

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

ZACHARY WILSON, : CIVIL ACTION
Petitioner :
 :
v. : (DEATH PENALTY -
 : HABEAS CORPUS)
 :
JEFFREY A. BEARD, ET AL., : No. 05-2667
Respondents :

MEMORANDUM

Padova, J.

August 9, 2006

Petitioner Zachary Wilson has filed a counseled Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (the “Petition”). He raises thirteen claims for relief, challenging the guilt-determining and penalty phases of his trial on charges of first degree murder and possession of an instrument of crime. Before the Court is Petitioner’s motion for partial summary judgment¹ (the “Motion”) as to his first claim for relief, in which he claims that the prosecutor withheld the existence of exculpatory evidence at his trial, in violation of Brady v. Maryland, 373 U.S. 83 (1963). For the reasons that follow, the Court grants the Motion, grants the requested Writ of Habeas Corpus, and vacates Petitioner’s conviction without prejudice to the right of the Commonwealth of Pennsylvania to retry the Petitioner on the charges of first degree murder and possession of an instrument of crime.

I. BACKGROUND

Petitioner was convicted of first degree murder and possession of an instrument of crime in the August 3, 1981 murder of Jamie Lamb. He was tried in the Philadelphia Court of Common

¹Although Petitioner styled the Motion as a motion for summary judgment, he acknowledged through counsel, during the Hearing held on June 5, 2006, that he presently seeks partial summary judgment as to Claim 1 of his Petition. (6/5/06 Tr. at 19.)

Pleas, Case No. 2950-52, September Term, 1986 (Albert F. Sabo, J.). Jury selection in Petitioner's trial began on December 29, 1987. (Pet. ¶ 2.) Testimony began on January 5, 1988 and the jury returned its verdict on January 7, 1988. (Id.) A penalty hearing was held on January 11, 1988. (Id.) The jury found two aggravating circumstances - a significant history of violent felony convictions and the knowing creation of a grave risk of death to others - and no mitigating circumstances. (Id.) The jury returned a death sentence. (Id.) On January 25, 1998, Judge Sabo sentenced Petitioner to death and to a term of imprisonment of 2.5 to 5 years. (Id. ¶ 3.) The Pennsylvania Supreme Court affirmed on direct appeal. Commonwealth v. Wilson, 649 A.2d 435 (Pa. 1994) ("Wilson I"), cert. denied, 516 U.S. 850 (1995).

On March 11, 1996, Petitioner filed a counseled "Petition for Habeas Corpus Relief and Statutory Post-Conviction Relief" pursuant to the Pennsylvania Post Conviction Relief Act, 42 Pa.C.S. §§ 9541-9546 (the "PCRA"). Commonwealth v. Wilson, 861 A.2d 919, 923 (Pa. 2004) ("Wilson II"). The PCRA Court conducted an evidentiary hearing on 12 days spanning a six month period. Id. at 924. After the hearing concluded, Petitioner filed a Post-PCRA Hearing Memorandum which added Brady claims regarding the failure of the prosecutor at Petitioner's trial to provide his trial counsel with exculpatory evidence regarding the prosecution's three main witnesses against him. See id. at 927, 928. The PCRA Court denied the PCRA petition on May 6, 1998 and issued a written opinion in support of the denial of the petition on September 23, 1999. (Pet. ¶ 7.) The Pennsylvania Supreme Court affirmed the denial of the PCRA petition on November 19, 2004. Wilson II, 861 A.2d 919. Petitioner filed the instant Petition on June 6, 2005.

The following recitation of the factual history and trial testimony in this case was set forth by the Pennsylvania Supreme Court in Wilson II. On August 3, 1981, a man later identified as

Petitioner by two witnesses, Jeffrey Rahming and Edward Jackson, entered a bar in the City of Philadelphia, “brandished a handgun, and fired four rounds into Jamie Lamb (‘Lamb’), killing him.” Id. at 922. After he was shot, Lamb fell on Rahming. Id. The gunman attempted to flee the bar but tripped over Jackson, who had dropped to the floor during the shooting, and fell on the floor. Id. Jackson was able to see the gunman’s face before he was able to get up and run out of the bar. Id. Both Jackson and Rahming gave the police descriptions of the gunman and attended a police lineup in March 1982. Id. Rahming identified Petitioner as the gunman at the lineup but Jackson did not. Id. Petitioner was charged with Lamb's murder; “however, at the initial preliminary hearing, Rahming failed to identify [Ppetitioner], and the charges were dismissed.” Id.

Petitioner was later incarcerated on unrelated charges. In the summer of 1984, Lawrence Gainer, who was imprisoned with Petitioner, told Philadelphia Police Officer John Fleming that, in October 1983, he asked Petitioner why he killed Lamb and Petitioner responded that he killed Lamb because “Lamb had killed [his] adopted brother, Ronnie Williams.” Id. Gainer “refused to cooperate further” at that time. Id. However, Gainer spoke to Fleming again in March 1986, and agreed “to provide a statement to detectives investigating the homicide.” Id. Petitioner was re-arrested for Lamb’s murder as a result of Gainer’s cooperation. Id.

“At the ensuing jury trial, the Commonwealth's case centered upon the testimony of Jackson, Rahming, and Gainer.” Id. At Petitioner’s trial, Jackson “described the circumstances surrounding the shooting; acknowledged that he told police that he could identify the perpetrator; stated that, although he recognized Appellant in the lineup, he selected another individual because [Ppetitioner] had threatened him; and . . . identified [Ppetitioner] as the individual who shot Lamb.” Id. at 922-23. Rahming first admitted his own prior criminal record; “he then related his observations of Lamb's

killing, which he had given to police the day of the incident, and identified [Petitioner] as having committed the crime.” Id. at 923. Rahming also testified that Petitioner had threatened him, which was why, “although he had identified [Petitioner] at the lineup, he declined to implicate him at the preliminary hearing.” Id. “Gainer testified to [Petitioner]’s admission and to having related it to Officer Fleming.” Id. Petitioner did not testify during the guilt phase of his trial. Id. His sole witness during the guilt phase was another prison inmate, Steven Whitfield, “who claimed that he had been in the bar at the time of Lamb’s killing and had seen the perpetrator, who was not [Petitioner].” Id.

In Claim I of the Petition, Petitioner contends that the prosecutor violated Brady by failing to turn over to his counsel exculpatory evidence which could have been used to impeach Jackson, Rahming and Gainer. He maintains that his entitlement to relief with respect to this claim is plain and that the entry of judgment in his favor on this claim will save the Court and the parties from having to engage in lengthy and complex litigation regarding his other twelve claims for relief.²

²The Petition also asserts the following twelve claims:

Claim II: Petitioner is actually innocent and his trial counsel’s ineffectiveness prevented him from establishing his innocence because trial counsel failed to call an alibi witness on his behalf; Claim III: Trial counsel was ineffective in failing to investigate, develop and present substantial mitigating evidence; Claim IV: Constitutional errors related to the testimony of the two eyewitnesses require vacating Petitioner’s conviction and sentence; Claim V: The prosecutor used her peremptory jury strikes in a racially discriminatory manner in violation of the Equal Protection Clause; Claim VI: Petitioner’s death sentence was a product of racial discrimination in violation of the United States Constitution and international law; Claim VII: The trial court’s definition of “preponderance of the evidence” at the penalty phase violated due process and the Eight Amendment; Claim VIII: Petitioner was denied his right to be present at all stages of his capital trial and sentencing and his right to effective assistance of counsel; Claim IX: Petitioner’s

II. LEGAL STANDARD

The instant Petition was filed pursuant to 28 U.S.C. § 2254 which allows federal courts to grant habeas corpus relief to prisoners “in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C.A. § 2254(a). Since it was filed after April 24, 1996, the Petition is governed by the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), P.L. 104-132, 110 Stat. 1214; see Lindh v. Murphy, 521 U.S. 320, 326-27 (1997). Section 2254(d)(1), as amended by the AEDPA, provides:

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 with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the

death sentence violates the Eighth and Fourteenth Amendments because it is based in part on an unconstitutionally vague and overbroad aggravating circumstance of knowingly creating a grave risk of death to another person in addition to the victim of the offense; Claim X: The penalty phase jury instructions and verdict sheet unconstitutionally indicated that the jury had to unanimously find any mitigating circumstance; Claim XI: Petitioner’s death sentence violates the Eighth and Fourteenth Amendments because it is based in part on an unconstitutionally vague and overbroad aggravating circumstance of a significant history of felony convictions involving the use or threat of violence to the person; Claim XII: Petitioner’s Eighth and Fourteenth Amendment rights were violated because the jury was not instructed that, if it sentenced Petitioner to life imprisonment, he would be ineligible for parole; Claim XIII: Petitioner is entitled to relief from his conviction and sentence because of the cumulative effect of these errors.

State court proceeding.

28 U.S.C.A. § 2254(d)(1). Under the AEDPA, a state court's legal determinations may only be tested against “clearly established Federal law, as determined by the Supreme Court of the United States.” See 28 U.S.C.A. § 2254(d)(1). This phrase refers to the “holdings, as opposed to the dicta” of the United States Supreme Court's decisions as of the time of the relevant state court decision. Williams v. Taylor, 529 U.S. 362, 412 (2000).

Section 2254 mandates heightened deference to state court factual determinations by imposing a presumption of correctness. 28 U.S.C.A. § 2254(e)(1). The presumption of correctness is rebuttable only through clear and convincing evidence. Id. Clear and convincing evidence is evidence that is “so clear, direct, weighty and convincing as to enable the jury to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue.” United States Fire Ins. Co. v. Royal Ins. Co., 759 F.2d 306, 309 (3d Cir. 1985).

In Claim I of the Petition, Petitioner contends that the prosecution withheld the existence of exculpatory impeachment evidence relating to Jackson, Rahming and Gainer in violation of Brady. He argues that he is entitled to a new trial with respect to the Lamb murder because of the prosecution's Brady violations and maintains that this claim was exhausted in state court. However, the Pennsylvania Supreme Court did not address the merits of this claim, and instead denied it on the state procedural ground that the claim was waived. Consequently, if the Court determines that Claim I was not waived, the deferential standard required by the AEDPA does not apply because “this claim was not ‘adjudicated on the merits’ by the state supreme court.” Bronshtein v. Horn, 404 F.3d 700, 710 n.4 (3d Cir. 2005); see also Appel v. Horn, 250 F.3d 203, 210 (3d Cir. 2001) (“[W]hen, although properly preserved by the defendant, the state court has not reached the merits

of a claim thereafter presented to a federal habeas court, the deferential standards provided by AEDPA and explained in Williams do not apply.”) (citations omitted). Accordingly, if the Court determines that Claim I was not waived, it must “conduct a de novo review over pure legal questions and mixed questions of law and fact, as a court would have done prior to the enactment of AEDPA.” Appel, 250 F.3d at 210 (citing McCandless v. Vaughn, 172 F.3d 255, 260 (3d Cir.1999)). The Court must still presume that the state court's factual determinations are correct, although this presumption is “rebuttable upon a showing of clear and convincing evidence.” Id. (citing 28 U.S.C. § 2254(e)(1)).

Wilson has asked the Court to consider his Brady claim in the context of a motion for summary judgment pursuant to Federal Rule of Civil Procedure 56. Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). The moving party “bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] . . . which it believes demonstrate an absence of a genuine issue of material fact.” Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the moving party has met its burden, the non-moving party must go beyond the pleadings and set forth specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e). “The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). An issue is “material” if it may affect the outcome of the matter pursuant to the underlying law. Id. An issue is “genuine” if “the evidence is such that

a reasonable jury could return a verdict for the nonmoving party.” Id.³

III. DISCUSSION

Wilson contends that the prosecutor violated Brady v. Maryland, 373 U.S. 83 (1963), by failing to provide his counsel with exculpatory information which would have allowed his counsel to impeach the testimony of Jackson, Rahming and Gainer. In 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, irrespective of the good faith or bad faith of the prosecution.’” Banks v. Dretke, 540 U.S. 668, 691 (2004) (quoting Brady, 373 U.S. at 87). The particular information which was withheld pertains to Jackson’s prior criminal history, specifically his *crimen falsi* convictions and a psychiatric evaluation which was done in connection with one of those convictions; Rahming’s psychiatric history; and Gainer’s relationship with Officer Fleming, namely that Gainer was a long-time informant for Officer Fleming and that

³Respondents challenge the propriety of addressing Petitioner’s Brady claim separately from his twelve other claims in the context of a motion for summary judgment. They suggest that addressing Petitioner’s claims one at a time will cause this litigation to drag on for years, a particularly problematic result in this case since Lamb’s murder took place 25 years ago. Respondents admit that there is no rule against addressing habeas claims on summary judgment, but urge the Court not to adopt a policy of allowing habeas petitions to be judged on a piecemeal basis.

The Court is sensitive to the policy considerations underlying Respondents’ position on this issue. However, habeas petitions are treated as civil actions and the Federal Rules of Civil Procedure, including Rule 56, apply to them. Indeed, while motions for summary judgment are not filed as frequently in habeas actions as they are in other types of civil litigation, the instant motion is not unique, and other courts in this judicial circuit have recognized that “[s]ummary judgment is appropriate in a habeas proceeding, as in other cases, when ‘the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.’” Forman v. Cathel, Civ.A.No. 04-5309, 2006 WL 840392, at * 1 (D.N.J. Mar. 27, 2006) (quoting Fed. R. Civ. P. 56(e)). The Court finds, in this case, that allowing Petitioner to proceed on summary judgment with respect to what he considers to be his strongest claim will promote judicial efficiency by allowing him to obtain the relief he seeks without burdening the court system with the evidentiary hearings and briefing which would be required for the determination of his twelve remaining claims.

Officer Fleming made interest-free loans to Gainer.⁴

A. The Undisclosed Evidence

Petitioner claims that the following information was available to the prosecutor and to police prior to or at the time of Petitioner's trial and was not provided to him.

1. Material withheld regarding Edward Jackson

On May 26, 1981, six weeks before the Lamb murder, Jackson was arrested for impersonating a public servant. (App. Ex. 7, Extract of Criminal Record.) In the May 26, 1981 incident, Jackson, who was working as a security guard, threw a man against a wall, handcuffed him and disarmed him. (App. Ex. 7, 7/7/81 N.T. at 4-10.) The man he assaulted claimed that Jackson said that he was a member of the Philadelphia Police Department in a special unit. (Id.) Jackson was convicted on October 28, 1981 and a pre-sentence investigation and mental health evaluation were ordered. (App. Ex. 8.) Petitioner contends that, if the prosecutor had disclosed the fact of Jackson's arrest and conviction for impersonating a public servant, his trial counsel could have obtained the December 16, 1981 pre-sentence investigation report and mental health evaluation and used those documents to impeach Jackson's trial testimony.

The December 16, 1981 pre-sentence investigation report showed that Jackson had two prior arrests for impersonating a police officer, a juvenile record, an adult record of thirteen arrests and four convictions, and an out-of-state record of six arrests. (App. Ex. 8 at 4.) The pre-sentence investigation also reported that Jackson had suffered "a serious head injury in 1970" and that during

⁴Petitioner's Memorandum also cited to other information regarding the relationship between Gainer and Officer Fleming, and about Officer Fleming's work history, which was allegedly not disclosed to his trial counsel by the prosecutor. Petitioner's counsel informed the Court during the June 5, 2006 Hearing that, for the purposes of the instant Motion, his claim with respect to Gainer concerns only the interest-free loans Gainer received from Officer Fleming. (6/5/06 Tr. at 35.)

the one and one half years prior to his arrest he had “experienced pains in the back of his head, blackouts and occasional loss of memory.” (Id. at 2.) Jackson was evaluated by court psychologist Albert Levitt, who prepared a report on December 12, 1981. (App. Ex. 8.) Dr. Levitt noted that “Jackson is a marginal historian.” (App. Ex. 9 at 1.) Levitt also noted the following neurological history:

He received two fractured skulls. The first time was in 1974 and the second time was in ‘79. He states that he has been having bad headaches and blackouts of late. Testing indicates that there may be some difficulty in the left hemisphere. He has some motor visual problems, cannot subtract sevens backwards. He has difficulty counting backwards from 20.

(Id. at 2.) Dr. Levitt also reported on Jackson’s mental status as follows: “His long and short term memory were weak, but his social judgment was adequate. He could not think in abstract terms, and he has difficulty explaining himself and was easily confused. He could not interpret simple proverbs.” (Id. at 3.) Dr. Levitt’s psychological testing revealed:

patterns that have a neurological quality in that he was blocked and unable to form adequate perceptions, and showed some dissociative tendencies. He has a need to have control over his environment primarily because he has difficulty interacting within a normal manner. He has a severe status problem and has a need to be accepted.

(Id.) Dr. Levitt concluded that Jackson had a schizoid personality disorder with neurological implications as a result of his skull fractures. (Id.) Dr. Levitt further concluded that:

Jackson was “attempting to function in a socialized manner and tends to go overboard in this regard. He sees himself as an aid to the Police and likes to associate and attach himself to Police activities. His poor judgment and distorted perceptions of reality and where he fits into it appropriately causes him to function beyond normal limits at times. . . . The prognosis in this case tends to be marginal since the need to impersonate seems to be well engrained [sic] and is likely to surface

at some time in the future.”

(Id.)

2. Material withheld regarding Jeffrey Rahming

Jeffrey Rahming was diagnosed during Petitioner’s trial with schizophrenia. (App. Ex. 12(A).) He also had a history of psychiatric treatment and of mixing street drugs and prescribed psychotropic medications. (App. Ex. 13, Periodic Progress Rpt.)

Rahming testified at Petitioner’s trial on January 5, 1988. (1/5/88 N.T. at 100-126.) He testified that he was standing behind Lamb when he was killed. (Id. at 103.) He further testified that a “dude named Zach” came into the bar and just started shooting and that the bullets hit Lamb. (Id. at 104.) On January 6, 1988, the second day of the trial, Rahming was taken by a detective from the prosecutor’s office to the Hahnemann Medical College emergency room. The medical records state:

Patient is a 27 year old black male who was brought by a Detective from the District Attorneys Office for evaluation prior to placement.

Patient has a history of mental illness and has been treated with Prolexin shots and pills as recently as 1 months [sic] ago. He reports that he has not abused any drugs since 1984. He has [sic] used marihuana at that time. Patient states that he recently witnessed a murder and the victim had fallen on him with the “bullets in him.”

(App. Ex. 12(A)). Rahming was diagnosed with schizophrenia. (Id.) Rahming’s trip to the Hahnemann emergency room was not disclosed to trial counsel. (12/1/97 N.T. at 7.) Petitioner contends that, had this emergency room visit been disclosed to his counsel, his counsel could have used that information to impeach Rahming. Petitioner’s trial counsel, Joel P. Trigiani, Esq., testified at the PCRA evidentiary hearing that, if he had been notified about Rahming’s emergency room visit, he would have asked questions and asked to see what the hospital notes pertained to. (Id.) He also

testified that he would have asked to see Rahming's rap sheet.

Rahming's 1996 rap sheet shows a psychiatric report dated February 25, 1980. (Id. at 8.) Rahming was examined for that mental health evaluation on February 7, 1980. (App. Ex. 13.) The evaluation stated that Rahming had "a Mixed Personality Disorder with passive-aggressive and explosive traits" and that he "also suffers from a seizure disorder." (Id.) Trigiani testified that, if he had been aware of the emergency room visit, he would have asked to see the 1980 psychiatric evaluation. (12/1/97 N.T. at 9.) He also would have asked to see Rahming's presentence report and his probation report. (Id. at 9-10.) Rahming's 4/9/80 Certificate of Probation states that he was given a sentence of four years of probation and was to receive psychiatric and vocational guidance and strict psychiatric probation. (App. Ex. 13.) March 19, 1981 and May 18, 1981 Periodic Progress Reports state that Rahming was being prescribed Haldol. (Id.) Trigiani testified that it would have been significant to know that Rahming was receiving Haldol five months before the shooting because "Haldol is a psychotropic drug which is used to control psychoses or schizophrenia and it's a mood equalizer." (12/1/97 N.T. at 11-12.) Trigiani also testified that it would have been important to know whether Rahming was taking the medication at the time of the shooting because if he wasn't taking his medication he could have been psychotic. (Id. at 12.) The September 23, 1981 Periodic Progress Report states that Rahming exhibits the demeanor of a "slightly retarded person." (App. Ex. 13.) Trigiani testified that, if he had known this, he would have asked Rahming questions about his ability to perceive, if the drugs affected him, and where he had symptoms which affected his ability to recall incidents. (12/1/97 N.T. at 13.) Other Periodic Progress Reports contain information regarding Rahming's use of other psychotropic medications in the 1980s, prior to his testimony at Petitioner's trial, including Haldol, Prolexin, Mellaril and Cogentin, and that he was suspected of

using alcohol and marijuana. (App. Ex. 13.)

3. Brady material withheld regarding Lawrence Gainer

Officer Fleming loaned money, interest-free, to Gainer during the time period in which Gainer acted as an informant. Officer Fleming testified at Petitioner's trial that he had been friends with Gainer for thirteen years and had "used him on many occasions for information." (1/6/88 N.T. at 85.) Trigiani was permitted by the Court to question Officer Fleming in-camera about his relationship with Gainer. (Id. at 97-98.) Officer Fleming told Trigiani, under oath, that he had "not paid Lawrence Gainer on prior occasions for his information" and that he had never given him anything. (Id. at 98.) However, during the PCRA evidentiary hearing, Officer Fleming testified that he had loaned money, interest-free, to Gainer over the years. (11/25/97 N.T. at 108-09.)

B. Procedural Default

The Commonwealth argues that the Motion should be denied without consideration of the merits of Petitioner's Brady claim because that claim was procedurally defaulted in state court. A petitioner seeking a writ of habeas corpus in federal court must first exhaust the available state-court remedies by fairly presenting all the claims that he attempts to raise in his habeas corpus petition to each level of the state courts. Lines v. Larkins, 208 F.3d 153, 159 (3d Cir. 2000). To "fairly present" a claim, a petitioner must present a federal claim's 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). Thus, "[b]oth the legal theory and the facts underpinning the federal claim must have been presented to the state courts, and the same method of legal analysis must be available to the state court as will be employed in the federal court." Evans v. Court of Common Pleas, 959 F.2d 1227, 1231 (3d Cir. 1992). The burden of establishing that a habeas claim

was fairly presented in state court falls upon the petitioner. Lines, 208 F.3d at 159. If a petitioner fails to fairly present his claim to the state courts and is now procedurally barred from doing so, the claim is procedurally defaulted. Coleman v. Thompson, 501 U.S. 722, 735 n.1 (1991). Not only must a petitioner fairly present the substance of his claim to be eligible for federal habeas review, he must do so in compliance with state court procedures; if a petitioner presents his federal claim to the state court, but the state court rejects the claim on procedural grounds that are independent of federal law and adequate to support the judgment, the claim is defaulted. Id. at 729-30. State law procedural grounds are considered adequate if they are “firmly established and regularly followed.” Ford v. Georgia, 498 U.S. 411, 423-24 (1991). If a petitioner’s claims were procedurally defaulted in state court, the federal court may only consider them if the petitioner is able to “demonstrate cause for the default and actual prejudice as a result of the violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.” Coleman, 501 U.S. at 750. A demonstration of cause sufficient to survive dismissal “must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded [his] efforts to comply with the state's procedural rule.” Caswell v. Ryan, 953 F.2d 853, 862 (3d Cir. 1992) (citation omitted).

Petitioner contends that his Brady claim was initially asserted in his PCRA petition as Claim IX, which states: “Mr. Wilson is entitled to relief from his conviction and sentence because police and prosecutorial misconduct resulted in the use of perjured testimony against Mr. Wilson and the withholding of discoverable and important evidence from the defense . . .” (App. Ex. 1 at 71.) This claim alleges that Officer Fleming coerced and threatened Gainer and Rahming into testifying falsely against Petitioner and that another police officer exerted undue and improper influence against

Jackson in order to obtain his false testimony against Petitioner. (Id. at 72.) This claim does not allege that the prosecution withheld information regarding Jackson's criminal history, Jackson's or Rahming's psychiatric history, or Gainer's relationship to Fleming. (Id.)

Petitioner maintains that he was not aware of the facts underlying his Brady claim until he received discovery from the Commonwealth in connection with his PCRA petition and that he learned additional facts regarding this claim through the PCRA evidentiary hearing. After the PCRA evidentiary hearing concluded, Petitioner filed a Post-PCRA Hearing Memorandum expressly presenting his Brady claim to the PCRA court. (App. Ex. 2.) Petitioner's Post-PCRA Hearing Memorandum asserts Brady claims regarding the exculpatory impeachment evidence which Wilson presently claims was withheld by the prosecution regarding Jackson and Rahming. The Post-PCRA Hearing Memorandum states that the prosecution misrepresented the existence of critical impeachment evidence with respect to Jackson, informing the trial court and trial counsel that Jackson did not have a criminal record, even though the prosecutor knew that Jackson had several criminal convictions, including the 1982 conviction for impersonating a public servant. (App. Ex. 2 ¶¶ 5-6.) The Post-PCRA Hearing Memorandum also includes Petitioner's claim that the prosecutor failed to disclose a psychiatric evaluation of Jackson which was conducted in connection with his 1982 *crimen falsi* conviction and failed to disclose Rahming's relevant psychiatric history and his visit to the Hahnemann Medical College emergency room during Petitioner's trial. (Id. ¶¶ 7-8.) Petitioner's Post-PCRA Hearing Memorandum also asserts that the prosecutor failed to disclose exculpatory evidence regarding Gainer and Officer Fleming, although the Memorandum does not explicitly mention the interest-free loans which Officer Fleming provided to Gainer. (App. Ex. 2 ¶ 9.) The Commonwealth responded, on the merits, to Petitioner's Brady claim as it was

asserted in the Post-PCRA Hearing Memorandum. (App. Ex. 3.) The PCRA Court denied Petitioner's PCRA petition on the merits, but did not address his Brady claim. Wilson II, 861 A.2d at 928 n.8.

Petitioner reasserted his Brady claim in his appeal of the denial of his PCRA petition to the Pennsylvania Supreme Court. (App. Ex. 4.) He specifically addressed the facts underlying this claim in that appeal and explicitly discussed the interest-free loans made by Officer Fleming to Gainer as part of his claim that the prosecution failed to turn over Brady material with respect to Gainer and Officer Fleming. (App. Ex. 4 at 7-24, 32.) The Commonwealth addressed these arguments on the merits but also argued, for the first time, that Petitioner's Brady claim had been waived because it was not contained in Petitioner's PCRA petition. The Pennsylvania Supreme Court agreed that Petitioner's Brady claim had been waived because it was not asserted in his original PCRA petition or in an amended PCRA petition:

Preliminarily, Appellant's brief in this Court includes issues that were not pled in his PCRA petition, specifically, claims based on: the alleged failure of the Commonwealth to provide exculpatory evidence relating to Jackson's prior *crimen falsi* conviction for impersonating a public servant; mental health evaluations of Jackson and Rahming that purportedly could have been used to impeach them; after-discovered evidence involving Officer Fleming and Gainer focusing upon corruption in the 39th Police District; Officer Fleming's alleged participation in such misconduct; a connection between Gainer and Officer Fleming that casts doubt on their trial testimony; and the existence of an alibi. Appellant contends that, with respect to the claims concerning exculpatory evidence involving Jackson and Rahming, these issues were included under Claim IX in the PCRA petition, in Appellant's "renewed motion for discovery," and in Appellant's post-hearing memorandum. To the extent that the exculpatory evidence claims were not included in Appellant's PCRA petition, he argues that such omission occurred only because the Commonwealth had improperly suppressed the foundation for those claims. Appellant also emphasizes that the PCRA court, without

objection from the Commonwealth, permitted Appellant to present evidence and argument on these issues and, in any event, the merits of the additional claims can be reached, as the relaxed waiver rule was in effect during the disposition of Appellant's PCRA petition.

Although Appellant's PCRA petition included an allegation that the Commonwealth had withheld discoverable evidence, such evidence was described as coercion and threats by Officer Fleming and a detective directed against Jackson, Rahming, and Gainer, causing them to falsely incriminate Appellant. The averments supporting the allegation did not reference, most notably, Jackson's prior conviction, the mental health evidence concerning Jackson and Rahming, or the asserted after-discovered evidence relating to Officer Fleming and Gainer. Neither Appellant's discovery motion nor his "Post-PCRA Hearing Memorandum" is a substitute for a sufficient PCRA petition and, likewise, neither can be construed as an amendment to such a petition. See generally Pa.R.Crim.P. 905(A), (D) (providing that permission to file an amended PCRA petition may be granted by leave of court and describing the requirements for such petition). While certain of the evidence supporting these claims may not have been available to Appellant when he filed his PCRA petition, particularly the mental health records of Jackson and Rahming, once such records were provided to Appellant, he had the opportunity to pursue amendment of his petition, but failed to do so. This Court has previously rejected claims as waived in similar circumstances. See Commonwealth v. Thomas, 560 Pa. 249, 254 & n. 4, 744 A.2d 713, 715 & n. 4 (2000). Consequently, as Appellant failed to plead the claims involving the alleged exculpatory evidence relating to Jackson and Rahming, after-discovered evidence involving Officer Fleming, and the purported alibi, these issues are waived.

Wilson II, 861 A.2d at 927-28 (footnotes omitted).

The Commonwealth contends that, since the Pennsylvania Supreme Court found that Petitioner had waived this claim by not complying with the state's established procedural rules, this Court cannot review this claim absent a showing of "cause and prejudice" or a "miscarriage of justice." The Commonwealth contends that neither exist in this case. However, "a claim is not procedurally defaulted merely because a state court concluded that it was waived under a state

procedural rule; rather, it must also be shown that the state rule constitutes an ‘adequate’ and ‘independent’ ground barring review.” Wilson v. Beard, 426 F.3d 653, 664 (3d Cir. 2005).

Petitioner contends that the Pennsylvania Supreme Court’s determination that this claim was waived is not an adequate state law procedural ground because the waiver rule was not firmly established and regularly followed at the time Petitioner committed the procedural error. See Bronshtein, 404 F.3d at 707 (noting that the Supreme Court has held state procedural rules to be inadequate “if they are not ‘firmly established and regularly followed.’” (quoting Ford v. Georgia, 498 U.S. 411, 424 (1991))). A state court procedural rule is only adequate if ““(1) the state procedural rule speaks in unmistakable terms;(2) all state appellate courts refused to review the petitioner’s claims on the merits; and (3) the state courts’ refusal in this instance is consistent with other decisions.”” Jacobs v. Horn, 395 F.3d 92, 117 (3d Cir. 2005) (quoting Doctor v. Walters, 96 F.3d 675, 683-84 (3d Cir. 1996)). “In other words, a procedural rule is adequate only if it is ‘firmly established, readily ascertainable, and regularly followed at the time of the purported default.’” Id. (quoting Szuchon v. Lehman, 273 F.3d 299, 327 (3d Cir. 2001)).

The PCRA “requires a petitioner to prove that his allegation of error has not been waived.” Id. (citing 42 Pa. Cons. Stat. Ann. § 9543(a)(3)). “An issue is deemed waived if the petitioner could have raised it but failed to do so before trial, at trial, during unitary review, on appeal or in a prior state postconviction proceeding.” Id. (citing 42 Pa. Cons. Stat. Ann. § 9544(b)). The United States Court of Appeals for the Third Circuit (“Third Circuit”) has stated that the Pennsylvania Supreme Court currently “enforces the waiver rule in capital cases on PCRA appeal, and generally deems an issue waived where the petitioner failed to present it to the PCRA court.” Id. (citing Commonwealth v. Albrecht, 720 A.2d 693, 700 (1998)). When considering whether “the waiver bar is a state

procedural rule of sufficient clarity and routine application so as to command deference from a federal habeas court” the Court examines the waiver rule “in place at the time [Petitioner] should, assertedly, have complied with the rule, and not the one in place at the time that the Pennsylvania Supreme Court ruled on his direct appeal or his PCRA petition.” Thomas v. Beard, 388 F. Supp. 2d 489, 501-02 (E.D. Pa. 2005) (finding that the waiver bar was not an adequate state ground to bar consideration of claims which were deemed to have been waived by the Pennsylvania Supreme Court in Commonwealth v. Thomas, 744 A.2d 713, 715 & n. 4 (2000)) (citing Terrell v. Morris, 493 U.S. 1, 2 (1989); Cabrera v. Barbo, 175 F.3d 307, 313 (3d Cir. 1999); Doctor v. Walters, 96 F.3d 675, 684 (3d Cir. 1996); and Jacobs v. Horn, 129 F. Supp. 2d 390, 399 (M.D. Pa. 2001)).

The Third Circuit has recognized that, prior to the Pennsylvania Supreme Court’s 1998 decision in Commonwealth v. Albrecht, 720 A.2d 693 (1998), it employed a relaxed waiver doctrine:

Prior to Albrecht . . . , the Pennsylvania Supreme Court applied the relaxed waiver doctrine in capital cases on PCRA appeal. [Albrecht, 720 A.2d at 700.] Under the relaxed waiver doctrine, the Pennsylvania Supreme Court declined to apply ordinary waiver principles in capital cases in an effort to prevent the court “from being instrumental in an unconstitutional execution.” Id. On November 23, 1998, the Pennsylvania Supreme Court in Albrecht expressly abandoned the relaxed waiver doctrine in capital cases on PCRA appeal. Id. The relevant question, then, is whether Pennsylvania’s strict enforcement of the waiver rule in capital cases on PCRA appeal was “firmly established, readily ascertainable, and regularly followed at the time of the purported default.” Szuchon, 273 F.3d at 327.

Jacobs, 395 F.3d at 117. The Pennsylvania Supreme Court found that Petitioner waived his Brady claim by failing to present it to the PCRA court either in his original PCRA petition or in an amended PCRA petition. Wilson II, 861 A.2d at 927-28. Petitioner filed his PCRA petition on March 11, 1996. (Pet. ¶ 7.) His PCRA petition was denied on May 6, 1998. (Id.) Therefore, the

relevant time period for determining whether the waiver rule was “firmly established and regularly followed” is March 11, 1996 through May 6, 1998, the time during which Petitioner could have filed an amended PCRA petition. Petitioner argues that the waiver rule is not an adequate state ground in this case because the Pennsylvania Supreme Court decided Albrecht six months after his lower court PCRA proceedings concluded. Petitioner relies on Jacobs, in which the Third Circuit found that the federal court could consider the merits of Jacobs’ claim regarding his counsel’s failure to seek voir dire on racial prejudice, even though the Pennsylvania Supreme Court had held the claim waived because it was not asserted in his PCRA petition:

The Pennsylvania Supreme Court did not firmly establish its strict enforcement of the waiver rule in such cases until November 23, 1998, when it decided Albrecht, more than a year after Jacobs’ PCRA petition was denied. It follows that the Pennsylvania Supreme Court’s strict enforcement of its waiver rule in capital cases on PCRA appeal is not adequate to support the judgment for the purpose of finding a procedural default under federal habeas law. See Szuchon, 273 F.3d at 327. Accordingly, we are free to examine the merits of Jacobs’ claim.

Jacobs, 395 F.3d at 117-18. Petitioner maintains that, since the Third Circuit found that the waiver rule was an inadequate state ground where the petitioner had totally failed to present his claim before the PCRA court in Jacobs, the waiver rule should also be an inadequate state ground in this case, where Petitioner did assert his claim, albeit imperfectly, before the PCRA court.

The Commonwealth maintains that the waiver rule was an adequate state ground even if that rule was not regularly followed by the Pennsylvania Supreme Court prior to Albrecht. The Commonwealth cites no opinions of the United States Supreme Court or the Third Circuit which support this position. The Court thus concludes that the waiver rule which the Pennsylvania Supreme Court invoked to deny review of Petitioner’s Brady claim was not firmly established and

regularly followed at the time it was applied. The rule cannot, therefore, form the basis for a finding of procedural default. See id. The Court finds, accordingly, that Petitioner fairly presented his Brady claim to the state courts and that this claim was not procedurally defaulted. Consequently, the Court will review Claim I on the merits and conduct a de novo review of that claim. See Appel, 250 F.3d at 210.

C. The Merits of Petitioner’s Brady Claim

There are three elements to a Brady claim of prosecutorial misconduct: “The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.” Banks v. Dretke, 540 U.S. at 691 (quoting Strickler v. Greene, 527 U.S. 263, 281-282 (1999)). In other words, a verdict will be overturned for a Brady violation only if the petitioner can establish both “that evidence in the possession of the government was actually suppressed, and . . . that the suppressed evidence was material.” Slutzker v. Johnson, 393 F.3d 373, 386 (3d Cir. 2004).

1. Favorableness to the accused

Petitioner maintains that the prosecution withheld evidence that both eyewitnesses, Jackson and Rahming, suffered from serious mental illnesses which interfered with their perceptions of reality, their abilities to observe, their memories, and their abilities to tell the truth. In addition, the prosecution failed to disclose that Jackson had prior *crimen falsi* convictions and, according to the police psychologist who examined him prior to Petitioner’s trial, a need to associate with and help the police. Petitioner further argues that the prosecution knew, but failed to disclose, that Gainer received money, in the form of interest-free loans, from Officer Fleming in exchange for the

information which Gainer provided to Officer Fleming. Respondents do not contend that there are any genuine issues of material fact with regard to this evidence and concede that this evidence would have had impeachment value with respect to Jackson, Rahming and Gainer. (6/5/06 Tr. at 51.) Consequently, the Court finds that this evidence was favorable to Petitioner and that Petitioner has satisfied the first element of a Brady claim.

2. Suppression by the prosecutor

Petitioner maintains that the prosecutor did not turn this information over to his trial counsel, even though his trial counsel made a general request for Brady material. Petitioner's trial counsel testified during the PCRA evidentiary hearing that, although he does not specifically recall filing pretrial motions in Petitioner's case, he would have filed a standard request for Brady material, including any evidence that could have been used to impeach prosecution witnesses, such as *crimen falsi* convictions. (12/1/97 N.T. at 5-6, 27.) Pursuant to Pa. R. Crim. P. 573(B)(1)(a),⁵ the Commonwealth has a mandatory duty to provide any evidence favorable to the accused and material to either guilt or punishment to a defendant upon request. The prosecution disclosed Rahming's and Gainer's previous convictions to Trigiani, but did not disclose any previous convictions for Jackson. The prosecutor also failed to inform Trigiani of Rahming's trip to the Hahnemann Medical College emergency room and Officer Fleming's interest-free loans to Gainer. (1/6/88 N.T. at 121-22, 12/1/97 N.T. at 7, 29.) Respondents do not deny that the prosecutor did not provide this information to Petitioner's trial counsel.

The Supreme Court has explained that the prosecutor's duty of disclosure under Brady does

⁵Rule 573 was numbered Pa. R. Crim. P. 305 at the time of Petitioner's trial and renumbered 573 on March 1, 2000, effective April 1, 2001.

not depend upon a request made by a defendant: “regardless of request, favorable evidence is material, and constitutional error results from its suppression by the government, ‘if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.’” Kyles v. Whitley, 514 U.S. 419, 433-34 (1995) (quoting United States v. Bagley, 473 U.S. 667, 682 (1985) (opinion of Blackmun, J.); id., at 685 (White, J., concurring in part and concurring in judgment)). Moreover, the prosecutor’s duty of disclosure is not limited to evidence actually known to the prosecutor, but also applies to all information in the possession of the prosecutor’s office, the police, and others acting on behalf of the prosecutor:

There is no question that the government's duty to disclose under Brady reaches beyond evidence in the prosecutor's actual possession. Since Giglio [v. United States], 405 U.S. [150,]154, 92 S. Ct. 763 [(1972)], the Supreme Court has made clear that prosecutors have “a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police.”

United States v. Risha, 445 F.3d 298, 303 (3d Cir. 2006) (quoting Kyles, 514 U.S. at 437); see also Giglio v. United States, 405 U.S. 150, 154 (1972) (“Brady v. Maryland held that suppression of material evidence justifies a new trial ‘irrespective of the good faith or bad faith of the prosecution.’ When the ‘reliability of a given witness may well be determinative of guilt or innocence,’ nondisclosure of evidence affecting credibility falls within this general rule.”) (citations omitted).

Respondents contend that the prosecutor was not aware of Jackson’s *crimen falsi* conviction at the time of Petitioner’s trial. Arlene Fisk, Esq., the prosecutor, testified during the PCRA evidentiary hearing that she did not recall whether she knew about Jackson’s *crimen falsi* conviction, but if she did, she would have disclosed that conviction on direct examination. (12/1/97 N.T. at 99.) Following Ms. Fisk’s testimony, Evan Silverstein, Esq., who represented the Commonwealth with

respect to Petitioner's PCRA petition, found Jackson's 75-10 rap sheet which includes the impersonation of a public servant charge in the Commonwealth's file on Petitioner and it was turned over to Petitioner's PCRA counsel. (1/16/98 N.T. at 23-24.) Ms. Fisk admitted, during the January 16, 1998 PCRA evidentiary hearing, that she had Mr. Jackson's 75-10 in the back of her binder and that she did have it at Petitioner's trial. (Id. at 49-50.) Mr. Jackson's 75-10 includes arrests for impersonating an officer in 1966 and 1968 and his May 26, 1981 arrest for impersonating a public servant. (App. Ex. 10.) Whether or not Ms. Fisk was personally aware of Jackson's prior convictions, those prior convictions were known to and available to the police and the prosecution had an obligation to turn that information over to Petitioner's trial counsel pursuant to Giglio. See Giglio, 405 U.S. at 154; Risha, 445 F.3d at 303. Moreover, Rahming's trip to the emergency room, where he told personnel that he had recently witnessed a murder and the victim had fallen on him with the "bullets in him" and where he was diagnosed with schizophrenia, was known to the prosecutor's office because Rahming was taken to the emergency room by a detective from the prosecutor's office. (App. Ex. 12(A).) Furthermore, Officer Fleming's interest-free loans to Gainer were obviously known to the police.

Respondents do not contest that Jackson's criminal record, Rahming's emergency room visit and Officer's Fleming's interest-free loans to Gainer were known to the prosecutor's office or to the police and not revealed to Petitioner's trial counsel. They do, however, dispute that a Brady violation occurred with respect to the failure to disclose Jackson's *crimen falsi* conviction because that conviction is a public record and, as such, they contend that it was equally available to Petitioner's trial counsel. Respondents rely on United States v. Pelullo, 399 F.3d 197 (3d Cir. 2005), in which the Third Circuit stated that "the 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.” Id. at 213 (quoting United States v. Starusko, 729 F.2d 256, 262 (3d Cir.1984)). Pellulo, however, did not involve the government’s failure to disclose its witness’s criminal history. Pellulo involved the failure to turn over certain documents which had been seized by the government from Pellulo in connection with a separate investigation in another state and which were being held in a warehouse in that other state (the “warehouse documents”). Id. at 211. The Third Circuit found that Brady did not require the government to turn the warehouse documents in question over to Pellulo because those documents were Pellulo’s own documents with which he was more familiar than the government; the government provided more than 75,000 pounds of the warehouse documents to Pellulo before trial; the government was not aware of the “exculpatory nature of the warehouse documents”; and “the government repeatedly made the warehouse documents available to Pellulo and his attorneys for inspection and copying.” Id. at 211-12.

In United States v. Perdomo, 929 F.2d 967 (3d Cir. 1991), the Third Circuit addressed whether a public defender could be charged with knowledge of a government witnesses’s previous conviction where another attorney in his office had represented the witness in connection with the previous conviction. The Third Circuit determined that, although “Brady does not oblige the government to provide defendants with evidence that they could obtain from other sources by exercising reasonable diligence,” and even though “[e]vidence is not considered to be suppressed if the defendant either knew or should have known of the essential facts permitting him to take advantage of any exculpatory evidence,” defense counsel cannot be imputed with the knowledge of a witness’s criminal history, even if the witness was represented by someone in the defense counsel’s own office. Id. at 973 (citations omitted). The Third Circuit concluded that “the prosecution, not

the defense, is equipped with the resources to accurately and comprehensively verify a witness's criminal background. Therefore, we find the district court's allocation of the burden to the Office of the Public Defender incorrect as a matter of law and as a matter of fairness." Id. If the prosecution has the obligation, pursuant to Perdomo, to notify defense counsel that a government witness has a criminal record even when that witness was represented by someone in defense counsel's office, the fact that a criminal record is a public document cannot absolve the prosecutor of her responsibility to provide that record to defense counsel.

There are no genuine issues of material fact regarding whether Jackson's previous conviction, Rahming's emergency room visit for psychiatric care, and Officer Fleming's interest-free loans to Gainer were known to the prosecutor's office or to the police and were not disclosed to Petitioner's trial counsel. The Court finds, accordingly, as a matter of law, that this information was suppressed and that Petitioner has satisfied the second element of a Brady claim.

3. Materiality

When considering materiality, the Court examines the "cumulative effect of all such evidence suppressed by the government," Kyles, 514 U.S. at 421, and also assesses how "disclosure of the suppressed evidence to competent counsel" would have affected the result. Id. at 441-447 (reviewing the way competent counsel could have used the withheld evidence to impeach the prosecution's two main eyewitnesses and to undercut the police investigation); see also United States v. Bagley, 473 U.S. 667, 683 (1985) ("[U]nder the Strickland formulation the reviewing court may consider directly any adverse effect that the prosecutor's failure to respond might have had on the preparation or presentation of the defendant's case."); Perdomo, 929 F.2d at 971 ("This court has recognized that the Bagley inquiry requires consideration of the totality of the circumstances,

including possible effects of non-disclosure on the defense's trial preparation." (citing Gov't of Virgin Islands v. Martinez, 780 F.2d 302, 306 (3d Cir.1985)). The Supreme Court has explained that "[the] touchstone of materiality is a 'reasonable probability' of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." Kyles, 514 U.S. at 434.

Petitioner contends that the withheld information regarding Jackson's conviction for impersonating a police officer would have provided significant impeachment evidence, as would the presentence report and psychologist's report, which Petitioner's counsel could have obtained when he became aware of the conviction. Petitioner contends that the conviction and related reports show that Jackson had *crimen falsi* convictions, a pro-prosecution bias, and mental impairments that undermine the reliability of his testimony. In addition, Petitioner also maintains that, had this evidence not been suppressed, effective trial counsel could have presented expert testimony at trial regarding Jackson's mental health and ability to testify truthfully based on this evidence. Petitioner's psychiatric expert, Julie Kessel, M.D., testified during the PCRA evidentiary hearing that the head injuries suffered by Jackson could cause the blackouts and significant cognitive troubles noted by Dr. Levitt. (11/24/97 N.T. at 120-21.) She also stated that Dr. Levitt's report that Jackson's long and short-term memory were weak and that he was easily confused were consistent with the possibility of brain damage and that Dr. Levitt's report suggests that Jackson would have difficulty recalling things accurately. (Id. at 121.) She further testified that Jackson's history of seeing himself as an aid to the police "would raise some serious issue [sic] as to his suggestibility and he has an interest here in appearing helpful" and that Jackson "wouldn't necessarily be credible in reporting

something because he distorts reality and has an interest in being helpful.” (Id. at 122-23.)

Petitioner also argues that Rahming’s emergency room visit, accompanied by a detective from the prosecutor’s office, would have been important impeachment evidence. Petitioner claims that, had Trigiani been notified of Rahming’s trip to the emergency room for psychiatric care, he could have investigated Rahming’s mental impairments by requesting other mental-health related information in the possession of the prosecutor, by seeking court orders for Rahming’s criminal history, probation records and pre-sentence reports, and by consulting with a mental health expert. Petitioner further argues that the psychiatric evidence regarding Rahming which was admitted during the PCRA hearing could have been developed and presented by Trigiani at Petitioner’s trial, had Rahming’s trip to the psychiatric emergency room been disclosed by the prosecutor. Petitioner claims that, if Trigiani had this information, he could have impeached Rahming’s testimony with evidence that he is chronically mentally ill with schizophrenia, suffers from hallucinations, has memory impairments, and has a history of mixing psychotropic medication with street drugs. Petitioner also claims that this history would have undermined Rahming’s trial testimony that he was not taking medication or drugs at the time of the shooting. (1/5/88 N.T. at 113-14.) Petitioner further maintains that, had this evidence not been suppressed, Trigiani could have presented expert testimony at trial regarding Rahming’s mental health. Dr. Kessel examined Rahming’s medical and probation records and determined that they indicate that Rahming suffers from “schizophrenia, chronic type.” (12/24/97 N.T. at 114-16.) She also stated that the records indicate that Rahming took antipsychotic medications for many years and that there were indications that he was a substance abuser. (Id. at 116-17.)

Respondents challenge the materiality of the psychiatric records of Jackson and Rahming on

the grounds that those records are hearsay and would have been inadmissible at Petitioner's trial. However, under Pennsylvania law, where a hospital record, such as the record of Rahming's emergency room visit, is "admitted to establish the fact of hospitalization and the fact of treatment given, and [was] not admitted to show a medical opinion, the record [is] properly admitted as a business records exception to the hearsay rule." Commonwealth v. Carter, 861 A.2d 957, 967 (Pa. Commw. Ct. 2004). Furthermore, in Pennsylvania, "[e]vidence of mental illness or a disability which impairs a witness' ability to perceive, remember and narrate perceptions accurately is invariably admissible to impeach credibility, even if not adequate to demonstrate incompetency." Cohen v. Albert Einstein Medical Center, 592 A.2d 720, 726 (Pa. Super. Ct. 1991). Indeed, the Pennsylvania Superior Court has determined, in accordance with this rule, that the records of a witness's therapy are admissible for purposes of impeachment. Commonwealth v. Davis, 650 A.2d 452, 461-62 (Pa. Super. Ct. 1994) (finding that the victim's therapy records, including the therapist's clinical observation "that the victim was a 'pathological liar,'" would have been admissible at trial to impeach the victim's credibility). Consequently, the Court finds that trial counsel could have used knowledge of Jackson's and Rahming's psychiatric history, in addition to Jackson's *crimen falsi* conviction, for impeachment of those witnesses. This evidence would have allowed Petitioner's trial attorney to impeach Jackson with his conviction for impersonating a Philadelphia police officer and evidence that he had suffered head injuries, had an impaired memory, was a "marginal historian," and had a need to associate with and aid the police. (App. Exs. 8, 9.) The suppressed evidence would have allowed Petitioner's trial attorney to impeach Rahming with evidence that he had been diagnosed with schizophrenia; that he had been prescribed psychotropic medication at the time of Lamb's murder; and that he believed, at the time of trial, that he had, as he told hospital

personnel, “recently witnessed a murder and the victim had fallen on him with the ‘bullets in him[,]’” when, in fact, the murder had taken place more than six years before. (App. Exs. 12(A), 13.) This evidence “would have been critical in presenting the witness[es]’ mental state, demeanor and behavior to the jury, and in questioning the witness[es]’ credibility.” Perdomo, 929 F.2d at 972 (finding a “strong probability” that the outcome of Perdomo’s trial would have been different if the government had disclosed evidence of a material witness’s previous convictions and psychiatric evaluation).

Petitioner also argues that the undisclosed information about Gainer’s relationship with Fleming would have been exculpatory. Petitioner claims that Trigiani tried to show that Gainer acted as a paid informant for Officer Fleming and that he fabricated his trial testimony as part of a *quid pro quo*, but that he was prevented from doing so because Officer Fleming denied at trial that he ever paid Gainer for information or ever gave anything to Gainer. (1/6/88 N.T. at 97-98.) Petitioner maintains that the evidence introduced at the PCRA evidentiary hearing undermines this testimony by showing that Officer Fleming gave Gainer interest-free loans. Evidence that Gainer may thus have had a monetary interest in providing Officer Fleming with information against Petitioner would have placed Petitioner’s trial counsel in a much stronger position to impeach this key witness. “The failure to disclose this valuable impeachment evidence places the jury’s verdict in doubt and undermines confidence in the outcome of the trial.” United States v. Fenech, 943 F. Supp. 480, 487 (E.D. Pa. 1996) (finding a Brady violation and granting defendant’s motion for a new trial where the government failed to provide defense counsel with information that an important government witness was motivated by money to provide information to the government).

The Commonwealth’s case against Petitioner “centered upon the testimony of Jackson,

Rahming and Gainer.” Wilson II, 861 A.2d at 922. Weighing the cumulative effect of all of the evidence which was suppressed by the prosecution at Petitioner’s trial, none of which is disputed by Respondents, the Court finds that there is a reasonable probability that, had that evidence been disclosed to the defense, Petitioner’s trial counsel could have used that evidence to effectively impeach Jackson, Rahming and Gainer. Jackson and Rahming were the prosecution’s only eyewitnesses and Gainer testified that Petitioner admitted killing Lamb. Consequently, the Court finds that there is a reasonable probability that the result of the trial would have been different had this evidence not been suppressed and that Petitioner has satisfied the third and final element of a Brady claim. The Court concludes, accordingly, that the prosecutor suppressed evidence favorable and material to the defense in violation of Brady.

IV. CONCLUSION

For the foregoing reasons, Petitioner’s Motion for Summary Judgment is granted as to Claim I of his Petition for Writ of Habeas Corpus. The proper relief in this case is to grant the writ, vacate Petitioner’s conviction, and allow the Commonwealth of Pennsylvania to retry Petitioner within 180 days of the date of the accompanying order.⁶

An appropriate order follows.

⁶As the Petitioner does not contend that the prosecution’s Brady violation was willful, the appropriate sanction is a retrial. See Virgin Islands v. Fahie, 419 F.3d 249, 255 (3d Cir. 2005) (“While retrial is normally the most severe sanction available for a Brady violation, where a defendant can show both willful misconduct by the government, and prejudice, dismissal may be proper.”).

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

ZACHARY WILSON,	:	CIVIL ACTION
Petitioner	:	
	:	
v.	:	(DEATH PENALTY -
	:	HABEAS CORPUS)
	:	
JEFFREY A. BEARD, ET AL.,	:	No. 05-2667
Respondents	:	

ORDER

AND NOW, this 9th day of August, 2006, upon consideration of the Petition for Writ of Habeas Corpus (Docket No. 4), Petitioner's Motion for Summary Judgment (Docket No. 5), all documents filed in connection therewith, and the argument held on June 5, 2006, **IT IS HEREBY ORDERED** that Petitioner's Motion for Summary Judgment is **GRANTED** and that the Petition for a Writ of Habeas Corpus is **GRANTED** as to Petitioner's first claim for relief. **IT IS FURTHER ORDERED** that Petitioner's convictions for First Degree Murder and Possessing an Instrument of Crime in Commonwealth v. Wilson, No. 2950-52, September Term, 1986 (Albert F. Sabo, J.), are **VACATED**. The Commonwealth of Pennsylvania may retry Petitioner on these charges within 180 days of the date of this Order.

BY THE COURT:

John R. Padova, J.