APPENDIX - A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17-3662

BOBBY KENNETH WILLIAMSON,
Appellant

v.

DISTRICT ATTORNEY PHILADELPHIA;
ATTORNEY GENERAL PENNSYLVANIA;
SUPERINTENDENT SMITHFIELD SCI

(E.D. Pa. No. 2-14-cv-05964)

SUR PETITION FOR REHEARING

Present: SMITH, Chief Judge, McKEE, AMBRO, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., VANASKIE, SHWARTZ, KRAUSE, RESTREPO, and BIBAS, Circuit Judges

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

s/Patty Shwartz
Circuit Judge

Dated: June 12, 2018

kr/cc: Bobby Kenneth Williamson
John W. Goldsborough, Esq.

APPENDIX - B

DLD-170 April 5, 2018

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **17-3662**

BOBBY KENNETH WILLIAMSON, Appellant

VS.

DISTRICT ATTORNEY PHILADELPHIA, et al.

(E.D. Pa. Civ. No. 2-14-cv-05964)

Present: JORDAN, SHWARTZ, and KRAUSE, Circuit Judges

Submitted are:

(1) Appellant's request for a certificate of appealability under 28 U.S.C.§ 2253(c)(1); and

(2) Appellant's "Motion for Expansion of Pages"

in the above-captioned case.

Respectfully,

Clerk

ORDER

The foregoing application for a certificate of appealability is denied. For substantially the reasons given by the Magistrate Judge and the District Court, jurists of reason would not find it debatable that the District Court was correct in its procedural ruling, see Slack v. McDaniel, 529 U.S. 473, 484 (2000), that appellant's habeas corpus petition was untimely filed, see 28 U.S.C. § 2244(d)(1), that appellant failed to demonstrate a basis for any further equitable tolling, see Holland v. Florida, 560 U.S. 631, 652-53 (2010), and that appellant failed to demonstrate that the equitable exception to the limitation period set forth in McQuiggin v. Perkins, 569 U.S. 383, 399 (2013), applies to his case. Appellant's application for a certificate of appealability offers no

persuasive argument as to how the dismissal of his petition as untimely filed could be considered debatable or wrong. Appellant's motion to exceed the page limit is granted.

By the Court,

s/Patty Shwartz
Circuit Judge

Dated: April 10, 2018
SLC/cc: Bobby Kenneth Williamson
John W. Goldsborough, Esq.

A True Copy:

Patricia S. Dodszuweit, Clerk
Certified Order Issued in Lieu of Mandate

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 17-3662

Williamson v. District Attorney Philadelphia

To: Clerk

1) Motion by Appellant for Extension of Time to File Application for Certificate of Appealability

---

The foregoing motion is granted. Appellant's application for a certificate of appealability must be filed within thirty (30) days of the date of this order. If Appellant does not file an application for a certificate of appealability by the deadline established, Appellant's notice of appeal will be deemed to be such an application and will be submitted by the Clerk of this Court to a panel of the Court for consideration. See Fed. R. App. P. 22(b)(2).

For the Court,

s/ Marcia M. Waldron
Clerk

Dated: December 12, 2017

kr/cc: Bobby Kenneth Williamson
John W. Goldsborough, Esq.

APPENDIX - C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

BOBBY KENNETH WILLIAMSON, Petitioner, v. DISTRICT ATTORNEY OF PHILADELPHIA COUNTY; THE ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA; and ERIC TICE, SUPERINTENDENT, Respondents.	No. 2:14-cv-05964

OPINION
Report and Recommendation, ECF No. 16 – Adopted

Joseph F. Leeson, Jr.
United States District Judge

November 2, 2017

I. INTRODUCTION

Bobby Williamson filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 challenging his conviction for a murder committed in 1987 and requesting an evidentiary hearing. ECF No. 1. Magistrate Judge Elizabeth T. Hey issued a Report and Recommendation (R&R) recommending that the habeas corpus petition be dismissed as untimely and the request for an evidentiary hearing be denied. ECF No. 16. Williamson timely filed objections to the R&R, ECF No. 20, and later filed supplemental documents in support of his objections, ECF No. 21. After de novo review and for the reasons set forth below, the R&R is adopted, the habeas petition is dismissed as untimely, and the request for an evidentiary hearing is denied.

II. FACTUAL AND PROCEDURAL HISTORY

The Court adopts the factual and procedural history as summarized by Magistrate Judge Hey in the R&R. In his Objections, Williamson takes issue with Magistrate Judge Hey's factual findings because she did not have access to the state court record at the time and based her findings on the parties' submissions and the state court dockets. Pet'r's Objs. 2. The Court later received the state court record, ECF Nos. 24-25, and, after independent review, concludes that Magistrate Judge Hey accurately summarized the facts and procedural history of this case.

III. STANDARD OF REVIEW

When objections to a report and recommendation have been filed under 28 U.S.C. § 636(b)(1)(C), the district court must make a de novo review of those portions of the report to which specific objections are made. *Sample v. Diecks*, 885 F.2d 1099, 1106 n.3 (3d Cir. 1989); *Goney v. Clark*, 749 F.2d 5, 6-7 (3d Cir. 1984) ("providing a complete de novo determination where only a general objection to the report is offered would undermine the efficiency the magistrate system was meant to contribute to the judicial process"). "District Courts, however, are not required to make any separate findings or conclusions when reviewing a Magistrate Judge's recommendation de novo under 28 U.S.C. § 636(b)." *Hill v. Barnacle*, 655 F. App'x. 142, 147 (3d Cir. 2016). The district court "may accept, reject, or modify, in whole or in part, the findings and recommendations" contained in the report. 28 U.S.C. § 636(b)(1)(C) (2009).

IV. ANALYSIS

This Court has considered Williamson's Objections to the R&R and conducted a de novo review of his habeas corpus petition. After a tortuous path through the state courts involving five petitions under Pennsylvania's Post-Conviction Relief Act (PCRA), 42 Pa. Cons. Stat. Ann. §§ 9541-9551, Williamson filed his habeas petition on October 15, 2014, over seventeen years past

the expiration of the statute of limitations on April 23, 1997. Statutory tolling of the statute of limitations does not apply because Williamson's PCRA petitions were untimely, and thus cannot toll the limitations period. Equitable tolling does not stay the statute of limitations because Williamson did not diligently pursue his claims. Nor can Williamson avoid the statute through a gateway claim of actual innocence, because the 2012 affidavit of an alleged alibi witness he presents in support is not newly discovered evidence, and a reasonable jury could still have found him guilty, even in light of the affidavit. Therefore, the Court adopts Magistrate Judge Hey's conclusions in the R&R and dismisses Williamson's petition as untimely.

A. Statute of Limitations

Magistrate Judge Hey correctly found that Williamson's conviction became final on February 11, 1995, as the Pennsylvania Superior Court recognized in its opinion reinstating Williamson's first PCRA petition. ECF No. 7-5, at 2. The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) imposes a one-year limitations period on habeas claims from the date that a conviction becomes final, but because Williamson's conviction became final before AEDPA's effective date on April 24, 1996, he had a one year "grace period" that extended his deadline to April 23, 1997. *See Burns v. Morton*, 134 F.3d 109, 111 (3d Cir. 1998). Therefore, in the absence of tolling of the statute of limitations, Williamson's October 15, 2014 petition is over seventeen years late.

B. Statutory Tolling

Statutory tolling does not apply because the Pennsylvania courts determined that all of Williamson's PCRA petitions were untimely. Under the AEDPA, a "properly filed" PCRA petition tolls the one-year statute of limitations during the period while it is pending before the state court. An untimely PCRA petition is not "properly filed" under the AEDPA, and does not

toll the limitations period. *Pace v. DiGuglielmo*, 544 U.S. 408, 417 (2005). Williamson filed five PCRA petitions, all of which were dismissed as untimely by the Pennsylvania courts. Magistrate Judge Hey correctly found that statutory tolling therefore does not apply.

Many of Williamson's objections argue that his PCRA petitions should be considered timely, or their untimeliness should be excused. For example, he complains that he did not receive a copy of the January 12, 1995 order dismissing his direct appeal, so he couldn't comply with the Pennsylvania appellate rules, and was abandoned by his direct appeal counsel, which led to a delay in seeking PCRA relief. Pet'r's Objs. 8. He contends that the prison mailroom failed to submit his Notice of Appeal of his fourth PCRA petition, and that the PCRA court's delay of two years in deciding his fifth PCRA petition forced him to file his habeas petition "before first exhausting that claim in state court." Pet'r's Objs. 6.

Williamson seems to confuse two different issues: the question before this court is not whether his PCRA petitions were timely, but whether his habeas corpus petition is. Williamson states that he "is accused of breaking the PCRA Statutory Deadline Rule," and contends that Magistrate Judge Hey concluded that "Petitioner was require [sic] to follow the PCRA procedural rule" despite "severe obstacles," such as abandonment by direct appeal counsel. Pet'r's Objs. 19, 22-23. Although Williamson protests that his PCRA petitions should be considered timely or he should be excused from the timeliness requirement, a state court's decision that a postconviction petition is untimely is "the end of the matter" for purposes of federal habeas. *See Pace v. DiGugliemo*, 544 U.S. 408, 414 (2005). Because Williamson's

PCRA petitions were deemed untimely by the state courts, they do not entitle him to statutory tolling.[1]

C. Equitable Tolling

To merit equitable tolling of the statute of limitations, a habeas petitioner must demonstrate (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing. An extraordinary circumstance only warrants equitable tolling if there is "a causal connection, or nexus, between the extraordinary circumstances he faced and the petitioner's failure to file a timely federal petition." *Ross v. Varano*, 712 F.3d 784, 803 (3d. Cir. 2013).

Magistrate Judge Hey found limited equitable tolling appropriate here because the "peculiar and confusing series of events understandably frustrated Petitioner's ability to exhaust his claims." R&R, at 12-13. She identified five events in particular that, in tandem, justified equitable tolling: (1) the dismissal of Williamson's direct appeal on January 12, 1995, because his counsel did not file a brief; (2) the trial court's sua sponte order of August 11, 1998, permitting Williamson to file a direct appeal nunc pro tunc; (3) the dismissal of the reinstated direct appeal on October 21, 1999, for failure to file a brief; (4) the Superior Court's reinstatement on September 17, 2002, of Williamson's first PCRA as a result of his second PCRA; and (5) the Superior Court's dismissal of Williamson's first PCRA petition as untimely

---

[1] In *Pace*, the Supreme Court recognized that the timeliness and exhaustion requirements for habeas petitions can create the exact predicament in which Williamson finds himself: "a petitioner trying in good faith to exhaust state remedies may litigate in state court for years only to find out at the end that he was never 'properly filed,' and thus that his federal habeas petition is time barred." 544 U.S. at 416. The Court dismissed any concerns about unfairness to petitioners by emphasizing the importance of filing a "protective" habeas petition within the limitations period, even if state court proceedings remain pending: the petitioner can ask the federal court to stay and abey the federal habeas proceedings until state remedies are exhausted. *Id.* However, Williamson did not do so here.

on June 25, 2004. R&R, at 12. Magistrate Judge Hey recognized that Williamson justifiably could have been confused by this convoluted series of events, and equitably tolled the AEDPA limitations period from its starting date in April 1996 through July 25, 2004, thirty days after the Superior Court affirmed the denial of Williamson's reinstated first PCRA petition as untimely.

Even after equitably tolling the statute of limitations to July 2004, Magistrate Judge Hey correctly found that Williamson's habeas petition is untimely. Williamson failed to exercise due diligence in bringing his claims: even though Williamson knew as of July 2004 that his first PCRA petition was untimely under Pennsylvania law, he failed to file his habeas petition for another ten years.

Williamson offers no excuse for his ten-year delay. Many of his objections focus on the period between his conviction in 1995 and the denial of his first PCRA as untimely in 2004. For example, Williamson argues that he did not receive proper notice of the dismissal of his direct appeal in January 1995, and that his direct appeal counsel abandoned him.[2] Pet'r's Objs. 7-8. Additionally, he points to his imprisonment in Baltimore, without access to Pennsylvania law resources, from 1994 through 1998, as justification for his failure to comply with the timeliness requirements. Pet'r's Objs. 22. These arguments miss the point, because Magistrate Judge Hey already accounted for these complications in tolling the statute from 1996 through 2004.

If the statute is tolled until July 25, 2004, as Magistrate Judge Hey recommended, the limitations period would run for one year, through July 25, 2005. Williamson does not explain his failure to file in that time period. He presents objections based on subsequent events, such as his complaint that the prison mailroom did not submit his notice of appeal of his fourth PCRA petition after it was dismissed on August 17, 2012, and the two-year delay in reviewing his fifth

[2] Although these events occurred in 1995, Williamson inexplicably argues that they entitle him to equitable tolling from 1995 until October 15, 2012. Pet'r's Objs. 7-8.

PCRA petition, both of which Williamson argues entitle him to tolling from August 17, 2012 through October 15, 2014. This time period and the objections based upon it are irrelevant to the one-year period between July 2004 and July 2005, the period Williamson had to bring his habeas claims if equitable tolling applies. Williamson offers no explanation or excuse for his failure to file a habeas petition in that time frame. Williamson does not suggest that he pursued his rights diligently during that time[3] and points to no extraordinary circumstance that stood in his way and prevented timely filing before July 2005, so he is not entitled to further equitable tolling beyond what Magistrate Judge Hey applied. Even giving Williamson the benefit of the doubt and applying equitable tolling until July 2004, the limitations period expired in July 2005, and his petition is still untimely by nine years.

D. Actual Innocence

Williamson seeks to overcome the statute of limitations through a gateway claim of actual innocence, supported primarily by the 2012 affidavit of an alleged alibi witness. Although actual innocence, if proved, acts as a "gateway" through which a petitioner may pass beyond an expired statute of limitations to have his claim considered on the merits, the Supreme Court has stated that "tenable actual-innocence gateway pleas are rare." *McQuiggin v. Perkins*, 569 U.S. 383 (2013). To establish an actual innocence claim, a 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." *Id.* A court evaluating an actual innocence claim must evaluate the evidence under the *Schlup* standard, which requires "new reliable evidence—

[3] Williamson does not seem to have taken any steps to pursue his rights during July 2004 and July 2005, even on the state level: the record reveals no action by Williamson after the June 25, 2004 dismissal of his PCRA petition until January 11, 2006, when he filed his third PCRA petition.

whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence [ ] that was not presented at trial." *Schlup v. Delo*, 513 U.S. 298, 324 (1995).

Williamson has not produced new evidence, so his actual innocence claim fails. He offers the July 13, 2012 affidavit of Hughie Johnson, an alleged alibi witness who attests that Williamson was with him in Houston from June through September 1987, so Williamson could not have committed the murder in Philadelphia in July 1987. Although Williamson argues that "new evidence" includes "newly presented evidence," the Third Circuit Court of Appeals considers evidence "new" under *Schlup* only if it was not available at trial and could not have been discovered earlier through the exercise of due diligence, except in situations where evidence was not discovered because of ineffective assistance of trial counsel.[4] *See Houck v. Stickman,* 625 F.3d 88, 93–94 (3d Cir. 2010); *Pirela v. Dist. Attorney of the Cty. of Philadelphia*, No. CIV.A. 00-5331, 2014 WL 2011536, at *5–6 (E.D. Pa. May 16, 2014). Specifically, evidence of an alibi is not new evidence when the alibi is known by the petitioner at the time of trial. *See Cruz v. Wetzel*, No. CV 14-2681, 2015 WL 6855637, at *5 (E.D. Pa. July 30, 2015), *adopted*, No. CV 14-2681, 2015 WL 6811324 (E.D. Pa. Nov. 6, 2015), *cert. of appealability denied* (May 31, 2016) (finding that affidavits submitted by petitioner to establish alibi did not satisfy *Schlup*). Williamson freely admits that he knew that Hughie Johnson was an

---

[4] One district court in this Circuit has recognized a circuit split over what counts as "new" evidence under *Schlup*: while the Third and Eighth Circuits require newly discovered evidence, or evidence that could not have been discovered through reasonable diligence, the Seventh and Ninth Circuits view "new" evidence as evidence not "presented" at trial. *See Phlipot v. Johnson*, No. CV 14-383-RGA, 2015 WL 1906127, at *4 n.6 (D. Del. Apr. 27, 2015). The case Williamson cites in support of his position, *U.S. v. Davies*, does not control because the court in that case did not decide the meaning of "new" evidence, but merely referenced Seventh and Ninth Circuit decisions accepting "newly presented" evidence. 394 F.3d 182, 191 (3d Cir. 2005) ("We need not weigh in today on the 'newly presented' versus 'newly discovered' issues because, as we note below, we write in the context of a claim that a post-conviction Supreme Court decision has held that the statute of conviction does not reach the petitioner's conduct.").

alibi witness at the time of his trial and identified him as a witness to be investigated. Pet'r's Objs. 9. He tries to excuse his delay by stating that Johnson had moved from Houston to Florida and was incarcerated for seventeen of the twenty years since Williamson's trial. While this might explain Williamson's delay in presenting Johnson's affidavit, it does not explain his delay in presenting his alibi, of which he was fully aware at the time of trial. Therefore, the Johnson affidavit is not new evidence sufficient to ground an actual innocence claim.

Even if the affidavit did qualify as new evidence, Williamson's actual innocence claim would fail because he cannot establish that no reasonable juror could find him guilty.

To determine whether a petitioner's new evidence shows it is "more likely than not that no reasonable juror would have convicted him," a court must consider "all the evidence, old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under rules of admissibility that would govern at trial." *Phlipot v. Johnson*, No. CV 14-383-RGA, 2015 WL 1906127, at *4 (D. Del. Apr. 27, 2015) (citing *House v. Bell,* 547 U.S. 518, 538 (2006)). In doing so, a court "may consider how the timing of the submission [of actual innocence] and the likely credibility of the affiant[ ] bear on the probable reliability of that evidence." *Id.* (citing *Schlup,* 513 U.S. at 332). A petitioner's actual innocence claim will fail where the new evidence "does not eliminate the possibility that the crime occurred as set forth by the prosecution at trial." *Prosdcocimo v. Beard*, No. CIV.A. 08-1500, 2010 WL 5186641, at *4 (W.D. Pa. Nov. 3, 2010), *adopted*, 2010 WL 5186618 (W.D. Pa. Dec. 14, 2010), *aff'd sub nom. Prosdocimo v. Sec'y, Pennsylvania Dep't of Corr.*, 458 F. App'x 141 (3d Cir. 2012). *See also Albrecht v. Horn,* 485 F.3d 103 (3d Cir. 2007) (holding that new fire science expert opinion that fire could have been accident did not rule out the possibility that the fire was set intentionally and thus did not support actual innocence claim for petitioner convicted of murder); *Cruz*, 2015

WL 6855637 at *6 (rejecting actual innocence claim based on alibi affidavits where witness testimony linked petitioner to murder).

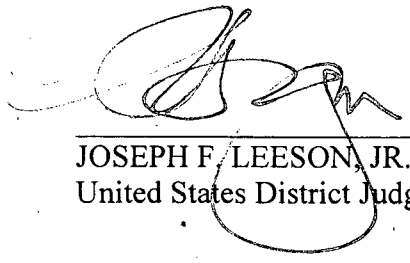
Williamson's claim fails to meet the exacting standard for actual innocence. He presents an affidavit of an alleged alibi witness twenty years after the trial and twenty-five years after the crime, a delay which casts doubt on the reliability of the affidavit. *See Taylor v. Illinois*, 484 U.S. 400, 414 (1988) ("It is ... reasonable to presume that there is something suspect about a defense witness who is not identified until after the 11th hour has passed."); *Cruz*, 2015 WL 6855637, at *6 (finding alibi affidavits unreliable when presented ten years after conviction). Additionally, the affidavit does not eliminate the possibility that the crime occurred as presented by the prosecution, and a reasonable jury could still find adequate evidence to convict. As Magistrate Judge Hey highlighted, the victim's girlfriend, who was an eyewitness to the crime, described the events and the shooter in detail within minutes of the attack and identified Williamson as the shooter. Although Williamson attempts to relitigate the evidence against him at trial, Pet'r's Objs. 13-14, he cannot demonstrate that, in light of all the evidence on the record, a reasonable jury could not have convicted him. Therefore, his actual innocence claim fails, and his petition is time barred.

V. CONCLUSION

Magistrate Judge Hey correctly concludes that the instant petition for writ of habeas corpus is untimely. This Court therefore adopts the findings and conclusions in the Report and Recommendation and follows the recommendation to deny the habeas petition as untimely, and to deny Williamson's request for an evidentiary hearing. There is no basis to issue a certificate of appealability.

A separate Order will be issued.

BY THE COURT:



JOSEPH F. LEESON, JR.
United States District Judge

APPENDIX - D

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

BOBBY WILLIAMSON	:	CIVIL ACTION
v.	:	
KEVIN KAUFFMAN, et al.[1]	:	NO. 14-5964

REPORT AND RECOMMENDATION

ELIZABETH T. HEY, U.S.M.J. May 19, 2015

This is a pro se petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2254, by Bobby Williamson ("Petitioner"), who is currently incarcerated at SCI Huntingdon. For the reasons that follow, I recommend that the petition be dismissed as untimely.

I. FACTS AND PROCEDURAL HISTORY[2]

On February 28, 1992, a jury sitting before the Honorable John Poserina convicted Petitioner of first-degree murder, criminal conspiracy, possession of an instrument of crime, and reckless endangerment related to the July 5, 1987, murder of James Pride. The Superior Court quoted the trial court's summary of the evidence as follows:

---

[1] Petitioner originally named John D. Fisher, Superintendent of the State Correctional Institution ("SCI") in Huntington, Pennsylvania, as the respondent in this case. By Order dated February 23, 2015, Kevin Kauffman, the current Superintendent of SCI Huntington, was substituted for Mr. Fisher. See Rules Governing Section 2254 Cases, Rule 2; Doc. 14.

[2] Because Petitioner's fifth PCRA petition has only recently been dismissed by the state courts, I was unable to obtain the state court record in this case. The facts and procedural history are derived from the petition, the parties' submissions, and the state court dockets.

> On July 5, 1987, at approximately 3:30 a.m. on the sidewalk at 52nd and Warren Streets, Philadelphia, Pennsylvania, [Petitioner] shot and killed the victim James Pride (a/k/a 'Chico').
>
> The evidence at trial disclosed the fact that [Petitioner] and another male came up the street to a point outside of an after[-]hours club, where victim and his girl[-] friend, Helen Thompson McFarland, were standing. The other male turned his back to the couple and began urinating in the street. Subsequently, victim challenged the urinating person, who was next to [Petitioner], and said 'Can't you go elsewhere, you are showing disrespect to my lady!' Chico then said to [Petitioner] 'Ask your friend to get out of here . . . and do it somewhere else.'
>
> [Petitioner] replied, with his hand inside his shirt, 'Do you want some shots?' Chico then said the same words back to [Petitioner]. 'Do you want some shots?' They repeated these words back and forth approximately half a dozen times.
>
> At that point, a police car cruised by, and after it was a half-block away, [Petitioner] pulled out a gun and fired two shots at Chico. The victim's girl[-]friend, Helen McFarland observed the victim 'jerk back twice' and drop to the ground. She then dropped to the ground right beside the victim. As she laid there she heard what she testified to be ten (10) more shots, but that she was too frightened to be thinking of how many shots were coming at her or the victim.
>
> Within minutes, the policeman who had previously passed by this location arrived back at the scene and attempted to secure the area and determine from the hysterical woman, Helen McFarland, what had occurred. She gave the police descriptions of both the shooter and his cohort. The description includes the fact that the shooter[] had no facial hair, but that the one urinating did have facial hair.

Commonwealth v. Williamson, No. 555 EDA 2007, Memorandum at 1-2 (Pa. Super. June 13, 2008) ("2008 Super. Ct. Op.") (attached to Response at Exh. F, Doc. 7-6) (quoting Commonwealth v. Williams, 1994 WL 1251180, 28 Phila. Co. Rpr. 306, 306-07

(Phila. C.C.P. Oct. 5, 1994) ("Trial Ct. Op.")). Judge Poserina sentenced Petitioner to life imprisonment for the murder, plus two-to-five years for possessing an instrument of crime; no further penalties were imposed on the remaining convictions. See Commonwealth v. Williamson, CP-51-CR-0806431-1990 (Phila. C.C.P.) ("Docket Sheet").[3]

On April 6, 1994, trial counsel, Mark Gottlieb, Esquire, filed a timely appeal. Despite counsel's failure to submit a statement of issued raised on appeal, Judge Poserina filed an opinion for appellate review addressing issues that were raised in post-verdict motions. Trial Ct. Op., 28 Phila. Co. Rptr. at 308. However, on January 12, 1995, the Superior Court dismissed the appeal due to counsel's failure to file a brief. Super. Ct. Op. at 2. Petitioner did not file a petition for allowance of appeal in the Pennsylvania Supreme Court.

On March 21, 1997, more than two years after the end of his direct appeal, Petitioner filed a pro se petition pursuant to Pennsylvania's Post Conviction Relief Act ("PCRA"), 42 Pa. C.S.A. §§ 9541-9551. See Petition for Post Conviction Relief, attached to Response at Exh. A (Doc. 7-1) ("First PCRA"). Petitioner raised eight claims in his First PCRA, none of which implicated ineffectiveness of direct appeal counsel for

[3]The prosecution sought the death penalty and during the penalty-phase hearing held immediately after the trial verdict, the jury was informed that Petitioner had previously been convicted of murder in Maryland. When the jury deadlocked over imposition of the death penalty, Judge Poserina imposed a mandatory sentence of life imprisonment. See 2008 Super. Ct. Op, at 2. On March 29, 1994, following the denial of post-trial motions, Judge Poserina resentenced Petitioner to life imprisonment and imposed the remaining sentences. Trial Ct. Op., 28 Phila. Co. Rpr. at 308.

failing to file a brief. See id. at 1-3.[4] Judge Poserina did not appoint counsel, and on April 18, 1997, dismissed the petition as untimely. Petitioner did not appeal.

More than one year passed with no activity on Petitioner's docket, followed by the following events as later recounted by the Superior Court:

> On August 11, 1998, the trial court inexplicably issued an order, *sua sponte*, permitting [Petitioner] to file a direct appeal *nunc pro tunc*. On September 10, 1998, the trial court issued an order that directed [Petitioner] to file a 1925(b) statement with the trial court. Apparently, [Petitioner] neither filed an appeal nor complied with the order of the trial court.
>
> Then, on January 7, 1999, the trial court entered another order granting [Petitioner] permission to file a direct appeal *nunc pro tunc*. Six days later, [Petitioner] filed a notice of appeal with the Superior Court. On February 10, 1999, the trial court ordered [Petitioner] to file a 1925(b) statement, and on February 19, 1999, the trial court issued a second order extending the time for [Petitioner] to file a 1925(b) statement. Nonetheless, [Petitioner] failed to comply with this order and failed to file an appellate brief. Accordingly, on October 21, 1999, [the Superior] Court issued an order dismissing [Petitioner's] appeal without prejudice to his right to seek relief under the PCRA.

Commonwealth v. Williamson, No. 2128 EDA 2001, Memorandum at 2-3 (Pa. Super. Sept. 17, 2002), attached to Response at Exh. C (Doc. 7-3) ("2002 Super. Ct. Op.").[5]

---

[4]Petitioner asserted that the trial court improperly admitted a "tainted" photo line-up, violated his rights under the Confrontation Clause, failed to instruct the jury on the alibi defense, and denied his right to a speedy trial. Petitioner also asserted prosecutorial misconduct and ineffectiveness of trial counsel for not permitting him to testify on his own behalf. First PCRA at 1-3.

[5]In his response, the District Attorney avers that Judge Poserina's sua sponte order was prompted by a "now-missing" ex parte letter from John W. Packel, Esquire, of the Defender Association of Philadelphia, notifying the judge of direct appellate counsel's failure to file a brief. See Doc. 7 at 4-5. The District Attorney avers that a copy of Judge Poserina's sua sponte order was never served on the Commonwealth,

On August 18, 2000, ten months after the Superior Court's second dismissal of his appeal for failure to file a brief, Petitioner filed a second PCRA petition, requesting another reinstatement of his appellate rights nunc pro tunc ("Second PCRA"). Counsel was appointed and filed an amended petition on March 19, 2001. Judge Poserina issued a notice of intent to dismiss without a hearing on the basis of untimeliness, and dismissed Petitioner's Second PCRA on June 6, 2001.

Petitioner appealed the denial of his Second PCRA to the Pennsylvania Superior Court, arguing that the trial court erred in its jury charge on conspiracy liability as it relates to first degree murder, the trial court erred by failing to appoint counsel to represent him during his First PCRA, his pre-trial identification proceeding was unnecessarily suggestive, and his First PCRA petition was timely. See 2002 Super. Ct. Op. at 4. In an unpublished memorandum dated September 17, 2002, the Superior Court vacated and remanded to the PCRA court. The Superior Court found that Judge Poserina had no authority to reinstate Petitioner's direct appeal rights sua sponte, and therefore that his Orders dated August 11, 1998, and January 7, 1999, were "a legal nullity." Id. at 8. However, the Superior Court held that the PCRA court should have appointed counsel for Petitioner in his First PCRA, even if it was untimely. Id. at 9. Therefore, the Superior Court remanded for the appointment of counsel concerning Petitioner's now-reinstated First PCRA, and instructed counsel to investigate whether any exception to the PCRA's jurisdictional time-bar applied to Petitioner's case. Id. at 11-12.

---

which was not given an opportunity to respond, and that Mr. Packel never entered an appearance or was appointed as Petitioner's attorney. Id. at 5.

On December 3, 2002, James Lammendola, Esquire, was appointed as PCRA counsel. After review of the record and the applicable law, counsel filed a no-merit letter pursuant to Commonwealth v. Finley, 550 A.2d 213 (Pa. Super. 1988), and a petition to withdraw, explaining that the First PCRA was untimely and that the substantive issues lacked merit. See 03/23/03 Finley Letter, attached to Response at Exh. D (Doc. 7-4). On April 30, 2003, the PCRA court dismissed the re-instated First PCRA as untimely and without merit, and granted counsel's petition to withdraw. See Commonwealth v. Williamson, 1657 EDA 2003, at 1, 3 (Pa. Super. June 25, 2004), attached to Response at Exh. E (Doc. 7-5) ("2004 Super. Ct. Op.").

Petitioner again appealed the denial of PCRA relief to the Superior Court, raising ten issues, including "whether his current PCRA petition was timely filed." 2004 Super. Ct. Op. at 3. By unpublished memorandum opinion dated June 25, 2004, the Superior Court found Petitioner's re-instated First PCRA petition to be untimely and that no exceptions to the PCRA limitations period applied, that Petitioner's judgment of conviction therefore became final on February 11, 1995, and that no further merits review was warranted. Id. at 3-5. Petitioner did not file a petition for allowance of appeal with the Pennsylvania Supreme Court.

On January 11, 2006, approximately one and a half years later, Petitioner filed another pro se PCRA petition ("Third PCRA"). See Docket Sheet. According to the District Attorney, Petitioner claimed that his First PCRA should have been considered premature rather than untimely because he had not received official notice of the Superior Court's 1995 dismissal notice on direct appeal, and that any lateness should be excused in

light of after-discovered evidence of a violation of Brady v. Maryland, 373 U.S. 83 (1963). See Doc. 7 at 7-8. On December 11, 2006, following notice of intent to dismiss, Judge Poserina dismissed the Third PCRA as untimely. See Docket Sheet.

Petitioner again appealed the denial of PCRA relief to the Superior Court, raising the same timeliness arguments presented in his Third PCRA. See 2008 Super. Ct. Op. at 5, 7. By unpublished memorandum dated June 13, 2008, the Superior Court affirmed the time-bar dismissal of his Third PCRA. Id. at 1, 8. The court recognized that direct appeal counsel was "[u]nquestionably . . . ineffective in not filing a Pa. R. A. P. 1925(b) statement," but that "a petitioner seeking reinstatement of appellate rights *nunc pro tunc* must be filed within" the applicable time constraints." Id. at 6. Petitioner filed a petition for allowance of appeal with the Pennsylvania Supreme Court, which was denied on December 16, 2008. Commonwealth v. Williamson, 401 EAL 2008 (Pa. 2008).

On September 29, 2009, nine months later, Petitioner filed another pro se PCRA petition ("Fourth PCRA"), which was assigned to the Honorable Steven R. Geroff. See Docket Sheet. The PCRA court appointed Gary S. Server, Esquire, as counsel, who filed an amended petition but later filed a no-merit letter and a motion to withdraw pursuant to Finley. See id.; 05/04/11 Finley Letter, attached to Response at Exh. G (Doc. 7-7), at 1-2.[6] The PCRA court sent a notice of intent to dismiss due to untimeliness on October 21, 2011, after which Petitioner sought additional time to answer and a motion to compel

[6]As explained in his Finley letter, Mr. Server initially sought to amend the petition because Petitioner averred that a new witness (Palram Sukie) had come forward. Mr. Server was unable through investigation to confirm the existence of the witness, and his efforts included attempting to reach him through a couple named Huwie and Charlotte Johnson at an address provided by Petitioner. 05/04/11 Finley Letter at 2-3.

discovery, and filed an amended PCRA petition and affidavit in support thereof. See Docket Sheet. On August 17, 2012, the PCRA court dismissed the Fourth PCRA as untimely, and permitted counsel to withdraw. Id.[7] Petitioner did not appeal to the Superior Court.

On November 2, 2012, Petitioner filed another pro se PCRA petition ("Fifth PCRA"). See Docket Sheet. On January 7, 2015, the PCRA court sent Petitioner notice of intent to dismiss, and on March 25, 2015, dismissed the Fifth PCRA as untimely. Id.[8] Petitioner did not appeal the dismissal of his Fifth PCRA.

Meanwhile, on October 15, 2014,[9] Petitioner filed the present pro se petition for habeas corpus consisting of the standard 19-page form interspersed with lengthy argument totaling 196 pages plus exhibits. See Doc. 1. The Honorable William H. Yohn assigned the case to me for a Report and Recommendation. See Doc. 3. On January 23, 2015, the District Attorney filed a response arguing that the petition is time-barred, and

---

[7]The Docket Sheet states that the petition was dismissed on August 17, 2012, and also contains an entry for an order on August 23, 2012, dismissing the petition as untimely "following a review of the pleadings, record evidence and argument of counsel."

[8]The Docket Sheet does not contain any information to explain the delay of more than two years in processing the Fifth PCRA. In his Response, the District Attorney avers that the petition "was located when undersigned counsel inquired about it." Doc. 7 at 8. The Fifth PCRA plays no role in the outcome of the present habeas petition, and therefore it is not necessary to determine the cause of the delay.

[9] The petition was docketed on October 20, 2014, but the federal court employs the "mailbox rule," deeming the petition filed when given to prison authorities for mailing. Burns v. Morton, 134 F.3d 109, 113 (3d Cir. 1998) (citing Houston v. Lack, 487 U.S. 266 (1988)). The original petition was signed on October 15, 2014, and therefore, I will assume that Petitioner gave the petition to prison authorities for mailing on that date.

on February 17, 2015, Petitioner filed a reply in which he addressed the timeliness of his habeas petition for the first time. See Docs. 7, 11. The matter is ripe for review.[10]

II. DISCUSSION – STATUTE OF LIMITATIONS

A. Start Date

With the passage of the Antiterrorism and Effective Death Penalty Act of 1996, ("AEDPA"), Congress enacted a one-year limitations period for federal habeas corpus petitions. 28 U.S.C. § 2244(d). Ordinarily, the one-year period begins to run on the date on which the judgment became final in the state courts and is tolled only by a properly filed application for state post-conviction relief or other collateral review. 28 U.S.C. §§ 2244(d)(1)(A) and (d)(2). Here, Petitioner's direct appeal was dismissed by the Pennsylvania Superior Court on January 12, 1995, and Petitioner did not file a petition for allowance of appeal with the Pennsylvania Supreme Court within the thirty days allotted by state law. See Pa. R. App. P. 903(a). Therefore, Petitioner's conviction became final on February 11, 1995. See Harris v. Vaughn, 129 Fed. Appx. 684, 685 (3d Cir. 2005) (where petitioner does not file an allocator petition in the Pennsylvania Supreme Court, judgment becomes final thirty days after the Superior Court affirms conviction). For convictions which became final before April 24, 1996 (the effective date of AEDPA), petitioners have a one-year "grace period" in which to file a timely habeas petition. Burns v. Morton, 134 F.3d 109, 111 (3d Cir. 1998). Therefore, absent

[10]Plaintiff also requested an evidentiary hearing on the merits of his claims of ineffectiveness of counsel. Doc. 2. In light of my conclusion that the petition is untimely, I will recommend that this request be denied.

statutory or equitable tolling, Petitioner would have had to file his habeas petition on or before April 23, 1997.

The habeas statute also provides for an alternate start date of the habeas limitations period if the state created an impediment to filing, the claim relies on a newly recognized constitutional right, or the factual predicate of the claim could not have been discovered through due diligence. See 28 U.S.C. §§ 2244(d)(1)(B)-(D). Here, none of the recognized circumstances apply to allow for an alternate start date.[11] Therefore, absent tolling, Petitioner's habeas filed on October 15, 2014, is more than seventeen years late.

B. Statutory Tolling

The habeas limitations period is subject to statutory tolling. Specifically, the time during which a "properly filed" PCRA petition is pending is excluded from the one-year calculation. 28 U.S.C. § 2244(d)(2). Here, Petitioner filed his First PCRA on March 21, 1997 – more than two years after the end of his direct appeal – and subsequently filed four more PCRA petitions – on August 18, 2000, January 11, 2006, September 29, 2009, and November 2, 2012. The state courts ultimately determined that all five of the PCRA petitions were untimely filed, and that no exceptions to the PCRA limitations were applicable. A PCRA petition that is found to be untimely by the state court is not considered "properly filed" for purposes of section 2244(d)(2) and does not toll the limitations period. Pace v. DiGuglielmo, 544 U.S. 408, 417 (2005). Moreover, to the

[11]To the extent the equitable tolling arguments presented in Petitioner's reply could be construed as arguing the applicability of an alternate start time, see Doc.11, I disagree. Issues related to alleged impediments to filing, newly discovered evidence, and due diligence will be discussed in the context of equitable tolling.

extent Petitioner argues that the state courts erred in dismissing his PCRA petitions as untimely, the Supreme Court has directed that "[w]hen a postconviction petition is untimely under state law, 'that [is] the end of the matter for purposes of § 2244(d)(2).'" Id. at 414 (quoting Carey v. Saffold, 536 U.S. 214, 226 (2002)). Therefore, no period of time following the filing deadline of April 23, 1997, is tolled by operation of the statute.

C. Equitable Tolling

The United States Supreme Court has held that the habeas time bar is not jurisdictional, but is instead subject to equitable tolling. Holland v. Florida, 560 U.S. 631, 645-46 (2010). In Holland, the Supreme Court held that equitable tolling is proper only where the petitioner "shows (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." Id. at 649 (citing Pace, 544 U.S. at 418). "The diligence required for equitable tolling purposes is 'reasonable diligence.'" Id. at 653 (citing Lonchar v. Thomas, 517 U.S. 314, 326 (1996)); see also LaCava v. Kyler, 398 F.3d 271, 277 (3d Cir. 2005) (petitioner must exercise reasonable diligence in exhausting state remedies and bringing federal habeas petition); Schlueter v. Varner, 384 F.3d 69, 77-78 (3d Cir. 2004) (petitioner must exercise diligence even when there is attorney malfeasance).

The Supreme Court did not identify what would constitute an "extraordinary circumstance," except to suggest that attorney misconduct could rise to the level of "extraordinary" in some circumstances. Holland, 560 U.S. at 651-52. The Supreme Court explained that "the 'exercise of a court's equity powers . . . must be made on a case-by-case basis.'" Id. at 649-50 (quoting Baggett v. Bullitt, 377 U.S. 360, 375

(1964)); see also Miller v. N. J. State Dept. of Corr., 145 F.3d 616, 618 (3d Cir. 1988) (equitable tolling appropriate when "principles of equity would make [the] rigid application [of a limitation period] unfair"). The Third Circuit has held that equitable tolling is justified when (1) the defendant has actively misled the plaintiff, (2) the plaintiff has in some extraordinary way been prevented from asserting his or her rights, (3) the plaintiff has timely asserted rights, but has mistakenly done so in the wrong forum, or (4) the plaintiff received inadequate notice of the right to file suit, a motion for appointment of counsel is pending, or the court has misled the plaintiff into believing that he or she has done everything required. See Jones v. Morton, 195 F.3d 153, 159 (3d Cir. 1999).

Here, the District Attorney argues that nothing in the record indicates that equitable tolling is appropriate. Specifically, there is no suggestion that Petitioner was actively misled by Respondents, that Petitioner was in some extraordinary way prevented from asserting his rights, or that he timely asserted his rights in the wrong forum. See Doc. 7 at 11. As outlined above, however, this case has a lengthy procedural history in which the following events are most pertinent: Dismissal of Petitioner's direct appeal as a result of appellate counsel's failure to file a brief (January 12, 1995); Judge Poserina's sua sponte order permitting Petitioner to file a direct appeal nunc pro tunc (August 11, 1998); the Superior Court dismissing that appeal for the failure to file a brief (October 21, 1999); the Superior Court re-instating Petitioner's First PCRA as a result of his Second PCRA (September 17, 2002); and the Superior Court's subsequent determination that the First PCRA was untimely (June 25, 2004). Because this peculiar and confusing series of

events understandably frustrated Petitioner's ability to exhaust his claims – and particularly because this history involved two separate abandonments by counsel on direct appeal – I will give him the benefit of the doubt and will equitably toll the running of the AEDPA limitations period from its effective date in April 1996 through July 25, 2004, thirty days after the Superior Court affirmed the denial of his re-instated First PCRA.

In his memorandum addressing the statute of limitations, Petitioner argues that he is entitled to equitable tolling for a variety of additional reasons, not all of which are clear. For example, Petitioner appears to argue that he was prevented from asserting his right to file because the state court erroneously failed to properly docket the dismissal of his direct appeal in 1995, thereby depriving him of proper notice and affecting his subsequent ability to properly assert his claims. See Doc. 11 at 4, 11-16, 19, 22-23. Even assuming the state court made a docketing error and/or failed to provide proper notice of its determination on direct appeal, this had no bearing on Petitioner's failure to file a habeas petition at any point after the Superior Court's unfavorable decision on July 25, 2004. Similarly, Petitioner's argument that he is entitled to equitable tolling because he was abandoned by his direct appeal counsel, see Doc. 11 at 5, cannot excuse the entirety of the seventeen years that passed while Petitioner pursued five untimely PCRA petitions, or the ten years that passed since the Superior Court's 2004 denial of PCRA relief. Petitioner also implies that the District Attorney's failure to attach various 1994 and 1995 state court documents to his habeas response warrants equitable tolling. Id. at

8-9. While the documents in question may be relevant to consideration of the merits of Petitioner's claims, they are not relevant to the question of timeliness.

Moreover, the federal courts have repeatedly stated that in order to qualify for equitable tolling, the petitioner must exercise reasonable diligence throughout the period he seeks to toll. See Holland, 560 U.S. at 641 (petitioner must pursue his rights diligently); LaCava, 398 F.3d at 277 (petitioner must exercise reasonable diligence in exhausting state remedies and bringing federal habeas petition). Petitioner was clearly not diligent in pursuing his claims, despite his assertion that the "myriad thick pleadings" he has filed over the years suggests the contrary. Doc. 11 at 7. Even giving Petitioner the benefit of the doubt through the Superior Court's unfavorable ruling on June 25, 2004, Petitioner repeatedly failed to exercise due diligence thereafter. For example, he waited approximately one and half years from that date before filing his Third PCRA on January 11, 2006, he waited approximately nine months from the end of his Third PCRA appeal before filing his Fourth PCRA on September 29, 2009, and he waited more than two additional months from the end of his Fourth PCRA before filing his Fifth PCRA on November 2, 2012. The Fifth PCRA petition remained pending in the PCRA court for more than two years, with absolutely no activity reflected on the docket.[12]

Most importantly, Petitioner made no effort to file a federal habeas petition until October 2014, despite state courts having repeatedly determined that his PCRA petitions

[12]In his claim of actual innocence discussed below, Petitioner relies on a witness affidavit. That affidavit is dated June 13, 2012, and Petitioner offers no explanation for waiting over two years after obtaining the affidavit before filing his federal habeas petition, again demonstrating a lack of diligence.

were untimely and that his judgment of conviction became final on February 11, 1995. See Pace, 544 U.S. at 416 (endorsing the filing of a protective habeas petition while petitioner pursues state court remedies). This lack of diligence prevents this court from equitably tolling the limitations period, despite the unfortunate circumstances of his never having had a direct appeal on the merits. As the Superior Court noted, despite counsel's ineffectiveness in abandoning him on appeal, it was still incumbent upon Petitioner to follow applicable time limitations to seek relief. See 2008 Super Ct. Op. at 6.

D. Actual Innocence

The Supreme Court has recently held that a convincing claim of actual innocence will overcome section 2244's limitations period. McQuiggin v. Perkins, ___ U.S. ___, 133 S. Ct. 1924 (May 28, 2013). This requires the petitioner to supplement his claim with new, reliable evidence of factual innocence. Schlup v. Delo, 513 U.S. 298, 324 (1995). The Supreme Court has explained that this is an exacting standard. "The miscarriage of justice exception, we underscore, applies to a severely confined category: cases in which new evidence shows 'it is more likely than not that no reasonable juror would have convicted [the petitioner].'" McQuiggin, 133 S. Ct. at 1933 (quoting Schlup, 513 U.S. at 329). While a petitioner alleging actual innocence need not prove diligence in order to assert a claim of actual innocence, "[u]nexplained delay in presenting new evidence bears on the determination whether the petitioner has made the requisite showing." Id. at 1935; see also Schlup, 513 U.S. at 332 ("A court may consider how the timing of the submission and the likely credibility of [a petitioner's] affiants bear on the probable reliability of . . . evidence [of actual innocence.]").

In his reply, Petitioner asserts his actual innocence to escape the time bar.[13] He claims that he was not at the scene of the crime and offers as "the most critical piece of evidence" the alibi contained in the June 13, 2012 affidavit of Hughie Johnson. See Doc. 11 at 7, 30 (ECF pagination); Doc. 1-12 at 29-30 (ECF pagination).[14] Petitioner asserts that he submitted the affidavit in his June 2012 PCRA petition, see Doc. 11 at 7, although I am unable to confirm without the state court record if and when he in fact presented the affidavit to the state courts.[15] If Petitioner did submit the affidavit as he suggests, clearly it was not sufficient to meet any exception to the PCRA timeliness requirement, as his

[13]Although Plaintiff did not address timeliness in his petition, a number of argument sections are devoted to his asserted innocence. Doc. 1 at 29, 102, 114, 142, 184 (ECF pagination). However, these arguments go to the quality of the trial evidence and his lawyer's alleged failings, not to "new" evidence of innocence.

[14]In the affidavit, Mr. Johnson stated that he and Petitioner were friends since the early 1980's, and that Petitioner was with him and his girlfriend (later his wife) Charlette in Houston from sometime in June through September 1987 without interruption. Doc. 1-12 at 29. He also stated that he last saw Petitioner in 1989 when Petitioner was arrested, and that Petitioner had not contacted him thereafter. Id. Mr. Johnson stated that he was contacted about the matter at his old address by a man named Reginald Martin and Petitioner's daughter, id. at 30, although it is not clear from the affidavit when that contact occurred. Petitioner's bound exhibits (although not the bound version which the Clerk's Office scanned onto the docket) also include a letter from "Hughie" to "Bobby" dated June 26, 2011, from an address in England. Doc. 1 Exh. E (last six pages of the exhibit).

[15]As previously noted, Petitioner filed his Fourth PCRA petition on September 29, 2009, and his Fifth PCRA petition on November 2, 2012, neither of which date corresponds to the June 2012 petition Petitioner mentions. However, the state court docket entries disclose that Petitioner filed an amended petition on June 26, 2012, and filed a supporting affidavit on June 28, 2012, supporting Petitioner's representation that he submitted the affidavit to the state courts.

Ct. Op. at 1-2; see also 03/23/03 Finley Letter (Doc. 7-4), at 2 (noting Ms. McFarland provided a detailed description of the shooter and the clothes he was wearing, which was corroborated by another witness, and citing her trial testimony identifying Petitioner as shooter).

In light of the evidence and the passage of more than two decades between Petitioner's conviction and his submission of the Johnson affidavit, Petitioner cannot meet the exacting Schlup standard for a showing of actual innocence. See McQuiggin, 133 S. Ct. at 1933; Schlup, 513 U.S. at 329. Accordingly, Petitioner's habeas petition is time barred.

III. CONCLUSION

Petitioner's conviction became final on February 11, 1995, and the petition is not subject to statutory tolling because the state courts determined that each of his PCRA petitions was untimely. However, giving Petitioner the benefit of the doubt regarding the state courts' handling of his First PCRA, I will equitably toll the running of the AEDPA limitations period from its effective date in April 1996 through July 25, 2004, thirty days after the Superior Court affirmed the denial of his re-instated First PCRA. The limitations period started to run on that date, and Petitioner had one year, or until July 25, 2005, to file a timely habeas petition. There is no further basis to toll the running of the limitations period on equitable grounds, or on grounds of actual innocence, or to decline to enforce the time bar. Accordingly, the habeas petition filed on October 15, 2014, is time barred and should be dismissed.

petitions were all dismissed as untimely. As previously noted, Petitioner did not file a timely appeal of the dismissal of his Fifth PCRA petition.[16]

In addressing Petitioner's claim of actual innocence based on the Johnson affidavit, it is important to recall that Petitioner was convicted in February 1992 for crimes which occurred in July 1987. Petitioner was arrested in 1989, and obviously was aware that Johnson was an alibi witness from the outset, which is confirmed by Petitioner's argument that he told his trial counsel about Mr. Johnson prior to the trial in 1992. See Doc. 1 at 30-31 (ECF pagination). Yet the affidavit was not obtained until 2012, twenty years after the trial. Petitioner's PCRA counsel in 2003 (Mr. Lammendola) reported to the court that Petitioner did not identify the witnesses who should have been investigated, see 03/23/03 Finley Letter (Doc. 7-4) at 8, whereas Petitioner did give the name to his PCRA counsel in 2011 (Mr. Server). See 05/04/11 Finley Letter (Doc. 7-7) at 4. Although both PCRA counsel in 2011 and Petitioner noted difficulties in locating Mr. Johnson, the lengthy delay not only defies adequate explanation, but throws into question the credibility of Mr. Johnson to recall with specificity the whereabouts of Petitioner at the relevant time. See, e.g., Philipot v. Johnson, No. 14-0383, 2015 WL

[16]Following the PCRA court's March 25, 2015 dismissal of his Fifth PCRA petition as untimely, Petitioner informed the PCRA court that he would not file a timely appeal because he had this habeas petition pending before the undersigned, and he requested that the state court stay his Fifth PCRA. See Doc. 15 (copy of state court filing). The stay request is not reflected on the state court docket, nor is there any reason to believe that the state courts would hold his Fifth PCRA in abeyance pending disposition of this habeas petition. In any event, Petitioner's mistaken understanding of the time bar's operation does not provide an adequate basis to toll the running of the statute. See Jones, 195 F.3d at 160 (misunderstanding of the law is insufficient to equitably toll habeas limitations period).

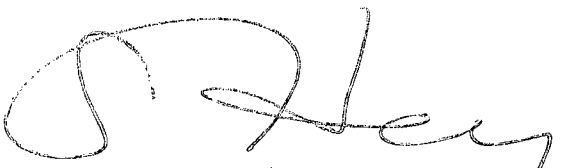
1906127, at * 6 (D. Del. Apr. 27, 2015) (Andrews, J.) (timing of affidavit submitted for purposes of actual innocence suspect where, inter alia, the affidavit was signed three and a half years after the denial of petitioner's direct appeal, and conflicting reasons were given for the delay). Moreover, the passage of over 22 years from Petitioner's conviction to the filing of this habeas petition potentially prejudices the government's ability to effectively re-try the case, particularly considering the trial involved fact witnesses, various police officers, a crime evidence specialist, an assistant medical examiner, and ballistics testimony. See McQuiggin, 133 S. Ct. at 1936 ("Considering a petitioner's diligence, not discretely, but as part of the assessment whether actual innocence has been convincingly shown, attends to the State's concern that it will be prejudiced by a prisoner's untoward delay in proffering new evidence."). For these reasons, Mr. Johnson's evidence does not constitute new and reliable evidence of Petitioner's innocence.

Even if the court were to view the Johnson affidavit as constituting new reliable evidence, Petitioner has not shown that "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." Schlup, 513 U.S. at 327. As the witness testimony described by the Superior Court and Petitioner's post-conviction counsel demonstrates, the evidence presented at trial was more than sufficient to support Petitioner's first-degree murder conviction. For example, Ms. McFarland, the victim's girlfriend, who was present at the time of the crime, described the events in detail, provided detailed descriptions of the shooter and his cohort to a police officer who arrived at the scene within minutes, and identified Petitioner as the shooter. 2008 Super.

Accordingly, I make the following:

RECOMMENDATION

AND NOW, this 19th day of May 2015, IT IS RESPECTFULLY RECOMMENDED that the petition for writ of habeas corpus be DISMISSED as untimely, and Petitioner's request for an evidentiary hearing be DENIED. There has been no substantial showing of the denial of a constitutional right requiring the issuance of a certificate of appealability. Petitioner may file objections to this Report and Recommendation. See Local Civ. Rule 72.1. Failure to file timely objections may constitute a waiver of any appellate rights.



ELIZABETH T. HEY
UNITED STATES MAGISTRATE JUDGE

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

BOBBY WILLIAMSON	:	CIVIL ACTION
v.	:	
KEVIN KAUFFMAN, et al.	:	NO. 14-5964

ORDER

AND NOW, this day of , 2014 , upon careful and independent consideration of the petition for writ of habeas corpus, and after review of the Report and Recommendation of United States Magistrate Judge Elizabeth T. Hey, IT IS ORDERED that:

1. The Report and Recommendation is APPROVED and ADOPTED.
2. The petition for a writ of habeas corpus is DISMISSED AS UNTIMELY.
3. Petitioner's request for an evidentiary hearing (Doc. 2) is DENIED.
4. There is no basis for the issuance of a certificate of appealability.

BY THE COURT:

WILLIAM H. YOHN, J.