

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE**

DONTÁ E. VICKERS,	)	
	)	
Petitioner,	)	
	)	
v.	)	Civil Action No. 00-131-GMS
	)	
STATE OF DELAWARE,	)	
ROBERT SNYDER, Warden, and	)	
M. JANE BRADY, Attorney General of	)	
the State of Delaware,	)	
	)	
Respondents.	)	
	)	

**MEMORANDUM AND ORDER**

Following a jury trial in the Delaware Superior Court, Dontá E. Vickers was convicted of first degree robbery. The Superior Court sentenced Vickers to eight years in prison suspended after five years for decreasing levels of supervision. Vickers is currently incarcerated at the Delaware Correctional Center in Smyrna, Delaware. He has filed with the court a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. For the reasons set forth below, the court will deny Vickers' petition.

**I. BACKGROUND**

On December 3, 1997, petitioner Dontá Vickers and Shavell Miller entered the Jolly Time Arcade in the Dover Mall. The attendant on duty was Randy Farrow. Vickers approached Farrow, held out a twenty-dollar bill, and asked for change. As Farrow took money from his pouch to make change, Vickers hit him in the face and slapped the money from his hand. An

off-duty attendant, Dave Wardwell, saw what occurred, and grabbed Vickers by his coat. Miller attempted to pull Wardwell from Vickers, while Vickers shed his coat and fled on foot.

Wardwell and a security guard chased Vickers, but by the time they caught up to him, other security personnel had restrained him. Back at the arcade, a Dover police officer retrieved Vickers' coat from Miller, and found \$169 in cash in one of the pockets.

Based on these events, Vickers was charged by information with one count of first degree robbery. After a two-day trial, the jury found Vickers guilty as charged. The Superior Court sentenced Vickers on July 24, 1998, to eight years imprisonment, suspended after five years for one year at a halfway house followed by three years probation. On direct appeal, the Delaware Supreme Court concluded that the appeal was “wholly without merit and devoid of any arguably appealable issue,” and affirmed. *Vickers v. State*, No. 358, 1998, 1999 WL 89276, \*\*3 (Del. Jan. 8, 1999).

Vickers then filed in the Superior Court a motion for postconviction relief pursuant to Rule 61 of the Superior Court Rules of Criminal Procedure. In his Rule 61 motion, Vickers alleged that: (1) the Superior Court lacked jurisdiction because he did not waive prosecution by indictment; (2) counsel rendered ineffective assistance in several respects; and (3) the police illegally detained him for more than six hours before charging him. (D.I. 7.) The Superior Court found that Vickers had waived prosecution by indictment and consented to prosecution by information, and rejected his jurisdictional argument on the merits. *State v. Vickers*, 1999 WL 1427767, \*2 (Del. Super. Ct. Sept. 9, 1999). The Superior Court then summarily dismissed Vickers' two remaining claims as “entirely conclusory.” *Id.* at \*3. On appeal, the Delaware Supreme Court first ruled that Vickers had abandoned his claim of illegal detention by failing to

raise it on appeal. *Vickers v. State*, No. 431, 1999, 2000 WL 140108, \*\*1 (Del. Jan. 31, 2000). The Delaware Supreme Court then concluded that the Superior Court had jurisdiction over Vickers' case because he knowingly waived prosecution by indictment and consented to prosecution by information. *Id.* Finally, the Delaware Supreme Court agreed with the Superior Court's decision to summarily dismiss as conclusory Vickers' claims of ineffective assistance of counsel. *Id.* at \*\*2.

Vickers has now filed with the court the current petition for federal habeas relief.

## **II. LEGAL PRINCIPLES**

### **A. Exhaustion and Procedural Default**

Pursuant to the federal habeas statute:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that -

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

28 U.S.C. § 2254(b)(1). Grounded on principles of comity, the requirement of exhaustion of state court remedies ensures that state courts have the initial opportunity to review federal constitutional challenges to state convictions. *Werts v. Vaughn*, 228 F.3d 178, 192 (3d Cir. 2000), *cert. denied*, 532 U.S. 980 (2001).

To satisfy the exhaustion requirement, "state prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's

established appellate review process.” *O’Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999).

Although a state prisoner need not “invoke extraordinary remedies” to satisfy exhaustion, he must fairly present each of his claims to the state courts. *Id.* at 844-45. Generally, federal courts will dismiss without prejudice claims that have not been properly presented to the state courts, thus allowing petitioners to exhaust their claims. *Lines v. Larkins*, 208 F.3d 153, 159-60 (3d Cir. 2000), *cert. denied*, 531 U.S. 1082 (2001). A mixed petition, *i.e.*, one containing both exhausted and unexhausted claims, must be dismissed for failure to exhaust. *Rose v. Lundy*, 455 U.S. 509, 510 (1982); *Lambert v. Blackwell*, 134 F.3d 506, 513 (3d Cir. 1998).

If a claim has not been fairly presented, and further state court review is procedurally barred, the exhaustion requirement is deemed satisfied because further state court review is unavailable. *Lines*, 208 F.3d at 160. Although deemed exhausted, such claims are nonetheless procedurally defaulted. *Id.* Additionally, where a claim was presented to a state court, but the state court refused to consider it for failure to comply with an independent and adequate state procedural rule, the claim is considered procedurally defaulted. *Harris v. Reed*, 489 U.S. 255, 263 (1989); *Werts*, 228 F.3d at 192. Federal courts may not consider the merits of procedurally defaulted claims unless the petitioner demonstrates cause for the default and prejudice resulting therefrom, or a fundamental miscarriage of justice. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991); *Lines*, 208 F.3d at 160.

In order to demonstrate cause for a procedural default, a petitioner must show that “some objective factor external to the defense impeded counsel’s efforts to comply with the State’s procedural rule.” *Murray v. Carrier*, 477 U.S. 478, 488 (1986). A petitioner may establish cause, for example, by showing that the factual or legal basis for a claim was not reasonably

available or that government officials interfered in a manner that made compliance impracticable. *Werts*, 228 F.3d at 193. Additionally, ineffective assistance of counsel constitutes cause, but only if it is an independent constitutional violation. *Edwards v. Carpenter*, 529 U.S. 446, 451 (2000). In addition to cause, a petitioner must establish actual prejudice, which requires him to show “not merely that the errors at . . . trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.” *Murray*, 477 U.S. at 494.

Alternatively, a federal court may excuse a procedural default if the petitioner demonstrates that failure to review the claim will result in a fundamental miscarriage of justice. *Edwards*, 529 U.S. at 451; *Wenger v. Frank*, 266 F.3d 218, 224 (3d Cir. 2001). The miscarriage of justice exception applies only in extraordinary cases “where a constitutional violation has probably resulted in the conviction of one who is actually innocent.” *Murray*, 477 U.S. at 496. To establish actual innocence, a petitioner must satisfy the “extremely high burden” of showing that it is more likely than not that no reasonable juror would have convicted him. *Sweger v. Chesney*, 294 F.3d 506, 522-23 (3d Cir. 2002)(citing *Schlup v. Delo*, 513 U.S. 298, 329 (1995)).

## **B. Standards of Review**

A federal court may consider a habeas petition filed by a state prisoner only “on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254(a). Pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”):

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

(1) resulted in a decision that 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) resulted in a decision that 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). A federal court may issue a writ of habeas corpus under § 2254(d)(1) only if it finds that the state court decision on the merits of a claim either was contrary to clearly established federal law, or involved an unreasonable application of clearly established federal law. *Williams v. Taylor*, 529 U.S. 362, 412 (2000).

Respecting a state court's determinations of fact, this court must presume that they are correct. 28 U.S.C. § 2254(e)(1). The petitioner bears the burden of rebutting the presumption of correctness by clear and convincing evidence. *Id.* The presumption of correctness applies to both explicit and implicit findings of fact. *Campbell v. Vaughn*, 209 F.3d 280, 286 (3d Cir. 2000), *cert. denied*, 531 U.S. 1084 (2001).

### III. DISCUSSION

In his petition, Vickers articulates the following claims for relief:

- (1) His sentence of eight years imprisonment, suspended after five years for one year at a halfway house followed by three years probation, is illegal.<sup>1</sup>
- (2) The Superior Court lacked jurisdiction because he did not waive his right to prosecution by indictment in violation of the Fifth and Sixth Amendments.
- (3) Counsel rendered ineffective assistance in violation of the Sixth Amendment by

---

<sup>1</sup> Vickers mentions this claim briefly in his reply, not in his original petition. (D.I. 15 at 1.) Because Vickers is proceeding pro se, the court reads his submissions liberally in an effort to provide review of his claims to the fullest extent permissible under federal habeas law.

failing to investigate, challenge the prosecution's evidence, subpoena defense witnesses, and follow his instructions.

(4) The police illegally detained him for more than six hours without charging him.

(5) He was denied the right to cross-examine the arresting officer.

(D.I. 2 at 5-6, D.I. 15 at 1.) The respondents assert that Vickers' first claim of an illegal sentence remains unexhausted. They acknowledge that Vickers exhausted his second and third claims by presenting them to the state courts in his postconviction proceedings, and ask the court to reject these claims on the merits. The respondents argue that Vickers' fourth claim is procedurally barred from federal habeas review because he failed to present it to the Delaware Supreme Court. They do not address Vickers' fifth claim. The court considers each of Vickers' claims in turn.<sup>2</sup>

#### **A. Illegal Sentence**

Vickers' first claim is that his sentence is illegal. Pursuant to the sentence order issued by the Superior Court:

The defendant is placed in the custody of the Department of Correction at Supervision Level 5 for a period of 8 years. After serving 5 years at Supervision Level 5, this sentenced is suspended for 1 year at Supervision Level 4 – half-way house. Followed by 3 years at Supervision Level 3.

(D.I. 24, Sentence Order of July 24, 1998.) Although Vickers has failed to explain this claim, it appears that he believes that his sentence is illegal because the aggregate time, *i.e.*, five years Level 5, plus one year Level 4, plus three years Level 3, exceeds the eight-year sentence

---

<sup>2</sup> Also pending in this matter is Vickers' application in support of motion to proceed *in forma pauperis*. (D.I. 12.) In his application, Vickers attests that he is not employed, has no cash, and owns no property of value. The court thus finds that Vickers is unable to pay the fees for this action, and will grant his motion to proceed *in forma pauperis*.

imposed. Obviously, Vickers' computation is correct. Whether that renders his sentence illegal, however, is a question that the court cannot consider at this time.

According to the respondents, Vickers has never presented his illegal sentence claim to the state courts. They acknowledge that Vickers filed two motions for reduction of sentence, but that neither alleged that the sentence was illegal. For this reason, they assert that the court "is not authorized under the habeas statute to grant relief on the issue" because this claim is unexhausted. (D.I. 22 at 3.) In response, Vickers argues that he presented his illegal sentence claim to the state courts in his postconviction proceedings. Alternatively, he asks to withdraw this claim if the court deems it unexhausted. (D.I. 27 at 3.)

A review of Vickers' amended Rule 61 motion reveals that in the "Summary of Facts," he states the sentence imposed, then writes: "Which at this time, I would like to bring to the courts [sic] attention would clearly appears [sic] to be that of an illegal sentence under the courts [sic] discretion." (D.I. 7, No. 431, 1999, Amended Motion at 2.) On appeal, Vickers asked the Delaware Supreme Court to treat his amended Rule 61 motion as his opening brief, a request which the court granted. (*Id.*, Letter of December 8, 1999 from Senior Court Clerk.) Neither the Superior Court nor the Delaware Supreme Court addressed whether the sentence is illegal.<sup>3</sup>

Unfortunately for Vickers, his reference to an illegal sentence in his postconviction

---

<sup>3</sup> It appears that the Superior Court may have recognized subsequently the internal inconsistency of its sentence order. In denying Vickers' Rule 61 motion, the Superior Court reported that "on July 24, 1998, [the Superior Court] sentenced Defendant to **seven (7) years** at Level 5, **suspended after 4 years** with 3 years probation at different levels." *Vickers*, 1999 WL 1427767 at \*1. Plainly, the July 24, 1998 sentence order contained in the record before this court is not consistent with the sentence reported by the Superior Court in its postconviction order. Nothing in the Superior Court's order addresses why its recitation of Vickers' sentence differs from that set forth in the sentence order itself.



submissions is insufficient to satisfy the exhaustion requirement. To satisfy the exhaustion requirement, a petitioner must fairly present each claim by submitting “[b]oth the legal theory and the facts supporting” each claim to the state courts. *Lesko v. Owens*, 881 F.2d 44, 50 (3d Cir. 1989). Here, Vickers’ passing reference in his summary of facts to an illegal sentence, without any explanation whatsoever, is simply insufficient to alert the state courts to his claim. Accordingly, the court agrees with the respondents that Vickers did not fairly present his illegal sentence claim to the state courts.

The next step of the analysis is to determine whether state court review of this claim is available to Vickers. Here, the respondents concede that Vickers may present his illegal sentence claim to the Superior Court in a motion for correction of sentence pursuant to Rule 35(a) of the Superior Court Rules of Criminal Procedure. (D.I. 22 at 2.) Under Rule 35(a), “The [Superior Court] may correct an illegal sentence **at any time.**” Super. Ct. R. Crim. P. 35(a)(emphasis added). According to the Delaware Supreme Court, a sentence is illegal for purposes of Rule 35(a) if it is, *inter alia*, “internally contradictory.” *Tatem v. State*, 787 A.2d 80, 81 (Del. 2001); *Brittingham v. State*, 705 A.2d 577, 578 (Del. 1998). Vickers’ claim of an illegal sentence appears to fall squarely within this category. Accordingly, the court agrees with the respondents that Vickers may present his illegal sentence claim to the Superior Court in a Rule 35(a) motion for correction of sentence.

Upon reaching the conclusion that a petition contains an unexhausted claim, a federal court must either dismiss the petition in its entirety without prejudice for failure to exhaust, or extend to the petitioner the opportunity to withdraw the unexhausted claim and proceed on his remaining claims. *Lundy*, 455 U.S. at 520. In compliance with *Lundy*, the court has advised

Vickers of his option “to delete any unexhausted claims, and proceed only on his exhausted claims.” (D.I. 26 at 1-2.) The court has cautioned Vickers that “he risks forfeiting any federal habeas review of those deleted and unexhausted claims.” (*Id.*) Being fully informed, Vickers has notified the court that he wishes to withdraw any unexhausted claims. (D.I. 27 at 3.)

For these reasons, the court finds that Vickers’ claim of an illegal sentence remains unexhausted. The court also finds that Vickers has withdrawn this unexhausted claim after being fully advised by the court of the consequences for doing so. Accordingly, the court will not examine the merits of this claim.<sup>4</sup>

**B. Jurisdiction of Superior Court – Involuntary Waiver of Indictment**

Vickers’ next claim is that the Superior Court lacked jurisdiction to try him because he did not voluntarily waive his right to be charged by grand jury indictment. The waiver of indictment submitted by his attorney, Vickers alleges, was fraudulent. The respondents correctly acknowledge that Vickers exhausted this claim by presenting it to the state courts in his postconviction proceedings. Because the state courts rejected Vickers’ involuntary waiver of indictment claim on the merits, this court’s review is limited to determining whether the state courts’ decision either was contrary to, or involved an unreasonable application of, clearly established federal law. 28 U.S.C. § 2254(d)(1); *Williams*, 529 U.S. at 412.

In rejecting Vickers’ involuntary waiver claim, the Delaware Supreme Court wrote:

---

<sup>4</sup> The fact that this court may not review the merits of Vickers’ unexhausted claim does not preclude him from seeking relief in the state courts. While the court refrains from expressing an opinion on the merits of Vickers’ unexhausted claim, the court emphasizes that a Rule 35(a) motion for correction of an illegal sentence appears to be the only available avenue for seeking relief as to this claim. Whether Vickers files such a motion is entirely his own decision.

Vickers claims that his waiver of indictment was involuntary and that, as a result, the Superior Court lacked jurisdiction to consider his case. The record belies Vickers' assertion that his waiver of indictment was involuntary. The waiver of indictment form filed in the record clearly states that Vickers knowingly waived prosecution by indictment and consented to prosecution by information. The waiver of indictment form has Vickers' original signature on it as well as the signature of Vickers' counsel. The State's subsequent filing of an information served to properly establish the Superior Court's jurisdiction over the case against Vickers. Vickers' jurisdictional claim is without merit.

*Vickers*, 2000 WL 140108 at \*\*1.

Regrettably, the court cannot examine independently the document on which the Delaware Supreme Court relied – neither of the parties has provided the court with a copy of the waiver of indictment form. Notwithstanding, this court must presume that the Delaware Supreme Court's findings of fact are correct. 28 U.S.C. § 2254(e)(1). Vickers bears the burden of rebutting the presumption of correctness by clear and convincing evidence. *Id.* He offers nothing more than his own allegation that the waiver of indictment was fraudulent. His self-serving statement falls far short of clear and convincing evidence sufficient to rebut the Delaware Supreme Court's findings of fact.

In short, the court presumes that the waiver of indictment form in the state court record bears the signatures of both Vickers and his attorney. Vickers has failed to offer any evidence to rebut these findings or to establish that his waiver of indictment was involuntary. Accordingly, the court cannot conclude that the state courts' rejection of this claim is contrary to, or involved an unreasonable application of, federal law. Vickers' request for federal habeas relief as to this claim will be denied.

### **C. Ineffective Assistance of Counsel**

Vickers' next claim is based on ineffective assistance of counsel:

Counsel failed to investigate and develop [sic] mitigating evidence, that would have proven reasonable doubt. Counsel failed to challenge the prosecutions [sic] introductions of evidence. Counsel also neglected to subpoena defence [sic] witnesses that could have presented doubt in the case against him. Because counsel failed to follow the defendant's instructions, the defendant's defence [sic] was limited and counsel's [sic] representation was totally lacking to the effect that amounted only to ineffective assistance.

(D.I. 2, ¶ 12.B.) The respondents acknowledge that Vickers exhausted these claims by presenting them to the state courts in his postconviction proceedings. The Superior Court summarily dismissed Vickers' ineffective assistance claims as "vague and entirely conclusory." *Vickers*, 1999 WL 1427767 at \*3. The Delaware Supreme Court agreed. *Vickers*, 2000 WL 140180 at \*\*2.

In order to succeed on his claims of ineffective assistance of counsel, Vickers must satisfy the familiar two-prong test of *Strickland v. Washington*, 466 U.S. 668 (1984). He must show (1) that counsel's performance was deficient, and (2) prejudice, *i.e.*, a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Id.* at 686, 694.

Vickers first alleges that counsel rendered ineffective assistance by failing to investigate. He asserts that the victim stated that he was robbed by a clean-shaven man with no scars and no jewelry. He alleges that the arrest photograph shows that he had a beard, a moustache, and a scar near his left eye, and that the prison intake inventory sheet reflects that he was wearing jewelry. If counsel had investigated, he argues, she would have discovered these facts and presented them as evidence of the victim's misidentification.

The court is not persuaded by this argument. Vickers overlooks the fact that the victim was not the only one to identify Vickers. Wardwell and several officers also identified Vickers as the robber. Vickers has failed to explain how the outcome of his trial would have been

different if counsel had discredited the victim's identification in light of the other evidence identifying Vickers as the robber.

Next, Vickers asserts that counsel rendered ineffective assistance by failing to object to the admission into evidence of the coat he was wearing, and by failing to request testing on hair and blood samples taken from the coat. He asserts that tests would demonstrate that the coat did not belong to him. He does not explain, however, why the coat should not have been admitted into evidence. In addition, he does not explain why a finding that the coat did not "belong" to him would have any effect on the outcome of the trial. The evidence adduced at trial established that Vickers was wearing the coat when he entered the arcade and took money from Farrow, and that he shed the coat while trying to flee.

Vickers next claims that counsel rendered ineffective assistance by failing to call Shavell Miller to testify. He does not describe Miller's proposed testimony. He also argues that counsel should have subpoenaed Ahmad Dorsey as a witness, but he fails to explain who Dorsey is or to describe Dorsey's proposed testimony.

Vickers' final claim of ineffective assistance is that counsel failed to follow his instructions. He asserts in a conclusory fashion that if counsel had followed his instructions, the outcome of the trial would have been different. His conclusory assertions, however, are insufficient to establish ineffective assistance of counsel.

For these reasons, the court finds that Vickers' allegations are inadequate to satisfy the *Strickland* standard. The court agrees with the state courts' characterization of these claims as conclusory. Accordingly, the court will deny Vickers' request for federal habeas relief as to his claims of ineffective assistance of counsel.

#### **D. Illegal Detention**

Vickers next alleges that he was detained for more than six hours without being charged in violation of his rights under both the Fourth Amendment and Delaware law. The respondents assert that this claim is procedurally barred from federal habeas review.

The court need not determine whether Vickers' illegal detention claim is procedurally barred. According to the United States Supreme Court, a conviction cannot be vacated solely because a defendant was detained without a determination of probable cause in violation of the Fourth Amendment.<sup>5</sup> *Gerstein v. Pugh*, 420 U.S. 103, 119 (1975). Additionally, Vickers' claim based on a violation of his rights under state law is not cognizable on federal habeas review. *Pulley v. Harris*, 465 U.S. 37, 41 (1984); *Riley v. Harris*, 277 F.3d 261, 310 n.8 (3d Cir. 2001). For these reasons, and assuming the truth of Vickers' factual allegations, he has failed to state a claim for federal habeas relief.<sup>6</sup>

#### **E. Right of Confrontation**

Vickers' final claim is that he was denied the right to cross-examine the officer who arrested him. According to Vickers, conflicts arose in the witnesses' descriptions of the person

---

<sup>5</sup> The court does not suggest that Vickers was detained in violation of the Fourth Amendment. Judicial determinations of probable cause within 48 hours of arrest generally satisfy the Fourth Amendment. *County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991).

<sup>6</sup> The court need not decide whether Vickers' Fourth Amendment claim is barred by *Stone v. Powell*, 428 U.S. 465 (1976). Under *Stone*, a federal court may not grant habeas relief to a state prisoner on the ground that evidence obtained in an unconstitutional search or seizure was introduced at trial, if the state provided an opportunity for full and fair litigation of the Fourth Amendment claim. *Deputy v. Taylor*, 19 F.3d 1485, 1491 (3d Cir. 1994)(quoting *Stone*, 428 U.S. at 494). Here, Vickers does not allege that any evidence used against him was obtained in violation of the Fourth Amendment – thus, his Fourth Amendment claim is distinct from those typically barred by *Stone*. Even if Vickers' claim is not barred by *Stone*, it cannot provide a basis for federal habeas relief, as explained above.

who committed the crime. The arresting officer, in Vickers' words, "elected to be absent" and could not be "cross-examined" on this point. (D.I. 2, ¶ 12.C.) The court views this claim as an allegation that Vickers was denied his right to confront witnesses in violation of the Sixth Amendment. The respondents have not addressed this claim.

Upon review of the state court records, the court cannot find that Vickers exhausted this claim. He did not raise it to the state courts, either on direct appeal or in postconviction proceedings. Because Vickers failed to fairly present this claim to the state courts, the court must determine whether state court review of this claim is now clearly foreclosed.

Two separate procedural impediments preclude Vickers from presenting his right to confront claim to the state courts. The first is Rule 61(i)(2):

Repetitive Motion. Any ground for relief that was not asserted in a prior postconviction proceeding, as required by subdivision (b)(2) of this rule, is thereafter barred, unless consideration of the claim is warranted in the interest of justice.

Super. Ct. R. Crim. P. 61(i)(2). In Delaware, a petitioner must present each of his grounds for relief in his initial Rule 61 motion. Super. Ct. R. Crim. P. 61(b)(2); *Robinson v. State*, 562 A.2d 1184, 1185 (Del. 1989). Delaware courts refuse to consider any claim that was not asserted in an initial Rule 61 motion unless warranted in the interest of justice. *Maxion v. State*, 686 A.2d 148, 150 (Del. 1996). In order to satisfy the interest of justice exception, a petitioner must show that "subsequent legal developments have revealed that the trial court lacked the authority to convict or punish" him. *Woods v. State*, No. 259, 1997, 1997 WL 425492 (Del. July 18, 1997)(citing *Flamer v. State*, 585 A.2d 736, 746 (Del. 1990)). In the matter at hand, the record is devoid of any such subsequent legal developments. Accordingly, the court concludes that Rule 61(i)(2) clearly forecloses state court review of this claim in a second postconviction motion.

Even if Vickers could file a second motion for postconviction relief, his right to confront claim is procedurally barred by Rule 61(i)(3):

Procedural Default. Any ground for relief that was not asserted in the proceedings leading to the judgment of conviction, as required by the rules of this court, is thereafter barred, unless the movant shows (A) Cause for relief from the procedural default and (B) Prejudice from violation of the movant's rights.

Super. Ct. R. Crim. P. 61(i)(3). In Delaware, the failure to raise an issue on direct appeal generally renders a claim procedurally defaulted absent a showing of cause and prejudice. *See Bialach v. State*, 773 A.2d 383, 386 (Del. 2001). Here, Vickers did not raise this claim on direct appeal, nor has he offered any explanation for his failure to do so.

The only remaining question as to this claim is whether Vickers has offered any basis for excusing his procedural defaults. Although he alleges that counsel rendered ineffective assistance in a variety of ways, the court has concluded that his claims of ineffective assistance lack merit. Moreover, he does not specifically allege that appellate counsel rendered ineffective assistance by failing to raise this claim on direct appeal. In short, Vickers cannot rely on counsel's alleged ineffective assistance as cause for failing to present his claim to the state courts. In addition, Vickers does not argue that he is actually innocent for the purpose of excusing his procedural default.

For these reasons, the court finds that Vickers' right to confront claim is procedurally barred. Federal habeas review of this claim is unavailable.

#### **IV. CERTIFICATE OF APPEALABILITY**

Finally, the court must determine whether a certificate of appealability should issue. *See* Third Circuit Local Appellate Rule 22.2. The court may issue a certificate of appealability only



if the petitioner “has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). This requires the petitioner to “demonstrate that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Here, the court has concluded that Vickers’ claims do not provide a basis for granting federal habeas relief. The court is persuaded that reasonable jurists would not find its conclusions debatable or wrong. Vickers has, therefore, failed to make a substantial showing of the denial of a constitutional right, and a certificate of appealability will not be issued.

## V. CONCLUSION

For the foregoing reasons, IT IS HEREBY ORDERED THAT:

1. Dontá E. Vickers’ application to proceed *in forma pauperis* (D.I. 12) is GRANTED.
2. Vickers’ petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 (D.I. 2) is DENIED.
3. The court declines to issue a certificate of appealability for failure to satisfy the standard set forth in 28 U.S.C. § 2253(c)(2).

IT IS SO ORDERED.

Dated: September 23, 2002

Gregory M. Sleet  
UNITED STATES DISTRICT JUDGE