August 16, 2018

CLD-289

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **18-1919**

JOEL GLASTON MUIR, Appellant

v.

SUPERINTENDENT GRATERFORD SCI; ET AL.

(E.D. Pa. Civ. No. 2-16-cv-02256)

Present: CHAGARES, GREENAWAY, JR. and FUENTES, Circuit Judges

Submitted is Appellant's request for a certificate of appealability under 28 U.S.C. § 2253(c)

in the above-captioned case.

Respectfully,
Clerk

ORDER

Muir's application for a certificate of appealability is denied. See 28 U.S.C. § 2253(c). Jurists of reason would agree without debate that Muir's claims lack merit for the reasons provided in the Magistrate Judge's well-reasoned report and recommendation. See Miller-El v. Cockrell, 537 U.S. 322, 336 (2003).

By the Court,

s/ Julio M. Fuentes
Circuit Judge

Dated: September 12, 2018

kr/cc: Joel Glaston Muir
Robert M. Falin, Esq.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 18-1919

JOEL GLASTON MUIR,
Appellant

v.

SUPERINTENDENT GRATERFORD SCI;
DISTRICT ATTORNEY MONTGOMERY COUNTY;
ATTORNEY GENERAL PENNSYLVANIA

(E. D. Pa. No. 2-16-cv-02256)

SUR PETITION FOR REHEARING

Present: SMITH, Chief Judge, McKEE, AMBRO, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., VANASKIE, SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, and FUENTES,* Circuit Judges

The petition for rehearing filed by appellant, in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

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* Pursuant to Third Circuit I.O.P. 9.5.3., Judge Fuentes's vote is limited to panel rehearing.

BY THE COURT,

s/ Julio M. Fuentes
Circuit Judge

Dated: December 18, 2018

kr/cc: Joel Glaston Muir
Robert M. Falin, Esq.

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

JOEL GLASTON MUIR, **Petitioner,** **v.** **CYNTHIA LINK, Superintendent of SCI-Graterford,** **THE DISTRICT ATTORNEY OF THE COUNTY OF MONTGOMERY, and** **THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA,** **Respondents.**	**CIVIL ACTION** **NO. 16-2256**

ORDER

AND NOW, this 23rd day of March, 2018, upon consideration of counseled Amended Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus and Petitioner's Memorandum of Law in Support of His Amended Habeas Petition filed by petitioner, Joel Glaston Muir (Document No. 19, filed January 3, 2017), the Report and Recommendation of United States Magistrate Judge Lynne A. Sitarski dated January 12, 2018 (Document No. 31), Petitioner's Objections to the Magistrate's Report & Recommendation to Dismiss Petitioner's Amended Habeas Corpus Petition (Document No. 33, filed January 25, 2018), and the record in this case, **IT IS ORDERED** as follows:

1. The Report and Recommendation of United States Magistrate Judge Lynne A. Sitarski dated January 12, 2018, is **APPROVED** and **ADOPTED**;

2. Petitioner's Objections to the Magistrate's Report & Recommendation to Dismiss Petitioner's Amended Habeas Corpus Petition are **OVERRULED** on the ground that all of the Objections are addressed in the Report and Recommendation, with which the Court agrees. Any arguments with respect to the Objections not specifically addressed in the Report and

Recommendation of United States Magistrate Judge Lynne A. Sitarski dated January 12, 2018, are overruled on the ground that, individually and considered together, they are insufficient to warrant the granting of the requested relief;

3. Amended Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus filed by petitioner, Joel Glaston Muir, is **DENIED** for the reasons stated in the Report and Recommendation of United States Magistrate Judge Lynne A. Sitarski dated January 12, 2018;

4. Petitioner's request for an evidentiary hearing is **DENIED**; and,

5. A certificate of appealability will not issue because reasonable jurists would not debate this Court's decision that the petition does not state a valid claim of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

BY THE COURT:

/s/ Hon. Jan E. DuBois

DuBOIS, JAN E., J.

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

JOEL GLASTON MUIR, **Petitioner,**	:	**CIVIL ACTION**
v.	:	**NO. 16-cv-2256**
CYNTHIA LINK, et al., **Respondents.**	:	

REPORT AND RECOMMENDATION

LYNNE A. SITARSKI
UNITED STATES MAGISTRATE JUDGE

January 12, 2018

Before the Court is a counseled Petition for Writ of Habeas Corpus filed pursuant to 28 U.S.C. § 2254 by Joel Muir ("Petitioner"), an individual currently incarcerated at the State Correctional Institution in Graterford, Pennsylvania. This matter has been referred to me for a Report and Recommendation. For the following reasons, I respectfully recommend that the petition for habeas corpus be DENIED.

I. PROCEDURAL BACKGROUND[1]

The Superior Court provided the following recitation of the facts:

> Around 2:00 a.m., on August 3, 2001, in the parking lot of the Sunnybrook Ballroom, [Petitioner], co-defendant Nicholas Roberts, and two unidentified men, riding in a maroon Toyota Camry, approached one Rian Wallace, who was standing in the parking lot, and began yelling, "New York Crips." The two

[1] Respondents have submitted the relevant transcripts and portions of the state court record in electronic format, ranging from Docket Numbers 5-1 through 5-141. Documents contained in the state court record will be cited according to their respective Docket Numbers, as "ECF No. ___." This Court has also consulted the Court of Common Pleas criminal docket sheet for *Commonwealth v. Muir*, No. CP-46-CR-0001707-2004 (Montgomery Cnty. Com. Pl.), *available at* https://ujsportal.pacourts.us/DocketSheets/CPReport.ashx?docketNumber=CP-46-CR-0001707-2004 (last visited Jan. 11, 2018) [hereinafter "Crim. Docket"].

> unidentified men exited the vehicle and began doing a gang ritual dance around Wallace, purportedly alerting Wallace to the fact they were members of the Crips street gang. [Petitioner] then also exited the car, and the three men surrounded Wallace. Shortly thereafter, two of Wallace's friends, the victim Michael Ziegler and Brandon Germany, arrived at the scene. No violence occurred during this confrontation.
>
> Wallace then left the scene with a friend, followed 30 minutes later by Ziegler, Germany, and two other men, driving a gold Ford Taurus. After dropping off the other men at an acquaintance's house, Ziegler and Germany stopped briefly at a motel party, and then drove to the home of a friend, Janae Nixon. Ziegler parked on the street, and, according to Germany's testimony, [Petitioner's] maroon Toyota Camry with its lights turned out was also parked on that street. Co-defendant Roberts was seated in the driver's seat of the Camry, [Petitioner] was in the passenger's seat and two other individuals were in the backseat. [Petitioner] sped past the victim's car, but returned 10 minutes later, at about 3:00 a.m., minus the two rear passengers. As [Petitioner's] car approached Nixon's home and the parked Taurus, Germany, Nixon, and a second woman, Shena Beasley[,] were entering the Taurus. The victim already was seated at the wheel. With Germany in the passenger seat, the victim drove away, and [Petitioner] and Roberts, the driver of the Camry, followed. As Roberts sped past the Taurus, [Petitioner], seated in the backseat, fired into the victim's vehicle, striking Ziegler in the head and killing him.

Commonwealth v. Muir, No. 1970 EDA 2014, slip op. at 1-2 (Pa. Super. Oct. 27, 2015) (citation omitted). On August 24, 2004, following a jury trial, Petitioner was found guilty of first degree murder, 18 Pa. Cons. Stat. § 2502(a), third degree murder, *id.* § 2502(c), conspiracy to commit first degree murder and third degree murder, *id.* § 903(a)(1), multiple counts of aggravated assault, *id.* §§ 2702(a)(1)-(a)(4), and carrying a firearm without a license, *id.* § 6106(a). (Op., ECF No. 5-116); Crim. Docket at 3-5, 10. On December 29, 2004, Petitioner was sentenced to two concurrent sentences of life imprisonment without the possibility of parole, in addition to an aggregate term of twenty-one to forty-two years' imprisonment, to be served consecutively to the life sentence. (Op. 2, No. 5-116); Crim. Docket at 3-5. After timely post-sentence motions were

denied, Petitioner filed a notice of appeal to the Superior Court on July 5, 2005. Crim. Docket at 15-16; (Not. of App., ECF No. 5-86). The Superior Court affirmed his judgment of sentence on August 23, 2006. Crim. Docket at 16; *Commonwealth v. Muir*, No. 1868 EDA 2005, slip op. at 1 (Pa. Super. Aug. 23, 2006). Petitioner's right to appeal to the Pennsylvania Supreme Court was reinstated *nunc pro tunc*, and he filed a petition for allowance of appeal on October 19, 2011. *Commonwealth v. Muir*, No. 788 MAL 2011 (Pa.), Appellate Docket at 1. It was denied on March 29, 2012. Crim. Docket at 23; (Order, ECF No. 5-47).

On December 18, 2012, Petitioner filed a timely *pro se* petition for relief under Pennsylvania's Post-Conviction Relief Act, 42 Pa. Cons. Stat. §§ 9541, *et seq.* ("PCRA"). Crim. Docket at 24; (Mot. for Post Conviction Collateral Relief, ECF No. 5-140). Counsel was subsequently appointed and filed three amended PCRA petitions, the third of which "fully replace[d] the first and second amended petitions." Crim. Docket at 25-27; (Third Am. Pet. ¶ 14, ECF No. 5-115). The PCRA Court held an evidentiary hearing and denied the third amended petition on May 22, 2014. Crim. Docket at 29; (Order, ECF No. 5-67). Petitioner filed a timely notice of appeal in the Superior Court.[2] Crim. Docket at 29; (Not. of App., ECF No. 5-82). The Superior Court affirmed the PCRA Court's decision on October 27, 2015. Crim. Docket at 33; *Commonwealth v. Muir*, No. 1970 EDA 2014, slip op. at 1 (Pa. Super. Oct. 27, 2015). Petitioner filed a petition for allowance of appeal, which was denied March 8, 2016. Crim. Docket at 33; (Order, ECF No. 5-49).

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[2] Petitioner's notice of appeal was filed *pro se* on June 23, 2014. Crim. Docket at 29; *Muir*, No. 1970 EDA 2014, slip op. at 4 n.2. PCRA counsel, Henry S. Hilles, III, filed a motion to withdraw in PCRA Court that same day, which the PCRA Court granted. Crim. Docket at 29. The Superior Court found the PCRA Court lacked jurisdiction to grant such a motion, and remanded the matter to the PCRA Court for appointment of new counsel. *Muir*, No. 1970 EDA 2014, slip op. at 4. Attorney Melissa A. Lovett was subsequently appointed and filed a *Turner/Finley* letter in the Superior Court. *Id.* at 5.

On May 4, 2016, Petitioner filed a *pro se* petition for writ of habeas corpus. (Hab. Pet., ECF No. 1). He subsequently retained counsel, who filed an amended habeas petition on January 3, 2017, raising the following claims for relief (re-ordered but recited verbatim):

> (A) Ineff. Assist. Counsel for failing to give objectively reasonable advice to Petitioner that he should not testify on his own behalf.
>
> (B) Ineff. Ass. Counsel in violation of 6th A for failing to present evidence to establish imperfect self defense
>
> (C) Ineff. Assis. of counsel for failing to request an imperfect self defence [sic] jury charge
>
> (D) Ineff. Assist. Counsel for failing to interview and call Larry Phillips
>
> (E) Ineff. assist. of counsel for failing to call & interview character witnesses.

(Am. Hab. Pet. ¶ 12, ECF No. 19).[3]

The petition was assigned to the Honorable Jan E. DuBois, who referred it to the undersigned for a Report and Recommendation. (Order, ECF No. 2). The Commonwealth filed a Response (Respondent/Commonwealth's Resp. in Opp. to Am. Pet. for Writ of Habeas Corpus, ECF No. 26 [hereinafter "Resp."]), and Petitioner has not filed a Reply. The matter is fully briefed and ripe for disposition.

[3] After the instant habeas petition was filed, Petitioner filed a *pro se* PCRA petition in state court on January 13, 2017. Crim. Docket at 33. The petition was dismissed on August 18, 2017, and Petitioner timely filed a notice of appeal to the Superior Court. *Id.* at 35. That appeal is currently pending. *Commonwealth v. Muir*, No. 3016 EDA 2017 (Pa. Super.), Appellate Docket at 3. Petitioner filed a motion to stay the instant proceedings pending the resolution of his state application for post-conviction relief. (Mot. to Stay, ECF No. 27). The Court denies Petitioner's stay motion in a separate Order accompanying this Report and Recommendation.

II. LEGAL STANDARDS

A. Exhaustion and Procedural Default

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") grants to persons in state or federal custody the right to file a petition in a federal court seeking the issuance of a writ of habeas corpus. *See* 28 U.S.C. § 2254. Pursuant to the AEDPA:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—
>
> (A) the applicant has exhausted the remedies available in the courts of the State; or
> (B)(i) there is an absence of available State corrective process; or
> (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

28 U.S.C. § 2254(b)(1). The exhaustion requirement is rooted in considerations of comity, to ensure that state courts have the initial opportunity to review federal constitutional challenges to state convictions. *See Castille v. Peoples*, 489 U.S. 346, 349 (1989); *Rose v. Lundy*, 455 U.S. 509, 518 (1982); *Leyva v. Williams*, 504 F.3d 357, 365 (3d Cir. 2007); *Werts v. Vaughn*, 228 F.3d 178, 192 (3d Cir. 2000).

Respect for the state court system requires that the habeas petitioner demonstrate that the claims in question have been "fairly presented to the state courts." *Castille*, 489 U.S. at 351. To "fairly present" a claim, a petitioner must present its "factual and legal substance to the state courts in a manner that puts them on notice that a federal claim is being asserted." *McCandless v. Vaughn*, 172 F.3d 255, 261 (3d Cir. 1999); *see also Nara v. Frank*, 488 F.3d 187, 197-98 (3d Cir. 2007) (recognizing that a claim is fairly presented when a petitioner presents the same factual and legal basis for the claim to the state courts). A state prisoner exhausts state remedies by giving 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 v. Boerckel*, 526 U.S. 838, 845 (1999). In Pennsylvania, one complete round includes presenting the federal claim through the Superior Court on direct or collateral review. *See Lambert v. Blackwell*, 387 F.3d 210, 233-34 (3d Cir. 2004). The habeas petitioner bears the burden of proving exhaustion of all state remedies. *Boyd v. Walmart*, 579 F.3d 330, 367 (3d Cir. 2009).

If a habeas petition contains unexhausted claims, the federal district court must ordinarily dismiss the petition without prejudice so that the petitioner can return to state court to exhaust his remedies. *Slutzker v. Johnson*, 393 F.3d 373, 379 (3d Cir. 2004). However, if state law would clearly foreclose review of the claims, the exhaustion requirement is technically satisfied because there is an absence of state corrective process. *See Carpenter v. Vaughn*, 296 F.3d 138, 146 (3d Cir. 2002); *Lines v. Larkin*, 208 F.3d 153, 160 (3d Cir. 2000). The failure to properly present claims to the state court generally results in a procedural default. *Lines*, 208 F.3d at 683. The doctrine of procedural default bars federal habeas relief when a state court relies upon, or would rely upon, "'a state law ground that is independent of the federal question and adequate to support the judgment'" to foreclose review of the federal claim. *Nolan v. Wynder*, 363 F. App'x 868, 871 (3d Cir. 2010) (not precedential) (quoting *Beard v. Kindler*, 558 U.S. 53, 53 (2009)); *see also Taylor v. Horn*, 504 F.3d 416, 427-28 (3d Cir. 2007) (citing *Coleman v. Thompson*, 501 U.S. 722, 730 (1991)).

The requirements of "independence" and "adequacy" are distinct. *Johnson v. Pinchak*, 392 F.3d 551, 557–59 (3d Cir. 2004). State procedural grounds are not independent, and will not bar federal habeas relief, if the state law ground is so "interwoven with federal law" that it cannot be said to be independent of the merits of a petitioner's federal claims. *Coleman*, 501 U.S. at 739–40. A state rule is "adequate" for procedural default purposes if it is "firmly established and

regularly followed." *Johnson v. Lee*, ___ U.S. ___, 136 S. Ct. 1802, 1804 (2016) (*per curiam*) (citation omitted). These requirements ensure that "federal review is not barred unless a habeas petitioner had fair notice of the need to follow the state procedural rule," *Bronshtein v. Horn*, 404 F.3d 700, 707 (3d Cir. 2005), and that "review is foreclosed by what may honestly be called 'rules' . . . of general applicability[,] rather than by whim or prejudice against a claim or claimant." *Id.* at 708.

Like the exhaustion requirement, the doctrine of procedural default is grounded in principles of comity and federalism. As the Supreme Court has explained:

> In the absence of the independent and adequate state ground doctrine in federal habeas, habeas petitioners would be able to avoid the exhaustion requirement by defaulting their federal claims in state court. The independent and adequate state ground doctrine ensures that the States' interest in correcting their own mistakes is respected in all federal habeas cases.

Edwards v. Carpenter, 529 U.S. 446, 452-53 (2000).

Federal habeas review is not available to a petitioner whose constitutional claims have not been addressed on the merits by the state courts due to procedural default, unless such petitioner can demonstrate: (1) cause for the default and actual prejudice as a result of the alleged violation of federal law; or (2) that failure to consider the claims will result in a fundamental miscarriage of justice. *Id.* at 451; *Coleman*, 501 U.S. at 750. To demonstrate cause and prejudice, the petitioner must show some objective factor external to the defense that impeded counsel's efforts to comply with some state procedural rule. *Slutzker*, 393 F.3d at 381 (quoting *Murray v. Carrier*, 477 U.S. 478, 488 (1986)). To demonstrate a fundamental miscarriage of justice, a habeas petitioner must typically demonstrate actual innocence. *Schlup v. Delo*, 513 U.S. 298, 324-26 (1995).

B. Merits Review

The AEDPA increased the deference federal courts must give to the factual findings and legal determinations of the state courts. *Woodford v. Viscotti*, 537 U.S. 19, 24 (2002); *Werts*, 228 F.3d at 196. Pursuant to 28 U.S.C. § 2254(d), as amended by the AEDPA, a petition for habeas corpus may be granted only if: (1) the state court's adjudication of the claim resulted in a decision contrary to, or involved an unreasonable application of, "clearly established Federal law, as determined by the Supreme Court of United States;" or (2) the adjudication 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)(1)-(2). Factual issues determined by a state court are presumed to be correct, and the petitioner bears the burden of rebutting this presumption by clear and convincing evidence. *Werts*, 228 F.3d at 196 (citing 28 U.S.C. § 2254(e)(1)).

The Supreme Court has explained that, "[u]nder the 'contrary to' clause, 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, 412-13 (2000); *see also Hameen v. State of Delaware*, 212 F.3d 226, 235 (3d Cir. 2000). "Under the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Williams*, 529 U.S. at 413. The "unreasonable application" inquiry requires the habeas court to "ask whether the state court's application of clearly established federal law was objectively unreasonable." *Hameen*, 212 F.3d at 235 (citing *Williams*, 529 U.S. at 388-89). "In further delineating the 'unreasonable application of' component, the Supreme Court stressed that an unreasonable application of

federal law is different from an incorrect application of such law and a federal habeas court may not grant relief unless that court determines that a state court's incorrect or erroneous application of clearly established federal law was also unreasonable." *Werts*, 228 F.3d at 196 (citation omitted).

III. DISCUSSION

Petitioner alleges ineffective assistance of counsel for failure to: give objectively reasonable advice that Petitioner should not testify, present evidence to establish imperfect self-defense, request an imperfect self-defense jury charge, interview and call Larry Phillips as a witness, and interview and call character witnesses.[4]

A. Ineffective Assistance of Counsel Standard

A claim for ineffective assistance of counsel is governed by *Strickland v. Washington*, 466 U.S. 668 (1984). In *Strickland*, the United States Supreme Court established the following two-pronged test to obtain habeas relief on the basis of ineffectiveness:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so

[4] Grounds B, C, D, and E were not raised in Petitioner's third amended PCRA petition, nor adjudicated on the merits by the PCRA Court. After Attorney Hilles withdrew, and before Attorney Lovett was appointed, Petitioner raised these claims in *pro se* PCRA filings. (*See* Statement of Matters Complained of on Appeal 2, ECF No. 5-98; Br. for Appellant, ECF No. 30). The Superior Court evaluated their merits in reviewing Attorney Lovett's *Turner/Finley* letter and Petitioner's *pro se* appellate brief. *See, e.g.*, *Muir*, No. 1970 EDA 2014, slip op. at 6, 6 n.4; *Commonwealth v. Finley*, 550 A.2d 213, 215 (Pa. Super. 1988) (after no-merit letter is filed, the court must independently review the record to determine whether the issues raised are meritless). Thus, "the purpose of the exhaustion doctrine—to give state courts the first word on a claim—has been satisfied." *Moore v. DiGuglielmo*, 489 F. App'x 618, 623-24 (3d Cir. 2012) (not precedential); *see also id.* at 622-23 (finding claim exhausted when petitioner discussed it in response to PCRA Court's notice of intent to dismiss, and the state courts "addressed his claim and assessed whether he had pled sufficient facts to prevail"). In any event, "[a]n application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(2).

> serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

466 U.S. at 687. Because "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," a court must be "highly deferential" to counsel's performance and "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. "Thus . . . a defendant must overcome the 'presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Bell v. Cone*, 535 U.S. 685, 698 (2002) (quoting *Strickland*, 466 U.S. at 689). To establish prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

It is well settled that *Strickland* is "clearly established Federal law, as determined by the Supreme Court of the United States." *Williams*, 529 U.S. at 391. Thus, Petitioner is entitled to relief if the Pennsylvania court's rejection of his claims was: (1) "contrary to, or involved an unreasonable application of," that clearly established law; or (2) "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)(1)-(2).

Regarding the "contrary to" clause, the state courts addressed Petitioner's ineffective assistance claims using Pennsylvania's three-pronged ineffectiveness test. (Op. 5-6, ECF No. 5-108); *Muir*, No. 1970 EDA 2014, slip op. at 6-7. This test requires the petitioner to establish: (1) the underlying claim has arguable merit; (2) counsel lacked a reasonable basis for his or her

conduct; and (3) but for counsel's ineffectiveness, there is a reasonable probability that the outcome of the proceedings would have been different. *Muir*, No. 1970 EDA 2014, slip op. at 7 (quoting *Commonwealth v. Cam Ly*, 980 A/2d 61, 73 (Pa. 2009)). The Third Circuit has found that the Pennsylvania ineffectiveness test is not contrary to the *Strickland* standard. *See Werts* 228 F.3d at 204. Because the Superior Court did not apply law contrary to clearly established precedent, Petitioner is entitled to relief only if he can demonstrate that its adjudication involved an unreasonable application of *Strickland* or was based on an unreasonable determination of the facts in light of the evidence.[5]

B. Ground A: Ineffective Assistance for Advising Petitioner not to Testify

In Ground A, Petitioner alleges counsel was ineffective for "failing to give objectively reasonable advice to Petitioner that he should not testify on his own behalf." (Am. Hab. Pet. ¶ 12, ECF No. 19). He claims that counsel incorrectly advised him that his prior convictions were *crimen falsi* that could be used to impeach him, and that his prior firearm conviction could be used to show access to firearms. (*See id.* ¶ 12(a); Mem. of Law 31, ECF No. 19-1). The Commonwealth responds that this claim does not warrant relief. (Resp. 12, ECF No. 26). The Court concludes this claim is meritless.

The PCRA Court found this claim "was not supported in fact." (Op. 6, ECF No. 5-108). At the PCRA hearing, Petitioner testified that he informed trial counsel before trial "that there was an innocent explanation for why two cars were side-by-side, with him alone in the rear passenger seat leaning out an open window with a firearm, and that he fired six bullets only because he thought he saw one of the passengers in the other car aiming a gun to shoot him."

[5] In considering a § 2254 petition, the federal courts examine the "last reasoned decision" of the state courts. *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)).

(*Id.*) (citing N.T. 01/22/14 at 7-11, 12-15). He testified that trial counsel gave him the impression that he would present that version of events to the jury. (*Id.*) (citing N.T. 01/22/14 at 11). He also testified that during trial, after he heard the Commonwealth's evidence and/or when he learned that his co-defendant would not testify, he informed trial counsel that he urgently needed to tell the jury his version of events. (*Id.*) (citing N.T. 01/22/14 at 13-14). When asked why he did not testify, Petitioner explained:

> Because of my – at the time of all this, I was on parole in New York for a gun and a drug charge. I was on state parole. And [trial counsel] basically said that they could use my criminal history against me to make me look like a liar and destroy my credibility.
>
> I found out now, I found out the word is impeach.
>
> All right, but, you know, listen, they use that against you, they going to make you look like a liar and a bad person because I had a drug and gun charge.
>
> And that's why I didn't testify; do you know what I mean?

(*Id.* at 7) (quoting N.T. 01/22/14 at 14-15).

The PCRA Court found "that it was false that [P]etitioner went to trial expecting trial counsel to tell the jury that [P]etitioner admitted to the killing," and "that it was false that [P]etitioner decided not to tell his version of what happened because he feared impeachment." (*Id.*). Trial counsel credibly testified that before trial, Petitioner decided the best defense strategy was to challenge the reliability of the Commonwealth's eyewitness testimony identifying Petitioner as the shooter. (*Id.*) (citing N.T. 01/22/14 at 29-31). Trial counsel also credibly testified that he never told Petitioner he could be impeached with a drug conviction; rather, trial counsel told Petitioner that his "'drug conviction could not be used against him.'" (*Id.*) (citing N.T. 01/22/14 at 31-32). Trial counsel also credibly testified that he told Petitioner evidence of

the firearm offense could only be used against him for the limited purpose of showing that he had potential access to a firearm at the time of the offense. (*Id.* at 8) (citing N.T. 01/22/14 at 32). Moreover, the PCRA Court found it "wholly incredible" that Petitioner feared the jury hearing evidence of firearm access when he claimed he was willing to admit that "he not only had a firearm, but that he had it at the ready to defend himself upon being surprised to see someone in another moving car aiming to shoot him." (*Id.*). The PCRA Court also found it "beyond belief" that Petitioner, who "stood accused of having committed a cold-blooded, gangland-style 'hit' at point-blank range," chose not to testify out of fear that the jury would find him to be "a 'liar and a bad person.'" (*Id.*). Thus, the PCRA Court concluded that Petitioner failed to establish that trial counsel's ineffectiveness caused Petitioner to not take the stand to testify in his own defense. (*Id.*). On PCRA appeal, the Superior Court found the transcripts from the evidentiary hearing supported the PCRA Court's conclusions, and agreed that the issue was meritless. *Muir*, No. 1970 EDA 2014, slip op. at 10.

A state court's factual findings are presumed correct on habeas review, unless rebutted by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). This Court must accept the PCRA Court's factual findings and credibility determinations.[6] *See Campbell v. Vaughn*, 209 F.3d 280, 290 (3d Cir. 2000); *Dicker v. Glunt*, No. 10-5240, 2011 WL 286090, at *6 (E.D. Pa. May 25, 2011), *report and recommendation adopted*, No. 10-5240, 2011 WL 3862012 (E.D. Pa. Aug. 31, 2011). The state court rejected Petitioner's claim that he proceeded to trial expecting counsel to tell the jury that he admitted to the killing, and credited counsel's testimony that Petitioner

[6] Petitioner points to his testimony from the PCRA evidentiary hearing in support of his claim. However, the PCRA Court explicitly found his testimony was not credible. Federal habeas courts are not permitted to re-determine witness credibility, and are bound by factual findings of state courts. *See Marshall v. Lonberger*, 459 U.S. 422, 434-35 (1983). Thus, Petitioner has not rebutted the presumption of correctness afforded to the state court's factual findings.

decided the best defense strategy was to challenge the reliability of the Commonwealth's eyewitness identification testimony. The state court also found it "wholly incredible" that Petitioner feared the jury hearing that he had access to a firearm if he was willing to admit that he had a firearm that he used in self-defense, further corroborating counsel's testimony that Petitioner wished to proceed on a misidentification defense. From the state court's factual findings, it is reasonable to infer that the decision not to have Petitioner testify was part of counsel's strategy of pursuing a misidentification defense. As the Commonwealth points out, had Petitioner testified in support of a misidentification defense but denied possessing a firearm, this testimony may have opened the door to his prior firearm conviction.[7] (Resp. 14, ECF No. 26) (citing *Commonwealth v. Reese*, 31 A.3d 708, 723 (Pa. Super. 2011); *Commonwealth v. Akers*, 572 A.2d 746, 754-55 (Pa. Super. 1990)). Thus, Petitioner has not overcome the "dual presumptions that counsel's decisions constituted sound trial strategy; and that counsel and defendant discussed the defendant's right to testify and defendant voluntarily and intelligently waived that right." *United States v. Hatcher*, No. 94-173, 1997 WL 698488, at *3 (E.D. Pa. Nov. 7, 1997) (citing *United States v. Pennycooke*, 65 F.3d 9, 12-13 (3d Cir. 1995)).

Moreover, the state court credited counsel's testimony that he did not advise Petitioner that his prior convictions could be used to impeach him. Accordingly, Petitioner's claim that counsel incorrectly advised him his prior convictions were *crimen falsi* exposing him to impeachment wholly lacks merit. This claim must fail, as it is unsupported in fact.

Accordingly, the Court respectfully recommends denying relief on this claim.

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[7] "[I]n opposing a petitioner's attempt to disprove the existence of a possible sound strategy, it is entirely proper for the Commonwealth to engage in record-based speculation as to what counsel's strategy might have been." *Thomas v. Varner*, 428 F.3d 491, 500 n.8 (3d Cir. 2005) (citing *Buehl v. Vaughn*, 166 F.3d 163, 176 (3d Cir. 1999)); *see also United States v. Martin*, 262 F. App'x 392, 398 (3d Cir. 2008).

C. Grounds B, C, and D: Ineffective Assistance Relating to Imperfect Self-Defense

Petitioner raises three claims regarding counsel's failure to investigate and present an imperfect self-defense theory.[8] In Ground B, Petitioner asserts an ineffectiveness claim due to trial counsel's failure to investigate and present evidence to establish imperfect self-defense. (Am. Hab. Pet. ¶ 12, ECF No. 19; Mem. of Law 13, ECF No. 19-1). Specifically, Petitioner avers that counsel should have presented Petitioner's testimony in support of this defense, and counsel should have investigated and presented the testimony of Patricia Whitehawk and Larry Phillips. (Mem. of Law 16-22, ECF No. 19-1). In Ground C, Petitioner argues that counsel was ineffective for failing to request an imperfect self-defense jury charge because there would have been an evidentiary basis for such a charge, had counsel "been effective and presented this evidence." (Am. Hab. Pet. ¶¶ 12-12(a), ECF No. 19; *see also* Mem. of Law 35-39, ECF No. 19-1). In Ground D, Petitioner again asserts that trial counsel was ineffective "for failing to interview and call Larry Phillips," as Phillips' testimony "could have helped establish imperfect self-defense." (Am. Hab. Pet. ¶¶ 12-12(a); *see also* Mem. of Law 23-26, ECF No. 19-1). The Commonwealth responds that Petitioner has failed to demonstrate that the Superior Court's adjudication of these claims was contrary to, or an unreasonable application of, *Strickland*. (Resp. 12, ECF No. 26). The Court concludes that Petitioner's claim regarding Larry Phillips is procedurally defaulted, and his other claims are meritless.

On collateral appeal, the Superior Court found Petitioner's claims that counsel failed to present a defense of imperfect self-defense and investigate Patricia Whitehawk lacked merit, and "any issue with respect to Larry Phillips has been waived." *Muir*, No. 1970 EDA 2014, slip op. at 10-16. The Superior Court explained that imperfect self-defense "exists where the defendant

[8] Because these claims are largely cumulative, they will be addressed together.

actually, but unreasonably, believed that deadly force was necessary." *Id.* at 11 (citation omitted). Petitioner's self-defense claim was "premised on the fact that he purportedly saw [Brandon] Germany with a gun" on the night of the incident, but trial counsel testified at the PCRA hearing that Petitioner never told him he saw Germany with a firearm. *Id.* Additionally, trial counsel testified that "'all the witnesses in the car denied having any evidence of Brandon Germany carrying a firearm.'" *Id.* at 11-12 (quoting N.T. 01/22/14 at 29).

The Superior Court found trial counsel's testimony was supported by the evidence presented at trial. *Id.* at 12. Germany, Beasley, and Nixon denied that Germany had a firearm on the night in question, and Germany testified that he did not observe anyone with him to have a firearm. *Id.* (citing N.T. 08/20/04 at 48-49; N.T. 08/19/04 at 83, 162-63). Thus, the Superior Court found that "the crux of [Petitioner's] argument, that he shot at the car in self-defense, was utterly contrary to the other evidence presented at trial." *Id.* Counsel's strategy of not pursuing self-defense was reasonable, and "trial counsel could not be ineffective for failing to request a [self-defense] jury instruction[.]" *Id.*

Additionally, Petitioner claimed that trial counsel was ineffective for failing to investigate Patricia Whitehawk and Larry Phillips in support of a self-defense claim.[9] *Id.* at 12-13. The Superior Court applied the following standard in considering this claim:

> When raising a claim of ineffectiveness for the failure to call a potential witness, a petitioner satisfies the performance and prejudice requirements of the [*Strickland v. Washington* . . .] test by establishing that: (1) the witness existed; (2) the witness was available to testify for the defense; (3) counsel knew of, or should have known of, the existence of the witness; (4) the witness was willing to testify for the defense; and (5) the absence of the

[9] Petitioner also argued that counsel was ineffective for failing to interview Nixon, Beasley, and Germany. *Muir*, No. 1970 EDA 2014, slip op. at 13. The Superior Court found this issue lacked arguable merit because these witnesses testified that Germany did not have a firearm; therefore, their testimony would not have been helpful to the defense. *Id.*

> testimony of the witness was so prejudicial as to have denied the defendant a fair trial . . . . "To demonstrate *Strickland* prejudice, a petitioner must show how the uncalled witnesses' testimony would have been beneficial under the circumstances of the case." Counsel will not be found ineffective for failing to call a witness "unless the petitioner can show that the witness's testimony would have been helpful to the defense. . . ."

Id. at 12-13 (quoting *Commonwealth v. Matias*, 63 A.3d 807, 810-11 (Pa. Super. 2013)) (internal citations omitted).

Petitioner argued that Whitehawk's testimony would have established that Germany went to her house after the incident "brandishing a handgun and looking for [Petitioner]." *Id.* at 13 (citation and quotation marks omitted). However, trial counsel testified at the PCRA hearing that his investigator unsuccessfully attempted to contact Whitehawk on several occasions, and "that was discussed with [Petitioner]." *Id.* at 13-14 (quoting N.T. 01/22/14 at 33). Whitehawk has since passed away. *Id.* at 14. Thus, the Superior Court concluded Petitioner could not receive a new trial on this basis, because she is unavailable to testify. *Id.* Moreover, the PCRA Court credited trial counsel's testimony that he attempted to contact this witness, so Petitioner could not demonstrate ineffectiveness. *Id.*

Finally, Petitioner argued that Phillips "was a first responder to the scene of the shooting" and provided a statement to police that he "saw a guy standing on the sidewalk with a gun." *Id.* (citation and quotation marks omitted). The Superior Court explained that Petitioner's *pro se* PCRA petition requested that the Commonwealth provide him with Phillips' statement, but the record revealed no other reference to Phillips. *Id.* The Superior Court noted that Attorney Hilles' *Turner/Finley* letter gave "no indication [that Petitioner] brought this witness to counsel's attention." *Id.* Attorney Hilles' petition to withdraw explained why each of the claims urged by Petitioner lacked merit; absent from the petition was any discussion of trial counsel's failure to

call Phillips, supporting the inference that the issue had not been brought to counsel's attention. *Id.* at 14-15. Moreover, Petitioner's *pro se* appellate brief stated that Phillips' police statement could be found in the reproduced record at page 17, but the Superior Court found no page 17, and no statement by Phillips, in the reproduced record. *Id.* at 15. Thus, "any issue with respect to Larry Phillips" was waived. *Id.*

The Superior Court concluded its opinion by noting:

> "A claim of ineffectiveness generally cannot succeed through comparing, in hindsight, the trial strategy employed with alternatives not pursued." Furthermore, "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." While it may look now to [Petitioner] that trial counsel should have pursued a self-defense theory in hopes that [Petitioner's] conviction would be reduced to voluntary manslaughter, at the time of trial counsel's investigation, the evidence was not there to support such a defense.

Muir, No. 1970 EDA 2014, slip op. at 18 (citations omitted).

Here, Petitioner contends that counsel ineffectively failed to present an imperfect self-defense theory, and failed to investigate, interview, and present witnesses. As discussed above, a claim of ineffectiveness is governed by *Strickland*: "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." 466 U.S. at 691. Counsel is not required to interview every possible witness; "counsel [i]s simply required to exercise reasonable professional judgment in deciding whether to interview [a witness]." *Lewis v. Mazurkiewicz*, 915 F.2d 106, 113 (3d Cir. 1990).

Petitioner has not established that the Superior Court's adjudication of his claims was unreasonable, or that it was based on an unreasonable determination of the facts. The Superior Court found that the evidence simply did not support an imperfect self-defense theory, noting

that Petitioner did not inform trial counsel that he saw Germany with a firearm that night, and three Commonwealth witnesses testified that Germany did not have a firearm that night. *Muir*, No. 1970 EDA 2014, slip op. at 11-12, 18. Therefore, the Superior Court reasonably concluded that counsel was not ineffective for failing to pursue this theory, or for failing to request an imperfect self-defense charge. *See Lewis v. Horn*, 581 F.3d 92, 108 (3d Cir. 2009) (counsel was not ineffective for failing to pursue theory of self-defense when, *inter alia*, "the testimony of the only witness who observed the entire altercation between [petitioner and the victim] would have directly contradicted a theory of self-defense."); *Durham v. Varano*, No. 11-719, 2015 WL 5022717, at *8 (W.D. Pa. Aug. 24, 2015) (counsel was not ineffective for failing to request an alibi instruction when alibi defense was not part of trial strategy); *Rice v. Kerestes*, No. 11-1174, 2012 WL 1106875, at *4-6 (E.D. Pa. Mar. 30, 2012) (counsel was not ineffective for failing to investigate and present a self-defense case when evidence supported misidentification defense and witness statements did not support self-defense claim). Moreover, because counsel did not pursue an imperfect self-defense theory at trial, counsel was not ineffective for failing to present Petitioner's testimony in support of this non-viable theory. In fact, having Petitioner testify in support of a self-defense theory would have been inconsistent with the misidentification defense that was actually pursued.

Petitioner's claim regarding counsel's failure to interview and present testimony from Whitehawk similarly lacks merit. The PCRA Court credited counsel's testimony that his investigator tried to contact Whitehawk multiple times, but was unsuccessful. This Court must defer to that credibility determination. *See* 28 U.S.C. § 2254(e)(1); *Campbell*, 209 F.3d at 290; *Dicker*, 2011 WL 286090, at *6. In light of that finding, the Superior Court reasonably concluded that counsel was not ineffective for failing to interview and present Whitehawk. *See*

McGahee v. United States, 570 F. Supp. 2d 723, 734 (E.D. Pa. 2008), *aff'd*, 370 F. App'x 274 (3d Cir. 2010) (suggesting that if counsel "had made even cursory attempts to contact [potential] witnesses, to find their phone numbers, and failed," counsel's performance may not have been found deficient); *Porter v. Horn*, 276 F. Supp. 2d 278, 352 (E.D. Pa. 2003) (petitioner did not establish that counsel performed deficiently when counsel was unsuccessful in his attempts to contact her through his hired investigator).

Finally, the Superior Court relied on an independent and adequate rule in concluding any claims regarding Phillips were waived.[10] The Pennsylvania Rules of Appellate Procedure mandate that an appellant's brief "direct the court's attention to the relevant section of the record necessary to assess a claim." *Commonwealth v. Lesko*, 15 A.3d 345, 401 (Pa. 2011) (citing Pa. R.A.P. 2119; Pa. R.A.P. 2132). Specifically, Rule 2119(c) states, "If reference is made to the pleadings, evidence, . . . or any other matter appearing in the record, the argument must set forth, in immediate connection therewith, or in a footnote thereto, a reference to the place in the record where the matter referred to appears (see Pa. R.A.P. 2132)."[11] Pa. R.A.P. 2119(c). Although the court did not specifically identify Rule 2119, it found this claim waived because Petitioner did not provide a copy of Phillips' statement in the reproduced record. *Muir*, No. 1970 EDA 2014, slip op. at 15. This is an independent and adequate state procedural rule. *See Alston v. Gilmore*, No. 14-6439, 2016 WL 7493979, at *11 (E.D. Pa. Aug. 16, 2016), *report and recommendation*

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[10] The Superior Court cited an additional reason as well: besides a single reference in Petitioner's *pro se* PCRA petition, the record contained "no other reference to Larry Phillips." *Muir*, No. 1970 EDA 2014, slip op. at 14.

[11] Rule 2132 similarly provides, in relevant part, "References in briefs to parts of the record appearing in a reproduced record filed with the brief of the appellant (see Rule 2154(b) (large records)) shall be to the pages in the reproduced record where those parts appear, *e.g.* 'R. 26a.'" Pa. R.A.P. 2132.

adopted, No. 14-6439, No. 2016 WL 7491731 (E.D. Pa. Dec. 30, 2016); *Gibson v. Beard*, No. 10-445, 2015 WL 10381753, at *30 (E.D. Pa. July 28, 2015), *report and recommendation adopted*, 165 F. Supp. 3d 286 (E.D. Pa. 2016).

Because the Superior Court invoked an independent and adequate state rule in finding waiver, Petitioner's claim regarding Larry Phillips is procedurally defaulted. The Court cannot review the merits of this claim unless Petitioner establishes cause and prejudice or a fundamental miscarriage of justice. He alleges cause and prejudice, arguing that PCRA counsel abandoned him and his claims, and thus, this Court should review his claim pursuant to *Martinez v. Ryan*, 566 U.S. 1 (2012).[12] (Mem. of Law 25-26, ECF No. 19-1).

Martinez recognized a "narrow exception" to the general rule that attorney errors in collateral proceedings do not establish cause to excuse a procedural default, holding, "[i]nadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." 566 U.S. at 9. To successfully invoke the *Martinez* exception, a petitioner must satisfy two factors: that the underlying, otherwise defaulted, claim of ineffective assistance of trial counsel is "substantial," meaning that it has "some merit," and that petitioner had "no counsel" or "ineffective" counsel during the initial phase of the state collateral review proceeding. *Id.* at 14, 17; *see also Glenn v. Wynder*, 743 F.3d 402, 410 (3d Cir. 2014). Both prongs of *Martinez* implicate the controlling standard for ineffectiveness claims articulated in *Strickland*: (1) that counsel's performance was deficient; and (2) the deficient performance prejudiced the defense. 466 U.S.at 687.

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[12] Petitioner also argues, "[T]he state court could have easily advised Petitioner that [Phillips' statement] had not been attached as Petitioner had indicated so that Petitioner could[ ] remedy the defect. It would be manifestly unjust not to permit federal review of this claim on that basis." (Mem. of Law 26, ECF No. 19-1). Petitioner presents no case law to support the assertion that an independent and adequate state rule can be disregarded simply because the state court *could have* informed Petitioner of a defect, so the Court will not address this contention.

Petitioner has not demonstrated that he had ineffective counsel during the initial phase of his PCRA proceeding, and thus, procedural default cannot be excused under *Martinez*. Attorney Hilles represented Petitioner through PCRA proceedings, and thereafter, filed a motion to withdraw, along with a *Turner/Finley* Letter stating "there are no other issues of arguable merit to support the filing of an amended motion." (Pet. to Withdraw as Counsel, ECF No. 5-81). The PCRA Court granted Attorney Hilles' motion to withdraw, and agreed that Petitioner's claims lacked merit. (Order, ECF No. 5-95; Order, ECF No. 5-99; Op. 9-10, ECF No. 5-108). Although the Superior Court found the PCRA Court lacked jurisdiction to grant Attorney Hilles' motion to withdraw, and Petitioner argued that Attorney Hilles abandoned him on appeal, the Superior Court "remedied that situation . . . by remanding the case for appointment of new counsel." *Muir*, No. 1970 EDA 2014, slip op. at 4-5, 17-18; *see also id.* at 18 (concluding Petitioner's claims about Attorney Hilles' performance "are moot"). Attorney Hilles' filing of a no-merit letter does not constitute deficient performance. *See Davis v. Cameron*, No. 15-4855, 2016 WL 4072030, at *5 (E.D. Pa. Apr. 15, 2016), *report and recommendation adopted sub nom. Davis v. Superintendent Cameron*, No. 15-4855, 2016 WL 4045305 (E.D. Pa. July 27, 2016) (PCRA counsel was not ineffective for filing a *Finley* letter that was accepted by the PCRA Court); *Edwards v. Walsh*, No. 13-1010, 2013 WL 4457365, at *1 n.1 (E.D. Pa. Aug. 21, 2013) (same).

In any event, the underlying ineffective assistance of trial counsel claim is not substantial. Trial counsel reasonably concluded that pursuing a misidentification defense was the best defense strategy. That reasonable decision rendered interviewing and presenting Phillips, who arrived on the scene after the shooting, unnecessary. *See Strickland*, 466 U.S. at 691 (counsel has a duty to either perform a reasonable investigation or to make a reasonable decision that

renders particular investigations unnecessary). Moreover, Phillips' police statement simply stated that he "saw a person on the sidewalk with a gun, walking towards the car" and Phillips assumed the person with the gun "was with the guy who was shot." (Statement of Larry Phillips, ECF No. 19-2). However, while Petitioner contends that he saw Germany with a firearm prior to the shooting, Phillips' statement puts a firearm in the hands of someone other than Germany – a male unknown to Phillips, who he described as "about 5' tall, about 130-140 lbs., light complexion, maybe a black male or a Hispanic." (*See id.*). Thus, Phillips' statement is inconsistent with Petitioner's imperfect self-defense theory that Germany had a firearm, and is inconsistent with testimony of Germany, Beasley, and Nixon, that no one in the car had a firearm on the night in question. (N.T. 08/19/04 at 82-83, 93-94, 162-63, 167-68, 180:7-18; N.T. 08/20/04 at 57:2-13). Because PCRA counsel was not ineffective, and because Petitioner's underlying ineffective assistance of trial counsel claim is not substantial, Petitioner cannot avail himself of *Martinez*' narrow exception.

The Court respectfully recommends that Grounds B and C be denied as meritless and Ground D be denied as procedurally defaulted.

D. Ground E: Ineffective Assistance for Failing to Interview and Call Character Witnesses

In Ground E, Petitioner avers that counsel was ineffective for failing to interview or present Curtis Jack, Jamel Harris, and Joseph Broderick as character witnesses. (Hab. Pet. 16, ECF No. 19; Mem. of Law 39-43, ECF No. 19-1). The Commonwealth responds that this claim lacks merit. (Resp. 15, ECF No. 26). The Court agrees that this claim is meritless.

The PCRA Court found that "the issue of trial counsel's failure to call character witnesses was wholly nonexistent. Petitioner in no way testified that he gave trial counsel the name of anyone who might have testified to as to his good character." (Op. 8, ECF No. 5-108). It thus

construed this claim as alleging that trial counsel failed to call Patricia Whitehawk, a claim which it found lacked merit. (*Id.* at 9).

On PCRA appeal, the Superior Court found Petitioner's claim that trial counsel ineffectively failed to investigate and present character witnesses was meritless. *Muir*, No. 1970 EDA 2014, slip op. at 15-17. The Superior Court explained:

> The failure to call character witnesses does not constitute *per se* ineffectiveness. In establishing whether defense counsel was ineffective for failing to call character witnesses, appellant must prove: (1) the witness existed; (2) the witness was available to testify for the defense; (3) counsel knew of, or should have known of, the existence of the witness; (4) the witness was willing to testify for the defense; and (5) the absence of the testimony of the witness was so prejudicial as to have denied the defendant a fair trial.

Id. at 15 (quoting *Commonwealth v. Treiber*, 2015 WL 4886374, at *23 (Pa. Super. Aug. 17, 2015)). The Pennsylvania Rules of Evidence "are specific as to what type of character evidence may be presented at trial." *Id.* As a general rule, character evidence may not be admitted to show that an individual acted in conformity with that character on a particular occasion; however, a criminal defendant may offer evidence of his character traits that are pertinent to the crimes charged, and the Commonwealth may rebut the same. *Id.* at 15-16 (citations omitted). Evidence of a criminal defendant's good character must be limited to his general reputation. *Id.* at 16 (citations omitted). Such evidence "must be established by testimony of witnesses as to the community opinion of the individual in question, not through specific acts or mere rumor." *Id.* at 17 (citations omitted).

Petitioner provided identical affidavits from his potential character witnesses, which stated: "2. That I do know his past which involve[s] some problems with the law but that I do not judge him because of that, [sic] I base my decision of his character on who he is as a person

that I personally know." *Id.* at 17. Thus, the Superior Court concluded that the character witness testimony would have been "irrelevant and inadmissible." *Id.* The affidavits were "void of any information that [Petitioner] has a reputation for being law abiding and peaceful." *Id.* Therefore, the absence of their testimony "was [not] so prejudicial as to have denied the defendant a fair trial." *Id.* (quoting *Treiber*, 2015 WL 4886374, at *23).

Petitioner has not demonstrated that the Superior Court's adjudication of this claim was an unreasonable application of *Strickland*. He challenges the Superior Court's finding that the witnesses' testimony would have been irrelevant and inadmissible. (Mem. of Law 41, ECF No. 19-1). However, the Superior Court's finding on this point is a determination of state evidentiary law that is binding on this court. *See Bradshaw v. Richey*, 546 U.S. 74, 76 (2005) ("We have repeatedly held that a state court's interpretation of state law . . . binds a federal court sitting in habeas corpus."); *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) ("[I]t is not the province of a federal habeas court to re-examine state-court determinations on state-law questions."); *Lewis v. Wilson*, 748 F. Supp. 2d 409, 427 (E.D. Pa. 2010), *aff'd*, 423 F. App'x 153 (3d Cir. 2011). Because the testimony would have been inadmissible, the Superior Court reasonably concluded that Petitioner did not establish prejudice from counsel's failure to interview or present these witnesses. *See Dicks v. United States*, No. 03-266, 2010 WL 11484356, at *5 (E.D. Pa. Sept. 8, 2010) (finding § 2255 petitioner suffered no prejudice from counsel's failure to obtain impeachment evidence that was inadmissible).

The Court respectfully recommends denying relief on this claim.

IV. CONCLUSION

For the foregoing reasons, I respectfully recommend that the petition for writ of habeas

corpus be DENIED without an evidentiary hearing and without the issuance of a certificate of appealability.

Therefore, I respectfully make the following:

RECOMMENDATION

AND NOW this 12th day of January, 2018, it is respectfully RECOMMENDED that the petition for writ of habeas corpus be DENIED without an evidentiary hearing and without the issuance of a certificate of appealability.

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

BY THE COURT:

/s/ Lynne A. Sitarski
LYNNE A. SITARSKI
UNITED STATES MAGISTRATE JUDGE