

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

DERRICK MELTON,	:	
	:	
Petitioner,	:	CIVIL ACTION
	:	
v.	:	
	:	
ROBERT D. SHANNON, et al.,	:	
	:	
Respondents.	:	
	:	NO. 01-3304

MEMORANDUM

Petitioner Derrick Melton is before the court on his petition for Writ of Habeas Corpus, filed pursuant to 28 U.S.C. § 2254. He challenges his conviction for first degree murder based on several claims of ineffective assistance of counsel. Petitioner's habeas petition was filed 87 days after the one-year limitations period expired. He does not dispute that his petition was untimely, but contends that he should be entitled to argue the merits of his claim because he is actually innocent. After considering his petition and the parties' briefs, and upon hearing oral argument, I find that Petitioner has not presented sufficient evidence of actual innocence to overcome the procedural default. His section 2254 claim is time barred.

I. BACKGROUND

The procedural and factual history is set forth in Magistrate Judge M. Faith Angell's Report and Recommendation. The facts are as follows:

Darryl Ransom, a 29 year old male, had a six year relationship with Sonya Johnson ("Renee"), during which they lived together for some time and had four children. Their romantic relationship ended in January of 1990, at which time Mr. Ransom moved out of Ms. Johnson's home.

On February 16, 1990, at about 11:00 p.m., Ms. Johnson returned home after purchasing a 40-ounce bottle of beer at a bar. Upon returning to her apartment building, she saw a friend, Darlene Blackman ("Neicey"), and struck

up a conversation. Petitioner, Derrick Melton ("Boo"), a 27 year old male, walked by on his way to the home of his sister, and was invited in by Ms. Johnson to have some beer.

Thereafter, Ransom came and knocked on Johnson's door. When she refused to admit him, Ransom started breaking the living room windows. Police were called on a number of occasions the same evening. Ransom was not present on the occasions that police arrived. After the police left, he would return and break more windows.

After the police left for the second time, Melton used Ms. Johnson's telephone to call Rodney Kemp, a 22 year old male. Petitioner told Kemp to come over because he needed help. Ten to fifteen minutes later, Kemp arrived at Johnson's door and gave Petitioner a gun. Petitioner put the gun in his pocket and went back inside. Ransom came back again, tried to break a window in the back of the house, and an argument ensued between Ransom and Kemp. Petitioner told Ms. Johnson not to call the police again. Petitioner asked her if she wanted him to take care of Ransom, and she replied, "Give me the gun and I'll shoot him." She said she was "tired of Darryl messing with her," and she told Melton "to do what he had to do." Petitioner then left Ms. Johnson's home.

In between the first two window breaking episodes, Ransom stopped at Debra Daye's home and they talked. Ransom stopped at Ms. Daye's home a second time to use her phone to call Ms. Johnson. Before he came into the house, Ms. Daye observed Ransom and Petitioner arguing while a third party stood behind a wall with only his jacket visible. Petitioner told Ransom, "Stay away from Renee's house." Ransom replied that Ms. Johnson was his girlfriend and that they used to live together for many years. Ms. Daye observed Petitioner holding a gun in his right hand a couple of feet from Ransom. Ransom then came to Ms. Daye's home, made a phone call and left around 2:30 a.m., February 17, 1990.

Petitioner and Kemp returned to Ms. Johnson's home. After being there awhile, they asked Ms. Johnson if they could leave through the window and she agreed. Before they climbed through the window, Petitioner told Ms. Johnson not to worry if she heard gunshots. About fifteen minutes after Petitioner and Kemp left, Ms. Johnson heard five gunshots.

A short while later, Petitioner and Kemp returned to Ms. Johnson's home. Petitioner told her that they had taken care of her kids' father and told her not to speak with the police concerning Ransom's death. Petitioner warned her that if she said anything, her life would be in danger. Petitioner and Kemp stayed at Ms. Johnson's for about thirty minutes, until 3:00 a.m., helping to clean up the broken glass. Later that morning, Darlene Blackman told Ms. Johnson that Ransom's body was behind her house on the tracks, and he appeared to have been shot in the head. Ms. Johnson called the police. The police arrived on the scene shortly after they were notified, at approximately 11:00 a.m. Mr. Ransom was dead, the victim of four gunshot wounds: two to the head, one to the right chin

and one to the lower back. See Com. v. Melton, CP 9005 Court No. 0589-0593, PCRA CP Opinion, Dec. 6, 1999, at pp. 1-3.

On May 14, 1991, following a bench trial of Petitioner and Rodney Kemp, the Honorable Michael R. Stiles, of the Court of Common Pleas for Philadelphia County, convicted Melton of first degree murder, criminal conspiracy, carrying a firearm on a public street, and possessing an instrument of crime.¹ After timely post-trial motions were filed, trial counsel was permitted to withdraw and new counsel was appointed. Judge Stiles sentenced Petitioner to life imprisonment for murder, plus concurrent terms of five to ten years for criminal conspiracy, and two and one-half to five years for the firearms offenses.

On April 23, 1992, Petitioner appealed his conviction to the Superior Court of Pennsylvania. The following issues were presented for review: (1) a challenge to the sufficiency of evidence in support of his conviction for first degree murder; (2) ineffectiveness of trial counsel for failing to object to the testimony of Dr. Ian Hood, the Assistant Medical Examiner; (3) exposure of the trial judge to Petitioner's 'mug shots'; (4) ineffectiveness of counsel for failing to present 'Andrew Vance' as a defense witness; (5) erroneous statements by David Cliett, related to conversations between Cliett and the victim; and (6) ineffectiveness of trial counsel for failing to suppress Debra Daye's identification of Petitioner from a pictorial array.

The Superior Court affirmed Petitioner's conviction on April 19, 1993. See Commonwealth v. Melton, 630 A.2d 463 (Pa.Super. 1993). On November 10, 1993, the Supreme Court of Pennsylvania denied his petition for allowance of appeal. See Commonwealth v. Melton, 647 A.2d 509 (Pa. 1993) (Table).

Petitioner's convictions consequently became final on February 10, 1994, when the ninety day period allotted to him to petition for writ of certiorari to the United States Supreme Court passed. Petitioner filed nothing between February 10, 1994 and January 16, 1997. On January 16, 1997, Melton filed a timely pro se petition for State post-conviction collateral relief pursuant to 42 Pa. C.S.A. § 9541 et seq. (hereinafter "PCRA"). On [January 26, 1999], his counsel filed an amended petition. On September 7, 1999, the Honorable John J. Poserina dismissed the PCRA petition.

Petitioner appealed the denial of PCRA relief to the Superior Court on October 6, 1999, on two grounds: (1) PCRA Court error for dismissing the petition where petitioner produced after-discovered evidence; and (2) PCRA Court error in failing to grant relief where trial counsel was ineffective for failing to call a favorable witness at trial.

On October 27, 2000, the Superior Court affirmed, finding that the after-discovered evidence to be inadmissible hearsay, and the favorable witness claim

¹ Judge Stiles also convicted co-defendant Rodney Kemp of third degree murder, criminal conspiracy, carrying a firearm on a public street, and possessing an instrument of crime.

to be waived.² See Commonwealth v. Melton, 767 A.2d 1110 (Pa.Super. 2000). Mr. Melton did not file a petition for allocatur with the Pennsylvania Supreme Court.

On July 2, 2001, Petitioner filed this federal habeas petition. On August 29, 2001, the Honorable Franklin Van Antwerpen dismissed the petition without prejudice and closed the case. On February 12, 2002, Petitioner paid the required filing fee. On February 19, 2002, Judge Van Antwerpen ordered that Petitioner's case be re-opened. The instant habeas petition contains the following claims of counsel's ineffectiveness: (1) trial counsel failed to call Lendia Brown and Cynthia Melton on Petitioner's behalf; (2) trial counsel failed to locate and call 'Damon Meider' as a witness at trial; (3) trial counsel was operating under a conflict of interest while representing Petitioner; and (4) appellate counsel was ineffective for failing to raise one through three of the above.

Report and Recommendation [Docket No. 14], July 15, 2002, at 1-6.

Magistrate Judge Angell found that Petitioner's habeas petition was time-barred because it was filed 87 days after the one-year statute of limitations expired, and recommended that the Petitioner's claims be dismissed. Id. Petitioner objected to Judge Angell's Report and Recommendation, claiming that the limitations period should be equitably tolled because he is mentally retarded, and he should not be barred from arguing the merits of his claim because he is actually innocent. Objections to Report & Recommendation of Magistrate M. Faith Angell [Docket No. 15]. Upon receiving the Respondents' response to Petitioner's objections, Judge Van Antwerpen remanded the case to Judge Angell to determine whether Petitioner's claims of actual innocence and mental retardation could lead to an equitable tolling of the statute of limitations. See Order [Docket No. 17], Aug. 7, 2002. Judge Angell found that the evidence that Petitioner presented was not new, and even assuming that it was, that the evidence did not establish actual innocence for habeas purposes. Supplemental Report and Recommendation

² The Superior Court found the second claim un-meritorious because petitioner failed to attach an affidavit of the proposed testimony of one 'Damon Meider,' who petitioner stated 'may have provided favorable testimony' as to who shot Darryl Ransom.

[Docket No. 40], July 30, 2004. Moreover, she concluded that there is no evidence that Petitioner's mental condition prevented him from complying with the statute of limitations. The Petitioner does not challenge Judge Angell's Report and Recommendation regarding Derrick Melton's mental capacity. See Petitioner's Objections to the Supplemental Report and Recommendation of Magistrate Judge Angell [Docket No. 43], September 22, 2004, at 2 n.1.

This case was reassigned to me on July 1, 2004. Because I agree with Judge Angell that Petitioner has not provided sufficient evidence of actual innocence to overcome the procedural hurdle, I find that his claims are time-barred.

II. DISCUSSION

The 1996 Anti-Terrorism and Effective Death Penalty Act ("AEDPA") amended the habeas statute and provides for a strict one-year statute of limitations on the filing of new habeas petitions. See 28 U.S.C. § 2244(d) (1996). For petitioners who were convicted prior to the effective date of AEDPA, the Third Circuit has found that a grace period applied. See Burns v. Morton, 134 F.3d 109 (3d Cir. 1998). In her initial Report and Recommendation, Judge Angell determined that Petitioner filed his habeas petition 87 days after the grace period expired, and therefore, his claims are time-barred. Report and Recommendation [Docket No. 14], July 15, 2002, at 7. The Petitioner does not contest this finding. Rather, he argues that despite the untimeliness of his petition he is entitled to a decision on the merits pursuant to the holding in Schlup v. Delo, 513 U.S. 298 (1995), because he is actually innocent.

Neither the Supreme Court nor the Third Circuit has decided whether there is an actual innocence exception to the AEDPA statute of limitations. See, e.g. Devine v. DiGuglielmo, 2004 WL 945156, at *3 (E.D. Pa. Apr. 30, 2004). Assuming that such an exception exists,

however, a petitioner may overcome a procedural bar to his habeas petition if he is able to establish either (1) cause for the default and actual prejudice resulting from the errors of which he complains, see McCleskey v. Zant, 499 U.S. 467, 495 (1991), or (2) that strictly enforcing the procedural rule would result in a fundamental miscarriage of justice. Id. at 493-94. The fundamental-miscarriage-of-justice exception is "rare" and should be applied only in the "extraordinary case." Murray v. Carrier, 477 U.S. 478, 496 (1986). To fall within the exception, the petitioner must supplement his constitutional claims with a showing of actual innocence. Id. at 495 (citing Kuhlmann v. Wilson, 477 U.S. 436, 454 (1986)); see also Carrier, 477 U.S. at 496; Smith v. Murray, 477 U.S. 527, 537 (1986)); Schlup, 513 U.S. at 322. Actual innocence means factual innocence, not merely legal insufficiency. See Bousley v. United States, 523 U.S. 614, 623 (1998). The actual innocence claim is not substantive, but rather is merely a mechanism to avoid the procedural bar. As the Schlup Court explained, "[the petitioner's] claim of 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. Schlup, 513 U.S. at 315 (citations omitted). "To be credible, [a claim of actual innocence] requires petitioner to support his allegation of constitutional error with new reliable evidence--whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence--that was not presented at trial." Id. at 865.

In support of his claim of actual innocence, Petitioner offers three pieces of evidence: (1) a notarized confession by co-defendant Rodney Kemp, dated May 23, 1995, in which Kemp states that he shot the victim by mistake and that Petitioner had nothing to do with the shooting; (2) an unsigned and undated typed affidavits by Kemp's wife (Lendia Kemp) and Petitioner's

wife (Cynthia Melton) in which each state that co-defendant Kemp confessed to them; and (3) a statement given by Deneen Meider, who did not see the shooting, but told police that her brother told her that he had heard gunshots and had described an individual running away from the scene, whose description did not match Petitioner. See Petitioner’s Mem. Regarding Equitable Tolling, Exs. A, B, C, and D. In her Supplemental Report and Recommendation, Judge Angell found that the evidence proffered by Petitioner is not “new” under the Schlup standard. Supplemental Report and Recommendation, Aug. 2, 2004, at 10. I agree.

There has been some debate among the circuits regarding the meaning of the phrase “new reliable evidence” as it was used in Schlup. Whereas some circuits have found that evidence is “new” for purposes of conducting a Schlup analysis if it was not *presented* at trial, see, e.g., Gomez v. Jaimet, 350 F.3d 673 (7th Cir. 2003); Griffin v. Johnson, 350 F.3d 956, 962-63 (9th Cir. 2003), others have held that to be “new,” the evidence must not have been *available* at the time of trial. See, e.g., Armine v. Bowersox, 238 F.3d 1023, 1028 (8th Cir. 2001). In Hubbard v. Pinchak, 378 F.3d 333, 341 (3d Cir. 2004), the Third Circuit adopted the latter interpretation, suggesting that only newly-available evidence would be considered “new” for purposes of Schlup. As the Hubbard court explained, “[a] defendant’s own late-proffered testimony is not ‘new’ because it was available at trial. [The defendant] merely chose not to present it to the jury. That choice does not open the gateway.” Id. In light of the definition set forth in Hubbard, I find that none of the evidence proffered by the Petitioner is “new.”

Rodney Kemp’s confession is “new” in form only. Petitioner aware at the time of his trial of Kemp’s oral confession. In fact, Kemp states in his confession that he told Petitioner immediately after the shooting that he shot the victim in the face and the back. See Petitioner’s

Mem. Regarding Equitable Tolling, Ex. A. Like the defendant in Hubbard, Petitioner could have presented this evidence at the time of trial by testifying, but opted not to do so. Furthermore, Kemp's confession is unreliable. Kemp asserted his factual innocence in signed police statement prior to trial, see Respondent's Supplemental Response to Petition for Writ of Habeas Corpus, Ex. A, but now that he has been convicted of third-degree murder and any further prosecution for first degree murder is subject to double-jeopardy bar, see Commonwealth v. Hickson, 586 A.2d 393, 396 (Pa. Super. 1990), he claims that he shot the victim "by mistake." See Petitioner's Mem. Regarding Equitable Tolling, Ex. A.

Likewise, the statement of Dineen Nader was available to Petitioner prior to trial, see id. Ex. D., as was the information in the "affidavits" of Lendia Kemp and Cynthia Melton. Lendia Kemp's unsigned statement, which is simply dated "1999," states that her now-husband confessed to her the night of the shooting. See id. Ex. B. In Cynthia Melton's statement, which was also unsigned and undated, she claims that before the defendants' trials, Rodney Kemp called her, admitted that he shot the victim, and instructed her not to tell Petitioner's lawyer. See id. Ex. C. The alleged "confessions" were made prior to the trial and Petitioner has not alleged that either his wife or Lendia Kemp were unavailable to testify. Therefore, this evidence was available to Petitioner and cannot be considered "new" under the Third Circuit's interpretation of Schlup.

Even if the evidence were "new," Petitioner must prove that it is "more likely than not that no reasonable juror would have convicted him in light of the new evidence." Schlup, 513 U.S. at 327. I agree with Judge Angell that "based upon all the evidence, including the purported 'new evidence,' I cannot conclude that no rational juror would have voted to convict Petitioner of

first degree murder.” Supplemental Report and Recommendation, Aug. 2, 2004, at 11.

III. CONCLUSION

I find that Petitioner has not proffered any new evidence of actual innocence sufficient to overcome the procedural bar to his habeas claim of ineffective assistance of counsel, nor has Petitioner established that in light of this evidence that it is more likely than not that no reasonable juror could have voted to convict him.

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	:	NO. 01-CV-3304

ORDER

AND NOW, this day of November, 2004, upon consideration of the pleadings and the record herein, and after review of the Supplemental Report and Recommendation of M. Faith Angell, United States Magistrate Judge, it is hereby ordered that:

1. The Supplemental Report and Recommendation is **APPROVED AND ADOPTED.**

2. The Petition for Writ of Habeas Corpus is **DENIED AND DISMISSED**
WITHOUT AN EVIDENTIARY HEARING.

There is no probable cause to issue a certificate of appealability.

This case is closed for statistical purposes.

LAWRENCE F. STENGEL, J.