

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17-3229

SCOTT OLIVER, Appellant

v.

SUPERINTENDENT GRATERFORD SCI, et al.

(E.D. Pa. Civ. No. 5-16-cv-00920)

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: April 3, 2018
ARR/cc: SDO; RJK

DLD-124

February 15, 2018

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. 17-3229

SCOTT D. OLIVER, Appellant

VS.

SUPERINTENDENT GRATERFORD SCI, et al.

(E.D. Pa. Civ. No. 5-16-cv-00920)

Present: JORDAN, SHWARTZ and KRAUSE, Circuit Judges

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

in the above-captioned case.

Respectfully,

Clerk

ORDER

The application for a certificate of appealability is denied. See 28 U.S.C. § 2253(c). Jurists of reason would not debate the District Court's denial of relief on Appellant's free-standing claim of innocence. See Miller-El v. Cockrell, 537 U.S. 322 (2003). Jurists of reason also would not debate the District Court's dismissal of Appellant's due process claims as untimely. More specifically, Appellant's conviction was final in August 1993, and since he was not able to make a sufficient showing of his innocence under Schlup v. Delo, 513 U.S. 298, 329 (1995), his February 24, 2016 filing was untimely. See McQuiggin v. Perkins, 569 U.S. 383 (2013). Jurists of reason would not debate these points.

By the Court,

s/Patty Shwartz
Circuit Judge

Dated: February 23, 2018
ARR/cc: SDO; RJK



A True Copy:

Patricia A. Dodszeit

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

Appendix B

APPENDIX "C"

District Court's Order adopting the Magistrate's R/R
at No. 16-0920
(9/18/17)

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

SCOTT D. OLIVER

v.

WARDEN CYNTHIA LINK, et al.

C.A. NO. 16-920

FILED SEP 18 2017

ORDER

AND NOW, this 15th day of September, 2017, upon careful *de novo* consideration of the petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2254, the response, the thorough and well-reasoned report and recommendation of United States Magistrate Judge Timothy R. Rice, petitioner's objections to the report and recommendation, it is hereby **ORDERED** that:

1. Petitioner's objections [Doc. 8] are **OVERRULED**.
2. The report and recommendation of United States Magistrate Judge Timothy R. Rice [Doc. 6] is **APPROVED** and **ADOPTED**.
3. The petition for writ of habeas corpus is **DISMISSED WITH PREJUDICE**.
4. The petitioner having failed to demonstrate that a reasonable jurist could conclude that the court is incorrect in dismissing the petition, there is no ground to issue a certificate of appealability.
5. The Clerk is **DIRECTED** to mark this case closed.

BY THE COURT:

/s/ Jeffrey L. Schmehl
JEFFREY L. SCHMEHL, J.

ENTERED
SEP 18 2017
CLERK OF COURT

Appendix C

APPENDIX "D"

Magistrate Report & Recommendation
at No. 16-0920
(7/21/17)

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

SCOTT D. OLIVER,
Petitioner,

v.

CYNTHIA LINK, et al.,
Respondents.

CIVIL ACTION

No. 16-0920

FILED

JUL 22 2016

LUCY V. CHIN, Interim Clerk
By _____ Dep. Clerk

REPORT & RECOMMENDATION

TIMOTHY R. RICE
U.S. MAGISTRATE JUDGE

July 21, 2016

Scott Oliver, a prisoner at the State Correctional Institution in Graterford, Pennsylvania, filed a pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. For the following reasons, I recommend denying his claims with prejudice. His newly discovered evidence claim is meritless, and his other claims are untimely.

FACTUAL AND PROCEDURAL HISTORY

In February 1991, Oliver was found guilty of first-degree murder, rape, involuntary deviate sexual intercourse, and indecent assault, following a three-week trial during which the jury was sequestered due to the publicity the case had attracted. N.T. 1/11/91 at 101; 1/14/91 at 50; 2/8/91 at 4093. Before the trial began, Oliver had pled guilty to corruption of minors and furnishing liquor to minors under age 16. N.T. 1/23/91 at 1409-10. Although his convictions were death penalty eligible, Oliver was sentenced to life imprisonment on February 9, 1991. Commonwealth v. Oliver, CP-48-CR-2354-1989, Crim. Dkt. at 5.¹

The crimes to which Oliver pled guilty related to a party held by a group of juveniles on August 20, 1989. Commonwealth v. Oliver, 3092 EDA 2013, at 1-3 (Pa. Super. Feb. 26, 2015)

¹ Consecutive sentences on the other charges were imposed on October 16, 1992. N.T. 10/16/92 at 17-18.

ENTERED

JUL 25 2016

CLERK OF COURT

Appendix D-1

("Super. Ct. Op."). Oliver admitted he had purchased beer for the group, which included the 11-year-old victim. N.T. 1/23/91 at 1414-15; 2/5/91 at 3599. He also admitted he walked the victim home that evening. N.T. 2/5/91 at 3609. He denied raping or killing her, however, and contended that a signed confession to the rape and murder, hand-written by a Northampton County detective on August 22, 1991, was inaccurate and signed under duress. Id. at 18, 21, 25-26. At trial, neither the Commonwealth nor the defense submitted DNA evidence because the forensic exam had failed to produce sufficient samples for testing. N.T. 6/12/92 at 73-75.

Oliver first filed a petition for relief under Pennsylvania's Post Conviction Relief Act ("PCRA"), 42 Pa. C.S.A. § 9542 et seq., before the completion of his direct appeal. Commonwealth v. Oliver, 3708 PHL 1992, Dkt. at 2; 21Crim. Dkt. at 2 PHL 1993, Dkt. at 2. The Superior Court resolved both appeals in an August 1993 opinion affirming judgment and denying due process claims contesting the trial judge's rulings on recusal, the confession, venue, and photographic evidence. Id.; Habeas Pet. (doc. 1) at 3. The Pennsylvania Supreme Court declined review of the combined appeal on February 9, 1994. Id. at 3. A second PCRA petition was denied, in July 2002, as untimely. Crim. Dkt. at 7.

In 2009, new testing techniques revealed male DNA from the victim's original vaginal swab that did not belong to Oliver. November 2009 DNA testing report ("11/09 Report"), attached to Pet. Br. for Ev. Hearing (Nov. 3, 2011) as Ex. A, attached hereto as Ex. A. On January 14, 2010, the Innocence Project filed a PCRA petition on Oliver's behalf, and sought testing of additional tissue samples with the agreement of the Commonwealth. 2010 PCRA Petition at 7. The Innocence Project withdrew from Oliver's case when that testing could not be completed because the other samples contained no male DNA, and mtDNA² testing of hair

² Mitochondrial DNA ("mtDNA") testing is a more sensitive but less specific forensic methodology that can be used with older pieces of evidence containing smaller fragments of

samples found on the victim did not exclude Oliver as their source. July 2011 mtDNA report summary ("mtDNA Report"), attached to Pet. Br. for Ev. Hearing as Ex. B, attached hereto as Ex. B, at 2. Oliver continued to pursue PCRA relief with substitute assigned counsel, which was denied on October 14, 2013.³ Crim. Dkt. at 22. The Superior Court affirmed on February 26, 2015. Super. Ct. Op. at 1; 3092 EDA 2013 Dkt. at 3.⁴ The Pennsylvania Supreme Court declined review on August 10, 2015. Crim. Dkt. at 30.

On December 21, 2015, Oliver filed his habeas petition, alleging: (1) after-discovered DNA evidence proves he was convicted in error; and (2) a variety of due process violations, including a coerced confession and biased judge and jury. Habeas Pet. at 1-10.

DISCUSSION

I. Timeliness

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") imposes a one-year limitations period on applications for writs of habeas corpus. 28 U.S.C. § 2244(d)(1). Generally, the limitations period 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."

biological material. FBI Laboratory Partners with 4 Regional Crime Laboratories to Increase DNA Capabilities, 2005 WL 2866048 (Joint DOJ/FBI news release) (Nov. 2, 2005). Because individuals with the same maternal lineage can share mtDNA, the testing cannot positively identify an individual, but it can rule out a specific suspect. Id.

³ Oliver's 2010 PCRA was originally denied November 30, 2012. Crim. Dkt. at 14. The case was remanded by the Superior Court, however, for reconsideration focused exclusively on the November 2009 testing. Id. at 21; Commonwealth v. Oliver, 3356 EDA 2012 (Pa. Super. June 21, 2013).

⁴ On June 19, 2015, Oliver filed another PCRA petition, which was held in abeyance while appeal of his prior PCRA was pending before the Pennsylvania Supreme Court. Crim. Dkt. at 27-28. This petition did not address the newly-discovered DNA evidence and was dismissed as untimely. Commonwealth v. Oliver, 2354-1989, at 7 (C.C. P. Sept. 11, 2015). The Superior Court affirmed the dismissal on October 27, 2015. Crim. Dkt. at 30-31.

Id. § 2244(d)(1)(A). The petitioner, however, may establish that one of the following alternative start dates applies to his claims:

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

Id. § 2244(d)(1)(B) – (D); Brown v. Cuyler, 669 F.2d 155, 158 (3d Cir. 1982) (petitioner must prove “all facts entitling him to” habeas relief). In calculating the one-year limitations period from the appropriate start date, AEDPA also permits the period to 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.” 28 U.S.C. § 2244(d)(2). A properly filed state petition is one “submitted according to the state’s procedural requirements[.]” Lovasz v. Vaughn, 134 F.3d 146, 148 (3d Cir. 1998); see also Pace v. DiGuglielmo, 544 U.S. 408, 417 (2005) (where the state court rejected a PCRA petition as untimely, it was not “properly filed” and did not trigger statutory tolling under § 2244(d)(2)).

Oliver’s judgment of sentence became final on May 10, 1994, ninety days after the Pennsylvania Supreme Court denied review of the Superior Court’s decision affirming his judgment of sentence. See § 2244(d)(1)(A); U.S. S. Ct. Rule 13 (allowing ninety days to file a petition for writ of certiorari with the United States Supreme Court); 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); Crim. Dkt. at 30-31. Under the general rule

concerning the one-year limitations period, Oliver was required to file his federal habeas petition within one year of his final judgment date, or by May 10, 1995. See § 2244(d)(1)(A). Oliver, however, filed his federal habeas petition on December 28, 2015, more than twenty years after the expiration of the limitations period. Habeas Pet. at 1. The statute of limitations applies separately to each of Oliver's claims for relief. Munchinski v. Wilson, 694 F.3d 308, 327 (3d Cir. 2012). Thus, all of Oliver's claims are untimely unless he can show the limitations period should be tolled and/or calculated based on a different starting date.

Review of an otherwise untimely federal habeas petition may be warranted if the petitioner claims his conviction has resulted in a fundamental miscarriage of justice based on evidence proving he is actually innocent of the crime for which he was convicted. McQuiggin v. Perkins, 133 S. Ct. 1924, 1931 (2013). An actual innocence claim provides "a gateway" to review otherwise untimely claims. Id. at 1928. Overcoming a procedural bar to obtain review under this standard is extremely difficult. See Schlup v. Delo, 513 U.S. 298, 324 (1995) ("in the vast majority of cases, claims of actual innocence are rarely successful"); Sistrunk v. Rozum, 674 F.3d 181, 192 (3d Cir. 2012) (actual innocence exception sets a "supremely high bar"). A petitioner must present "new credible evidence" that makes it "more likely than not that no reasonable juror would have convicted" if it had been presented at trial. McQuiggin, 133 S. Ct. at 1933 (citing Schlup, 513 U.S. at 329).

A. Timeliness of the Due Process Claims

Oliver's due process claims are that: (1) the trial judge should have recused himself; (2) his confession should have been suppressed; (3) he should have been granted a change of venue; and (4) photographs of the victim's body should not have been sent out with the jury. Habeas Mem. at 18-20. These claims are not based on newly-discovered evidence or newly-recognized

rights, and the Commonwealth did not impede their filing in federal court. § 2244(d)(1)(B)-(D). Although the state courts addressed those claims in Oliver's original direct and PCRA appeal, Breard v. Greene, 523 U.S. 371, 375 (1998); Habeas Pet. at 3, they are nevertheless untimely unless Oliver can demonstrate that his petition warrants review McQuiggin. This requires him to present a successful actual innocence gateway claim: proving by a preponderance of the evidence that "no reasonable juror" would have voted to convict him in light of "new, reliable evidence." Schlup, 513 U.S. at 324. Thus, Oliver's alleged due process violations can only be reviewed in federal court if his actual innocence gateway claim succeeds.

B. Timeliness of the New Evidence Claim

Oliver's actual innocence claim is based on new evidence from the November 2009 report concluding male DNA from the victim's vaginal swab was not Oliver's. Habeas Pet. at 4. The Commonwealth concedes Oliver's 2010 PCRA petition based on this evidence was timely if filed as soon as possible after the advanced testing technique used became available. Cmwlth. Br. (doc. 4) at 10-11. This tracks the requirements for the alternative statute of limitations start date applied to claims based on newly discovered evidence. § 2244(d)(1)(D). Although Oliver does not provide evidence or argument to support this timeliness analysis, the case record and public information establish his 2010 PCRA petition was timely, which tolls the federal limitations period.⁵

⁵ Oliver first requested additional DNA testing in an April 2002 PCRA petition. PCRA Pet. (filed April 10, 2002). He continued to seek assistance from lawyers associated with the Innocence Project until the testing was completed. See July 7, 2002 letter to President Judge Freedburg (describing his attempts to reach Innocence Project attorneys); Mot. for Special Admission of Co-Counsel, at ¶ 6 (filed Jan. 14, 2010) (noting Oliver had been represented by the Innocence Project "for several years"); see also Dispatch from Dallas: The growing impact of ultra-sensitive DNA testing, available at: <http://www.innocenceproject.org/dispatch-from-dallas-the-growing-impact-of-ultra-sensitive-dna-testing/> (dated July 10, 2008) (last visited July 5, 2016) (describing "major improvements in DNA testing technology over the last few years," including the testing method used in the November 2009 Report). (cont. next page)

Nevertheless, Oliver fails to allege a viable constitutional violation based on the newly discovered evidence in his federal habeas petition. Oliver describes the legal basis of his claim as both “actual innocence” and “due process.” Habeas Br. at 10 (citing House v. Bell, 547 U.S. 518, 554 (2006) (actual innocence) and United States v. Bagley, 473 U.S. 667, 682 (1985) (due process)). Neither theory applies here.

The United States Supreme Court has “not yet resolved whether a prisoner may be entitled to habeas relief based on a freestanding claim of actual innocence.” McQuiggin, 133 S. Ct. at 1931 (citing Herrera v. Collins, 506 U.S. 390, 404-05 (1993)). Further, Oliver has failed to cite any cases authorizing review of a claim styled in due process when the introduction of the allegedly exculpatory evidence was delayed only by technological standards, not a prosecutor’s failure to disclose. See Habeas Br. at 10 (citing Bagley, 473 U.S. at 682 (Brady claim) and Kyles v. Whitley, 514 U.S. 419, 436 (1995) (same)). I have found none. Cf. Weary v. Cain, 136 S. Ct. 1002, 1006 (2016) (Brady claim); Holmes v. South Carolina, 547 U.S. 319, 324 (2006) (“the constitution guarantees criminal defendants ‘a meaningful opportunity to present a complete defense’”). Therefore, Oliver has presented no viable claim to review. Moreover, even if I assume a freestanding actual innocence claim exists, its burden of persuasion would be “extraordinarily high.” Schlup, 513 U.S. at 316 (citing Herrera, 506 U.S. at 426). As explained

The record and public information support a finding that Oliver pursued DNA testing with due diligence and obtained the advanced testing as soon as it was available to him, supporting an alternative start date to the one-year statute of limitations of November 12, 2009, when Oliver first had reason to know of the factual predicate for his federal claim based on the newly discovered DNA evidence. § 2244(d)(1)(D). Sixty-three days after this alternative start date, Oliver’s properly-filed PCRA petition tolled the limitations period until 90 days after the Pennsylvania Supreme Court declined review, November 8, 2015. § 2244(d)(1)(A); U.S. S. Ct. Rule 13; Swartz v. Meyers, 204 F.3d at 419. Oliver’s federal habeas petition was filed 49 days after the tolling ended, on December 28, 2015. Habeas Pet. at 1. (Because November 8, 2015, was a Sunday, tolling extended to November 9, 2015. Alicia v. Rozum, No. 12-7025, 2013 WL 3821566, at *4 (E.D.P.A. July 23, 2013) (citing Fed. R. Civ. Pro. 6(a)(1)(C)).) Thus, only 112 days of Oliver’s 365-day tolling period had lapsed before his federal petition was filed, making his claim timely.

below, Oliver cannot meet the burden of establishing his claim of actual innocence justifies review of an otherwise untimely habeas petition, or that it meets the even higher burden a freestanding claim of actual innocence would demand.

C. AEDPA Deference

Where a habeas petitioner has previously raised his habeas claim in state court, and the state court has denied it on its merits, a federal court can grant relief on the claim 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). "[A]n 'unreasonable application' ... must be 'objectively unreasonable,' not merely wrong; even 'clear error' will not suffice." White v. Woodall, 134 S. Ct. 1697, 1702 (2014) (citing Lockyer v. Andrade, 538 U.S. 63, 75–76 (2003)).

A state court ruling is "contrary to" clearly established Supreme Court precedent for the purposes of Section 2254(d)(1) "if the state court applies a rule that contradicts the governing law set forth in [Supreme Court] cases," or "if the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from [its] precedent." Williams v. Taylor, 529 U.S. 362, 405-06 (2000); see also Breakiron v. Horn, 642 F.3d 126, 131 (3d Cir. 2011). A state court decision constitutes an "unreasonable application" of Supreme Court precedent if it identifies the correct governing legal rule from Supreme Court decisions, but "unreasonably applies it to the facts of the particular state prisoner's case." Williams, 519 U.S. at 407-08. The state court's reasonable

factual findings must be presumed correct unless the petitioner shows otherwise by clear and convincing evidence. See 28 U.S.C. § 2254(e)(1); Miller-El v. Cockrell, 537 U.S. 322, 340-41 (2003); Bentley v. Lamas, No. 13-6045, Rep. & Rec. (Jan. 22, 2016) (doc. 56), at 8.

D. The Superior Court Decision

Oliver appears to argue that the Superior Court's opinion was both "contrary to" Supreme Court precedent and an "unreasonable determination of the facts." Habeas Br. at 9-11. The Superior Court held Oliver's "new evidence would unlikely result in a different outcome at trial." Super. Ct. Op. at 12. The Superior Court based its holding on four findings: (1) the exculpatory DNA test was unreliable because of a disclaimer regarding chain of custody; (2) the evidence against Oliver was "substantial;" (3) Oliver's confession was "highly damning because [he] knew details that only the killer would know;" and (4) Oliver's "claim that the DNA results would bolster other exculpatory trial evidence is not correct." Id. at 7-10.

The Superior Court cited no federal law in its determination, and instead applied the Pennsylvania standard for granting a new trial: whether, by a preponderance, the newly-discovered evidence "would have changed the outcome of the trial." PCRA Ct. Op. at 10 (citing 42 Pa.C.S. § 9543(a)(2)(vi)). State courts, however, need not cite federal law to avoid issuing opinions that run afoul of it for AEDPA purposes. Early v. Packer, 537 U.S. 3, 8 (2002) (AEDPA "does not even require awareness of [Supreme Court] cases, so long as neither the reasoning nor the result of the state-court decision contradicts them").

To successfully pursue an actual innocence gateway claim and obtain federal review of his otherwise untimely due process claims, Oliver must show that, by a preponderance of the evidence, "no reasonable juror" would convict him based on the new evidence. McQuiggin, 133 S. Ct. at 1933. This is a higher burden than he was required to meet under Pennsylvania law; in

state court, Oliver had to show, by a preponderance, only that his new evidence would have raised a reasonable doubt for only one out of 12 jurors. 42 Pa.C.S. § 9543(a)(2)(vi). Here, however, he must prove that no reasonable juror would have voted to convict. McQuiggin, 133 S. Ct. at 1933. The “extraordinarily high” legal burden to prove a theoretical freestanding actual innocence claim is even higher, and failure to meet the federal gateway standard necessarily entails failure to meet this formidable requirement. Albrecht v. Horn, 485 F.3d 103, 126 (3d Cir. 2007) (no petitioner who fails to meet the lower gateway standard can meet the heightened freestanding standard). Thus, because the Superior Court’s denial of Oliver’s state court claims using the more lenient state standards was not “contrary to” nor “an unreasonable application of” federal law, it does not contradict clearly established Supreme Court law, as established in McQuiggin or Herrera. See Early, 537 U.S. at 8 (noting that state court opinions that do not cite federal law are especially unlikely to be “contrary to” or an “unreasonable application of” Supreme Court precedent when the state legal standard is more lenient to the petitioner than its federal counterpart).

1. The New DNA Testing Results

Nor was the Superior Court decision based on an unreasonable determination of facts. § 2254(d)(2). Although the Superior Court’s finding regarding the chain of custody procedure involved in obtaining the DNA results was objectively unreasonable, its finding that the test results were unreliable was objectively reasonable based on the record developed in state court. §§ 2254(e)(1), 2254(d)(2). The November 2009 Report limits its chain of custody disclaimer to “the identity of the items received on September 2, 2009.” 11/09 Report, at 1. That same page identifies the items received on that date: (1) “Buccal swabs – Scott Oliver;” and (2) “Swab Wrapper: Buccal Swabs – Scott Oliver.” Id. The disclaimer, therefore, does not apply to “DNA

Extract – Scott Oliver,” which was received on August 24, 1989, as the report shows. Id. The third page of the report is a table which shows the “Y-filer” allele profile for each specimen, and demonstrates that Oliver’s 1989 and 2009 samples are identical. Id. at 3. Thus, the report itself rebuts the Superior Court’s finding regarding the chain of custody’s unreliability.

Nevertheless, “even if a state court’s individual factual determinations are overturned, what factual findings remain to support the state court decision must still be weighed under the overarching standard of section 2254(d)(2).” Lambert v. Blackwell, 387 F.3d 210, 235-36 (3d Cir. 2004). The November 2009 report also describes the proper procedures required to prevent contamination of samples. “A reagent blank is generated during the DNA extraction process to monitor for the presence of contamination.” 11/09 Report at 2. The report concedes that those procedures were not followed here. “In this case, a reagent control for [the vaginal swab] was not generated. Therefore, a contamination control for [this] sample[] was not tested in our laboratory.” Id. The Supreme Court has noted that the advanced testing process used in 2009 is “so powerful that it actually increases the risks associated with mishandling evidence.” District Attorney’s Office for the Third Judicial District v. Osborne, 557 U.S. 52, 82 (2009). Because procedures designed to distinguish between male DNA obtained directly from the victim and DNA that may have contaminated the vaginal swab during processing were admittedly not followed here, the Superior Court’s finding that the results are unreliable is not objectively unreasonable.⁶ Cf. United States v. Trala, 162 F. Supp. 2d 336, 349 (D. Del. 2001) (no error in

⁶ For the purposes of reviewing Oliver’s § 2254(d)(2) claim, I am limited to “the evidence presented in the state proceeding.” Further review of the record, however, shows that DNA testing on additional forensic samples revealed no additional male DNA. Pet. Br. for Ev. Hearing at 2. This further suggests that the DNA revealed in the November 2009 testing came from contamination. Moreover, mtDNA testing performed on hairs found on the victim’s body did not exclude Oliver as their possible source. Id. Regardless, the facially unreliable November 2009 testing “would have had no impact on the jury verdict,” as the state court noted. PCRA Ct. Op. at 10.

admitting potentially contaminated testing results using the same technique, because of “evidence that the government has taken steps to prevent contamination”).

2. The Substantial Evidence Against Oliver

The Court’s determination that the unreliable DNA test results could not outweigh the “substantial” evidence of guilt also is reasonable. §2254(d)(2). The evidence against Oliver included testimony from the detective who took Oliver’s confession. Super Ct. Op. at 7-8. The detective described the confession as Oliver’s “exact words,” noted Oliver had signed a document detailing his Miranda rights, and that he had also initialed another statement to confirm his confession was voluntary. N.T. 1/30/91 at 2654, 2668, 2672 (Det. Wilkinson); see also Confession, attached hereto as Ex. C. The detective further testified Oliver had provided information about the use of the victim’s sweatshirt in the strangulation. N.T. 1/30/91 at 2683. That admission was later confirmed by the forensic pathologist. N.T. 1/31/91 at 3089-158.

The evidence against Oliver also included testimony about another confession made to a former prisoner in Northampton County Prison, featuring graphic details about the rape that were consistent with Oliver’s police confession, N.T. 1/31/91 at 3039-50 (Jose Ocasio), and with the autopsy findings; compare N.T. 1/31/91 at 3049 (Ocasio) with 3121, 3125 (autopsy findings). It further included: (1) testimony from the victim’s best friend that placed Oliver with the victim on the night of the crime, and described behavior that suggested guilt when he was confronted about the victim’s absence the next day, N.T. 1/24/91 at 1565-1709 (Melynda Amato); (2) testimony from six other witnesses who corroborated the friend’s testimony, id. at 1710-92 (Joshua Braggs); N.T. 1/25/91 at 1795-1828 (Lark Rose), 1829-47 (David Blamar), 1852-1970 (William Shannon), 1971-2000 (Frank Rose), 2002-09 (James Ciaramitaro); and (3) testimony from the

first officer on the scene when the victim's body was found, N.T. 1/28/91 at 2137-2218 (Officer Orchulli).

Further, a Pennsylvania State Police forensic scientist testified she had undertaken a microscopic analysis of hairs found on the victim's body and determined they could have come from Oliver. N.T. 1/30/91 at 2824-72, N.T. 1/31/91 at 2875-2992 (Dr. Barbara Rowley).⁷ Finally, the forensic pathologist who conducted the victim's autopsy testified the victim had been beaten, raped, and strangled. N.T. 1/31/91 at 3089-158 (Dr. Isadore Mihalakis).

3. The Confession

The Superior Court's finding that Oliver's confession was "highly damning" also is objectively reasonable. The Court found that, because the confession included information that the victim was choked with her sweatshirt, it was not coerced. Super. Ct. Op. at 10. The detective who obtained Oliver's confession testified that, at the time he obtained the statement, he was not aware that the victim had been choked with her sweatshirt. N.T. 1/30/91 at 2681-82. Although the confession does not state the victim was strangled with her sweatshirt, it does admit the victim's "shirt wrapped around her neck" and her shirt was "yanked . . . around her neck." Confession, at 1. It then explains why the sweatshirt was found so far from the body. Id. at 2.

At trial, Oliver argued the evidence regarding whether the sweatshirt was used in the strangulation was equivocal. N.T. 2/7/1991 at 3904. The medical examiner testified the cause of death was strangulation, without specifying a method. N.T. 1/31/91 at 3122. The examiner also admitted he had discussed the unconfirmed sweatshirt theory with a state trooper, possibly in the presence of a detective, on August 21, 1989, the night before Oliver's confession was signed. Id. at 3149. That detective, however, denied discussing the theory with the state trooper, or passing

⁷ In the Superior Court Opinion, Dr. Rowley is referred to as Dr. Reilly, Super. Ct. Op. at 9, although she is identified as Dr. Barbara Rowley in the official transcript, N.T. 1/30/91 at 2824.

the theory on to the detective that took Oliver's confession. N.T. 1/29/91 at 2562. Moreover, the trooper testified he did not inform the Commonwealth about his conclusions regarding the sweatshirt until September 1, 1989. N.T. 1/31/91 at 3019. The Superior Court's finding that a jury would not find Oliver's confession coerced because it contained "details that only the killer would know" is not objectively unreasonable.⁸ Super. Ct. Op. at 10; Lockyer, 538 U.S. at 75-76.

4. The Other Allegedly Exculpatory Evidence

Finally, the Superior Court reasonably rejected Oliver's contention that the DNA evidence bolstered other exculpatory evidence. Oliver contended to the state court that he should have been acquitted based on four other kinds of forensic evidence presented at his trial, in combination with the DNA evidence: (1) white skin, which could not be his because he is African-American, found under the victim's fingernails; (2) the absence of scratches or bruises on Oliver's own body; (3) the absence of a match between the dirt found on Oliver and the dirt found on the victim's body; and (4) the Commonwealth's failure to demonstrate the hairs found on the victim's body were his. Mem. in Support of PCRA Appeal (Feb. 18, 2014) (doc. 4-3) at 22-24. The record does not support his claims.

With respect to the hairs found on the victim's body, Oliver makes claims related to his expert's testimony and the testimony of the Commonwealth's expert. Habeas Br. at 12-13. He notes that his expert testified the hairs did not match his, and that they could not have come from him because they were long head hairs and his head was shaved bald at the time of the crime. Id. He also alleges the Commonwealth's expert's testimony was based on a "highly unreliable" methodology. Habeas Br. at 12.

⁸ Oliver appears to argue that the information in the confession, that he raped the victim for five minutes but did not ejaculate, is contradicted by the newly-discovered DNA evidence. Habeas Br. at 14. Because the new testing does not specify the type of cell from which the identified DNA originated, his factual premise is faulty.

Even if Oliver's assertions regarding the Commonwealth's microscopic hair identification methodology are credited, the remedy to the problem of outdated microscopic hair analysis is mtDNA hair testing. See FBI Press Release (April 20, 2015) ("FBI Testimony on Microscopic Hair Analysis Contained Errors in at Least 90 Percent of Cases in Ongoing Review"), available at <https://www.fbi.gov/news/pressrel/press-releases/fbi-testimony-on-microscopic-hair-analysis-contained-errors-in-at-least-90-percent-of-cases-in-ongoing-review> (last visited June 24, 2016). The mtDNA testing conducted on the hair fragments found in Oliver's case was inculpatory. mtDNA Report at 2. Further, testimony established that, on the night of the murder, Oliver was wearing a hat. N.T. 1/24/91 at 1579, 1834, 1858, 1984. To the extent that some of the hairs on the victim were longer than could be found on Oliver's closely-shaved head at that time, Oliver's own forensic expert explained that longer hairs inconsistent with his haircut could easily have been transmitted to the victim if he was wearing a hat. N.T. 2/5/91 at 3511.

With respect to the white skin Oliver contends was found under the victim's fingernails, the state forensic expert testified the substance might have been skin, or might have been "the inside of the [victim's] nail lining." N.T. 1/31/91 at 2991. Oliver asserts that physical examinations of him a few days after the murder did not reveal any scratches, marks and/or bruises. Mem. in Support of PCRA Appeal at 17. The forensic pathologist testified, however, that because the victim's injuries showed she was on the ground underneath her attacker, it was possible that her attacker, especially one much larger than her, would not have had scratches or abrasions on his skin. N.T. 1/31/91 at 3126-27.

Finally, Oliver pointed out that dirt/soil tested from the crime scene was not a match to the dirt/soil tested from his clothing and footwear. Mem. in Support of PCRA Appeal at 17.

Oliver fails to disclose, however, that his samples were submitted on August 22, 1989, the morning of his arrest, two days after the murder took place. N.T. 1/31/91 at 2978. Two of the victim's contemporaries who had seen the victim with Oliver on the night of the murder and confronted him the following day described his legs as covered in dirt at that time. N.T. 1/24/91 at 1598; 1/25/91 at 1982-83. The Superior Court found "the failure to find scratches, a soil sample match, or a hair sample match . . . is simply not exculpatory." Super. Ct. Op. at 12. That finding is not objectively unreasonable.

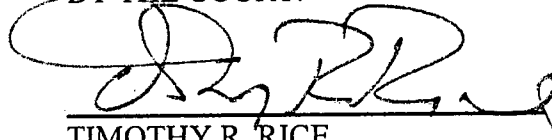
The Superior Court's holding that the potentially contaminated November 2009 DNA testing would not have changed the verdict is not contrary to, nor an objectively unreasonable application of, federal law. § 2254(d); McQuiggin, 133 S. Ct. at 1933; Herrera, 506 U.S. at 404-05. In light of the overwhelming evidence of guilt cited by the state court, Oliver cannot establish that no reasonable juror would have voted to convict if the new evidence contained in the November 2009 Report had been introduced at his trial. McQuiggin, 133 S. Ct. at 1933. Because the Superior Court opinion must be upheld under AEDPA, Oliver's gateway actual innocence claim fails, rendering his due process claims untimely, and any freestanding actual innocence claim, assuming it exists, is dismissed as meritless. Id.

Accordingly, I make the following:

RECOMMENDATION

AND NOW, on July ²¹ 2016, it is respectfully recommended that the petition for writ of habeas corpus be DENIED with prejudice. It is further recommended that there is no probable cause to issue a certificate of appealability. 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:

A handwritten signature in black ink, appearing to read 'Timothy R. Rice', written over a horizontal line.

TIMOTHY R. RICE
U.S. MAGISTRATE JUDGE