

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

<b>WILLIAM FORD AYRES, JR.,</b>	:	<b>CIVIL ACTION</b>
<b>Petitioner,</b>	:	
	:	
v.	:	
	:	
<b>PAUL J. STOWITZKY, et al.,</b>	:	
<b>Respondents</b>	:	<b>NO. 06-1636</b>

**MEMORANDUM AND ORDER**

PRATTER, DISTRICT JUDGE

APRIL 30, 2007

William Ford Ayres petitions for habeas corpus relief pursuant to 18 U.S.C. § 2254 from a conviction and sentence imposed by the Philadelphia County Court of Common Pleas and affirmed by the Pennsylvania Superior Court. Judge Timothy R. Rice, United States Magistrate Judge, filed a Report and Recommendation recommending that Mr. Ayres's Petition be denied for failure to exhaust state remedies and dismissed without prejudice. Mr. Ayres filed objections to the Report and Recommendation, and the Government responded. After conducting a de novo review pursuant to 28 U.S.C. § 636(b)(1)(C), the Court concludes that Mr. Ayres failed to exhaust state remedies. However, because Mr. Ayres's statutory one-year time limit to seek post-conviction relief in state court expired on February 8, 2007, and in absence of circumstances warranting statutory tolling, Mr. Ayres's claims are procedurally defaulted. For this reason, the Court will adopt in part and modify in part the Report and Recommendation. The Court will stay the case, and Mr. Ayres will have 30 days to file a supplement to his Petition pointing to facts, if any, that demonstrate cause for the default and actual prejudice as a result of the alleged violations of federal law, or demonstrating that failure to consider the claims will result in a fundamental miscarriage of justice.

## **BACKGROUND**

On April 13, 1999, following a two-day bench trial in the Philadelphia County Court of Common Pleas, Mr. Ayres was found guilty of involuntary deviate sexual intercourse, kidnaping, sexual assault, statutory rape, indecent assault, possessing an instrument of crime, corruption of minors, simple assault, reckless endangerment, and indecent exposure. On July 16, 1999, Mr. Ayres was sentenced to a term of five-to-ten years imprisonment with a consecutive term of five years probation, and the sentence was affirmed by the Superior Court of Pennsylvania on December 29, 2000. Commonwealth v. Ayres, 769 A.2d 1199 (Pa. Super. 2000). At that time, Mr. Ayres did not petition the Supreme Court for allowance of appeal.

Instead, on August 23, 2001, Mr. Ayres filed a *pro se* petition for relief under the Pennsylvania Post Conviction Relief Act (“PCRA”), 42 Pa. C.S. § 9541, *et seq.* Mr. Ayres’s appointed counsel subsequently filed a “no merit” letter pursuant to Commonwealth v. Finley, 550 A.2d 213 (Pa. Super. 1988), which the PCRA court approved. The PCRA court advised Mr. Ayres of its intent to dismiss the petition without an evidentiary hearing and afforded Mr. Ayres an opportunity to respond. Over Mr. Ayres’s objection, the PCRA court dismissed the petition and permitted counsel to withdraw.

Mr. Ayres then appealed to the Pennsylvania Superior Court. On appeal, the Government conceded, and the Pennsylvania Superior Court agreed, that remand was appropriate because neither the PCRA court opinion nor appointed counsel’s “no merit” letter fully addressed the claims Mr. Ayres sought to raise. See Commonwealth v. Ayres, No. 1987 EDA 2002 (Pa. Super. July 7, 2003). Accordingly, the Pennsylvania Superior Court remanded the case to the PCRA court.

At that point, newly appointed counsel for Mr. Ayres requested reinstatement of Mr. Ayres's direct appellate rights from the December 29, 2000 Pennsylvania Superior Court decision affirming his judgment of sentence. On March 18, 2005, the PCRA court reinstated Mr. Ayres's right to a direct appeal *nunc pro tunc*. Counsel for Mr. Ayres then filed a petition for allowance of appeal in the Pennsylvania Supreme Court on May 10, 2005, which the Pennsylvania Supreme Court denied on November 10, 2005. Commonwealth v. Ayres, 887 A.2d 1239 (Pa. 2005). Instead of filing a second petition for relief in state court under the PCRA, on April 19, 2006, Mr. Ayres filed the present Petition seeking federal habeas corpus relief on the following grounds:

1. "Ineffective Assistance of Counsel for failure to: Request continuance to investigate evidence; to enter evidence; to call witnesses; to object to prosecutors [sic] improper [sic] comments." (Petition 9.)
2. In effective assistance of counsel on direct appeal. (Id.)
3. "Prosecutorial Misconduct. Prosecutor withheld evidence until day of trial. Misstates defendants [sic] testimony to mislead factfinder." (Id.)
4. "Prosecutorial Misconduct. Prosecution failed to notify defense the Commonwealth's case contained perjured testimony." (Id.)

## **LEGAL STANDARD**

When a habeas petition has been referred to a magistrate judge, the Court may "accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b). The Court must "make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made." Id.

## DISCUSSION

### A. Failure to Exhaust

Absent exceptional circumstances, a federal court may not determine the merits of a habeas corpus petition until the petitioner has exhausted all means of available relief under state law. 28 U.S.C. § 3354(b); O’Sullivan v. Boerkel, 526 U.S. 838, 839 (1999); Slutzker v. Johnson, 393 F.3d 373, 379 (3d Cir. 2004). Principles of comity “dictate that when a prisoner alleges that his continued confinement for a state court conviction violates federal law, the state courts should have the first opportunity to review this claim and provide any necessary relief.” O’Sullivan, 526 U.S. at 844-45. Mr. Ayres bears the burden of proving that he has exhausted available state remedies. Landano v. Rafferty, 897 F.2d 661, 668 (3d Cir. 1990).

A petitioner “shall not be deemed to have exhausted the remedies available . . . if he has the right under the law of the state to raise, by any available procedure, the question presented.” 28 U.S.C. § 2254(c). Before this Court may review the merits of Mr. Ayres’s Petition, he “must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State’s established appellate review process.” O’Sullivan, 526 U.S. 844-45. To demonstrate exhaustion, Mr. Ayres must show that the claim he asserts in federal court has been “fairly presented” to the state courts. Landano, 897 F.2d at 668 (citing Picard v. Connor, 404 U.S. 270, 275 (1971); Ross v. Petsock, 868 F.2d 639, 641 (3d Cir. 1989)). To be “fairly presented,” the federal claim must be the substantial equivalent of that presented to the state courts. Id. at 668. The Court of Appeals for the Third Circuit has interpreted “substantial equivalence” to mean that “*both* the legal theory and the facts on which a federal claim rests must have been presented to the state courts.” Id. (citing Ross, 868 F.2d at 641). This ensures that

“the same method of legal analysis” used by the federal court was available to the state court when it adjudicated the claim. Id. at 669. Mr. Ayres must exhaust state remedies as to each of his federal claims. Id.

In the present Petition, Mr. Ayres raises four claims: ineffective assistance of trial counsel, ineffective assistance of appellate counsel, and two claims of prosecutorial misconduct. (Petition 9.) On direct appeal in state court, Mr. Ayres raised the following grounds for relief:

The verdict was against the weight of the evidence.

The verdict was against the evidence.

The Commonwealth failed to prove all the elements beyond a reasonable basis of the charge of kidnapping.

The Defendant’s extreme consciousness of innocence mandates a reversal of judgment and acquittal.

The trial court erred in failing to grant the Defendant’s motion for mistrial due to a sequestered and sworn witness being coached by another witness.

The trial court impermissibly assumed facts not in evidence or take [sic] an improper inference when finding the Defendant guilty of involuntary deviate sexual intercourse, statutory rape, statutory sexual assault and indecent assault.

Commonwealth v. Ayres, 769 A.2d 1199 (Pa. Super. Dec. 29, 2000).

Although it is not clear what claims Mr. Ayres raised in his first PCRA petition,<sup>1</sup> the

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<sup>1</sup> Mr. Ayres contends that he raised in his first PCRA petition the ineffective assistance of counsel and prosecutorial misconduct claims presented to the Court here. (Objections 1.)

The Pennsylvania Superior Court vacated the PCRA court’s dismissal and remanded the case on the grounds that neither the PCRA court opinion nor appointed counsel’s “no merit” letter fully addressed the claims Mr. Ayres sought to raise, as required by Commonwealth v. Glover, 738 A.2d 460 (Pa. Super. 1999). Commonwealth v. Ayres, No. 1987 EDA 2002 (Pa. Super. July 7, 2003). Before counsel’s request to withdraw may be granted, (1) counsel must file a “no merit” letter detailing the nature and extent of his review; (2) counsel must list in the “no

filing of Mr. Ayres's first PRCA petition alone is insufficient to exhaust a claim. To satisfy the exhaustion requirement, state prisoners must "give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." O'Sullivan, 526 U.S. at 845. With respect to the four claims raised here, it appears from the available record that Mr. Ayres has not pursued "one complete round" of either the direct appeal review process or the PCRA review process.

Instead of filing a second PCRA petition, Mr. Ayres's newly appointed counsel successfully sought *nunc pro tunc* reinstatement of Mr. Ayres's direct appellate rights. In his petition for allowance of appeal in the Pennsylvania Supreme Court, Mr. Ayres claimed that (1) the evidence was insufficient to support verdict; (2) the Commonwealth failed to prove kidnapping beyond a reasonable doubt; and (3) the Pennsylvania Superior Court erred as a matter of law in denying the motion for mistrial. (See Government Response Ex. E, *Nunc Pro Tunc* Petition for Allowance of Appeal.)

Thus, Mr. Ayres has failed to fully exhaust his state remedies because he has not presented his federal claims to any state appellate court. This Court may not review the merits of Mr. Ayres's claims until he has fully exhausted all of his claims in state court. Here, however, Mr. Ayres's claims are now procedurally defaulted under state law because the PCRA statute of limitations has expired.

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merit" letter each issue the petitioner wishes to have reviewed; (3) counsel must explain in the "no merit" letter why the petitioner's issues are without merit; (4) the PCRA court must conduct its own independent review of the record; and (5) the PCRA court must agree with counsel that the petition is without merit. Glover, 738 A.2d at 464.

## **B. Time Limitations**

Pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), a petition for a writ of habeas corpus must be filed within one year from “the date on which the [petitioner’s] judgment became final by the conclusion of direct review or the expiration of the time for seeking such review.” 28 U.S.C. § 2244(d)(1)(A) and (d)(2).<sup>2</sup> The AEDPA one-year time limit is statutorily tolled during the time when “a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending . . . .” 28 U.S.C. § 2244(d)(2). An AEDPA time bar prevents consideration of the substantive grounds advanced in the request for relief.

The PCRA also provides a one-year limitations period.<sup>3</sup> 42 Pa. C.S. § 9545(b)(1). A petition must be filed within one year of the conclusion of direct review, or at the expiration of the time period for seeking such review. 42 Pa. C.S. § 9545. The statute provides three exceptions to this time limitation: (1) 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 the Commonwealth or the Constitution or laws of the United States; (2) the facts upon which the claim is predicated were unknown to the petitioner and could not have

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<sup>2</sup> None of the other possible “start dates” found in § 2244(d)(1) apply here: no state action prevented the timely filing of the instant action; Mr. Ayres does not rely on a new rule of retroactively applicable constitutional law; and the factual predicates for Mr. Ayres’s claims stem from events that took place during the trial or on direct appeal and were discoverable in the exercise of due diligence.

<sup>3</sup> The Pennsylvania Post-Conviction Relief Act provides for “an action by which persons convicted of crimes they did not commit and persons serving illegal sentences may obtain collateral relief.” 42 Pa. C.S. § 9542. The PCRA is the exclusive means in Pennsylvania by which defendants may obtain collateral relief. Id.

been ascertained by the exercise of due diligence; or (3) 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 expiration of the PCRA time period and which has been held by that court to apply retroactively. 42 Pa. C.S.A. § 9545(b)(1).

The Supreme Court of Pennsylvania has held that the PCRA's time limitations are jurisdictional, meaning they "go to a court's right or competency to adjudicate a controversy." Commonwealth v. Cruz, 852 A.2d 287 (Pa. 2004) ("the time for filing a PCRA petition can be extended only to the extent that the PCRA permits it to be extended, i.e., by operation of one of the statutorily enumerated exceptions to the PCRA time-bar"). For this reason, equitable tolling may not be applied to petitions brought under the PCRA. McCabe v. Pennsylvania, 419 F. Supp. 2d 692, 695-96 (E.D. Pa. 2006). A court may only grant an extension of the time limit pursuant to the statutory exceptions. Commonwealth v. Fahy, 737 A.2d 214, 222-23 (Pa. 2002).

If a federal habeas petition is mixed, i.e., contains both exhausted and unexhausted claims, a federal court may stay the petition and hold it in abeyance until the unexhausted claims have been exhausted. A stay, as opposed to a dismissal, avoids the problematic result of a petition being time-barred upon the petitioner's return to federal court after exhausting all his claims.<sup>4</sup> If, however, state law "clearly foreclose[s] state court review of unexhausted claims,"

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<sup>4</sup> Both the Supreme Court and the Court of Appeals for the Third Circuit have since recognized that rigid application of the AEDPA time limit in conjunction with the total exhaustion rule can lead to problematic results. In Rhines v. Weber, 544 U.S. 269, 275 (2005), the Supreme Court pinpointed the problem faced by prisoners filing mixed habeas petitions post-AEDPA:

As a result of the interplay between AEDPA's 1-year statute of limitations and Lundy's dismissal requirement, petitioners who come to federal court with "mixed" petitions run the risk of forever losing

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their opportunity for any federal review of their unexhausted claims. If a petitioner files a timely but mixed petition in federal district court, and the district court dismisses it under Lundy after the limitations period has expired, this will likely mean the termination of any federal review. . . . The problem is not limited to petitioners who file close to the AEDPA deadline. Even a petitioner who files early will have no way of controlling when the district court will resolve the question of exhaustion. Thus, whether a petitioner ever receives federal review of his claims may turn on which district court happens to hear his case.

Id. at 275; see also Crews v. Horn, 360 F.3d 146, 151 (3d Cir. 2004) (noting that, under certain circumstances, “AEDPA’s limitations period may act to deprive a petitioner of a federal forum if dismissal of the habeas petition is required”) (internal citations omitted).

In Rhines, the Supreme Court held that under AEDPA, district courts retain the authority to issue stays that are a proper exercise of their discretion. Rhines, 544 U.S. at 276. The Court held that a district court should stay a mixed petition “if [1] the petitioner had good cause for his failure to exhaust, [2] his unexhausted claims are potentially meritorious, and [3] there is no indication that the petitioner engaged in intentionally dilatory litigation tactics.” Id. at 278. Under these circumstances, it would likely be an abuse of discretion to deny a stay. Id. See also Lundy, 455 U.S. at 522 (the total exhaustion requirement was not intended to “unreasonably impair the prisoner’s right to relief”); Crews, 360 F.3d at 154 (“district courts have the discretion to stay mixed habeas corpus petitions but . . . when an outright dismissal could jeopardize the timeliness of a collateral attack, a stay is the only appropriate course of action”).

Although this line of cases specifically addressed only “mixed” petitions, the circumstances facing petitioners with exclusively unexhausted claims are closely analogous. As the Supreme Court noted in Rhines, “[e]ven a petitioner who files early will have no way of controlling when the district court will resolve the question of exhaustion. Thus, whether a petitioner ever receives federal review of his claims may turn on which district court happens to hear his case.” Rhines, 544 U.S. at 275. This is equally true for those petitioners with exclusively unexhausted claims as it is for those with mixed petitions because under no circumstances was the total exhaustion requirement intended to “unreasonably impair the prisoner’s right to relief.” Lundy, 455 U.S. at 522. However, neither the Supreme Court nor Court of Appeals for the Third Circuit has applied the stay-and-abeyance procedure to “unmixed” petitions.

Alternatively, some courts have suggested that equitable tolling may be an appropriate way to address petitions containing exclusively unexhausted claims. See, e.g., Duncan v. Walker, 533 U.S. 167, 184 (2001) (Stevens, J., concurring) (“[A] federal court might very well conclude that tolling is appropriate based on the reasonable belief that Congress could not have intended to bar habeas review for petitioners who invoke the court’s jurisdiction within the 1-year interval prescribed by AEDPA,” but “whose timely filed petitions remain pending in district court past the limitations period, only to be dismissed after the court belatedly realizes that one or

the exhaustion requirement is excused because under these circumstances, exhaustion is not possible and, therefore, pursuit of state court remedies would be futile. See Touloson v. Beyer, 987 F.2d 984, 987 (3d Cir. 1993); Slutzker v. Johnson, 393 F.3d 373, 380 (3d Cir. 2004) (“The exhaustion requirement does not apply, however, in cases where the state courts would not consider the unexhausted claims because they are procedurally barred.”). The Court of Appeals, however, has cautioned that “[t]he mere existence of a state procedural rule that would appear to bar relief is not . . . sufficient to avoid the exhaustion requirement.” Slutzker, 393 F.3d at 380. Thus, if there is “any likelihood that the state courts would consider the merits of a petitioner’s claim, the federal courts should dismiss his petition and allow him to seek relief in state courts.” Id. Conversely, “if state law ‘clearly foreclose[s] state court review of the unexhausted claims,’” the exhaustion requirement is excused. Id. (citing Toulson, 987 F.2d at 987).

Here, the Pennsylvania Supreme Court denied allocatur on November 10, 2005. The time period for seeking *certiorari* in the United States Supreme Court expired 90 days later, on

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more claims have not been exhausted.”); Hargrove v. Brigano, 300 F.3d 717, 721 (6th Cir. 2002) (holding that, under certain circumstances, prospective equitable tolling is a reasonable alternative to dismissal); Rodriguez v. Bennett, 303 F.3d 435, 438 (2d Cir. 2002) (“under appropriate circumstances the petitioner may be entitled to equitable tolling). Even if appropriate, however, equitable tolling would be applied by the Court only if and when Mr. Ayres returns to federal court after exhausting his claims in state court.

Here, Mr. Ayres timely filed his Petition on April 19, 2006, at which point he had approximately eight months to file either a federal habeas petition or a state PCRA petition. When the Report and Recommendation was filed on September 15, 2006, Mr. Ayres had 146 days remaining in both his federal and state limitations periods. As of the date of this Memorandum and Order, however, the AEDPA limitations period has expired. If Mr. Ayres’s Petition is dismissed at this juncture, he will be effectively deprived of a federal forum. Even if he is able to subsequently exhaust state remedies, he will be time-barred upon his return to federal court. See Crews, 360 F.3d at 151. The Court, however, will not reach the question of whether a stay or equitable tolling would be appropriate in this case because Mr. Ayres’s claims are now procedurally defaulted under state law.

February 8, 2006. Thus, Mr. Ayres's judgment of sentence became final on February 8, 2006, at which time the AEDPA and PCRA one-year time limits began to run, giving Mr. Ayres until February 8, 2007 to properly file a federal habeas petition. Mr. Ayres timely filed the present Petition on April 19, 2006. As of the date of this Memorandum and Order, however, both the AEDPA and PCRA one-year time limits have expired. If Mr. Ayres filed a second PCRA petition, his claims would only be heard on merits if one of the statutory exceptions applied.<sup>5</sup>

Mr. Ayres raises four claims in his Petition: (1) ineffective assistance of trial counsel; (2) ineffective assistance of appellate counsel; (3) prosecutorial misconduct for withholding evidence and misleading the factfinder; and (4) prosecutorial misconduct for failure to notify the defense of allegedly perjured testimony. For the reasons discussed below, the statutory exceptions to the PCRA time limit do not apply to any of these claims.

**a. Ineffective Assistance of Trial Counsel**

In support of his ineffective assistance of counsel claim, Mr. Ayres alleges the following facts:

Counsel failed to obtain exculpatory DNA evidence for lab testing. counsel [sic] also failed to enter into evidence a 911 tape recording used to impeach testimony of commonwealth's witness[es]. Also to request a continuance when court[-]ordered documents were not present for trial. To investigate evidence presented at trial that was withheld from pretrial discovery. Counsel entered x-rays into evidence, but failed to call doctor as witness to give exculpatory testimony.

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<sup>5</sup> The fact that Mr. Ayres's federal habeas petition was pending past the limitations period does not constitute cause to excuse Mr. Ayres's state court procedural default for the purpose of federal review. The PCRA limitations period is not tolled during federal habeas review. *Fahy*, 737 A.2d at 222-23. As previously noted, equitable tolling may not be applied to petitions brought under the PCRA. *Id.* at 222.

To request a[n] in-camera inspection of the Dept. of human [sic] Services case file after it was learned [sic] of previous accusations of other persons.

To motion for a mistrial after commonwealth's witness[']s admission to giving perjured testimony at preliminary hearing.

To raise a claim that [the] trial court err[ed] after [it] ruled that evidence withheld from pretrial discovery would not be entered, only to change that ruling later prejudicing defendant.

Counsel failed to call several witness' [sic] to testify in defendant[']s behalf. Counsel did not call any witness' [sic] to testify in regards to the defendant[']s handwriting which was in question. Nor did he call a witness with respects [sic] to injuries of defendant[']s hand as to range of motions.

For failure to object to improper questioning on matters [sic] not germane to the case and in violation of PA rules of evidence.

Counsel's failure to raise claim on direct appeal that the verdict was so contrary to the evidence that it shocks one's sense of justice and based on pure conjecture and surmise.

Counsel ineffective due to a conflict of interest. A conflict of interest developed when the cost of a diligent and affirmative defense in my criminal case would exceed the anticipated monetary settlement award of a personal injury case that my attorney was also representing me for.

All fees for the criminal case was to be paid contingent from the settlement of the personal injury case.

The defendant contends through ineffective assistance of counsel, prosecutorial misconduct and judicial abuse of discretion that the defendant was denied a fair and impartial trial.

(Petition 9 and reverse side of 9.)

Claims of ineffective assistance of counsel do not "automatically qualify" under the statutory exceptions to the PCRA one-year time limitation, Commonwealth v. Pursell, 749 A.2d

911, 915 (2000), and Mr. Ayres does not allege any facts that bring this claim within any of the statutory exceptions.

First, nothing in the record indicates that Mr. Ayres failed to raise this claim in state court because of the interference of government officials. To the extent Mr. Ayres would claim that ineffective assistance of counsel prevented him from raising this claim, he cannot invoke this statutory exception because the term “government officials” does not include Petitioner’s own defense counsel. Pursell, 749 A.2d at 916. Second, the alleged ineffective assistance of counsel was not unknown to Mr. Ayres at the time of his state court appeals because the claim stems from events that took place during the trial or on direct appeal and were discoverable long before in the exercise of due diligence. Finally, Mr. Ayres does not assert a newly recognized constitutional right.

**b. Ineffective Assistance of Appellate Counsel**

Mr. Ayres alleges that appellate counsel raised three issues on direct appeal, but he failed to cite the correct standard of review for those issues. (Petition 9.) He also contends that his appellate counsel failed raise a claim “that [the] verdict was contrary to the evidence” or raise the issue of prosecutorial misconduct. (Id.) Again, none of the statutory exceptions apply here. With the possible exception of the status of defense counsel, there is no allegation of government interference, but, as stated above, the term “government officials” does not include defense counsel. Pursell, 749 A.2d at 916. Mr. Ayres’s claims do not implicate any new rule of retroactively applicable constitutional law and their factual predicates were indisputably known to Mr. Ayres prior to the expiration of the PCRA limitations period.

**c. Prosecutorial Misconduct: Withholding Evidence / Misleading Factfinder**

Mr. Ayres alleges that

Prosecutor withheld from pretrial discovery a 911 tape [and] police photos. Elicited testimony of a parking lot [attendant?] not reported or of record. [M]isstates portions of defendant[']s testimony to mislead factfinder and to raise passions. Prosecutor improperly vouches for the commonwealth witness' credibility.

(Petitioner 9.) Again, Mr. Ayres does not allege any government interference that prevented him from raising this claim on direct and collateral appeals in state court, and no newly recognized rule of constitutional law is implicated. Mr. Ayres has known of the facts upon which this claim is predicated since the moment the underlying events occurred during his trial.

**d. Prosecutor Misconduct: Failure to Notify Defense of Perjured Testimony**

Mr. Ayres alleges that during the cross examination of the Commonwealth's "chief witness," the witness admitted to "providing perjured testimony at the preliminary hearing." (Petition 9.) Mr. Ayres additionally alleges that the prosecution stipulated "not to argue forged signature on Miranda warnings, but then enters Miranda warnings after defense withdraws it's [sic] motion." (*Id.* at 10.) Neither of these claims fall within any of the statutory exceptions to the PCRA limitations period. Mr. Ayres was aware of these alleged facts when he filed his direct and collateral appeals, and they do not implicate any newly recognized issue of constitutional law. There is no indication of any government action that interfered with Mr. Ayres's ability to timely raise these issues in post-conviction proceedings in state court.

Thus, the exhaustion requirement must be excused as to the unexhausted claims presented here because they were not raised on direct or collateral appeals in state court before the PCRA

one-year limitations period expired and do not fall within any of the statutory exceptions to that time limit. See 28 U.S.C. § 2254(b)(1)(B); Slutzker, 393 F.3d at 380 (“Since Slutzker gets no help from the statutory exceptions, and since the Pennsylvania courts will not consider late-filed petitions, there is no doubt that Slutzker cannot now bring his *Brady* claim in the Pennsylvania courts. Thus his failure to exhaust that claim is excused under 28 U.C.S. § 2254(b)(1)(B)”); Keller v. Larkins, 251 F.3d 408, 415 (3d Cir. 2001) (stating that if petitioner “could still present his federal claim to the state courts at this late date, we would be compelled to dismiss his petition, but it is undisputed that the Pennsylvania courts would not entertain that claim” where it is time-barred by the PCRA); McCabe, 419 F. Supp. 2d at 696 (independently determining that petitioner’s unexhausted claims were time-barred and consequently declining to dismiss the petition).

### **C. Procedural Default**

Even if the exhaustion requirement is excused, the Court lacks jurisdiction to consider “an issue of federal law on direct review from a judgment of a state court if that judgment rests on a state-law ground that is both ‘independent’ of the merits of the federal claim and an ‘adequate’ basis for the court’s decision.” Harris v. Reed, 489 U.S. 255, 260 (1989). Such claims are considered to be procedurally defaulted. If a petitioner’s unexhausted claims have been procedurally defaulted, a federal court may review those claims on the merits only if “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.” Coleman v. Thompson, 501 U.S. 722, 750 (1991).

To establish the requisite cause, a petitioner must “demonstrate some objective factor

external to the defense that prevented compliance with the state's procedural requirements.” Cristin v. Brennan, 281 F.3d 404, 412 (3d Cir. 2002) (quoting Coleman, 501 U.S. at 753). The cause must be “something that cannot fairly be attributed to the petitioner.” Johnson v. Klem, 2004 WL 1175575, at \*2 (E.D. Pa. May 26, 2004), Report and Recommendation adopted by 2004 WL 1552003 (E.D. Pa. Jul. 9, 2004) (quoting Coleman, 501 U.S. at 753).

To establish prejudice, the petitioner must demonstrate that “the alleged error ‘worked to [Petitioner’s] actual and substantial disadvantage.’” United States v. Rodriguez, 153 F. Supp. 2d 590, 594 (E.D. Pa. 2001) (quoting United States v. Frady, 456 U.S. 152, 170 (1982)). Specifically, Mr. Ayres must show not merely the alleged errors during his trial created the *possibility* of prejudice, but that “they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.” Frady, 456 U.S. at 170.

To show that a fundamental miscarriage of justice will occur if the claims are not reviewed, a petitioner must present new evidence that he is actually innocent of the crime for which he has been convicted. McCabe, 419 F. Supp. 2d at 697 (citing Cristin, 281 F.3d at 412).

Because Mr. Ayres’s claims were not procedurally defaulted at the time he filed this Petition or at time he filed his objections to the Report and Recommendation, he has not had the opportunity to be heard on these issues. Accordingly, Mr. Ayres shall have 30 days to demonstrate cause for the default and actual prejudice as a result of the alleged violations of federal law, or to show that failure to consider the claims will result in a fundamental miscarriage of justice. See McCabe, 419 F. Supp. 2d at 701 (providing petitioner 30 days to make showing of cause and prejudice or fundamental miscarriage of justice).

## **CONCLUSION**

For the foregoing reasons, the Court will adopt in part and modify in part the Report and Recommendation. Mr. Ayres did not raise in state court any of the claims he seeks to present here and thus failed to exhaust his state remedies. These claims, however, were procedurally defaulted while Mr. Ayres's federal Petition was pending. Consequently, the Court will provide Mr. Ayres with 30 days from the date of this Memorandum and Order to identify and address any cause and prejudice, or a fundamental miscarriage of justice, which would permit the Court to rule on the merits of his procedurally defaulted claims.

**BY THE COURT:**

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**GENE E.K. PRATTER**  
**UNITED STATES DISTRICT JUDGE**

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

<b>WILLIAM FORD AYRES, JR.,</b>	:	<b>CIVIL ACTION</b>
<b>Petitioner,</b>	:	
	:	
<b>v.</b>	:	
	:	
<b>PAUL J. STOWITZKY, et al.,</b>	:	
<b>Respondents</b>	:	<b>NO. 06-1636</b>

**ORDER**

AND NOW, this 30th day of April, 2007, upon consideration of the Petition for Writ of Habeas Corpus of William Ford Ayres (Docket No. 1); the Government's response thereto (Docket No. 7); the Report and Recommendation of Judge Timothy R. Rice, United States Magistrate Judge (Docket No. 8); Petitioner's objections thereto (Docket No. 9); and the Government's response to Petitioner's objections (Docket No. 10), it is hereby ORDERED that:

1. The Report and Recommendation is ADOPTED IN PART and MODIFIED IN PART;
2. Petitioner's objections are DENIED; and
3. The Petition is STAYED to permit Mr. Ayres to have thirty (30) days from the date of this Order to supplement his Petition to identify facts demonstrating cause for the default and actual prejudice as a result of the alleged violations of federal law, or demonstrating that failure to consider the claims will result in a fundamental miscarriage of justice.

There is no basis on which to issue a Certificate of Appealability under 28 U.S.C. § 2253.<sup>6</sup>

BY THE COURT:

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GENE E.K. PRATTER  
UNITED STATES DISTRICT JUDGE

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<sup>6</sup> Mr. Ayres has not made a substantial showing of the denial of a constitutional right for any of his claims as required under 28 U.S.C. § 2253(c)(2).