

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

BOBBIE LEE SIMS,
Petitioner,

v.

GEORGE N. PATRICK, *et al*,
Respondents.

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CIVIL ACTION

NO. 04-3379

Memorandum and Order

YOHN, J.

October ____, 2005

Presently before this court is Petitioner Bobbie Lee Sims's *pro se* petition for a writ of habeas corpus. Petitioner is currently incarcerated in the State Correctional Institution at Houtzdale, Pennsylvania, **and is asserting nine separate claims for relief under 28 U.S.C. § 2254. Petitioner's claims are based on inadequate assistance of trial, appellate, and postconviction relief counsel; prosecutorial misconduct, including the presentation of perjured testimony and the failure to disclose favorable evidence; multiple denials of due process in the state postconviction proceedings; erroneous state court determinations that his petitions for postconviction relief were untimely; and actual innocence.** After conducting a *de novo* review of the Report and Recommendation of United States Magistrate Judge Thomas J. Rueter, **and upon careful consideration of the parties' submissions, this court approves and adopts the Report and Recommendation, and denies and dismisses petitioner's petition.**

I. FACTUAL & PROCEDURAL BACKGROUND

A. Petitioner's Underlying Offense and Conviction

Petitioner's application for a writ of habeas corpus arises out of his October 10, 1981 conviction for first degree murder, robbery, and criminal conspiracy in the Philadelphia County Court of Common Pleas. *Commonwealth v. Sims*, Nos. 2984-2988, slip op. at 3 (Phila. Ct. Com. Pl. Aug. 19, 1983). The Pennsylvania Superior Court summarized the facts underlying the conviction as follows:

Lawrence Baker and Bobbie Sims were arrested for the beating and shooting death of Robert Limerick. This arose from an incident which occurred at 731 N. 44th Street in Philadelphia on the night of Christmas, 1979.

In the evening hours of December 25, 1979, trial testimony indicated that the victim, Robert Limerick, arrived at the 44th Street address to purchase drugs. Mr. Limerick was no stranger to the occupants and his appearance at this location for the purposes of buying drugs was not unexpected.

After he 'placed his order' and told the defendants how much money he had, they insisted that he had more and that he should produce it immediately.

Mr. Limerick maintained that that was all he was carrying. During the events that followed defendant Sims discovered that Mr. Limerick was carrying a gun. Janet Fleming, a visitor in the house, was told to disarm him and give the gun to defendant Sims. She followed these directions. At that point defendant Baker entered the room with a gun and while he trained his gun on Limerick, defendant Sims searched Limerick and removed his wallet, as well as, checks and personal papers.

Ms. Fleming was given these items and told to take them upstairs. Subsequently, both defendants began beating Mr. Limerick. At least three shots were fired, one hitting another visitor [Walter Brown] and one hitting the victim, Mr. Limerick, at which point Mr. Limerick, in an effort to escape this brutal beating, jumped through a window on the first floor, landing on the porch in front of the residence.

Mr. Limerick died as a result of the gunshot wound, as well as injuries caused by the beating.

At trial one witness presented by the Commonwealth was Michelle Hannibal [who] testified that on the evening of December 25, 1979, she was living at 4273 Lidia Avenue with Carl Davis. Hannibal identified Sims as someone she had known for a long time. She testified that around the time of the incident, Sims sometimes lived at her house. Hannibal stated further that on the evening of December 25th, Sims came to her house to talk to Davis. Hannibal testified that . . . Sims told Davis that "he had shot some guy and he had jumped through the window." Hannibal stated that Robert Limerick was the victim [and] that Sims had the identification of the victim and the gun. Hannibal stated that Sims talked about it in a bragging way, as if it was a joke.

Commonwealth v. Sims, No. 2186 EDA 2002, slip op. at 1-2 (Pa. Super. Ct. Sept. 19, 2003) (citations omitted). Police arrested petitioner when he attempted to cash one of the victim's checks and found him in possession of Limerick's wallet and other identifying documents. (Resp. 6.) The jury sentenced petitioner to life imprisonment for the murder. *Sims*, Nos. 2984-2988, slip op. at 3. After denying petitioner's post-verdict motions, the trial court sentenced petitioner to ten to twenty years for robbery and five to ten years for conspiracy, both to run consecutively with petitioner's life sentence. *Id.* at 4.

B. Direct Appeal

On June 9, 1983, petitioner directly appealed his conviction to the Pennsylvania Superior Court, arguing that the trial court erred: (1) in refusing to allow a juror to be struck for cause; (2) in denying a mistrial when a witness stated, on direct, that the investigation was delayed "to relocate some people that were in fear of their lives;" and (3) in admitting the murder victim's wallet into evidence when the prosecution disclosed its existence after completion of the suppression hearing. *Commonwealth v. Sims*, No. 2124 Phila. 1983, slip op.1-2 (Pa. Super. Ct. Feb. 27, 1985). On February 27, 1985, the superior court affirmed petitioner's conviction, finding his contentions meritless. *Id.* at 1-3. Petitioner filed for permission to appeal, but the Pennsylvania Supreme Court denied allocatur on August 20, 1985. *Commonwealth v. Sims*, No. 329 E.D. Allocatur Docket 1985. Petitioner did not pursue an appeal to the United States Supreme Court.

C. First Petition for Postconviction Relief

Since the failure of his direct appeal, Petitioner has filed three separate petitions for postconviction relief in state court. Petitioner filed his first petition on March 20, 1986, pursuant

to Pennsylvania's Post Conviction Hearing Act ("PCHA"), 42 Pa. Cons. Stat. §§ 9541-9551, *repealed by* Post Conviction Relief Act ("PCRA"), 42 Pa. Cons. Stat. §§ 9541-9546 (1988).

Petitioner claimed that he was denied effective assistance of trial counsel because his attorney:

(1) refused to call and notify witnesses; (2) failed to visit or speak with the petitioner regarding the strategy for his defense; (3) failed to object to an incorrect interpretation of the medical examiner's report at the preliminary hearing; (4) failed to object to prejudicial remarks made by the District Attorney during closing arguments; (5) failed to object to the non-sequestration of a police officer who later testified during the trial; (6) failed to consult with the petitioner regarding *voire dire*; and (7) failed to ask the judge to question the empaneled jurors regarding the prejudicial effect of having the prisoner in prison garb. (Am. Pet. Under PCHA ¶ 6, June 1981.)

Petitioner also argued that he had not wanted his counsel to continue representing him during his trial. *See Commonwealth v. Sims*, No. 3080 EDA 1999, slip op. 7, n.2 (Pa. Super. Ct. Sept. 21, 2001) (citations omitted). The PCHA court denied this petition on February 11, 1988, and petitioner did not appeal. *Id.*

D. Second Petition for Postconviction Relief

On December 10, 1996, petitioner filed his second petition for postconviction relief (his first petition under the PCRA), again arguing his trial counsel had been ineffective. Petitioner asserted that his trial counsel (1) failed to object to improper jury instructions; (2) failed to investigate, subpoena, and present the testimony of alibi witnesses; (3) improperly coerced petitioner into not taking the stand; and (4) failed to obtain a severance of petitioner's case from his co-defendant, Lawrence Baker. (Mot. for Post Conviction Collateral Relief ¶ 6, Dec. 10, 1996; Supplemental Am. Pet. ¶¶ 4-7, Oct. 15, 1997.) The PCRA court appointed Martin

Isenberg, Esq. to represent petitioner. (Isenberg Letter 1.) On March 8, 1999, Attorney Isenberg filed a “no merit” letter pursuant to *Commonwealth v. Finley*, 550 A.2d 213 (Pa Super. Ct 1988).¹ *Id.*

In reply to the “no-merit” letter, petitioner filed several petitions with the PCRA court. (Pet. Resp. to Counsel’s Mot. to Withdraw, Apr. 9, 1999; Pet. in Forma Appointment of Counsel, Aug. 17, 1999; Mot. to Introduce After/Discovered Evidence, Sept. 03, 1999.) In these documents, petitioner asserted additional claims of prosecutorial misconduct, specifically, that the prosecution concealed witness-victim Walter Brown (“Brown”) and **knowingly presented the perjured testimony of Michelle Hannibal (“Hannibal”) and Janet Fleming (“Fleming”)**. (Pet. in Forma 2-4.) Petitioner alleged the Commonwealth concealed Brown because Brown would have testified consistently with his preliminary hearing testimony, in which he stated neither petitioner nor Fleming was present at the time of the shooting. *Id.* at 2. In addition, petitioner argued that the prosecution knowingly presented the perjured testimony of Hannibal, who **testified** that petitioner confessed to the shooting while visiting Davis at Hannibal’s house. *Id.* Petitioner provided an arrest report showing that Davis was in prison at the time Hannibal said petitioner confessed. *Id.* at 3. Finally, petitioner presented a statement by Matthew Faulkner who claimed Fleming was with him at a hotel at the time of the shooting, and not at the house where the shooting took place. *Id.* at 4.

On September 28, 1999, the PCRA court, after rendering notice of its intent to dismiss

¹Under *Finley*, the withdrawal of PCRA counsel comports with a petitioner’s entitlement to effective counsel under Pennsylvania law, so long as counsel provides a “no-merit” letter and the court independently reviews the petitioner’s claims. 550 A.2d at 393.

without a hearing, dismissed the petition and permitted Attorney Isenberg to withdraw. *See Sims*, No. 3080 EDA 1999, slip op. 2-3. **Petitioner** proceeded *pro se* and appealed the dismissal on October 27, 1999, raising claims from his PCHA and PCRA petitions. *Id.* Petitioner did not raise his prosecutorial misconduct claims. *Id.* at 3. **As the PCRA judge was no longer sitting on the bench, petitioner's file was forwarded to the Pennsylvania Superior Court without an opinion. (Susan A. Carmody Letter, Oct. 10, 2000.)** On September 21, 2001, the superior court affirmed the dismissal, finding petitioner's claims untimely and previously litigated, or else waived absent the untimely filing. *Id.* at 8. **Petitioner did not file a request for allocatur with the Pennsylvania Supreme Court.**

E. Third Petition for Postconviction Relief

On November 20, 2001, petitioner filed his third petition for collateral review. **Petitioner, represented by counsel, affirmatively asserted that this PCRA petition was timely because** petitioner just became aware of newly discovered evidence, specifically, that prosecution witness Hannibal recanted her testimony in October 2001. *Sims*, No. 2186 EDA 2002, slip op. at 6. Hannibal's statement, in pertinent part, is as follows:

I believe that I was with Carl Davis on the night of December 25, 1979 but do not remember seeing Bobbie Sims. It seems like I would remember if I had seen Sims on this night.

I never saw Sims with checks or any other types of identification that belonged to Robert Limerick and, as I said, I do not believe I saw Sims on December 25, 1979. Robert Limerick is not a person known to me.

I can not [sic] recall Sims admitting to the killing and robbing of Limerick while in my presence, while Sims was talking to Carl Davis.

I do not recall Sims ever taking Davis back to the crime scene in order to prove he killed Limerick and Carl never mentioned anything about it to me.

During the day and evening of December 25, 1979, I was at home at 4273 Leidy Avenue, Philadelphia, PA or with my parents at 4213 Lidia Avenue, because I cooked dinner for them. I slept at my own house and Carl Davis was probably there with me, although I can not [sic] be sure since he

had been locked up so many times. I do believe that he got out of jail in September 1978 but can't remember what Davis was doing on December 25, 1979.

I am sure that Sims never bragged about killing any one while he was in my house on December 25, 1979 because I do not even remember seeing him on that date.

Before testifying at Bobbie Sims' trial, I met with two Philadelphia Police Homicide detectives. One was named Ernest Bethea and the other (first name unknown) Shelton (phonetic). They read things to me from my previous statement and drilled me on what to say when I testified. I believe that I was coerced by them into giving testimony during Sims' trial so that Carl Davis would not go to jail. Davis was also turning state's evidence on Sims in order to stay out of jail himself.

All the information about this murder case I learned from detectives Bethea and Shelton.

Although in the past I had read the transcript of my trial testimony, I can not [sic] now recall what I said at that time. At that period of my life people could get me to say anything. I was young, naive and in love with Carl Davis.

(Hannibal Statement at 1-2.) Petitioner argued that this new petition met PCRA timeliness exceptions² because it (1) contained "after-discovered evidence" that would have compelled a

² 42 Pa.C.S.A. § 9545(b) (2005) provides the PCRA timeliness requirements:
(b) Time for Filing Petition.-

- (1) Any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final, unless the petition alleges and the petitioner proves that:
 - (i) the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States;
 - (ii) 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; or
 - (iii) the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively.

different verdict and (2) constituted “government interference” in the form of a *Brady*³ violation when the prosecutor did not disclose to petitioner that “deals” had been made with Hannibal in return for her testimony. *Sims*, No. 2186 EDA 2002, slip op. at 6. However, the PCRA court dismissed this third petition as untimely and the Pennsylvania Superior Court affirmed that dismissal on September 19, 2003. *Id.* at 3, 9. The court stated that petitioner failed to meet the “after-discovered evidence” standard because the statement did not exculpate petitioner and was previously discoverable. *Id.* at 7. Furthermore, the court found that the **information in the statement did not constitute “governmental interference” in the nature of a *Brady* violation.** *Id.* at 8. **Petitioner claims he did not seek allocatur to the Pennsylvania Supreme Court because he did not know of the superior court’s decision until after the time to appeal expired, due to the “intentional” and “malicious” withholding of mail by individuals in the correctional institution’s mail room.**⁴ (Pet. 8(A).)

F. The Instant Habeas Petition

Petitioner originally filed this petition on **July 19, 2004.**⁵ On September 7, 2004, this

³*Brady v. Maryland*, 373 US 83, 87 (1963) (holding “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”).

⁴Petitioner filed several grievances with the Pennsylvania Department of Corrections in regard to a history of missing mail. (Pet’r’s Reply 7, Apr. 8, 2005.) The institution reviewed petitioner’s grievances regarding his mail and found no evidence his mail was withheld or that his legal materials were confiscated. (Pet’r’s Objections to Resp’t’s Answer Letters dated Mar. 15, 2004 & Apr. 29, 2004 (attached as Exhibits).)

⁵The original petition was signed and dated April 6, 2004, which the court will accept as the date of filing under the prison mailbox **rule in order to give petitioner the benefit of every doubt.** *Jones v. Morton*, 195 F.3d 153, 157-58 (3d Cir. 1999) (“a pro se prisoner's habeas petition is deemed filed at the moment he delivers it to prison officials for mailing to the district court”).

court referred the case to Magistrate Judge Rueter for a Report and Recommendation.

Respondents filed their response to the petition on January 31, 2005, petitioner filed a reply to the response on April 8, and the magistrate judge issued a Report and Recommendation on April 19. On June 6, 2005, petitioner filed his objections to the Report and Recommendation, and respondents filed their response to the objections on June 17. Finally, on June 29, 2005, petitioner filed a reply to respondent's response.

II. DISCUSSION

In his habeas petition, petitioner raises numerous claims arising out of his trial, direct appeal, and postconviction relief proceedings. Specifically, petitioner asserts that (1) his trial counsel was ineffective by agreeing with the district attorney that the “the decease [sic] was tied, bound and shot in the head”; (2) his appellate counsel was ineffective for failing to preserve and argue “petitioner’s some 95 claims” in his direct appeal; (3) the prosecutor committed misconduct when he presented the perjured testimony of Hannibal and Marie Hillyard (“Hillyard”);⁶ (4) the prosecution violated *Brady* by failing to disclose evidence favorable to petitioner; (5) his PCRA counsel was ineffective; (6) he was denied due process of law because his second petition for collateral review was forwarded to the superior court without a hearing or opinion; (7) he was denied due process and right to appeal because he did not receive notice of

⁶Petitioner also alleges the prosecution committed misconduct in presenting the perjured testimony of Juanita Peck-Brown. However, Peck-Brown did not testify against petitioner in the murder trial of Robert Limerick, rather, she testified against petitioner in a different trial for the murder of Calvin Cliett. *Commonwealth v. Sims*, Pa. Super. Ct. Opinion, No. 4878 Phila. 1997. Petitioner was convicted of that murder. *Id.* Petitioner cannot assert a claim for habeas relief arising out of a different conviction. *See generally* 28 U.S.C. § 2254. This court will therefore focus on those witnesses who testified at petitioner’s trial for the murder of Robert Limerick.

the superior court's dismissal of that petition; (8) the superior court erred in finding that his second and third petitions for collateral review were untimely; and (9) petitioner is actually innocent of the crimes. As discussed below, this court finds that the statute of limitations under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") bars petitioner's claims, which are not subject to statutory or equitable tolling. In addition, even if actual innocence is an exception to the statute of limitations, this court finds that petitioner has failed to meet the requirements for an actual innocence claim.

A. Jurisdiction and Standard of Review

This court exercises jurisdiction over this habeas petition under 28 U.S.C. § 2254(a). 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.*

B. AEDPA's Statute of Limitations

Before the court will consider the merits of a petition for a writ of habeas corpus, the petition must be timely. 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 in which the habeas petitioner's conviction becomes 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). In addition, if the habeas petitioner's claim is based on newly discovered evidence, the petitioner has one year to file his claim from "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)(D). In either case, the limitation period is subject to two tolling exceptions: (1) statutory tolling, during the time a "properly filed" application for state post-conviction review is pending in state court, and (2) equitable tolling, a judicially crafted exception. 28 U.S.C. § 2244(d)(2); *Merritt v. Blaine*, 326 F.3d 157, 161 (3d Cir. 2003) (citing *Jones v. Morton*, 195 F.3d 153 (3d Cir. 1999)).

As petitioner's conviction became final on November 18, 1985,⁷ prior to AEDPA's effective date, petitioner's one-year grace period began running on April 24, 1996. Accordingly, petitioner's right to apply for federal habeas relief expired on April 24, 1997, unless petitioner can show that an alternative start date applies, or this deadline is subject to statutory or equitable tolling.

1. Alternative Start Date

Petitioner contends that the statute of limitations did not begin running on April 24, 1996, but rather on October 31, 2001, when he discovered new evidence of prosecutorial misconduct in his case. On that date, petitioner asserts he received a signed statement from prosecution witness Hannibal, in which she claims she no longer remembers petitioner's incriminating statements or the actions relevant to Limerick's murder.

⁷A conviction becomes final when the time for seeking certiorari in the United States Supreme Court expires, which is 90 days from the final entry of judgment. *Kapral v. United States*, 166 F.3d 565, 570 (3d Cir. 1999); Sup. Ct. R. 13. The Pennsylvania Supreme Court denied allocatur to petitioner on August 20, 1985; therefore, petitioner had until November 18, 1985 to seek certiorari.

In habeas claims based on newly discovered evidence, “the one-year period of limitation commences under 28 U.S.C. § 2244(d)(1)(D) when the factual predicate of a claim could have been discovered through the exercise of due diligence, not when it actually was discovered.” *Schlueter v. Varner*, 384 F.3d 69, 74 (3d Cir. 2004) (citations omitted). Due diligence does not require “‘the maximum feasible diligence,’ but it does require reasonable diligence in the circumstances.” *Id.* Petitioner can only avail himself of a later accrual date “if vital facts could not have been known.” *Id.* Thus, in order for this alternative start date to apply, petitioner must demonstrate that October 31, 2001 was “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)(D). An examination of petitioner’s claims arising out of his trial and direct appeal demonstrates that petitioner fails to meet this standard, and that even if he did, his claims for relief are still time-barred.⁸

⁸This court restricts this analysis to petitioner’s claims arising out of his trial and direct appeal because his claims arising out of his PCRA proceedings are not cognizable on federal habeas review. With regard to his PCRA proceedings, petitioner asserts (1) his PCRA counsel was ineffective; (2) he was denied due process of law when his second petition for collateral review was forwarded to the superior court without a hearing; (3) he was denied due process and right to appeal because he did not receive notice of the superior court’s dismissal of that petition; and (4) the superior court erred in finding that his second and third petitions for collateral review were untimely. First, there is no Sixth Amendment right to counsel in PCRA proceedings, and therefore, Sims’s claims of ineffective PCRA counsel are not cognizable on federal habeas review. *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987) (“the right to appointed counsel extends to the first appeal of right, and no further”). Furthermore, federal habeas review is not available for claims alleging due process violations in state collateral proceedings. *Hassine v. Zimmerman*, 160 F.3d 941, 954 (3d Cir. 1998) (“the federal role in reviewing an application for habeas corpus is limited to evaluating what occurred in the state or federal proceedings that actually led to the petitioner’s conviction; what occurred in the petitioner’s collateral proceeding does not enter into the habeas calculation”); *see also Lambert v. Blackwell*, 387 F.3d 210, 247 (3d Cir. 2004) (“[A]lleged errors in collateral proceedings . . . are not a proper basis for habeas relief from the original conviction. It is the original trial that is the ‘main event’ for habeas purposes.”); *Mason v. Myers*, 208 F.3d 414, 417 (3d Cir. 2000) (rejecting the premise that “a

a. Petitioner's Ineffective Assistance of Trial & Appellate Counsel Claims

First, petitioner's ineffective assistance of trial and appellate counsel claims are not subject to this alternative start date, because they are not based on petitioner's alleged newly discovered evidence, the Hannibal statement. Petitioner's ineffective assistance claims - that his trial counsel was ineffective by agreeing with the District Attorney that the "the decease [sic] was tied, bound and shot in the head" and that his appellate counsel was ineffective for failing to preserve and argue "petitioner's some 95 claims" in his direct appeal - have no relation to the Hannibal statements and could have been brought at any time since the conclusion of the direct appeal. Thus, petitioner's ineffective assistance of counsel claims expired on April 24, 1997 because they are not based on newly discovered evidence.

b. Petitioner's Claims of Prosecutorial Misconduct in the Solicitation of Perjury

Petitioner's first prosecutorial misconduct claim alleges that the prosecution presented the perjured testimony of witnesses Hillyard and Hannibal. However, this court concludes that like the ineffective assistance of counsel claims, petitioner's solicitation of perjury claims are not

delay in a collateral proceeding can be the basis of a petition for a writ of habeas corpus"); *Duff-Smith v. Collins*, 973 F.2d 1175, 1182 (5th Cir. 1992) (noting that "infirmities in state habeas proceedings do not constitute grounds for federal habeas relief"); *Williams v. Missouri*, 640 F.2d 140, 144 (8th Cir. 1991) (finding that "[e]ven where there may be some error in state postconviction proceedings, this would not entitle appellant to federal habeas corpus relief since appellant's claim here represents an attack on a proceeding collateral to detention of appellant and not on the detention itself"); *Abu Jamal v. Horn*, 2001 WL 1609690, at *129 (E.D. Pa. Dec 18, 2001) (holding that "a viable habeas claim cannot be predicated on petitioner's allegation of error in his PCRA hearing"). Accordingly, this court is limited to reviewing the proceedings that led to the petitioner's original sentence; petitioner's claims of procedural impropriety at the state habeas level fall outside its domain. *See also infra* Part 2.B (holding that because the timeliness of petitioner's PCRA petitions are a matter of state law, this court cannot reexamine those determinations). Thus, Sims's claims alleging error in his state collateral process, rather than in his underlying detention, must be dismissed.

based on newly discovered evidence.

First, petitioner's claim that Hillyard gave false testimony has no relation to the Hannibal statements and could have been brought at any time since the conclusion of the direct appeal. At trial, Hillyard testified that during Christmas week 1979, petitioner discussed with her his participation in Limerick's murder. (Tr. 1200, Oct. 6, 1981.) On the other hand, Hannibal's statement relates to an entirely different confession made by the petitioner on December 25, 1979. Her failure to remember the events of that night, or her deals with prosecutors, has no impact on whether or not Hillyard gave false testimony. Therefore, petitioner's claim that the prosecutor knowingly allowed Hillyard to provide false testimony is not based on new evidence. Petitioner could have brought this misconduct claim during the statute of limitations period.

Nor is petitioner's assertion that the prosecutor allowed Hannibal to give perjured testimony based on new evidence. Petitioner has made this same claim as early as August 1999, when he responded to the "no merit" letter submitted by Attorney Isenberg. (Pet. in Forma Appointment of Counsel, Aug. 17 1999.) Along with other evidence, petitioner provided an arrest report, which shows that Davis was in prison at the time Hannibal said petitioner confessed to Davis. *Id.* Thus, petitioner had discovered the factual predicates of this misconduct claim as early as August 1999, yet failed to raise this claim in federal court until April 6, 2004. Therefore, this claim is not based on newly discovered evidence, is not subject to an alternative start date of October 31, 2001, and expired on April 24, 1997.

c. Petitioner's Claims of Prosecutorial Misconduct in the Withholding of Evidence

The factual predicates to petitioner's *Brady* claim also "could have been discovered through the exercise of due diligence" prior to October 31, 2001. 28 U.S.C. § 2244(d)(1)(D).

Petitioner claims that the prosecution withheld evidence of deals it made with its witness Hannibal. However, at trial, petitioner's attorney had ample opportunity to cross-examine Hannibal on her motives, on her romantic relationship with Davis, on Davis allegedly being in prison, and on alleged deals Davis and Hannibal made with prosecutors. Furthermore, at the time of trial, petitioner had reason to know that both Hannibal and Davis had made deals with the Commonwealth. Under the protection of a prosecution deal with Davis, both Davis and Hannibal testified against petitioner in another, almost simultaneous murder trial, in which petitioner was convicted for the second-degree murder of Calvin Cliett. *See Sims v. Patrick*, 2005 U.S. Dist. LEXIS 7639, at *3, 20 (E.D. Pa. Apr. 29, 2005). At that trial, petitioner's attorney impeached Davis on deals he made with prosecutors in exchange for his testimony incriminating petitioner.⁹ Thus, it was clear Hannibal and Davis were continuously cooperating with the police, and through the exercise of reasonable diligence, including impeaching Hannibal at trial, petitioner could have discovered any deals prior to October 2001. Therefore, petitioner has not met the standard of newly discovered evidence under 28 U.S.C. § 2244(d)(1)(D).

Finally, to the extent that any of petitioner's claims may be based on the new evidence provided in Hannibal's statement,¹⁰ petitioner's time to apply for habeas relief has expired. If

⁹Hannibal also "recanted" her testimony in this previous murder case in April 2001. In petitioner's application for habeas relief from that conviction, petitioner claimed Hannibal's statement was "newly discovered evidence" that tolled AEDPA's statutory period in that case. *Sims v. Patrick*, 2005 U.S. Dist. LEXIS at *20-21. As it does here, this court ruled that the information in Hannibal's statements were not newly discovered evidence. *Id.*

¹⁰While this court concludes that the misconduct claims are not based on newly discovered evidence and could have been brought before the expiration of the statute of limitations period, the Hannibal statement does bolster petitioner's misconduct claims to the extent that Hannibal stated that she was "coerced" by detectives to give testimony to protect Davis and that "all the information about this murder case [she] learned from detectives." (Hannibal Statement 1-2.)

this court applied section 2244(d)(1)(D) and gave petitioner the benefit of the doubt, the one-year statute of limitations would begin to run on October 31, 2001, the date Hannibal signed the statement. Petitioner therefore had until October 31, 2002 to file a timely petition for a writ of habeas corpus on the misconduct claims. Petitioner's instant petition was filed on April 6, 2004, approximately eighteen months too late. Thus, unless this petition is subject to statutory or equitable tolling, all his claims, whether based on new evidence or not, are time-barred.

2. Statutory Tolling and Petitioner's Untimely PCRA Claims

Petitioner asserts his habeas claims are timely because his PCRA petitions tolled the statutory period. AEDPA expressly tolls its one-year statute of limitations for 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." 28 U.S.C. § 2244(d)(2). A collateral petition for state relief tolls the AEDPA statute of limitations only when the petition was "submitted according to the state's procedural requirements, such as the rules governing time and place of filing." *Fahy v. Horn*, 240 F.3d 239, 243 (3d Cir. 2001) (internal citation omitted). Specifically, state time limits on applications for postconviction relief are "condition[s] to filing," such that untimely petitions are not "properly filed" under AEDPA. *Pace v. DiGuglielmo*, 125 S. Ct. 1807, 1811-12 (2005) (stating "when a postconviction petition is untimely under state law, 'that [is] the end of the matter' for purposes of § 2244(d)(2)"). Moreover, this court must defer to a Pennsylvania court's determination of whether a petition was timely under state law. *Merritt v. Blaine*, 326 F.3d 157, 165-66 (3d Cir. 2003).

An analysis of this case's procedural history demonstrates that petitioner is not entitled to statutory tolling. Petitioner's first PCHA petition, filed on March 20, 1986 and dismissed on

February 11, 1988, does not toll the statutory period because it was dismissed before the date the statute of limitations began to run on petitioner's claims. It has no effect on the statute of limitations period. Moreover, petitioner's second and third petitions also do not toll the statute of limitations because the Pennsylvania Superior Court held that they were untimely under state law.¹¹ Therefore, these two petitions are not "properly filed" according to AEDPA and cannot toll the limitations period.

Petitioner argues that the Pennsylvania Superior Court erred in these determinations and that this court should find his petitions were timely and toll the limitations period. However, because the timeliness of petitioner's PCRA petitions are a matter of state law, his claim of state judicial error 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)). The United States Supreme Court has emphasized "that it is not province of a federal habeas court to reexamine state-court determinations on state-law questions." *Id.* at 67-68. Thus, because petitioner's PCRA claims were dismissed by the Pennsylvania Superior Court on state law grounds, petitioner's claim that his PCRA petitions were timely is not cognizable. As petitioner is not entitled to statutory tolling under AEDPA, he is time-barred unless equitable tolling applies.

3. Equitable Tolling

Petitioner argues that if this court finds his petition untimely, the court should equitably toll the statute of limitations. The Third Circuit has held that the one-year filing deadline in 28

¹¹This court notes that if it had found petitioner's misconduct claims to be based on new evidence, only the third petition for collateral relief could have feasibly tolled the statute of limitations, because his second petition was filed and disposed of prior to October 31, 2001.

U.S.C. § 2244(d)(1) can be subject to equitable tolling, but “only when the principle of equity would make the rigid application of a limitation period unfair. Generally, this will occur when the petitioner has in some extraordinary way been prevented from asserting his or her rights. The petitioner must show that he or she exercised reasonable diligence in investigating and bringing the claims.” *Miller v. New Jersey State Department of Corrections*, 145 F.3d 616, 618-619 (3d Cir. 1998) (internal citations and alterations omitted). Courts should be sparing in their use of equitable tolling, applying it “only in the rare situation where [it] is demanded by sound legal principles as well as the interests of justice.” *LaCava v. Kyler*, 398 F.3d 271, 275 (3d Cir. 2005) (internal citations omitted). A court may equitably toll the statute of limitations only when: (1) the state has actively misled the petitioner; (2) the petitioner has timely asserted his rights but in a wrong forum; or (3) the petitioner has in some extraordinary way been prevented from asserting his rights. *Jones v. Morton*, 195 F.3d 153, 159 (3d Cir. 1999). Magistrate Judge Rueter concluded that petitioner’s case is not the kind of extraordinary case that would warrant equitable tolling. This court agrees.

Petitioner’s case is not one of those “rare situations” that demands equitable tolling. Petitioner has not demonstrated that the state misled petitioner as to the timing deadlines for postconviction relief or that he asserted his rights in the wrong forum. Furthermore, petitioner has not shown that, in some extraordinary way, he has been prevented from asserting his rights. Petitioner argues that equitable tolling applies because government officials in the correctional institution’s mail room “intentionally and maliciously” prevented him from receiving notice of the superior court’s ruling on his second PCRA petition, in order to “place him in a procedural nightmare [sic].” (Pet’r’s Objections to Resp’t’s Answer 7.) Petitioner’s argument, however, is

without merit. Petitioner does not establish how his timely notification of the superior court's decision would have made this instant petition timely. While petitioner contends that he would "have saved six months in [the PCRA] process," petitioner filed this habeas petition almost seven years too late - an additional six months would not have rendered this instant petition timely.¹² *Id.* Moreover, petitioner has not provided any evidence that a hearing before the Pennsylvania Supreme Court would have had any effect on the timeliness of this petition. Thus, petitioner has not proffered sufficient evidence that he has, in some extraordinary way, been prevented from asserting his rights. Neither statutory nor equitable tolling is warranted in this case, and petitioner's right to apply for federal habeas relief expired on April 24, 1997.

C. Actual Innocence

Petitioner contends that even if the petition is untimely, this court should review the merits because 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*, 132 Fed. Appx. 407, 409 n.2 (3d Cir. 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 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 (1993) (explaining that "a claim of 'actual innocence' is . . . a gateway through which a

¹²Nor would it have made the petition timely if this court had found that petitioner's claims were based on newly discovered evidence.

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 present at trial.” *Schlup*, 513 U.S. at 321-22.

Here, petitioner contends that Hannibal’s affidavit is new evidence that proves he is “actually innocent.” However, this evidence is not “reliable” as required by *Schlup*. The PCRA court, which oversaw petitioner’s trial, found Hannibal’s affidavit not credible and three superior court judges agreed with this determination. *Sims*, No. 2186 EDA 2002, slip op. at 8-9 (Phila. Ct. Com. Pl. Dec. 31, 2002) *aff’d*, No. 2186 EDA 2002, slip op. at 1 (Pa. Super. Ct. Sept. 19, 2003). On federal habeas review, “factual 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. As discussed in Magistrate Judge Rueter’s recommendation, Hannibal neither states that her trial testimony was false nor does she exculpate petitioner. Rather, her affidavit reveals only her poor memory of the events that occurred more than twenty years ago in 1979. She does not remember whether she saw petitioner on the night of the murder, whether he confessed, or whether petitioner took Davis to the scene of the murder. Moreover, her statement is internally inconsistent, stating at various

points that she believes she was with Davis, then at her home, then at her parents' home, finally stating, she "doesn't remember what Davis was doing on December 25, 1979." (Hannibal Statement 1.) Thus, there is no clear and convincing evidence in the Hannibal statement itself that contradicts the state court's determination of credibility.

Petitioner argues that affidavits by Brown and Faulkner, as well as Fleming's testimony, corroborate Hannibal's statement, and calls into question the state courts' credibility determinations. However, these statements are also not the type of "clear and convincing evidence" required to overturn state court credibility determinations.

In his affidavit, Brown states petitioner is not the one who shot him on December 25, 1979. However, Brown gave contrary sworn statements, incriminating petitioner, at the preliminary hearing. *Sims*, Nos. 2989-2993, slip op. at 25. Brown, with petitioner's knowledge and consent, specifically did not testify at trial due to these prior statements. *Id.* Thus, because Brown gave contrary statements under oath at the preliminary hearing, the affidavit is not "clear and convincing evidence of the contrary" of the Pennsylvania courts' credibility determinations and petitioner cannot use it to challenge these findings.

Nor does Faulkner's August 6, 1999 affidavit provide the "clear and convincing evidence" necessary to revisit the state court's determination that Hannibal's statement is not credible. In his affidavit, Faulkner contends that Fleming was with him the night of Limerick's murder, that "they shot crank and other drugs," and that she could not have been with petitioner when the murder took place. (Faulkner Aff. 1.) However, the reliability of Faulkner and this statement is questionable. The twenty-year time period that has passed between a night of supposed drug use and Faulkner's affidavit makes Faulkner's recollections shaky at best.

Petitioner provides no additional evidence to corroborate Faulkner's statement. Thus, this affidavit by no means rises to the exacting "clear and convincing" evidence standard that would warrant this court to review the state court's factual determinations.

Petitioner fares no better claiming that Fleming's trial testimony calls into question the state court's findings. In his petition, petitioner contends that "[d]uring [his] trial it was established by [Fleming] that at the time of the murder petitioner was not in the house. This witness further testified that one Lawrence Baker shot the deacease [sic] in the arm, which caused his death." (Petition ¶ 12(D).) However, these claims are not reflected by Fleming's trial testimony. At trial, Fleming testified that petitioner held up, robbed, threatened, and then participated in Limerick's murder. (Tr. 1062-1068, Oct. 5, 1981.) By no means then, let alone by clear and convincing evidence, does Fleming's testimony dispute the state court's findings of fact.

After evaluating petitioner's submitted affidavits, this court must conclude that petitioner has not produced any new evidence of the kind the law requires. Therefore, even if the Third Circuit were to rule that there is an actual innocence exception to the AEDPA statute of limitations, this court agrees with Magistrate Judge Rueter that petitioner has failed to carry his very high burden of proof with respect to his actual innocence claim.

III. CONCLUSION

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

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

BOBBIE LEE SIMS,
Petitioner,

v.

GEORGE N. PATRICK, *et al.*,
Respondents.

:
:
: CIVIL ACTION
:
: NO. 04-3379
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:
:

Order

And now, this ____ day of October 2005, upon careful consideration of petitioner Bobbie Lee Sims' 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