SLEET, District Judge

I. INTRODUCTION

Eddie Lee Maxion, Jr. ("Maxion") is currently incarcerated at the Delaware Correctional Center located in Smyrna, Delaware. On October 3, 1996, Maxion filed a petition with the court for the issuance of a writ of habeas corpus pursuant to 28 U.S.C. § 2254 (the "Original Petition") (D.I. 1). The Respondents timely filed a response on January 31, 1997 (D.I. 14). Maxion filed a motion to amend his petition on April 28, 1997 (D.I. 22). The Honorable Roderick R. McKelvie granted the motion to amend on December 18, 1997[1] (D.I. 27) and deemed the petition amended (the "First Amended Petition") (D.I. 24). Before the Respondents answered the First Amended Petition, Maxion filed a second motion to amend on September 10, 1998. (D.I. 32). The court was reassigned this matter September 28, 1998 (D.I. 36). The Respondents timely filed a response to the First Amended Petition on November 3, 1998 (D.I. 37). The court granted Maxion's second motion to amend his petition on December 6, 1998 (D.I. 41) and deemed it amended (the "Second Amended Petition") (D.I. 33). The Respondents timely filed a response to the Second Amended Petition on January 18, 2000 (D.I. 44).

Maxion raises the following claims in all his petitions:

1. The trial court improperly gave the jury an *Allen* charge that violated due process by being coercive and "tacitly prejudicial".[2]

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[1]Although Judge McKelvie granted Maxion's motion to amend, he denied Maxion's requests for discovery and an evidentiary hearing. *See id.*

[2]Maxion's fifth claim in his First Amended Petition is phrased differently but raises the same issues – he alleges that the trial judge improperly instructed the jury and entered the jury room during deliberations. The court will consolidate the two claims for discussion purposes.

2. The trial court violated the Due Process and Equal Protection clauses of the Fourteenth Amendment by denying Maxion's request to funds to conduct DNA testing.[3]

3. The trial court committed error by allowing an FBI agent to testify on the frequency of pubic "hair transfers."

4. The trial court erred by not sequestering the jury during its deliberations.

5. Maxion's kidnaping charge should be reversed for insufficient evidence.

6. The State withheld forensic serological reports with "negative results" in violation of its discovery obligations.[4]

7. The State violated Maxion's right to a speedy trial.

8. The trial court did not permit cross examination of the victim.

9. Defense counsel at trial was constitutionally ineffective since he (1) filed a brief under Delaware Supreme Court Rule 26, (2) did not object to testimony by the victim, and (3) did not object to testimony by Dr. Mary Eberhardt.

10. Maxion's appellate counsel was constitutionally ineffective since he failed to pursue a *Brady* claim despite Maxion's request he do so.

11. Maxion's arrest warrant was invalid for lack of jurisdiction.

12. The state courts improperly applied Delaware Superior Court Criminal Rule 61 and state habeas procedure.

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[3]This claim is similar to claim six, although it is actually the reverse. Claim two focused on the State's failure to provide funds to conduct DNA testing on phantom genetic material, while claim six argues that the state withheld forensic reports that show the lack of genetic material. *Compare* Section IVB2, *with* Section IVB3.

[4]In his First Amended Complaint, Maxion raises a similar claim but couches it in terms of the State's obligations under *Brady v. Maryland*, 373 U.S. 83 (1963), and argues that his attorney was constitutionally ineffective for failing to request the evidence. The court will, therefore, consider the two claims as one in addressing the issue.

13. The state courts improperly denied Maxion's motion for a new trial based on newly discovered evidence and ineffective assistance of counsel for failure to discover the new evidence.

14. The trial court improperly admitted the testimony of Dr. Eberhardt since it was unduly prejudicial.

15. A violation of the Fourth, Sixth, and Fourteenth Amendments since Maxion was never indicted for the crimes with which he was charged.

After considering the parties' submissions,[5] the court finds that all of Maxion's claims are procedurally barred or otherwise lack merit. Therefore, the court will dismiss the petition and deny the relief requested.

II. BACKGROUND

On March 22, 1990, Theresa Lewis ("Lewis") was walking to a friend's house in Wilmington, Delaware. As she neared the lower end of the Market Street Mall, Maxion called her name and asked her to come over to him. Prior to this event, Lewis had only met or seen Maxion twice before.[6] When Lewis approached Maxion, he told her that her grandmother was ill and wanted to see her immediately.[7] Maxion further offered to give Lewis a ride to her grandparents' house. The two then walked around the

[5]Maxion submitted a response to each of the Respondents' answers without first requesting – or receiving – leave of the court (D.I. 21, 38, 45). Given Maxion's pro se status, the court has reviewed each of Maxion's responses. Most of Maxion's responses either repeat arguments asserted in his various amended petitions or are non-responsive to the Respondents' arguments. The court incorporates by reference all of Maxion arguments that are new or are otherwise responsive to the Respondents' positions.

[6]The first time was when Lewis' grandfather "briefly introduced" Lewis to Maxion in approximately October, 1989. The second time was the day before the incident, March 21, 1990, when Lewis saw Maxion drive past her.

[7]Maxion claimed that he had just spoken with Lewis' grandfather who conveyed the information to him. Lewis later learned that her grandmother was not sick.

corner to Maxion's car. Since Maxion's car was damaged on the front passenger side, making the front passenger door inoperable, Lewis had to enter the car via the driver side door and climb over the seats.

As the two began driving, Lewis realized that Maxion was going in the wrong direction and asked him where he was going. Maxion responded by telling Lewis that he needed to speak with her. Lewis then asked Maxion to take her home; a request he ignored. Maxion drove to a dirt path off of East 12th Street and parked his car in a remote, deserted area situated under Interstate 495, near the Amtrak railroad yard. As soon as he stopped the car, Maxion began to accost Lewis. Lewis told Maxion to stop but she was unable to open the passenger door to get out of the car (it was broken). As Lewis began to cry, Maxion pushed her seat back, climbed on top of her, and engaged in vaginal intercourse.[8]

Maxion then asked Lewis where she wanted to go and she told him to take her back to the Market Street Mall, when she had initially seen him. As he drove, Maxion offered to pay Lewis for her "services" and to buy her a dress; she refused both "offers." When Lewis got out of the car, she memorized the license plate number of Maxion's car. Lewis proceeded directly to a friend's house and informed her what happened. The police were called immediately. When the police arrived, Lewis was crying. She told the police Maxion's license plate number and provided an accurate description of the car.[9] Lewis then went to the hospital. At the hospital, the examining doctor found a small tear on a muscle in Lewis' vagina which was covered with a drop of fresh blood. The doctor testified at trial that it was possible the tear came from

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[8]Prior to intercourse, Maxion inserted his fingers in Lewis' vagina several times.

[9]The police subsequently confirmed that the plate number Lewis provided them was for a car registered to Maxion.

the insertion of a finger or penis, although the examination could have reopened the tear and produced the fresh blood. The doctors did not find any semen or foreign hair on Lewis.

At trial the State introduced carpet fibers found in Lewis' pants, underpants, brassiere, coat and socks. The State also had an expert testify about the method of collection of the carpet samples from Maxion's car, as well as hair samples from Maxion. The evidence, along with Lewis' clothing, was sent to the FBI laboratory for analysis. The FBI analysis found the fibers discovered in Lewis' clothes matched samples from the carpet in the front passenger seat of Maxion's car. The FBI, however, was unable to find any of Maxion's hairs on Lewis' clothes (a "hair transfer"). At trial an FBI expert testified, over objection, that hair transfers were uncommon in these types of cases and that the lack of such a finding was not unusual. The FBI expert also stated that they found no genetic material on Lewis' clothes with which to conduct a comparative match.[10]

According to Maxion's testimony at trial, he and Lewis had a platonic relationship which ended in approximately February, 1990 when Maxion told Lewis to stop calling him. He stated that on March 21, 1990, the day before the incident, Lewis had asked Maxion for a ride several times and he eventually relented. Maxion's girlfriend, Rita Foster, testified that on the day of the incident she had Maxion's car all day. According to Foster, on her way to work she dropped Maxion off around 6:45 a.m. at the Longshoreman's Hall in Wilmington, met him for lunch near a bar on South Claymont Street, and returned to her job (still with Maxion's car). Foster met Maxion around 3:40 p.m and the two went home and then

[10]As noted above, the State collected genetic material from Maxion and sent it to the FBI so it could attempt a DNA test.

to Castle Mall. This story flatly contradicted Maxion's statement to the police regarding his whereabouts on the day in question.[11]

On February 25, 1991, Maxion was convicted in the Delaware Superior Court of first degree unlawful sexual intercourse and first degree kidnaping. The Delaware Supreme Court affirmed the conviction on direct appeal. *See Maxion v. State*, 612 A.2d 158, 1992 WL 183093, (Del. July 22, 1992) (*Maxion I*). Maxion then filed his first motion for post conviction relief which was denied by the Superior Court and affirmed by the Delaware Supreme Court. *See Maxion v. State*, 628 A.2d 425, 1994 WL 424138 (Del. Aug. 11, 1994) (*Maxion II*). Maxion's second through fifth motions for post conviction relief were also denied by the Superior Court and affirmed by the Delaware Supreme Court. *See Maxion v. State*, No. 10, 1994 (Del. Sept. 19, 1994) (*Maxion III*). The Superior Court denied Maxion's sixth motion for post conviction relief and the Delaware Supreme Court affirmed the denial. *See Maxion v. State*, 648 A.2d 425, 1994 WL 397566 (Del. June 30, 1994) (*Maxion IV*). His seventh motion for post conviction relief met with the same fate, *Maxion v. State*, No. 197, 1994 (Del. Jan 27, 1995) (*Maxion V*), as did his eighth, *Maxion v. State*, 686 A.2d 148 (Del. 1996) (*Maxion VI*).[12]

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[11]When the police interviewed Maxion the day after the incident, he stated that he had been in Newark, Delaware the entire day of the incident.

[12]In *Maxion VI*, the Delaware Supreme Court also affirmed the denial of Maxion's motions for a new trial. *See Maxion VI*, 686 A.2d at 151. In addition, Maxion filed at three petitions for the issuance of a writ of mandamus with the Delaware Supreme Court which were all denied. *See Petition of Maxion*, 676 A.2d 905, 1996 WL 69810 (Del. Feb. 1, 1996); *Petition of Maxion*, 670 A.2d 1339, 1995 WL 715515 (Del Oct. 23, 1995); *Petition of Maxion*, 670 A.2d 1339, 1995 WL 567040 (Del. Sept. 11, 1995).

III. STANDARD OF REVIEW

Because Maxion filed his habeas petition after April 24, 1996, the terms of the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA") apply. *See, e.g.*, *Lindh v. Murphy*, 521 U.S. 320, 326-27 (1997). Under AEDPA, a habeas petitioner who is incarcerated as a result of a state conviction cannot obtain relief unless the decision of the state court was either "contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States" or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *See* 28 U.S.C. § 2254(d); *see also Matteo v. Superintendent, SCI Albion*, 171 F.3d 877, 880 (3d Cir. 1999); *Dickerson v. Vaughn*, 90 F.3d 87, 90 (3d Cir. 1996); *Finch v. Snyder*, Civ.A.No. 98-537-SLR, 2000 WL 52162, at *3 (D. Del. Jan. 10, 2000). The AEDPA also requires that the court afford substantial deference to factual findings and legal determinations made by state courts and places the burden on the petitioner to rebut the presumption by clear and convincing evidence. *See* 28 U.S.C. § 2254(e) (as amended); *Dickerson*, 90 F.3d at 90.

IV. DISCUSSION

As mentioned above, Maxion has raised 15 claims for federal habeas relief. Of the 15 claims, all of them, except claims three, eleven, and part of nine are exhausted. The court will first briefly discuss the unexhausted claims then proceed to address the exhausted claims.

A. Exhaustion Requirement

The court must determine whether Maxion has exhausted all available state remedies. *See* 28 U.S.C. § 2254(b)(1)(A). A claim is considered exhausted if it has been fairly presented to the state's highest court, either on direct appeal or in a post conviction-proceeding. *See Lambert v. Blackwell*, 134

F.3d 506, 513 (3d Cir. 1997) (citing *Evans v. Court of Common Pleas, Delaware Co., Pennsylvania*, 959 F.2d 1227, 1230 (3d Cir. 1992)). To have fairly presented a claim, Maxion must have submitted to the state court both the legal theory and the facts that are "substantially equivalent" to those asserted in his federal habeas petition. *See Doctor v. Walters*, 96 F.3d 96 F.3d 675, 678 (3d Cir. 1996). Maxion bears the burden of establishing that the exhaustion requirement has been satisfied. *See Landano v. Rafferty*, 897 F.2d 661, 670-71 (3d Cir. 1990). Upon examining Maxion's lengthy list of claims, the court finds that three, eleven, and part of nine are unexhausted. Furthermore, the court concludes that Maxion has failed to satisfy the both the"cause and prejudice" and the "fundamental miscarriage of justice" exceptions to the exhaustion requirement.[13] The court will briefly discuss each claim in turn.

1. Claim Three: Testimony By FBI Expert on Hair Transfer Statistics

a. No Federal Issue Raised Before the State Courts

In his federal petition, Maxion argues that the trial court (1) "committed a plain error" by not excluding expert testimony from an FBI agent regarding the frequency of pubic hair transfers since the State did not provide a expert report prior to trial, (2) abused its discretion by allowing "irrelevant" testimony on

[13]Maxion has not produced any evidence – beyond conclusory assertions – in any of his claims to support a finding that failing to hear his petition would constitute a "fundamental miscarriage of justice". *See, e.g., Coleman v. Thompson*, 501 U.S. 722, 750 (1991); *Murray v. Carrier*, 477 U.S. 478 , 496 (1986). As the courts have repeatedly stated, this exception is reserved for claims of actual innocence. *See, e.g., Schlup v. Daleo*, 513 U.S. 298, 327-28 (1995); *Lines v. Larkins*, 208 F.3d 153, 166 (3d Cir. 2000). Throughout his petition, Maxion has neither directly asserted his innocence, nor adduced sufficient evidence to overcome the high burden he faces. *See Schlup*, 513 U.S. at 327 (stating that "[t]o establish the requisite probability, the petitioner must show that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence."). Since the court concludes that none of Maxion's claims suggest actual innocence, the court will not discuss this exception to the exhaustion requirement as it relates to each claim.

hair transfers, and (3) abused its discretion by allowing the FBI agent's testimony without requiring the State to lay a proper evidentiary foundation. *See* Original Petition, at 15. Although Maxion raised these arguments in the state courts, he failed to cast them in federal or constitutional terms, as he did in his federal petition.[14] The Delaware Supreme Court rejected all of Maxion's arguments on state law evidentiary grounds. *See Maxion I*, 1992 WL 183093, at *2 (stating that FBI agent's testimony was not expert opinion on facts of case so State did not need to disclose testimony prior to trial or lay foundation and concluding that testimony was relevant and "wholly proper").

A state court ruling on an evidentiary matter only warrants federal habeas relief when it renders the trial so fundamentally unfair as to deny the defendant his right to due process. *See*, *e.g.*, *Mayes v*. *Gibson*, 210 F.3d 1284, 1293 (10th Cir. 2000); *Spivey v*. *Rocha*, 194 F.3d 971, 977-78 (9th Cir. 1999); *Jackson v*. *Johnson*, 194 F.3d 641, 656 (5th Cir. 1999). As the United States Supreme Court has made clear, however, "[i]f a habeas petitioner wishes to claim that an evidentiary ruling at a state court trial denied him the due process of law guaranteed by the Fourteenth Amendment, he must say so, not only in federal court, but in state court [as well]." *See Duncan v*. *Henry*, 513 U.S. 364, 366 (1995). Admittedly, a defendant who is appealing his conviction need not refer directly to the United States Constitution in order to inform the state courts that he is presenting a claim based on federal law. *See McCandless v*. *Vaughn*, 172 F.3d 255, 261 (3d Cir. 1999). For example, if a defendant raises a claim in terms that are so specific that they "call to mind a specific right protected by the Constitution," then he is usually deemed to have

[14]Maxion's federal petition states that these violations "usurped . . . [his] rights to due process and equal protection . . . . [and t]hese constitutional violations tainted the entire trial." *See id.* From this statement, the court assumes that Maxion is asserting a Fourteenth Amendment violation.

presented the federal issue to the state courts. *See Evans*, 959 F.2d at 1231-32 (relying on *Daye v. Attorney General of New York*, 696 F.2d 186, 194 (2d Cir. 1982)). Likewise, as the *Evans* court explained, if a defendant relies on federal or state cases that employ a constitutional analysis, then he is generally considered to have sufficiently presented the issue. *See id.* Finally, if the defendant alleges a pattern of facts that is "well within the mainstream of constitutional litigation," the courts tend to consider his federal issue to have been fairly presented. *See id.*

Maxion's challenge to the FBI agent's testimony fails to allege facts that generally fall within the mainstream of constitutional litigation because, as previously discussed, complaints about evidentiary rulings generally fail to warrant federal habeas relief. Thus, in order to conclude that he presented a due process claim to the Superior Court, the court must find that he used words that were so particular that they called to mind a specific right protected by the Constitution.

As mentioned above, Maxion did not assert the denial of a federal right, either directly or indirectly. The Delaware Supreme Court's opinion exclusively discusses Delaware Uniform Rule of Evidence 702 and 705 and focuses on the discretion of the trial court in its evidentiary rulings. Furthermore, Maxion's brief to the Delaware Supreme Court only referred to state cases devoid of constitutional analysis; the court has been unable to find a single reference to a federal case, statute, or constitutional right.[15] Finally, the

[15]Although Maxion states that the evidentiary errors caused him to be wrongly convicted, such a conclusory assertion is well short of demonstrating that the trial was fundamentally unfair and that there was a significant likelihood than an innocent person has been convicted. *See, e.g., Anderson v. State*, 243 F.3d 1049, 1053 (7th Cir. 2001); *see also Bisaccia v. Attorney General*, 623 F.2d 307, 312 (3d Cir. 1980) (concluding that state evidentiary errors "are not considered to be of constitutional proportion, cognizable in federal habeas corpus proceedings, unless the error deprives a defendant of fundamental fairness in his criminal trial").

State's answering brief, filed in the Delaware Supreme Court, does not suggest that the prosecutors viewed Maxion as raising any federal or constitutional claims. *See Brown v. Cuyler*, 669 F.2d 155, 159 (3d Cir. 1982) (concluding that state's understanding of petitioner's argument in state post conviction proceedings is relevant in determining assertion of constitutional claim). Since Maxion did not submit to the state court either the legal theory or the "substantially equivalent" facts to those asserted in his federal habeas petition, the court finds that he did not 'fairly present' the issue.[16]

b. Cause and Prejudice

Maxion's failure to raise his federal claim in state court would ordinarily be enough to preclude review. *See* 28 U.S.C. § 2254(b)(1)(A). This does not end the analysis, however, since any attempt to raise it now would be barred by various provisions of Delaware Superior Court Criminal Rule 61(i). *See, e.g., Coverdale v. Snyder*, Civ. A. No. 98-718-GMS, 2000 WL 1897290, at *3-*4 (D. Del. Dec. 22, 2000) (collecting cases); *see also* Section IVA2, *infra*; *see also.* notes 19, 23, 24, *infra*. Therefore, Maxion is excused from the state exhaustion requirement.

Nevertheless, Maxion must first demonstrate cause to explain why he did not present this claim to the state courts. *See Hull v. Freeman*, 991 F.2d 86, 91 (3d Cir. 1993); *Caswell v. Ryan*, 953 F.2d 853, 861-62 (3d Cir. 1992). If cause is established, he must then show actual prejudice. *See id.* To demonstrate cause, Maxion "must show 'some objective factor external to the defense' which precluded his compliance with state procedural rules. *See Laurie v. Snyder*, 9 F. Supp.2d 428, 441 (D. Del. 1998)

[16]To have 'fairly presented' a claim, the petitioner must have submitted to the state court both the legal theory and the facts that are "substantially equivalent" to those asserted in his federal habeas petition. *See Doctor*, 96 F.3d at 678. The court finds that Maxion did not do this.

(citations omitted). Maxion has not provided the court with any explanation as to why he did not include the federal claim in his state motion for post conviction relief. *See Stanley v. Lockhart*, 941 F.2d 707, 709-10 (8th Cir. 1991) (finding that petitioner's pro se status and limited educational background failed to constitute sufficient cause for his delay in timely filing an appeal).

Since Maxion is unable to establish any external factor sufficient to overcome his procedural default, it is unnecessary for the court to consider whether he has suffered any prejudice. *See, e.g., Coleman*, 501 U.S. at 750-51; *Finch*, 2000 WL 52162, at *6; *Laws v. Snyder*, Civ.A.No. 95-579-SLR, 1996 WL 484835, at *3 (D. Del. Aug. 7, 1996). Nevertheless, the court notes that Maxion has offered no evidence in support of his contention that the state procedural bar prejudiced his claim. *See Smith v. Murray*, 477 U.S. 527, 533 (1986); *Laurie*, 9 F. Supp.2d at 151. The court will therefore dismiss claim three of Maxion's petition and deny the relief requested.

2. Claim Eleven: Arrest Warrant Was Invalid

In this claim, Maxion argues that the Superior Court committed constitutional error because it lacked jurisdiction due to an invalid arrest warrant. *See* First Amended Petition, at 18. As Maxion admits, this claim was not presented to the state courts. *See id.* at 19 (stating that "none of the above issues were ever raised in prior post conviction applications"). This claim is, therefore, unexhausted and cannot be considered by the court. *See* 28 U.S.C. § 2254(b)(1)(A); *see also Lambert*, 134 F.3d at 513 (stating that "[i]t is axiomatic that a federal habeas court may not grant a petition for a writ of habeas corpus filed by a person incarcerated from a judgment of a state court unless the petitioner has first exhausted the remedies available in the state courts.").

As noted above, however, Maxion is excused from the exhaustion requirement since there is no available state remedy. *See, e.g.*, Del. Super. Ct. Crim. R. 61(i)(1) (stating that motion for post conviction relief may not be filed more than three years after conviction is final); *id.* at Rule 61(i)(2) (precluding claims not asserted in prior post conviction proceeding unless doing so is contrary to the interests of justice). Given this, the court must next determine whether Maxion can meet the aforementioned cause and prejudice test before it can consider the merits of his claim. *See* Section IVA1(b), *supra*. Maxion's excuse for his procedural default is that he found "newly discovered evidence" which includes the arrest warrant, the police reports, and the "charge sheet" which he recently obtained from various sources. *See* First Amended Petition, at 19. Maxion's failure to obtain the information earlier does not make it "newly discovered evidence"; Maxion could have obtained it with "reasonable diligence" at the time of his various state court motions for post conviction relief. *See* 28 U.S.C. § 2244(b)(2)(B); *cf. In re Minarik*, 166 F.2d 591, 604 (3d Cir. 1999) (stating that petitioner is deemed to have know about all facts discoverable with "reasonable diligence" and subjective unawareness is insufficient to constitute "cause" to overcome successive petition hurdle). The court, therefore, will dismiss Maxion's eleventh claim and deny the requested relief.

3. Claim Nine: Ineffective Assistance of Counsel

This claim relates to the conduct of Maxion's trial counsel. Although he presents it as one claim, it is actually comprised of four separate complaints about the actions of his trial counsel:[17] (a) filing a notice

[17]The Third Circuit has stated that it impermissible for the court to "misread habeas petitions in order to split single claims and conduct a separate exhaustion analyses for each." See Henderson v. Frank, 155 F.3d 159, 165 (3d Cir. 1998); *see also Brewer v. Williams*, 430 U.S. 387, 403 (1977). The court, however, has not done so in this case since the facts of each part of claim nine could

of appeal but then withdrawing it pursuant to Delaware Supreme Court Rule 26(d) (hereinafter "claim 9(a)"),[18] (b) allowing Lewis to give false statements to the police, the hospital, and to the court (hereinafter "claim 9(b)"), (c) allowing Dr. Eberhardt to testify about DNA, something that is beyond the scope of her expertise (hereinafter "claim 9(c)") and (d) failing to challenge the indictment (hereinafter "claim 9(d)"). Although he presented claim 9(c) to the Delaware Supreme Court, he did not assert claims 9(a), (b), and (d). *See Maxion V*, 1994 WL 424138, at *2 & n.1 (stating that Maxion challenged the admission of expert testimony "in conjunction with his ineffective assistance of counsel claim, not as a separate ground for relief").

Although Maxion made general and vague allegations regarding the ineffectiveness of his trial counsel in his various motions for post conviction relief, he did not make specific mention of false testimony by Lewis or his attorney's failure to challenge the indictment. *See id.* (stating that Maxion's first motion for post conviction relief "mere[ly] list[ed] conclusory allegations of errors by his trial counsel"). As the Respondents correctly note, "[t]he fact that Maxion was complaining about some aspect of his attorney's alleged shortcomings . . . [is] not sufficient to put the state courts on notice that he was complaining about other aspects of his counsel's representation." *See* Resp. Ans. Original Petition, at 20; *see also Wyldes*

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constitute a separate and distinct claim; the court has merely consolidated them for efficiency purposes.

[18]Delaware Supreme Court Rule 26(d) allows privately retained attorneys to withdraw without consent of their clients. The court understands Maxion to be challenging his attorney's ability to withdraw rather than whether his attorney correctly followed the procedural requirements for doing so. This contention has no merit; the Delaware Supreme Court has consistently applied Rule 26(d) to allow attorneys to withdraw over the objections of their clients. Furthermore, it appears that Maxion's counsel followed the proper procedure – he filed a notice of appeal and then notified his client of his intention to withdraw. Presumably, the Supreme Court allowed him to do so. Maxion does not allege any improprieties by the Delaware Supreme Court.

v. *Hundley*, 69 F.3d 247, 253 (8th Cir.1995) (stating that habeas petitioners must present state courts with same specific claims of ineffective assistance made out in federal habeas petition). Maxion's failure to present claims 9(a), (b), and (d) to the state courts means that such claims are barred absent a showing of cause and prejudice. *See* Section IVA1(b), *supra*. Maxion has not provided any facts – or allegations – to suggest why he did not present the specific claims of 9(a), (b), and (d) to the state courts. *See id.* Therefore, the court will dismiss these claims and deny the relief Maxion seeks.

B. Exhausted Claims

The Respondents agree that Maxion has properly exhausted claims 1, 2, 4, 5, 6, 7, 8, 9(c), 10, 12, 14 and 15. A determination of exhaustion, however, is but the first step in the analysis. The court must next inquire whether Maxion complied with the relevant state procedural requirements before it can turn to the merits of the claims. *See Caswell*, 953 F.2d at 860 (finding that habeas court must determine whether it "fairly appears" that state Supreme Court based its decision primarily on state law); *see also Coleman*, 501 U.S. at 731-32 (stating that allowing federal habeas petitioners to proceed when procedural default in state court is responsible for absence of state remedies would undermine principles of comity and federalism). A state court ruling resting on an adequate and independent state procedural ground will bar federal habeas review absent a showing of cause and prejudice by the petitioner. *See Wainwright v*. *Sykes*, 433 U.S. 72, 81-82 (1977). Because Maxion failed to comply with state procedural requirements and the Delaware Supreme Court rested its decisions on state law grounds, the court will dismiss his remaining claims and deny the relief he requests.

1. Claim One: Improper *Allen* Charge

The Delaware Supreme Court based its rejection of this claim on Delaware Supreme Court Rule 8.[19] *See* Del. S.Ct R. 8 (stating that "[o]nly questions that have been fairly presented to the trial court may be presented for review"). Since Maxion did not raise this issue in the trial court, the Delaware Supreme Court reviewed it for plain error on Maxion's direct appeal. *See id*. The Delaware Supreme Court found that although there may have been "one questionable statement", the charge, when taken in its entirely and in context, did not deprive Maxion of a substantial right. *See Maxion I*, 1992 WL 183093 at *1.

Having identified the ground on which the Delaware Supreme Court rejected Maxion's claim – Rule 8 – the court must next determine if it constitutes a "plain statement", *Harris v. Reed*, 489 U.S. 255, 263-63 (1989), that the decision rested on state procedural grounds and is, therefore, an adequate and independent basis which bars federal habeas review. *See Ylst v. Nunnemaker*, 501 U.S. 797 (1991). Numerous courts in this district have found that Delaware Supreme Court Rule 8 is an 'adequate and independent' state ground which bars federal habeas review. *See, e.g., Laurie*, 9 F. Supp.2d at 453 (collecting cases); *see also Wonnum v. Kearney*, Civ.A.No. 97-660-GMS, 2001 WL 173799, at *3 (D. Del. Feb. 15, 2001).

As with the exhaustion requirement, Maxion is excused from state procedural bars if he establishes cause and actual prejudice after the state court refuses to hear his claim.[20] *See* 28 U.S.C. § 2254(a);

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[19]Maxion again raised the issue in a later motion for post conviction relief. The Delaware Supreme Court rejected the claim under Delaware Superior Court Criminal Rule 61(i)(4). *See* Del. S.Ct. Crim R. 61(i)(4) (barring consideration of claims already adjudicated unless doing so is warranted "in the interest of justice"). The Delaware Supreme Court found that Maxion failed to show reconsideration was warranted and that the Superior Court properly denied the claim. *See Maxion II*, 1994 WL 424138, at *1.

[20]There is also a "fundamental miscarriage of justice" exception to state procedural bars. For reasons already discussed, however, Maxion has fallen far short of meeting this exception. *See* note13, *supra*.

Caswell, 953 F.2d at 861 n.7 (citing *Coleman*, 501 U.S. at 750-51). To establish 'cause,' Maxion must show that "some objective factor external to the defense" precluded compliance with state procedural rules. *See McClesky v. Zant*, 499 U.S. 467, 493 *1991). For Maxion to establish prejudice, he must demonstrate that the errors at trial "worked to his actual and substantial disadvantage" and not merely that they "created a possibility of prejudice." *See Murray*, 477 U.S. at 493-94. Maxion has not provided the court with any explanation as to why he did not comply with the relevant state procedural rules.[21] Since Maxion has failed to show 'cause' for his procedural default, the court need not consider whether he suffered any prejudice. *See Coleman*, 501 U.S. at 757; *Miller v. Snyder*, Civ.A.No. 96-187-GMS, 2001 WL 173796, at *3 (Feb. 14, 2001) (citing cases). Given the above, the court will dismiss Maxion's first claim and deny the relief requested.

2. Claim Two: Denial of Funds for DNA Testing

Maxion argued – first to the Superior Court and then to the Delaware Supreme Court – that the trial judge erred in denying his request for DNA testing at the State's expense. The Delaware Supreme Court rejected this argument. *See Maxion VI*, at 151. In its decision, the Court stated that:

> The trial record . . . unequivocally reflects that no foreign hair, sperm, or blood samples were recovered from the victim or her clothing, which could have been subject to DNA testing for comparison with samples taken from Maxion. This information was presented to the jury . . . . In Maxion's case there clearly could have been no prejudice from the lack of DNA testing as there were no samples recovered from the victim which could have been tested for comparison.

[21]Maxion may not rely on an unfamiliarity or any lack of awareness of the state procedural rules to establish 'cause'. *See Coverdale*, 2000 WL 1897290, at *4 (citing cases). In any event, Maxion has failed to allege any reason which would meet his burden.

Id at 151-52. The factual findings by the trial court – that there was no evidence collected which could be used for genetic forensic testing – are presumed correct. *See* 28 U.S.C. § 2254(e)(1). The burden, therefore, falls on Maxion to prove the contrary by clear and convincing evidence. *See Duncan v. Morton*, — F.3d —, No. 99-5551, 2001 WL 732014 (3d Cir. June 29, 2001) (citing *Dickerson*, 90 F.3d at 90).

In his federal habeas petition – and throughout his numerous state motions for post conviction relief – Maxion provides no more than conclusory assertions that the State must have had the genetic material he sought but that he was prevented from testing it. Given its duty in this case, the court will not repeat the litany of facts which contradict such an accusation. *See Maxion II*, 1994 WL 424138, at *2. Maxion's wildly speculative claims regarding the State's actions (or inactions) have no more substance now than they did during his plethora of post conviction motions. Thus, his "bald and conclusory assertions" warrant a dismissal of his second claim.[22] *See Mayberry v. Petsock*, 821 F.2d. 179, 185 (3d Cir. 1987).

Even if Maxion was correct and the State found genetic material but refused to give him funds for DNA testing, his claim would still fail. Maxion has cited no case or authority to support his argument that

[22]In his First Amended Petition, Maxion appears to argue that the State violated his Fourteenth Amendment right to due process by destroying a semen sample retrieved from Lewis. This claim, and any implicit *Brady* claim, are little more than variations on the theme of claim 2. These other claims not only suffer from the same defects as claim 2, but have the added problem of not being explicitly presented to the state courts. Barring these types of claims on pure exhaustion grounds, however, may be unnecessarily parsing Maxion's argument. The court, therefore, rejects any claims regarding a failure to provide a semen sample to Maxion on any number of constitutional and federal grounds under the above analysis.

he is entitled to funds to conduct such testing. On the contrary, the Delaware Supreme Court explicitly found that (1) the State is not required to provide funds for "every investigative service requested by indigent defendants" and (2) any failure to do so did not prejudice Maxion. *See Maxion VI,* 686 A.2d at 151-52. This is a "plain statement" of state law.

Finally, the court does not believe that federal law would require the State to provide Maxion funds for DNA testing in this situation. Not only is an indigent defendant not entitled to all tools a wealthier defendant may buy, *Ross v. Moffitt*, 417 U.S. 600 (1974), but also independent DNA testing is not a " basic tool" necessary to launch a meaningful defense. *See Ake v. Oklahoma*, 470 U.S.68, 77 (1985); *Britt v. North Carolina*, 404 U.S. 226, 227 (1971). Since the Delaware Supreme Court's statement "was not contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States," the court will dismiss Maxion's second claim and deny the relief sought. *See* 28 U.S.C. § 2254(d).

3. Claims Four, Five, Six, Seven, Eight, Twelve, and Fourteen

The Respondents admit that Maxion exhausted his fourth (failure to sequester jury), fifth (kidnaping conviction on insufficient evidence), sixth (failure to disclose FBI reports on DNA testing results), seventh (right to speedy trial), eighth (trial court erred by not permitting cross examination of victim), twelfth (improper application of state procedural rules) and fourteenth (improper expert witness testimony) claims. *See* Resp. Ans. Original Petition, at 15 (claims four through eight); Resp. Ans. First Amended Petition, at 5-8 (twelfth and fourteenth claims).[23] Nevertheless, Maxion must demonstrate that he complied with the

[23]What the court has identified as claims twelve and fourteen are called claims two and four by the Respondents in their brief.

relevant state procedural requirements. *See Coleman*, 501 U.S. at 731-32; *Caswell*, 953 F.2d at 860. The court concludes that Maxion has failed to do so for each of the aforementioned claims.

The Delaware Supreme Court dismissed the fourth, fifth, seventh and fourteenth claims by invoking Delaware Superior Court Criminal Rule 61(i)(2).[24] *See Maxion IV*, 1994 WL 397655, at *2; *Maxion III*, No. 10, 1994, at 3. The Delaware Supreme Court also invoked Delaware Superior Court Criminal Rule 61(i)(3) to deny Maxion's sixth and eighth claims.[25] *See Maxion II*, 1994 WL 424318, at *2. It is beyond dispute that Delaware Superior Court Criminal Rule 61(i) and all its subsections constitutes an adequate and independent state law ground which preclude federal habeas review. *See, e.g.*, *Coverdale*, 2000 WL 1897290, at *3 (collecting cases); *see also* Section IVA1(b), *supra*.

In claim twelve, Maxion argues that the state courts erred in not applying Rule 61(i)(5) to excuse his various procedural defaults. Under Rule 61(i)(5), the procedural bars of Rule 61(i)(1)-(3) are inapplicable to prevent the Delaware Supreme Court from exercising jurisdiction over "a colorable claim that there was a miscarriage of justice because of a constitutional violation that undermined the fundamental legality, reliability, integrity or fairness of the proceedings leading to the judgment of conviction." *See* Del. Super. Ct. Crim. R. 61(i)(5). As the court has already discussed, Rule 61 is an adequate and independent

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[24]Rule 61(i)(2) deals with repetitive motions and states that "[a]ny ground for relief that was not asserted in a prior postconviction proceeding . . . is thereafter barred unless consideration of the claim is warranted in the interest of justice." Since these claims were first asserted well after Maxion's first motion for post-conviction relief, the Delaware Supreme Court applied this rule.

[25]Rule 61(i)(3) describes procedural default and states that "[a]ny ground for relief that was not asserted in the proceedings leading to the judgment of conviction . . . is thereafter barred unless the movant shows (A) [c]ause for relief from the procedural default and (B) [p[rejudice from a violation of the movant's rights." The Delaware Supreme Court concluded that Maxion failed to timely raise the issues and could not satisfy the cause and prejudice requirements.

state procedural ground which precludes habeas review. Just as the court cannot review the state courts' application of Rule 61, it cannot review a state court's decision *not* to apply Rule 61(i)(5).[26] To the extent that Maxion is asserting that the state court improperly applied Rule 61 in light of Delaware law, the court is barred from considering the claim. *See Rivera v. Snyder*, Civ.A.No, 97-572-GMS, 2001 WL 173790, at *1 (D. Del. Feb. 13, 2001).[27]

As noted above, Maxion may overcome his various procedural defaults under Rule 61 if he can establish the requisite amount of cause and actual prejudice. *See* Section IVB1(b), *supra* After reviewing the record, the court concludes that Maxion has failed to state any reason or point to any evidence which would constitute either cause or prejudice. Thus, the court is compelled to dismiss claims four, five, six, seven, eight, twelve and fourteen and deny the relief Maxion seeks.

4. Claims 9(c) and Ten: Ineffective Assistance of Counsel

The Respondents admit that claims 9(c) (trial counsel allowed testimony beyond scope of expert's expertise) and ten (appellate counsel failed to raise issues requested by Maxion) are not exhausted. *See* Resp. Ans. Original Petition at 19. Yet, as is true with all of Maxion's other claims, he has failed to follow the relevant state procedural requirements. Furthermore, the court finds that the Delaware Supreme Court's analysis was not "contrary to, or involved an unreasonable application of, clearly established

[26]As the Respondents correctly note, "[t]he mere fact that a state supreme court has some discretion to forgive procedural defaults under Rule 61(i)(5) does not weigh against the court's plain statement." *See* Resp. Ans. Second Amended Petition, at 6.

[27]Rule 61(i)(5)'s catch all provision is similar to the "fundamental miscarriage of justice exception" articulated in federal law. *See McCandless*, 172 F.3d at 260 (citing cases). As the court previously discussed, Maxion has utterly failed to make such a showing. *See* note 13, *supra*. Therefore, even if the court were to reach the merits of the state courts' failure to apply Rule 61(i)(5), it would reach the same result.

federal law as determined by the Supreme Court of the United States," nor "was [the analysis] based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *See* 28 U.S.C. § 2254(d).

The Delaware Supreme Court rejected Maxion's first ineffectiveness claim in his first motion for post conviction relief. *See Maxion II*, 648 A.2d at 425. The Delaware Supreme Court based its holding on the two prong test first announced in *Strickland v. Washington*, 466 U.S. 668, (1984). This is the correct standard under federal law. *See, e.g., Williams (Terry) v. Taylor*, 529 U.S. 362, 391 (2000). In applying the *Strickland* test, the Delaware Supreme Court stated "Maxion's mere listing of conclusory allegations of errors by his counsel manifestly fails to establish that counsel's representation fell below 'an objective standard of reasonableness' and that there is a 'reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different." *See Maxion II*, 1994 WL 424138, at *2. Upon reviewing Maxion's claims, the court concludes that the Delaware Supreme Court correctly applied the *Strickland* test.

Moreover, Maxion's federal petition undermines his claims of ineffective assistance of counsel. In arguing that his appellate counsel was ineffective in claim ten, Maxion states, "what . . . [counsel] deemed to be his professional judgment of the issues to be raised or advanced on Direct Appeal, was a meritless weak companion barred argument . . . because it was not first raised at [the] trial Court." *See* Original Petition, at 25. Simply put, Maxion concludes that his appellate counsel was constitutionally ineffective merely because he decided not to raise the issues that Maxion deemed "the most significant." See id. Tactical choices do not rise to the level of constitutional ineffectiveness. *See, e.g., Duncan*, 2001 WL 732014, at *11 (citing *Strickland*, 466 U.S. at 690) (stating that "[s]trategic choices made after thorough

investigation of law and facts relevant to plausible options are virtually unchallengeable."); *Sistrunk v. Vaughn*, 96 F.3d 666, 670 (3d Cir. 1996) (concluding that "in a criminal defense, certain litigation decisions are considered fundamental and are for the client to make . . . all other decisions fall within the professional responsibility of counsel") (internal quotations omitted). Not appealing an issue because, in the exercise of independent judgment, appellate counsel believed it was meritless or otherwise barred are inherently strategic decisions that cannot be properly attacked under the *Strickland* test.

5. Claim Thirteen: Improper Denial of Motion for New Trial

In this claim, Maxion alleges that the Superior Court erred in denying his motion for a new trial based on newly discovered evidence. Since Maxion raised this claim in his seventh motion for state post conviction relief, he has properly exhausted it. *See Maxion V*, 686 A.2d at 151. Despite this, Maxion's claim must fail since it merely challenges state law.

Maxion's motion for a new trial based on new evidence was denied under state procedural rules. According to Delaware Superior Court Criminal Rule 33, "[a] motion for a new trial based on the ground of newly discovered evidence may be made *only* before or within two years after final judgment." *See* Del. Super. Ct. Crim. R. 33 (emphasis added). According to the Delaware Supreme Court, Maxion's conviction became final in August, 1992 when it "issued its mandate following Maxion's direct appeal".[28] *See Maxion V*, 686 A.2d at 151. Maxion filed a motion for a new trial in April, 1995 – well beyond the

[28]The Delaware Supreme Court issued its order affirming the denial of Maxion's direct appeal by the Superior Court on July 22, 1992. *See Maxion I*, 1992 WL 183093, at *1. The court questions whether Maxion's conviction was final on this date or in August, 1992, as the Delaware Supreme Court stated. Indeed, the Delaware Supreme Court may have credited Maxion with a few more weeks. As discussed below, however, this difference is immaterial given the timing of Maxion's motion. *See infra*.

two year limitation. *See id.* Since the time limitation of Rule 33 is "jurisdictional and mandatory" under Delaware law, the Delaware Supreme Court properly denied Maxion's motion as untimely. *See id.* (citing cases). The court cannot grant habeas relief for violations of state law short of violations of federal constitutional law. *See* 28 U.S.C. § 2254(a), (d)(1); *see also Estelle v. McGuire*, 502 US. 62, 67-68 & n.2 (1991) (emphasizing that in "conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States"); *Kontakis v. Beyer*, 19 F.3d 110, 117 (3d Cir. 1994) (discussing *Estelle*). Since federal habeas relief is unavailable for this claim, the court is compelled to dismiss it and deny the requested relief.[29]

6. Claim Fifteen: Variance Between Indictment and Conviction

Maxion's Second Amended Petition raises what is properly considered his fifteenth claim for relief. Put simply, Maxion argues that his rights under the Fourth, Sixth, and Fourteenth Amendments were violated because he never received a preliminary hearing for certain charges in his indictment. Although this claim may be unexhausted,[30] the court will examine it to the extent that it relates to a claim that Maxion presented to the state courts in his eighth motion for post conviction relief. *See Maxion V*, 686 A.2d at 148-50 (stating that Maxion alleged prosecutorial and judicial misconduct since Superior Court lacked

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[29]Even if the court were to examine whether Maxion's "new evidence" warranted a new trial, his claim would still fail since it consists entirely of a trial transcript. *See Maxion V*, 686 A.2d at 150. Under federal law, this type of evidence cannot be considered to grant habeas relief. *See, e.g., Thorton v. Taylor*, Civ.A.No. 98-414-SLR, 2001 WL 641741, at *3 (D. Del. May 8, 2001) (articulating rigorous five factor test before habeas court can grant new trial based on "newly discovered evidence") (citing cases); *see also* Section IVA2, *supra*.

[30]The Respondents argue that this claim is similar to his eleventh claim for relief (invalid arrest warrant) and is, therefore, procedurally barred. The court agrees that this claim is "substantially similar." Out of an abundance of caution, the court will not dismiss this claim on exhaustion grounds.

authority to convict him). As more fully discussed above, the Delaware Supreme Court's dismissal of this claim under Delaware Superior Court Criminal Rule 61(i)(2) is an 'adequate and independent' state procedural ground which cannot be reviewed by the court. *See* Section IVB3, *supra*. He has also failed to demonstrate the requisite amount of cause and prejudice. *See* Section IVB1(b), *supra*.

Even if the court were to overlook the significant procedural hurdles Maxion has to overcome, his claim must still fail. It is axiomatic that the Fourth Amendment protects individuals from extended restraint of liberty following arrest in the absence of a judicial determination of probable cause. *See generally Gerstein v. Pugh*, 420 U.S. 103 (1975). The return of an indictment by a grand jury is conclusive proof of the existence of probable cause. *See id.* at 118 & n. 19; *United States v. Suppa*, 799 F.2d 115, 118-119 (3d Cir. 1986). A conviction by a jury after a trial on those charges in the indictment renders any problem or defect in the charging instrument harmless error. *See United States v. Lennick*, 18 F.3d 814, 817 (9th Cir. 1994) (quoting *Bank of Nova Scotia v. United States*, 487 U.S. 250, 254-57 (1988)) (stating that "errors in the grand jury indictment procedure are subject to harmless error analysis unless the structural protections of the grand jury have been so compromised as to render the proceedings fundamentally unfair") (internal quotations omitted).

The record in this case reveals that the Superior Court conducted a preliminary hearing on charges of first degree unlawful imprisonment and third degree unlawful sexual intercourse. The grand jury indicted Maxion on charges of first degree sexual intercourse, third degree unlawful sexual penetration, third degree unlawful sexual contact and first degree kidnaping. The State filed a nolle prosequi as to the unlawful imprisonment charge. Maxion was then convicted at trial by a jury of unlawful sexual intercourse in the first degree and first degree kidnaping. There is nothing wrong with this ordinary and routine procedure of

changing the charges a defendant faces. At minimum, such a procedure does not raise due process concerns sufficient to warrant federal habeas relief.

Any residual challenge Maxion may pose to the indictment or the Superior Court's jurisdiction is entirely governed by Delaware law; the court cannot grant habeas relief over this claim. *Cf*. Section IVB1, *supra*. In *Maxion V*, the Delaware Supreme Court explicitly found that the Superior Court had jurisdiction over the various felony offenses Maxion was charged with violating. *See Maxion V*, 686 A.2d at 151. The court cannot – and should not – review such a jurisdictional determination. Indeed, doing so would violate the essence of the principles of comity and federalism upon which the AEDPA is grounded.

Given the above, the court has no choice but to dismiss Maxion's fifteenth claim and deny the sought after relief.

C. Certificate of Appealibility

Upon consideration of Maxion's petition (including his First and Second Amended Petitions), the court finds that he has not made a substantial showing of a denial of a constitutional right. Further, the court finds that the constitutional issues raised in the petition are not debatable among jurists of reason, adequate to receive encouragement to proceed further, or capable of being resolved in a different manner. *See, e.g., Morris v. Horn*, 187 F.3d 333, 339 (3d Cir. 1999) (citing 28 U.S.C. § 2253(c)(1)(A)).

V. CONCLUSION

Despite having presented this court with an Original Petition, a First Amended Petition, and a Second Amended Petition, Maxion cannot gain habeas relief under 28 U.S.C. § 2254. The court believes that deciding whether to issue "the great writ" is an important task. However, in spite of the mountain of briefs, appendices, transcripts and exhibits, Maxion's petition which is replete with repetitive, untimely, and

ill-considered claims warrants summary dismissal. For the reasons stated above, the court finds that Maxion's claims are unexhausted, procedurally barred, or otherwise fail on the merits. Therefore, it will dismiss the petition in its entirety and deny the requested relief. Additionally, the court finds that there is no probable cause to appeal. The court will issue an appropriate order in conjunction with this memorandum opinion.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

EDDIE LEE MAXION, JR., Petitioner, v. ROBERT SNYDER, Warden, and M. JANE BRADY, Attorney General of the State of Delaware, Respondents.	)	Civil Action No. 96-486-GMS

MEMORANDUM OPINION

Eddie Lee Maxion, Jr., pro se.

Deputy Attorney General Thomas E. Brown, Esq. of THE DELAWARE DEPARTMENT OF JUSTICE, Wilmington, Delaware.
Attorney for Respondents.

Dated: July 27, 2001
Wilmington, Delaware.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

EDDIE LEE MAXION, JR.,	)	
Petitioner,	)	
v.	)	Civil Action No. 96-486-GMS
ROBERT SNYDER, Warden, and M. JANE BRADY, Attorney General of the State of Delaware,	)	
Respondents.	)	

ORDER

For the reasons stated in the court's Memorandum Opinion of the same date, IT IS HEREBY ORDERED that:

1. Maxion's petition for the issuance of a writ of habeas corpus (D.I. 3) is DISMISSED and the relief requested is DENIED.[31]

2. A certificate of appealibility shall not issue in accordance with 28 U.S.C. § 2253(c)(2).

Dated: July 27, 2001

Gregory M. Sleet
UNITED STATES DISTRICT JUDGE

[31]Maxion's First Amended Petition (D.I. 24) and his Second Amended Petition (D.I. 33) are incorporated by reference.