APPENDIX A

CLD-124 March 7, 2019

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. 18-3423

CHAPEL THOMPSON, Appellant

VS.

SUPERINTENDENT ROCKVIEW SCI. ET AL.

(E.D. Pa. Civ. No. 5-17-cv-03860)

Present: CHAGARES, RESTREPO, and SCIRICA, Circuit Judges

Submitted is Appellant's application for a certificate of appealability under 28 U.S.C. § 2253(c)(1):

in the above-captioned case.

Respectfully,

Clerk

ORDER

The foregoing application for a certificate of appealability is denied. Jurists of reason would not debate whether the District Court was correct in determining that Appellant's claims in his habeas petition were either procedurally defaulted or untimely. See Slack v. McDaniel, 529 U.S. 473, 484 (2000). Appellant has not made the requisite showing to excuse his procedural default. See Coleman v. Thompson, 501 U.S. 722, 750 (1991). To the extent that his circumstantial evidence jury instruction claim relies on a claim of ineffective assistance of trial counsel, Appellant has not arguably shown that Martinez v. Ryan, 132 S. Ct. 1309, 1320 (2012), excuses the procedural default of his claims of ineffective assistance of trial counsel, as he has not demonstrated that the claim has "some merit." See Glenn v. Wynder, 743 F.3d 402, 410 (3d Cir. 2014) (quoting Martinez, 132 S. Ct. at 1319). Further, contrary to Thompson's contention, his conviction became final on January 13, 2015, ninety days after the Pennsylvania Supreme Court denied review on direct appeal. See Kapral v. United States, 166 F.3d 565, 575 (3d Cir. 1999). Appellant has failed to establish that he is entitled to equitable tolling of the

limitations period based on the transfer of his habeas petition on August 28, 2017. See Holland v. Florida, 560 U.S. 631, 649 (2010).

By the Court,

s/ L. Felipe Restrepo
Circuit Judge

Dated: April 2, 2019
CLW/cc: Mr. Chapel Thompson
Trista M. Boyd, Esq.

APPENDIX B

CHAPEL THOMPSON, Petitioner, v. MARK GARMAN, et al., Respondents.
UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA
2018 U.S. Dist. LEXIS 173352
CIVIL ACTION No. 17-3860
October 8, 2018, Decided
October 9, 2018, Filed

Editorial Information: Prior History

Thompson v. Garman, 2018 U.S. Dist. LEXIS 73263 (E.D. Pa., Apr. 27, 2018)

Counsel {2018 U.S. Dist. LEXIS 1}CHAPEL THOMPSON, Petitioner, Pro se, MARIENVILLE, PA.

For MARK GARMAN, PA STATE ATTORNEY GENERAL, DISTRICT ATTORNEY OF LANCASTER COUNTY, Respondents: TRISTA MARIE BOYD, LANCASTER CTY DA'S OFFICE, LANCASTER, PA.

Judges: WENDY BEETLESTONE, UNITED STATES DISTRICT JUDGE.

Opinion

Opinion by: WENDY BEETLESTONE

Opinion

ORDER

WENDY BEETLESTONE, J.

AND NOW, this 8th day of October, 2018, upon careful and independent consideration of the petition for a writ of habeas corpus, and after review of the Report and Recommendation of United States Magistrate Judge Timothy R. Rice, IT IS ORDERED that:

1. The Report and Recommendation is APPROVED and ADOPTED;
2. The Petition for Writ of Habeas Corpus is DENIED with prejudice;
3. The request for an evidentiary hearing is DENIED with prejudice;
4. The request for counsel is DENIED with prejudice;
4. There is no probable cause to issue a certificate of appealability; and
5. The Clerk of the Court shall mark this case closed for statistical purposes.

BY THE COURT:

/s/ Wendy Beetlestone

WENDY BEETLESTONE

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

CHAPEL THOMPSON, Petitioner,	:	CIVIL ACTION
v.	:	
MARK GARMAN, et al., Respondents.	:	No. 17-3860

REPORT & RECOMMENDATION

TIMOTHY R. RICE
U.S. MAGISTRATE JUDGE

April 27, 2018

Petitioner Chapel Thompson, a prisoner at the State Correctional Institution in Rockview, Pennsylvania, has filed a pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, alleging his rights to due process and effective assistance of counsel were violated by: (1) jury instructions on circumstantial evidence; (2) jury instructions about letters written by Thompson's co-defendant; and (3) an undisclosed plea deal between the prosecution and one of Thompson's accomplices. I respectfully recommend Thompson's claims be dismissed as untimely, procedurally defaulted, or meritless.

FACTUAL AND PROCEDURAL HISTORY

In January 2013, a jury convicted Thompson of three counts of robbery, two counts of kidnapping, theft by extortion, unlawful restraint, and conspiracy, based on a series of armed robberies. See Commonwealth v. Thompson, CP-36-CR-0001547-2012, Dkt. at 4–7; 08/26/2013 Tr. Ct. Op. at 1.

Two accomplices, Lennell Preston and Aaron Robinson, were charged in connection with the same events. See N.T. 01/18/2013 at 240–41. At trial, Preston testified that he, Thompson, and Robinson had "forcibly" ordered the victim, Leroy Freeman, to a backroom in his

workplace, where Preston handcuffed Freeman to a pole using Thompson's handcuffs. Id. at 247–48. Robinson kept a gun pointed at Freeman while they demanded money from him. Id. at 249. They later drove Freeman to an ATM to withdraw more cash, which Preston, Thompson, and Robinson split. Id. at 251–54. Preston said the group planned to make Freeman withdraw more money the next day, although Preston did not end up returning. Id. at 255.

Preston testified that he and Thompson, after hearing Freeman had gone to the police, checked the Pennsylvania court docket website and discovered "a long list of charges" filed against them. Id. at 257. Robinson wanted to intimidate Freeman into changing his story, and the jury saw several letters from Robinson to Preston relaying that plan. Id. at 258–59, 266–69.

On cross-examination, Preston testified that the Commonwealth had not offered him a deal up front in exchange for his testimony. Id. at 271. He said he did not expect to get a break, although he "would hope to be given some consideration." Id. at 272. Preston admitted a 30-day sentence for a traffic violation had been "taken care of" after he told the detective he did not want to be incarcerated alongside Thompson and Robinson. Id. at 273, 305–06. Preston also admitted he received a favorable plea agreement after testifying in an unrelated case more than a decade earlier, and agreed that he knew cooperation with the Commonwealth could potentially lead to beneficial treatment. Id. at 278–80. On re-cross, Preston confirmed he was "not here today just to save [his] own skin." Id. at 310.

Freeman, who testified as well, largely corroborated Preston's version of events. See N.T. 01/17/2018 at 135–49. He also testified that Thompson demanded more money the next day, and that Robinson assaulted Freeman the following week. Id. at 149–60. Later, the jury was shown two guns and a pair of handcuffs recovered from Thompson's home. Id. at 227–35.

In April 2013, Thompson was sentenced to 23 to 46 years in prison. Dkt. at 4–8; 08/26/2013 Tr. Ct. Op. at 2. The Superior Court affirmed in May 2014, and the Pennsylvania Supreme Court denied review on October 15, 2014. See Dkt. at 13; 391 MAL 2014, Dkt. at 3.

On January 11, 2016, Thompson filed a petition under Pennsylvania's Post Conviction Relief Act, 42 Pa. C.S. § 9541 et seq. ("PCRA"). See Dkt. at 13. The PCRA court dismissed his petition in August 2016, and the Superior Court affirmed on July 18, 2017. Id. at 14–15.

On July 31, 2017, Thompson filed his habeas petition, alleging his rights to due process and counsel were violated when the trial court (1) improperly instructed the jury about circumstantial evidence, and (2) failed to instruct the jury about potential bias in Preston's testimony. See Hab. Pet. I (doc. 1) at 6–8. In October 2017, Thompson withdrew his second claim and added a new one based on the trial court's failure to instruct the jury that the incriminating letters written by co-defendant Robinson could be used only against Robinson. See Hab. Pet. II (doc. 9) at 1.

In November 2017, Thompson filed a second PCRA petition, alleging he had recently learned the prosecutor had falsely told the jury that Preston was testifying from the goodness of his heart, when in fact the Commonwealth had agreed to reduce Preston's charges.[1] See 11/19/2017 PCRA Pet. In January 2018, Thompson moved to add a due process claim to his federal petition based on this alleged prosecutorial misconduct, and requested a stay pending state court proceedings. See 01/10/2018 Mot. to Am. (doc. 15) at 1–3.

On January 22, 2018, the PCRA court dismissed Thompson's second petition as untimely. See 01/22/2018 PCRA Ct. Op. at 1–2. Thompson did not appeal. See Dkt. at 16.

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[1] In July 2013, after Thompson's trial concluded, all charges against Preston were withdrawn or dismissed. See Commonwealth v. Preston, CP-36-CR-0001538-2012, Dkt. ("Preston Dkt.") at 4.

In February 2018, Thompson filed his second amended federal petition, adding the prosecutorial misconduct due process claim. See Hab. Pet. III (doc. 18) at 1. He seeks an evidentiary hearing and appointment of counsel. Id. at 3.

DISCUSSION

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") imposes strict procedural constraints on prisoners seeking writs of habeas corpus, including a one-year statute of limitations and a requirement to exhaust state court remedies. See 28 U.S.C. § § 2244(d)(1), 2254(b)(1). Because Thompson fails to demonstrate that he meets these requirements or qualifies for an exception, his claims must be dismissed.

I. Circumstantial Evidence Claim

Thompson argues his "due process rights were violated due to structural error in circumstantial evidence instruction." Hab. Pet. I at 6. This claim is procedurally defaulted and meritless.

Before seeking federal relief, a habeas petitioner must exhaust all available state court remedies, see 28 U.S.C. § 2254(b)(1), "thereby giving the State the opportunity to pass upon and correct alleged violations of its prisoners' federal rights," Baldwin v. Reese, 541 U.S. 27, 29 (2004) (citations omitted). If a petitioner has failed to exhaust his state court remedies and the state court would now refuse to review a claim on procedural grounds, the claim is procedurally defaulted. See Coleman v. Thompson, 501 U.S. 722, 735 n.1 (1991); Bey v. Superintendent Greene SCI, 856 F.3d 230, 236 (3d Cir. 2017). Procedural default may be excused only if a petitioner demonstrates a legitimate cause for the default and actual prejudice from the alleged constitutional violation. Coleman, 501 U.S. at 750.

Ineffective assistance of PCRA counsel may provide cause for defaulting a claim of trial

counsel ineffectiveness if: (1) PCRA counsel's failure to raise the claim constituted ineffective assistance under Strickland v. Washington, 466 U.S. 668 (1984); and (2) the underlying trial counsel ineffectiveness claim is "a substantial one," meaning it has "some merit." Martinez v. Ryan, 566 U.S. 1, 14 (2012). Strickland ineffectiveness requires establishing: (1) deficiency, meaning "errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment"; and (2) prejudice, meaning "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694.

Habeas courts reviewing an allegedly unconstitutional jury charge must examine "whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." Estelle v. McGuire, 502 U.S. 62, 72–73 (1991). Due process is violated only where there is "'a reasonable likelihood'" the jury applied the challenged instruction in a way that relieves the government of its burden of proving every element beyond a reasonable doubt. Bennett v. Superintendent Graterford SCI, No. 16-1908, 2018 WL 1463505, at *11–12 (3d Cir. Mar. 26, 2018) (quoting Waddington v. Sarausad, 555 U.S. 179, 190–91 (2009)).

Thompson concedes his circumstantial evidence instruction claim is procedurally defaulted, but argues the default should be excused under Martinez because trial counsel was ineffective for failing to object to the instructions, and PCRA counsel was ineffective for failing to raise trial counsel's ineffectiveness. See Hab. Pet. I at 6–7; Petr. Br. (doc. 10) at 4, 6–8, 10.

The trial court instructed the jury that direct evidence "is something that you see or a witness sees or hears or experiences," and circumstantial evidence "is the conclusion that is reached based upon what somebody else sees or hears or observes." N.T. 01/18/2013 at 463. Circumstantial evidence from a witness, the court explained, is "testimony that leads you to a

conclusion that some other fact might exist." Id.

The court used an example of snow in the yard to illustrate the difference:

> Perhaps the best way to do this is talk about suppose you go to bed on a winter's night. Before you do so, you look out in the front yard. If you actually see it snowing, that's direct evidence. You may conclude that it's snowing.
>
> If you don't actually see it snowing and you wake up the next morning and you see snow in the front yard, you may conclude by circumstantial evidence that it, in fact, snowed the night before.
>
> Let's take that one step further. Suppose you don't look out in the front yard at all the next morning but one of your children or a family member comes to you and says, it snowed last night.
>
> Well, if you don't actually see it snowing, you don't have direct evidence, but you are relying upon one of your children's testimony or their statement to you that it snowed the night before.
>
> You first have to accept what they tell you to be truthful. If they actually saw it snowing, they obtained that evidence by direct. If they didn't and it's in the front yard, that's circumstantial evidence.
>
> Go even one step further. Suppose your family member comes to you and says, someone walked across our front yard in the snow. Well, if you saw the footprints or if you actually saw somebody walking across the front yard, that's direct evidence. If you ask your child or your family member, how do you know that? Well, I saw footprints in the snow.
>
> Number one, you have to believe what the person is telling you; and number two, the footprints, does that lead you to the conclusion that someone walked across the front yard.

Id. at 463–65.

Thompson argues that, although the trial court "correctly explained [circumstantial evidence] in the beginning instruction," the additional explanation "distorted" the accurate instructions and violated due process. Petr. Br. at 9. He contends the court's example "conveyed to the jury that they could consider what someone else saw without the jury seeing it themselves and rely on the credibility of that person to make a connection with facts, without ever presenting the facts for the jury." Id. I disagree.

The circumstantial evidence instructions, taken as a whole, did not relieve the Commonwealth of its burden of proof and did not violate due process. Nor were the trial court's

examples unconstitutional. Whether evidence is circumstantial or direct, a jury "must use its experience with people and events" to "weigh the chances that the evidence correctly points to guilt against the possibility of inaccuracy or ambiguous inference." Holland v. United States, 348 U.S. 121, 137–38 (1954). Throughout the trial, the court emphasized the jurors' duty to accept only evidence they deemed truthful, telling them: "You may also rely upon the logical inferences which flow or can be derived from that evidence. You are not to rely upon supposition or guess on any matters which are not in evidence, and you should not regard as true any evidence which you find to be incredible, even if it is uncontradicted." N.T. 01/18/2013 at 456; see also id. at 459 (explaining that witness believability "is solely for [the jury's] determination"), 461 ("It's entirely up to you to decide what portion, if any, of a person's testimony to accept as truthful and thereby rely upon it or to reject any or all or any portion of a person's testimony if you find it is not truthful and not worthy of belief."); N.T. 01/17/2013 at 95–96 (reiterating jury's duty to assess credibility and providing relevant factors to consider).

The court also clearly instructed the jury about the burden of proof: "[A] defendant is presumed to remain innocent throughout the entire trial unless and until you conclude, based upon a careful and impartial consideration of all of the evidence, that the Commonwealth has proven him guilty beyond a reasonable doubt of the charges made against him." Id. at 90–91; see also N.T. 01/18/2013 at 456 (explaining that the jury must determine whether crimes were committed and whether the defendant committed those crimes "as proven by the Commonwealth beyond a reasonable doubt"), 457 ("It is not the defendant's burden to prove that he is not guilty. Instead, it is the Commonwealth that always has the burden of proving each and every element of the crime charged against the defendant beyond a reasonable doubt."). The trial court defined

reasonable doubt multiple times, see N.T. 01/17/2013 at 91–92; N.T. 01/18/2013 at 457–58, concluding:

> So to summarize reasonable doubt, you may not find the defendants guilty based upon a mere suspicion of guilt. The Commonwealth has the burden of proving the defendant guilty beyond a reasonable doubt.
>
> If the Commonwealth has met that burden, the defendant is no longer presumed to be innocent and you should find him guilty. On the other hand, if the Commonwealth has not met its burden, then you must find the defendant or defendants not guilty.

N.T. 01/18/2013 at 458–59. The jury instructions, taken as a whole, did not relieve the Commonwealth of its burden of proof. See Bennett, 2018 WL 1463505, at *11–12; see also Holland, 348 U.S. at 138 ("If the jury is convinced beyond a reasonable doubt [by the circumstantial evidence], we can require no more.").

Because the jury instruction did not violate due process, trial counsel was not ineffective for failing to object, and PCRA counsel was not ineffective for failing to raise the underlying ineffectiveness claim. See United States v. Sanders, 165 F.3d 248, 253 (3d Cir. 1999) ("There can be no Sixth Amendment deprivation of effective counsel based on an attorney's failure to raise a meritless argument."). Thompson is unable to meet either Martinez prong, see 566 U.S. at 14, and his claim should be denied as procedurally defaulted and meritless.

II. Letter Claim

Thompson argues his "due process rights were violated when the trial court allowed the introduction of an incriminating letter against the alleged co-defendant but failed to instruct the jury that the letter could only be considered against the alleged co-defendant and not petitioner." Hab. Pet. II at 1. This claim is untimely.

AEDPA's one-year limitations period generally begins on the date the petitioner's judgment of sentence became final "by the conclusion of direct review or the expiration of the

time for seeking such review." 28 U.S.C. § 2244(d)(1)(A). The limitations period may be tolled for "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending." Id. § 2244(d)(2).

Thompson's judgment of sentence became final on January 13, 2015, 90 days after the Pennsylvania Supreme Court denied review of his sentence. See 28 U.S.C. § 2244(d)(1)(A); Sup. Ct. R. 13 (allowing 90 days to file a petition for certiorari with the Supreme Court of the United States); Swartz v. Meyers, 204 F.3d 417, 419 (3d Cir. 2000) (judgment of sentence becomes final at conclusion of direct review or expiration of time for seeking such review).

Thompson timely filed a PCRA petition on January 11, 2016, which tolled the federal limitations period. See 28 U.S.C. § 2244(d)(2). The Superior Court dismissed his petition on July 18, 2017. The dismissal became final 30 days later, on August 17, 2017, see Pa. R.A.P. 903, at which time Thompson had two days to file his federal petition. Although Thompson timely filed his original habeas petition on July 31, 2017, his letter claim, added in October 2017, is untimely unless it "relates back" to the initial, timely petition. See Fed. R. Civ. P. 15(c)(2); Mayle v. Felix, 545 U.S. 644, 649, 655 (2005). An amendment relates back if "the original and amended petitions state claims that are tied to a common core of operative facts." Mayle, 545 U.S. at 664. A claim will not relate back if it constitutes "a new ground for relief supported by facts that differ in both time and type from those the original [petition] set forth." Id. at 650.

Thompson's letter claim does not relate back. In his original petition, Thompson argued his "due process rights were violated when trial court failed to give corrupt source instruction," because "the state called Petitioner's alleged co-defendant [Preston] to testify against Petitioner but the trial court failed to instruct the jury for potential bias." Hab. Pet. I at 7 (citing N.T. 01/18/2013 at 460–61). He later withdrew this claim and added a new one. Hab. Pet. II at 1 n.1.

In his new claim, Thompson alleges his "due process rights were violated when the trial court allowed the introduction of an incriminating letter against [Robinson] but failed to instruct the jury that the letter could only be considered against [Robinson] and not [Thompson]." Id. at 1. He explains that "the Commonwealth introduced a letter supposedly written by alleged co-defendant Aaron Robinson which depicted some sort of intimidation of the alleged victim," id., "which the Commonwealth tried to [use to] establish consciousness of guilt," Petr. Br. at 5. In support, Thompson accurately quotes the trial court's jury instruction:

> There was also evidence suggesting that Defendant Robinson sent letters to Lennell Preston which advocated intimidation of the victim, Leroy Freeman. If you believe this evidence, you may consider it as tending to prove the defendant's consciousness of guilt. You are not required to do so, however. You should consider and weigh this evidence along with all of the other evidence presented in this case.

Petr. Br. at 5 (quoting N.T. 01/18/2013 at 481). Thompson contends the court "did not inform the jury that this evidence could only be used against Mr. Robinson and not [Thompson]." Id.

Although both the letter claim and the corrupt source claim relate to jury instructions and Thompson's accomplices, "these common features are not enough to make the claims arise from the same 'operative facts' when the problems asserted with the jury charge are entirely unrelated." Wilkerson v. Superintendent Fayette SCI, 871 F.3d 221, 237 (3d Cir. 2017) (quoting Mayle, 545 U.S. at 664). The operative fact underlying the corrupt source claim is that the jury allegedly was not cautioned to assess Preston's testimony skeptically based on his bias and self-interest in testifying for the Commonwealth. The operative fact of the new claim is that the jury allegedly was not instructed to consider Robinson's letter only against its author. "These claims are not the same in 'time and type,' but are distinct claims with their own factual predicates that happen to involve the presence or absence of [limits on permissible use of an accomplice's evidence] in the jury instructions." Wilkerson, 871 F.3d at 238 (quoting Mayle, 545 U.S. at

657). Thompson's letter claim does not relate back to his original, timely petition and is therefore barred by AEDPA's one-year limitations period. Thompson has alleged no exception to the limitations period and I have identified none. See infra Part III.A (analyzing exceptions).

III. Prosecutorial Misconduct Claim

Thompson argues his due process rights "were violated due to the prosecutor conveying to the jury that [Lennell Preston] . . . was testifying from the goodness of his heart and he would be receiving the same punishment regardless of his testimony in violation of Brady/Giglio." Hab. Pet. III at 1. This claim is untimely, procedurally defaulted, and meritless.

Under Brady v. Maryland, 373 U.S. 83 (1963), a criminal defendant's due process rights are violated when: (1) evidence that is "favorable to the accused, either because it is exculpatory, or because it is impeaching"; (2) has been "suppressed by the State"; and (3) "there is a reasonable probability" the conviction or sentence would have been different had the evidence been disclosed. Strickler v. Greene, 527 U.S. 263, 281–82, 296 (1999). The government's failure to disclose material "evidence affecting credibility" violates due process when "the 'reliability of a given witness may well be determinative of guilt or innocence.'" Giglio v. United States, 405 U.S. 150, 154 (1972) (quoting Napue v. Illinois, 360 U.S. 264, 269 (1959)).

A. Timeliness

Thompson added his Brady claim in February 2018, six months after the federal limitations period expired in August 2017. He attributes the untimely filing to the fact that he did not receive the relevant information until October 2017.[2] See 01/10/2018 Mot. to Am. at 2.

Although the one-year limitation period typically runs from the date a petitioner's

[2] Thompson also argues the claim is not untimely because he requested a stay while his second PCRA petition was pending. See Reply Br. at 2. This request, however, was filed in January 2018, which still places it outside the limitations period. See 01/10/2018 Mot. to Am.

judgment becomes final, AEDPA allows for certain alternative start dates. See 28 U.S.C. § 2244(d)(1)(B)–(D). Because Thompson has characterized Preston's alleged plea deal as newly discovered evidence, I shall construe his petition as seeking a start date based on "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." See id. § 2244(d)(1)(D); Estelle v. Gamble, 429 U.S. 97, 106 (1976) (requiring liberal construction of pro se pleading).

Preston's charges were dismissed or withdrawn in July 2013. See Preston Dkt. at 4. Thompson claims he did not receive this information until October 2017. See Hab. Pet. III at 1. He fails to explain, however, why he could not have discovered the information earlier by checking the public court docket, especially given the evidence showing Preston and Thompson had checked their dockets online after the robbery. See N.T. 01/18/2018 at 257. Instead, Thompson argues that "due diligence is not a factor under Brady," pursuant to Dennis v. Sec'y, Pa. Dept. of Corr., 834 F.3d 263 (3d Cir. 2016).[3] Reply Br. at 3. Although Dennis observed that "the concept of 'due diligence' plays no role in the Brady analysis," 834 F.3d at 291, this conclusion was not made in the context of timeliness. Rather, the court was explaining that the Commonwealth is not absolved of its Brady obligation simply because the exculpatory documents are publicly accessible. See id. at 288–93. Although the availability of Preston's docket would not bar a Brady claim, Thompson's inability to show he exercised due diligence by

[3] Thompson also asserts in the timeliness section of his reply brief that he "would be in compliance consistent with the Miller warnings." Reply Br. at 3. Miller warnings refer to a district court's obligation not to recharacterize a pro se pleading "as a habeas petition unless it first warns the petitioner of the consequences under AEDPA, including the bar on successive petitions, and gives the petitioner a chance to oppose the recharacterization or to withdraw or amend the motion." Hatches v. Schultz, 381 F. App'x 134, 136 (3d Cir. 2010) (citing United States v. Miller, 197 F.3d 644, 652 (3d Cir. 1999)). Because Thompson's amended petition was not recharacterized as a first § 2254 or § 2255 motion, Miller warnings are irrelevant to his claim. See id.; see also Castro v. United States, 540 U.S. 375, 383 (2003).

checking the docket precludes an alternative start date for purposes of a timeliness analysis.

Equitable tolling of AEDPA's limitations period is warranted in rare circumstances. Schlueter v. Varner, 384 F.3d 69, 75 (3d Cir. 2004). A petitioner must show both "extraordinarily burdensome circumstances" and "reasonable diligence in investigating the claim." Sistrunk v. Rozum, 674 F.3d 181, 189 (3d Cir. 2012). Because Thompson fails to establish diligence or an extraordinary circumstance that prevented him from filing his federal petition earlier, he is not entitled to equitable tolling.

A petitioner's "convincing showing of actual innocence" may also serve as a "gateway" to judicial review of an untimely habeas petition. McQuiggin v. Perkins, 569 U.S. 383, 386 (2013). Thompson must provide "(1) new evidence (2) that is reliable and (3) so probative of innocence that no reasonable juror would have convicted." Sistrunk, 674 F.3d at 191. Thompson, however, does not assert his innocence, and evidence of the alleged Brady violation does not render it more likely than not that no reasonable juror would have convicted. He cannot satisfy the "supremely high bar" of the actual innocence exception. See id. at 192; see also Schlup v. Delo, 513 U.S. 298, 324 (1995) ("claims of actual innocence are rarely successful").

B. Procedural Default

Thompson raised his Brady claim in his second PCRA petition. Because the PCRA court dismissed that petition as untimely, however, the claim is procedurally defaulted. See Coleman, 501 U.S. at 735 n.1; 42 Pa. C.S. § 9545(b)(1) (PCRA petition must be filed within one year of final judgment except in limited circumstances); Glenn v. Wynder, 743 F.3d 402, 409 (3d Cir. 2014) (PCRA time-bar is adequate and independent state ground). Thompson argues the procedural default for all three of his claims is excused under Martinez. Reply Br. at 1. Martinez, however, applies only to underlying claims of trial counsel ineffectiveness. See 566

U.S. at 14. Thompson's Brady claim does not allege trial counsel was ineffective, so his procedural default cannot be excused under Martinez.

C. Merits

Even if Thompson's Brady claim were timely and not defaulted, it is meritless. If the state court denies a claim on the merits, I can grant relief only if the state court's decision: (1) "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States"; or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). This is a "difficult to meet and highly deferential standard . . . which demands that state-court decisions be given the benefit of the doubt." Cullen v. Pinholster, 563 U.S. 170, 181 (2011) (internal quotations omitted). "[E]ven a strong case for relief does not mean the state court's contrary conclusion was unreasonable." Harrington v. Richter, 562 U.S. 86, 102 (2011).

The PCRA court determined that Thompson "failed to demonstrate a violation of his due process rights under Brady." 01/22/2018 PCRA Ct. Op. at 22. This finding merits deference. See Rolan v. Coleman, 680 F.3d 311, 321 (3d Cir. 2012) ("where a state court has considered the merits of the claim, and its consideration provides an alternative and sufficient basis for the decision, such consideration warrants deference").

Noting that Preston was "under oath and subject to cross-examination," the state court found him "credible in stating that there was no deal struck, and that there was no definitive agreement between Preston and the prosecution." 01/22/2018 PCRA Ct. Op. at 19; see also id. at 16–19 (analyzing N.T. 01/18/2013 at 271–74, 306). The court explained: "The fact that Preston received favorable treatment in his case after testifying against Thompson does not establish there was an agreement; all Thompson has demonstrated is that Preston's cooperation was taken

into consideration by the Commonwealth—something any testifying witness with pending charges hopes will happen." Id. at 20. The court concluded that "no Brady violation took place as the prosecutor fully disclosed to Thompson all information related to the cooperating co-defendant." Id. at 21. This was not an unreasonable finding of fact or an objectively unreasonable application of Brady.

Even assuming a deal existed and was suppressed, the state court found "no prejudice resulted because the jury was aware of Preston's motive to testify falsely against Thompson to obtain leniency in his own prosecution. Moreover, the jury was presented with significant evidence beyond Preston's testimony to convict Thompson." Id. Given Preston's testimony, Freeman's testimony, and the guns and handcuffs recovered from Thompson's house, the state court was not unreasonable in finding Thompson's proffered evidence "insufficient to 'put the whole case in such a different light as to undermine confidence in the verdict.'" 01/22/2018 PCRA Ct. Op. at 21–22 (quoting Strickler, 527 U.S. at 290). Preston's reliability was not determinative of guilt or innocence, see Giglio, 405 U.S. at 154, and there was not a reasonable probability that disclosing evidence of the unproven plea deal would result in a different outcome, see Strickler, 527 U.S. at 296. Thompson's claim should be denied as meritless.

IV. Requests for Evidentiary Hearing and Counsel

I have discretion to order an evidentiary hearing if such a hearing would be meaningful. See Campbell v. Vaughn, 209 F.3d 280, 287 (3d Cir. 2000). A petitioner must show there is new evidence that can help his "cause," or otherwise explain how his "claim would be advanced by an evidentiary hearing." Id. Because Thompson has failed to show that an evidentiary hearing would be meaningful, his request should be denied.

I also may appoint counsel for a habeas petitioner when the interests of justice require.

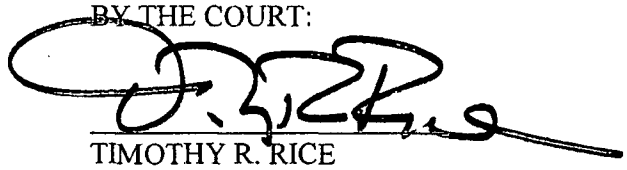
See 18 U.S.C. § 3006A(a)(2)(B); see also Rule 6(a), 28 U.S.C. fol. § 2254 (court must appoint counsel if necessary for effective discovery and petitioner qualifies for counsel under § 3006A); Rule 8(c), 28 U.S.C. fol. § 2254 (if evidentiary hearing is warranted, court must appoint counsel if petitioner qualifies for counsel under § 3006A). I must consider whether Thompson has presented a non-frivolous claim, whether appointing counsel would benefit Thompson and the court, the complexity of the factual and legal issues, and Thompson's ability to investigate the facts and present claims. See Reese v. Fulcomer, 946 F.2d 247, 263-64 (3d Cir. 1991), superseded on other grounds by statute, 28 U.S.C. § 2254. Because the interests of justice do not require the appointment of counsel, Thompson's request should be denied.

Accordingly, I make the following:

RECOMMENDATION

AND NOW, on April 27, 2018, it is respectfully recommended that the petition for a writ of habeas corpus be DISMISSED with prejudice. It is further recommended that there is no probable cause to issue a certificate of appealability.[4] The petitioner may file objections to this Report and Recommendation within fourteen days after being served with a copy. See Local Civ. Rule 72.1. Failure to file timely objections may constitute a waiver of any appellate rights. See Leyva v. Williams, 504 F.3d 357, 364 (3d Cir. 2007).

BY THE COURT:



TIMOTHY R. RICE
U.S. MAGISTRATE JUDGE

[4] Jurists of reason would not debate my recommended procedural or substantive dispositions of the petitioner's claims. See Slack v. McDaniel, 529 U.S. 473, 484 (2000). Therefore, no certificate of appealability should be granted. See id.