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

BOBBIE LEE SIMS, Petitioner,	:	
	:	CIVIL ACTION
v.	:	NO. 04-0887
GEORGE N. PATRICK, *et al*, Respondents.	:	

Memorandum and Order

YOHN, J. April ___, 2005

Petitioner Bobbie Lee Sims, a prisoner in the State Correctional Institution at Houtzdale, Pennsylvania, filed a *pro se* petition for writ of habeas corpus in this court pursuant to 28 U.S.C. § 2254, asserting four separate claims for relief.[1] Petitioner claims that: (1) his counsel in his state criminal trial for second-degree murder, robbery, and possession of an instrument of crime was constitutionally ineffective for eliciting testimony about additional crimes in which petitioner was allegedly involved, for allowing testimony from a hospital records custodian, for advising petitioner not to testify at his trial, for improperly cross-examining three prosecution witnesses, and for failing to uncover the intimate relationship between two of those witnesses; (2) the prosecutor committed misconduct when he failed to correct false testimony given by prosecution witnesses; (3) his fourth PCRA petition was timely filed; and (4) the prosecution

[1] After filing his original petition, petitioner filed a motion to amend, which was granted by the magistrate judge. Petitioner then filed "amended grounds" for relief. The original petition and "amended grounds," read together, contain petitioner's four claims for relief.

violated *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to disclose information favorable to petitioner. After conducting a *de novo* review of the Report and Recommendation of United States Magistrate Judge Thomas J. Rueter, and upon consideration of petitioner's objections thereto, respondents' response to petitioner's objections, and petitioner's reply to respondents' response, I have determined that the petition will be dismissed and denied.

FACTUAL & PROCEDURAL BACKGROUND

On January 28, 1982, petitioner was convicted in the Philadelphia County Court of Common Pleas of second-degree murder, robbery, and possession of an instrument of crime. The Pennsylvania Superior Court has summarized the facts underlying the conviction as follows:

> On December 15, 197[9], Calvin Cliett was living on the third floor of a house located at 731 North 44th Street in Philadelphia. The house is owned by Frank Knight and was used by drug addicts to buy and sell heroin and methamphetamine and to inject those narcotics. Early that morning, [petitioner] came to the house, entered Juanita Brown's first floor room, and asked for methamphetamine. Ms. Brown said that Mr. Cliett had the drug and told [petitioner] to go upstairs. Ms. Brown's fifteen-year-old son, Walter, went with [petitioner]. When [petitioner] arrived, he pulled a gun on Mr. Cliett, took his money and drugs, and told Mr. Cliett not to move. While [petitioner] was counting the money, the victim began to move, and [petitioner] shot him in the chest. In the process of shooting the victim, [petitioner] shot himself in the hand, and the bullet also passed through the money that [petitioner] was counting. As the victim stumbled from his room and then fell down the stairs, [petitioner] fled.
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> [Petitioner], with his hand bleeding and wrapped in a towel, went to the home of his friends Carl Davis and Michelle Hannible. Mr. Davis asked [petitioner] what had occurred, and [petitioner] responded, "I had to kill the n_____." He then admitted to shooting Mr. Cliett after robbing him of his money and drugs. He also showed Mr. Davis the money with a bullet hole in it.
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> Ms. Hannible told [petitioner] that he would have to go to the hospital. At the hospital, [petitioner] was treated for the gunshot wound, which had fractured bones in his hand. On the

> third day of his hospital stay, [petitioner] left against the advice of his doctor.
>
> Still wearing his hospital gown and a cast, [petitioner] returned to the scene of the murder. Mr. Knight, the owner of the house, had tied up the victim's body and wrapped it in a rug. [Petitioner], Mr. Knight, and Ms. Brown buried the body in a shallow grave in back of the house. One and one-half years later, Ms. Brown told the police about the buried body. Police exhumed it and positively identified it as Mr. Cliett's remains.

Pa. Super. Ct. Opinion, No. 4878 Philadelphia 1997, at 1-2 (citations omitted). On November 17, 1982, petitioner was sentenced to life imprisonment on the second-degree murder conviction, concurrent terms of ten to twenty years for robbery, and two and one-half to five years for possession of an instrument of crime.

Petitioner appealed his conviction to the Pennsylvania Superior Court, arguing that the trial court erred: (1) in declining to give a jury instruction regarding a prosecution witness's addiction to narcotics; (2) in refusing to grant a mistrial due to a remark by a prosecution witness that allegedly created an inference that petitioner had engaged in prior criminal activity; and (3) by admitting testimony by a hospital records custodian. On April 12, 1985, the Superior Court affirmed petitioner's conviction, finding that contentions (1) and (3) were not properly preserved for appellate review, and that contention (2) was without merit because "the remarks objected to did not rise to the level of depriving [petitioner] of a fair and impartial trial and are therefore not grounds for a mistrial." Pa. Super. Ct. Opinion, No. 3433 Philadelphia 1982, at 2, 7. Petitioner did not seek direct review of the conviction in the Pennsylvania Supreme Court.

Petitioner next collaterally attacked his conviction in state court on December 10, 1996, pursuant to Pennsylvania's Post-Conviction Relief Act ("PCRA"), 42 Pa. Cons. Stat. § 9541, *et seq.* In this PCRA petition, petitioner claimed that his counsel was ineffective for: (1) failing to

argue that the verdict was against the weight of the evidence; and (2) failing to request a limiting jury instruction after a prosecution witness suggested in his testimony petitioner's involvement in another shooting. The PCRA court denied the petition on November 13, 1997, and on appeal, the Pennsylvania Superior Court affirmed on March 22, 1999. Pa. Super. Ct. Opinion, No. 4878 Philadelphia 1997. Petitioner appealed to the Pennsylvania Supreme Court, but his petition for allowance of appeal was denied on August 24, 1999. *Commonwealth v. Sims*, 742 A.2d 674 (Pa. 1999).

Meanwhile, on May 14, 1999, petitioner filed a second PCRA petition, but it was dismissed pursuant to state law on June 30, 1999 because his appeal to the Pennsylvania Supreme Court was still pending.

Petitioner filed a third PCRA petition on October 20, 1999, but it was dismissed by the PCRA court as time-barred on April 6, 2000. The Pennsylvania Superior Court affirmed that dismissal on March 2, 2001, finding that none of the exceptions to the PCRA's time bar applied to the petition. Pa. Super. Ct. Opinion, No. 1513 EDA 2000. No petition for allowance of appeal was filed with the Pennsylvania Supreme Court.

On April 24, 2001, petitioner filed a fourth PCRA petition, this time claiming that recent written statements of prosecution witnesses Michelle Hannible-Johnson ("Hannible")[2] and Juanita Peck ("Peck")[3] established that the prosecution had violated *Brady* by not disclosing to petitioner that "deals" had been made with witnesses in return for their testimony. In these

[2] At the time of petitioner's trial, Michelle Hannible-Johnson was known as Michelle Hannible.

[3] At the time of petitioner's trial, Juanita Peck was known as Juanita Brown.

statements, which were made in April of 2001, Hannible and Peck recanted parts of their trial testimony and revealed certain facts that petitioner claims were known to the prosecution, but unknown to himself and the jury. Hannible's statement, in pertinent part, is as follows:

> I lived with Carl Davis in Philadelphia, PA from 1976 until 1985. Davis and Bobbie Sims were friends and I also know Sims, his brother, aunt and wife. Sims may have come to my home on December 15, 1979 to visit Davis and play pool as he often did but I am not sure. At Sims' trial, I may have said things that are in the transcript that were not true.
>
> I never treated Bobbie Sims at my house on December 15, 1979 for a gunshot wound of his right hand or any type of wound and would remember if I did.
>
> I can not remember ever hearing Bobbie Sims confess to Carl Davis that Sims had shot someone through his own hand. I also never observed any shot-up money that Sims had in his possession.
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> While living with Davis, I was young, naive and in love with him. Davis was a drug user, a career criminal and an informant who worked with Philadelphia Police detectives Bethea and another detective whose name I cannot recall. I believe I was coerced to giving testimony during trials so that Davis would not go to jail. The detectives never told me to lie but they drove things into my head to say when I was going to court to testify. I am not a criminal and have never been arrested and at this time of my life I did not know how the system worked and believed I had to say things to help Davis. Even though he had a lot of robbery cases against him and was facing thirty years back time in prison, Davis never went to jail because of his help to the homicide detectives.
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> I never received any special favors from the detectives but during 1979 and 1980; Davis was brought to the police headquarters' building at 8th and Race Streets, Philadelphia, PA so that my two children and I could visit with him for one hour. I was not allowed any conjugal visits with him.

Hannible Statement at 1-2.

Peck's statement, in pertinent part, is as follows:

> During December 1979, I was living at the home of Frank Knight on 44th Street, Philadelphia, PA along with my son, Walter Brown and a bunch of other people whose names I cannot now remember.

> I knew Bobbie Sims as a friend in 1979 and I was in my room at the above residence in December 1979 when Sims reportedly shot and killed another man at this house. No one witnessed the shooting and everyone got out of the house. Frank Knight came home. He was half high on drugs at the time and cleaned up the shooting and then rolled the body in a rug and buried the man in the back yard.
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> At this time of my life I was supporting a $100.00 per day heroin and speed habit and when I testified at Sims' trial I was high on heroin and speed and told this to the detective at the time. I cannot remember this detective's name. I have no recollection what I said during my testimony. For over ten years I have been clean of all drugs.
>
> My son, Walter was fifteen years old at the time of this shooting and had earlier been playing craps with Bobbie Sims at Knight's house. He was held as a witness to the shooting and the detective, whose name I cannot recall, told me he would lock my son up as a conspirator if I did not testify at Sims' trial. Neither my son nor anyone else living at Knight's house were charged of anything.
>
> It is my belief that Sims was not a killer and the shooting was an accident because Bobbie had earlier been playing around with the gun and shot himself in the hand during the shooting.

Peck Statement at 1.

The PCRA court dismissed the fourth petition as untimely, but on appeal the Pennsylvania Superior Court concluded on November 26, 2002 that "the averments in [petitioner's] PCRA petition satisfied the requisite factors for it to be considered timely under" one of the exceptions set forth in the PCRA. Pa. Super. Ct. Opinion, No. 336 EDA 2002, at 8. However, despite the timeliness of the petition, the Superior Court found petitioner's claim meritless and affirmed the dismissal. *Id.* at 10. On May 8, 2003, the Pennsylvania Supreme Court denied petitioner's request for review. *Commonwealth v. Sims*, 825 A.2d 638 (Pa. 2003).

Petitioner originally filed the instant habeas corpus petition on March 1, 2004 and later amended it. On March 17, I referred the case to Magistrate Judge Rueter for a Report and

Recommendation. Respondents filed their response to the petition on June 15, petitioner filed a reply to the response on July 7, and the magistrate judge issued a Report and Recommendation on September 28. On November 15, 2004, petitioner filed his objections to the Report and Recommendation, and respondents filed their response to the objections two weeks later. Finally, on December 8, 2004, petitioner filed a reply to respondents' response.

STANDARD OF REVIEW

Where a habeas petition has been referred to a magistrate judge for a Report and Recommendation pursuant to 28 U.S.C. § 636(b)(1)(B), this court's review of "those portions of the report or specified proposed findings or recommendations to which objection is made" is *de novo*. 28 U.S.C. § 636(b). After conducting such a review, this court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate." *Id.*

AEDPA STANDARDS

Under 28 U.S.C. § 2254, federal courts are empowered to grant habeas corpus relief to a prisoner "in custody pursuant to the judgment of a State court" where his custody violates the Constitution of the United States. 28 U.S.C. § 2254(a). Because the present petition is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (codified in scattered sections of 28 U.S.C.), petitioner is entitled to habeas relief only where the state court proceedings "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law," or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1).

A state court decision may be "contrary to" clearly established federal law in one of two ways. First, a state court decision is contrary to clearly established precedent where "the state

court applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases." *Williams v. Taylor*, 529 U.S. 362, 405 (2000). Second, a state court decision will be "contrary to" clearly established precedent "if the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from [the] precedent." *Id.* at 406. A state court decision involves an "unreasonable application" of federal law, on the other hand, where it "correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case." *Id.* at 407-08.

Habeas relief will also be granted where a state court decision is "based on an unreasonable determination of the facts." Under AEDPA, however, factual determinations made by the state court are accorded a presumption of correctness: "a federal court must presume that the factual findings of both state trial and appellate courts are correct, a presumption that can only be overcome on the basis of clear and convincing evidence to the contrary." *Stevens v. Delaware Corr. Ctr.*, 295 F.3d 361, 368 (3d Cir. 2002) (citing 28 U.S.C. § 2254(e)(1)). Thus, to prevail under this "unreasonable determination" prong, petitioner must demonstrate that the state court's determination of the facts was objectively unreasonable in light of the evidence available; mere disagreement with the state court – or even a showing of erroneous factfinding by the state court – will be insuffucient to warrant relief, provided that the state court acted reasonably. *See Weaver v. Bowersox*, 241 F.3d 1024, 1030 (8th Cir. 2001) (citing *Williams*, 529 U.S. at 409); *Torres v. Prunty*, 223 F.3d 1103, 1107-08 (9th Cir. 2000) (citing same).

DISCUSSION

Petitioner raises four claims in the pending habeas corpus petition. First, petitioner contends that his counsel was ineffective for: (1) eliciting testimony from prosecution witness

Carl Davis ("Davis") dealing with another shooting in which petitioner was allegedly involved; (2) allowing the testimony of a hospital records custodian "even though the custodian could answer no questions concerning the record" about which she testified; (3) advising petitioner against testifying in his trial; (4) improperly cross-examining Davis and Hannible by allowing them to testify falsely regarding the treatment of petitioner's gunshot wound; and (5) failing to uncover the "intimate relationship" between Davis and Hannible. Petitioner apparently contends that the fact of the relationship could have been used for impeachment purposes. Second, petitioner claims that the prosecution in his criminal trial engaged in misconduct when it failed to correct false testimony given by Hannible and Davis. Third, petitioner claims that his fourth PCRA petition was timely filed on April 24, 2001. Finally, petitioner claims that the prosecution in his Pennsylvania criminal trial violated *Brady* when it failed to disclose evidence favorable to him – evidence that has come to light through the Hannible and Peck statements.

I. The Timeliness Issue & Petitioner's Ineffective Assistance of Counsel Claims

Under AEDPA, a state prisoner seeking federal habeas relief must file his habeas petition within one year of the date on which his judgment of conviction became final. 28 U.S.C. § 2244(d)(1). However, in cases (like this one) in which the habeas petitioner's conviction became final prior to the statute's effective date of April 24, 1996, AEDPA has been construed as providing a one year grace period, thus permitting the filing of a habeas petition any time before April 24, 1997. *Duncan v. Walker*, 533 U.S. 167, 183-84 (2001); *Burns v. Morton*, 134 F.3d 109, 111-12 (3d Cir. 1998). Moreover, as provided in 28 U.S.C. § 2244(d)(2), this limitation is tolled during the pendency of a "properly filed" petition for state collateral review. *See Nara v. Frank*, 264 F.3d 310, 315 (3d Cir. 2001).

Petitioner's one year grace period began running on April 24, 1996, and was then tolled during the pendency of his first PCRA petition, from December 10, 1996 (when petitioner filed) to August 24, 1999 (when the Pennsylvania Supreme Court denied petitioner's request for allocatur). At that point, 230 days had expired on the limitations period. Because petitioner's second PCRA petition was dismissed because the first was still pending before the Pennsylvania Supreme Court,[4] and because the third PCRA petition was dismissed as time-barred, neither was properly filed, and neither tolled the limitations period. Thus, the limitations period was running from August 24, 1999, the date of the final adjudication of the first PCRA petition, and it expired on January 6, 2000, 135 days later.[5] Because petitioner did not file the present petition until March 1, 2004, all of his claims not based on newly-discovered evidence are time-barred.[6]

In light of the foregoing, petitioner's ineffective assistance of counsel claims are not timely, because they are not based on the Hannible and Peck statements. Petitioner's first three ineffective assistance claims – that his counsel elicited testimony from Davis about another shooting in which petitioner was allegedly involved; that his counsel allowed the testimony of the hospital records custodian when the custodian was unable to answer questions about the records; and that his counsel was ineffective for advising petitioner not to testify – have no

[4] The second petition would not affect the statute of limitations in any event, because it was filed (on May 14, 1999) and dismissed (on June 30, 1999) within the time period when the statute was already tolled by the first PCRA petition.

[5] Even assuming that the statute of limitations was tolled while the fourth PCRA petition was pending, petitioner gets no relief because the statute had already expired when the fourth petition was filed on April 24, 2001.

[6] Respondents admit that any claims based upon the Hannible and Peck statements are not time-barred by virtue of 28 U.S.C. § 2244(d)(1)(D). Response to Habeas Petition at 9.

relation to the Hannible and Peck statements and could have been brought at any time since the conclusion of the direct appeal. In addition, petitioner's fourth and fifth claims of ineffective assistance of counsel are not based on the Hannible and Peck statements, because petitioner's counsel could not have been constitutionally ineffective for failing to raise issues that were unknown to him at the time of trial. Thus, the petitioner's ineffective assistance of counsel claims, because they are not based on the newly discovered evidence, will be dismissed as time-barred.

II. Petitioner's Claim of Prosecutorial Misconduct

Petitioner's second claim for habeas relief is that the prosecution in his Pennsylvania criminal trial engaged in misconduct when it did not correct false testimony by prosecution witnesses Davis and Hannible. Petitioner asserts that Davis falsely "testified under oath that he received no deals or favors for his testimony," and that "the prosecutor allowed this perjured testimony to continue without correcting it." Furthermore, petitioner contends that the prosecutor allowed both Davis and Hannible to state falsely that they treated petitioner's gunshot wound when "the prosecutor knew that this was perjury because . . . [he] knew that the petitioner was in the hospital during the time Hannible and Davis claimed to be treating" the wound.

The court concludes that like the ineffective assistance of counsel claims, petitioner's prosecutorial misconduct claims are not based on the newly discovered evidence – the Hannible and Peck statements – and will thus be dismissed as time-barred. As Magistrate Judge Rueter stated in his Report and Recommendation, petitioner's trial counsel impeached Davis on "the suspicion that he had a deal with the prosecutors," and made reference to possible deals in his

closing argument.[7] MJRR at 20. Thus, petitioner knew of these alleged deals at the time of the trial and could have brought his first misconduct claim – that it was misconduct to allow Davis to testify falsely about deals he allegedly had with the prosecution – at any time before the expiration of the statute of limitations period. In addition, petitioner knew at the time of trial that the prosecutor had his hospital record. Therefore, petitioner likewise could have brought his second misconduct claim – that it was misconduct to allow Davis and Hannible to testify falsely about their alleged treatment of petitioner's gunshot wound – during the statute of limitations period.

To the extent that the misconduct claims are based on the newly discovered evidence[8] and are therefore not time-barred, they are nonetheless procedurally defaulted, because petitioner never raised them in any state court. Before reaching the merits of petitioner's claims, this court must decide whether they were raised in the state proceedings, because federal habeas relief pursuant to 28 U.S.C. § 2254 is available to a state prisoner only where he has exhausted his remedies in state court. "In other words, the state prisoner must give the state courts an opportunity to act on his claims before he presents those claims to a federal court in a habeas petition." *O'Sullivan v. Boerckel*, 526 U.S. 838, 842 (1999); 28 U.S.C. § 2254(b)(1)(A). This

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[7] In his closing argument, petitioner's counsel, in reviewing Davis's trial testimony, stated, "'Did you get anything in exchange for this story that you told the police?' 'No.' He didn't get anything, just a changed soul." MJRR at 20 (citing Trial Transcript, 1/26/82, at 15.121-15.122).

[8] While I conclude that the misconduct claims are not based on the newly-discovered evidence and could have been brought before the expiration of the statute of limitations period, the contrary argument can be made. The Hannible statement does bolster petitioner's misconduct claims to an extent by stating that Davis "worked with Philadelphia Police detectives," and that "I never treated Bobbie Sims at my house on December 15, 1979 for a gunshot wound of his right hand or any type of wound and would remember if I did." Hannible Statement at 1.

exhaustion rule requires petitioner to "fairly present" each of his federal claims to the state courts. *McCandless v. Vaughn*, 172 F.3d 255, 260 (3d Cir. 1999) (citations omitted). To "fairly present" a claim, petitioner must present its "factual and legal substance to the state courts in a manner that puts them on notice that a federal claim is being asserted." *Id.* at 261 (citations omitted). While petitioner need not cite "book and verse" of the federal constitution, *Picard v. Connor*, 404 U.S. 270, 277 (1971), he must "give the State 'the opportunity to pass upon and correct' alleged violations of its prisoners' federal rights" before presenting those claims here. *Duncan v. Henry*, 513 U.S. 364, 365 (1995) (quoting *Picard*, 404 U.S. at 275).

Failure to present federal habeas claims to the state courts in a timely fashion results in procedural default. *See O'Sullivan*, 526 U.S. at 848 (citing *Coleman v. Thompson*, 501 U.S. 722, 731 (1991)). "A habeas petitioner who has defaulted his federal claims in state court meets the technical requirements for exhaustion; there are no state remedies any longer 'available' to him." *Coleman*, 501 U.S. at 732 (quoting 28 U.S.C. § 2254(b)). Like petitioners who have failed to exhaust their state remedies, however, "a habeas petitioner who has failed to meet the State's procedural requirements for presenting his federal claims has deprived the state courts of an opportunity to address those claims in the first instance." *Id.* This doctrine of procedural default, therefore, ensures that state prisoners cannot evade the exhaustion requirement of § 2254 by defaulting their federal claims in state court.

Thus, absent a showing that default should be excused, this court is barred from reviewing a petitioner's claims. As the Supreme Court made explicit in *Coleman*, procedural default can be excused in only two ways:

> In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state

> procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

Id. at 750. To show "cause," petitioner must demonstrate that "some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Murray v. Carrier*, 477 U.S. 478, 488 (1986).[9] To show "actual prejudice," a petitioner must demonstrate that the alleged errors "so infected the entire trial that the resulting conviction violates due process." *United States v. Frady*, 456 U.S. 152, 168-69 (1982).

The second manner in which a petitioner's procedural default can be excused – the "fundamental miscarriage of justice" exception – "will apply only in extraordinary cases, i.e., 'where a constitutional violation has probably resulted in the conviction of one who is actually innocent . . . .'" *Werts v. Vaughn*, 228 F.3d 178, 193 (3d Cir. 2000) (quoting *Murray*, 477 U.S. at 496). "'[A]ctual innocence' means factual innocence, not mere legal insufficiency." *Bousley v. United States*, 523 U.S. 614, 623 (1998). To establish such a claim, a petitioner must "support his allegations 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." *Schlup v. Delo*, 513 U.S. 298, 321-22 (1995). Further, actual innocence "does not merely require a showing that a reasonable doubt exists in the light of the new evidence, but rather that no reasonable juror would have found the defendant guilty." *Id.* at 329.

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[9] Examples of "cause" include a showing that "the factual or legal basis for a claim was not reasonably available to counsel," that "some interference by officials made compliance impracticable," or that "some external impediment prevented counsel from constructing or raising the claim." *Murray*, 477 U.S. at 488-92.

Petitioner never fairly presented his prosecutorial misconduct claims before any state court. In addition, at this point, a new PCRA petition raising these claims would be deemed time-barred. Thus, because petitioner has deprived the Pennsylvania courts of the opportunity to address them, his claims of prosecutorial misconduct are procedurally defaulted. In order to have this court consider the merits of these claims, petitioner would have to show "cause and prejudice" or a "fundamental miscarriage of justice" to excuse the default.

Petitioner does not allege that he was in any way prevented by external circumstances from raising the prosecutorial misconduct claims in state court. Despite petitioner's assertions that "the prosecutorial misconduct arrives from the newly discovered evidence," this evidence – the Hannible statement – was available to petitioner prior to the filing of his fourth PCRA petition.[10] In fact, in that petition, petitioner made arguments regarding the Hannible statement but failed to raise the issue of prosecutorial misconduct. I conclude that due to the foregoing, petitioner has not shown "cause and prejudice" to excuse the procedural default of his claims of prosecutorial misconduct.

In addition, petitioner has not shown that his procedural default of the misconduct claims would result in a "fundamental miscarriage of justice." As stated above, the evidence on which petitioner relies is not "new" – it was in his possession when he filed his fourth PCRA petition. Also, the Hannible statement fits into none of the categories of evidence enumerated by the *Schlup* Court – it is not scientific evidence, it is not an eyewitness account of the murder of

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[10] Hannible's statement is dated April 10, 2001, and Peck's statement is dated April 12, 2001. Petitioner's fourth PCRA petition was not filed until April 24, 2001. Thus, petitioner was in possession of this "newly discovered evidence" before he filed his fourth PCRA petition, and he could have included this prosecutorial misconduct claim in that petition.

Calvin Cliett that exonerates petitioner, and it is not critical physical evidence. In fact, the evidence is less pertinent to the actual innocence of petitioner than it is to impeachment of Davis and Hannible.

In light of the foregoing, I conclude that petitioner's claims of prosecutorial misconduct are procedurally defaulted for purposes of habeas review in this court, and that petitioner has not demonstrated that either the "cause and prejudice" exception or the "fundamental miscarriage of justice" exception applies to excuse the default. Thus, petitioner's prosecutorial misconduct claims are dismissed.

III. Petitioner's PCRA Claim

Petitioner's third claim is that his fourth PCRA petition, which he filed on April 24, 2001, was not time-barred. Because the Pennsylvania Superior Court ruled that the PCRA trial court was in error in finding the petition time-barred and proceeded to consider the merits of petitioner's claims, the state court agreed with petitioner, and he has already been granted the relief he seeks. See Pa. Super. Ct. Opinion, No. 336 EDA 2002. In addition, because the timeliness of petitioner's PCRA petition is a matter of state law, it is not cognizable on federal habeas review. *See Estelle v. McGuire*, 502 U.S. 62, 67 (1991) (stating that "federal habeas corpus relief does not lie for errors of state law") (quoting *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990)). Thus petitioner's claim that his fourth PCRA petition was timely (which it was) will be dismissed as moot and non-cognizable.

Petitioner's objections to the part of the Report and Recommendation dealing with this issue also seem to rehash his argument under *Brady*. To the extent that the objections do so, the court will deal with the *Brady* issue in the following part of this memorandum.

IV. Petitioner's Claim under *Brady v. Maryland*

Petitioner claims that the prosecution violated *Brady* when it failed to disclose evidence favorable to him. Petitioner contends that the Hannible and Peck statements, made in April of 2001, reveal certain facts that the prosecution knew at the time of the trial but withheld from petitioner. Petitioner claims that Hannible's statement shows that the prosecution never revealed that "deals" existed between the prosecution and Davis, another of its witnesses. Petitioner claims that Davis worked for the Philadelphia homicide detectives, and that those detectives told Hannible what to say when she testified. In addition, petitioner contends that the Hannible statement shows that the prosecution failed to disclose the fact that Hannible neither treated petitioner's gunshot wound nor saw any shot-up money on December 15, 1979. Petitioner contends that Peck's statement reveals that the police threatened to charge her son with murder if she did not testify against petitioner, and that Peck was high on heroin and speed when she did testify. Petitioner contends that the jury was unaware of these facts, and that the prosecution knew of them but did not disclose them. Petitioner argues that *Brady* required the prosecution to make these facts known, and that "this new information would have changed the outcome of the verdict."

Preliminarily, the court finds that petitioner did present this *Brady* issue in his fourth PCRA petition, which was filed on April 24, 2001. The memorandum of law accompanying the petition contains several pages analyzing the *Brady* line of cases, explaining how it has been applied in Pennsylvania, and arguing its application to petitioner's case. PCRA Petition, April 24, 2001, at 8-12. However, the Pennsylvania Superior Court, on appeal of the dismissal of the

fourth PCRA petition, failed to reach the *Brady* issue, and decided the case on PCRA grounds.[11] Pa. Super. Ct. Opinion, No. 336 EDA 2002, at 9-10. "In such an instance, the federal habeas court 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 v. Horn*, 250 F.3d 203, 210 (3d Cir. 2001) (citing *McCandless v. Vaughn*, 172 F.3d 255, 260 (3d Cir. 1999)). This is true because AEDPA "applies only to claims already 'adjudicated on the merits in State court proceedings.'" *Appel*, 250 F.3d at 210. Thus, I will undertake a *de novo* analysis of the *Brady* claim instead of applying the habeas standard of review identified earlier in this memorandum.

In *Brady*, the United States Supreme Court held that "the suppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material to either guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87. "There are three components of a true *Brady* violation: 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." *Strickler v. Greene*, 527 U.S. 263, 281-82

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[11] The Pennsylvania Superior Court read the April 24, 2001 petition as seeking relief under state law dealing with the "unavailability at the time of trial of exculpatory evidence that has subsequently become available and would have changed the outcome of the trial if it had been introduced." 42 Pa. Cons. Stat. § 9543(a)(2)(vi). Under that provision of the PCRA, a petitioner must establish four criteria in order to be entitled to relief, one of which is that the newly-discovered evidence "will not be used solely for impeachment purposes." *Commonwealth v. Cobbs*, 759 A.2d 932, 934 (Pa. Super. 2000). The Superior Court concluded that petitioner's claim failed because "by his own admission, [the Hannible and Peck statements'] only utility is to undercut the credibility of the two witnesses at trial." Pa. Super. Ct. Opinion, No. 336 EDA 2002, at 10. It should be noted, however, that the suppression of evidence by the prosecution that is relevant only to impeachment does violate *Brady*, but only if the evidence is "material." *See Lambert v. Blackwell*, 387 F.3d 210, 252 (3d Cir. 2004) (stating that "impeachment evidence, as well as exculpatory evidence, falls within the *Brady* rule") (citation omitted).

(1999). In addition, the suppressed evidence must be "material," in that there must be a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* at 281 (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)). In other words, a new trial is not required "whenever 'a combing of the prosecutors' files after the trial has disclosed evidence possible useful to the defense but not likely to have changed the verdict . . . .'" *Giglio v. United States*, 405 U.S. 150, 154 (1972) (quoting *United States v. Keogh*, 391 F.2d 138, 148 (2d Cir. 1968)).

Assuming that the Hannible and Peck statements are factually credible (as I must at this juncture without holding an evidentiary hearing), the court still concludes that petitioner has not established that a *Brady* violation occurred, because: (1) the Hannible statement does not prove that any "deals" existed between Davis, herself, and the prosecution; (2) even if the statement were enough to prove that some "deal" existed, such evidence does not pass *Brady*'s "materiality" inquiry; (3) petitioner has failed to show that the prosecution knew of Hannible's assertion that she never treated petitioner's gunshot wound or saw the shot-up money; and (4) petitioner has failed to show that the prosecution knew of any of the allegedly exculpatory information contained in the Peck statement.

With respect to petitioner's assertion regarding deals between Hannible, Davis, and the prosecution, the court concludes that the statement evidences only Hannible's nebulous expectation of help from the police and prosecution in return for her testimony and does not show that she or Davis was promised anything. In fact, Hannible specifically states that the detectives "never told me to lie," and as Magistrate Judge Rueter points out, "Ms Hannible denies . . . that her testimony was being given in exchange for leniency for Mr. Davis." MJRR at

15. In addition, there is no definitive statement of any parameters of a "deal" between Davis and the police or prosecution, as Hannible simply asserts that Davis "worked with" the police without providing any supporting statements or evidence or the basis of her knowledge, aside from her rather vague contention that Davis "worked with Philadelphia Police detectives." The word "deal" never appears in her statement, only in petitioner's memorandum. Moreover, Davis himself denied having any kind of deal with the prosecution in his trial testimony. Trial Transcript, 1/22/82, at 13.12, 13.26-13.27.

Even if the Hannible statement were enough to show that the prosecution suppressed evidence favorable to petitioner, this evidence does not pass *Brady*'s materiality inquiry – in other words, the court concludes that there is not a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Strickler*, 527 U.S. at 281. This is true because despite the fact that petitioner claims that he was unaware of "deals" that could have been used on cross-examination of Davis, Davis was thoroughly impeached by petitioner's counsel. Davis was questioned extensively about his criminal history and drug use. Trial Transcript, 1/22/82, 13.12-13.15, 13.23-13.25. As Magistrate Judge Rueter points out, during cross-examination, "petitioner's counsel suggested several times that Mr. Davis' testimony was tainted by a 'deal' he had with the prosecution." MJRR at 19. In addition, during his closing argument, petitioner's counsel stated, "Do you think [Davis] was telling the truth, that he got nothing for coming up with this story? Reasonable doubt. Reasonable doubt." Trial Transcript, 1/26/82, 15.121-15.122. It is clear to the court that because of the thorough impeachment of Davis at petitioner's trial, even if petitioner had the allegedly suppressed evidence of "deals" between Davis and the prosecution, it is highly unlikely that the verdict would have been in his favor.

As for petitioner's contention regarding Hannible's assertion that she neither treated petitioner's gunshot wound nor saw any shot-up money on the day of Calvin Cliett's death, the court concludes that petitioner has failed to show that the prosecution knew of this information at the time of trial. Hannible's statement does not contain any claim that she told the prosecution or police of this fact, and there is no other evidence, aside from petitioner's newly-announced bare assertion, that the alleged fact was known to anyone. Thus, because petitioner has provided no proof of the prosecution's knowledge of the fact in question, his *Brady* claim must fail.

Similarly, petitioner's *Brady* claim regarding the Peck statement will be dismissed because petitioner has not shown that the prosecution knew of the information contained therein at the time of the trial. With regard to the allegation that the police threatened to charge Peck's son with conspiracy if she did not testify, at the part of the trial when Peck was granted immunity, a discussion took place between the trial judge, the district attorney, Peck, and defense counsel, during which Peck asked whether or not her son also had been granted immunity. Trial Transcript, 1/21/82, at 12.25. After the district attorney explained that the grant of immunity applied only to her, Peck stated on the record, "I am alright with the immunity, and I believe if any further action, you know, would transpire from this, I think that I can do it now." *Id.* at 12.29. At no point during this discussion did Ms. Peck mention that her testimony was being coerced, even though the subject of her son was explicitly raised. In addition, petitioner has provided no other evidence that the prosecution knew of this allegedly coerced testimony. Finally, Peck, through her statement, asserts only that a detective "told me that he would lock my son up as a conspirator if I did not testify at Sims' trial," not that the detective told her what to say.

In addition, assuming that Peck's statement regarding her intoxication at trial is true, petitioner has failed to show that the prosecution knew of this condition at trial. In fact, when deciding whether or not Peck understood the immunity agreement into which she was entering, the trial judge stated, "From as much as I have seen from our conversation with her, she appears to speak well and understand the English language. That is the impression I have." Trial Transcript, 1/21/82, at 12.28. In addition, the district attorney stated on the record that "from my conversation with her, I think she does understand what I have said, and I think she is responsive by the answers she has given, and she appears to be an alert, intelligent person." *Id.* Petitioner's counsel questioned Peck regarding her prior drug use and never raised the possibility that she was under the influence of anything. Moreover, Peck's trial testimony reveals that she was in prison at the time, and she said that she had not used drugs for eleven months. *Id.* at 12.83, 12.70. Based on the trial transcript, the court cannot find that the prosecution knew of Peck's alleged physical condition at the time of trial.

In light of the foregoing, all of petitioner's *Brady* claims will be denied.

CONCLUSION

For all of the above stated reasons, petitioner's objections to Magistrate Judge Rueter's Report and Recommendation are overruled, and the § 2254 petition is dismissed and denied.

An appropriate order follows.

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

BOBBIE LEE SIMS, Petitioner,	:	CIVIL ACTION
v.	:	NO. 03-0887
GEORGE N. PATRICK, *et al*, Respondents.	:	

Order

And now, this _____ day of April 2005, upon careful consideration of the petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2254, the response, petitioner's reply to the response, the Report and Recommendation of United States Magistrate Judge Thomas J. Rueter, petitioner's objections, respondents' response thereto, and petitioner's reply, it is hereby ORDERED that:

1. Petitioner's objections are OVERRULED.
2. The Report and Recommendation of United States Magistrate Judge Thomas J. Rueter is APPROVED and ADOPTED.
3. The petition for writ of habeas corpus is DISMISSED and DENIED.
4. The petitioner having failed to make a substantial showing of the denial of a constitutional right, there is no ground to issue a certificate of appealability, *see* 28 U.S.C. § 2253(c).
5. The Clerk shall CLOSE this case statistically.

_____

William H. Yohn, Jr., Judge