IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

MEL S. McALLISTER, Petitioner, v. ROBERT SNYDER, Warden, and ATTORNEY GENERAL OF THE STATE OF DELAWARE, Respondents.	)	Civil Action No. 97-681-GMS

M E M O R A N D U M A N D O R D E R

Following a jury trial in the Delaware Superior Court, Mel S. McAllister was convicted of first degree murder and possession of a deadly weapon during the commission of a felony. McAllister is presently incarcerated in the Delaware Correctional Center in Smyrna, Delaware, where he is serving a sentence of life imprisonment. He has filed with the court[1] a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, asserting four separate claims for relief. For the reasons set forth below, the court concludes that each of McAllister's claims either lacks merit or is procedurally barred, and will deny the petition and the requested relief.

[1] This matter was originally assigned to the Honorable Sue L. Robinson, but was reassigned to this court on March 18, 1999.

I. BACKGROUND[2]

In mid-April 1991, Mel S. McAllister was visiting the area near the intersection of Ninth and Kirkwood Streets in Wilmington, Delaware. Stephen Davis and two of his accomplices attacked McAllister and stole money from his pockets. Davis threatened to beat McAllister if he returned to the area. Despite Davis' threat, McAllister returned to the area on April 25, 1991. On that visit, someone struck him from behind with a pipe and took his money. Davis was present and threatened to kill McAllister the next time he returned to the area.

Four days later, on April 29, 1991, McAllister returned to the area armed with a revolver in his pants. He encountered Davis, who was carrying a forty-ounce beer bottle. The two exchanged words, and an altercation ensued. McAllister knocked the beer bottle from Davis' hands, and struck him on the head with his revolver. During the fight, McAllister shot Davis in the head then fled to Philadelphia. Davis died a week later. The medical examiner determined that the gunshot wound caused Davis' death.

Following a jury trial in the Delaware Superior Court, McAllister was convicted of first degree murder and possession of a deadly weapon during the commission of a felony. He was sentenced to life in prison for the murder charge and a fifteen-year consecutive sentence for the weapons charge. On July 15, 1993, the Delaware Supreme Court affirmed McAllister's conviction and sentence. (D.I. 10, Delaware Supreme Court Order of July 15, 1993.)

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[2] The court's recitation of the facts is taken from the Delaware Supreme Court's Order of July 15, 1993, the Delaware Superior Court's Order of January 22, 1996, and the respondents' answer. McAllister has not provided the court with a statement of facts, nor does he dispute the accuracy of the facts set forth in the above-referenced orders and answer.

McAllister then filed in the Delaware Superior Court a motion for post-conviction relief pursuant to Rule 61 of the Superior Court's Rules of Criminal Procedure. In his Rule 61 motion, McAllister alleged that trial counsel rendered ineffective assistance in several respects, and also raised numerous trial court errors. The Superior Court denied McAllister's ineffective assistance claims on the merits, but found his remaining claims procedurally barred by Rule 61(i)(3). (D.I. 10, Delaware Superior Court Order of January 22, 1996.) In a one-page order, the Delaware Supreme Court affirmed the denial of McAllister's Rule 61 motion "for the reasons stated in the well-reasoned Memorandum Opinion of Superior Court dated January 22, 1996." (D.I. 10, Delaware Supreme Court Order of October 9, 1996.)

McAllister has now filed with the court the current petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. For the reasons that follow, the court will deny the petition.

II. LEGAL STANDARDS

A. 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"):[3]

[3] Effective April 24, 1996, the AEDPA amended the standards for reviewing state court judgments in habeas petitions filed under 28 U.S.C. § 2254. *Werts v. Vaughn*, 228 F.3d 178, 195 (3d Cir. 2000). Federal courts must apply the AEDPA's amended standards to any habeas petition filed on or after April 24, 1996. *See Lindh v. Murphy*, 521 U.S. 320, 336 (1997); *Werts*, 228 F.3d at 195. McAllister filed the current habeas petition at the earliest on September 26, 1997, the date he signed it. Accordingly, the AEDPA's amended standards of review apply to McAllister's petition.

> 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 –
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> > (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 . . .

28 U.S.C. § 2254(d). A federal court may issue a writ of habeas corpus under this provision only if it finds that the state court decision on the merits of a claim either: (1) was contrary to clearly established federal law, or (2) involved an unreasonable application of clearly established federal law. *Williams v. Taylor*, 529 U.S. 362, 412 (2000).

A federal court may grant the writ under the "contrary to" clause "if the state court arrives at a conclusion opposite to that reached by [the United States Supreme Court] on a question of law or if the state court decides a case differently than [the United States Supreme Court] has on a set of materially indistinguishable facts." *Id.* at 412-13. The court "must first identify the applicable Supreme Court precedent and determine whether it resolves the petitioner's claim." *Werts*, 228 F.3d at 197, *citing Matteo v. Superintendent, SCI Albion*, 171 F.3d 877, 888 (3d Cir. 1999). In short, the petitioner must demonstrate "that Supreme Court precedent *requires* the contrary outcome." *Matteo*, 171 F.3d at 888 (emphasis added).

If the petitioner fails to satisfy the "contrary to" clause, the court must determine whether the state court decision was based on an unreasonable application of Supreme Court precedent. *Id.* Under the "unreasonable application" clause, the court "may grant the writ if the state court identifies

the correct governing legal principle . . . but unreasonably applies that principle to the facts of the prisoner's case." *Williams*, 529 U.S. at 413. In other words, a federal court may not grant a petition under this clause "unless the state court decision, evaluated objectively and on the merits, resulted in an outcome that cannot reasonably be justified under existing Supreme Court precedent." *Matteo*, 171 F.3d at 890.

Respecting a state court's determinations of fact, a federal habeas 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). When the state court did not specifically articulate its factual findings but denied a claim on the merits, federal courts on habeas review generally may "properly assume that the state trier of fact . . . found the facts against the petitioner." *Weeks v. Snyder*, 219 F.3d 245, 258 (3d Cir. 2000).

B. 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 –
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> (A) the applicant has exhausted the remedies available in the courts of the State; or
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> (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, 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).

To satisfy exhaustion, "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, 844-45 (1999). Although a state prisoner is not required to "invoke extraordinary remedies" to satisfy exhaustion, he must nonetheless fairly present each of his claims to the state courts. *Id.* at 845, 848. If a claim has not been fairly presented to the state courts, and further state-court review is foreclosed under state law, exhaustion may be excused on the basis of futility. *Wenger v. Frank*, 266 F.3d 218, 223 (3d Cir. 2001).

Where a state court refuses to consider a petitioner's claims because he failed to comply with an independent and adequate state procedural rule, his claims are considered exhausted but procedurally defaulted, and a federal court generally is barred from reviewing them. *Harris v. Reed*, 489 U.S. 255, 263 (1989); *Werts*, 228 F.3d at 192. A federal court may, however, consider the merits of a procedurally defaulted claim if there is a basis for excusing the procedural default. *Wenger*, 266 F.3d at 224. A procedural default may be excused if the petitioner can demonstrate cause for the default and prejudice resulting therefrom, or a fundamental miscarriage of justice. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991); *Werts*, 228 F.3d at 192.

In order to demonstrate cause, 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 by showing, for example, 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. *See Coleman*, 501

U.S. at 755. 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 can demonstrate that failure to review the claim will result in a fundamental miscarriage of justice. *Edwards v. Carpenter*, 529 U.S. 446, 451 (2000); *Wenger*, 266 F.3d at 224. 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 a miscarriage of justice, a petitioner must prove that it is more likely than not that no reasonable juror would have convicted him. *Schlup v. Delo*, 513 U.S. 298, 326 (1995); *Werts*, 228 F.3d at 193.

III. DISCUSSION

In his habeas petition, McAllister articulates four separate claims for relief:

(1) Counsel rendered ineffective assistance in violation of the Sixth Amendment.

(2) The trial court erred in its jury instruction by not explaining the burden of proof to the jury in violation of the Due Process Clause of the Fourteenth Amendment.

(3) The trial court conducted unreported sidebar conferences in violation of the Due Process Clause of the Fourteenth Amendment.

(4) The state refused to produce the death certificate of the victim as required by *Brady v. Maryland*, 373 U.S. 83 (1963).

(D.I. 3.) The respondents concede that each of McAllister's claims is exhausted. They argue first that

McAllister's claim of ineffective assistance of counsel should be denied on the merits. They further argue that McAllister's remaining claims, while exhausted, are procedurally barred from federal habeas review.

A. Claim 1 – Ineffective Assistance of Counsel

McAllister's first claim is that trial counsel rendered ineffective assistance in several respects. The respondents correctly concede that this claim is exhausted. McAllister presented it to the Delaware Superior Court in his Rule 61 motion, and then to the Delaware Supreme Court on appeal from the denial of his Rule 61 motion.[4] The Delaware Superior Court rejected this claim on the merits. The Delaware Supreme Court affirmed "for the reasons stated in the well-reasoned Memorandum Opinion of Superior Court." (D.I. 10, Delaware Supreme Court Order, Oct. 9, 1996.) As explained in detail above, this court's role is to review the state courts' decision under the standards of the AEDPA. *See* 28 U.S.C. § 2254(d)(1); *Williams*, 529 U.S. at 412.

1. Counsel's Inexperience

First, McAllister asserts that this was counsel's first murder trial, and that counsel's inexperience and lack of knowledge and skill prejudiced him. (D.I. 3 at 4.) Even assuming that this was counsel's first murder trial, it is well established that an attorney's inexperience, standing alone,

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[4] McAllister did not raise this claim on direct appeal. Generally, the failure to raise an issue on direct appeal renders a claim procedurally defaulted. *See* Super. Ct. R. Crim. P. 61(i)(3); *Bialach v. State*, 773 A.2d 383, 386 (Del. 2001). The Delaware Supreme Court, however, has repeatedly stated that claims of ineffective assistance of counsel are properly raised for the first time in a Rule 61 post-conviction motion, not on direct appeal. *See MacDonald v. State*, 778 A.2d 1064, 1071 (Del. 2001); *Flamer v. State*, 585 A.2d 736, 753 (Del. 1990). For this reason, McAllister's failure to raise his claim of ineffective assistance on direct appeal did not result in a procedural default.

does not give rise to a claim of ineffective assistance. *See United States v. Cronic*, 466 U.S. 648, 665 (1984)(stating that inexperience does not justify a presumption of ineffectiveness in the absence of specific deficiencies in performance); *Anderson v. Calderon*, 232 F.3d 1053, 1095 (9th Cir. 2000)("A defense attorney is not presumed to be ineffective simply because that attorney is young, inexperienced, and has never before tried a jury trial."); *Cooks v. Ward*, 165 F.3d 1283, 1292 n.5 (10th Cir. 1998)("An attorney with little or no prior experience certainly can render effective assistance"); *United States v. O'Neil*, 118 F.3d 65, 72 n.2 (2d Cir. 1997)("Inexperience alone does not constitute ineffective assistance absent specific instances of deficient conduct").[5]

Rather than focusing on counsel's experience or lack thereof, the proper inquiry is the familiar two-part test of *Strickland v. Washington*, 466 U.S. 664 (1984): A defendant claiming ineffective assistance of counsel must show that (1) counsel's performance was deficient, and (2) counsel's deficient performance prejudiced the defense. *Id.* at 687. The court will assess each of McAllister's remaining allegations of deficient conduct to determine whether the state courts' decision was either contrary to, or involved an unreasonable application of, the *Strickland* test. *See* 28 U.S.C. § 2254(d)(1); *Williams*, 529 U.S. at 390 (stating that *Strickland* is the "clearly established Federal law" governing ineffective assistance of counsel claims).

2. Failure to Call the Clays as Witnesses

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[5] In denying McAllister's Rule 61 motion, the Delaware Superior Court acknowledged that he claimed that "this was trial counsel's first murder case." (D.I. 8, Delaware Superior Court Order, Jan. 22, 1996, at 7.) The Superior Court rejected McAllister's claim of ineffective assistance of trial counsel on the merits, but did not specifically address counsel's inexperience. Notwithstanding the Superior Court's silence on this specific issue, counsel's lack of experience, standing alone, does not constitute ineffective assistance.

McAllister's first allegation of deficient conduct is counsel's failure to call Thomas and Sharon Clay as witnesses. (D.I. 3 at 4.) According to McAllister, the Clays' statements were used in support of the arrest warrant, but counsel never questioned the Clays or challenged their statements. (*Id.*) McAllister has not identified for the court the statements at issue, nor has he provided the court with the Clays' proposed testimony.

In rejecting McAllister's claim of ineffective assistance, the Delaware Superior Court first correctly recited the *Strickland* test. (D.I. 8, Delaware Superior Court Order, Jan. 22, 1996, at 13.) The Superior Court, acknowledging McAllister's claim that counsel failed to investigate the case, stated that he "name[d] no witnesses not interviewed or called." (*Id.*) Without further discussion, the Superior Court rejected this claim as "conclusory." (*Id.* at 14.)

While McAllister has provided this court with the names of Thomas and Sharon Clay, his claim is nonetheless conclusory and cannot succeed. In order to demonstrate that he was prejudiced by counsel's failure to call the Clays, McAllister must present the court with their proposed testimony. *Duncan v. Morton*, 256 F.3d 189, 201-02 (3d Cir. 2001). Here, McAllister has not informed the court what the Clays would have testified to if counsel had called them as witnesses. His failure to inform the court of their proposed testimony results in a failure to establish prejudice. *Id.* at 202. Without a showing of prejudice, the court cannot conclude that trial counsel rendered ineffective assistance. The court finds that the state courts' decision on this claim, although terse, is not contrary to *Strickland*, nor did it involve an unreasonable application of *Strickland*'s two-part test. Therefore, this claim cannot provide a basis for federal habeas relief.

3. Failure to Obtain *Brady* Material

Next, McAllister claims that counsel was ineffective by failing to obtain the death certificate as evidence of the cause of death of the victim. McAllister asserts that the death certificate was "crucial to the defense and should be considered *Brady* material." (D.I. 3 at 10.) He contends that the death certificate was necessary to prove that he caused the victim's death, and to disprove that the victim died as a result of "intervening medical care." (*Id.*) In his reply brief, McAllister represents that he does not know what the death certificate states. (D.I. 13 at 3.)

The Delaware Superior Court acknowledged McAllister's claim that counsel failed to obtain *Brady* evidence. (D.I. 8, Delaware Superior Court Order, Jan. 22, 1996, at 14.) The Superior Court opined that this claim was "conclusory" and could not stand because McAllister failed to provide any "specifics about what the *Brady* claim is." (*Id.*)

While McAllister has provided this court with more information respecting his *Brady* claim, his allegation of ineffective assistance based on a *Brady* violation lacks merit. Under *Brady*, a defendant's due process right to a fair trial is violated when the prosecution withholds material, exculpatory evidence. *Brady*, 373 U.S. at 83. Evidence is considered material for *Brady* purposes when there is a reasonable probability that if the evidence had been disclosed, the result of the proceedings would have been different. *United States v. Bagley*, 473 U.S. 667, 682 (1985); *Buehl v. Vaughn*, 166 F.3d 163, 181 (3d Cir. 1999).

Plainly, McAllister has failed to establish that a *Brady* violation occurred. He readily acknowledges that he does not even know what the death certificate states. (D.I. 13 at 3.) Thus, the court cannot determine whether the death certificate is either exculpatory or material. Regardless, McAllister has presented this claim as one of ineffective assistance of counsel. Because he does not

know what the death certificate states, he cannot satisfy *Strickland*'s prejudice requirement. McAllister himself speculates that the death certificate may state that his gunshot was the cause of the victim's death. (*Id.*) For this reason, McAllister has failed to show a reasonable probability that the outcome of the proceeding would have been different if counsel had obtained the death certificate. *See Strickland*, 466 U.S. at 694.

In sum, the state courts' decision on this claim is neither contrary to, nor an unreasonable application of, *Strickland*. This claim does not provide a basis for federal habeas relief.

4. Failure to Raise Claims on Direct Appeal

McAllister's final allegation of ineffective assistance is, in its entirety, that "[a]ppellate counsel was ineffective for raising any of the above claims on direct appeal." (D.I. 3 at 4.) The court presumes that McAllister's intent is to assert that counsel was ineffective *for failing* to raise certain claims on direct appeal. The court also presumes that "any of the above claims" refers to the above claims of ineffective assistance of trial counsel.

The Delaware Superior Court rejected this claim on the merits. Because each of McAllister's claims of ineffective assistance of trial counsel was without merit, the Superior Court stated, appellate counsel could not be ineffective for failing to raise them on appeal. (D.I. 8, Delaware Superior Court Order, Jan. 22, 1996, at 15-16.)

The court agrees that this claim cannot provide a basis for habeas relief for two reasons. In Delaware, claims of ineffective assistance of trial counsel are properly raised in a Rule 61 post-conviction motion, not on direct appeal. *See MacDonald v. State*, 778 A.2d 1064, 1071 (Del. 2001); *Flamer v. State*, 585 A.2d 736, 753 (Del. 1990). Appellate counsel cannot be ineffective for failing

to raise on direct appeal claims that are not properly raised on direct appeal. Even if such claims were properly raised on direct appeal, the court has concluded that the above claims of ineffective assistance of trial counsel lack merit. Appellate counsel cannot render ineffective assistance for failing to raise meritless claims on appeal. *See Diggs v. Owens*, 833 F.2d 439, 446 (3d Cir. 1987).

B. Claims 2, 3, and 4

The threshold inquiry respecting claims 2, 3, and 4 is whether these claims are procedurally barred from federal habeas review, as the respondents argue. While they concede that McAllister exhausted these claims by presenting them to the state courts in his Rule 61 post-conviction proceedings, the respondents assert that he was required to present them to the Delaware Supreme Court on direct appeal. His failure to raise claims 2, 3, and 4 on direct appeal, the respondents contend, renders these claims procedurally barred by Superior Court Criminal Rule 61(i)(3).[6] Absent a showing of cause and prejudice or a fundamental miscarriage of justice, they conclude, the court is barred from reviewing the merits of claims 2, 3, and 4.

After reviewing the state court record, the court agrees that McAllister exhausted claims 2, 3, and 4 by presenting them to both the Delaware Superior Court and the Delaware Supreme Court in his Rule 61 proceedings. A review of the record also confirms the respondents' assertion that McAllister failed to present any of these claims on direct appeal to the Delaware Supreme Court – not even McAllister suggests otherwise.

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[6] "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., Rule 61(i)(3).

In Delaware, failure to present a particular claim on direct appeal generally is treated as a procedural default for purposes of Rule 61(i)(3). *See Younger v. State*, 580 A.2d 552, 555-56 (Del. 1990). Indeed, in denying McAllister's Rule 61 motion, the Delaware Superior Court specifically invoked Rule 61(i)(3), cited *Younger*, and refused to consider the merits of claims 2, 3, and 4 based on McAllister's failure to present them on direct appeal. The Delaware Superior Court's decision on claims 2, 3, and 4 rests on an independent and adequate state procedural ground.[7] *See Coleman*, 501 U.S. at 730; *Gattis v. Snyder*, 46 F. Supp. 2d 344, 367 (D. Del. 1999). For this reason, federal habeas review of claims 2, 3, and 4 is procedurally barred unless McAllister can establish cause and prejudice or a fundamental miscarriage of justice. *Coleman*, 501 U.S. at 750.

McAllister advances no arguments addressing cause and prejudice or a fundamental miscarriage of justice. He alleges in a conclusory fashion that counsel was ineffective by failing to raise certain claims on direct appeal. (D.I. 3 at 4.) Ineffective assistance of counsel can constitute cause for a procedural default, but only if counsel's error gives rise to an independent constitutional violation. *See Coleman*, 501 U.S. at 755. As explained above, McAllister has failed to demonstrate ineffective assistance of counsel. He has also failed to explain how counsel's failure to raise *any* issues on direct appeal resulted in actual prejudice. Finally, McAllister does not suggest that he is actually innocent for the purpose of demonstrating a fundamental miscarriage of justice.

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[7] In a one-page order, the Delaware Supreme Court affirmed the Superior Court's denial of McAllister's Rule 61 motion "on the basis of and for the reasons stated in the well-reasoned Memorandum Opinion of Superior Court dated January 22, 1996." This court presumes that the Delaware Supreme Court's order rests upon the same ground as the Delaware Superior Court's decision, which explicitly imposed a procedural default, and that the Delaware Supreme Court "did not silently reject that bar and consider the merits." *Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991).

For these reasons, the court concludes that Claims 2, 3, and 4 are procedurally barred. Federal habeas review of these claims is unavailable.

C. Request for Evidentiary Hearing

Pursuant to the AEDPA, "a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1). The AEDPA grants the court discretion to conduct an evidentiary hearing on habeas review, but only in limited circumstances. *See* 28 U.S.C. § 2254(e); *Campbell v. Vaughn*, 209 F.3d 280, 286-87 (3d Cir. 2000). The court *may*, for example, conduct an evidentiary hearing if the petitioner "has diligently sought to develop the factual basis of a claim for habeas relief, but has been denied the opportunity to do so by the state court." *Campbell*, 208 F.3d at 287, *quoting Cardwell v. Greene*, 152 F.3d 331, 337 (4th Cir. 1998). In such a situation, the failure to develop the factual record is not the petitioner's fault. *Campbell*, 208 F.3d at 286-87.

In exercising its discretion, the court should focus "on whether a new evidentiary hearing would be meaningful, in that a new hearing would have the potential to advance the petitioner's claim." *Id.* at 287. The court properly refuses to conduct an evidentiary hearing where a petitioner fails "'to forecast any evidence beyond that already contained in the record' that would help his cause, 'or otherwise to explain how his claim would be advanced by an evidentiary hearing.'" *Id.*, *quoting Cardwell*, 152 F.3d at 338.

In his reply brief, McAllister asks the court to conduct an evidentiary hearing "to be provided with all of the facts that may be in question." (D.I. 13 at 4.) He fails to identify any evidence outside

the record that would help his cause, or to explain how any of his claims would be advanced by an evidentiary hearing. For this reason, McAllister's request for an evidentiary hearing is denied.

D. 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 is convinced that reasonable jurists would not find its assessments of McAllister's constitutional claims debatable or wrong. McAllister therefore has failed to make a substantial showing of the denial of a constitutional right, and a certificate of appealability will not issue.

IV. CONCLUSION

For the foregoing reasons, IT IS HEREBY ORDERED THAT:

1. McAllister's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 is DENIED.

2. 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: December 3, 2001

Gregory M. Sleet
UNITED STATES DISTRICT JUDGE