BLD-307 September 13, 2018

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **18-2060**

JOHN LUDOVICI, Appellant
VS.

SUPERINTENDENT BENNER TOWNSHIP SCI, ET AL.
(M.D. Pa. Civ. No. 3-13-cv-02997)

Present: RESTREPO, BIBAS and NYGAARD, Circuit Judges

Submitted is Appellant's notice of appeal, which may be construed as a request for a certificate of appealability under 28 U.S.C. § 2253(c)(1)

in the above-captioned case.

Respectfully,

Clerk

ORDER

The application for a certificate of appealability is denied. See 28 U.S.C. § 2253(c)(2). Jurists of reason could not debate that the District Court's rejection of Appellant's claim that his trial attorney was ineffective for failing to present the testimony of nurses who allegedly could have impeached Trooper Georgia's account of Appellant's inculpatory statements. See Strickland v. Washington, 466 U.S. 668, 696 (1984); Campbell v. Burris, 515 F.3d 172, 184 (3d Cir. 2008). Appellant's remaining claims are barred due to a procedural default, and he has not shown cause and prejudice or a fundamental miscarriage of justice sufficient to overcome the default. See Coleman v. Thompson, 501 U.S. 722, 750 (1991); see also Martinez v. Ryan, 566 U.S. 1, 14 (2012) ("To overcome the default, a prisoner must also demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit.").

By the Court,

s/ Richard L. Nygaard
Circuit Judge

Dated: September 21, 2018
CLW/cc: Mr. John Ludovici
Lisa Swift, Esq.

A True Copy:

Patricia A. Dodszuweit

Patricia S. Dodszuweit, Clerk
Certified Order Issued in Lieu of Mandate

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

JOHN LUDOVICI,	:	CIVIL NO.: 3:13-CV-02997
	:	
Petitioner,	:	
	:	(Judge Conaboy)
v.	:	
	:	(Chief Magistrate Judge Schwab)
MARIOSA LAMAS,	:	
	:	
Respondent.	:	
	:	

REPORT AND RECOMMENDATION

I. Introduction.

John Ludovici ("Ludovici"), an inmate who was confined at the State Correctional Institution in Bellefonte, Pennsylvania ("SCI-Benner"), commenced this *pro se* action by filing a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 ("Petition") against the Respondent, Marirosa Lamas, the then-Superintendent of SCI-Benner.[1] Ludovici's Petition, which has been fully briefed, is ripe for our disposition. For the reasons set forth below, we recommend that his Petition be dismissed.

[1] Ludovici is currently confined at the State Correctional Institution in Frackville, Pennsylvania ("SCI-Frackville"). *See doc. 21* (informing the Court of his change of address). SCI-Frackville, like SCI-Benner, is located within the Middle District of Pennsylvania.

II. Background.[2]

> On the night of April 4, 2003, [Ludovici] approached three individuals while they were sitting in a car outside of a restaurant in Moosic, PA. He stated that he was a police officer and requested identification. When they questioned him about his identity, he pulled a gun on the three victims, chased them in a car as they attempted to escape from him in their car, and after their car was boxed in, he pulled a gun on them again, robbed them[,] and then stole their car to flee the scene.
>
> Later that evening [Ludovici] encountered a car containing three Air Force Airmen as they were passing through Lackawanna County on Route 81. [Ludovici] forced their vehicle off of the roadway with his stolen vehicle, approached the vehicle of the Airmen and told them that he was a police officer. When they asked to see his badge, he pulled out a gun and forced them out of the car and robbed them.
>
> Still operating the stolen vehicle, [Ludovici] left the scene of the robbery of the Airmen, and when spotted by the police, he led them on a lengthy, high-speed chase through several communities before crashing in the stolen vehicle and being taken into custody by the State Police.[3]
>
> While in custody at the State Police Barracks that same night, [Ludovici] loosened the shackles that held him and escaped from the barracks. He fled across the parking lot but was again apprehended by the State Police.
>
> [Ludovici] was charged on April 5, 2003, with three counts of robbery, three counts of receiving stolen property, three counts of recklessly endangering another person, one count of

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[2] Considering that the Respondent is largely arguing that Ludovici's claims are barred from federal habeas review on the basis that they are procedurally defaulted, and given that the only claim we will address on the merits relates to a hearing that was conducted after Ludovici's criminal trial, we recite the factual background of Ludovici's criminal case as consistently set out by the state courts.

[3] Ludovici was eventually taken to the Community Medical Center in Scranton, Pennsylvania to be treated for the injuries he sustained in the car crash. *Doc. 11-1* at 9. As discussed more fully below, Ludovici made incriminating statements to Trooper Georgia while he was at that hospital.

> impersonating a public servant, one count of fleeing or attempting to elude police, and one count of escape. The[se] charges arose from the robberies of the three Air Force Airmen.
>
> On April 11, 2003, [Ludovici] was charged with three counts of robbery, three counts of theft by unlawful taking, three counts of recklessly endangering another person, two counts of simple assault and one count of impersonating a public servant. These charges arose from the robberies [of the] three individuals in Moosic, PA.
>
> [Ludovici's] Omnibus Motions were filed on November 18, 2003. [Ludovici] raised the possibility of an insanity defense and psychological evaluations were undertaken. On October 15, 2004, [the trial court] granted the Commonwealth's Motion to Preclude an Insanity Defense because [Ludovici's] own expert found that he was not legally insane at the time of the crimes.
>
> A jury trial was held from October 18 through October 20, 2004. The charges pending at the time of trial were three counts of robbery and one count of impersonating a public servant in 03-CR-923; three counts of robbery, one count of impersonating a public servant, one count of recklessly endangering another person and one count of fleeing and attempting to elude police in 03-CR-924; and one count of escape in 03-CR-926. The jury found [Ludovici] guilty of all charges.

Doc. 11-1 at 5-7. As a result, Ludovici was sentenced to a minimum of 66 years and three months incarceration to a maximum of 135 years incarceration. *Doc. 1* at 1 ¶ 3; *doc. 11* at 1 ¶ 3.

Following sentencing and the denial of post-sentence motions, Ludovici filed a direct appeal to the Pennsylvania Superior Court,[4] which affirmed his judgment of sentence on March 23, 2006. *Doc. 11-1* at 5-33. Although Ludovici

[4] The Respondent asserts that she does not have a copy of the brief Ludovici filed in support of his direct appeal. *Doc. 11-1* at 3. The Respondent also asserts, however, that the claims raised in that unaccounted-for-brief were set forth by the Superior Court in its decision, affirming Ludovici's judgment of sentence. Thus, we have reviewed the claims as set forth in that decision.

also filed a petition for allowance of appeal with the Pennsylvania Supreme Court (*id.* at 35-65), that petition was denied without comment on August 29, 2006 (*id.* at 67).

Ludovici then sought collateral relief pursuant to Pennsylvania's Post Conviction Relief Act ("PCRA"). Following the filing of a *pro se* PCRA petition on December 12, 2006, a *pro se* amended PCRA petition on December 5, 2007, a *pro se* second amended PCRA petition on September 11, 2008, and the appointment of several attorneys for his various PCRA proceedings, Ludovici filed a final, supplemental PCRA petition (*id.* at 155-162) *via* his fourth appointed attorney, Terrence McDonald, Esq., on October 21, 2009. *Id.* at 165-66. Ludovici also filed, *via* that same attorney, a brief in support of his supplemental PCRA petition (*doc. 31-5* at 76-103). *See doc. 11-1* at 165-66. Following a hearing, the PCRA court denied Ludovici's supplemental PCRA petition on May 18, 2011. *See id.* at 164-184.

Ludovici then appealed to the Pennsylvania Superior Court, which affirmed the PCRA court's denial of relief on March 13, 2012. *See id.* at 236-238. In its opinion, the Superior Court expressly adopted the PCRA court's reasoning as its own. *See id.* Although Ludovici also filed a petition for allowance of appeal to the Pennsylvania Supreme Court (*id.* at 240-260), that petition was denied without comment on December 27, 2012. *Id.* at 262.

After pursuing his direct appeal and collateral proceedings, Ludovici filed the instant Petition on December 16, 2013 (*doc. 1*), followed by a memorandum of law on January 22, 2014 (*doc. 8*). On February 10, 2014, the Respondent filed a response (*doc. 11*), as well as a memorandum of law (*doc. 12*). Then, on March 6, 2015, Ludovici filed a motion requesting this Court to stay his habeas proceedings because he planned on filing another PCRA petition with the state courts and thus wanted to await the outcome of such proceedings before he continued with his Petition in this Court. *See doc. 18.* On February 22, 2016, we denied that motion because we found that Ludovici had failed to meet the requisite elements that would have qualified him for such a stay. *See doc. 26.*

Following our denial, Ludovici filed another motion. This time he sought to amend his Petition. *See doc. 27.* On January 20, 2017, we denied his motion, finding that it had neither been accompanied by a brief in support, nor a proposed amended petition. *Doc. 30* at 1. We further found that it was simply too disjointed for us to make the requisite assessment of the proposed claims and whether amendment should be allowed. *Id.* In that decision, we also directed the Respondent to file additional underlying documents from Ludovici's state-court proceedings. *Id.* at 1-2. The Respondent has since filed those documents. *See doc. 31.*

Then, on February 24, 2017, Ludovici filed yet another motion. He sought leave to file a supplemental memorandum of law, which, per Ludovici, would "address the issue of procedural default." *Doc. 32* at 2. We granted his motion (*see doc. 36*), and on May 4, 2017, we received Ludovici's supplemental memorandum of law (*doc. 38*). Having received that memorandum from Ludovici, as well as the underlying state-court documents from the Respondents, we can now address Ludovici's Petition as originally filed. Before turning to our discussion, we will first set out the pertinent legal standards.

III. Legal Standards.

A. Legal Standards For Addressing Exhaustion and Procedural Default.

"Federal habeas courts reviewing the constitutionality of a state prisoner's conviction and sentence are guided by rules designed to ensure that state-court judgments are accorded the finality and respect necessary to preserve the integrity of legal proceedings within our system of federalism." *Martinez v. Ryan*, 566 U.S. 1, 9 (2012). One of these rules is that a state prisoner must exhaust available state remedies before filing a petition for habeas corpus in federal court. 28 U.S.C. § 2254(b) and (c). The exhaustion requirement serves the interests of comity between the federal and state systems by allowing the state an initial opportunity to determine and correct any violations of a prisoner's federal rights. *O'Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999) ("Comity . . . dictates that when a prisoner

alleges that his continued confinement for a state court conviction violates federal law, the state courts should have the first opportunity to review this claim and provide any necessary relief."). "The exhaustion rule also serves the secondary purpose of facilitating the creation of a complete factual record to aid the federal courts in their review." *Walker v. Vaughn*, 53 F.3d 609, 614 (3d Cir. 1995). A habeas corpus petitioner bears the burden of demonstrating that he has exhausted state remedies. *O'Halloran v Ryan*, 835 F.2d 506, 508 (3d Cir. 1987). The petitioner "must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." *O'Sullivan*, 526 U.S. at 845.[5]

In order to exhaust state remedies for federal habeas corpus purposes, a petitioner must show that he fairly presented his federal claim to the state courts. *Picard v. Connor*, 404 U.S. 270, 275-76 (1971). The fair-presentation requirement provides the State the opportunity to consider and correct an alleged violation of a prisoner's federal rights. *Duncan v. Henry*, 513 U.S. 364, 365 (1995). "If state courts are to be given the opportunity to correct alleged violations of prisoners' federal rights, they must surely be alerted to the fact that the prisoners are asserting

[5] In Pennsylvania, pursuant to Order 218 of the Pennsylvania Supreme Court, review of criminal convictions and post-conviction relief matters from the Pennsylvania Supreme Court is discretionary and "unavailable" for purposes of exhausting state court remedies under § 2254. *Lambert v. Blackwell*, 387 F.3d 210, 233 (3d Cir. 2004). Thus, to exhaust state remedies, a Pennsylvania prisoner need appeal only to the Pennsylvania Superior Court.

claims under the United States Constitution." *Id.* at 365-66. "It is not enough that all the facts necessary to support the federal claim were before the state courts, or that a somewhat similar state-law claim was made." *Anderson v. Harless*, 459 U.S. 4, 6 (1982) (citations omitted). Rather, for a claim to have been fairly presented to the state courts, both the legal theory and the facts supporting the claim must have been presented to the state courts. *O'Halloran*, 835 F.2d at 508.

"[O]rdinarily a state prisoner does not 'fairly present' a claim to a state court if that court must read beyond a petition or a brief (or a similar document) that does not alert it to the presence of a federal claim in order to find material, such as a lower court opinion in the case, that does so." *Baldwin v. Reese*, 541 U.S. 27, 32 (2004). "A litigant wishing to raise a federal issue can easily indicate the federal law basis for his claim in a state-court petition or brief, for example, by citing in conjunction with the claim the federal source of law on which he relies or a case deciding such a claim on federal grounds, or by simply labeling the claim 'federal.'" *Id.* Although to meet the fair-presentation requirement, a petitioner need not cite "'book and verse'" of the federal constitution, "the substance of a federal habeas corpus claim must first be presented to the state courts." *Picard*, 404 U.S. at 278. "A petitioner can 'fairly present' his claim through: (a) reliance on pertinent federal cases; (b) reliance on state cases employing constitutional analysis in like fact situations; (c) assertion of the claim in terms so particular as to

call to mind a specific right protected by the Constitution; and (d) allegation of a pattern of facts that is well within the mainstream of constitutional litigation." *Nara v. Frank*, 488 F.3d 187, 198 (3d Cir. 2007).

"If a claim has not been fairly presented to the state courts but state law clearly forecloses review . . . exhaustion is excused." *Carpenter v. Vaughn*, 296 F.3d 138, 146 (3d Cir. 2002); *see also McCandless v. Vaughn*, 172 F.3d 255, 260 (3d Cir. 1999) ("When a claim is not exhausted because it has not been 'fairly presented' to the state courts, but state procedural rules bar the applicant from seeking further relief in state courts, the exhaustion requirement is satisfied because there is 'an absence of available State corrective process.'"). Such a claim is procedurally defaulted, rather than unexhausted. *McCandless*, 172 F.3d at 260. A procedural default occurs when a prisoner's claim is barred from consideration in the state courts by an "independent and adequate" state procedural rule. *Martinez*, 566 U.S. at 10. A procedural default generally bars a federal court from reviewing the merits of a habeas claim that the prisoner procedurally defaulted in state court. *Id.; Munchinski v. Wilson*, 694 F.3d 308, 332 (3d Cir. 2012). "Grounded in principles of comity and federalism, the procedural default doctrine prevents a federal court sitting in habeas from reviewing a state court decision that rests on a state law ground 'that is sufficient to support the judgment,' when that state law ground 'is independent of the federal question and adequate to support

the judgment.'" *Id.* at 332-33 (quoting *Coleman v. Thompson*, 501 U.S. 722, 729 (1991)). "In such situations, 'resolution of any independent federal ground for the decision could not affect the judgment and would therefore be advisory.'" *Id.* at 333.

There are, however, exceptions to the bar on consideration of procedurally defaulted claims. *Martinez*, 566 U.S. at 10. A federal court may consider the merits of a procedurally defaulted habeas claim in two situations: (1) the petitioner establishes cause for the default and actual prejudice because of the alleged violation of federal law; or (2) the petitioner "demonstrate[s] that failure to consider the claim[] will result in a fundamental miscarriage of justice." *Coleman*, 501 U.S. at 750. "To show cause and prejudice, 'a petitioner must demonstrate some objective factor external to the defense that prevented compliance with the state's procedural requirements.'" *Cristin v. Brennan*, 281 F.3d 404, 412 (3d Cir. 2002) (quoting *Coleman*, 501 U.S. at 753). "To show a fundamental miscarriage of justice, a petitioner must demonstrate that he is actually innocent of the crime by presenting new evidence of innocence." *Keller v. Larkins*, 251 F.3d 408, 415–16 (3d Cir. 2001) (citation omitted).

B. Legal Standards for Addressing the Merits.

In addition to overcoming procedural hurdles, a state prisoner must meet exacting substantive standards in order to obtain habeas corpus relief. As amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2254 limits the power of a federal court to grant a state prisoner's petition for a writ of habeas corpus. *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011). A federal court may not grant habeas corpus relief with respect to any claim that was adjudicated on the merits in state court unless the state court's 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;
>
> (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 standard under § 2254(d) is highly deferential and difficult to meet. *Cullen*, 563 U.S. at 181. It "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." *Harrington v. Richter*, 562 U.S. 86, 102-103 (2011) (quoting *Jackson v. Virginia*, 443 U.S. 307, 332 n.5 (1979) (Stevens, J., concurring)). State courts are presumed to know and follow the law, *Woods v.*

Donald, 135 S.Ct. 1372, 1376 (2015), and Section 2254(d) "'demands that state-court decisions be given the benefit of the doubt.'" *Cullen*, 563 U.S. at 181 (quoting *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002)).

Under § 2254(d)(1), only the holdings, not the dicta, of the Supreme Court constitute "clearly established Federal law." *Howes v. Fields*, 565 U.S. 499, 505 (2012). "[R]eview under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits." *Cullen*, 563 U.S. at 181. Under the "contrary to" clause of § 2254(d)(1), a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or if the state court decides a case differently than the Supreme Court has on a set of materially indistinguishable facts. *Williams v. Taylor*, 529 U.S. 362, 412 (2000).

Under the "unreasonable application" clause of § 2254(d)(1), a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from the Supreme Court's decisions but unreasonably applies that principle to the facts of the prisoner's case. *Id.* at 413. But federal habeas relief may be granted only if the "state court's application of clearly established federal law was objectively unreasonable." *Keller v. Larkins*, 251 F.3d 408, 418 (3d Cir. 2001). "[A]n incorrect application of federal law alone does not warrant relief." *Id.* "[I]f the state-court decision was reasonable, it cannot be disturbed." *Hardy v.*

Cross, 565 U.S. 65, 72 (2011). "A state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Richter*, 562 U.S. at 101 (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). "When assessing whether a state court's application of federal law is unreasonable, 'the range of reasonable judgment can depend in part on the nature of the relevant rule' that the state court must apply." *Renico v. Lett*, 559 U.S. 766, 776 (2010) (quoting *Yarborough,* 541 U.S. at 664). "Because AEDPA authorizes federal courts to grant relief only when state courts act *unreasonably*, it follows that '[t]he more general the rule' at issue—and thus the greater the potential for reasoned disagreement among fair-minded judges—'the more leeway [state] courts have in reaching outcomes in case-by-case determinations.'" *Id.* (emphasis in original).

Under the "unreasonable determination of the facts" provision of § 2254(d)(2), the test "is whether the petitioner has demonstrated by 'clear and convincing evidence,' § 2254(e)(1), that the state court's determination of the facts was unreasonable in light of the record." *Roundtree v. Balicki*, 640 F.3d 530, 537-38 (3d Cir. 2011). "[T]he evidence against which a federal court measures the reasonableness of the state court's factual findings is the record evidence at the time of the state court's adjudication." *Id.* at 538.

"In considering a § 2254 petition, we review the 'last reasoned decision' of the state courts on the petitioner's claims." *Simmons v. Beard*, 590 F.3d 223, 231–32 (3d Cir. 2009) (citing *Bond v. Beard*, 539 F.3d 256, 289–90 (3d Cir.2008)). Thus, "[w]e review the appellate court decision, not the trial court decision, as long as the appellate court 'issued a judgment, with explanation, binding on the parties before it.'" *Burnside v. Wenerowicz*, 525 F. App'x 135, 138 (3d Cir. 2013). But when the highest state court that considered the claim does not issue a reasoned opinion, we look through that decision to the last reasoned opinion of the state courts. *Ylst v. Nunnemaker*, 501 U.S. 797, 804 (1991).

The highly deferential standard of § 2254(d) applies only to claims that have been "adjudicated on the merits" in the state court. *Han Tak Lee v. Glunt*, 667 F.3d 397, 403 (3d Cir. 2012). "[I]f the state court did not reach the merits of the federal claims, then they are reviewed *de novo*." *Id.* But we must still presume that the state court's factual determinations are correct, and the petitioner has "the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1). Further, even as to a claim adjudicated by the state court on the merits, if a habeas petitioner overcomes the § 2254(d) hurdle, the habeas court then considers the claim *de novo*. *See Panetti v. Quarterman*, 551 U.S. 930, 953 (2007) (When § 2254(d) is satisfied, "[a] federal court must then resolve the claim without the deference AEDPA otherwise requires.").

IV. Discussion.

In this case, the Respondent does not dispute that the Petition was timely filed with this Court. *Doc. 12* at 3. The Respondent does dispute, however, whether all of the claims raised in that Petition have been properly exhausted. *See id.* at 4-16. In support, the Respondent contends that only one of Ludovici's claims has been exhausted and that all of his other claims, which have not been exhausted, are procedurally defaulted. *See id.* The Respondent further contends that the only exhausted claim should be dismissed on the merits and that the procedurally defaulted claims should be dismissed for Ludovici's' failure to show cause and prejudice or a fundamental miscarriage of justice.[6] *See id.*

A. Ground One.

In his first ground for relief, Ludovici alleges that he received ineffective assistance from trial and appellate counsel, which he perceives to be a violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. *Doc. 1* at 5. Specifically, he alleges that his counsel failed to investigate, present

[6] Although the Respondent also contends that the Court should dismiss the Petition because it is "mixed" with both exhausted and procedurally defaulted claims, this assertion is legally inaccurate. *See Fann v. Mooney*, No. 4:14-CV-456, 2016 WL 1624013, at *3 (M.D. Pa. Apr. 25, 2016) ("The United States Supreme Court has recognized that if a habeas corpus petition containing both exhausted and unexhausted claims is presented, then the entire petition must be dismissed. *Rose v. Lundy*, 455 U.S. 509, 522 (1982). However, 'a petition containing unexhausted but procedurally barred claims in addition to exhausted claims is not a mixed petition requiring dismissal under *Rose*.' *Toulson v. Beyer*, 987 F.2d 984, 987 (3d Cir. 1993); *see also Castille v. Peoples*, 489 U.S. 346, 351 (1989).").

evidence (including "affirmative psychiatric expert testimony, defense, and available impeachment witness testimony"), and preserve issues. *Id.*; *see also doc. 8* at 4. In support of these broad allegations, Ludovici argues that: (1) his trial counsel did not contact Joseph Ferguson, a witness whose testimony would have revealed that on the night of the criminal activity, he slipped LSD into Ludovici's drink; (2) his trial counsel also did not contact Lori Toini, another witness who would have supported his defense of involuntary intoxication; and finally, (3) his trial counsel failed to present Ronald J. Refice, a witness who authored "a letter," which explained that involuntary LSD intoxication would have made the events on the night of the criminal activity "outside" of Ludovici's control. *Id.* at 5. Thus, we treat ground one as raising an ineffective assistance of counsel claim based on trial counsel's failure to pursue an involuntary intoxication defense by not investigating or presenting the testimony of these three witnesses. We also treat ground one as raising an ineffective assistance of counsel claim based on trial counsel's failure to impeach the testimony of Trooper Georgia.[7]

1. Exhaustion and Procedural Default.

The Respondent contends that Ludovici's ineffective assistance of counsel claim based on trial counsel's failure to pursue an involuntary intoxication defense

[7] Although Ludovici has not provided any factually specific allegations in support of this claim, the Respondent has, nevertheless, conceded that Ludovici sufficiently raised this claim in ground one of his Petition. *Doc. 12* at 8.

by not investigating or presenting the testimony of the discussed witnesses is procedurally defaulted, and thus, should not be entertained by this Court. *See doc. 12* at 5-8; *see also doc. 35* at 6. We agree. Although Ludovici appears to have raised a similar claim before the PCRA court, regarding trial counsel's failure to investigate Joseph Ferguson (*see doc. 31-5* at 87-88),[8] Ludovici did not raise such a claim on PCRA appeal to the Pennsylvania Superior Court or in his petition for allowance of appeal with the Pennsylvania Supreme Court. And, while Ludovici may have raised the same legal theory of "ineffective assistance of counsel" on PCRA appeal, the facts supporting that legal theory are not the substantial equivalent of the facts supporting ground one in the instant Petition. Indeed, in his PCRA appeal, Ludovici asserts that trial counsel was ineffective for failing to investigate and present the testimony of John Stambaugh, Sharon Birney, Evelyn Christiano, and Jeffrey Fuller, all of whom, Ludovici contended, were witnesses that would have supported his involuntary intoxication defense. *See doc. 11-1* at 211-217. In ground one of his Petition, however, Ludovici asserts that trial counsel was ineffective for failing to investigate and present the testimony of

[8] In his brief in support of his supplemental PCRA petition, Ludovici identified four witnesses that had knowledge of the LSD that had been placed into his drink and/or had observed his behavior shortly after the LSD had been placed in his drink. *Doc. 31-5* at 87. One of the witnesses that Ludovici specifically identified was Joseph Ferguson. *Id.*

Joseph Ferguson, Lori Toini, and Ronald J. Refice, a completely different set of witnesses. *See doc. 8* at 5.

Thus, Ludovici has not properly exhausted this claim. *See Evans v. Court of Common Pleas*, 959 F.2d 1227, 1231 (3d Cir. 1992) (explaining that a petitioner's federal claim has been "fairly presented" to the state courts when the "substantial equivalent" of both the legal theory and the facts supporting that claim have been submitted to the state courts); *see also Bechtol v. Prelesnik*, 568 F. App'x 441, 446-47 (6th Cir. 2014) (concluding that although the petitioner had raised the same legal issue of witness intimidation on direct appeal, the petitioner had not presented the same factual basis because the claim generally related to a different witness (i.e., Lee) and only mentioned the original witness (i.e., Hittle) in a manner that was ancillary to and in support of the claim regarding Lee).

Requiring exhaustion of this claim now, however, would be futile since Ludovici is foreclosed from further state court review. *See* 42 PA. CONS. STAT. ANN. § 9544(b) ("For purposes of [PCRA review], an issue is waived if the petitioner could have raised it but failed to do so before trial, at trial, during unitary review, on appeal or in a prior state postconviction proceeding."). Ludovici is, therefore, deemed to have procedurally defaulted this claim. *See Paolino v. Glunt*, No. 11–5436, 2012 WL 7018081, *9–*10 (E.D. Pa. Jan.12, 2012) (explaining that presenting a claim to the PCRA trial court, but abandoning that claim in the PCRA

appeal to the Pennsylvania Superior Court, constitutes a waiver of that claim under Pennsylvania law, and thus, is procedurally defaulted for purposes of federal habeas review (citing 42 PA. CONS. STAT. ANN. § 9544(b)).

2. The Merits.

The Respondent has conceded, however, that Ludovici exhausted the other ineffective assistance of counsel claim that has been raised in ground one—that his trial counsel was ineffective in failing to impeach the testimony of Trooper Georgia since trial counsel did not investigate or present the testimony of hospital personnel who treated Ludovici on the night of the criminal activity. *See doc. 12* at 8. Thus, in addressing the merits, the Respondent contends that Ludovici has failed to demonstrate that the state court's adjudication of this claim resulted in a decision that is contrary to, or an unreasonable application of, clearly established federal law, or was based on an unreasonable application of the facts in light of the evidence presented in state court. *Id.* at 9-13. Again, we agree.

The PCRA court's opinion, dated May 18, 2011 (*doc. 11-1* at 164-184), is the "last reasoned decision" of the state courts with respect to this ineffective assistance of counsel claim.[9] In that opinion, the PCRA court stated as follows:

[9] Because the Superior Court adopted the trial court's opinion as its own (*see doc. 11-1* at 238), it is the PCRA court's opinion that we review. *See Simmons*, 590 F.3d at 231–32 (instructing that a federal habeas court reviews the "last reasoned decision" of the state courts with respect to a petitioner's claims) (quoted case and quotation marks omitted).

> The defendant asserts that trial counsel failed to impeach Trooper Georgia's testimony by [not] investigating and calling the nurses who treated the defendant at the [hospital on the night of the criminal activity]. The defendant asserts that trial counsel planned to subpoena the entire nursing staff at the [hospital] for trial, but the court disallowed that. He argues that instead of investigating the names of the treating nurses, which appear on his medical records, defense counsel chose not to pursue it. He argues that these nurses might have had a different recollection of his mental capacity at the time his statement was given, or what he said to the trooper.[10]
>
> The Commonwealth replies that there is no evidence that trial counsel failed to investigate whether the nursing staff would be able to impeach the testimony of Cpl. Georgia, but just that he decided not to call them. The Commonwealth asserts that this was a strategic decision by trial counsel. The Commonwealth also argues that the defendant has not demonstrated that these witnesses would have been available to testify, or that their testimony would have changed the outcome of the trial.

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[10] Ludovici's PCRA attorney, Terrence McDonald, read Trooper Georgia's testimony into the record during the PCRA hearing on February 22, 2011, as follows:

> [W]ell, the whole time we were searching [Ludovici], and afterwards, in fact, he kept apologizing for the pursuit saying that he was sorry, he didn't mean it, for it to happen. He offered an explanation as to why it happened.
>
> [Ludovici] went onto [sic] say that he was a drug dealer; in his position as a drug dealer he was attempting to sell a large rock of crack cocaine to other individuals, and in the process of his drug deal, the other individual assaulted him, and he was saying that to avoid the assault he was forced to steal the vehicle and flee the area.

Doc. 11-1 at 302.

> At the PCRA hearing, [Ludovici's trial counsel[11]] testified that he did not call or speak to any of the nurses at the [hospital] because there was no indication that there were any nurses within earshot of the defendant's statements to Trooper Georgia. Transcript of February 22, 2011 PCRA Hearing at 26. He testified that the defendant was non-responsive on this issue. Id. at 27. The defendant testified that he himself created a witness list that included all doctors, nurses and x-ray technicians from the [hospital], and he put down all of them because he knows that he was being examined at the time that Trooper Georgia says that he made the statement. Id. at 63-64. He testified that he does not recall making the statement, but he believes that someone was with him in the examination room the whole time. Id. at 64.

Doc. 11-1 at 178-79.

After reviewing the parties' respective arguments and the hearing transcript, the PCRA court cited to *Commonwealth v. Bryant*, 855 A.2d 726 (Pa. 2004) and *Commonwealth v. Horton*, 644 A.2d 181 (Pa. Super. 1994), and asserted that Ludovici was required under Pennsylvania law to prove the following elements, but ultimately failed to do so:

> (1) that the witness existed; (2) that the witness was available to testify for the defense; (3) that counsel knew or should have known of the existence of the witness; (4) that the witness was willing to testify for the defense; and (5) that the absence of the testimony of the witness is so prejudicial that he was denied a fair trial.

Doc. 11-1 at 179-80. In support of this assertion, the PCRA explained that Ludovici had not shown that there were, in fact, any witnesses to the statements he

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[11] Ludovici actually had two attorneys representing him at his trial: Attorney George Gretz and Attorney Robert Buttner. *Doc. 11-1* at 283-84. It was Attorney Gretz who testified at the PCRA hearing. *Id.* at 283.

made to Trooper Georgia. *Id.* at 179. As noted by the PCRA court, Ludovici had not produced affidavits or statements from any of these alleged witnesses to prove that they were available and willing to testify for him at trial. *Id.* at 180. As further noted by the PCRA court, Ludovici had not even produced the names of these alleged witnesses. *Id.* Thus, because Ludovici had not demonstrated that these alleged witnesses existed, that they were available, that they were willing to testify on his behalf, or that such testimony would have been beneficial to his case, the PCRA court concluded that his trial counsel had not been ineffective in failing to call such witnesses. *Id.*

This analysis the PCRA court utilized in ruling on the existence and availability of witnesses is neither contrary to, nor an unreasonable application of, federal law. Further, this analysis was not based on an unreasonable determination of the facts in light of the evidence presented in the PCRA record. Thus, the PCRA court's conclusion, and the Pennsylvania Superior Court's adoption thereof, should not be disturbed, and Ludovici should be denied habeas relief on this claim. *See, e.g.*, *Zettlemoyer v. Fulcomer*, 923 F.2d 284, 298 (3d Cir. 1991) (explaining that the § 2254 habeas petitioner was not entitled to relief where he could not meet his burden to show that counsel was ineffective in failing to call witnesses, who would have testified to a diminished capacity defense, because the petitioner had not presented evidence that such testimony was forthcoming or available, and

further explaining that the petitioner's conclusory allegations of unspecified and speculative testimony were simply insufficient); *Corbin v. Mooney*, No. 1:CV-13-2276, 2016 WL 627753, at *7-*8 (M.D. Pa. Feb. 17, 2016) (concluding that the PCRA court's ruling on the petitioner's ineffective-assistance-of-trial-counsel claim should not be disturbed since the PCRA court's analysis regarding the lack of an existing and available witness was not an unreasonable application of federal law relative to a claim of ineffective assistance of counsel (citing *Zettlemoyer*, 923 F.2d at 298, and *Moore v. DiGuglielmo*, 489 F. App'x 618, 625-26 (3d Cir. 2012))).

B. Ground Two.

In ground two, Ludovici contends that the Commonwealth of Pennsylvania's attorneys engaged in prosecutorial misconduct by withholding various forms of material evidence, including "eyewitness statements, police reports, and involuntary intoxication evidence[,]" which he perceives to be a violation of the Fourth, Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. *Doc. 1* at 6. In support of this broad contention, Ludovici argues: (1) that the Commonwealth failed to provide him with requested discovery (including, "medical reports, lab reports, progress notes, witness interview notes, supervisor notes[, and] E.M.S reports and statements . . ."), which would have supported his defense of involuntary LSD intoxication; and (2) that the Commonwealth did not

provide "statements and debriefing notes" that were rendered by the Airmen to their superior officers, which would have also supported his defense of involuntary LSD intoxication. *Doc. 8* at 6. The Respondent argues, however, that Ludovici never raised this ground for relief before the state courts. *Doc. 12* at 13-16. The Respondent further argues that because it is too late for Ludovici to do so now, the claim is procedurally defaulted. *Id.* at 16.

Even though Ludovici's second ground for relief explicitly references "prosecutorial misconduct," it appears that Ludovici is actually raising a *Brady* claim.[12] And, a complete review of the state court proceedings confirms that on direct appeal Ludovici exhausted a *Brady* claim, but only as it relates to the alleged error of the trial court in not granting his request that the Commonwealth disclose the psychiatric reports and opinions of Dr. Timothy Michals, the Commonwealth's medical expert. *See, e.g., doc. 11-1* at 16-20 (raising this *Brady* claim on direct appeal to the Pennsylvania Superior Court); *see id.* at 46-51 (raising this *Brady* claim once again on appeal to the Pennsylvania Supreme Court). Ludovici,

[12] *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (holding "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.").

however, has not included this exhausted *Brady* claim in the instant Petition.[13] Instead, he raises what appear to be new or different *Brady* claims, none of which have been fairly presented to the state courts. Because "a general claim that the prosecutor has suppressed exculpatory information cannot satisfy the exhaustion requirement as to all subsequent *Brady* claims that a habeas petitioner may bring," *Landano v. Rafferty*, 897 F.2d 661, 669 (3d Cir. 1990), we conclude that Ludovici has not exhausted the new *Brady* claims he now raises in ground two of his Petition. *See id.* at 669-70 ("[The United States Court of Appeals for the Third Circuit] has consistently held that in complying with the exhaustion requirement a habeas petitioner must not only provide the state courts with his legal theory as to why his constitutional rights have been violated, but also the factual predicate on which that legal theory rests. This requirement is especially appropriate in the context of an alleged *Brady* violation since the materiality of the suppressed information is determined by considering the strength of the state's case as a whole." (citing *United States v. Agurs*, 427 U.S. 97, 112-13 (1976))).

Requiring exhaustion of these *Brady* claims, now, would be futile. Indeed, the only way in which Ludovici could present these claims in state court is by filing another PCRA petition. *Lines v. Larkins*, 208 F.3d 153, 164 n.17 (3d Cir.

[13] For instance, Ludovici neither expressly references Dr. Timothy Michals, nor sets forth sufficient facts that would lead us to conclude that he is implicitly referencing Dr. Michals.

2000). Any such petition, however, would be time-barred by the PCRA's statute of limitations. *See* 42 PA. CONS. STAT. § 9545(b)(1) (explaining that collateral actions must be filed "within one year of the date the judgment becomes final[.]"); *see also* 42 PA. CONS. STAT. § 9545(b)(3) (explaining that, for purposes of the PCRA, "a judgment becomes final at the conclusion of direct review," including discretionary review in the Pennsylvania Supreme Court and the United Sates Supreme Court, or at the expiration of the time for seeking such review). Thus, Ludovici is deemed to have procedurally defaulted this claim.

C. Ground Three.

In his third ground for relief, Ludovici alleges various deficiencies associated with his criminal trial, deficiencies which he perceives to be violations of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. *Doc. 1* at 8. Specifically, Ludovici alleges that his trial was "tainted" by "improper *voir dire*," by the "improper" presentation of the Commonwealth's evidence, and by the "improper" jury instructions, regarding the elements of certain crimes and the weight to be afforded to certain testimony. *Id.* In support of these allegations, Ludovici raises the following arguments: (1) that four jurors were permitted to sit on the jury, despite three of them asserting they would find him guilty due to having law enforcement in their family, and despite one of them asserting they have a moral obligation to believe police testimony over any other individual's

testimony; and (2) that the Commonwealth intentionally misled the jury in the way that it presented the evidence. *Doc. 8* at 7.

The Respondent contends, yet again, that Ludovici did not adequately raise this ground for relief before the state courts, and thus, is it is now procedurally defaulted. *Doc. 12* at 16. We agree. A thorough review of the underlying state-court proceedings reveals that Ludovici did not fairly present this claim to the state courts. While Ludovici raised a similar claim in his supplemental PCRA petition and supporting brief[14] (*see doc. 11-1* at 160, ¶ 42 (raising, in his PCRA petition, an ineffective-assistance-of-trial-counsel claim based on counsel's failure to ensure an impartial, unbiased jury when counsel allowed jurors on the panel that said they would be more likely to believe law enforcement testimony); *see also id.* at 31-5 at 99-103 (elaborating on this claim in his brief)), Ludovici did not raise such a claim in his PCRA appeal to the Pennsylvania Superior Court or in his petition for allowance of appeal with the Pennsylvania Supreme Court. Thus, Ludovici did not properly exhaust this claim.

Requiring exhaustion of this claim now would, as we explained above, be futile since Ludovici is foreclosed from further state court review. *See* 42 PA. CONS. STAT. ANN. § 9544(b) ("For purposes of [PCRA review], an issue is waived if the petitioner could have raised it but failed to do so before trial, at trial, during

[14] We say "similar" because ground three in the Petition is not couched as an ineffective-assistance-of-trial-counsel claim.

unitary review, on appeal or in a prior state postconviction proceeding."). Thus, Ludovici is deemed to have procedurally defaulted this claim as well. *See Paolino*, 2012 WL 7018081 at *9–*10 (explaining that presenting a claim to the PCRA trial court, but abandoning that claim in the PCRA appeal to the Superior Court, constitutes a waiver of that claim under Pennsylvania law, and thus, is procedurally defaulted for purposes of federal habeas review (citing 42 PA. CONS. STAT. ANN. § 9544(b)).

D. Ground Four.

1. Ineffectiveness of Counsel.

In his fourth ground for relief, Ludovici contends that the ineffectiveness of his trial and appellate counsel inhibited his access to the courts and interfered with his ability to obtain proper judicial review of his criminal case, in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. *Doc. 1* at 9-10. In support, Ludovici contends that his trial and appellate counsel failed to inform of, and assist him with, the preservation of his rights. *See doc. 8* at 9.[15] Although unclear, it does appear that Ludovici is raising this contention in an attempt to show cause and prejudice for his other procedurally defaulted claims.

[15] To the extent Ludovici is also arguing that the "government['s] obstruction" caused the "delay" in the filing of his Petition (*doc. 8* at 8), we briefly reiterate that the Respondent has already conceded that his Petition was timely filed in this Court (*doc. 12* at 3).

See, e.g., *id.* at 8 (discussing procedural default legal standards in connection with ground four in his petition). Ludovici has also attempted to show such cause and prejudice by filing a supplemental memorandum of law and arguing that any procedural default should be excused because of his PCRA counsel's ineffectiveness. *See doc. 38.*

As discussed above in our legal standards, we are generally barred from reviewing the merits of a habeas claim that a prisoner has procedurally defaulted in state court, unless our failure to consider the claim would result in a fundamental miscarriage of justice, or the petitioner is able to demonstrate "cause" to excuse the default and actual prejudice as a result of the alleged violation of federal law. *Coleman*, 501 U.S. at 750. Particularly relevant here, is the principle that an "[a]n attorney error does not qualify as 'cause' to excuse a procedural default unless the error amounted to constitutionally ineffective assistance of counsel." *Davila v. Davis*, 137 S.Ct. 2058, 2062 (2017). Because, however, "a prisoner does not have a constitutional right to counsel in state postconviction proceedings," the United States Supreme Court held in *Coleman* that the ineffective assistance of counsel "in those proceedings does not qualify as cause to excuse a procedural default." *Id.* (citation omitted).

Ludovici, however, cites to *Martinez*, where the United States Supreme Court subsequently carved out a "narrow exception" to *Coleman*'s general rule by

holding as follows: when a State requires a prisoner to raise an ineffective-assistance-of-trial-counsel claim in collateral proceedings, a prisoner can establish "cause" for a default of that claim if "the state courts did not appoint counsel in the initial-review collateral proceeding [(i.e., the first collateral proceeding in which the claim could be heard)]" or the "appointed counsel in the initial-review collateral proceeding . . . was ineffective under the standards of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) [("*Strickland*")]." *Martinez*, 566 U.S. at 14. "To overcome the default, a prisoner must also demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit." *Id.* (citation omitted).

As explained by the *Martinez* Court, allowing a federal habeas court to hear such claims of trial counsel infectiveness "acknowledges, as an equitable matter, that the initial-review collateral proceeding, if undertaken without counsel or with ineffective counsel, may not have been sufficient to ensure that proper consideration was given to a substantial claim." *Id.* As also explained by the *Martinez* Court, however, the general "rule of *Coleman* governs in all but the limited circumstances recognized [in *Martinez*]." *Id.* at 16. Thus, the Court explained, *Martinez* does not extend to "attorney errors in other kinds of proceedings, including appeals from initial-review collateral proceedings, second

or successive collateral proceedings, and petitions for discretionary review in a State's appellate courts." *Id.*

Applying these standards here, we expressly acknowledge that, in Pennsylvania, prisoners like Ludovici are required to raise ineffective-assistance-of-trial-counsel claims in collateral review, rather than on direct appeal. *See Cox v. Horn*, 757 F.3d 113, 124 n.8 (3d Cir. 2014) ("In *Commonwealth v. Grant*, 572 Pa. 48, 813 A.2d 726, 738 (2002), Pennsylvania decided to defer consideration of ineffective assistance of counsel claims to collateral review, making *Martinez* applicable to its criminal procedural system."). Accordingly, if Ludovici can show that his PCRA counsel was ineffective in failing to raise any substantial claims of trial counsel ineffectiveness during his initial-review collateral proceeding, then there would be "cause" to excuse the procedural default of those claims, thereby allowing federal habeas review here.

In this regard, Ludovici argues that the ineffectiveness of his PCRA counsel during the initial-review collateral proceeding is "not in dispute" and that his underlying ineffective assistance of counsel claim has "some merit." *Doc. 38* at 3. He thus requests this Court to consider the following claims on the merits: (1) that trial counsel was ineffective in failing to pursue an involuntary intoxication defense by not investigating Joseph Ferguson, the witness who allegedly slipped LSD into Ludovici's drink (*id.* at 3-6); and (2) that trial counsel was ineffective in

failing to use peremptory challenges to strike jurors who revealed during *voir dire* that they would believe the testimony of law enforcement officials based solely on their status (*id.* 6-9).[16]

The Respondent sharply disputes these contentions and argues that the issue of whether Ludovici's' PCRA counsel was constitutionally ineffective under the standards set forth in *Strickland* is plainly in dispute. *See doc. 35* at 4-5. The Respondent further argues that, under *Martinez*, Ludovici is required to show *both* that his PCRA counsel was ineffective and that his underlying claim of ineffective assistance of counsel has merit. *See id.* at 2-5. In support, the Respondent cites to, among other cases, *Glenn v. Wynder*, where the United States Court of Appeals for the Third Circuit explained that, "[u]nder *Martinez*, the failure of collateral attack counsel to raise an ineffective assistance of trial counsel claim in an initial-review collateral proceeding can constitute 'cause' if (1) collateral attack counsel's failure itself constituted ineffective assistance of counsel under *Strickland* and (2) the underlying ineffective assistance of trial counsel claim is 'a substantial one,' which is to say 'the claim has some merit.'" 743 F.3d 402, 410 (3d Cir. 2014). Thus, because Ludovici has not shown that his PCRA counsel was, in fact, ineffective

[16] Although Ludovici also contends, in his supplemental memorandum of law, that trial counsel was ineffective for failing to object to the imposition of an allegedly illegal sentence (*see doc. 38* at 9-13), this claim was not raised, and is not related to those raised, in the instant Petition.

under the standards set forth in *Strickland*, the Respondent contends that there can be no "cause" for Ludovici's defaulted claims under *Martinez*. We agree.

"Under *Strickland*, courts are precluded from finding that counsel was ineffective unless they find both that counsel's performance fell below an objectively unreasonable standard, and that the defendant was prejudiced by that performance." *Marshall v. Hendricks*, 307 F.3d 36, 85 (3d Cir. 2002) (citation omitted). Such a review must be "highly deferential[,]" as "[i]t is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Strickland*, 466 U.S. at 689 (citation omitted). Courts, therefore, "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance[.]" *Id.*

Here, although Ludovici has argued at length that his underlying ineffective-assistance-of-trial-counsel claims have some merit (*doc. 38* at 3-9), he has neither identified any specific error by PCRA counsel during the initial-review collateral proceeding, nor offered any explanation as to why such an alleged error amounts to constitutionally ineffective assistance of counsel under *Strickland*. As explained above, however, Ludovici is required to show *both* that his PCRA counsel was ineffective and that his ineffective-assistance-of-trial-counsel claim has "some

merit." *See, e.g.*, *Glenn*, 743 F.3d at 410; *Cox*, 757 F.3d at 119 (explaining that, under *Martinez*, a procedural default of the underlying ineffective-assistance-of-trial-counsel claims will not bar federal habeas review if "the default was caused by ineffective assistance of post-conviction counsel . . . in the initial-review collateral proceeding . . . *and* . . . the underlying claim of trial counsel ineffectiveness is 'substantial[.]'" (citing *Martinez*, 132 S.Ct. at 1318–20) (emphasis added))). Because Ludovici has failed to make such a showing, we conclude that he has not demonstrated that his case fits within the narrow scope of *Martinez*'s exception to procedural default.

Even if Ludovici had attempted to make such a showing, we would still reach the same conclusion. A complete review of the record reveals that Ludovici's underlying claims of ineffective assistance of counsel—regarding counsel's failure to investigate Joseph Ferguson and counsel's failure to ensure an impartial and unbiased jury—were, in fact, presented to the PCRA court. *See, e.g.*, *doc. 31-5* at 87 (arguing, in his brief in support of his supplemental PCRA petition, that trial counsel knew of, but ultimately did not pursue, four witnesses, all of whom had knowledge that LSD had been slipped into his drink, and identifying Joseph Ferguson as one of those witnesses); *doc. 11-1* at 160, ¶ 42 (raising an ineffective assistance of counsel claim in his supplemental PCRA petition based on trial counsel's failure to ensure an impartial, unbiased jury by not using peremptory

challenges on jurors that said they were more likely to believe law enforcement testimony).

Thus, the focus of Ludovici's arguments appear to be misplaced, as it was not the alleged ineffective assistance of his PCRA counsel at the initial-review collateral proceeding that led to the procedural defaults, but it was the failure of his PCRA counsel to pursue those claims on collateral appeal to the Pennsylvania Superior Court. As we discussed herein, however, the exception announced in *Martinez* "applies only to attorney error in initial-review collateral proceedings, not appeals from those proceedings." *Norris v. Brooks*, 794 F.3d 401, 404–05 (3d Cir. 2015) (citation omitted), *cert. denied*, 136 S. Ct. 1227, 194 L. Ed. 2d 225 (2016); *see also Martinez*, 566 U.S. at 16 (instructing that its holding does "not concern attorney errors in other kinds of proceedings, including appeals from initial-review collateral proceedings, second or successive collateral proceedings, and petitions for discretionary review in State's appellate courts." (citation omitted)).

Accordingly, because this case does not fit within the narrow scope of *Martinez*, Ludovici has failed to establish "cause" for his procedurally defaulted claims. In the absence of "cause," we will refrain from addressing the issue of "actual prejudice." Furthermore, because Ludovici has not argued, much less demonstrated, that a miscarriage of justice would result from the Court's failure to consider his procedurally defaulted claims, we conclude that those claims should

be dismissed. We further conclude that Ludovici's only exhausted claim, regarding trial counsel's failure to impeach the testimony of Trooper Georgia *via* the testimony of hospital personnel, should be dismissed on the merits.

IV. Recommendations.

For the foregoing reasons, **WE RECOMMEND** that Ludovici's Petition (*doc. 1*) be **DISMISSED**.

The Parties are further placed on notice that pursuant to Local Rule 72.3:

> Any party may object to a magistrate judge's proposed findings, recommendations or report addressing a motion or matter described in 28 U.S.C. § 636 (b)(1)(B) or making a recommendation for the disposition of a prisoner case or a habeas corpus petition within fourteen (14) days after being served with a copy thereof. Such party shall file with the clerk of court, and serve on the magistrate judge and all parties, written objections which shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for such objections. The briefing requirements set forth in Local Rule 72.2 shall apply. A judge shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made and may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge, however, need conduct a new hearing only in his or her discretion or where required by law, and may consider the record developed before the magistrate judge, making his or her own determination on the basis of that

record. The judge may also receive further evidence, recall witnesses or recommit the matter to the magistrate judge with instructions. Failure to file timely objections to the foregoing Report and Recommendation may constitute a waiver of any appellate rights.

Submitted this **18th** day of **October, 2017**.

S/ Susan E. Schwab
Susan E. Schwab
United States Chief Magistrate Judge

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

JOHN LUDOVICI,	:
	:CIVIL ACTION NO. 3:13-CV-2997
Petitioner,	:
	:(JUDGE CONABOY)
v.	:(Magistrate Judge Schwab)
	:
MARIROSA LAMAS,	:
	:
REspondent.	:
	:

ORDER

AND NOW, THIS 24th DAY OF APRIL 2018, FOR THE REASONS DISCUSSED IN THE SIMULTANEOUSLY FILED MEMORANDUM, IT IS HEREBY ORDERED THAT:

1. The Magistrate Judge's Report and Recommendation (Doc. 40) is ADOPTED;
2. Petitioner's Petition for Writ of Habeas Corpus filed pursuant to 28 U.S.C. § 2254 (Doc. 1) is dismissed;
3. There is no basis for the issuance of a certificate of appealability;
4. The Clerk of Court is directed to close this case.

S/Richard P. Conaboy
RICHARD P. CONABOY
United States District Judge

Additional material from this filing is available in the Clerk's Office.