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

HENRY TOWNES, Petitioner,	:	
v.	:	CIVIL ACTION
MARILYN BROOKS, SUPERINTENDENT OF THE STATE CORRECTIONAL INSTITUTION AT ALBION, LYNN ABRAHAM, THE DISTRICT ATTORNEY OF THE COUNTY OF PHILADELPHIA, and THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA, Respondents.	:	No. 04-5002

MEMORANDUM & ORDER

YOHN, J. June _____, 2005

Petitioner Henry Townes, a prisoner at the State Correctional Institution in Albion, Pennsylvania, brings this petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. United States Magistrate Judge M. Faith Angell filed a report and recommendation recommending denial of the petition and petitioner filed objections to the report and recommendation. For the reasons set forth below, I will overrule petitioner's objections, adopt the report and recommendation, and dismiss the petition.

I. BACKGROUND[1]

[1]The facts in this section are substantially similar to the facts set forth in the state court record and the magistrate judge's report and recommendation. *See Commonwealth v. Townes*, No. 1767 EDA 2002 (Pa. Super. Ct. Mar. 6, 2003); *Commonwealth v. Townes*, No. 93- 2218, slip op. at 7–8 (C.P. Phila. Cty. May 15, 2002); *Townes v. Brooks, et al.*, No. 04-5002, WL 984212 (E.D. Pa. Apr. 21, 2005).

On July 31, 1995, petitioner Henry Townes was convicted in the Common Pleas Court of Philadelphia for his role in a robbery and a murder at a Bell Telephone payment center in Philadelphia on July 17, 1992.

At trial, petitioner's accomplice, Devere Gant, testified for the Commonwealth. Gant testified that he and petitioner planned the robbery a week in advance. According to Gant, on the day of the robbery, he and petitioner, who were both armed with handguns, waited outside of the payment center for an armored truck to arrive. When the truck arrived, Gant and petitioner entered the payment center and waited for the armored truck guard. When the guard appeared with a bag of currency, Gant fell on the guard, causing the guard to drop the bag. Next, Gant shot the guard, picked up the bag, ran to his vehicle, and drove off. Petitioner fled on foot. Following the robbery, Gant gave petitioner his share of the robbery proceeds, which amounted to $15,000.

The Commonwealth also called Roberta Yancey, petitioner's girlfriend at the time of the robbery. Yancey testified that several hours after the robbery, petitioner told her that he had robbed the telephone company and a man had been killed.

The jury found petitioner guilty of second degree murder, possession of an instrument of crime, robbery, criminal conspiracy, and carrying a firearm on public streets or public property. Immediately following his conviction, in accordance with Pennsylvania law the court sentenced petitioner to life imprisonment.

On direct appeal, the Pennsylvania Superior Court affirmed the trial court's judgment on February 27, 1997, *see Commonwealth v. Townes*, 694 A.2d 1122 (Pa. Super. Ct. 1997) (table), and the Pennsylvania Supreme Court denied *allocatur* review on August 5, 1997. *See*

Commonwealth v. Townes, 699 A.2d 734 (Pa. 1997) (table).

On August 7, 1998, petitioner filed a *pro se* petition for collateral relief under Pennsylvania's Post Conviction Relief Act ("PCRA"), 42 Pa. Cons. Stat. § 9541, *et seq*. The PCRA court appointed counsel, counsel filed a "no-merit letter," and on March 14, 2000, the PCRA court dismissed the petition without a hearing. The Superior Court affirmed the PCRA court on March 14, 2000, and the Supreme Court denied *allocatur* review on July 25, 2000.

On May 7, 2001, petitioner filed a second *pro se* PCRA petition. In his second petition, petitioner sought a new trial on the basis of newly discovered evidence. Petitioner attached affidavits from Gant and Stafford Chestnut, Gant's jail house lawyer. In his affidavit, Gant claims that petitioner "had absolutely nothing at all to do with the crime," and that he lied about petitioner's involvement in the robbery to avoid the death penalty for himself. Gant further alleges that even after he told the prosecution that petitioner was innocent, the prosecution pressured Gant to implicate petitioner in the crime. Chestnut's affidavit asserts that Gant "told [Chestnut] that he had to lie on [petitioner] in order to save his own life."

The PCRA court appointed counsel, who filed an amended PCRA petition on December 13, 2001. Nonetheless, on May 15, 2002, the PCRA court dismissed the petition without a hearing as untimely pursuant to 42 Pa. Cons. Stat. § 9545(b), which imposes a one-year statute of limitations on PCRA petitions. *Commonwealth v. Townes*, No. 93- 2218, slip op. at 7–8 (C.P. Phila. Cty. May 15, 2002). The court also considered the merits of petitioner's allegedly exculpatory evidence. It found that Gant's recantation was unreliable and concluded that even if the petition was timely, petitioner would not be entitled to a new trial on the basis of Gant and Chestnut's affidavits. *Id*. at 8–10.

On appeal, petitioner argued that his petition was timely because the affidavits fall within the PCRA's after-discovered evidence exception to the statute of limitations. *See* 42 Pa. Cons. Stat. § 9545(b)(1)(ii). To invoke this exception, petitioners must show that "the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence." *Id*. at § 9545(b)(1)(ii). A majority of the superior court's three-judge panel determined that petitioner's "new" evidence did not fall within this exception because the information in the affidavits was available to petitioner at the time of trial. *Commonwealth v. Townes*, No. 1767 EDA 2002, slip op. at 6 (Pa. Super. Ct. Mar. 6, 2003). The court reasoned that if petitioner did not participate in the robbery, he would have known that Gant's testimony was false at the time of trial. *Id*. Alternatively, the majority concluded that even if the affidavits fell within § 9545(b)(1)(ii)'s exception to the statute of limitations, there was ample support in the record for the PCRA court's determination that the affidavits were not credible. *Id*. at 7.

The third member of the panel, Judge Klein, filed a separate memorandum concurring in the result. Judge Klein disagreed with the majority about the timeliness of the petition. He found that the petition was timely under § 9545(b)(1)(ii). Nonetheless, he agreed with the majority that the record supported the PCRA court's finding that the affidavits lacked sufficient credibility to warrant an evidentiary hearing. *Id*. at 10. Petitioner sought *allocatur* review of the superior court's opinion, which the Pennsylvania Supreme Court denied on October 28, 2003.

On October 17, 2004,[2] petitioner filed the instant petition for writ of habeas corpus, which

[2]The petition was actually filed on October 25, 2004. However, under the prison mailbox rule, I will consider the petition filed on October 17, the day that petitioner allegedly delivered the petition to prison officials for mailing to the court. *See Burns v. Morton*, 134 F.3d 109, 113

includes copies of Gant and Chestnut's affidavits along with a statement from Yancey, his former girlfriend, which allegedly refutes her trial testimony. Petitioner captions his sole ground for relief "newly discovered evidence." However, he goes on to assert that Gant and Chestnut's affidavits show that the prosecution "purchase[d] and use[d] . . . perjured testimony, which [it] knew to be false . . . .". The Commonwealth contends that petitioner's claim is not cognizable on federal habeas review because he has not alleged an independent constitutional violation. *See Herrera v. Collina*, 506 U.S. 390, 400 (1993) ("Claims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state proceeding."). Nonetheless, because petitioner is a *pro se* litigant, I will read the petition liberally[3] and assume that petitioner intends to state a prosecutorial misconduct claim under the due process clause of the Fourteenth Amendment. *See Napue v. Illinois*, 360 U.S. 264, 269 (1959) ("[A] conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment . . . .") (citations omitted).

The magistrate judge filed her report and recommendation on April 21, 2005. *See Townes v. Brooks, et al.*, No. 04-5002, 2005 WL 984212 (E.D. Pa. Apr. 21, 2005). She concluded that the petition is time barred pursuant to the one-year statute of limitations set forth

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(3d Cir. 1998).

[3]The Supreme Court has made clear that "a *pro se* complaint, 'however inartfully pleaded,' must be held to 'less stringent standards than formal pleadings drafted by lawyers' . . . ." *Estelle v. Gamble*, 429 U.S. 97, 106 (1976) (citation omitted).

in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA").[4] *Id*. at *5. The magistrate judge used two alternative starting dates to analyze the timeliness of the petition. First, she found that petitioner failed to file his petition within one year of the date on which his conviction became final. *Id*. Alternatively, she concluded that even if petitioner's limitations period did not begin to run until the day that Gant and Chestnut signed their post-judgment affidavits, the petition was still filed nearly two and a half years late. *Id*. at *6. The magistrate judge also declined to recommend that the court except petitioner from AEDPA's timeliness requirement on the basis of petitioner's "actual innocence" claim. *Id*. at *7–8. She concluded that even if there was an "actual innocence" exception to AEDPA's statute of limitations, which has yet to be resolved, petitioner's "new" evidence fails to satisfy the stringent standard that the United States Supreme Court has imposed on defendants claiming "actual innocence." *Id*. at *7–*8.

On May 5, 2005, petitioner filed objections to the report and recommendation. He contends that his petition is timely and that the magistrate judge used an improper starting date to calculate his one-year limitations period. (Objections at 3.) Petitioner argues that his limitations period should have begun running on October 28, 2003, when the Pennsylvania Supreme Court denied *allocator* review of his second PCRA petition. (*Id*. at 3.) He asserts that this is the proper starting date under 28 U.S.C. § 2244(d)(1)(D), which provides that petitioners must file their petitions within one year of "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." Petitioner also

[4]AEDPA governs this petition because it governs all §2254 habeas petitions filed on or after April 24, 1996. *See Lindh v. Murphy*, 521 U.S. 320, 327 (1997).

reasserts his actual innocence claim. (*Id*. at 4–8.)

II. STANDARD OF REVIEW

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

III. DISCUSSION

A. Timeliness

Before I may analyze the timeliness of the petition, I must determine the proper starting date for calculating petitioner's limitations period. Under AEDPA, a state prisoner seeking federal habeas relief must file his petition within one year of the latest of the following four dates:

> (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;
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1).

Petitioner urges the court to use a later date than the date on which his judgment of

conviction became final because he had not discovered the "factual predicate" of his claims at that point. (Objections at 3.) The Pennsylvania courts concluded that petitioner discovered the information contained in Gant and Chestnut's affidavits as soon as Gant gave the allegedly false testimony because if petitioner did not participate in the robbery, he would have known that Gant's testimony was false at the moment that Gant implicated him in the crime. *See Townes*, No. 1767 EDA 2002, slip op. at 6–7 (Pa. Super. Ct. 2002). The logic of this argument is persuasive if I treat petitioner's claim as an actual innocence claim based solely on the fact that Gant allegedly lied at trial. However, as I described above, such a claim is not cognizable on federal habeas review and I will, therefore, assume that petitioner intends to bring a prosecutorial misconduct claim under the due process clause of the Fourteenth Amendment.

If I treat petitioner's ground for relief as a prosecutorial misconduct claim, petitioner could not have discovered the "factual predicate" for this claim until he learned not only that Gant's trial testimony was false, but also that the prosecution knew that Gant's testimony was false at the time of trial. There is no evidence that petitioner could have learned about the prosecution's knowledge of Gant's allegedly false testimony until after petitioner received Gant and Chestnut's affidavits, which are dated April 25, 2001. Petitioner must have received the affidavits by the time that he filed his second PCRA petition on May 7, 2001 because he attached the affidavits to this petition. Hence, under § 2244(d)(1)(D), I will use this date to calculate petitioner's limitations period.

If I use May 7, 2001 to start calculating petitioner's federal limitations period, his statute of limitations expired on May 7, 2002. Petitioner filed this petition on October 17, 2004, nearly two and a half years after his limitations period had elapsed.

Petitioner argues that his second PCRA petition should have tolled his limitations period under 28 U.S.C. § 2244(d)(2), which provides that AEDPA's statute of limitations is tolled for "the time during which a properly filed application for State post-conviction or other collateral review . . . is pending . . . ." *Id*. at § 2244(d)(2). However, this petition did not affect petitioner's AEDPA limitations period because the Pennsylvania courts dismissed the petition as untimely, and "an untimely PCRA petition does not toll the statute of limitations for a federal habeas corpus petition" because it is not "properly filed" within the meaning of AEDPA.[5] *Merritt v. Blaine*, 326 F.3d 157, 165 (3d Cir. 2003). For these reasons, even if I assume that petitioner could not have discovered the factual predicate for the instant petition until the day that he received Gant and Chestnut's affidavit, the petition is time barred.

B. Actual Innocence

Petitioner contends that even if the petition is untimely, the court should review the merits because the new evidence establishes that petitioner is "actually innocent." The Third Circuit has yet to decide whether there is an "actual innocence" exception to AEDPA's timeliness requirement. *See Knecht v. Shannon*, No. 01-2330, 2005 U.S. App. LEXIS 9568, at *4 n.2 (3d Cir. May 25, 2005) ("This Court has not yet determined whether a showing of actual innocence is grounds for equitable tolling of AEDPA's statute of limitations."). If there is an "actual innocence" exception to the statute of limitations, petitioner would most certainly be

[5]Petitioner contends that the magistrate judge failed to give sufficient weight to the concurring judge's determination that his second PCRA petition was timely. (Objections at 4.) However, federal habeas courts may not review a state court's application of state law, *see Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991), and thus I must defer to the superior court majority's analysis of petitioner's PCRA statute of limitations.

required to satisfy the stringent standard that the Supreme Court has set forth for habeas petitioners who hope to circumvent other procedural requirements in AEDPA with a showing of "actual innocence." *See Herrera v. Collins*, 506 U.S. 390, 404 (explaining that "a claim of 'actual innocence' is . . . a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits."). Under this line of cases, to show actual innocence, "'a habeas petitioner must 'persuade[] the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt.'" *Cristin v. Brennan*, 281 F.3d 404, 420 (3d Cir. 2002) (quoting *Schlup v. Delo*, 513 U.S. 298, 329 (1995)) (additional citations omitted). 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*, 513 U.S. at 321–22.

Here, petitioner contends that Gant and Chestnut's affidavits prove that he is "actually innocent." However, this evidence is not "reliable" as required by *Schlup*. The PCRA court, which oversaw petitioner's trial, found that Gant and Chestnut's affidavits were not credible, *Townes*, No. 93- 2218, slip op. at 8–10, and three superior court judges agreed with this determination. *Townes*, No. 1767 EDA 2002, at slip op. 7, 10. On federal habeas review, "[f]actual determinations by state courts are presumed correct absent clear and convincing evidence to the contrary . . . ." *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003) (citing 28 U.S.C. § 2254(e)(1)). Here, there is none.

Petitioner argues that Yancey's statement corroborates Gant and Chestnut's affidavits and

calls into question the state courts' credibility determinations.[6] In her statement, Yancey contradicts her trial testimony and claims that petitioner never told her that he committed the robbery. However, this statement is not the type of "clear and convincing evidence" necessary to overturn state court credibility determinations. A year before Yancey gave the statement, she told a police detective that petitioner told her that he committed the robbery. A year after she gave the statement, she testified under oath at petitioner's trial that petitioner told her that he committed the crime. (*See* N.T. Trial, July 21, 1995, at 90–91.) Because Yancey twice contradicted the statement offered by petitioner, this statement is not "clear and convincing evidence to the contrary" of the Pennsylvania courts' credibility determinations and he cannot use it to challenge these findings.

For these reasons, petitioner has failed to show "actual innocence" and his petition is time-barred.

IV. CONCLUSION

For the reasons explained above, I will overrule petitioner's objections, adopt the report and recommendation, and dismiss the instant petition for writ of habeas corpus. An appropriate order follows.

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[6]To the extent that petitioner intends to argue that Yancey's statement itself is "newly discovered evidence" that establishes his "actual innocence," this argument is also without merit because the statement is dated June 8, 1994, more than a year before petitioner's trial. Hence, Yancey's statement is not "new" evidence as required by *Schlup* because it was available to petitioner at the time of trial. In fact, at trial, defense counsel used Yancey's statement to impeach her testimony. (*See* N.T. Trial, July 21, 1995, at 97–101.)

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ORDER

And now on this _____ day of June, 2005, upon consideration of petitioner Henry Townes' petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 (Doc. #1), review of the United States Magistrate Judge M. Faith Angell's report and recommendation (Doc. #10), and consideration of petitioner's objections thereto (Doc. #11), it is hereby ORDERED that:

1. Petitioner's objections are OVERRULED;

2. The recommendation of the magistrate judge is APPROVED and ADOPTED;

3. The petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254 is DISMISSED;

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); and

5. The Clerk shall CLOSE this case statistically.

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William H. Yohn, Jr., Judge