IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 18-50026

MAURICE SAMUEL ARRINGTON,

Petitioner-Appellant,

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent-Appellee.

Appeal from the United States District Court
for the Western District of Texas

O R D E R:

Maurice Samuel Arrington, Texas prisoner # 1833454, moves for a certificate of appealability (COA) to appeal the denial of his 28 U.S.C. § 2254 application challenging his jury-trial conviction for possession with intent to deliver a controlled substance. He specifically seeks a COA to appeal the denial of his claims that trial counsel rendered ineffective assistance by failing to move to suppress evidence seized based on an insufficient search warrant, failing to move to suppress his statements to police, failing to file a motion to disclose the identity of the confidential informant, failing to assure that he received a public trial, and agreeing to edit the video of his statement to police. He also seeks to appeal the denial of his claims of trial court and state habeas

court error relating to the failure to disclose the identity of the confidential informant.

Although Arrington raised other claims in his § 2254 application, he does not brief them in his COA motion. Accordingly, he has abandoned those claims, *see Brinkmann v. Dallas Cty. Deputy Sheriff Abner*, 813 F.2d 744, 748 (5th Cir. 1987), and they are not addressed here, *see Hughes v. Johnson*, 191 F.3d 607, 613 (5th Cir. 1999).

To obtain a COA on his remaining claims, Arrington must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To satisfy this standard, he must show 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), or that an issue he presents deserves encouragement to proceed further, *see Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

He has failed to make the required showing. *See id.*; *Slack*, 529 U.S. at 484. Accordingly, his motion for a COA is DENIED.

/s/ Jennifer Walker Elrod
JENNIFER WALKER ELROD
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

MAURICE SAMUEL ARRINGTON	§	
	§	
V.	§	**6-17-CV-0151-RP**
	§	
LORIE DAVIS	§	

ORDER

Before the Court are Petitioner's Application for Habeas Corpus Relief under 28 U.S.C. § 2254 (Docket Entry "DE" 1) and memorandum in support of his petition (DE 12); Respondent's Answer (DE 19); and Petitioner's Reply (DE 22). Petitioner, proceeding pro se, has paid the full filing fee for this matter. For the reasons set forth below, Petitioner's application for writ of habeas corpus is **denied**.

STATEMENT OF THE CASE

Respondent has custody of Petitioner pursuant to a judgment and sentence entered by the 426th District Court of Bell County, Texas. A jury found Petitioner guilty on one count of possession with the intent to deliver a controlled substance, and the trial court assessed punishment at a term of 35 years' imprisonment. Petitioner asserts he is entitled to habeas relief because he was denied his rights to due process and the effective assistance of counsel.

BACKGROUND

A. Petitioner's state criminal proceedings

A criminal complaint filed December 10, 2011, alleged a search warrant executed by the Killeen Police Department at Petitioner's residence yielded four or five individual bags containing

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a total of 8.9 grams of cocaine, digital scales, and two guns. (DE 20-4 at 8).[1] The search warrant was the result of information provided to the Killeen Police Department by a confidential informant and "months" of surveillance. (DE 20-11 at 24-25, 37-39). After being Mirandized, Petitioner told the investigating officer that the cocaine and guns found in the residence belonged to Petitioner. (DE 20-4 at 8; DE 20-11 at 30, 34-35).

A grand jury indictment returned January 11, 2012, charged Petitioner with possession with the intent to deliver at least four but less than 200 grams of cocaine. (DE 20-4 at 5). Petitioner was initially represented by retained counsel. (DE 20-4 at 13). On June 1, 2012, the State filed notice of its intent to introduce evidence of Petitioner's prior felony conviction for assault on a pubic servant, and other state misdemeanors. (DE 20-4 at 50). The State moved to amend the indictment on June 6, 2012, to charge Petitioner's 1999 conviction for aggravated battery, for the purpose of enhancing his sentence. (DE 20-4 at 36).

On August 2, 2012, Petitioner's counsel moved to withdraw. (DE 20-4 at 39). A hearing was conducted on the motion to withdraw. (DE 20-6). At the hearing Petitioner was informed by the State that it would pursue amendment of the indictment if he refused the State's plea offer of a term of 15 years' imprisonment. (DE 20-6). Petitioner was also informed that, if the indictment was amended to allow enhancement of Petitioner's sentence, his mandatory minimum sentence would be 15 years' imprisonment, and that he faced as much as 99 years or life imprisonment. (DE 20-6 at 10). Petitioner initially opted to reject the plea offer, but then stated he wanted to consider the offer with his new counsel. (DE 20-6 at 11-12). The State agreed to leave the "offer on the table through the first few weeks of representation by the next lawyer." (DE 20-6 at 12).

[1] The state court record in this matter is lodged at CM/ECF Docket Entry 20.

Retained counsel's motion to withdraw was granted and Petitioner was appointed new counsel. (DE 20-4 at 45; 20-6 at 14). Petitioner ultimately refused the plea offer. (DE 20-4 at 85).

A hearing on the State's motion to amend the indictment was conducted November 14, 2012. (DE 20-7). The motion was granted and the indictment was amended. (DE 20-4 at 38). A pretrial hearing was conducted on November 21, 2012, at which time the trial court heard Petitioner's request to discharge his appointed counsel. (DE 20-8 at 4-5). At that time Petitioner affirmed that he had refused the State's plea offer. (DE 20-08 at 6). At the conclusion of the hearing, the trial court denied the motion to appoint different counsel. (DE 20-8 at 12).

Petitioner proceeded to trial. Petitioner testified at his trial. (DE 20-11 at 83- 126). Petitioner testified he did not have any knowledge of the cocaine found at his residence. (DE 20-11 at 85, 89). Petitioner testified the drugs and guns found in the residence did not belong to him. (DE 20-11 at 86). Petitioner testified his residence was used by a number of individuals, who also had keys to the residence, as a place to host parties. (DE 20-11 at 84, 89-90, 117). Petitioner testified that the person to whom the drugs belonged "wrote a notarized letter saying that – admitting to his stuff or whatever, and the court ignored it." (DE 20-11 at 87).

After deliberating for less than half an hour, the jury returned a verdict of guilty as charged. (DE 20-4 at 59, 66, 88; DE 20-12 at 29). Petitioner pleaded true to the enhancement paragraph of the indictment. (DE 20-12 at 35). The court assessed punishment at a term of 35 years' incarceration after reviewing a presentence investigation report and conducting a sentencing hearing. (DE 20-4 at 66; DE 20-13).

Petitioner's trial counsel filed a timely notice of appeal. (DE 20-4 at 81; DE 20-15). Counsel then filed a motion to withdraw, which motion was granted. (DE 20-4 at 82, 83). Petitioner was

appointed appellate counsel. (DE 20-4 at 69). Appellate counsel filed an *Anders* brief, asserting his thorough review of the record revealed no legitimate basis for an appeal. (DE 20-16). Petitioner filed a pro se brief raising fourteen issues, including trial court error in the admission and exclusion of evidence, judicial bias, prosecutorial misconduct, and ineffective assistance of counsel. *Arrington v. State*, No. 03-13-00066-CR, 2015 WL 1058828, at *1 (Tex. App.–Austin 2015, pet. ref'd). The Court of Appeals reviewed the records and the briefs, and affirmed Petitioner's conviction and sentence. *Id.*

Petitioner sought a state writ of habeas corpus asserting, *inter alia*, the claims raised in his federal habeas petition. *Ex parte Arrington*, No. WR-84,245-02, 2017 WL 117750, at *1 (Tex. Crim. App. 2017). *See also* DE 21-30 at 7-107. The state trial court recommended the Texas Court of Criminal Appeals dismiss the writ as noncompliant. (DE 21-30 at 112-17). The Court of Criminal Appeals remanded the matter to the trial court to address the merits of Petitioner's claims. *Ex parte Arrington*, 2017 WL 117750, at *2. The state trial court ordered Petitioner's trial and appellate counsel to file affidavits addressing Petitioner's claims for relief. (DE 21-28 at 2-4). After receiving and considering additional pleadings, the trial court issued findings of fact and conclusions of law, and recommended the Court of Criminal Appeals deny the writ because Petitioner's claims were without merit. (DE 21-27 at 231-248). The Court of Criminal Appeals denied the writ without written order on the findings of the trial court. (DE 21-16).

B. Federal habeas claims

In his federal habeas action, Petitioner asserts he was denied his right to the effective assistance of counsel; he was subjected to prosecutorial misconduct; there was insufficient evidence to support his conviction; the trial court erred by failing to disclose the identity of the confidential

informant; and the Court of Criminal Appeals erred by denying relief based on the trial court's findings of fact and recommendation of law. Respondent allows the petition is timely and does not assert Petitioner's claims are procedurally barred. (DE 19 at 4).

ANALYSIS

A. The Antiterrorism and Effective Death Penalty Act of 1996

The Supreme Court summarized the basic principles established by the Court's many cases interpreting the 1996 Antiterrorism and Effective Death Penalty Act ("AEDPA") in *Harrington v. Richter*, 562 U.S. 86, 97-100 (2011). Section § 2254(d) provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Section 2254(d) permits the granting of federal habeas relief in only three circumstances: (1) when the state court's decision "was contrary to" federal law as clearly established by the holdings of the Supreme Court; (2) when the state court's decision involved an "unreasonable application" of such law; or (3) when the decision "was based on an unreasonable determination of the facts" in light of the record before the state court. *Richter*, 562 U.S. at 100, *citing Williams v. Taylor*, 529 U.S. 362, 412 (2000). Each of these three grounds for relief presents an independent inquiry. *Williams*, 529 U.S. at 404-05 (holding that the "contrary to" and "unreasonable application" clauses have independent meaning); *Salts v. Epps*, 676 F.3d 468, 479 (5th Cir. 2012).

Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law, or if the state court decides a case differently than the Supreme Court on a set of materially indistinguishable facts. *Thaler v. Haynes*, 559 U.S. 43, 47 (2010); *Mitchell v. Esparza*, 540 U.S. 12, 16 (2003). Under the unreasonable application clause of § 2254(d), a federal court may grant the writ if the state court identifies the correct governing legal principle from the Supreme Court's decisions, "but unreasonably applies that principle to the facts of the prisoner's case." *Dowthitt v. Johnson*, 230 F.3d 733, 741 (5th Cir. 2000) (quotation marks and citation omitted).

A reviewing federal court presumes the state court's factual findings are sound unless the petitioner rebuts the "presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1); *Miller-El v. Dretke*, 545 U.S. 231, 240 (2005); *Maldonado v. Thaler*, 625 F.3d 229, 236 (5th Cir. 2010). This presumption extends to both express findings of fact and to implicit findings of fact by the state court. *Register v. Thaler*, 681 F.3d 623, 629 (5th Cir. 2012). The Supreme Court has "explicitly left open the question whether § 2254(e)(1) applies in every case presenting a challenge under § 2254(d)(2)." *Wood v. Allen*, 558 U.S. 290, 300 (2010). However, the Fifth Circuit Court of Appeals has held that, while section 2254(e)(1)'s clear and convincing standard governs a state court's resolution of "particular factual issues," section 2254(d)(2)'s unreasonable determination standard governs "the state court's decision as a whole." *Blue v. Thaler*, 665 F.3d 647, 654 (5th Cir. 2011). *See also Hoffman v. Cain*, 752 F.3d 430, 441-42 (5th Cir. 2014) (reaffirming the standard stated in *Miller-El* and *Blue*), *cert. denied*, 135 S. Ct. 1160 (2015).

B. Petitioner's claims for relief

1. Ineffective assistance of trial counsel

Ineffective assistance of counsel claims are analyzed under the well-settled standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). To prevail on a claim of ineffective assistance of counsel, a petitioner must show that (1) counsel's representation fell below an objective standard of reasonableness, and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 687. When deciding whether counsel's performance was deficient, the Court must apply a standard of objective reasonableness, mindful that judicial scrutiny of counsel's performance must be highly deferential. *Id.* at 686-89. "Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* at 689 (citation omitted). Federal habeas courts presume that counsel's choice of trial strategy is objectively reasonable unless clearly proven otherwise. *Id.* The prejudice prong of *Strickland* requires a petitioner to show there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

The Fifth Circuit has determined that both prongs of the *Strickland* test involve mixed questions of law and fact. *Nobles v. Johnson*, 127 F.3d 409, 418 (5th Cir. 1997). Whether counsel made a decision to pursue a particular trial strategy is a question of fact and whether that strategy was reasonable is a question of law. *Wood v. Allen*, 558 U.S. 290, 304 (2010); *Trottie v. Stephens*, 720 F.3d 231, 244 (5th Cir. 2013). A state courts findings of fact are presumed to be correct unless the

petitioner can rebut the findings of fact with clear and convincing evidence. *Valdez v. Cockrell*, 274 F.3d 941, 949 (5th Cir. 2001). A habeas petitioner has the burden to prove both prongs of the *Strickland* ineffective assistance test. *Rogers v. Quarterman*, 555 F.3d 483, 489 (5th Cir. 2009); *Blanton v. Quarterman*, 543 F.3d 230, 235 (5th Cir. 2008).

When considering a state court's application of *Strickland*, this Court's review must be "doubly deferential," to afford "both the state court and the defense attorney the benefit of the doubt." *Woods v. Donald*, 135 S. Ct. 1372, 1376 (2015), *citing Yarborough v. Gentry*, 540 U.S. 1, 6 (2003). When evaluating Petitioner's complaints about the performance of his counsel under the AEDPA, the issue before this Court is whether the Texas Court of Criminal Appeals could reasonably have concluded Petitioner's complaints about his counsel's performance failed to satisfy either prong of the *Strickland* analysis. *Schaetzle v. Cockrell*, 343 F.3d 440, 444 (5th Cir. 2003).

The Court notes that, in denying relief in his state habeas action, the Texas Court of Criminal Appeals adopted the findings of the trial court, which found counsel's sworn statements in that action credible. (DE 21-27 at 234). A state court's credibility determinations are entitled to "special deference" by a federal habeas court. *Marshall v. Lonberger*, 459 U.S. at 422, 434 (1983); *Valdez*, 274 F.3d at 948 n.11. The Fifth Circuit Court of Appeals has recognized the AEDPA's presumption of correctness is particularly strong where, as in this matter, the trial court and the state habeas court are one and the same. *Clark v. Johnson*, 202 F.3d 760, 764 (5th Cir. 2000).

a. Failure to file a motion to suppress evidence

Petitioner alleges counsel was ineffective for failing to file a motion to suppress evidence, asserting the affidavit in support of the search warrant was insufficient to find probable cause for a search. (DE 1 at 6, 8; DE 12 at 4-6). The state court denied this claim for relief as presented in

Petitioner's state habeas action. The state court noted the search warrant "was the result of information that KPD received from an informant who told them that the Applicant was trafficking narcotics out of that location, coupled with KPD's own surveillance of the apartment." (DE 21-27 at 235).

Petitioner's claim that the search warrant affidavit was insufficient is conclusory and cannot support relief. *Schlang v. Heard*, 691 F.2d 796, 799 (5th Cir. 1982) ("Mere conclusory statements do not raise a constitutional issue in a habeas case."). Additionally, in denying relief the state court impliedly found the warrant sufficient under state law, a determination entitled to deference by the Court. *Charles v. Thaler*, 629 F.3d 494, 500-501 (5th Cir. 2011) ("A federal court lacks authority to rule that a state court incorrectly interpreted its own law."). The state court also found counsel had no obligation to make meritless objections. This conclusion was not clearly contrary to or an unreasonable application of *Strickland*. *Clark v. Collins*, 19 F.3d 959, 966 (5th Cir. 1994) ("failure to raise meritless objections is not ineffective lawyering; it is the very opposite.").

b. Failure to move to suppress Petitioner's statements to law enforcement

Petitioner alleges counsel was ineffective for failing to file a motion to suppress his video-taped, post-Mirandized statements to law enforcement, asserting his arrest was illegal rendering his statements inadmissible. (DE 1 at 8; DE 12 at 7- 10). With regard to this claim the state court found:

> . . . the Applicant begins his analysis of Mr. McDurmitt's allegedly deficient performance with the contention that he should have filed a Motion to Suppress his "illegal" arrest, "coerced" statement, and interrogation video. According to his affidavit, Mr. McDurmitt notes that the Applicant and his cousin were arrested after they were seen leaving the apartment that the police had legally searched and in which they found illegal narcotics and weapons, and they had connected the apartment to the Applicant by an informant, documents found inside, previous surveillance, and the Applicant's own voluntary statement.

(DE 21-27 at 236). Counsel's affidavit in Petitioner's state habeas action states that, after he determined the arrest was not illegal and that Petitioner's statements were not coerced, counsel saw no legitimate basis for a motion to suppress. (DE 21-27 at 217).

"The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." *Strickland*, 466 U.S. at 691. Counsel's affidavit avers: "In summary, Mr. Arrington made his case decidedly more difficult to defend when he admitted to the police that the illegal drugs and weapons found in the apartment were his. I had no way to counter the State's facts or Mr. Arrington's admissions." (DE 21-27 at 225).

Because the state court found counsel's statements credible, and counsel has no obligation to file meritless motions, *Turner v. Quarterman*, 481 F.3d 292, 298 (5th Cir. 2007); *Parr v. Quarterman*, 472 F.3d 245, 256 (5th Cir. 2006), the state court's denial of relief on this claim was not clearly contrary to or an unreasonable application of *Strickland*.

c. Failure to file a motion seeking the identity of the confidential informant

Petitioner alleges counsel was ineffective for failing to file a motion to identify the confidential informant. (DE 1 at 8; DE 12 at 14-17). In recommending denial of these claims, the state trial court determined:

> 42. According to his affidavit, Mr. McDurmitt was aware that a motion to require the disclosure of the informant had been filed by Mr. Graeff, the Applicant's previous attorney, but the record does not show it was ever ruled on by the trial court. *Id.*
>
> 43. The Court finds that Mr. McDurmitt, citing *Roviaro v. United States*, 353 U.S. 53, 61, 77 S.Ct. 623, 1 L.Ed. 639 (1957) determined that there was no basis for mandatory disclosure of the informant because: he did not participate in the offense; he was not present at the time of the offense; and, he was not a material witness to the transaction.
>
> 44. In addition, according to his affidavit, when he examined disclosure in light to the less exacting standards of Texas law found in *Bodin v. State*, 807 S.W.2d

> 313, 317 (Tex. Crim. App. 1991) (disclosure is required upon a showing that the informant's testimony is necessary for a fair determination of guilt), he still determined that the trial court was within its discretion not to disclose the informant's identify. *Id.*

(DE 21-27 at 2321-32).

The state court found that, pursuant to state law, there was no basis for the trial court to order the disclosure of the confidential informant's identity and, accordingly, counsel's decision to not pursue this issue was neither deficient performance nor prejudicial because any such motion was unlikely to succeed. The Texas Court of Criminal Appeals adopted this conclusion, a decision based on the interpretation of state law that is binding on the Court. *Charles*, 629 F.3d at 500-01. Because counsel is not required to file frivolous motions, *Turner*, 481 F.3d at 298, the state court's denial of relief on this claim was not contrary to or an unreasonable application of *Strickland*.

d. Failure to seek an evidentiary hearing on the admissibility of the firearms

Petitioner contends trial counsel erred by not filing a motion for a hearing on the admissibility of evidence that firearms found in the residence during execution of the search warrant. (DE 1 at 8; DE 12 at 23-24). The state trial court found:

> 60. Next, the Court finds that the Applicant claims that Mr. McDurmitt failed to object to the State's admission of firearms into evidence, contending that it prejudiced his defense by leaving the impression that his was a violent offense.
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> 61. However, as Mr. McDurmitt points out in his affidavit, the weapons in question were found when the police searched the Applicant's apartment, and the Applicant admitted to the police that the weapons belonged to him. *Id.* at 10.
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> 62. The Court finds that the weapons in question were clearly relevant evidence in that they were part of the crime scene, therefore, as Mr. McDurmitt explains in his affidavit, there was no viable legal argument to exclude them. *Id.*
>
> 63. In addition, as noted by Mr. McDurmitt in his affidavit, in no way does the State use the weapons' presence at the crime scene to enhance the Applicant's punishment range. *Id.*

> 64. The Court finds no deficient performance on Mr. McDurmitt's part with regard to the introductions of weapons found at the crime scene into evidence at the Applicant's trial.

(DE 21-27 at 233).

As previously noted, "the reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." *Strickland*, 466 U.S. at 691. As previously noted, Petitioner "made his case decidedly more difficult to defend when he admitted to the police that the illegal drugs and weapons found in the apartment were his." (DE 21-27 at 225). The state habeas court could properly conclude Petitioner's own statements and actions rendered counsel's actions, i.e., the "failure" to move to suppress this evidence, reasonable.

Because any motion to exclude evidence of the guns was unlikely to succeed, and because Petitioner makes only a conclusory allegation with regard to any prejudice arising from the admission of this evidence, the state court's resolution of this claim was not clearly contrary to or an unreasonable application of *Strickland*.[2]

e. Agreeing to alter the video of Petitioner's statement to law enforcement

Petitioner argues counsel was ineffective for agreeing to alter the video of his statement to law enforcement to render it admissible, rather than seeking to suppress the video. (DE 1 at 9; DE 12 at 11-13). In recommending denial of this claim, the state habeas trial court concluded:

> 37. Next the Applicant insists that Mr. McDurmitt should have prevented the admission of his video taped statement to the police because it was coerced and altered.

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[2] With regard to the firearms found during the search of his residence, on September 5, 2013, Petitioner pleaded guilty to one count of possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g)(1) and 924(e), and was sentenced to a term of 46 months' incarceration to be served concurrently with his sentence in the instant state case. *See United States v. Arrington*, 6:12-CR-00205-LY.

denying this claim was not clearly contrary to or an unreasonable application of *Strickland*, Petitioner is not entitled to relief on this claim.

j. Failure to assure a public trial

Petitioner asserts counsel was ineffective for failing to object to the denial of Petitioner's right to a public trial. (DE 1 at 10; DE 12 at 18-20). The state court found, with regard to this claim:

> 48. Next, the Court finds that the Applicant contends that Mr. McDurmitt's performance was deficient because he failed to object to the Applicant's lack of a public trial.
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> 49. The Applicant bases his belief that his trial was not public, on the experience of a friend who was first told by the court bailiff that she could remain inside the court-room during voir dire, but was then told by two men that she would have to wait outside.
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> 50. In addition, the Applicant recounts that throughout his pre-trial hearings and trial the courtroom was virtually empty, yet at his sentencing hearing the courtroom was packed.
>
> 51. The Court finds that according to Mr. McDurmitt's affidavit, his experience trying cases in Bell County led him to the conclusion that the Applicant's observations were not unusual.
>
> 52. Typically, he explains, the District courtrooms are not large enough to accommodate a [sic] prospective jurors and spectators, therefore, those not involved in the voir dire proceedings are asked to remain outside the courtroom until a jury panel is selected. *Id.* at 8.
>
> 53. The Court finds that in Mr. McDurmitt's affidavit, he explains that the extent to which the courtroom is filled with spectators is a function of the phases of the trial, and not the result of manipulation by court personnel. *Id.*
>
> 54. The Court knows that trials in Bell County, with very rare exceptions, are open to the public, and has no recollection that at any point attendance at the Applicant's trial was prohibited.

(DE 21-27 at 232).

Petitioner has not met his burden of establishing counsel failed to raise a meritorious argument, nor has Petitioner demonstrated prejudice. *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1911 (2017) (holding prejudice is not presumed when a defendant raises a violation of right to a public trial on a claim of ineffective assistance). Petitioner has not rebutted the state court's

> 38. However, according to his affidavit, the Court finds that McDurmitt has established that the taped statement was not coerced because was taken from the Applicant voluntarily, after he had been given his Miranda warnings. *Id.* at 5.
>
> 39. While it is true that the Applicant's video taped statement had been altered, according to Mr. McDurmitt's affidavit, it was done with full knowledge of the defense, because there were certain portions of the statement that were germane and admissible, while others parts were irrelevant or inadmissible. *Id.*
>
> 40. Mr. McDurmitt notes in his affidavit, that he had access to the original tape and the edited version, and agreed with the State that the portions redacted were appropriate, therefore, he saw no substantive reason to try and exclude from evidence the redacted version of the tape. *Id.* at 6.

(DE 21-27 at 230-31).

Counsel's decision in this regard was a strategic decision after his investigation of the issue. Federal habeas courts presume that counsel's choice of trial strategy is objectively reasonable unless clearly proven otherwise. *Strickland*, 466 U.S. at 689. Counsel's strategic choices, made after a thorough investigation of the law and facts relevant to plausible options, are virtually unchallengeable. *Id.* at 673; *Pape v. Thaler*, 645 F.3d 281, 289-90 (5th Cir. 2011). Additionally, because the state court found that the video was admissible pursuant to state law, any objection was without merit. Trial counsel's failure to object does not constitute deficient representation unless a sound basis exists for objection. *Emery v. Johnson*, 139 F.3d 191, 198 (5th Cir. 1997). Accordingly, the state court's denial of this claim was not clearly contrary to or an unreasonable application of *Strickland.*

f. Failure to object to evidence of a remote criminal history

Petitioner faults counsel for introducing evidence of criminal history that was more than ten years old. (DE 1 at 9; DE 12 at 27-29). With regard to this claim the state court found:

> 75. The Court finds that the Applicant also contends that Mr. McDurmitt's performance was deficient because he "facilitated" the introduction into evidence of his prior conviction that was over ten (10) years old.

> 76. However, as Mr. McDurmitt explains in his affidavit, the Applicant chose to take the stand in his own defense, and when he did so he opened himself up to questioning by either side on a variety of issues, including his entire prior criminal history. *See* McDurmitt, pp. 11-12 & RR-VII, p. 81.
>
> 77. The Court finds that in his affidavit, Mr. McDurmitt correctly explains that it is common practice for the defense to broach a negative area of inquiry with one of its witnesses in order to lessen the impact should the State broach the issue on cross examination. *Id.*
>
> 78. The Court finds that Mr. McDurmitt's actions in this regard were totally appropriate, and in keeping with the norms of professional conduct expected of defense attorneys.

(DE 21-27 at 235).

Petitioner complains evidence of the conviction was not admissible because it was more than10 years old, however, state law provides no absolute bar to the introduction of offenses that are more than 10 years old. Tex. R. Evid. 609; *Theus v. State*, 845 S.W.2d 874, 879 (Tex. Crim. App. 1992). The state court found introduction of this evidence was proper pursuant to state law, a determination binding on this Court. *Charles*, 629 F.3d at 500-01. Because the evidence was admissible, counsel's performance failing to object to the evidence was not deficient, *Emery*, 139 F.3d at 198, and the state court's factual finding that the admission of the evidence was sound trial strategy has not been rebutted by Petitioner. Because counsel's performance in this regard was not deficient or prejudicial, the state court's decision was not contrary to or an unreasonable application of *Strickland*.

g. Failure to object to prosecutor's statements

Petitioner asserts counsel was ineffective for failing to object when prosecutor, during cross-examination, insinuated Petitioner intended to harm the confidential informant. (DE 1 at 9; DE 12 at 24-26).

> 45. The Applicant also contends that Mr. McDurmitt's performance was deficient when he failed to object to the State's insinuations that he was trying to get the name of the informant so he could harm him.
>
> 46. However, according to Mr. McDurmitt's affidavit, he notes that the State does not say on the record that the Applicant sought to harm the informant, but questions the Applicant on cross-examination about statements he is alleged to have made about the informant, which the Applicant had a chance to deny on the record. *Id.* at 7.
>
> 47. The Court finds that Mr. McDurmitt rightly characterizes the State inquiry about the informant as proper cross-examination. *Id.*

(DE 21-27 at 231-32).

The state court found the prosecutor's questioning regarding Petitioner's attempts to ascertain he identity of the confidential informant were permissible pursuant to state law, a determination binding on this Court. *Charles*, 629 F.3d at 500-01. Because the evidence was admissible, counsel's performance in "failing" to object was not deficient. *Emery*, 139 F.3d at 198. Because counsel's performance in this regard was not deficient or prejudicial, the state court's decision was not contrary to or an unreasonable application of *Strickland*.

h. Failure to object to the prosecution's comment on his post-arrest silence

Petitioner contends counsel was ineffective for failing to object to the prosecution's comment on his post-arrest silence. (DE 1 at 9; DE 12 at 30-31). The state habeas court addressed this claim, concluding:

> 69. The Court finds that the Applicant also faults Mr. McDurmitt for not objecting when the State allegedly attacked his "right to remain silent" during police questioning.
>
> 70. However, the Court finds that what is clear in this instance, is that when the Applicant was questioned by the police before being taken into custody, he chose to lie to them about his activities.
>
> 71. The Applicant does not claim that he had invoked his right to remain silent, and the Court finds that choosing to obfuscate or lie is not the same as invoking the right to remain silent.

> 72. Since the Applicant had not invoked the right to remain silent, the Court finds that there was no legal objection that Mr. McDurmitt could make to the State's argument.

(DE 21-27 at 234-35).

Petitioner has not rebutted the state court's finding of fact, i.e., that he did not invoke his right to remain silent, with clear and convincing evidence. Because there was no basis for a successful objection to these statements by the prosecutor, Petitioner's counsel was not ineffective for failing to object. *Emery*, 139 F.3d at 198. Accordingly, the state court's denial of this claim was not clearly contrary to or an unreasonable application of *Strickland*.

i. Failure to move for a mistrial

Petitioner complains counsel was ineffective for failing to move for a mistrial when the prosecution's argued in closing, "you've seen the police reports from the day," when that report was not available to the jury. (DE 1 at 9-10; DE 12 at 32-33).

Counsel explained in his affidavit in the state habeas action:

> In its closing argument the State, at one point, said: 'But you've seen the police report from that day' (RR-VIII, p. 25). . . It occurs to me that what happened was the State mispoke [sic] and referred to the 'police report' when it probably meant police testimony. Again, argument is not evidence, and there is no evidence that a police report was ever admitted into evidence. An objection to the State error, in my opinion, would have been of limited value to Mr. Arrington's defense.

(DE 21-27 at 217). Counsel made a strategic decision not to object to this statement during the State's closing argument. Such a strategic decision is virtually unchallengeable in a federal habeas proceeding. *Strickland*, 466 U.S. at 673; *Pape*, 645 F.3d at 289-90. Additionally, Petitioner makes only a conclusory allegation of prejudice with regard to this claim, which is insufficient to meet his burden to establish a valid ineffective assistance of counsel claim. Because the state court's decision

determination of fact that his trial was not closed to the public with clear and convincing evidence. Accordingly, the state court's denial of this claim was not clearly contrary to or an unreasonable application of *Strickland.*

k. Failure to require the prosecution to produce an expert witness's credentials

Petitioner argues counsel was ineffective for failing to require the prosecution to produce an expert witness's credentials. (DE 12 at 21- 22). In recommending denial of this claim the state court found:

> 55. The Court finds that the Applicant also criticizes Mr. McDurmitt's performance because he did not request by pre-trial motion particulars about the expert witness.
>
> 56. According to Mr. McDurmitt's affidavit, Duane Graeff, the Applicant's prior counsel, had previously filed a Motion for Discovery requesting the name, qualifications, and subject matter of any expert witness that the State intended to call at the Applicant's trial. *Id.* at 9.
>
> 57. The Court finds that according to his affidavit, Mr. McDurmitt was aware of this motion and saw no need to file an additional one. *Id.*
>
> 58. Moreover, according to his affidavit, Mr. McDurmitt received complete discovery from the State; knew that the State's witness was going to be KPD officer Pergande; took officer Pergande on voir dire when the State offered him as an expert witness in drug distribution; and, objected to officer Pergande being considered an "expert," but was overruled by the trial court. *Id.*
>
> 59. The Court finds that Mr. McDurmitt's performance with regard to the expert witness introduced at the Applicant's trial was in no way ineffective or deficient.

(DE 21-27 at 232-33).

Petitioner has not met his burden of demonstrating that counsel's performance was deficient. Counsel did challenge the testimony of this witness as an expert, and his objection was overruled. Accordingly, Petitioner is unable to establish that counsel's performance in failing to object to the use of this witness as an expert was deficient. Because counsel's performance was not deficient, the

state court's denial of this claim was not clearly contrary to or an unreasonable application of *Strickland*.

With regard to each of his ineffective assistance of counsel claims, Petitioner fails to demonstrate prejudice as a result of counsel's alleged deficiencies, particularly in light of the overwhelming evidence against him. *Berghuis v. Thompkins*, 560 U.S. 370, 390 (2010) (noting the weight of the evidence of guilt in finding alleged deficient performance of counsel not prejudicial); *Pondexter v. Quarterman*, 537 F.3d 511, 525 (5th Cir. 2008) (same).

2. Prosecutorial misconduct

Petitioner alleges the prosecution "intentionally altered the video interrogation in an attempt to hinder Appellant[']s defense, thus denying Appellant's rights to assistance of counsel, and due process." (DE 12 at 36).

To be entitled to federal habeas relief on a claim of prosecutorial misconduct, the petitioner must establish the improper conduct rendered his trial so fundamentally unfair as to make the result a denial of due process. *Greer v. Miller*, 483 U.S. 756, 765 (1987); *Barrientes v. Johnson*, 221 F.3d 741, 753 (5th Cir. 2000). A trial is fundamentally unfair if there is a reasonable probability that the verdict would have been different but for the prosecutor's improper behavior. *Barrientes*, 221 F.3d at 753; *Foy v. Donnelly*, 959 F.2d 1307, 1317 (5th Cir. 1992).

Petitioner makes only a conclusory allegation that the video was "altered" other than to redact inadmissible and irrelevant statements. The state trial court, in denying this claim, found the video was not substantially altered, other than to redact inadmissible or irrelevant statements with the approval of defense counsel. (DE 21-27 at 243). This finding of fact has not been rebutted by clear and convincing evidence. Petitioner has not established that any act by the prosecution "'so infected

the trial with unfairness as to make the resulting conviction a denial of due process.'" *Darden v. Wainwright*, 477 U.S. 168, 181 (1986), *quoting Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974). Petitioner's conclusory allegation that the prosecution altered the video to "hinder" his defense is insufficient to sustain his claim of prosecutorial misconduct. Accordingly, the state court's denial of this claim was not clearly contrary to federal law.

3. Insufficient evidence

Petitioner contends the evidence introduced at trial was insufficient to sustain his conviction. (DE 1 at 7).

In denying this claim, the state habeas trial court determined:

> 107. Specifically, the Applicant asserts that the only evidence linking him to the Cocaine he is charged with possessing was the interrogation video, which he claims was coerced. *Id.*
>
> 108. However, the Court has previously found that the interrogation video was not improperly altered, and the Applicant's confession was not coerced.
>
> 109. In addition, in his affidavit the Court finds that Mr. Parker spends several pages of his brief on direct appeal analyzing the sufficiency of the evidence, and linking the evidence admitted at trial that proved each element of the offense. *See Parker*, p. 1.
>
> 110. The appellate court agreed with Mr. Parker, finding that there were "no arguably meritorious grounds for review." *See Arrington v. State*, slip op. at 2.
>
> 111. Hence, the Court finds the record does not support the Applicant's contention that there is insufficient or no evidence to support his conviction.

(DE 21-27 at 247).

On federal habeas corpus review, the evidentiary sufficiency of a state court conviction is governed by the analysis set forth in *Jackson v. Virginia*, 443 U.S. 307 (1979), which reflects the federal constitutional due process standard. *Woods v. Cockrell*, 307 F.3d 353, 358 (5th Cir. 2002). This standard requires only that a reviewing court determine "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential

elements of the crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 319. In conducting that review, a federal habeas corpus court may not substitute its view of the evidence for that of the fact finder, but must consider all of the evidence in the light most favorable to the verdict. *Weeks v. Scott*, 55 F.3d 1059, 1061 (5th Cir. 1995). When a state court has reviewed the sufficiency of the evidence, that court's opinion is entitled to "great weight." *Parker v. Procunier*, 763 F.2d 665, 666 (5th Cir. 1985) (citation omitted). *See also Callins v. Collins*, 998 F.2d 269, 276 (5th Cir. 1993).

This Court's review of the entire record in this matter reveals there was sufficient evidence that a rational trier of fact could have found the essential elements of the crime of conviction beyond a reasonable doubt. The state court's conclusion that there was sufficient evidence to sustain Petitioner's conviction was not clearly contrary to or an unreasonable application of federal law.

4. Trial court error

Petitioner contends the trial court erred by failing to disclose the identity of the confidential informant. (DE 1 at 6).

The state habeas trial court found:

> 102. In ground three the Applicant alleges the trial court abused its discretion when it did not compel the disclosure of the police informant. *See* Applicant's Petition, p. 10.
>
> 103. However, as noted by Mr. McDurmitt, there was no basis for mandatory disclosure of the informant because he did not participate in the offense, he was not present at the time of the offense, and, he was not a material witness to the transaction. *Roviaro v. United States*, 353 U.S. 53, 61,77 S.Ct. 623, I L.Ed. 639 (1957).
>
> 104. Moreover, the Court finds that even when examining disclosure in light of the less exacting standards of Texas law (i.e., all that is needed in Texas is a showing that the informant's testimony is necessary for a fair determination of guilt), the trial court, based on the facts in this case, was within its discretion not to disclose the informant's identify. *See Bodin v. State*, 807 S.W.2d 313, 317 (Tex. Crim. App. 1991).

105. The Court finds that there is no showing that the trial court abused its discretion in failing to disclose the identify of the police informant.

(DE 21-27 at 246-47).

To warrant relief, trial court error must do more than merely affect the verdict; it must render the trial as a whole fundamentally unfair. *Bailey v. Procunier*, 744 F.2d 1166, 1168 (5th Cir. 1984); *Nelson v. Estelle*, 642 F.2d 903, 907 (5th Cir. 1981). The test applied to determine whether an error by the trial court rendered the trial fundamentally unfair is if there is a reasonable probability that the verdict would be different had the trial been conducted properly. *Rogers v. Lynaugh*, 848 F.2d 606, 609 (5th Cir. 1988).

Petitioner has not established that the trial court's alleged "error" had a substantial or injurious effect or influence on the jury's verdict. The state court's determination that state law did not require the disclosure of this information is entitled to deference by this Court. Accordingly, Petitioner is not entitled to relief on his claim of trial court error.

5. Habeas court error

Petitioner asserts the Court of Criminal Appeals abused its discretion by denying relief based on the trial court's findings of fact and recommendation of law. (DE 1 at 7). A claim asserting the denial of due process during state habeas corpus proceedings is not cognizable in a section 2254 action. *Kinsel v. Cain*, 647 F.3d 265, 273-74 & n.32 (5th Cir. 2011). Therefore, the Court must deny this claim for relief.

CONCLUSION

There was sufficient evidence to support Petitioner's conviction. Petitioner's due process rights were not violated by the trial court's decisions or by any conduct by the prosecutor. Petitioner was not denied his right to the effective assistance of counsel. Accordingly, the state court's decision denying the claims raised in Petitioner's federal habeas petition was not clearly contrary to or an unreasonable application of federal law nor an unreasonable determination of the facts, and Petitioner is not entitled to federal habeas relief on these claims. Petitioner's claim that the Texas Court of Criminal Appeals erred by adopting the trial court's findings of fact and conclusions of law in denying state habeas relief is not cognizable in this section 2254 action.

CERTIFICATE OF APPEALABILITY

An appeal may not be taken to the court of appeals from a final order in a habeas corpus proceeding unless a judge issues a certificate of appealability. 28 U.S.C. § 2253(c) (1)(A). Pursuant to Rule 11 of the Federal Rules Governing Section 2254 Cases, effective December 1, 2009, the district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant.

A certificate of appealability may issue only if a petitioner has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). The Supreme Court fully explained the requirement associated with a "substantial showing of the denial of a constitutional right" in *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). In cases where a district court rejected a petitioner's constitutional claims on the merits, "the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Id.*

In this case, reasonable jurists could not debate the dismissal or denial of the Petitioner's section 2254 petition on substantive or procedural grounds, nor find that the issues presented are adequate to deserve encouragement to proceed. *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003) (citing *Slack*, 529 U.S. at 484). Accordingly, the Court shall not issue a certificate of appealability.

IT IS THEREFORE ORDERED that the Application for Writ of Habeas Corpus [Docket Entry 1] is **DENIED**.

IT IS FURTHER ORDERED that a certificate of appealability is **DENIED.**

SIGNED on December 26, 2017.

ROBERT PITMAN
UNITED STATES DISTRICT JUDGE

Additional material from this filing is available in the Clerk's Office.