

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

SAMUEL ENGLISH, JR. : CIVIL ACTION
: :
v. : :
: : NO. 00-5358
DONALD T. VAUGHN, et al. :

SURRICK, J.

JULY 15, 2005

MEMORANDUM & ORDER

Presently before the Court is the *pro se* Petition For Writ Of Habeas Corpus By A Person In State Custody filed pursuant to 28 U.S.C. § 2254 (Doc. No. 1) filed by Samuel English, Jr., Magistrate Judge M. Faith Angell's Report and Recommendation recommending denial of the Petition (Doc. No. 18), and Petitioner's objections to the Report and Recommendation (Doc. No. 19). For the following reasons, we will overrule the objections, approve and adopt the Report and Recommendation, and dismiss the Petition.

I. BACKGROUND

On October 29, 1984, after a bench trial, Petitioner was convicted in the Court of Common Pleas, Philadelphia County, of rape, burglary, attempted involuntary deviate sexual intercourse, conspiracy, and possession of an instrument of crime. (Doc. No. 18 at 1.) He was sentenced to eight (8) to sixteen (16) years imprisonment for rape, a consecutive term of four (4) to eight (8) years for attempted involuntary deviate sexual intercourse, and a concurrent term of four (4) to eight (8) years for burglary. (*Id.* at 2.) Petitioner appealed the conviction, arguing ineffective assistance of counsel at trial, and the case was remanded for an evidentiary hearing. Following the hearing, Petitioner was awarded a new trial. On February 27, 1989, after a new

bench trial, Petitioner was found guilty of rape, burglary, criminal conspiracy, and possession of an instrument of crime, and was sentenced to an aggregate term of imprisonment of ten (10) to twenty-four (24) years imprisonment. No direct appeal was filed from the judgment or sentence.

On January 31, 1996, Petitioner filed a motion for relief under the Pennsylvania Post Conviction Relief Act (“PCRA”), asserting that a DNA test would exonerate him on the rape charge and that his trial counsel should have investigated DNA testing. PCRA counsel was appointed, and on June 28, 1997, Petitioner filed an amended petition. He claimed that DNA testing represented “newly discovered evidence” and that a DNA test should be performed. He also claimed that he had received ineffective assistance of counsel for advising him to request a bench trial before the same judge and for failing to advise him that he had the right to have his case heard by a different judge. (Doc. No. 18 at 4.)

On October 2, 1997, the PCRA Court rejected Petitioner’s claims and denied relief. (*Id.* Ex. C.) The PCRA Court observed that DNA testing had not received full endorsement until 1992, long after Petitioner’s trial, that the specimens that would have been subject to DNA testing were destroyed in 1989, and that Petitioner had not even suggested that the destruction was done in bad faith. Petitioner appealed to the Pennsylvania Superior Court, raising only the ineffective assistance of counsel claim. The Superior Court affirmed the PCRA Court’s denial of relief, concluding that Petitioner had not established that counsel’s actions “undermined the truth-determining process.” (*Id.* at 5.) Petitioner filed a petition for writ of *allocatur* in the Pennsylvania Supreme Court, which was denied.

On October 23, 2000, Petitioner filed the instant Petition. He alleges that he was “denied due process of law” when the Philadelphia District Attorney’s office, in “bad faith,” destroyed

blood samples that could have been the subject of DNA testing. (Doc. No. 1 at 9.) In the Report and Recommendation, Magistrate Judge Angell recommended that the Petition be denied because Petitioner's federal due process claim was not presented in his original PCRA petition and was therefore waived. (Doc. No. 18 at 8.) Judge Angell concluded that since the limitations period for filing a PCRA petition had expired, Petitioner's claim was now procedurally defaulted because he could not timely raise the claim in the state court. (*Id.*)

Petitioner filed objections to Judge Angell's Report and Recommendation. Specifically, he asserts that procedural default cannot occur unless the state court explicitly forecloses review of his claims and he repeats his assertion that blood samples from the victim were destroyed in bad faith in violation of his due process rights. (*Id.*)

II. STANDARD OF REVIEW

The Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (1996), requires courts to employ a deferential, "reasonableness" standard of review to a state court's judgment on constitutional issues raised in habeas petitions. *Matteo v. Superintendent, SCI Albion*, 171 F.3d 877, 903 (3d Cir. 1999); *see also Lindh v. Murphy*, 521 U.S. 320, 334 n.7 (1997) (describing AEDPA's standard of review as "highly deferential" to state court determinations). A federal court may overturn a state court's resolution on the merits of a constitutional issue only if the state court decision "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1) (2000). The Supreme Court has adopted a two-part standard for analyzing claims under § 2254(d)(1), establishing that the "contrary to" and "unreasonable application of" clauses have independent meaning:

Under 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 this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the “unreasonable application” clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court’s decisions but unreasonably applies that principle to the facts of the prisoner’s case.

Williams v. Taylor, 529 U.S. 362, 412-13 (2000). “[A] federal habeas court may not issue the writ [of habeas corpus] simply because the court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.” *Id.* at 411.

This Court must also apply a deferential standard to a state court’s determination of the facts. A state court’s determination of a factual issue is “presumed to be correct,” and may be rebutted only by “clear and convincing evidence” to the contrary. 28 U.S.C. § 2254(e)(1) (2000). Habeas relief predicated on an alleged factual error will be granted only if the state court decision “was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” *Id.* § 2254(d)(2).

We review *de novo* those portions of the Magistrate Judge’s Report and Recommendation to which specific objections have been made. 28 U.S.C. § 636(b); Fed. R. Civ. P. 72(b); *see also Thomas v. Arn*, 474 U.S. 140, 141-42 (1985) (“[A] United States district judge may refer . . . petitions for writ of habeas corpus [] to a magistrate, who shall conduct appropriate proceedings and recommend dispositions Any party that disagrees with the magistrate’s recommendations ‘may serve and file written objections’ to the magistrate’s report, and thus obtain *de novo* review by the district judge.” (citations and footnotes omitted)).

III. DISCUSSION

Under Pennsylvania’s Post Conviction Relief Act (“PCRA”), 42 Pa. Cons. Stat. §§ 9542 - 9545, a state prisoner may petition a state court for collateral relief from his sentence. The prisoner must file his petition, “including a second or subsequent petition,” within one year of the date that the judgment becomes final.”¹ *Id.* § 9545(b)(1). Furthermore, in PCRA petitions “an issue is waived if the petitioner could have raised it but failed to do so . . . in a prior state conviction hearing.” *Id.* § 9544(b).

Federal courts may consider the merits of petitions for habeas corpus only if the petitioner has “exhausted the remedies available in the courts of the state.” 28 U.S.C. § 2254(b)(1)(A); *see also McCandless v. Vaughn*, 172 F.3d 255, 260 (3d Cir. 1999). Under the exhaustion rule, state prisoners “must ‘fairly present’ all federal claims to the highest state court” before bringing them to federal court. *Whitney v. Horn*, 280 F.3d 240, 250 (3d Cir. 2002) (citing *O’Sullivan v. Boerckel*, 526 U.S. 838, 842 (1999)); *see also* 28 U.S.C. § 2254(b); *Picard v. Connor*, 404 U.S. 270, 275 (1971). If a claim has not been exhausted because it has not been “fairly presented” in the state courts, but state procedural rules bar the petitioner from seeking relief on that claim, the exhaustion requirement is excused. *Gray v. Netherland*, 518 U.S. 152, 161 (1996); *see also Whitney*, 280 F.3d at 250. However, in such cases, the petitioner’s claim is said to be

¹ In state court, the time limitation on a PCRA petition may be waived if the petition alleges and the petitioner proves that: “(i) the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution of the United States; (ii) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or (iii) the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively.” 42 Pa. Cons. Stat. § 9545(b)(1). Petitioner has not argued for, or offered evidence supporting, any of these exceptions to the time bar.

procedurally defaulted. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). When a claim is procedurally defaulted, a federal court will not consider the claim on the merits unless “the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.” *Id.*

In the instant case, Petitioner had the opportunity to assert the federal due process claim that now forms the basis for his § 2254 motion in the proper state venue when he filed his PCRA motion and pursued it through the full appeals process. He did not take advantage of the opportunity. Moreover, his suggestion that the DNA evidence was destroyed in bad faith is simply a bald assertion with no evidentiary support.

In his objections to the Magistrate Judge’s Report and Recommendation, Petitioner relies on *Toulson v. Beyer*, 987 F.2d 984 (3d Cir. 2000), arguing that federal courts should not find a claim to be procedurally barred from habeas review under § 2254 unless the state “clearly forecloses” review of the claim. (Doc. No. 19 ¶ 3.) The Pennsylvania Supreme Court has indicated that in the interests of achieving finality to criminal cases, it is unwilling to waive procedural requirements such as time limitations. *See Commonwealth v. Albrecht*, 720 A.2d 693, 700 (Pa. 1998) (holding that waiver rules will be relaxed even for capital offenders). Under the circumstances, we conclude that Petitioner’s claim is “clearly foreclosed” from state court review and is procedurally defaulted under 28 U.S.C. § 2254. *See Whitney*, 280 F.3d at 252 (holding that the habeas petitioner was “clearly foreclosed” due to a time bar even though the state court had not explicitly ruled on the matter).

As Petitioner points out in his objections, a federal court reviewing a petition for habeas

corpus under § 2254 may reach the merits of a procedurally defaulted claim if the prisoner can show “cause and prejudice” for the default or that a miscarriage of justice would result from upholding the default. (Doc. No. 19 ¶ 10.) *See Coleman*, 510 U.S. at 750. Under the Supreme Court’s standard for “miscarriage of justice,” announced in *Murray v. Carrier*, 477 U.S. 478, 496 (1986), the court may reach the merits of a procedurally defaulted § 2254 claim if the Petitioner can show that “a constitutional violation has probably resulted in the conviction of one who is actually innocent.” *Schlup v. Delo*, 513 U.S. 298, 327 (1995); *see also Whitney*, 280 F.3d at 261 (“[W]e will adjudicate the merits of a defaulted claim where it is more likely than not that no reasonable juror would have convicted a defendant absent the claimed error.”). “Actual innocence” is determined “in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available after the trial.” *Schlup*, 513 U.S. at 327.

Here, Petitioner does not offer a cause for his procedural default and does not explain why he did not raise the current federal due process claim in his PCRA petition or in the related state appellate proceedings. Furthermore, this procedural default will not cause a fundamental miscarriage of justice under the *Carrier* standard. The destruction of evidence alleged by Petitioner did not occur until well after his conviction and sentencing.² Moreover, Petitioner

² Even if the blood was still available, it would not be subject to testing under the PCRA. The PCRA states that “[i]f the evidence was discovered prior to the applicant’s conviction, the evidence shall not have been subject to the DNA testing requested because the technology was not in existence at the time of the trial or the applicant’s counsel did not seek testing at the time of the trial in a case where a verdict was rendered on or before January 1, 1995” 42 Pa. Cons. Stat. § 9543.1. Petitioner’s conviction and sentence became final in 1987, well before the date provided in the PCRA and the date at which DNA testing received full endorsement by

offers nothing to support his claim that the evidence was destroyed in bad faith. Finally, the record in this case casts substantial doubt on any assertion of “actual innocence.”³

Because Petitioner did not fairly present his federal claim in state court, and because there is no fundamental miscarriage of justice in denying this procedurally defaulted claim, his § 2254 Motion will be denied.

Pennsylvania courts. The Superior Court of Pennsylvania did not fully endorse DNA testing until 1992, when it first determined that the testing had become sufficiently accurate and reliable. *Commonwealth v. Brison*, 618 A.2d 420, 425 (Pa. Super. Ct. 1992); *see also Commonwealth v. Rodgers*, 605 A.2d 1228, 1235 (Pa. Super. Ct. 1992) (acknowledging the acceptance of DNA identification evidence in other state courts). Our research shows that no state appellate or supreme court endorsed the admissibility of DNA testing until 1988, two years after Petitioner’s conviction. *Andrews v. State*, 533 So. 2d 841, 850-51 (Fla. Dist. Ct. App. 1988); *see also* William C. Thompson and Simon Ford, *DNA Typing: Acceptance and Weight of the New Genetic Identification Tests*, 75 Va. L. Rev. 45, 46 n.4 (1989). Based on Pennsylvania law at the time of Petitioner’s second trial, neither his attorney nor the Commonwealth could have reasonably expected the court to accept DNA test results, even if they were actually available.

³ Though Petitioner claims “actual innocence” in his Petition, his defense at trial was essentially that the victim’s testimony against him should not be believed and that the attack of the victim had not occurred. However, the victim testified at trial that she knew and recognized Petitioner having seen him before, and she positively identified him as the person who had raped her. In addition, Petitioner was found wearing a jacket which belonged to the victim and had been taken from her home on the night of the incident. Finally, Petitioner had access to the victim’s house. (Doc. No. 17 at 10-11.)

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ORDER

AND NOW, this 15th day of July, 2005, upon consideration of the Petitioner's Petition For Writ Of Habeas Corpus By A Person In State Custody (Doc. No. 1, 00-CV-5358), Magistrate Judge M. Faith Angell's Report and Recommendation recommending denial of the Petition (Doc. No. 18, 00-CV-5358), and Petitioner's objections to the Report and Recommendation (Doc. No. 19, 00-CV-5358), it is ORDERED as follows:

1. Petitioner's objections to the Report and Recommendation are OVERRULED.
2. The Report and Recommendation is APPROVED and ADOPTED.
3. The Petitioner For Writ Of Habeas Corpus is DISMISSED.
4. There are no grounds for the issuance of a certificate of appealability.

IT IS SO ORDERED.

BY THE COURT:

S:/R. Barclay Surrick, Judge