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

RODNEY DERRICKSON	:	CIVIL ACTION
	:	
v.	:	
	:	
DELAWARE COUNTY DISTRICT ATTORNEY'S OFFICE, et al.	:	NO. 04-1569

O'NEILL, J. JULY 26, 2006

MEMORANDUM

Plaintiff, Rodney Derrickson, a state prisoner, filed a pro se complaint on June 1, 2004 alleging that defendants, the Delaware County District Attorney's Office, District Attorney George M. Green, and Deputy District Attorney A. Sheldon Kovach, in their official capacities, violated his due process rights, as protected by 42 U.S.C. § 1983, by refusing to provide him with and/or failing to preserve three pieces of evidence: (1) a bag of clothing worn by murder victim Patrick Cassidy, access to which would have enabled plaintiff to conduct a chemical study for invisible particles as evidence of a close range shooting; (2) the victim's bullet ridden vehicle; and (3) all photographs taken of the crime scene and vehicle.[1] Plaintiff seeks compensatory and punitive damages as well as an injunction requiring defendants to release this evidence for ballistics testing and examination. I subsequently appointed counsel and granted plaintiff's

[1]Although the complaint also asserts violations of the Equal Protection Clause of the Fourteenth Amendment, Cruel and Unusual Punishment Clause of the Eighth Amendment, and the Confrontation and Compulsory Process Clauses of the Sixth Amendment, plaintiff does not pursue these claims in his motion for summary judgment or in his response and reply to defendants' motion for summary judgment. Therefore, I will discuss only his claim for violation of his due process rights.

motion to amend his complaint. Counsel on behalf of plaintiff filed an amended complaint on August 16, 2005 without altering the original complaint in any significant or substantive way.[2] Before me now are parties' cross motions for summary judgment, responses, and replies thereto.

BACKGROUND

Rodney Derrickson[3] is a prisoner at the State Correctional Institution at Rockview, Pennsylvania. He was arrested and charged with criminal homicide and related offenses for the

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[2]It appears that plaintiff's counsel simply retyped her client's original pro se complaint, including all of his spelling and grammatical errors, added a few words and one sentence, and resubmitted the complaint with her signature.

[3]Derrickson has filed at least six other cases in the federal courts asserting violations of his constitutional rights. See Derrickson v. Dep't of Corrections, No. 02-0792, motion to dismiss slip op. (M.D. Pa. Mar. 10, 2003) (granting motion to dismiss in favor of corrections defendants because: (a) Derrickson's Section 1983 action arising out of medical treatment for his broken foot was barred by the Eleventh Amendment; (b) the Department of Corrections in not a "person" within the meaning of Section 1983; and (c) non-physician defendants cannot be considered deliberately indifferent under the Eighth Amendment for failure to respond to an inmates medical complaints when he is already receiving treatment by the prison's medical staff), motion for summary judgment slip op. (Jul. 1, 2004) (granting summary judgment in favor of health care provider defendants because Derrickson did not have a serious medical need and defendants were not deliberately indifferent in their treatment of Derrickson's foot), motion for summary judgment slip op. (granting summary judgment in favor of single doctor because he was not deliberately indifferent in his treatment of Derrickson's foot) all aff'd 122 Fed. Appx. 597 (3d Cir. 2005); Derrickson v. Meyers, No. 00-3718, 2004 WL 2600673 (E.D. Pa. Nov. 15, 2004) (denying Derrickson's habeas corpus petition because: (a) Derrickson procedurally defaulted on some of his claims in his first PCRA petition and this default would not result in a miscarriage of justice; (b) Derrickson failed to make out a claim for ineffective assistance of counsel; and (c) Derrickson could not demonstrate prosecutorial misconduct) (on appeal, No. 04-4497); Derrickson v. Hill, No. 97-5484, 200 WL 378134 (E.D. Pa. Apr. 13, 2000) (denying motion for summary judgment because Derrickson presented sufficient evidence from which a reasonable jury could find municipal liability) (O'Neill, J.); Derrickson v. Spigerilli, No. 95-3867, order (E.D. Pa. Jan 1, 1996) (dismissing Derrickson's civil rights complaint arising out of the theft of his personal property); Derrickson v. Hill, No. 95-7249, order (E.D. Pa. Dec. 7, 1995) (dismissing Derrickson's complaint for lack of prosecution); Derrickson v. CID's Department, No. 95-5445, order (E.D. Pa. Aug. 29, 1995) (dismissing Derrickson's complaint as frivolous).

shooting death of Patrick Cassidy, who was murdered on December 14, 1994 during an illegal drug transaction in Chester, Delaware County, Pennsylvania. Derrickson's first criminal trial ended in a hung jury on July 12, 1995. In a second trial, the jury found Derrickson guilty of second degree murder, aggravated assault, reckless endangerment, possession of an instrument of crime, and robbery on October 12, 1995. He received a sentence of life imprisonment on October 20, 1995.

The Commonwealth's case rested upon the testimony of two eyewitnesses. The first eyewitness was an admitted drug dealer. He testified that the victim had driven to the crime scene for the purpose of purchasing cocaine. He further testified that he observed Derrickson approach the driver's side door of Cassidy's car and shoot him after an argument. The second eyewitness was the father of the first eyewitness. He testified that from his living room window he observed Derrickson shoot Cassidy from outside the driver's side door. Derrickson's defense consisted of two alibi witnesses. They testified that Derrickson was at home in bed at the time of the incident.

The Commonwealth also presented the expert testimony of forensic pathologist and Delaware County Medical Examiner, Dimitri Contostavlos. Dr. Contostavlos testified that after looking at the victim's clothing and the bullet hole in the skin he did not see any evidence of close range firing in those areas. He further testified that a chemical study for invisible particles could be done on the clothing to determine whether the shooting was at close range, as the two eyewitnesses had testified, but Contostavlos did not know whether anyone performed such a test in that case.

II. Procedural History

In post trial briefs, Derrickson raised a Batson challenge and argued that the Commonwealth had improperly impeached its own eyewitness, Mark Harris. The trial court denied the motion because it concluded that the Commonwealth had articulated a legitimate reason for striking one African American juror while seating another African American on the jury and that it was not an abuse of discretion to allow the prosecution to impeach its own witness on his prior inconsistent statements. Derrickson raised the same two issues in his direct appeal before the Superior Court of Pennsylvania. The Superior Court affirmed the judgment of the trial court on November 13, 1996 and Derrickson's allowance of appeal was denied by the Pennsylvania Supreme Court on May 15, 1997.

Derrickson filed his first petition under the Pennsylvania Post Conviction Relief Act on March 18, 1996. After counsel was appointed, on May 17, 1996 Derrickson elected to withdraw his PCRA petition without prejudice to its renewal. On November 13, 1996, the Superior Court affirmed his conviction and sentence and, on May 15, 1997, the Pennsylvania Supreme Court denied Derrickson's petition for allowance of appeal. Derrickson filed an amended PCRA petition in state court on September 22, 1997, asserting several ineffective assistance of counsel issues, including: (1) failure to investigate the facts adequately; (2) failure to cross examine effectively prosecution witness Harris regarding prior inconsistent statements and possible witness tampering; (3) failure to request an instruction of an "incontrovertible physical fact" regarding identification of the firearm; (4) failure to object to the prosecutor's summation; and (5) failure to move to quash the prosecution's amended information, which reinstated the robbery

charge dismissed at the preliminary hearing. The trial court rejected these arguments in an opinion dated December 29, 1997.

Derrickson appealed three of the ineffective assistance of counsel claims--the failure to appeal the reinstatement of the robbery charge, the failure to cross examine Harris regarding prior inconsistent statements, and the failure to object to the prosecutor's summation--and, following appointment of new counsel, filed an amended appellate brief. The Superior Court affirmed the trial court's denial in an opinion dated June 11, 1999. The Supreme Court of Pennsylvania denied his allowance of appeal on March 14, 2000.

Derrickson filed a habeas corpus petition in this Court on July 24, 2000, raising both exhausted and unexhausted claims. Derrickson v. Meyers, No. 00-3718 (Weiner, J.). Derrickson elected to withdraw this petition on January 19, 2001 in order to return to state court to exhaust his remaining claims as required by 28 U.S.C. § 2254. On November 18, 2002, Derrickson filed a habeas petition in state court, which the court treated as a second PCRA petition, asserting that his second PCRA counsel was ineffective for failing to raise the issue that his first PCRA counsel was ineffective for not filing an amended petition preserving nineteen claims of ineffective assistance of his direct appeal counsel. The state court dismissed the second PCRA petition on January 3, 2002 because it concluded: (i) that the petition was untimely and that the court lacked jurisdiction to consider it as the petition was not filed within one year of the date on which Derrickson's conviction became final; (ii) that there was no basis for relief from the bar on second or successive petitions as there was no assertion of a miscarriage of justice; and (iii) all of Derrickson's issues had been litigated, waived, or were time barred.

On appeal, Derrickson asserted that the trial court's treatment of his state habeas petition as a second PCRA petition and failure to treat it as an extension of his first PCRA petition was an error. In an opinion dated March 16, 2004, the Superior Court affirmed the trial court, rejected Derrickson's arguments, and concluded that Derrickson should have raised his ineffective assistance of counsel arguments in his first petition and, thus, determined that his second PCRA petition was untimely.

On June 9, 2004, Derrickson reactivated his federal habeas petition in this Court and filed an amended petition on July 14, 2004 claiming that the direct appeal counsel was ineffective for fifteen reasons: (1) failing to assert trial counsel's ineffectiveness for not objecting to the reinstatement of the robbery charge; (2) failing to assert trial counsel's ineffectiveness for failing to argue that the evidence was insufficient to support a conviction for second degree murder; (3) failing to assert trial counsel's ineffectiveness for unreasonably advising Derrickson not to testify; (4) failing to assert trial counsel's ineffectiveness for failing to impeach the credibility of Mark Harris with prior inconsistent statements; (5) failing to assert trial counsel's ineffectiveness for failing to cross examine Harris concerning an assault upon him by Commonwealth witnesses Frank Richardson; (6) failing to assert trial counsel's ineffectiveness for failing to object to the trial court's allegedly inadequate alibi instruction; (7) failing to assert trial counsel's ineffectiveness for failing to call character witnesses; (8) failing to assert trial counsel's ineffectiveness for failing to object to the prosecutor's summation; (9) failing to assert trial counsel's ineffectiveness for failing to object to Harris' testimony as hearsay; (10) removal of the African-American juror was unconstitutional; (11) failing to assert trial counsel's ineffectiveness

for failing to adequately cross examine Harris regarding coaching of his testimony; (12) failing to assert trial counsel's ineffectiveness for failing to move to transfer the case to juvenile court; (13) failing to assert trial counsel's ineffectiveness for failing to provide adequate advice regarding accepting a plea bargain; (14) failing to assert trial counsel's ineffectiveness for failing to secure the testimony of Steven Kurek; and (15) failing to assert trial counsel's ineffectiveness for failing to request a jury instruction on voluntary manslaughter and incontrovertible physical facts.

In his November 15, 2004 memorandum and Order, my deceased colleague, Judge Weiner, concluded that Derrickson had procedurally defaulted on all but three of these claims--the failure to appeal the reinstatement of the robbery charge, the failure to cross examine Harris regarding his prior inconsistent statements, and the failure to object to the prosecutor's summation--and that there was no evidence to suggest that procedural default would result in a miscarriage of justice. Derrickson v. Meyers, No. 00-3718, 2004 WL 2600673, at *4 (E.D. Pa. Nov. 15, 2004). With respect to those three claims, Judge Weiner concluded that direct appeal counsel was not ineffective because: (a) the result would not have been different had counsel appealed that issue before the Superior Court as the Superior Court determined that direct appeal of that issue was meritless under Pennsylvania law; (b) the Superior Court properly determined that Derrickson failed to show prejudice arising from the failure to pursue Harris' impeachment testimony; and (c) the Superior Court properly determined that the prosecutor did not misrepresent the evidence in his summation. He therefore denied Derrickson's habeas petition and issued a certificate of appealability with respect to those three issues. Derrickson v. Meyers, 00-3718, 2004 WL 2600673 (E.D. Pa. Nov. 15, 2004). The Court of Appeals affirmed the

District Court's ruling on all three issues. Derrickson v. Meyers, No. 04-4497, 2006 WL 1140224 at *2-4 (3d Cir. May 1, 2006). To date, Derrickson's conviction has not been overturned on appeal, expunged by executive order, declared invalid by a state court, or called into question by a federal court via writ of habeas corpus.

III. The Requested Evidence

In the course of litigating his habeas petition, Derrickson requested access to the clothing worn by Cassidy at the time of the murder, the victim's bullet ridden vehicle, and photographs taken of the crime scene and vehicle for the purpose of examining that evidence in an attempt to show that the victim was not shot at close range and to undermine the Commonwealth's eyewitnesses. Pursuant to Judge Weiner's telephone conference with Derrickson and Kovach, Derrickson requested via letter dated November 22, 2000 certain items in discovery from Kovach, including: (1) "[a]ny and all criminal and juvenile records of all prosecution witnesses who testified at trial"; (2) "[a]ny records of any promises, rewards, or inductments [sic] given to the witnesses for their testimony at trial"; (3) "[a]ny and all mental health records of all prosecution witnesses who testified at trial"; (4) "[a]ny an all results or reports of scientific tests, expert opinions pertaining to the criminal homicide of Patrick Cassidy"; (5) "[a]ny and all tangible objects, including documents, photographs, and fingerprints results of evidence taken from the crime scene"; (6) "[a]ny exculpatory and favorable evidence in the possession of the Commonwealth"; (7) "[a]ny and all investigative reports and related information concerning the arrest and prosecution of petitioner." Derrickson did not specifically request access to Patrick Cassidy's clothing or automobile in that letter. Kovach responded via letter dated December 15,

2000 enclosing "a complete copy of discovery which [Derrickson's] trial attorney received and reviewed in preparation for [Derrickson's] murder case." Derrickson did not make any further requests until 2004.

By letter dated March 10, 2004 to Green, Derrickson specifically requested access for his private detective to: "(1) The bag of clothing of homicide victim Patrick Cassidy, (2) Patrick Cassidy [sic] gray 2 door 1983 Nissan "Sentra" vehicle, and (3) All photograph's [sic] taken of the scene and vehicle(s) by Detective Welsh." At the time of this letter, the District Attorney's Office was still defending against Derrickson's habeas petition before Judge Weiner. Via letter dated March 19, 2004, Kovach denied Derrickson's request because, as discussed in the Superior Court's March 16, 2004 opinion, Derrickson was "out of time for obtaining any form of post-conviction collateral relief unless [he] qualif[ies] under one of the express exceptions to the Act found at 42 Pa.C.S. §9545(b)." Kovach further stated:

> Your request for examination and testing does not fall under the post-conviction DNA testing provision of 42 Pa.C.S. §9543.1. Rather, it falls under the category of a discovery request which is not permitted under the PCRA except upon leave of court with a showing of exceptional circumstances. See 42 Pa.C.S. §9545(d)(2). Application of this section of the PCRA, however, presupposes that you have filed a PCRA petition which has not been dismissed. Moreover, review of your request must be denied apart from the above preclusions because it has not been made in a timely manner and, nevertheless, would not go to establishing your actual innocence.

On May 24, 2005, defendants responded to Derrickson's first set of interrogatories by stating, inter alia: "The photographs are in the possession of the Delaware County District Attorney's Office. The subject clothing is in evidence storage. The subject automobile is not in the

possession of the Delaware County District Attorney's Office."[4] Notwithstanding the pendency of his habeas petition, Derrickson filed the instant Section 1983 action seeking access to this evidence.

STANDARD OF REVIEW

Rule 56(c) of the Federal Rules of Civil Procedure provides, in relevant part, that summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c) (2004). The moving party "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions . . . which it believes demonstrate the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). After the moving party has filed a properly supported motion, the burden shifts to the nonmoving party to "set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e) (2004).

I must determine whether any genuine issue of material fact exists. An issue is genuine if the fact finder could reasonably return a verdict in favor of the non-moving party with respect to that issue. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). An issue is material only if the dispute over the facts "might affect the outcome of the suit under the governing law." Id.

[4]Plaintiff has withdrawn his claim arising out of defendants' failure to maintain custody of Cassidy's vehicle and Defendants have agreed to produce the photographs of the vehicle and crime scene. Therefore, I will discuss only his due process claim with respect to his request for access to the victim's clothing.

In making this determination, I must view the facts in the light most favorable to the non-moving party, and the non-moving party is entitled to all reasonable inferences drawn from those facts. Id. However, the nonmoving party may not rest upon the mere allegations or denials of the party's pleading. See Celotex, 477 U.S. at 324. The non-moving party must raise "more than a mere scintilla of evidence in its favor" in order to overcome a summary judgment motion and cannot survive by relying on unsupported assertions, conclusory allegations, mere suspicions. Williams v. Borough of W. Chester, 891 F.2d 458, 460 (3d Cir. 1989). If the evidence for the nonmoving party is merely colorable, or is not significantly probative, summary judgment may be granted. Anderson, 477 U.S. at 249-50 (citations omitted).

Cross motions are claims by each party that it alone is entitled to summary judgment; they do not constitute an agreement that if one is denied the other is necessarily granted or that the losing party waives judicial consideration and determination of whether genuine issues of material fact exist. Rains v. Cascade Indus., Inc., 402 F.2d 241, 245 (3d Cir.1968). If any such issue exists it must be disposed of at trial and not on summary judgment. Id. Here, the facts relating to Derrickson's request for evidence and this District Attorney's refusal are not in dispute. For the reasons that follow, I will grant defendants' motion for summary judgment.

DISCUSSION

Derrickson argues that he has a due process right to access the clothing for testing under Section 1983 because Brady v. Maryland, 373 U.S. 83 (1963) and its progeny bar a prosecutor from withholding evidence favorable to a defendant. In response, defendants contend that: (1) the statute of limitations bars Derrickson's claims, (2) the doctrine of Heck v. Humphrey, 512

U.S. 477 (1994) precludes Derrickson's access to the evidence, (3) Brady does not apply to Derrickson's Section 1983 action, and (4) Derrickson failed to prove municipal liability for any of defendants in their official capacity. I will address defendants' arguments seriatim.

I. Statute of Limitations

Defendants argue that the statute of limitations for Section 1983 actions in Pennsylvania bars Derrickson's claim for access to the requested clothing evidence. The Supreme Court has held that civil rights actions under Section 1983 are subject to the statute of limitations for suits for personal injury in the state in which the Section 1983 action arises. Wilson v. Garcia, 471 U.S. 261, 268-69, 280 (1985). Accordingly, this Court applies Pennsylvania's two year statute of limitation period as set forth in 42 Pa. Cons. Stat. Ann. § 5524(2); see, e. g., Bougher v. Univ. of Pittsburgh, 882 F.2d 74, 78 (3d Cir. 1989) (determining that the appropriate limitation period for Section 1983 actions is two years as set forth in 42 Pa. Cons. Stat. Ann. § 5524(2)). Under Pennsylvania law, this limitation period begins to run when the cause of action accrues. See 42 Pa. Cons. Stat. Ann. § 5524; S.T. Hudson Eng'rs, Inc. v. Camden Hotel Dev. Assocs., 747 A.2d 931, 934 (Pa. Super. Ct. 2000). However, federal law determines when a Section 1983 action accrues. Genty v. Resolution Trust Corp., 937 F.2d 899, 919 (3d Cir. 1991). Under federal law, an action accrues "when the plaintiff knew or should have known of the injury upon which its action is based." Sameric Corp. of Del., Inc. v. City of Phila., 142 F.3d 582, 599 (3d Cir. 1998); see also Lake v. Arnold, 232 F.3d 360, 366 (3d Cir. 2000) (holding that a cause of action accrues when "the first significant event necessary to make the claim suable" occurs) quoting Ross v. Johns-Manville Corp., 766 F.2d 823, 826 (3d Cir. 1985) (internal quotations omitted); Oshiver v.

Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1386 (3d Cir. 1994) ("A claim accrues in a federal cause of action as soon as a potential claimant either is aware, or should be aware, of the existence of and source of an injury."). The statute of limitations also begins to accrue when the plaintiff could have known of the violation of civil rights if the plaintiff had investigated matter with due diligence in light of known circumstances. Sandutch v. Muroski, 684 F.2d 252, 254 (3d Cir. 1982) (holding that plaintiff's knowledge of facts presented "should have led, by the exercise of due diligence, to the awareness that he had a cause of action.")

Derrickson argues that the statute of limitations does not bar his claim because he first learned of prosecutor's withholding of the clothing evidence when the prosecutor refused his access to such evidence in a letter dated March 19, 2004 and he filed his Section 1983 action in October 2005, well within the two year limitations period. Defendants contend that Derrickson should have known that the prosecutor allegedly was withholding the clothing evidence at his criminal trial in 1995 and, thus, the statute of limitation ran many years ago. Because Derrickson did not request and was not denied access to the clothing evidence at his criminal trial, he had no way of knowing that the prosecutor allegedly was withholding the clothing evidence. Accordingly, the statute of limitations did not begin to run at that time.

Defendants further argue that Derrickson should have known of the alleged withholding of the clothing evidence when he requested all evidence relating to his criminal trial in the course of litigating his habeas claim in 2000. However, Derrickson's global request for evidence and the prosecution's failure to produce the clothing evidence does not clearly demonstrate Derrickson knew or should have known that the prosecution was withholding the evidence.

There is also no evidence to show that Derrickson knew or should have known before his specific request for the clothing evidence in 2004 that the prosecution would refuse to produce the clothing. Rather, Derrickson's Section 1983 claim accrued in March 2004 when he received the letter denying him access to the clothing evidence. Derrickson's complaint, filed on June 1, 2004, is therefore timely and the statute of limitations does not bar his claim.

II. *Heck v. Humphrey*

Defendants argue that the doctrine of Heck v. Humphrey bars Derrickson's Section 1983 claim because ruling in Derrickson's favor would necessarily call into question the validity of Derrickson's conviction. In Heck, the Supreme Court held that a Section 1983 plaintiff seeking "to recover damages for [an] allegedly unconstitutional . . . harm caused by actions whose unlawfulness would render a conviction or sentence invalid must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus." Heck, 512 U.S. at 486-87. The Court further held that "[a] claim for damages bearing that relationship to a conviction or sentence that has not been so invalidated is not cognizable under § 1983." Id. at 487. Thus, I must determine "whether a judgment in favor of the plaintiff would *necessarily* imply the invalidity of his conviction or sentence." Id. (emphasis added). If granting Derrickson's cause of action for injunctive relief would necessarily imply the invalidation of his conviction, "the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated." Id. However, if I find that Derrickson's action, "even if successful, will not demonstrate the

invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed, in the absence of some other bar to the suit." Id.

Derrickson argues that the doctrine of Heck v. Humphrey does not bar his claim in light of this Court's decision in Godshalk v. Montgomery County Dist. Attorney's Office, 177 F. Supp. 2d 366, 370 (E.D. Pa. 2001), in which this Court granted plaintiff's "due process right of access to [evidence] for the limited purpose of . . . testing." Defendants argue that Derrickson's claim violates the doctrine of Heck v. Humphrey because Derrickson's seeks access to the clothing evidence to challenge his conviction and incarceration.

Although Derrickson hopes that testing the clothing evidence will produce exculpatory evidence that will ultimately lead to overturning his conviction, the evidence does not necessarily imply the invalidity of his conviction. The clothing evidence may just as easily prove inculpatory as exculpatory. Because of the uncertain material effect of the clothing evidence, granting access to the evidence for further testing does not necessarily imply the invalidation of Derrickson's conviction. See Savage v. Bonavitacola, No. 03-0016, 2005 WL 568045, at *22-23 (E.D. Pa. Mar. 9, 2005) on remand from Savage v. Bonavitacola, 112 Fed. Appx. 867, *8 (3d Cir. 2004) (finding that access to criminal trial transcripts would not necessarily contain evidence to support overturning conviction and therefore would not necessarily imply invalidation of the conviction). I turn to Derrickson's substantive claim.

III. Section 1983 Due Process Violation

Section 1983 is not a source of substantive rights; rather, Section 1983 authorizes a person to file a private cause of action against state actors for a deprivation of rights protected by

a federal statute or the United States Constitution. 42 U.S.C. § 1983; West v. Atkins, 487 U.S. 42, 48 (1988).[5] Thus, in order to state a claim under Section 1983, plaintiff must allege: (1) a violation of a right secured by the Constitution or the laws of the United States; and (2) that the deprivation was committed by a person acting under the color of state law. Abraham v. Raso, 183 F.3d 279, 287 (3d Cir. 1999).

With respect to the constitutional violation requirement, "it is not enough for plaintiff to show that [he] suffered a deprivation. A plaintiff must allege that [he] was deprived of a constitutionally protected interest without due process of law." Hammond v. Creative Fin. Planning Org., Inc., 800 F. Supp. 1244, 1248 (E.D. Pa. 1992) citing Parratt v. Taylor, 451 U.S. 527, 535 (1981). Therefore, Derrickson will be "entitled to relief [only] if [his] complaint sufficiently alleges deprivation of any right secured by the Constitution." Nami v. Fauver, 82 F.3d 63, 65 (3d Cir. 1996).

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[5]Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

42 U.S.C. § 1983.

A. *Brady v. Maryland*

Derrickson argues that the denial of his request for access to the clothing evidence violated his Constitutional right to due process as articulated in Brady and its progeny. In Brady, the Supreme Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Brady, 373 U.S. at 87. To prove a Brady violation, Derrickson must demonstrate that: (1) the State withheld evidence from him, "either willfully or inadvertently," (2) the evidence in question+ was favorable to Derrickson "either because it is exculpatory, or because it is impeaching," and (3) the evidence was material, meaning that "reasonable probability [exists] that the [withheld] evidence would have produced a different verdict" in Derrickson's criminal trial. Strickler v. Greene, 527 U.S. 263, 281-82 (1999).

1. Suppression

With respect to suppression of evidence, Derrickson claims that the prosecution withheld the clothing evidence despite his specific request. Defendants maintain that during the criminal trial Derrickson could have had access to the clothing evidence and that the Pennsylvania Post Conviction Relief Act now prohibits access to the evidence ten years after the trial and conviction.[6] The Court of Appeals has held that a prosecutor need not disclose evidence that a

[6]The PCRA bars discovery for any claims under that statute. 42 Pa. Cons. Stat. Ann. § 9545(d)(2).

defendant already possesses or can obtain with reasonable diligence unless "a prosecutor misleads the defense into believing the evidence will not be favorable to the defendant." United States v. Pelullo, 399 F.3d 197, 213 (3d Cir. 2005). Derrickson has not shown that during his criminal trial the prosecutor either actively denied his request for access to the clothing evidence or made misleading statements causing him to forsake pursuing access to the clothing evidence.[7] Moreover, Derrickson has not demonstrated that he or trial counsel exercised reasonable diligence in seeking this evidence. Because Derrickson has not demonstrated that the prosecutor withheld evidence from him at trial, he has not satisfied the first element under Brady.

2. Favorable

Turning to the second element of the Brady test, the prosecution has an obligation to disclose favorable and material evidence, notwithstanding the absence of a request for such evidence, and the Supreme Court has broadened the scope of favorable evidence to include both exculpatory and impeachment evidence. United States v. Bagley, 473 U.S. 667, 676 (1985); see also Giglio v. United States, 405 U.S. 150, 154 (1972) (holding that "nondisclosure of [material] evidence affecting credibility [of a witness] falls within this general rule" of Brady). Derrickson argues that in light of the forensic pathologist's claim that he saw no evidence of close range

[7]At one point, Derrickson appears to argue that the suppression of evidence has occurred in spite of Derrickson's request for access, not merely after his request. The Brady rule is meant "to ensure that a miscarriage of justice does not occur" by preventing suppression of evidence that "would deny defendant of a fair trial." United States v. Bagley, 473 U.S. 667, 677 (1985); see also Moore v. Lockyer, No. C 04-1952 MHP, 2005 WL 2334350 at *8 (N.D. Cal. Sept. 23, 2005) (noting that a "pretrial right that was at issue in Brady and Bagley"). To have a sustainable Brady claim, Derrickson must argue that the suppression occurred at trial, whether it continued beyond trial or not. For analysis under the Brady test, I will presume Derrickson's contests the withholding at his criminal trial.

firing, testing the clothing evidence will most likely produce results that will show that no close range firing occurred. According to Derrickson, this evidence will impeach witness testimony that Derrickson shot Casssidy at close range, and is favorable to Derrickson. In response, defendants argue that the prosecutor had no obligation to disclose the clothing evidence because he had no way of knowing whether the results of testing the clothing evidence would prove favorable to the defense because the prosecutor simply chose not to perform testing on the clothing. Defendants further argue that Derrickson has only offered speculative claims as to the value of testing the clothing, but no proof that such testing would produce evidence favorable to Derrickson. I agree. As intimated above, testing results could just as likely prove that close range firing did occur. Furthermore, Derrickson has not cited, nor can I find, any authority where a plaintiff has satisfied the second element of a Brady violation by arguing that the prosecutor failed to subject evidence to testing that might produce results that would impeach witness testimony. Because Derrickson has not shown that the clothing evidence is favorable to his defense, he has not met this element of a Brady violation.

3. Materiality

The duty of a prosecutor to disclose evidence to the defense also turns on the materiality of such evidence. "The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Bagley, 473 U.S. at 682. "The materiality standard for Brady claims is met when 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'" Banks v. Dredke, 540 U.S. 668, 691 (2004) quoting

Kyles v. Whitley, 514 U.S. 419, 435 (1995). Derrickson argues that his case is undoubtably close and any additional evidence, including the results of testing on the clothing, would affect the outcome of a new trial. Ultimately, Derrickson's argument concerning materiality rests upon his speculation that the testing of clothing evidence will produce results that may impeach the testimony of prosecution witnesses and challenge the outcome of his trial. As discussed above, the results of such testing could prove equally exculpatory or inculpatory. Because such indeterminate evidence cannot undermine confidence in the verdict in Derrickson's criminal trial, the clothing evidence is not material and the prosecutor did not violate Derrickson's due process rights as protected by Brady by withholding the clothing evidence.

Even assuming that the prosecution's refusal to grant access to the clothing evidence for testing satisfied the Brady test and constituted a constitutional violation, such a constitutional violation would face preclusion under the Heck doctrine. Confronted with alleged Brady violations giving rise to Section 1983 actions, several other courts have held that finding a Brady violation necessarily implies the invalidation of a criminal conviction. See Amaker v. Weiner, 179 F.3d 48, 51 (2d Cir. 1999) (holding that a claim sounding in Brady would "call into question the validity of his conviction . . . [and] is barred by Heck"); Hamilton v. Lyons, 74 F.3d 99, 103 (5th Cir. 1996) (finding that Heck would bar a successful Brady claim unless the defendant's "convictions or sentences have been reversed, expunged, invalidated, or otherwise called into question"). Assuming, as Derrickson has argued, that the clothing evidence and testing of it would satisfy the materiality element of Brady, that same evidence would necessarily imply the invalidation of his criminal conviction.

Derrickson cites Godschalk and Moore in support of his argument that Brady provides a right to post-conviction access to evidence notwithstanding Heck. In Godschalk, this Court relied upon the ruling in Harvey v. Horan, 119 F. Supp. 2d 581 (E.D. Va. 2000), rev'd, 278 F.3d 370 (4th Cir. 2002), reh'g and reh'g en banc denied, 285 F.3d 298 (4th Cir. 2002) to hold that a defendant has a constitutional right to secure access to biological evidence for DNA testing because the powerful exculpatory value of DNA evidence made it sufficient to satisfy the Brady test. Godshalk, 177 F. Supp. 2d at 369-70. Likewise, in Moore, the District Court for the Northern District of California held that "it must be the case that due process will under certain circumstances require a state to provide a lawfully convicted criminal with access to potentially exculpatory biological evidence." Moore, 2005 WL 2334350 at *8.

I decline to extend Brady to create a due process right to post-conviction access to clothing evidence for testing for close range firing because: (1) Derrickson does not challenge the validity of his conviction or the conduct of prosecutors at or before a criminal trial, see Harvey v. Horan, 278 F.3d 370, 378 (4th Cir. 2002) (finding that plaintiff seeking post-conviction access to evidence for DNA testing "does not state a valid Brady claim because he is not challenging a prosecutor's failure to turn over material, exculpatory evidence that, if suppressed, would deprive the defendant of a fair trial"); Alley v. Key, 431 F. Supp. 2d 790, 803 (W.D. Tenn. 2006) (holding that "Brady and the due process principle it vindicates are not implicated and do not provide Plaintiff with a due process right to the post-conviction release of evidence related to his conviction" where plaintiff did not show that evidence was material or that post-conviction refusal of access to it denied him a fair trial); (2) even assuming the existence of a due process

right to post-conviction access evidence, courts generally only grant access post-conviction evidence for requested testing that has "well-known powerful exculpatory effect," see Godshalk, 177 F. Supp. 2d at 370 (granting post-conviction access to evidence for DNA testing because of "the well-known powerful exculpatory effect of DNA testing" not considered at trial); (3) Derrickson has not demonstrated that such evidence has a reasonable probability of affecting the outcome of his criminal trial, see Moore, 2005 WL 2334350 at *9 (observing that it "may safely assume that the 'reasonable probability' standard set forth in Bagley establishes the outer limits of a state prisoner's right to obtain post-conviction access to DNA evidence.").[8] Defendants' motion for summary judgment will be granted.

An appropriate order follows.

[8]The court in Moore justified this assumption as an outgrowth of the competing interests at stake. It recognized that "the Constitution must impose some limitations upon a state's authority to withhold potentially exculpatory evidence from a convicted criminal defendant seeking to prove his or her innocence." Moore, 2005 WL 2334350 at *8. At the same time, it also acknowledged that "[u]pon being lawfully convicted of a crime . . ., a criminal defendant forfeits . . . many of the procedural protections that attach when the state [incarcerates the defendant, and] the residual due process rights of a convicted criminal defendant must be weighed against the state's interest in preserving the finality of its criminal judgments." Moore, 2005 WL 2334350 at *9.

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

RODNEY DERRICKSON	:	CIVIL ACTION
	:	
v.	:	
	:	
DELAWARE COUNTY	:	
DISTRICT ATTORNEY'S OFFICE, et al.	:	NO. 04-1569

ORDER

AND NOW, this 26th day of July 2006, upon consideration of plaintiff's motion for summary judgment, defendants' response, defendants' motion for summary judgment, plaintiff's response, and for the reasons set forth in the accompanying memorandum, it is ORDERED that plaintiff's motion for summary judgment is DENIED and defendants' motion for summary judgment is GRANTED. Judgment is entered in favor of defendants, Delaware County District Attorney's Office, George M. Green, and A. Sheldon Kovach, and against plaintiff, Rodney Derrickson.

s/ Thomas N. O'Neill, Jr.
THOMAS N. O'NEILL, JR., J.