walsh read petitioner his Miranda warnings from a pre-printed card and asked petitioner to read the card along with him as he read the rights aloud and to initial each line to indicate that he understood each particular right, which petitioner did. (H. 111-13, 115, 116, 232-34). Petitioner was not handcuffed at that time, (H. 111), and never interrupted, or otherwise indicated that he did not understand, the Miranda warnings, (H. 117).

According to Albergo, after reading the Miranda warnings, Walsh advised petitioner that he was going to ask him several questions about whether petitioner waived any of those rights, to which petitioner should verbally respond "yes" or "no," write his responses at the end of each question on the card and place his initials thereafter. (H. 113, 232-33). While Walsh was reading petitioner the waiver questions, petitioner never indicated that he did not understand the questions or that he wanted any of the waivers explained to him. (H. 117). Petitioner indicated that he understood his constitutional rights, that he did not wish to contact an attorney and that he

wished to talk with detectives without a lawyer present. (H. 116, 233). Albergo testified that he heard petitioner's responses to the waiver questions and observed petitioner write each answer down on the card, initial each line and sign the bottom of the rights card indicating that the entire card had been read to him. (H. 113-14). Petitioner noted on the card that the rights were completed at 11:35 p.m. (H. 118). Albergo then placed his initials and shield number in the upper right corner of the rights card. (H. 114). The rights card was admitted into evidence without objection. (H. 114). Albergo testified that neither he nor Walsh, nor any other member of the homicide squad, ever threatened petitioner to give a statement or speak to them, (H. 118, 237), and that petitioner never refused to answer any question. (H. 236). Albergo denied ever using, or seeing Walsh exert any, force upon petitioner on the night of his arrest. (H. 237-38).

Albergo testified that he began interviewing petitioner shortly after 11:35 p.m. (H. 118-19, 232). According to Albergo, when petitioner denied ever being in Medford, Albergo falsely indicated that people had picked him and Branas out of a photographic array and stated that they had been there on the night "the guy was shot" so that petitioner would think that people had identified him and would tell him what he had done. (H. 121-22). Albergo testified that he further told petitioner that the people who had identified him had indicated that he and Branas had been lit up with headlights as they ran from the scene. (H. 122-23). Nonetheless, petitioner continued to deny ever being in Medford and claimed not to know why someone would call the police and tell them that he and Branas were both involved in the crime in Medford. (H. 123-24). Albergo testified that petitioner was then told that "numerous people were burning up the phone lines calling in anonymous tips looking for the reward, stating that both he and [Branas] were involved in the murder," (H. 124), but petitioner maintained that they were all lying. (H.

125). Petitioner was then told that detectives had found his mask and gloves, to which petitioner responded that he did not know what Albergo was talking about. (H. 125). Petitioner was asked if he knew his DNA was on file, to which he responded that he did not know that. (H. 125-26). At 11:59 p.m., there was a break in the interview and petitioner was told to think about what had been discussed. (H. 126).

Albergo testified that during the break, he retrieved the photographs of the items, including a handgun, that had been recovered "not far from the scene," (H. 126-27), and was informed that Branas had confessed to being involved in the house robbery and had implicated petitioner as the shooter. (H. 127, 248). The interview recommenced at 12:05 a.m. (H. 127). According to Albergo, he started questioning petitioner again from the beginning, i.e., about petitioner being in Medford. (H. 127). Petitioner continued to maintain that all of the witnesses that had identified him and Branas had been mistaken. (H. 128). Albergo testified that petitioner also denied knowing about any property or jewelry that had been stolen, at which time Albergo informed him, falsely, that the jewelry that had been stolen from the house had been brought to a jewelry store to be appraised by a person who had been required to provide identification. (H. 128-29). Albergo explained to petitioner that the person who provided identification to the store would identify whomever had given him or her the jewelry once it was learned that the jewelry was stolen in a murder. (H. 129). Albergo then told petitioner that his gun had been recovered, to which petitioner responded that he did not have a gun. (H. 130). Petitioner was then shown the photographs of all of the items that had been recovered near the scene, at which time he remained silent. (H. 130-31). Albergo then reviewed with petitioner all that they had discussed to that point, informed him that Branas had confessed to the robbery and had named him as the

shooter and suggested that "it would seem likely that [petitioner and Branas] thought they were going there to rob a drug dealer * * * [and], of course, [would] bring a gun to do that. That maybe he did not intentionally go there to shoot anybody. And this was his chance to tell [detectives] that he didn't mean to kill anybody when he went into the house." (H. 131-32). Petitioner was asked if he wanted to speak with Branas, to which he responded affirmatively. (H. 132-33).

Albergo testified that Branas was brought to the door of petitioner's interview room at approximately 12:40 a.m. and told petitioner that he had "[given] up everything and to give it up, Dog." (H. 133-35). At that time, petitioner was seated in the chair by the table in the interview room and was not in handcuffs. (H. 134). According to Albergo, petitioner did not say anything in response to Branas's comment and Branas was escorted back to his own interview room. (H. 135). Petitioner then asked for several minutes to think about what had been said, so the detectives left the room, with the door open, and stood right outside the room for a few minutes. (H. 132, 136).

Albergo testified that when the detectives re-entered petitioner's interview room at approximately 12:45 a.m. they asked petitioner if he was ready to speak to them, to which petitioner responded that he "didn't mean to do it," that he was sorry and that "the guy was on [him] and [he] shot." (H. 136, 232). When detectives asked petitioner how they had gotten into the house, petitioner responded that they entered through the front door and that they thought the guy was a weed, or marijuana, dealer because "a guy in Bellport" had told them that he had bought weed there. (H. 136-37). Petitioner stated that the gun was not his and that he had gotten it from a "weed house" on Hoffman Avenue in Bellport from some guy named "June Bug," (H.

137), and that he had procured the mask and gloves from his work. (H. 137-38). According to petitioner, a guy he knew only as "Boo" had driven him and Branas to the house. (H. 137). Petitioner further told detectives that he had sold the jewelry stolen from the house to a guy named Kelvin. (H. 137). Petitioner told detectives that he would provide them with a written statement. (H. 137, 139-40). According to Albergo, petitioner provided this first confession to detectives at approximately 12:45 a.m., or a "little bit" after. (H. 138). At "sometime around" 1:00 a.m., there was another break in the interview because petitioner indicated that he needed to go to the bathroom. (H. 138-39). Walsh took petitioner to the bathroom. (H. 138-39).

Petitioner was brought back to the interview room at approximately 1:05 a.m., at which time Albergo and Walsh "began the process" of getting a written statement from petitioner. (H. 139). According to Albergo, at approximately 1:10 a.m., prior to executing a written statement, Albergo again advised petitioner of his constitutional rights and went over the waivers with him. (H. 142-43, 251). Except for the first page, which was a preprinted "advice of rights" form, Albergo wrote the statement based upon petitioner's responses to his questions about the crime. (H. 141-146, 251-53).

Albergo testified that approximately halfway through the written statement, they took a break because petitioner indicated that he was thirsty, so they gave him a soda. (H. 147, 150). The written statement was completed at approximately 3:25 a.m. and petitioner was again taken to the bathroom a little after 3:30 a.m. (H. 150-51). At approximately 3:37 a.m., petitioner returned to the interview room and remained unhandcuffed. (H. 151-52). Albergo and Walsh then reviewed the written statement with petitioner, which took approximately twenty (20) to twenty-five (25) minutes, following which petitioner initialed and signed each page of the written

statement, which was then signed by Walsh as a witness. (H. 141-46, 152, 251-53). The process was completed at approximately 4:05 a.m. (H. 153, 253). The written statement was admitted into evidence without objection. (H. 142).

Albergo testified that during the process of obtaining the written statement, petitioner, at the detectives' request, prepared a sketch to clarify where he had been dropped off and where he was supposed to have been picked up, which he then signed and Albergo initialed and placed his shield number on the upper left corner of the sketch. (H. 147-49). The sketch was admitted into evidence without objection. (H. 149).

After the completion of his written statement, between 4:05 a.m. and 4:25 a.m., petitioner was shown some photographs and was asked to explain in writing on the photographs what they were or meant to him. (H. 154, 159, 256). On one of the photographs depicting the gun used in the murder petitioner wrote "The gun I used," and signed that statement. (H. 155). On another photograph, petitioner indicated where he had thrown the gun and where he had been picked up by "Boo," and signed those statements. (H. 156-57). On a third photograph depicting the Medford house petitioner wrote "this is the house we went in, I recognize the car," and signed that statement. (H. 157-58). On the fourth photograph depicting Berman's room petitioner marked an "X" and wrote "this is where I shot the guy," and signed that statement. (H. 158-59). The photographs were admitted into evidence without objection. (H. 160).

After petitioner was shown the photographs, he was given some water. (H. 161). As he was drinking the water, petitioner was asked if he was willing to give a videotaped statement to the district attorney, to which petitioner responded in the negative. (H. 161, 256). Walsh then explained to petitioner that he needed to execute a form to that effect, which petitioner did. (H.

161-62). Prior to admitting the form into evidence, defense counsel conducted a voir dire of Albergo. (H. 163-67). Specifically, defense counsel inquired as to why the form did not contain a date or time when it was executed. (H. 165). Following the voir dire, the form was admitted into evidence without objection. (H. 167). According to Albergo, petitioner was not asked any further questions about the incident at headquarters after he was shown the photographs. (H. 259).

Albergo testified that neither he nor Walsh, nor anyone else, ever threatened or harmed petitioner into giving any statement or cooperating in the case. (H. 168-69). In addition, petitioner was not promised anything in exchange for his statements. (H. 169).

Petitioner was provided breakfast at approximately 9:00 a.m. (H. 170). In addition, petitioner slept while detectives did "other procedural things." (H. 170).

Albergo testified that "at some point" in the morning of June 15, 2003, a buccal swab exemplar was requested of petitioner. (H. 169, 247). After petitioner was fed breakfast, he signed a consent form indicating that he would voluntarily provide a buccal swab exemplar. (H. 171). Albergo testified that he was present for the actual buccal swab and witnessed petitioner's consent, or lack of objection, thereto, but that he did not actually witness petitioner sign the consent form, although he was right outside the door. (H. 171-72). Defense counsel objected to the admission of the buccal swab consent form on the basis that a proper foundation had not been laid therefor because Albergo could not testify to witnessing the execution of the consent form. (H. 173). In response, the prosecutor informed the hearing court that Walsh, who had signed the consent form as a witness to petitioner's execution of it, was deceased. (H. 174). The following colloquy then occurred:

THE COURT: Let me ask you, Detective Albergo, you have a clear independent recollection that you were present at that time, the time the document was signed?

[ALBERGO]: I was at the doorway of the room when the document was being prepared. I was there when the buccal swab was administered. I was asked if I was right there when he signed the paper. I did not, you know – I can't say that I witnessed him signing, you know, right there signing it. But I was there when he administered the buccal swab. I believe there was another – Detective Sergeant Twamaine [sic] was also there at that time in the room. It was an afterthought to take the swab.

THE COURT: This is still in the room, eight by eight.

[ALBERGO]: Yeah.

THE COURT: Now what – what was the distance that separated yourself?

[ALBERGO]: Oh, maybe five feet.

THE COURT: And did you overhear what the document purported to be?

[ALBERGO]: Oh, I know what the document is. I just – as I was asked if I witnessed his signature on there, I didn't really see him signing it, but I was there, the document was there.

THE COURT: Were they talking about that particular document for the swab?

[ALBERGO]: Yeah, that was all that was being talked about.

[DEFENSE COUNSEL]: If I may, Judge. If he didn't see the document being signed, how do you know that was in fact the document was [sic] that was signed? Because you are talking about a document, doesn't necessarily mean that that's the document.

THE COURT: All right, let's go one step further. Were there any other documents at that precise moment that he was asked to sign, or were there any on the desk, were there any other additional, umm, investigations going on other than the consent here on this swab?

[ALBERGO]: The circumstances were – that I was present for was that Detective Sergeant Twamaine [sic] realized that it was possible to take a buccal swab sample exemplar. He asked Detective Walsh to get an exemplar kit and asked [petitioner] if he would submit to a buccal swab. He and Detective Walsh entered

the room. He was at the doorway. And there were other things going on. But they were going over what appeared to be the form[.]

THE COURT: All right. When the sergeant asked [petitioner] would he consent to that, did you get a response?

[ALBERGO]: Detective Walsh, you know, before – before he went and got all the stuff, said, would you give us a buccal swab, and went out.

THE COURT: All right, he refused the video form, he wouldn't sign it, but you heard him say that he would consent to this.

[ALBERGO]: Well, he did sign the video form, he just didn't want to give the video.

THE COURT: That's what I'm saying. He gave the refusal for the video. And, in fact, you saw him - - they took the swab.

[ALBERGO]: Absolutely.

THE COURT: All right, overruled. I'm going [to] allow it. Mark it.

[DEFENSE COUNSEL]: Note my objection.

THE COURT: So noted. Exception on the record.

* * *

THE COURT: Let me go one step further. Did the [petitioner] - - did he create any disturbance or so forth that you have to force him to take the swab?

[ALBERGO]: Absolutely not, it was voluntary.

(H. 174-79).

Petitioner left headquarters with Albergo and Walsh at approximately 11:15 a.m. and was taken to the Fifth Precinct. (H. 179). At approximately 8:35 p.m., the district attorney requested that Albergo interview both petitioner and Branas and complete a death penalty questionnaire because the district attorney's office was considering charging them with murder in the first degree. (H. 180-81, 260-62). During that interview, petitioner indicated that he knew Goher, (H.

262), but that he had not seen him in a year. (H. 184, 262-63). Petitioner was then asked whether the female that he had punched in the house looked familiar to him, to which he responded that "that was Heather with the Honda" and that he had told Branas that she looked familiar. (H. 184, 263-65). The defense did not present any witnesses at the hearing. (H. 270).

"The police may use a defendant's confession * * * without transgressing his Fifth Amendment right only when the decision to confess is the defendant's free choice." Nelson v. Walker, 121 F.3d 828, 833 (2d Cir. 1997) (quoting United States v. Anderson, 929 F.2d 96, 98 (2d Cir. 1991)). "The prosecution bears the burden of demonstrating by a preponderance of the evidence that a confession was voluntary." Id.; see also United States v. Orlandez-Gamboa, 320 F.3d 328, 333 (2d Cir. 2003). The "ultimate issue of voluntariness [of a confession] is a legal question requiring independent federal determination." Nelson, 121 F.3d at 833 (quoting Arizona v. Fulminante, 499 U.S. 279, 287, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991)). "No single criterion controls whether an accused's confession is voluntary[;] whether a confession was obtained by coercion is determined only after careful evaluation of the totality of the surrounding circumstances." Green v. Scully, 850 F.2d 894, 901 (2d Cir. 1988); see also Orlandez-Gamboa, 320 F.3d at 332. The factors to be considered in determining the voluntariness of a confession include: "the characteristics of the accused, such as his experience, background, and education; the conditions of the interrogation; and the conduct of law enforcement officials, notably, whether there was physical abuse, the period of restraint in handcuffs, and use of psychologically coercive tactics." Nelson, 121 F.3d at 833; see also Green, 850 F.2d at 901-02. "Subsidiary questions, such as the length and circumstances of an interrogation, * * *, or whether the police engaged in the intimidation tactics alleged by the defendant, are entitled to the presumption of

correctness [under the AEDPA], * * *." Nelson, 121 F.3d at 833 (internal quotations, alterations and citations omitted); see also Miller v. Fenton, 474 U.S. 104, 112, 106 S.Ct. 445, 88 L.Ed.2d 445 (1985) (holding that although the ultimate question of whether a confession was voluntarily made is "a matter for independent federal determination," "subsidiary factual questions, such as * * * whether in fact the police engaged in the intimidation tactics alleged by the defendant, * * * are entitled to the [AEDPA] presumption [of correctness]" and that a federal habeas court should "give great weight to the considered conclusions of a coequal state judiciary.")

Petitioner's request for a hearing is denied because it is clear from the record of the state court proceedings that the hearing court adequately developed the material facts and that its factual determinations, including its determination that petitioner's confession was not coerced by any police misconduct, are supported by substantial evidence in the record. Those "subsidiary" factual findings are entitled to a presumption of correctness under the AEDPA, which petitioner has failed to rebut by clear and convincing evidence that his confession was the result of police misconduct, or was otherwise involuntary. See 28 U.S.C. § 2254(e)(1).

Considering the totality of the circumstances surrounding petitioner's confession, including, *inter alia*, that Miranda warnings were issued to petitioner; that the atmosphere and temperature of the room in which petitioner was interrogated were normal; that the investigating officers, whose testimony was found to be credible by the hearing court, testified that petitioner was offered food, drink and the use of bathroom facilities during the interrogation and was never threatened or physically abused during the interrogation; and that there was no evidence indicating that petitioner ever objected to the manner of questioning, ever complained about the

conditions of his interrogation or failed to understand his constitutional rights, petitioner's confession was voluntarily made. Therefore, Ground Two of the amended petition is denied.

G. Ineffective Assistance of Trial Counsel Claim

Petitioner alleges that his trial counsel rendered ineffective assistance at the suppression hearing and trial because, *inter alia*: (1) he only "vaguely attempted," and was "clearly under [sic] prepared," to show that petitioner's confession was involuntary, (Pet. Mem., at 32); (2) he made improper comments during his summation, (T. 1871, 1889); (3) he failed to object to the admission (a) of Stump's testimony identifying petitioner by his voice on the basis that it violated New York Criminal Procedure Law § 710.30, (T. 1017-18), and (b) of Branas's confession into evidence, (T. 400-02, 415); (4) he failed to use petitioner's medical records or the photograph depicting the injuries to his groin area to impeach Albergo's testimony during the suppression hearing; (5) he failed to adequately challenge prospective jurors during *voir dire* regarding their association with members of law enforcement; (6) he failed to "aggressively pursue" tape lifts taken of the victim's body, (Pet. Mem., at 35-36); and (7) he failed to understand the DNA evidence, (T. 933-34, 966, 969, 1894). The Appellate Division summarily denied petitioner's ineffective assistance of trial counsel claim as being "without merit." People v. Villafane, 48 A.D.3d at 714, 852 N.Y.S.2d 301.

"[W]here a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing that there was no reasonable basis for the state court to deny relief." Harrington v. Richter, 131 S. Ct. 770, 784, 178 L.Ed.2d 624 (2011); see

also Watson v. Green, 640 F.3d 501, 511 (2d Cir. 2011), cert. denied, — S.Ct. —, 2011 WL 4536276 (Oct. 3, 2011). The Supreme Court has held that:

> "When a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication of state-law procedural principles to the contrary. * * * § 2254(d) does not require a state court to give reasons before its decision can be deemed to have been 'adjudicated on the merits.'"

Harrington, 131 S.Ct. at 784-785. "A state court's determination that a claim lacks merit precludes federal habeas review so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." Id. at 786 (quoting Yarborough v. Alvarado, 541 U.S. 652, 664, 124 S. Ct. 2140, 158 L. Ed. 2d 938 (2004)). "Under § 2254(d), a habeas court must determine what arguments or theories supported or * * * could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the Supreme] Court." Id.

In order to prevail on a Sixth Amendment ineffective assistance of counsel claim, a petitioner must prove both: (1) that counsel's representation "fell below an objective standard of reasonableness" measured against "prevailing professional norms;" and (2) that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 20687-68, 80 L. Ed. 2d 674 (1984); see also Padilla v. Kentucky, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010). On habeas review of an ineffective assistance of counsel claim, "[t]he pivotal question is whether the state court's application of the Strickland standard was unreasonable." Harrington, 131 S. Ct. at 785; see also Byrd v. Evans, 420 Fed. Appx. 28 (2d Cir. Mar. 21, 2011). The AEDPA requires federal courts to give state courts "deference and latitude" when

considering an ineffective assistance of counsel claim on habeas review. Harrington, 131 S. Ct. at 786. Review of a state court's rejection of an ineffective assistance of counsel claim is "doubly deferential," Knowles v. Mirzayance, 556 U.S. 111, 129 S. Ct. 1411, 1420, 173 L.Ed.2d 251 (2009), i.e., the court must "take a 'highly deferential' look at counsel's performance, Strickland, supra, at 689, 104 S. Ct. 2052, through the 'deferential lens of § 2254(d),' Knowles, supra, at ---, n.2, 129 S. Ct. at 1419, n.2." Cullen v. Pinholster, 131 S. Ct. 1388, 1403, 179 L.Ed.2d 557 (2011). Thus, in order to prevail on his ineffective assistance of counsel claim, petitioner must demonstrate that it was "necessarily unreasonable" for the state court to conclude: "(1) that he had not overcome the strong presumption of competence; and (2) that he had failed to undermine confidence in the [jury's verdict and his sentence]." Cullen, 131 S. Ct. at 1403.

1. Reasonableness of Counsel's Performance

A petitioner must overcome the "strong presumption that counsel's conduct falls within the wide range of reasonably professional assistance." Knowles, 556 U.S. 111, 129 S. Ct. at 1420; see also Cullen, 131 S. Ct. at 1403. This presumption may only be rebutted by demonstrating that "in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." Strickland, 466 U.S. at 690, 104 S. Ct. 2052; see also Cullen, 131 S. Ct. at 1403. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight," Strickland, 466 U.S. at 689; see also Brown v. Greene, 577 F.3d 107, 110 (2d Cir. 2009), cert. denied, 130 S.Ct. 1881, 176 L.Ed.2d 403 (2010), and the court should review the circumstances "from counsel's perspective at the time" of the trial. Strickland, 466 U.S. at 689; see also Parisi v. United States,

529 F.3d 134, 141 (2d Cir. 2008), cert. denied, 129 S.Ct. 1376, 173 L.Ed.2d 632 (2009). "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable" in habeas corpus proceedings. Knowles, 129 S.Ct. at 1420, 1421 (quoting Strickland, 466 U.S. at 690, 104 S.Ct. 2052).

Petitioner has not pointed to any defect in his trial counsel's representation that fell below an objective standard of reasonableness under prevailing professional norms existing at the time of his pretrial hearing and trial. Defense counsel, *inter alia*, appropriately, albeit unsuccessfully, moved to suppress petitioner's statements to police prior to trial; reasonably and appropriately questioned prospective jurors during voir dire about their association with law enforcement, challenged them for cause where warranted and appropriately exercised peremptory challenges (T. 128-153, 156, 250-282, 344-366, 489-513, 604-627, 704-722); interposed timely and appropriate objections, including his objection to Leser's testimony as bolstering; effectively examined and cross-examined witnesses; subpoenaed petitioner's medical records and had them introduced into evidence at trial, (T. 1745); appropriately, albeit unsuccessfully, sought to have the photograph depicting petitioner's injuries to his groin area redacted and, as redacted, introduced into evidence; moved for curative instructions and/or a mistrial where appropriate; and delivered rational opening and closing statements and legal arguments.

b. Prejudice

In any event, petitioner has failed to demonstrate a reasonable probability that the outcome of the trial would have been different had counsel rendered more meaningful assistance at the suppression hearing or trial. See Strickland 466 U.S. at 687-94. A "reasonable

probability" is a probability "sufficient to undermine confidence in the outcome." Knowles, 129 S.Ct. at 1422, 173 L.Ed.2d 251 (quoting Strickland, 466 U.S. at 694). In light of the overwhelming evidence of petitioner's guilt, petitioner has not established that any alleged deficiency in his trial counsel's performance, even if considered cumulatively, "undermine[d] confidence in the outcome" of the trial.

Since petitioner has not demonstrated that the Appellate Division's denial of his ineffective assistance of counsel claim was contrary to, or an unreasonable application of, Strickland, or was based on an unreasonable determination of the facts in light of the evidence presented at trial, 28 U.S.C. § 2254(d), his ineffective assistance of trial counsel claim (Ground Six of the amended petition) is denied.

H. Prosecutorial Misconduct Claim

Petitioner alleges that the prosecutor violated his Fifth and Fourteenth Amendment due process rights by, *inter alia*: (1) presenting false testimony at trial, insofar as Galasso's testimony at trial, (T. 845, 874-76), differed from his testimony during the grand jury proceedings, (G.J. 9, 20-21), which the prosecutor "predicted" in her opening statements, (Pet. Mem., at 40-41); (2) presenting Stump's testimony identifying petitioner by his voice in contravention of state law, (T. 12-14, 24); (3) misstating during her summation that petitioner was a major component of DNA found on the bandana, (T. 1922), and that the gunman had "beat" Stump with a gun, (T. 1913), in contravention of the trial evidence; (4) ignoring the trial court's rulings not to elicit testimony regarding the death penalty, (T. 126, 1080, 1443), or the Crime Stoppers' tip, (T. 129-30); and

(5) failing to disclose evidence, i.e., the tape lifts of the victim's body, required to be disclosed pursuant to Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), (T. 1206).

Prosecutorial misconduct violates a defendant's constitutional rights when it "so infect[s] the trial with unfairness as to make the resulting conviction a denial of due process." Darden v. Wainwright, 477 U.S. 168, 181, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986); see also United States v. Spivack, 376 Fed. Appx. 144, 145 (2d Cir. May 12, 2010). "To constitute a due process violation, the prosecutorial misconduct must be of sufficient significance to result in the denial of the defendant's right to a fair trial." Greer v. Miller, 483 U.S. 756, 765, 107 S.Ct. 3102, 97 L.Ed.2d 618 (1987) (internal quotations and citations omitted). To determine whether a prosecutor deprived a petitioner of a fair trial, a court must consider (1) the severity of the misconduct; (2) the measures adopted by the trial court to cure the misconduct; and (3) the certainty of a conviction absent the misconduct. See Spivack, 376 Fed. Appx. at 145; Bentley v. Scully, 41 F.3d 818, 824 (2d Cir. 1994).

1. Testimony of Prosecution Witnesses

a. Galasso's Testimony

During her opening statement, the prosecutor indicated, *inter alia*, that Galasso would testify that "a man in a black ski mask barged in his room with a gun in his hand, pointed it right at his face and told him to turn around and lay down on [his] back in the bed. * * * [A]nother man * * * entered into the room second. That man wore a dark hat and wore a red bandana on the lower part of his face. * * * [E]ven though the faces were covered, [Galasso] could see that both men were white males." (T. 9-10). Petitioner contends that Galasso testified inconsistently

regarding the race of the gunman and, therefore, the prosecutor knowingly presented perjured testimony at trial.

"[A] conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment," Napue v. People of State of Illinois, 360 U.S. 264, 270, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959); see also Drake v. Portuondo, 553 F.3d 230, 240 (2d Cir. 2009) ("[A] conviction obtained through testimony the prosecutor knows to be false is repugnant to the Constitution."); Shih Wei Su v. Filion, 335 F.3d 119, 126 (2d Cir. 2003) (accord), regardless of whether the State actively solicited the false evidence or merely allowed it to go uncorrected once known. Drake, 553 F.3d at 240; see also Mills v. Scully, 826 F.2d 1192, 1195 (2d Cir. 1987). Nonetheless, "even when a prosecutor elicits testimony he or she knows or should know to be false, or allows such testimony to go uncorrected, a showing of prejudice is required." Shih Wei Su, 335 F.3d at 126-27; see also Spivack, 376 Fed. Appx. at 145. A conviction "must be set aside if (1) the prosecution actually knew of [a witness's] false testimony, and (2) there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." Drake, 553 F.3d at 241; see also United States v. Agurs, 427 U.S. 97, 103, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1972); Shih Wei Su, 335 F.3d at 127; Mills, 826 F.2d at 1195. Accordingly, the court must determine: "(1) whether false testimony was introduced, (2) whether that testimony either was or should have been known to the prosecution to be false, (3) whether the testimony went uncorrected, and (4) whether the false testimony was prejudicial * * *." Shih Wei Su, 335 F.3d at 127. "Such a determination requires an independent examination of the record." Mills, 826 F.2d at 1195.

Upon review of the transcripts of the proceedings, Galasso's trial testimony cannot be characterized as false. However, even if Galasso's trial testimony can be deemed to have been false, there is no evidence that the prosecutor knew it to be so. In any event, there is no reasonable likelihood that Galasso's testimony affected the judgment of the trial jury since, *inter alia*, all of the elements of the crime for which petitioner was convicted were established through the testimony of other witnesses or by physical evidence linking petitioner to the crime. Accordingly, "there was no error of constitutional magnitude owing to prosecutorial misconduct," Mills, 826 F.2d at 1196, stemming from the presentation of Galasso's challenged testimony at trial.

b. Stump's Testimony

Stump denied ever hearing petitioner's voice on an audio recording and making a comparison thereof. (T. 1044). Rather, according to Stump, she identified the voice she heard during the burglary as petitioner's based upon her past familiarity with him. (T. 1044-45).

The prosecutor's failure to provide the defense with pretrial notice of Stump's testimony identifying petitioner by his voice based upon her prior familiarity with him as a friend of a former boyfriend did not violate New York Criminal Procedure Law § 710.30(1)(b), which requires the State to provide the defendant advance notice of its intention to offer at trial "testimony regarding an observation of the defendant either at the time or place of the commission of the offense * * *, to be given by a witness who has previously identified him as such." That statute is "a legislative response to the problem of suggestive and misleading pretrial identification procedures," i.e., in-court identifications tainted by earlier police or prosecution

arranged identification procedures such as lineups, showups or photographic arrays. People v. Gissendanner, 48 N.Y.2d 543, 552, 423 N.Y.S.2d 893, 399 N.E.2d 924 (1979); Adelman v. Ercole, No. 08 CV 3609, 2010 WL 3210718, at * 6 (E.D.N.Y. Aug. 12, 2010); see also People v. Gee, 99 N.Y.2d 158, 161-62, 753 N.Y.S.2d 19, 782 N.E.2d 1155 (2002) ("the main concern motivating [Section 710.30] was the possibility * * * that pretrial identification procedures could be so suggestive or misleading as to compromise a defendant's constitutional right to due process of law. The danger sought to be avoided is, and always has been, the risk of convicting the innocent through tainted identification procedures.") Since Stump's voice identification of petitioner was based upon her prior familiarity with him, not upon any police or prosecution arranged identification procedure, the prosecution was not required to provide the defense with pretrial notice of Stump's testimony pursuant to Section 710.30(1)(b). See, e.g. Gissendanner, 48 N.Y.2d at 552, 423 N.Y.S.2d 893 (holding that Section 710.30 "does not come into play" when, *inter alia*, "the protagonists are known to one another" and, hence, "'suggestiveness' is not a concern."); Adelman, 2010 WL 3210718, at * 6 (holding that because the witness was not asked to identify the petitioner in a pre-trial identification procedure arranged by the police, there was no possibility of a suggestive and misleading pretrial identification procedure and, therefore, advance notice of the witness's testimony was not required under Section 710.30). Accordingly, there was no prosecutorial misconduct with respect to the presentation of Stump's testimony identifying petitioner by his voice based upon her past familiarity with him.

2. Comments on Summation

During her summation, the prosecutor commented, in relevant part, as follows:

> "* * * [Galasso] said that when [Berman] got shot, he's going, going towards the door and he said the first thing, right before that, right before [Berman] got up, [Stump] had gotten punched in the face by the man in the ski mask with the gun. The man in the ski mask with the gun.
>
> He wasn't certain if the man had used the gun to punch her in the face, but he was certain that it was the man with the ski mask with the gun that punched [Stump] right in the face in the hallway, that dropped her to the ground he hit her so hard. * * *.
>
> * * *
>
> Take the chart. [Petitioner] is in the red do-rag, I'm sorry, the red bandana, the Defense Counsel said he's not. [Petitioner] is a major component in the red bandana. [Branas] is a minor component in the red bandana.
>
> How do we know? Why is that information valuable? Because that corroborated Jesse McLaurin. Jesse McLaurin told you and he told the detectives that the day before this all happened, [petitioner] was wearing a red bandana. * * *."

(T. 1913, 1922-23).

In order to grant habeas relief based upon a prosecutor's comments during trial, the court must find that the comments "constituted more than mere trial error, and were instead so egregious as to violate the defendant's due process rights." Tankleff v. Senkowski, 135 F.3d 235, 252 (2d Cir. 1998). The petitioner must show "that he suffered actual prejudice because the prosecutor's comments during summation had a substantial and injurious effect or influence in determining the jury's verdict." Id. (quoting Bentley, 41 F.3d at 823).

Given the isolated nature of her comments during summation, and the fact that the trial court instructed the jury not to consider counsels' summations as evidence, (see T. 1847-48, 1884, 1958, 1959), the prosecutor's two (2) misstatements were not sufficiently significant to have denied petitioner due process. See, e.g. Donnelly v. DeChristoforo, 416 U.S. 637, 646, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974) ("The consistent and repeated misrepresentation of a dramatic

exhibit in evidence may profoundly impress a jury and may have a significant impact on the jury's deliberations. Isolated passages of a prosecutor's argument, billed in advance to the jury as a mater of opinion not of evidence, do not reach the same proportions.") (internal quotation marks omitted); Spivack, 376 Fed. Appx. at 146-47 (finding that although some of the prosecutor's comments during summation may have been "regrettable," none of those remarks, singularly or in the aggregate, were sufficiently egregious to deny the defendant's due process rights); Tankleff, 135 F.3d at 253 (holding that the "short and fleeting" comments made by the prosecutor were "less likely to have had a substantial effect on the jury's verdict" and that the trial court's standard instruction, *inter alia*, that the attorneys' arguments on summation are not evidence was "probably sufficient to cure any harm that the prosecutor's misstatements may have caused.")

3. Violation of Trial Court's Rulings

Similarly, the two (2) isolated occasions in which the prosecutor elicited, intentionally or not, testimony which the trial court had previously ruled was inadmissible did not amount to egregious misconduct denying petitioner a fair trial. See, e.g. Blissett v. Lefevre, 924 F.2d 434, 440 (2d Cir. 1991) (finding that although the prosecutor's questions in the face of the trial court's prior ruling were improper, petitioner was not denied a fundamentally fair trial because, *inter alia*, the misconduct was not pervasive or part of a persistent trial strategy, the trial judge responded promptly to defense counsel's objections thereto and there was substantial evidence of the defendant's guilt); Robbins v. Connolly, No. 09-CV-2055, 2011 WL 2748679, at * 5 (E.D.N.Y. July 13, 2011) (finding that the prosecutor's isolated question violating the trial

court's pretrial order, which was promptly withdrawn and which the trial judge instructed the jury to disregard, did not deny the petitioner a fair trial). "When a defendant contends that a prosecutor's question rendered his trial fundamentally unfair, it is important 'as an initial matter to place th[e] remar[k] in context.'" Greer, 483 U.S. at 765-66, 107 S.Ct. 3102 (quoting Darden, 477 U.S. at 179, 106 S.Ct. 2464) (alterations in original); see also Blissett, 924 F.2d at 440. The relevant sequence of events is as follows: (1) in response to the prosecutor's seemingly innocuous questions regarding what investigation Leser undertook, and what information he had received, on June 12, 2003, Leser twice referred to an anonymous Crime Stopper's tip, (T. 1060, 1079-80); (2) following Leser's second reference to the tip, defense counsel objected thereto and requested a mistrial, (T. 1081-83), which the trial court denied, (T. 1086-88); (3) in response to the prosecutor's inquiry about the questions Albergo asked petitioner when completing "a questionnaire" for the district attorney's office, (T. 1442), Albergo unsolicitedly referred to the death penalty, (T. 1443), following which defense counsel objected and the prosecutor immediately asked Albergo to "not state that and just proceed with the question [she] asked [him]," (T. 1443); (4) the trial court denied defense counsel's subsequent motion for a mistrial, but provided a curative instruction to the jury with respect to the reference to the death penalty, (T. 1450-52); and (5) the trial court also denied defense counsel's objection to the curative instruction given and further application for a mistrial, (T. 1453-55). Based upon that sequence of events, it is clear that the prosecutor's questioning of Leser and Albergo did not violate petitioner's due process rights. See, e.g. Greer, 483 U.S. at 766, 107 S.Ct. 3102.

Moreover, in light of the substantial evidence of petitioner's guilt, the improper testimony elicited by the prosecutor's seemingly innocuous questions did not undermine the fairness of the

trial. See United States v. Mussaleen, 35 F.3d 692, 695 (2d Cir. 1994); e.g. Blissett, 924 F.2d at 441 (finding it "highly improbable that the brief stricken testimony * * * led to [the petitioner's] murder conviction that otherwise would not have occurred, had the prosecutor respected the evidentiary parameters set forth by the pre-trial ruling."); Robbins, 2011 WL 2748679, at * 5.

4. Brady Violation

In light of the prosecutor's representation that the existence of the tape lifts of the victim's body and other trace evidence had been disclosed and made available to the defense prior to trial, there was no Brady violation by the prosecution. See, e.g. Arizona v. Youngblood, 488 U.S. 51, 55, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988) (finding no Brady violation where the State disclosed information, *inter alia*, about the existence of the swab and provided the defense access to it). At best, petitioner's claim is that the prosecution failed to preserve evidentiary material that could have been subjected to tests, and/or failed to test evidentiary material, the results of which might have exonerated defendant. However, a failure to preserve potentially useful evidence does not constitute a denial of due process unless the defendant demonstrates bad faith on the part of the police or prosecution. Youngblood, 488 U.S. at 57, 109 S.Ct. 333; see also Illinois v. Fisher, 540 U.S. 544, 547-48, 124 S.Ct. 1200, 157 L.Ed.2d 1060 (2004). There is a distinction between "material exculpatory" evidence, for which a failure to disclose constitutes a Brady violation, and the "potentially useful" evidence claimed here, for which a finding of bad-faith is required. See Fisher, 540 U.S. at 549, 124 S.Ct. 1200. Moreover, the Due Process Clause is not violated merely because the police failed to use a particular investigatory tool or to perform any particular test. Youngblood, 488 U.S. at 58-59, 109 S.Ct. 333; see also Neil v.

Walsh, No. 07 Civ. 6685, 2009 WL 382637, at * 16 (S.D.N.Y. Feb. 17, 2009) (distinguishing between a claim that the prosecution withheld exculpatory evidence in violation of Brady and a claim that the prosecution failed to collect evidence which might have proved exculpatory, for which Youngblood requires a finding of bad faith) In light of the prosecution's disclosure of the existence of this evidentiary material, and that fact that it was available to the defense for inspection and/or testing, there is no suggestion of bad faith on the part of the police or prosecution and, thus, no constitutional violation. See, e.g. Youngblood, 488 U.S. at 58, 109 S.Ct. 333. Petitioner's unsubstantiated claim that the tape lifts and trace evidence would have proved exculpatory to him does not entitle him to habeas relief. See, e.g. Neil, 2009 WL 382637, at * 16.

In sum, the only evidence in the record of arguable prosecutorial misconduct is that the prosecutor made two (2) misstatements during her summation and managed to elicit testimony from two (2) prosecution witnesses that violated pretrial rulings of the trial court. Such misconduct, even considered in the aggregate, does not rise to a level sufficient to have denied petitioner due process. In any event, there was overwhelming evidence of petitioner's guilt. Accordingly, the state court's adjudication of petitioner's prosecutorial misconduct claim is not contrary to, or an unreasonable application of clearly established federal law, nor was it based upon an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. See, 28 U.S.C. § 2254(d). Petitioner's prosecutorial misconduct claim (Ground Seven of the amended petition) is therefore denied.

I. Sufficiency of Evidence

1. Legal Insufficiency Claim

When considering the legal sufficiency of the evidence, the court "must look to state law to determine the elements of the crime," Ponnapula v. Spitzer, 297 F.3d 172, 179 (2d. Cir. 2002) (citation omitted); see also Langston v. Smith, 630 F.3d 310, 314 (2d Cir. 2011), and determine "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L.Ed.2d 560 (1979) (emphasis in original); see also Cavazos v. Smith, — S.Ct. —, 2011 WL 5118826, at * 3 (Oct. 31, 2011); Rivera v. Cuomo, 649 F.3d 132, 137 (2d Cir. 2011). "[A] reviewing court 'faced with a record of historical facts that supports conflicting inferences must presume– even if it does not affirmatively appear in the record– that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution.'" Cavazos, — S.Ct. —, 2011 WL 5118826, at * 3 (quoting Jackson, 443 U.S. at 326, 99 S.Ct. 2781). Moreover, when challenging the legal sufficiency of the evidence in a state criminal conviction, the petitioner "bears a heavy burden," Ponnapula, 297 F.3d at 179, of "rebutting [by clear and convincing evidence] the presumption that all factual determinations made by the state court were correct." Farrington v. Senkowski, 214 F.3d 237, 241 (2d Cir. 2000) (citing 28 U.S.C. § 2254(e)).

Under New York law at the time of the offense for which petitioner was convicted, a person was guilty of murder in the first degree, in relevant part: "when: 1. With intent to cause the death of another person, he causes the death of such person or of a third person; and (a) * * * (vii) the victim was killed while the defendant was in the course of committing or attempting to

commit and in furtherance of * * * burglary in the first degree * * *; provided however, the victim is not a participant in * * * the aforementioned crime[] * * *; and (b) The defendant was more than eighteen years old at the time of the commission of the crime." N.Y. Penal Law § 125.27 (effective Sept. 17, 2001 to October 31, 2003).

The Appellate Division's finding that upon "[v]iewing the evidence in the light most favorable to the prosecution," the evidence "was legally sufficient to establish the defendant's guilt beyond a reasonable doubt," People v. Villafane, 48 A.D. 3d at 713, 852 N.Y.S. 2d 301, is not "contrary to or * * * an unreasonable application of clearly established Federal law," nor is it based upon an unreasonable determination of the facts. There is sufficient evidence in the record from which a rational juror could have found petitioner guilty of murder in the first degree under then-existing New York law, i.e., that petitioner shot Berman with the intent to cause his death; that Berman was killed while petitioner was committing, and in furtherance of, the crime of burglary in the first degree; that Berman was not a participant in the crime of burglary in the first degree; and that petitioner was over the age of eighteen (18) years at the time he committed the crime. Specifically, *inter alia*: Branas and McLaurin testified regarding petitioner's planning of the burglary; Branas, Galasso and Stump testified to the commission of the burglary by petitioner and to the fatal shooting of Berman during the course of the burglary; Branas and Stump identified petitioner as the shooter of Berman; Wilson and Hopkins testified that the fatal gunshot wound was inflicted from a distance of approximately twelve (12) to twenty-four (24) inches, in contravention of petitioner's claim that Berman was "on him" at the time he was shot; Branas testified as to his and petitioner's flight from the Medford house and disposal of the evidence; Maurer, Keane, Luber and Leser testified as to the recovery of the evidence along the

flight route of which Branas had testified; Lee-Wyss testified that petitioner was a "major component" of the DNA found inside the gloves packaged with the ski mask and tee-shirt, and to the statistical probability, in the trillions, of that DNA belonging to someone other than petitioner, and that petitioner was also included as a contributor to the DNA recovered from the red bandana, although she was unable to determine a major or minor component of that DNA profile; Branas and McLaurin testified as to petitioner's disposal of the jewelry stolen during the burglary; cell phone records from the Barzallo phone, which McLaurin testified was the number from which petitioner had called him, corroborated McLaurin's testimony regarding petitioner's contact with him both before and after the burglary and murder; and rational jurors could reasonably conclude that petitioner's confession to the burglary and shooting was voluntarily made. Accordingly, petitioner's legal insufficiency claim (Ground Eight of the Amended Petition) is denied.

2. Weight of the Evidence Claim

To the extent petitioner claims that the verdict was against the weight of the evidence, that claim does not present a claim cognizable on federal habeas review. See McKinnon, 2011 WL 2005112, at * 4; Perez v. Smith, — F.Supp.2d —, 2011 WL 2411171, at * (E.D.N.Y. June 6, 2011); Garrett v. Perlman, 438 F.Supp.2d 467, 470 (S.D.N.Y. 2006); Correa v. Duncan, 172 F. Supp. 2d 378, 381 (E.D.N.Y. 2001). Accordingly, any such claim is denied.

III. CONCLUSION

For the reasons set forth above, petitioner's applications for the appointment of counsel and to stay this habeas proceeding are denied and the petition is denied in its entirety. As petitioner has failed to make a substantial showing of a violation of a constitutional right, a certificate of appealability will not issue. 28 U.S.C. § 2253(c)(1); see also Miller-El v. Cockrell, 537 U.S. 322, 336, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003); Contino v. United States, 535 F.3d 124, 127 (2d Cir. 2008). Petitioner has a right to seek a certificate of appealability from the United States Court of Appeals for the Second Circuit. See 28 U.S.C. § 2253.

The Clerk of the Court is directed to enter judgment in favor of respondent, to close this proceeding and to service notice of entry of this Order on all parties in accordance with Rule 77(d)(1) of the Federal Rules of Civil Procedure, including mailing a copy of the Order to the *pro se* petitioner at his last known address, see Fed. R. Civ. P. 5(b)(2)(C).

SO ORDERED.

SANDRA J. FEUERSTEIN
United States District Judge

Dated: November 17, 2011
Central Islip, New York