

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

CARMEN WOODS )  
 ) Civil Action  
 v. )  
 ) 99-5240  
 EDWARD BRENNAN, ET AL. )

**MEMORANDUM**

**Padova, J.**

**November , 2001**

Before the Court is Carmen Woods' counseled Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 ("Petition"). Petitioner is a state prisoner currently serving a life sentence for first degree murder, aggravated assault, and related offenses at the State Correctional Institution, Albion, Pennsylvania. Petitioner was convicted by a jury in 1983.<sup>1</sup> This is Petitioner's third federal habeas petition. He has filed three separate PCRA Petitions raising a variety of claims. Petitioner's first federal habeas petition, filed during the pendency of Petitioner's first PCRA Petition, was denied for failure to exhaust. Petitioner's second federal habeas petition, filed August 27, 1992, was denied by this Court on March 16, 1993. This third and latest federal habeas petition was filed on October 22, 1999.

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<sup>1</sup>The date of final conviction was May 22, 1987, when the Pennsylvania Supreme Court ruled on Petitioner's direct appeal. Commonwealth v. Woods, 525 A.2d 1204 (1987).

In accordance with 28 U.S.C. § 636(b)(1)(B) and Local Rule of Civil Procedure 72.1, the Court referred the Petition to United States Magistrate Judge Faith Angell for a report and recommendation ("Report and Recommendation"). Judge Angell recommended that the Petition be dismissed on the ground that it was time-barred under the AEDPA statute of limitations. She found that the Petition was filed after the expiration of the AEDPA statute of limitations, and, further, that an "actual innocence" exception to the AEDPA time limitation, should it exist, would not operate here because Petitioner failed to present evidence of actual innocence. Petitioner objects on the basis that: (1) AEDPA statute of limitations does not apply to successive petitions; and (2) even if it does apply, there is an actual innocence exception that is met in this case. Petitioner filed timely objections to the magistrate's report and recommendation. In accordance with 28 U.S.C. § 636(b), the Court will conduct a de novo determination of the Report.<sup>2</sup>

For the reasons that follow, the Court concludes that the instant Petition is barred by the one-year statute of limitations in the habeas corpus statute. The Court further concludes that

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<sup>2</sup>Where a habeas petition has been referred to a magistrate judge for a Report and Recommendation, the district court "shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made.... [The Court] may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate." 28 U.S.C. § 636(b) (1994).

none of the asserted bases for tolling or otherwise excusing the statute of limitations applies in this case. Accordingly, the Court overrules Petitioner's objections to the Report and Recommendation, and adopts the Report and Recommendation consistent with this memorandum. The instant Petition is dismissed.

## II. Discussion

The Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which went into effect on April 24, 1996, established a one-year statute of limitations, as follows:

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of-

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review . . .<sup>3</sup>

28 U.S.C.A. §2244(d)(1) (West Supp. 2001). In this case, Petitioner's date of final conviction was May 22, 1987. Because Petitioner's date of conviction was prior to the effective date of AEDPA, a one-year grace period applies, meaning that the limitations ran until April 23, 1997. Nara v. Frank, 264 F.3d 310, 315 (3d Cir. 2001) ("[W]e have implied from the statute a one-year grace period for those petitioners whose convictions became final before the effective date of AEDPA, and AEDPA was effective April 24, 1996 . . .") (citing Burns v. Morton, 134 F.3d 109, 111 (3d

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<sup>3</sup>The section provides several alternative dates for commencing the limitations period, but none of these apply in this case.

Cir. 1998)). Petitioner did not file the Petition until October 22, 1999, well beyond the expiration of the limitations period. The Petition is therefore barred by the statute of limitations.

Petitioner contends that the AEDPA statute of limitations does not apply in this case, however, because his petition is a successive petition rather than a first-time petition. Petitioner argues that under plain statutory interpretation, the limitations of § 2244(d) apply only to first-time petitions. The Court, however, finds no support in either the statutory language or the applicable case law for Petitioner's contention that the AEDPA statute of limitations does not apply to successive petitions. Whether the statute of limitations applies does not depend on whether the petition is first or successive. Rather, it depends on whether the petition was filed before or after the effective date of the AEDPA amendments. See, e.g., Jones v. Morton, 195 F.3d 153, 157-58 (3d Cir. 1999) (applying statute of limitations to bar successive federal habeas petition filed after April 23, 1997).

Moreover, the running of the limitations period was not tolled by Petitioner's filing of his third PCRA appeal. Ordinarily, "the time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation . . ." 28 U.S.C. § 2244(d)(2). A "properly filed application" is "one submitted according to the state's procedural

rules governing time and place of filing.” Lovasz v. Vaughn, 134 F.3d 146, 148 (3d Cir. 1998). If a petitioner files an application that the state court dismisses as either time-barred or waived, then it is not deemed a “properly-filed application.” Morris v. Horn, 187 F.3d 333, 338 (3d Cir. 1999). In this case, Petitioner’s third PCRA appeal was dismissed as improperly filed, because it was untimely, and therefore the PCRA appeal did not toll the limitations period. See Fahy v. Horn, 240 F.3d 239, 243 (3d Cir. 2001).

Petitioner further contends, however, that notwithstanding the statute of limitations, the Petition should be allowed under an exception for “actual innocence.” Specifically, Petitioner claims that the testimony of two witnesses who were not presented at trial (along with statements made by them to the police that had the impeachment potential of the lone eyewitness to the shooting) establishes his actual innocence.

The United States Supreme Court has not ruled as to whether there is an “actual innocence” exception to the AEDPA statute of limitations. The Court of Appeals for the Third Circuit also has not yet decided the issue.<sup>4</sup> In the instant case, however, it is unnecessary for the Court to determine whether there is such an

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<sup>4</sup>On June 12, 2001, the Third Circuit granted a certificate of appealability with respect to the following question: “Can petitioner demonstrate actual innocence?” See Hussman v. Vaughn, Civil Action No. 99-4512, Ct. App. No. 01-1724.

exception to the AEDPA statute of limitations, because even assuming there is, Petitioner has failed to present a sufficient basis to establish that an "actual innocence" exception would apply in this case.<sup>5</sup> See, e.g., Knowles v. Merkle, No.00-16912, 2001 U.S. App. LEXIS 22500, at \*2-3 (9th Cir. 2001) ("[W]e decline on these facts to consider whether there is an 'actual innocence' exception to AEDPA's one year statute of limitations. Not only has Knowles presented no evidence of actual innocence, the evidence he does point to supports his conviction."); Helton v. Secretary for the Dep't of Corr., 259 F.3d 1310, 1315 (11th Cir. 2001) ("This circuit has yet to decide whether there is an 'actual innocence' exception to AEDPA's one year statute of limitations. We need not decide the issue here, however, because the 'circumstantial' nature of the case against Helton is not sufficient to support a claim of actual innocence.") (citations omitted); Raglin v. Randle, No. 00-3322, 2001 U.S. App. LEXIS 9389, at \*6 (6th Cir. 2001) ("Whether or not there is an actual innocence exception to the AEDPA's statute

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<sup>5</sup>The Court notes that Petitioner incorrectly cites Alexander v. Keane, 991 F. Supp. 329 (S.D.N.Y. 1998) for the proposition that there is an exception to the AEDPA statute of limitations based on "actual innocence." (Pet'r. Obj. at 10). The Alexander court, while engaging in a lengthy discussion as to whether there was such an exception, instead bypassed the issue and determined that, even if there were such an exception, the petitioner had failed to establish that he was actually innocent for habeas purposes. Alexander, 991 F. Supp. at 338. However, other courts have explicitly held that an "actual innocence" exception applies. See Neuendorf v. Graves, 110 F. Supp. 2d 1144, 1157 (N.D. Iowa 2000) (listing cases).

of limitations, [petitioner] did not submit any new and reliable evidence that could have convinced a reasonable juror not to convict him of involuntary manslaughter." ).

In order to establish "actual innocence" on a habeas claim, a habeas petitioner must show that "a constitutional violation has probably resulted in the conviction of one who is actually innocent."<sup>6</sup> Schlup v. Delo, 513 U.S. 298, 327 (1995) (citing Murray v. Carrier, 477 U.S. 478, 495 (1986)); Alexander v. Keane, 991 F. Supp. 329, 339 (S.D.N.Y. 1998) (applying Schlup "actual innocence" jurisprudence to AEDPA statute of limitations context). The petitioner must establish that the constitutional error "has probably resulted in the conviction of one who is actually innocent." United States v. Garth, 188 F.3d 99, 107 (3d Cir. 1999) (citing Bousley v. United States, 523 U.S. 614, 622 (1998)). This exception is concerned with actual, as opposed to legal, innocence. Calderon v. Thompson, 523 U.S. 538, 559 (1998). The petitioner must establish that "in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him." Garth, 188 F.3d at 107. A claim of actual innocence must be based on reliable evidence that was not presented at trial. Schlup, 513

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<sup>6</sup>The constitutional violation involved here is the claim of ineffective assistance of counsel pursuant to the Sixth Amendment. The habeas jurisprudence "makes clear that a claim of 'actual innocence' is not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." Herrera v. Collins, 506 U.S. 390, 404 (1993).

U.S. at 324; Lee v. Kemna, 213 F.3d 1037, 1039 (8th Cir. 2000) (per curiam).

In the instant case, Petitioner claims that the testimony of the additional witnesses would have impeached the testimony of the lone eyewitness to the crime, Homer Lane. Lane testified that he witnessed Petitioner shoot the victim in the back, and that two other individuals, Mr. Omar Ancrum and Mr. Bruce Ellison, were also present on the scene. In signed statements to the police, Mr. Ancrum and Mr. Ellison both said they did not witness the shooting, and they did not mention Homer Lane. They said they were around the corner when the shooting occurred. Ancrum specifically said he did not hear shots or see anyone running away. Petitioner argues that this testimony contradicts Lane's testimony, and establishes that Lane did not witness the shooting. Petitioner asserts that since Lane was the only eyewitness to the crime, no reasonable jury could convict with this impeaching evidence.

Even assuming this evidence can be considered new<sup>7</sup>, it does not establish actual innocence for habeas purposes. Looking at the testimony of the two additional witnesses, neither witness actually

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<sup>7</sup>The evidence cited by Petitioner may not even be properly considered "new" evidence, because it could have been discovered through the exercise of due diligence. Neuendorf, 110 F. Supp. 2d at 1159. Moreover, Petitioner's assertions that the police reports were not made available to trial counsel in violation of Brady are unsupported by the record or argument. Bald assertions of violations are not sufficient to entitle habeas relief. Zettlemyer v. Fulcomer, 923 F.2d 284, 301 (3d Cir. 1999).

witnessed the event, though they were close to the scene of the shooting. Their statements raise possible factual inconsistencies, but do not foreclose that Lane was at the scene of the shooting and that he witnessed it. Although some of Petitioner's arguments suggest that defense counsel made tactical errors during trial, the purportedly new evidence, even if true, falls well short of establishing that it was more likely than not that no reasonable juror would have convicted Petitioner in light of the new evidence. Having thus failed to meet his burden of demonstrating "actual innocence," Petitioner also fails to demonstrate that he would be entitled to exception from the AEDPA statute of limitations even assuming that such an exception exists.

### **III. Conclusion**

In accordance with the above reasoning, the Court overrules Petitioner's objections and adopts and approves the Report and Recommendation.<sup>8</sup> The Court declines to issue a certificate of appealability, as Petitioner has failed to establish a substantial denial of a constitutional right. An appropriate Order follows.

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<sup>8</sup>In its response to Petitioner's Objections to the Report and Recommendation, Respondent raises two "Cross-Objections." The Court overrules Respondents' objections, as they are untimely under the applicable rule. Local R. of Civ. P. 72.1(iv)(b) ("Any party may object to a magistrate judge's proposed findings, recommendations or report . . . within ten (10) days after being served with a copy thereof.")

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**ORDER**

**AND NOW**, this \_\_\_\_\_ day of November, 2001, upon consideration of Petitioner Carmen Woods' Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254, all attendant and responsive briefing, the Magistrate Judge's Report and Recommendation, Petitioner's Objections, Respondents' Response to Petitioner's Objections, and the Record, **IT IS HEREBY ORDERED** that:

1. Petitioner's Objections to the Report and Recommendation are **OVERRULED**;
2. The Commonwealth's "Counter-objections" are **OVERRULED**;
3. The Report and Recommendation are **APPROVED** and **ADOPTED** consistent with the accompanying memorandum;
4. The Petition is **DENIED**; and
5. As Petitioner has failed to make a substantial showing of the denial of a constitutional right, there is no basis for the issuance of a certificate of appealability.

BY THE COURT:

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John R. Padova, J.