IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

DWAYNE BUTLER, Petitioner, v. ATTORNEY GENERAL OF THE STATE OF DELAWARE and STATE OF DELAWARE, Respondents.	)	Civil Action No. 98-370-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, Dwayne Butler was convicted of possession and delivery of a narcotic. He was sentenced to eight years imprisonment to be suspended after five years for probation. Butler is currently incarcerated at the Delaware Correctional Center in Smyrna, Delaware. Butler has filed with the court[1] a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, asserting a single claim for relief. For the following reasons, the court will deny his petition and the relief requested therein.

I. BACKGROUND

On July 20, 1996, Detective Steven Martelli, an undercover officer with the Wilmington Police Department, was driving on Tenth Street in an unmarked car. A man standing on the sidewalk flagged him down and asked him if he used marijuana or crack cocaine. Martelli

[1] This matter was originally assigned to the Honorable Joseph J. Farnan, Jr., but was reassigned to this court on September 28, 1998.

replied that he did. After a brief negotiation, Martelli agreed to purchase twenty dollars worth of crack cocaine. Martelli told the man he needed to withdraw some money from an automated teller machine ("ATM"). The two agreed to meet later at a designated location to complete the purchase.

Rather than going to an ATM, Martelli drove to his office and contacted his supervisor, Sergeant Dean Vetrie. Martelli obtained twenty dollars in "buy money" and was fitted with a radio transmitter. Vetrie assembled a surveillance team. Martelli returned to Tenth Street to find the man. As Vetrie and his surveillance team watched from less than a block away, Martelli purchased two small bags of crack cocaine from the man. Based on previous encounters, Vetrie recognized the man as Dwayne Butler. As soon as Martelli completed the purchase, he drove away. He informed the surveillance team by radio that the transaction had been completed. Martelli described the man as wearing black sweat pants and a white shirt. In order to protect his undercover status, Martelli did not return to the scene.

Vetrie and his surveillance team then observed Butler enter an apartment building on West Street. About fifteen minutes later, Butler left the apartment building. Vetrie ordered uniformed officers to arrest him. Vetrie then drove by the arrest scene to ascertain that Butler had been arrested. No drugs or money were found on Butler at the time of arrest.

Based on these events, Butler was charged with one count of possession of a narcotic and one count of delivery of a narcotic. About six weeks before trial, Butler's attorney filed a motion for a bill of particulars to learn the identity of the arresting officer. The prosecution informed the trial court that it had already identified the arresting officer as Officer Powell. The trial court thus denied Butler's motion as moot. On the morning of the second and final day of trial,

Butler's attorney inquired about the whereabouts of the arresting officer. After some discussions with Martelli and Vetrie, the prosecutor learned that Officer Canon, not Officer Powell, was the arresting officer. The prosecutor also discovered that Canon was out of town and unavailable to testify.

At the close of evidence, Butler moved for a continuance until Canon was available to testify, or in the alternative, for a mistrial. The trial court noted that both Martelli and Vetrie had identified Butler, and stated that Canon "had nothing to do with the case, other than to make the initial contact with the defendant and place him in a patrol car, was not present at the scene of the crime." (D.I. 3 at A-41.) The trial court thus concluded that Canon's testimony would not "add to the substance of the case from either the defense or prosecution," and denied Butler's motion for a continuance or a mistrial. (*Id.*) The jury returned a verdict of guilty on both counts.

On appeal to the Delaware Supreme Court, Butler argued that the state's failure to disclose the identity of the arresting officer deprived him of his constitutional right to present a defense and call witnesses in support thereof. (D.I. 3, Appellant's Opening Br. at 12.) On January 15, 1998, the Delaware Supreme Court concluded that no constitutional violation occurred, and thus affirmed Butler's conviction. (D.I. 14, Delaware Supreme Court Order, Jan. 15, 1998.) Butler did not file a motion for post-conviction relief with the state courts.

Butler has now filed the current petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The respondents ask the court to deny the petition on the merits.

II. 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"):[2]

> 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 . . .

28 U.S.C. § 2254(d). According to the United States Supreme Court, 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 only "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

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[2] 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. Butler filed the current habeas petition at the earliest on April 23, 1998, the date he signed it. Accordingly, this court applies the AEDPA's amended standards of review to Butler's petition.

petitioner's claim." *Werts*, 228 F.3d at 197, *citing Matteo v. Superintendent, SCI Albion*, 171 F.3d 877, 888 (3d Cir. 1999). In order to satisfy the "contrary to" clause, 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 should not grant the 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, 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). 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).

III. DISCUSSION

A. Sixth Amendment Right to Compulsory Process

In his habeas petition, Butler raises one claim[3] for relief: The state failed to disclose the identity of the arresting officer, which deprived him of his constitutional right to present a defense and call witnesses in support of his defense. The respondents correctly concede that Butler exhausted this claim by presenting it to the Delaware Supreme Court on direct appeal. *See O'Sullivan v. Boerckel*, 526 U.S. 838, 844-45 (1999)(holding that 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"); *Lambert v. Blackwell*, 134 F.3d 506, 513 (3d Cir. 1998)(stating that a petitioner who raised an issue on direct appeal is not required to raise it again in a state post-conviction proceeding). Because the Delaware Supreme Court rejected Butler's claim on the merits, the proper inquiry is whether the Delaware Supreme Court's decision either: (1) was contrary to clearly established federal law, or (2) involved an unreasonable application of clearly established federal law. *See* 28 U.S.C. § 2254(d)(1); *Williams*, 529 U.S. at 412.

Under the Compulsory Process clause of the Sixth Amendment, a criminal defendant has

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[3] On August 3, 1998, Butler filed a "Request to Amend," seeking to amend his petition to add claims. (D.I. 9.) The respondents agreed that Butler should be allowed to amend his petition. (D.I. 18.) They asserted, however, that his new claims were not exhausted and asked the court to dismiss the amended petition for failure to exhaust. (*Id.*) Butler then filed a document entitled "Motion to Excuse Unexhausted Claim, and Proceed with Exhausted Claim," in which he asked the court to allow him to proceed only on his exhausted claim. (D.I. 19). He also filed a subsequent document entitled "Response to States [sic] Answer Concerning Plaintiffs [sic] Request to Amend," in which he explained that he did not intend to amend his petition to add any new claims. (D.I. 22.) Based on Butler's submissions, the court deems his unexhausted claims withdrawn. *See Rose v. Lundy*, 455 U.S. 509, 514 (1982)(stating that petitioners may withdraw unexhausted claims and proceed only on exhausted claims).

the right "to have compulsory process for obtaining witnesses in his favor." U.S. Const. amend. VI. Encompassed within this right is a criminal defendant's right to present witnesses or evidence in his own defense. *Taylor v. Illinois*, 484 U.S. 400, 409 (1988); *Gov't of Virgin Islands v. Mills*, 956 F.2d 443, 445 (3d Cir. 1992). This fundamental element of due process protects a criminal defendant from unwarranted governmental interference in the presentation of his defense. *United States v. Cruz-Jiminez*, 977 F.2d 95, 100 (3d Cir. 1992); *Mills*, 956 F.2d at 445-46.

The right to present witnesses and evidence, however, "is not absolute." *Mills*, 956 F.2d at 446. Rather, the Sixth Amendment's protection extends *only* to evidence that is both material and favorable to the defense. *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982); *Mills*, 956 F.2d at 446. Evidence is material "only if there is a reasonable likelihood that the testimony could have affected the judgment of the trier of fact." *Valenzuela*, 458 U.S. at 874. A reasonable likelihood is "a probability sufficient to undermine confidence in the outcome." *Mills*, 956 F.2d at 446, *quoting United States v. Bagley*, 473 U.S. 667, 682 (1985).

The Third Circuit has summarized the applicable standard in the following manner:

> [T]o establish that he was convicted in violation of his Sixth Amendment right to compulsory process, [a criminal defendant] must show: First, that he was deprived of the opportunity to present evidence in his favor; second, that the excluded testimony would have been material and favorable to his defense; and third, that the deprivation was arbitrary or disproportionate to any legitimate evidentiary or procedural purpose.

Mills, 956 F.2d at 446.

In rejecting Butler's claim, the Delaware Supreme Court focused solely on the element of materiality. Citing *Valenzuela*, the Delaware Supreme Court stated that the denial of the right to call witnesses "violates Due Process only if the testimony is shown to be material." (D.I. 14,

Delaware Supreme Court Order, Jan. 15, 1998, at 5.) The Delaware Supreme Court explained that "[e]vidence is material only if there exists a reasonable probability that it will affect the result of the proceeding." (*Id.*) Because the Delaware Supreme Court correctly recited the applicable standards, its decision is not contrary to clearly established federal law. *See* 28 U.S.C. § 2254(d)(1); *Williams*, 529 U.S. at 412. Thus, the remaining question is whether the Delaware Supreme Court unreasonably applied these legal principles to the facts of Butler's case. *See Williams*, 529 U.S. at 413.

In ruling that Butler failed to establish a Sixth Amendment violation, the Delaware Supreme Court wrote:

> Butler's defense is one of misidentification. Detective Martelli, the undercover police officer, positively identified Butler as the individual who sold him drugs. Sergeant Vetrie, conducting surveillance of the drug transaction, also identified Butler. Sergeant Vetrie also testified to knowing Butler prior to the transaction. While the arresting officer may provide information as to Butler's demeanor, it is unlikely this evidence would refute the testimony of two police officers who witnessed the actual transaction. . . .
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> Since there is no reasonable possibility that the arresting officer's testimony would change the outcome of the proceeding, the State's failure to provide the arresting officer did not violate Butler's Sixth Amendment right to compulsory process or his Due Process right to obtain "potentially exculpatory" evidence under *Brady*.

(D.I. 14, Delaware Supreme Court Order, Jan. 15, 1998, at 5-6.)

After reviewing the record, the court finds that the Delaware Supreme Court's application of the law to the facts of this case is entirely reasonable. Martelli encountered Butler face-to-face on two distinct occasions: first, when Butler flagged him down to negotiate a drug purchase; and second, a short time later when Martelli returned with the money to complete the purchase. Martelli positively identified Butler as the person who sold cocaine to him. In addition, Vetrie observed the drug transaction from less than a block away, then watched Butler enter and leave

an apartment building. Vetrie also recognized Butler from previous encounters with him. Vetrie positively identified Butler as the man who sold drugs to Martelli.

Moreover, Butler has failed to allege any facts giving rise to "a reasonable likelihood that the testimony [of the arresting officer] could have affected the judgment of the trier of fact." *Valenzuela*, 458 U.S. at 874. Indeed, he has failed to inform the court of *any* testimony the arresting officer could have provided, much less establish that his testimony would have been either material or favorable. Certainly Butler was present at the time of the arrest. If he was aware of any favorable and material testimony the arresting officer could have offered, presumably Butler would have brought it to the court's attention. He did not.

Butler offers one argument worthy of discussion. At a hearing to determine whether Butler violated the terms of probation based on the charges at issue, Martelli testified. On cross-examination, Martelli was asked to describe the building that Butler left just prior to his arrest. Martelli testified that he did not know the building but that he had passed it, and described it as a "[b]asic city home, row home, a front porch, very small front yard." (D.I. 9, Transcript of Violation of Probation Hearing at 13:15-16.) At trial, however, Vetrie testified that the building was "an apartment house." (D.I. 3, A-20.) Butler argues that this conflict undermines the credibility of both officers' testimonies. In his words, this shows "that there was a conflict in officers testimony, which could of gave raise to plaintiffs contention of mistaken identity [sic]." (D.I. 22 at 1.) He speculates that "any neutralizing and or contradictory testimony by the officers involved could have materially aided the case." (*Id.* at 2.)

This argument does not support Butler's Sixth Amendment claim for several reasons. First, the jury did not hear Martelli's description of the building. His testimony respecting the

building was at a violation of probation hearing, not at trial. Additionally, Martelli did not witness Butler entering or exiting the building. After the purchase was complete, Martelli left the area. At trial, Vetrie testified that he observed Martelli purchase cocaine from Butler and observed Butler enter and leave the apartment building. He further testified that he knew Butler from prior encounters. The court is convinced that Martelli's description of the building at a probation hearing simply had no bearing on the outcome of Butler's trial.

In sum, the court concludes that Butler has failed to establish the essential element of materiality. Thus, his Sixth Amendment claim fails. The Delaware Supreme Court's decision was not contrary to, nor did it involve an unreasonable application of, clearly established federal law. *See* 28 U.S.C. § 2254(d)(1); *Williams*, 529 U.S. at 412. Therefore, federal habeas relief is unavailable, and his petition will be denied.

B. Request for Evidentiary Hearing

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.

The court has received from Butler several requests for a hearing date. In none of these submissions does Butler identify any evidence outside the record that should be developed, nor does he explain how an evidentiary hearing would advance his claim. Moreover, based on an examination of the record as a whole, the court cannot conclude that an evidentiary hearing would advance Butler's claim in any way. For these reasons, Butler's request for an evidentiary hearing is denied.

C. 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 determined that the Delaware Supreme Court reasonably applied the governing legal principles in rejecting Butler's Sixth Amendment claim. The court is persuaded that reasonable jurists would not find this assessment debatable or wrong. Therefore, Butler 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. Butler'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 11, 2001

Gregory M. Sleet
UNITED STATES DISTRICT JUDGE