

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

ANDRE J. BRODEUR, JR.,	:	
Petitioner,	:	
	:	
v.	:	CIVIL ACTION
	:	
GEORGE N. PATRICK, SUPERINTENDENT, et al.,	:	NO. 03-6092
Respondents.	:	
	:	

MEMORANDUM & ORDER

YOHN, J.

May ____, 2005

Presently before the court is Andre Brodeur's *pro se* petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner is currently a prisoner at the State Correctional Institution in Houtzdale, Pennsylvania. United States Magistrate Judge M. Faith Angell filed a report and recommendation recommending denial of the petition, and petitioner filed objections to the report and recommendation ("Objections"). For the following reasons, I will overrule petitioner's objections, adopt the report and recommendation, and deny the petition.

I. BACKGROUND¹

On February 8, 1996, petitioner Andre Brodeur was arrested by the Criminal Investigation Division of the Office of the District Attorney of Delaware County ("CID") following an

¹The facts in this section are substantially similar to the facts set forth in the state court records and the Magistrate Judge's Report and Recommendation. *See Commonwealth v. Brodeur*, No. 118-96 (C.P. Delaware County, Criminal Division Jun. 27, 1997); *Commonwealth v. Brodeur*, No. 4067 Phila. 1996 (Pa. Super Ct. Jun. 24, 1998); *Commonwealth v. Brodeur*, No. 118-96 (C.P. Delaware County Jun. 27, 2000); *Commonwealth v. Brodeur*, No. 522 EDA 2000 (Pa. Super. Ct. March 18, 2002); *Brodeur v. Patrick*, 2004 U.S. Dist. LEXIS 14310 (E.D. Pa. July 19, 2004).

investigation into a scheme to “replate”² and resell stolen vehicles. The CID had received information about petitioner from a confidential informant in January 1996. The informant reported that six months earlier he observed various materials associated with replating in petitioner’s home and that petitioner’s personal vehicle, a maroon and silver Ford Bronco, was stolen and replated. After running a background check on petitioner and the Bronco,³ the CID set up a surveillance of petitioner’s home.

On the day of petitioner’s arrest, officers from the Upper Darby Police Department in conjunction with the CID stopped petitioner in his Bronco and asked for his license and registration. After stopping petitioner, a detective with the CID observed that the steering column of the Bronco was damaged and the public VIN plate on the dashboard was scratched. These conditions are common in stolen vehicles. Next, the detective directed petitioner to park in a nearby parking lot. After petitioner parked his vehicle, the detective put him in an unmarked police car.⁴ At this point, the detective asked for permission to search the Bronco and petitioner

²The Pennsylvania Superior Court described replating as “the illicit practice of replacing the documentation of a stolen car with the legal documentation from a legitimately obtained vehicle.” *Brodeur*, No. 4067 Phila. 1996, slip op. at 1 n.1.

³The Department of Transportation reported that a Bronco with the same registration number had been severely damaged in a traffic accident. The Bronco involved in the accident was blue or black, not maroon and silver like petitioner’s vehicle. *Brodeur*, No. 118-96, slip op. at 6. Replaters often purchase a damaged vehicle that is beyond repair and use its title, registration, and VIN plates for a stolen vehicle. *Brodeur*, No. 4067 Phila. 1996, slip op. at 1 n.1. The criminal check of petitioner revealed that he “had a lengthy criminal history including multiple convictions for possession of stolen vehicles and altering serial numbers on vehicles.” *Brodeur*, No. 118-96, slip op. at 6–7.

⁴The state court opinions do not describe these potentially significant details. Nonetheless, at the suppression hearing, the detective testified that petitioner consented to the search of his vehicle while sitting in the backseat of the detective’s unmarked car. (N.T. Suppression Hr’g, July 29, 1996 at 36, 106.) This testimony was not disputed and the PCRA

consented. While searching petitioner's vehicle, the officers discovered that the confidential VIN number did not match the public VIN number, which also suggested that the vehicle was stolen. After confirming that the Bronco was stolen with the Pennsylvania Department of Transportation, the detective placed petitioner under arrest.

After arresting petitioner, the detective requested permission to search petitioner's house. Petitioner denied the request. That same day, the detective prepared an affidavit for a search warrant to search petitioner's house. A district justice⁵ issued a warrant and the CID executed a search on February 9. The search uncovered materials associated with replating, including public VIN plates, vehicle titles, and driver's licences, along with one pound of methamphetamine and a .22 caliber automatic weapon.

Petitioner was charged with various offenses related to trafficking stolen vehicles.⁶ With assistance of counsel, petitioner filed a motion to suppress evidence obtained pursuant to the search of his vehicle and the search of his home. Counsel argued that the search of petitioner's vehicle was illegal because the initial stop was illegal and the search of petitioner's home was illegal because the affidavit of probable cause was inadequate. Counsel did not challenge the

court found the detective credible. *See Brodeur*, No. 118-96, slip op. at 4 n.3.

⁵In 2004, the title "district justice" was officially changed to "magisterial district judge." *See* 2004 Pa. Laws 207. However, because the authorities that issued search warrants were known as "district justices" at the time that the warrant to search petitioner's home was issued, I will refer to the issuing authority as a "district justice."

⁶Petitioner was also charged with possession with intent to deliver one pound of methamphetamine. *Brodeur*, No. 118-96, slip op. at 1.

validity of petitioner's consent to search his vehicle on the ground that he was illegally detained.⁷ The Court of Common Pleas of Delaware County addressed these arguments on July 29 and 30, 1996, at a suppression hearing. The court concluded that both searches were proper and denied petitioner's motion. *Commonwealth v. Brodeur*, No. 118-96, slip op. at 12, 20 (C.P. Delaware County, Criminal Division Jun. 27, 1997). On July 30, following a non-jury trial, the court found petitioner guilty on all but one count, and on September 20, 1996, the court sentenced petitioner to an aggregate term of incarceration of not less than eight and one half years and no more than seventeen years. *Id.* at 2.

On October 17, 1996, petitioner, who was still represented by counsel from the suppression hearing, appealed the denial of his motions to suppress to the Pennsylvania Superior Court.⁸ The Superior Court affirmed the trial court's judgment in an opinion dated June 24, 1998, and on February 2, 1999, the Pennsylvania Supreme Court denied *allocatur* review. *Commonwealth v. Brodeur*, No. 4067 Phila. 1996, slip op. at 28 (Pa. Super Ct. Jun. 24, 1998); *Commonwealth v. Brodeur*, 736 A.2d 602 (Pa. 1999).

On August 12, 1999, petitioner filed a petition for post conviction collateral relief under

⁷Petitioner also did not raise this issue on direct appeal. Nonetheless, in the Court of Common Pleas's opinion issued pursuant to Pa. R. App. P. 1925(a), the court concluded that to the extent petitioner suggested that he was illegally detained, this argument was without merit under *Commonwealth v. Ellis*, 662 A.2d 1043 (Pa. 1995). *Brodeur*, No. 119-96, slip op. at 12 n.4. In *Ellis*, the court followed *United States v. Sharpe*, 470 U.S. 675 (1985), and concluded that an investigative detention of the defendant did not ripen into an arrest because "the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant." 662 A.2d at 1048-49 (quoting *Sharpe*).

⁸Petitioner also appealed the trial court's refusal to order the Commonwealth to disclose the identity of the confidential informant. *Brodeur*, No. 4067 Phila. 1996, slip op. at 26.

Pennsylvania’s Post Conviction Relief Act (“PCRA”), 42 Pa. Cons. Stat. § 9541, *et seq.*

Petitioner raised twelve separate claims for ineffective assistance of counsel.⁹ Among these claims, petitioner contended that counsel was ineffective because he failed to raise critical facts in connection with the consent search of petitioner’s vehicle and failed to call petitioner to testify to these facts.¹⁰ (*Commonwealth v. Brodeur*, No. 522 EDA 2000, slip op. at 7–8 (Pa. Super. Ct. March 18, 2002); *Commonwealth v. Brodeur*, No. 118-96, slip op. at 2 (C.P. Delaware County Jun. 27, 2000)). Specifically, petitioner alleged that counsel failed to establish that he was frisked and placed in the back seat of a police car, that he was surrounded by eight armed police officers, and that the officers retained his license and registration during the time he gave consent to search his vehicle.¹¹ *Brodeur*, No 522 EDA 2000, slip op. at 7. Additionally, petitioner claimed that counsel was ineffective because he failed to object under *Brady v. Maryland*, 373 U.S. 83 (1963),¹² when the prosecution did not disclose the identity of the individual who was allegedly responsible for stealing and replating petitioner’s Bronco.¹³ *Id.* at 9. In his PCRA petition, petitioner did not raise a separate *Brady* claim challenging the prosecution’s failure to disclose this supposedly exculpatory information.

⁹Petitioner also challenged the legality of his sentence. *Brodeur*, No. 522 EDA 2000, slip op. at 10.

¹⁰Petitioner made this argument in claims I, III, and VIII of his PCRA petition.

¹¹At the time of the PCRA hearing, Petitioner alleged that his license had still not been returned. (N.T. PCRA Hr’g, Oct. 29, 1999 at 13.)

¹²In *Brady*, the Supreme Court held 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.” 373 U.S. 83, 87 (1963).

¹³Petitioner made this argument in claim XI of his PCRA petition.

The PCRA court appointed counsel and counsel filed a “no merit letter” on October 26, 1999. *Brodeur*, No 118-96, slip op. at 2. On October 28 and November 30, 1999, the PCRA court held an evidentiary hearing to evaluate petitioner’s PCRA claims with appointed counsel representing petitioner. At the hearing, petitioner’s lawyer at the suppression hearing testified that at the time he was vaguely aware of the factual circumstances surrounding the consent search of petitioner’s vehicle. (N.T. PCRA Hr’g, Nov. 30, 1999 at 10, 14–15.) Counsel testified that he chose not to emphasize these facts because “the consent issue . . . was the weakest of all of the issues that we had.” (*Id.* at 16.) Instead, he focused on the stop itself. *See id.* at 8 (“[T]he issue as I saw it at the time was that we alleged that the police and the Commonwealth had no right to stop his vehicle.”) Counsel also testified that he did not call petitioner as a witness because his testimony was unnecessary. (*Id.* at 8.)

Petitioner also testified at the hearing. When petitioner was asked about the man purportedly responsible for replating the Bronco, he admitted that despite the prosecution’s failure to disclose the man’s name, petitioner already knew his identity. (N.T. PCRA Hr’g, Oct. 28, 1999 at 14.)

The court concluded that the PCRA petition was meritless and denied the petition in an order dated December 22, 1999. *Brodeur*, No. 118-96, slip op. at 4. Petitioner appealed the order to the Superior Court of Pennsylvania. Again, petitioner’s counsel filed a “no merit letter.” *Brodeur*, No 522, slip op. at 1. The Superior Court affirmed the lower court on March 18, 2002, *id.*, slip op. at 12, and on November 6, 2002, the Pennsylvania Supreme Court denied petitioner’s application for *allocatur* review. *See Commonwealth v. Brodeur*, 812 A.2d 1227 (Pa. 2002).

Petitioner signed and dated his petition for federal habeas corpus relief on October 30,

2003, and it was filed with the court on November 5, 2003. The petition raises four issues. First, petitioner claims that the search of his home was an unconstitutional search and seizure under the Fourth Amendment of the United States Constitution because the issuing district justice went beyond the four corners of the affidavit to issue a search warrant.¹⁴ *Brodeur v. Patrick*, 2004 U.S. Dist. LEXIS 14310, at *12 (E.D. Pa. July 19, 2004). Second, petitioner contends that the search of his vehicle was unconstitutional under the Fourth Amendment because his consent was invalid and his subsequent arrest was illegal. *Id.* Third, petitioner argues that the prosecution's failure to disclose the identity of the individual who allegedly stole and replated petitioner's Bronco violated his right to due process under *Brady*. *Id.* Last, petitioner asserts that he was denied effective assistance of counsel in violation of the Sixth Amendment because his lawyer failed to raise critical facts at the suppression hearing and failed to object when the prosecution did not disclose the name of the individual responsible for replating the Bronco.¹⁵ *Id.*

I referred this matter to Magistrate Judge Angell and on July 21, 2004, she filed her report and recommendation.¹⁶ First, she found that petitioner failed to file his petition within the one-year statute of limitations set forth in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), but decided that the court could not dismiss the petition on these grounds because

¹⁴Petitioner claims that the trial judge went beyond the four corners of the affidavit. However, the actual issuing authority of the search warrant was a district justice. *Brodeur*, No. 4067 Phila. 1996, slip op. at 18–26.

¹⁵Petitioner failed to allege ineffective assistance of counsel in connection with the prosecution's failure to disclose favorable evidence in his initial petition, but in his rebuttal to the Commonwealth's answer he made this claim. *Brodeur*, 2004 U.S. Dist. LEXIS 14310, at *14.

¹⁶This action was placed in civil suspense on September 1, 2004 when petitioner filed an appeal with the Third Circuit. That appeal has since been dismissed.

the Commonwealth had waived this defense. *Id.* at *14–16. Next, the magistrate judge concluded that petitioner’s two Fourth Amendment claims are barred under *Stone v. Powell*, 428 U.S. 465 (1976), because petitioner was provided a full and fair opportunity to litigate these claims in state court. *Id.* at *22–*24. She also concluded that petitioner’s *Brady* claim is barred because petitioner never raised the issue in state court and it is thereby procedural defaulted. *Brodeur*, 2004 U.S. Dist. LEXIS 14310, at *18. The magistrate judge reached the merits of petitioner’s final claim, which raises two ineffective assistance of counsel arguments. She concluded that petitioner’s counsel was not deficient for failing to raise certain facts at the suppression hearing because the record supports the superior court’s determination that the searches of petitioner’s vehicle and home were legal, and counsel’s performance cannot be deemed deficient for refusing to raise a baseless claim. *Id.* *27. She also determined that because petitioner admitted that he already knew the identity of the man who allegedly stole the Bronco, petitioner’s counsel was not ineffective for failing to object when the prosecution did not disclose this information. *Id.* at *28–*29.

Following the magistrate judge’s report and recommendation, the Commonwealth moved to amend its answer to the petition to raise the statute of limitations defense. Petitioner opposed the amendment, arguing that he would be unduly prejudiced if the Commonwealth was allowed to assert the defense. Nonetheless, after reviewing the Third Circuit’s recent decision in *Long v. Wilson*, 393 F.3d 390 (3d Cir. 2004),¹⁷ I concluded that petitioner would not suffer undue

¹⁷In *Long*, the court held that if a state fails to assert the AEDPA statute of limitations defense in its answer, it may amend its answer to raise the defense after a magistrate judge has raised the issue *sua sponte* if it does not unduly prejudice the habeas petitioner. *Id.* at 401, 403. Under *Long*, “prejudice” “turns on such factors as how late in the proceedings the defense was raised, whether the petitioner had an opportunity to respond, and whether the respondent acted in

prejudice if the Commonwealth raised ADEPA's statute of limitations defense and I permitted the Commonwealth to amend its answer.

II. STANDARD OF REVIEW

Where a habeas petition has been referred to a magistrate judge for a Report and Recommendation pursuant to 28 U.S.C. § 636(b)(1)(B), this court reviews “those portions of the report or specified proposed findings or recommendations to which objection is made” *de novo*. *Id.* at § 636(b). After conducting this review, I “may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate.” *Id.*

III. DISCUSSION

A. Timeliness

Under AEDPA,¹⁸ a state prisoner seeking federal habeas relief must file his habeas petition within one year of the date on which his judgment of conviction becomes final. 28 U.S.C. § 2244(d)(1). ADEPA provides for tolling of the statute of limitations for “the time during which a properly filed application for State post-conviction or other collateral review . . . is pending . . .” *Id.* at § 2244(d)(2).

Petitioner's conviction became final on May 2, 1999, upon expiration of his time to seek

bad faith.” *Id.* at 401 (citations omitted). I concluded that although the Commonwealth waited over seventeen months to raise the statute of limitations defense, petitioner would not suffer undue prejudice because I gave petitioner an opportunity to respond to the Commonwealth's amended answer and because there was no evidence that the Commonwealth acted in bad faith.

¹⁸AEDPA governs this petition because it governs all §2254 habeas petitions filed on or after April 24, 1996. *See Lindh v. Murphy*, 521 U.S. 320, 327 (1997).

direct review in the United States Supreme Court by writ of *certiorari*. See *Kapral v. United States*, 166 F.3d 565, 575 (3d Cir. 1999). Petitioner’s one-year statute of limitations ran for 100 days until August 12, 1999, when petitioner filed his petition for relief under the PCRA. See 28 U.S.C. § 2244(d)(2). The limitations period was tolled during the pendency of petitioner’s PCRA proceedings until November 6, 2002, when the Pennsylvania Supreme Court denied petitioner’s application for *allocatur* review. When the statute of limitations began to run again on November 7, 2002, petitioner had 265 days remaining to file a federal habeas petition. Petitioner filed his petition on October 30, 2003,¹⁹ 344 days after the statute began to run for a second time. Hence, the petition is time barred. Further, even I declined to apply AEDPA’s time-bar to the petition as petitioner suggests, denial would be proper for the following reasons.

B. Exhaustion and procedural default

AEDPA requires state prisoners to exhaust claims in state court before seeking habeas relief in federal court. 28 U.S.C. § 2254(b)(1)(A). “If, however, state procedural rules bar a petitioner from seeking further relief in state courts, the exhaustion requirement is satisfied because there is ‘an absence of available State corrective process.’” *Lines v. Larkins*, 208 F.3d 153, 160 (3d Cir. 2000) (quoting 28 U.S.C. 2254(b)(1)(B)(i)) (additional citation omitted). Under these circumstances, federal courts consider the claims procedurally defaulted and may not reach the merits unless the petitioner can establish “cause and prejudice” or a “fundamental miscarriage of justice” *Id.*

¹⁹The petition was actually filed on November 5, 2002. However under the prison mailbox rule, petitioner’s petition is considered filed on October 30, the day that he delivered it to prison officials for mailing to the district court. See *Burns v. Morton*, 134 F.3d 109, 113 (3d Cir. 1998).

In petitioner's third ground for habeas relief, he asserts that the Commonwealth deprived him of due process under *Brady*, by failing to disclose the identity of the individual who allegedly stole and replated his Ford Bronco. The magistrate judge found that petitioner never raised a *Brady* issue in state court and concluded that the claim is procedurally defaulted. *Brodeur*, 2004 U.S. Dist. LEXIS 14310, at *19.

In his third objection, petitioner disputes the magistrate judge's finding and contends that he argued a *Brady* violation in every motion he presented in state court. (Objections at 7.) Petitioner proceeds to cite various briefs that he submitted in the course of his state court proceedings. (*Id.*) After reviewing these documents, it appears that petitioner did raise *Brady* in his PCRA petition. However, petitioner only cited *Brady* in the context of an ineffective assistance of counsel claim. *See* PCRA Pet. at 3c ("Defendant was denied his right to effective assistance of counsel and due process under the constitution of this Commonwealth and/or United States when his suppression hearing and/or trial counsel failed to object and/or challenge the Commonwealth's *Brady* violation . . .") Because petitioner failed to assert an independent *Brady* claim, this claim is procedurally defaulted under 42 Pa. Cons. Stat. § 9545(b), which provides for a one-year statute of limitations for PCRA petitions.²⁰

Next, I must determine whether petitioner can show "cause and prejudice" or a "fundamental miscarriage of justice" to excuse the procedural default. "The 'cause' required to

²⁰Even if the state courts had construed petitioner's PCRA petition to include an independent *Brady* claim, they probably would have held that petitioner waived this claim under 42 Pa. Cons. Stat. § 9544(b), because he failed to raise it at trial or on direct appeal. *See Commonwealth v. Pursell*, 724 A.2d 293, 306 (Pa. 1999) ("With respect to the purported *Brady* violation, this issue is waived for Appellant's failure to raise it at trial or on direct appeal . . .") (citing 42 Pa. Cons. Stat. § 9544)

excuse a procedural default must result from circumstances that are ‘external to the petitioner, something that cannot fairly be attributed to him’” *Lines*, 208 F.3d at 166. (quoting *Coleman v. Thompson*, 501 U.S. 722, 753 (1991)). Petitioner charges that his counsel was ineffective for failing to object to the prosecution’s *Brady* violation. “Ineffective assistance of counsel . . . is cause for a procedural default.” *Murray v. Carrier*, 477 U.S. 478, 488 (1988). Thus, before I may decide whether petitioner has alleged sufficient “cause” to excuse the procedural default on his *Brady* claim, I must evaluate whether his counsel’s failure to object on *Brady* grounds was ineffective assistance of counsel.

To establish ineffective assistance of counsel, a defendant must show that: (1) his attorney’s performance was deficient, and (2) the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To show deficiency, a defendant must establish that counsel’s performance, “fell below an objective standard of reasonableness under prevailing professional norms.” *Buehl v. Vaughn*, 166 F.3d 163, 169 (3d Cir. 1999) (citing *Strickland*, 466 U.S. at 688.) To show prejudice, a defendant must establish that “counsel’s errors were so serious as to deprive him of a fair trial, a trial whose result is reliable.” *Strickland*, 466 U.S. at 687. Under *Strickland*, counsel is presumed to have acted within the range of “reasonable professional assistance,” and the defendant bears the burden of “overcoming the presumption that, under the circumstances, the challenged action ‘might be considered sound trial strategy.’” *Id.* at 689 (citation omitted).

Here, counsel’s performance was not deficient for failing to make a *Brady* objection

because there was no *Brady* violation.²¹ Under *Brady*, “the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material to either guilt or to punishment” 373 U.S. at 87. To establish a *Brady* violation, a defendant must show that (1) the evidence at issue is favorable, either because it is exculpatory or because it is impeaching; (2) the evidence was suppressed by the state, either willfully or inadvertently; and (3) the omission of this evidence prejudiced the defendant. *Strickler v. Greene*, 527 U.S. 263, 281–82 (1999). “[T]he government is not obliged under *Brady* to furnish a defendant with information which he already has or, with any reasonable diligence, he can obtain himself.” *United States v. Starusko*, 729 F.2d 256, 262 (3d Cir. 1984) (citation omitted). At the PCRA hearing, petitioner testified that at the time of the suppression hearing he knew the identity of the man who allegedly stole and replated the Bronco. Hence, there was no *Brady* violation because petitioner suffered no prejudice from the prosecution’s failure to disclose the man’s identity because petitioner already had this information. This means that counsel’s performance was not deficient because “counsel cannot be deemed ineffective for failing to raise a meritless claim.” *Werts v. Vaughn*, 228 F.3d 178, 203 (3d Cir. 2000) (citation omitted). Because petitioner’s counsel was not ineffective, petitioner cannot show “cause” to excuse the procedural default for his *Brady* claim.²²

²¹“Although the question of the merit of an underlying claim is not an explicit step under *Strickland*, [the Third Circuit has] held that it is a determinative factor in the ‘deficient performance’ prong of the *Strickland* analysis in at least some contexts.” *Rompilla v. Horn*, 355 F.3d 233, 249 n.9 (3d Cir. 2004) (citing *Parrish v. Fulcomer*, 150 F.3d 326, 328, where the court held that counsel was not ineffective for failing to raise a meritless claim).

²²Because petitioner has failed to show “cause” for the procedural default, I need not determine whether there was “prejudice.” See *Coleman v. Thompson*, 501 U.S. 722, 750 (1991).

Petitioner has not alleged a “fundamental miscarriage of justice,” which ordinarily requires a showing of “actual innocence.” *Schlup v. Delo*, 513 U.S. 298, 327 (1995). Hence, I will adopt the magistrate judge’s conclusion that petitioner’s *Brady* claim is procedurally defaulted and that the default has not been excused.

Petitioner has properly exhausted his Fourth Amendment claims because he raised them on direct appeal. He exhausted his ineffective assistance of counsel claims based on the alleged violations of the Fourth Amendment by raising them in his PCRA petition, when he was no longer represented by trial counsel. *See Commonwealth v. Griffin*, 644 A.2d 1167, 1170 (1994) (“In order to preserve claims of ineffectiveness of counsel under the PCRA, the claims must be raised at the earliest stage in the proceedings at which the allegedly ineffective counsel is no longer representing the claimant.”).

C. Petitioner’s Fourth Amendment claims and *Stone v. Powell*

In *Stone v. Powell*, 428 U.S. at 494, the Supreme Court held that “where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial.”²³ “The Court reasoned that the incremental benefit in deterring illegal police conduct by applying the exclusionary rule in a habeas proceeding did not outweigh the cost to society of excluding relevant, reliable evidence in a criminal prosecution.” *Gilmore v. Marks*, 799 F.2d 51, 54–55 (3d Cir. 1986). Thus, even if a

²³Although *Stone*’s holding might appear to preclude state defendants from obtaining federal court review of Fourth Amendment issues, the “opportunity for full and fair litigation” through the state courts would, of course, also include the right to petition the United States Supreme Court for a writ of certiorari after a decision by the state supreme court.

state court resolves a Fourth Amendment issue summarily or erroneously, *Stone* bars federal courts from hearing such claims on habeas review. *Marshall v. Hendricks*, 307 F.3d 36, 82 (3d Cir. 2002). Federal courts will only address Fourth Amendment claims on habeas review where “a structural defect in the system prevented [the] claim from being heard.” *Id.*

The petition raises two Fourth Amendment claims. Petitioner asserts that evidence obtained pursuant to the February 8, 1996 search of his vehicle and the February 9 search of his home was obtained illegally. The magistrate judge concluded that these claims are barred because the Pennsylvania courts provided petitioner with a full and fair opportunity to litigate them. *See Brodeur*, 2004 U.S. Dist. LEXIS 14310, at *22–*24.

Petitioner made two objections to the magistrate judge’s determination. First, he contends that the search of his home was illegal because the issuing district justice went out of the four corners of the affidavit to issue the search warrant and there was no evidence of ongoing criminal activity in the affidavit. (Objections 1–4.) On direct appeal, the Pennsylvania Superior Court addressed this very same argument. *See Commonwealth v. Brodeur*, No. 4067 Phila. 1996, slip op. at 24. (“We are cognizant of appellant’s claim that the issuing magistrate had no basis for concluding that appellant was engaged in ongoing criminal activity.”) Hence, I may not review this claim regardless of its merits.

In his second objection, petitioner argues that his arrest was illegal and that his consent to the search of his truck was invalid because he “was stopped by approximately eight (8) armed police officers,” [h]e was immediately removed from [his] vehicle and placed in the back seat of [a] police vehicle,” and the police retained “possession of [his] [d]rivers [l]icense and

other documents.” (Objections at 5–6.) The Court of Common Pleas thoroughly considered whether petitioner’s arrest was legal and the Superior Court affirmed this judgment. *See Commonwealth v. Brodeur*, No. 118-96, slip op. at 14 (“We are satisfied that under [the] circumstances, sufficient probable cause existed to justify arresting [d]efendant and charging him with theft and related offenses.”); *Commonwealth v. Brodeur*, No. 4067 Phila. 1996, slip op. at 28. Additionally, the Court of Common Pleas briefly addressed whether petitioner’s consent to search his vehicle was valid. *See Commonwealth v. Brodeur*, No. 118-96, slip op. at 13 (“Clearly this was an intelligent, voluntary, and knowing consent.”) None of the state courts acknowledged the facts that petitioner sets forth in his petition. Nonetheless, the Court of Common Pleas provided petitioner with an opportunity to adduce this evidence at the suppression hearing. Thus, petitioner was not deprived of a full and a fair opportunity to litigate the claim. Because petitioner received a full and fair opportunity to litigate his Fourth Amendment claims in state court, I will adopt the magistrate judge’s analysis and decline to review these issues.^{24, 25}

D. Petitioner’s Ineffective Assistance of Counsel Claims

²⁴If petitioner was unsatisfied with the state courts’ adjudication of his suppression issues, he could have petitioned for certiorari with the United States Supreme Court on direct appeal. *See Stone*, 428 U.S. at 495 n.38 (“[R]espondents were, of course, free to file a timely petition for certiorari prior to seeking federal habeas corpus relief.”)

²⁵ I will evaluate petitioner’s argument that his counsel failed to emphasize these critical facts and failed to call petitioner as a witness to testify to these facts as an ineffective assistance of counsel claim. *Stone*’s restriction on habeas review for Fourth Amendment claims does not extend to Sixth Amendment ineffective-assistance-of-counsel claims which are based on incompetent representation in connection with Fourth Amendment issues. *Kimmelman v. Morrison*, 477 U.S. 365, 382–83 (1986).

Petitioner's only remaining claims are for ineffective assistance of counsel. Petitioner makes two such claims. First, he contends that he was denied effective assistance of counsel because his lawyer failed to emphasize the circumstances surrounding the consent search of his vehicle. Second, petitioner argues that counsel was ineffective because did not object to the Commonwealth's supposed *Brady* violation. The Pennsylvania Superior Court reviewed these claims on PCRA appeal and affirmed the trial court's judgment on the merits. *See Brodeur*, No. 522 EDA 2000, slip op. at 7–10. After reviewing the superior court's decision, the magistrate judge concluded that petitioner was not entitled to relief under AEDPA on either of his ineffectiveness claim. In his final objection, petitioner repeats his initial allegations of ineffective assistance of counsel. (Objections at 8.)

1. *AEDPA Standards*

Under AEDPA, a prisoner is entitled to habeas relief where the state court proceedings “resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law,” or “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).

A state court decision is considered “contrary to” clearly established federal law where “the state court applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases” or “the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from [the] precedent.” *Williams v. Taylor*, 529 U.S. 362, 405–06 (2000). A state court decision involves an

“unreasonable application” of federal law where it “correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner’s case.” *Id.* at 407–08.

Federal courts will also grant habeas relief where a state court decision is “based on an unreasonable determination of the facts.” 28 U.S.C. § 2254(d)(2). Under AEDPA, “[f]actual determinations by state courts are presumed correct absent clear and convincing evidence to the contrary.” *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003) (citing 28 U.S.C. § 2254(e)(1)).

2. *Review of Petitioner’s Claims under AEDPA*

The relevant “clearly established” federal precedent for an ineffective assistance of counsel claim is *Strickland*. *See supra* Part III.B. Thus, under AEDPA, I must decide whether the Pennsylvania Superior Court’s decision was “contrary to” *Strickland*, “involved an unreasonable application” of *Strickland*, or “resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented.” 28 U.S.C. § 2254(d).

The superior court evaluated both of petitioner’s claims under the Pennsylvania standard for ineffective assistance of counsel. *See Brodeur*, No. 522 EDA 2000, slip op. at 7. Under that standard, a defendant must establish “(1) that the underlying claim has arguable merit, (2) that counsel’s conduct was without a reasonable basis designed to effectuate his or her client’s best interest, and (3) that counsel’s ineffectiveness prejudiced the appellant.” *Id.* (citing *Commonwealth v. Robinson*, 787 A.2d 152 (Pa. Super. Ct. 2001)). The Third Circuit has determined that this standard does not contradict the test articulated in *Strickland*. *See Werts v. Vaughn*, 228 F.3d 178, 204 (3d Cir. 2000). Hence, the superior court’s decision was not “contrary to” *Strickland*.

Additionally, the superior court's conclusion that petitioner was not denied effective assistance was not an "unreasonable application" of *Strickland*. In his first ineffectiveness claim, petitioner asserts that his counsel should have emphasized that the police retained his driver's license when he gave consent to search his vehicle because under *Florida v. Royer*, 460 U.S. 491 (1983), and relevant Pennsylvania case law, a motorist cannot consent to a search when officers hold his identification documents and he is illegally detained. (Objections at 6; Pet. for Writ of Habeas Corpus at 10.) The superior court failed to address this argument. Instead, it concluded, without any analysis, that the search was legal and that counsel was not ineffective for failing to pursue a meritless suppression argument. *Brodeur*, No. 522 EDA 2000, slip op. at 8.²⁶

Nonetheless, this argument is meritless because petitioner would not have prevailed at the suppression hearing even if counsel challenged the validity of his consent under *Florida v. Royer*. In *Royer*, the Court concluded that an investigative detention of the defendant ripened into an arrest when two police officers escorted the defendant into a small interrogation room and seized his airline ticket, his identification, and his luggage. 460 U.S. at 503. The Court held that because the defendant was illegally detained without probable cause, his consent to the search of his luggage "was tainted by the illegality and was ineffective to justify the search." *Id.* at 507–08. However, the Court recognized that "the fact that the officers did not believe that there was probable cause and proceeded on a consensual or *Terry*-stop rationale would not foreclose the State from justifying [the defendant's] custody by proving probable cause and hence removing any barrier to relying on [the defendant's] consent to search." *Id.* at 507 (citations

²⁶The magistrate judge also failed to address petitioner's argument and also concluded that counsel's performance was not deficient because the search was legal. *Brodeur*, 2004 U.S. Dist. LEXIS 14310 at *27.

omitted).

Here, the detention of petitioner became the functional equivalent of an arrest because the officers placed petitioner in an unmarked police car and retained his driver's license and registration. *See Royer*, 460 U.S. at 503; *see also Commonwealth v. Lopez*, 609 A.2d 177, 182 (Pa. Super. Ct. 1992) (concluding that the detention of the defendant "ceased to be lawful" when police officers retained his license, registration, and rental car agreement). Nonetheless, unlike *Royer*, the officers had probable cause to arrest petitioner at that time and could rely on petitioner's consent thereafter to search his vehicle. *See Royer*, 460 U.S. at 507. After the detective observed the damaged steering column and the scratched VIN plate in petitioner's truck, he had probable cause to arrest petitioner based on these conditions, which are common in stolen vehicles, and the additional information he previously received from the confidential informant, the background check of petitioner, and his surveillance of petitioner's home. Because the detective had probable cause to arrest petitioner, the detention was legal and petitioner's consent was valid. *See Royer*, 460 U.S. at 507.

Moreover, the search was legal with or without petitioner's consent pursuant to the so-called automobile exception, which "allows warrantless searches of any part of a vehicle that may conceal evidence . . . where there is probable cause to believe that the vehicle contains evidence of a crime." *Karnes v. Skrutski*, 62 F.3d 485, 498 (3d Cir. 1995) (citation omitted). Courts have held that officers may search a vehicle without a warrant if there is probable cause to believe that the vehicle is stolen because "a stolen vehicle will obviously 'contain[] evidence of a

crime.”²⁷ *United States v. Lopes*, No. 01-648, 2002 U.S. Dist. LEXIS 240, at *7 (E.D. Pa. Jan. 9, 2002) (citation omitted); *see also United States ex rel. Johnson v. Johnson*, 340 F. Supp. 1368, 1374 n.10 (E.D. Pa. 1972) (“It should be noted that probable cause to believe that an automobile is stolen apparently will justify an immediate warrantless search.”) (citing *Preston v. United States*, 376 U.S. 364, 367–68 (1964)). For these reasons, petitioner cannot fault counsel for failing to raise the validity of his consent at the suppression hearing because any challenge to his consent would have failed.

Further, even if I assume that petitioner could have successfully challenged the validity of his consent, counsel’s decision not to focus on petitioner’s consent did not violate petitioner’s Sixth Amendment right to effective counsel. “The [S]ixth [A]mendment does not guarantee success or entitle defendants to the best available counsel or the most prudent strategies. . . . The Constitution is satisfied when the lawyer chooses a professionally competent strategy that secures for the accused the benefit of an adversarial trial.” *Kokoraleis v. Gilmore*, 131 F.3d 692, 696 (7th Cir. 1997). At the suppression hearing, petitioner’s lawyer chose to focus on the legality of the stop and the legality of the search warrant. He argued these issues competently²⁸ and the Superior Court recognized that these arguments had some merit. *See Brodeur*, No. 522 EDA 2000, slip op. at 22 (“We agree with appellant that the affidavit of probable cause is deliberately

²⁷Under the automobile exception, “[i]f probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search.” *United States v. Ross*, 456 U.S. 798, 825 (1982). Hence, the search of petitioner’s car, which revealed that the confidential VIN number did not match the public VIN number, was proper pursuant to the automobile exception.

²⁸The Court of Common Pleas found that “suppression counsel did an excellent job of tenaciously representing Defendant’s interests.” *Brodeur*, No. 118-96, slip op. at 4 n.3.

vague”) Moreover, there are sound reasons why counsel chose not to emphasize the facts surrounding petitioner’s consent. This issue depended upon petitioner’s own account of the facts and the Court of Common Pleas found petitioner’s testimony at the PCRA hearing “less than credible.” *Brodeur*, No. 118-96, slip op. at 3. Hence, counsel chose not to challenge petitioner’s consent because he felt that petitioner’s testimony would ultimately hurt his case. Because counsel’s decision not to emphasize the consent search could be considered “sound trial strategy,” his representation was not deficient and the superior court’s conclusion was consistent with federal law. *Strickland*, 466 U.S. 689.

With respect to petitioner’s second ineffectiveness claim, which involves counsel’s failure to object on *Brady* grounds, the superior court found that petitioner already knew the identity of the man who allegedly replated the Bronco, and concluded that counsel was not ineffective for failing to object when the prosecution did not disclose the man’s name. As I described above, petitioner did not have a legitimate *Brady* claim because, “the government is not obliged under *Brady* to furnish a defendant with information which he already has” *Starusko* 729 F.2d at 262 (3d Cir. 1984) (citation omitted); *see also* Part III.B. Because petitioner did not have a *Brady* claim, his counsel was not deficient for failing to object on *Brady* grounds. *See Werts*, 228 F.3d at 203 (“[C]ounsel cannot be deemed ineffective for failing to raise a meritless claim.”). Hence, the Superior Court’s determination was not an “unreasonable application” of the *Strickland* standard.

Petitioner does not allege that the Pennsylvania courts made an unreasonable factual determination and he fails to present any evidence that would support such a claim. *See* 28 U.S.C. § 2254(d). Thus, I conclude that the superior court properly applied federal law in

evaluating petitioner's ineffective assistance of counsel claims and I will overrule petitioner's final objection and adopt the magistrate judge's recommendation.

IV. CONCLUSION

As I explained above, the instant petition is clearly time-barred pursuant to AEDPA's statute of limitations. Moreover, even if I declined to apply AEDPA's time-bar, the petition is meritless. Petitioner's *Brady* claim is procedurally defaulted because he failed to raise this issue in state court. Petitioner's Fourth Amendment claims are barred under the Supreme Court's decision in *Stone v. Powell*, 428 U.S. at 494, because the Pennsylvania courts provided petitioner with a full and fair opportunity to litigate these issues. Finally, petitioner's two ineffective assistance of counsel claims are meritless. Counsel was not ineffective for failing to challenge the validity of petitioner's consent to search his vehicle because counsel had no grounds to make such an objection. Similarly, counsel was not deficient for failing to object on *Brady* grounds because petitioner did not have a legitimate *Brady* claim. For these reasons, I will overrule petitioner's objections to the report and recommendation, adopt the report and recommendation, dismiss the instant petition as untimely, and alternatively, deny the petition on the merits. An appropriate order follows.

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

ANDRE J. BRODEUR, JR.,
Petitioner,

v.

GEORGE N. PATRICK, SUPERINTENDENT, et al.,
Respondents.

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CIVIL ACTION

NO. 03-6092

ORDER

YOHN, J.

May ____, 2005

And now on this ____ day of May 2005, upon careful and independent consideration of Andre Brodeur's petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2254 (Doc. #1), review of the report and recommendation (Doc. #6) of United States Magistrate Judge M. Faith Angell, and petitioner's objections to the report and recommendation (Doc. #10), and for the reasons set forth in the accompanying memorandum, it is hereby ORDERED that:

1. Petitioner's objections are OVERRULED;
2. Magistrate Judge M. Faith Angell's Report and Recommendation is APPROVED and ADOPTED as supplemented herein;
3. The petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2254 is DISMISSED as time-barred and also DENIED on the merits;
4. The petitioner having failed to make a substantial showing of the denial of a constitutional right, there is no ground to issue a certificate of appealability, *see* 28 U.S.C. § 2253(c); and
5. The Clerk shall CLOSE this case statistically.

William H. Yohn, Jr., J.