IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 18-50025

LAMONT RENARD STEWART,

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:

Lamont Renard Stewart, Texas prisoner # 1940731, was convicted by a jury of possession with intent to deliver a controlled substance. He pleaded true to two prior felony convictions, and the jury sentenced him to 60 years of imprisonment. Stewart moves for a certificate of appealability (COA) to appeal the district court's denial of his 28 U.S.C. § 2254 application.

Stewart argues that the State relied on perjured testimony regarding Stewart's admission to selling the pills; that trial counsel was ineffective for failing to object to the admission of prejudicial photos that deprived Stewart of his presumption of innocence, and for failing to seek discovery of available exculpatory and impeachment evidence which would have shown that the State presented perjured testimony regarding the accuracy of pictures of the

crime scene and the initial disclaimer of possession of the drugs by Stewart's girlfriend Jeanetta Mozee; and that state habeas counsel was ineffective for failing to raise trial counsel's failure to seek discovery, excusing his procedural default.[1]

A COA may be issued "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When the district court rejects constitutional claims on their merits, a COA should issue only if the petitioner "demonstrat[es] that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003); *see Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). Stewart has not made the requisite showing. Accordingly, his request for a COA is DENIED.

/s/ Leslie H. Southwick
LESLIE H. SOUTHWICK
UNITED STATES CIRCUIT JUDGE

[1] Stewart does not brief any argument regarding Detective Starr's testimony about the controlled drug buys or the validity of the cell phone search, and so those claims are abandoned. *See Weaver v. Puckett,* 896 F.2d 126, 128 (5th Cir. 1990).

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

LAMONT RENARD STEWART	§	
#1940731	§	
	§	
v.	§	**6:17-CV-156-RP**
	§	
LORIE DAVIS	§	

ORDER

Before the Court are Petitioner's Application for Habeas Corpus Relief under 28 U.S.C. § 2254 (#1); Petitioner's Amended Appendix (#5); Respondent's Answer (#10); and Petitioner's Reply (#12). Petitioner is represented by counsel and has paid the filing fee. For the reasons set forth below, the undersigned finds that Petitioner's application for writ of habeas corpus should be denied.

STATEMENT OF THE CASE

A. Petitioner's Criminal History

According to Respondent, the Director has lawful and valid custody of Petitioner pursuant to a judgment and sentence of the 54th District Court of McLennan County, Texas. Petitioner was charged by indictment with possession of a controlled substance, specifically 1-(3-trifluoromethylphenyl) piperazine, with intent to deliver, in an amount between 4 and 200 grams, alleged to have occurred on December 7, 2012. *Ex parte Stewart*, App. No. 86,360 (SHCR (#11-23) at 166). The indictment also included two habitual felony enhancement allegations which, if proved, increased the potential punishment range to a term of a minimum of 25 years of imprisonment. On May 28, 2014, a jury found Petitioner guilty. *Id.* at 180. On the following day, Petitioner pleaded true to the two sentencing enhancements, and the jury sentenced him to 60 years of imprisonment. *Id.* at 195. On June 18, 2015, the Tenth Court of Appeals affirmed Petitioner's conviction. *Stewart v. State*,

No. 10-14-00183-CR, 2015 Tex. App. LEXIS 6247 (Tex. App.–Waco 2015). The Texas Court of Criminal Appeals (TCCA) refused a petition for discretionary review on December 16, 2015.

Petitioner filed a state application for writ of habeas corpus challenging his conviction on December 20, 2016. On March 22, 2017, the TCCA denied habeas relief without written order on the findings of the trial court without a hearing. SHCR (#11-19). Petitioner filed his federal habeas petition on June 14, 2017.

B. Factual Background

The Tenth Court of Appeals summarized the facts as follows:

> After receiving information that [Petitioner] was selling ecstasy, Detective David Starr of the Waco Police Department's narcotics unit began a five-month investigation into [Petitioner]'s actions. During this investigation, Detective Starr conducted twelve "controlled buys," which involved [Petitioner] selling ecstasy pills to confidential informants. The "controlled buys" occurred at several locations, including the apartment of [Petitioner]'s girlfriend, Jeanetta Mozee. And on at least four of the "controlled buys," Mozee accompanied [Petitioner] to the location of the drug deal.
>
> Armed with the information obtained from the "controlled buys," Detective Starr was able to obtain a warrant to search [Petitioner]'s house and Mozee's apartment. On the day of the search, investigators observed [Petitioner] leave his house in a Suburban to drive to Mozee's apartment. Once [Petitioner] had entered Mozee's apartment and shut the door, a SWAT team entered Mozee's apartment.
>
> After the SWAT team secured the premises, Detective Starr entered the apartment, and on the kitchen counter, he observed [Petitioner]'s keys and a plastic bag that [Petitioner] had carried into the apartment. These items were next to a baggie of twenty-one pills that were in plain view on the kitchen counter. Witnesses testified that [Petitioner] was in close proximity to the baggie of pills and that [Petitioner] had stated the following when he was detained by the SWAT team: "I don't know what the big deal is, it's just 10 to 15 Ecstasy pills that I sell for, like, $3.00."[1] The SWAT team also found $1,211 in cash on [Petitioner]'s person and a key to Mozee's

[1] Petitioner vehemently disagrees that he ever admitted to possessing or selling controlled substances. In fact, the alleged lack of evidence of this statement is one of the grounds of relief he raises in his federal application for habeas relief.

> apartment on a keychain in [Petitioner]'s pocket. A subsequent test of the pills contained in the baggie revealed that the baggie contained 4.67 grams of l–(3–trifluoromethylphenyl piperazine) or TFMPP, which, as Detective Starr testified, is similar to ecstasy. Later, investigators searched the center console armrest of one of [Petitioner]'s vehicles and found digital scales that are commonly used in the drug trade. Thereafter, [Petitioner] was charged with unlawful possession of a controlled substance with intent to deliver.

Stewart, 2015 Tex. App. LEXIS 6247 at *1-3 (internal footnote omitted).

C. Petitioner's Grounds for Relief

Petitioner raises the following grounds for relief:

1. The State sponsored and relied on materially false and perjured testimony in the following instances:
   a. the State offered sworn testimony that pictures of the crime scene exactly and accurately depicted the scene prior to anything being touched or moved, which was untrue;
   b. the State offered sworn testimony that the resident of the apartment where drugs were found initially disclaimed possession of those drugs and later revised her story to help Petitioner, effectively portraying her as a liar;
   c. the State offered false testimony that Petitioner admitted to selling the pills, and that the admission was recorded; and
   d. the State offered testimony that the lead investigator personally witnessed 12 controlled drug buys using confidential informants.

2. His trial counsel was ineffective for failing to:
   a. challenge the constitutional validity of the cell phone search;
   b. object to the admission of prejudicial photos that stripped Petitioner of the presumption of innocence and deprived him of a fair trial;
   c. seek discovery of available exculpatory and impeachment evidence, including Waco Police Department incident reports and the "mike pack" recordings.

3. State habeas counsel was ineffective for failing to raise Claim 2(c) against trial counsel.[2]

Pet. (#1 at 6-7); Pet. Memo. (#1-2) at 5-29.

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[2] This is not a stand alone claim, but rather is Petitioner's argument for allowing the admittedly unexhausted Claim 2(c) to proceed on the merits pursuant to *Martinez v. Ryan*, 566 U.S. 1 (2012) and *Trevino v. Thaler*, 133 S. Ct. 1911 (2013).

DISCUSSION AND ANALYSIS

A. The Antiterrorism and Effective Death Penalty Act of 1996

The Supreme Court has summarized the basic principles that have grown out of the Court's many cases interpreting the 1996 Antiterrorism and Effective Death Penalty Act. *See Harrington v. Richter*, 562 U.S. 86, 97–100 (2011). The Court noted that the starting point for any federal court in reviewing a state conviction is 28 U.S.C. § 2254, which states in part:

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

28 U.S.C. § 2254(d). The Court noted that "[b]y its terms § 2254(d) bars relitigation of any claim 'adjudicated on the merits' in state court, subject only to the exceptions in §§ 2254(d)(1) and (d)(2)." *Harrington*, 562 U.S. at 98.

One of the issues *Harrington* resolved was "whether § 2254(d) applies when a state court's order is unaccompanied by an opinion explaining the reasons relief has been denied." *Id.* Following all of the Courts of Appeals' decisions on this question, *Harrington* concluded that the deference due a state court decision under § 2554(d) "does not require that there be an opinion from the state court explaining the state court's reasoning." *Id.* (citations omitted). The Court noted that it had previously concluded that "a state court need not cite nor even be aware of our cases under § 2254(d)." *Id.*

(citing *Early v. Packer*, 537 U.S. 3, 8 (2002) (per curiam)). When there is no explanation with a state court decision, the habeas petitioner's burden is to show there was "no reasonable basis for the state court to deny relief." *Id.* And even when a state court fails to state which of the elements in a multi-part claim it found insufficient, deference is still due to that decision, because "§ 2254(d) applies when a 'claim,' not a component of one, has been adjudicated." *Id.*

As *Harrington* noted, § 2254(d) permits the granting of federal habeas relief in only three circumstances: (1) when the earlier state court's decision "was contrary to" federal law then clearly established in the holdings of the Supreme Court; (2) when the earlier 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. *Id.* at 100 (citing 28 U.S.C. § 2254(d); *Williams v. Taylor*, 529 U.S. 362, 412 (2000)). The "contrary to" requirement "refers to the holdings, as opposed to the dicta, of . . . [the Supreme Court's] decisions as of the time of the relevant state-court decision." *Dowthitt v. Johnson*, 230 F.3d 733, 740 (5th Cir. 2000) (quotation and citation omitted).

> 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] has on a set of materially indistinguishable facts.

Id. at 740-41 (quotation and citation omitted). Under the "unreasonable application" clause of § 2254(d)(1), 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." *Id.* at 741 (quotation and citation omitted). The provisions of § 2254(d)(2), which allow the granting of federal habeas relief when the state court made an

"unreasonable determination of the facts," are limited by the terms of the next section of the statute, § 2254(e). That section states that a federal court must presume state court fact determinations to be correct, though a petitioner can rebut that presumption by clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1). But absent such a showing, the federal court must give deference to the state court's fact findings. *Id.*

B. Evidentiary Hearing

Section 2254(e)(2) provides:

> If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that–
>
> (A) the claim relies on--
>
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

Petitioner has failed to plead any allegations that would entitle him to a hearing. Accordingly, Petitioner's request for an evidentiary hearing is denied.

C. Unexhausted and Procedurally Barred Claims

Respondent asserts that Petitioner failed to properly exhaust his state court remedies with respect to claims (1)(a) the State offered sworn testimony that pictures of the crime scene exactly and accurately depicted the scene prior to anything being touched or moved, which was untrue; (1)(d) the State offered testimony that the lead investigator personally witnessed 12 controlled drug buys using confidential informants; and (2)(c) his trial counsel was ineffective for failing to seek

discovery of available exculpatory and impeachment evidence, including Waco Police Department incident reports and the "mike pack" recordings.

The exhaustion doctrine requires that the state courts be given the initial opportunity to address and, if necessary, correct alleged deprivations of federal constitutional rights. *Castille v. Peoples*, 489 U.S. 346, 349 (1989). In order to satisfy the exhaustion requirement, a claim must be presented to the highest court of the state for review. *Richardson v. Procunier*, 762 F.2d 429, 431 (5th Cir. 1985). Moreover, all of the grounds raised in a federal application for writ of habeas corpus must have been "fairly presented" to the state courts prior to being presented to the federal courts. *Picard v. Conner*, 404 U.S. 270, 275 (1971). In other words, in order for a claim to be exhausted, the state court system must have been presented with the same facts and legal theory upon which the petitioner bases his assertions. *Id.* at 275–77. Where a "petitioner advances in federal court an argument based on a legal theory distinct from that relied upon in the state court, he fails to satisfy the exhaustion requirement." *Wilder v. Cockrell*, 274 F.3d 255, 259 (5th Cir. 2001) (citing *Vela v. Estelle*, 708 F.2d 954, 958 n.5 (5th Cir. 1983)).

Petitioner fails to address the argument that Claim 1(a) is unexhausted. However, a review of Petitioner's petition for discretionary review to the TCCA and state habeas application reveals that there was no exhaustion of this claim. At no point has Petitioner presented the TCCA with any argument regarding the veracity of photographs of the crime scene, and Petitioner fails to assert otherwise. Consequently, Claim 1(a) is unexhausted.

Petitioner agrees that he failed to raise Claim 2(c), the issue of his trial counsel's ineffectiveness for failing to seek discovery of available exculpatory and impeachment evidence, including Waco Police Department incident reports and the "mike pack" recordings in any state

proceeding. As discussed below, Petitioner contends this claim, however, falls under an exception to the exhaustion rule.

As for Claim 1(d), Petitioner argues that it was exhausted in the context of his state habeas application, where he argued that exculpatory information had been withheld by the State. As a component of that argument, Petitioner asserted that Detective Starr's uncorroborated testimony regarding controlled drug purchases by confidential informants was unreliable due to Starr's subsequent admission (in an unrelated case) that he had lied on a search warrant affidavit. However, the claim Petitioner makes in his federal application is separate from any issue regarding alleged suppression of exculpatory evidence. Instead, Petitioner presents a standalone claim that the State elicited false testimony from Starr regarding his assertion that he personally witnessed the controlled drug buys. Thus, here, the state court system was not presented with the same facts and legal theory upon which the Petitioner bases his assertions. Because Petitioner is advancing "an argument based on a legal theory distinct from that relied upon in the state court" Claim 1(d) is unexhausted. *Wilder*, 274 F.3d at 259.

As a consequence of Petitioner's failure to exhaust these claims, Petitioner is procedurally barred from federal habeas corpus review. Even where a claim has not been reviewed by the state courts, this Court may find that claim to be procedurally barred. *Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991). If a petitioner has failed to exhaust his state court remedies and the state court to which he would be required to present his unexhausted claims would now find those claims to be procedurally barred, the federal procedural default doctrine precludes federal habeas corpus review. *Id.*; *see Nobles v. Johnson*, 127 F.3d 409, 423 (5th Cir. 1997) (finding unexhausted claim, which

would be barred by the Texas abuse-of-the-writ doctrine if raised in a successive state habeas petition, to be procedurally barred).

Here, if the Court required Petitioner to present his unexhausted claims to the Texas Court of Criminal Appeals to satisfy the exhaustion requirement, the Texas Court of Criminal Appeals would find his claim to be procedurally barred under the Texas abuse-of-the-writ doctrine. *See Fearance v. Scott*, 56 F.3d 633, 642 (5th Cir. 1995) ("[T]he highest court of the State of Texas announced that it would as a 'rule' dismiss as abuse of the writ 'an applicant for a subsequent writ of habeas corpus rais[ing] issues that existed at the time of his first writ.'") (quoting *Ex Parte Barber*, 879 S.W.2d 889, 892 n. 1 (Tex. Crim. App. 1994). Further, the Texas habeas corpus statute prohibits a Texas court from considering the merits of, or granting relief based on, a subsequent writ application filed after the final disposition of an inmate's first application unless he demonstrates the statutory equivalent of cause or actual innocence. TEX. CODE CRIM. PROC. ANN. art. 11.07 § 4 (West Supp. 1996). In order for this Court to reach the merits of his claim, Petitioner "must establish cause and prejudice from [the court's] failure to consider his claim." *Fearance*, 56 F.3d at 642 (citations omitted).

Even if it were exhausted, however, Petitioner's Claim 1(d) is also without merit. A court may deny an application for a writ of habeas corpus on the merits, notwithstanding the failure of the applicant to exhaust all available remedies. 28 U.S.C. § 2254(b)(2). A criminal defendant is denied due process when the prosecution knowingly uses perjured testimony at trial or allows untrue testimony to go uncorrected. *Giglio v. United States*, 405 U.S. 150 (1972); *Faulder v. Johnson*, 81 F.3d 515, 519 (5th Cir. 1996). To establish a denial of due process through the use of perjured testimony, a petitioner must show "that (1) the witness gave false testimony; (2) the falsity was

material in that it would have affected the jury's verdict; and (3) the prosecution used the testimony knowing it was false." *Reed v. Quarterman*, 504 F.3d 465, 473 (5th Cir. 2007); *see also Creel v. Johnson*, 162 F.3d 385, 391 (5th Cir. 1998). Perjured testimony is only material if it is also shown that there was a reasonable likelihood that it affected the jury's verdict. *Giglio*, 405 U.S. at 153–154. "Conflicting or inconsistent testimony is insufficient to establish perjury." *Kutzner v. Johnson*, 242 F.3d 605, 609 (5th Cir. 2001).

Petitioner has not established Detective Starr's testimony was perjured or that the prosecutor knew the testimony was false. Instead, Petitioner merely cites allegedly inconsistent statements in Detective Starr's search warrant affidavit, with no indication that whether Petitioner witnessed the controlled buys or was informed of them by confidential informants, the jury would have decided the case any differently. In addition, Petitioner fails to show that the prosecution had any knowledge of the alleged falsity. To the extent Petitioner raised these issues in his state court filings, the TCCA and state habeas court found that, when viewed in the context of the entirety of the evidence adduced at trial, there was no showing that Starr's testimony contradicted statements contained in his warrant affidavit. SHCR (#11-23 at 158).

At most, Petitioner has alleged a Fourth Amendment violation related to the evidence used to obtain a search warrant. A federal court may not grant habeas relief based on a Fourth Amendment violation where the state has provided an opportunity for full and fair litigation of the issue. *Stone v. Powell,* 428 U.S. 465, 493-95 (1976); *Janecka v. Cockrell*, 301 F.3d 316, 320 (5th Cir. 2002). This rule applies to all claims arising under the Fourth Amendment. *See,e.g. Janecka,* 301 F.3d at 320 (search and seizure); *Jones v. Johnson*, 171 F.3d 270, 277-78 (5th Cir. 1999) (arrest). A petitioner must plead and prove the state court proceeding was inadequate in order to obtain post-conviction

relief in federal court. *Davis v. Blackburn,* 803 F.2d 1371, 1372 (5th Cir. 1986). Petitioner had the opportunity to challenge the search warrant and probable cause affidavit in state court on Fourth Amendment grounds.

It is apparent Petitioner was afforded a full and fair opportunity to litigate his Fourth Amendment issues in state court. Petitioner is therefore barred from seeking federal habeas relief on these grounds. *See Caver v. Alabama*, 577 F.2d 1188, 1192 (5th Cir. 1978) ("An 'opportunity for full and fair litigation' means just that: an opportunity. If a state provides the processes whereby a defendant can obtain full and fair litigation of a Fourth Amendment claim, *Stone v. Powell* bars federal habeas corpus consideration of that claim whether or not the defendant employs those processes"). Having independently reviewed the entire state court record, this Court finds nothing unreasonable in the state court's application of clearly established federal law or in the state court's determination of facts in light of the evidence. Accordingly, the Court is of the opinion that 28 U.S.C. § 2254, as amended by the AEDPA, bars habeas corpus relief on Petitioner's claim that the State presented false evidence or perjured testimony on the issue of Starr's witnessing of controlled buys or use of confidential informants.

As for Claim 2(c), Petitioner admits the claim is unexhausted, but argues that he falls under the exception carved out by the Supreme Court in *Martinez*, 566 U.S. 1 and *Trevino*, 133 S. Ct. 1911. In those cases, the Supreme Court explained that "a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." *Martinez*, 566 U.S. at 18. This rule applies to the system in Texas. *Trevino*, 133 S. Ct. at 1921. To overcome the procedural default of an ineffective assistance of counsel claim a petitioner must "demonstrate

that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit." *Martinez*, 566 U.S. at 14; *see also Reed v. Stephens*, 739 F.3d 753, 774 (5th Cir. 2014). The Fifth Circuit has indicated that this showing is comparable to the standard for obtaining a certificate of appealability. *Crutsinger v. Stephens*, 576 F. App'x 422, 430 (5th Cir. 2014) (citations omitted).

Petitioner has failed to demonstrate that his claim is a substantial one, and thus cannot overcome the admitted failure to exhaust. Petitioner argues that his counsel was ineffective because he failed to seek discovery of the Waco Police Department's underlying investigative materials, including incident reports and the "mike pack" recording. Petitioner alleges this discovery would have "exposed materially false testimony and contained exculpatory/impeachment information." Specifically, Petitioner alleges that the incident reports would show that the State manipulated the crime scene (as alleged in unexhausted Claim 1(a) addressed above). Petitioner further alleges that the "mike pack" recording would have allowed trial counsel to prove that Mozee was not lying at trial and that she had consistently claimed possession of all of the pills found in her apartment.

Petitioner's state habeas counsel chose to pursue these claims directly, not as ineffective assistance of counsel claims. State habeas counsel obtained the "mike pack" and pursued claims based on the interpretation of the recordings and alleging that the recordings called into question the veracity of certain trial testimony. "[E]ffective assistance of counsel does not mean counsel who will raise every nonfrivolous ground of appeal available." *Green v. Johnson*, 160 F.3d 1029, 1043 (5th Cir. 1998). Because the only way state habeas counsel could show trial counsel had been ineffective for failing to obtain the "mike pack" would be to show the recording was valuable and could have changed the outcome of trial, state habeas counsel understandably chose to devote the argument to

the heart of the issue–what the recording showed and how it could have changed the outcome. In any event, Petitioner puts a great deal of weight on the "mike pack" recording of the interview with Mozee. But Petitioner's interpretation of that recording appears to misconstrue the contents of the recording (as discussed further below regarding Claim 1(b)), and fails to show that there are any meritorious claims relating to any failures of discovery. Because Petitioner has failed to show there was any available exculpatory or impeachment evidence, his claim that counsel was ineffective for failing to seek discovery of available exculpatory and impeachment evidence cannot overcome the fact that it is unexhausted and procedurally barred.

D. Claims of Materially False and Perjured Testimony

1. Claim 1(b) Regarding Starr's Testimony about Mozee

Petitioner contends that the State offered false testimony through Starr that portrayed Mozee as initially denying ownership of the pills, only later claiming ownership of them. Petitioner contends this false testimony painted Mozee as a liar and caused the jury to discredit her testimony at trial that she was the owner of all of the pills, not Petitioner. Petitioner contends that the recording of Mozee's interview with Starr at the scene contradicts Starr's testimony. The TCCA found Petitioner failed to establish that Starr committed perjury. SHCR (#11-23 at 158).

As discussed above, a criminal defendant is denied due process when the prosecution knowingly uses perjured testimony at trial or allows untrue testimony to go uncorrected. *Giglio*, 405 U.S. 150; *Faulder*, 81 F.3d at 519. To establish a denial of due process through the use of perjured testimony, a petitioner must show "that (1) the witness gave false testimony; (2) the falsity was material in that it would have affected the jury's verdict; and (3) the prosecution used the testimony knowing it was false." *Reed*, 504 F.3d at 473. Perjured testimony is only material if it is also shown

that there was a reasonable likelihood that it affected the jury's verdict. *Giglio*, 405 U.S. at 153–154. "Conflicting or inconsistent testimony is insufficient to establish perjury." *Kutzner*, 242 F.3d at 609.

Here, Petitioner fails to show that Starr gave false testimony. Petitioner's reliance on the "mike pack" recording appears to fundamentally misconstrue what Mozee says on the recording and the effect of her statements in the context of the interview. Petitioner provided a recording of the interview in this proceeding as Exhibit E to the habeas application. Having entered Mozee's apartment and conducted a search, officers had found approximately $1,200 and around 20 pills. *See* Ex. E (track 2 at 0:30). On the recording of Starr's questioning of Mozee, which proceeds after the search, he begins questioning her about the pills saying "let's talk about them pills that are down there." *Id.* (track 3 at 9:20). Mozee's response is difficult to hear, but she seems to say that she uses the pills to stay up when she has to work late at her job. *Id.* at 9:27.

Petitioner contends that Mozee's response at this point indicates that she is claiming ownership of all of the pills in the house. In the context of the questions and answers that follow, however, it is clear that Mozee is confused about the number of pills in the house and possibly unaware that Petitioner has brought pills into the house. Shortly after explaining that she uses the pills, Mozee asked Starr how many pills they found and explained that she had "only a little bit." *Id.* at 10:20. Starr responded by asking Mozee how many pills she had, to which she answered she had only 6 or 7 and that they were located in a drawer in her bedroom. *Id.* at 10:19-10:45.[3] Later in the questioning, Mozee again stated that she had only 6 or 7 pills and when Starr asks for her confirmation that "all those pills downstairs are yours," she specifically refused saying "there's only

[3] At trial, Starr admitted that the officers had not located these pills in their initial search, but that they located them after Mozee made this statement (there were actually 9 pills), exactly where she had said they would be. 3 RR 68, 99-100 (#11-3).

a certain amount that I had." *Id.* at 14:45. The recording, in its entirety, seems to indicate fairly clearly that Mozee is claiming ownership of the 6-7 pills she had in her bedroom drawer, but is either unaware of or denying any ownership of the 20 or so pills found by police in the kitchen. In any event, the recording does *not* establish that the TCCA was unreasonable in concluding as much.

Having independently reviewed the entire state court record, this Court finds nothing unreasonable in the state court's application of clearly established federal law or in the state court's determination of facts in light of the evidence. Accordingly, the Court is of the opinion that 28 U.S.C. § 2254, as amended by the AEDPA, bars habeas corpus relief on Petitioner's claim that the State presented false evidence or perjured testimony regarding Mozee's responses to initial questioning.

2. Claim 1(c)

Petitioner contends that the State elicited false testimony at trial that Officer Jones heard Petitioner make a spontaneous admission at the scene, stating "I don't know what the big deal is, it's just 10-15 Ecstasy pills that I sell for, like, $3.00." 4 RR at 27 (#11-4). Jones also testified that he did not make a written report regarding this alleged statement. *Id.* at 30, 33. Further, Petitioner contends that Jones's testimony that he walked right outside and told Starr about the statement and that Starr recorded the statement on his "mike pack" was false.

Jones's testimony regarding Petitioner's alleged statement was altered slightly just a short time later at trial when counsel re-phrased the testimony and said "the individual told you, 'I don't know what the big deal is, it's just 10 to 15 "X" pills, they only sell for about $3.00?'" 4 RR at 28 (#11-4). Jones responded "I don't know if he was speaking to me or just said it out loud to whoever was there. *But that's exactly what he said, yes, sir.*" *Id.* (emphasis added). In other words, when

counsel's restatement of the testimony did not include the "I sell" language, Jones affirmed that was exactly what Petitioner said. In addition, there is certainly a recording from the "mike pack" of Jones telling Starr that Petitioner said something to this effect, it seems the recording occurred at a later time, not "right outside" the apartment. Ex. E (track 5 at 1:19).

Again, inconsistent testimony does not, by itself, indicate perjury. *Kutzner*, 242 F.3d at 609. The omission of certain facts from the reports and written statements of the prosecution's witnesses, alone, is not adequate to put the prosecution on notice of perjury on their part, much less to establish that such perjury in fact occurred. *United States v. Martinez-Mercado*, 888 F.2d 1484, 1492 (5th Cir. 1989) (citing *United States v. Viera*, 819 F.2d 498, 502 (5th Cir. 1987). At most any omissions or inconsistencies merely go to the credibility of the witnesses, an area within the province of the jury. *Id.* In short, Petitioner has not established that the TCCA was unreasonable in denying this claim of alleged perjury.

Having independently reviewed the entire state court record, this Court finds nothing unreasonable in the state court's application of clearly established federal law or in the state court's determination of facts in light of the evidence. Accordingly, the Court is of the opinion that 28 U.S.C. § 2254, as amended by the AEDPA, bars habeas corpus relief on Petitioner's claim that the State presented false evidence or perjured testimony regarding Jones's characterization of what he heard Petitioner say.

E. Ineffective Assistance of Trial Counsel Claims

1. AEDPA Impact

Petitioner alleges his trial counsel was also ineffective for failing to (1) challenge the constitutional validity of the cell phone search and (2) object to the admission of prejudicial photos

of Petitioner at the time of his arrest that stripped Petitioner of the presumption of innocence and deprived him of a fair trial. Petitioner raised these same issues in his state habeas application and the Court of Criminal Appeals rejected the merits of Petitioner's claims. As such, the AEDPA limits the scope of this Court's review to determining whether the adjudication of Petitioner's claims by the state court either (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.

2. Standard of Review

Ineffective assistance of counsel claims are analyzed under the well-settled standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984):

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant can make both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Id. at 687. In deciding whether counsel's performance was deficient, the Court applies a standard of objective reasonableness, keeping in mind that judicial scrutiny of counsel's performance must be highly deferential. *Id.* at 686-689. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 689. "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.* (citation omitted). Ultimately, the focus of inquiry must be on the fundamental fairness of the proceedings whose result is being challenged. *Id.* at 695-97. Accordingly, in order to prevail on a claim of ineffective assistance of counsel, a convicted defendant 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.

3. Failing to Challenge the Constitutional Validity of the Cell Phone Search

Petitioner alleges counsel was ineffective for failing to challenge the searches of four cell phones. Petitioner alleges this failure led to the introduction of text messages at trial regarding Petitioner's sale of "tabs." Specifically, Petitioner argues that the search of the four cell phones was constitutionally invalid following the Supreme Court's decision in *Riley v. California*, 134 S. Ct. 2473 (2014).

In *Riley*, the Supreme Court addressed the question of "whether the police may, without a warrant, search digital information on a cell phone seized from an individual who has been arrested." *Id.* at 2480. The facts of *Riley* dealt with officers searching cell phones incident to arrests, without obtaining a search warrant. *Id.* at 2480-82. The Court held "not that the information on a cell phone is immune from search; it is instead that a warrant is generally required before such a search, even when a cell phone is seized incident to arrest." *Id.* at 2493. The Court further emphasized this holding, stating "Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple–get a warrant. *Id.* at 2495.

In this case, the four cell phones were searched pursuant to a warrant. *See* Ex. K (#5 at 48) (authorizing police to search "cellular phones to include data and information stored in the cellular phone"). Therefore, *Riley* is inapplicable. Petitioner cites to three unpublished district court cases, *United States v. Phua*, No. 2:14-cr-00249-AGP-PAL, 2015 WL 1281603, at *7 (D. Nev. Mar. 20, 2015); *In re Premises Known as Three Cellphones and One Micro-SD Card*, No. L4-MJ-8013-DJW, 2014 WL 3845157, at *2 (D. Kan. Aug. 4, 2014); and *In re Search of the Premises Known as a Nextel Cellular Telephone*, No. 14-MJ-8005-DJW, 2014 WL 2898262, at *12 (D. Kan. June 26, 2014), arguing that some courts have been extending *Riley* to require more particularized warrants for cell phones. Suffice to say, the extension of *Riley* has not occurred in this Circuit, and counsel cannot be found ineffective for failing to object on the basis of these non-binding cases.[4]

Having independently reviewed the entire state court record, this Court finds nothing unreasonable in the state court's application of clearly established federal law or in the state court's determination of facts in light of the evidence. Accordingly, the Court is of the opinion that 28 U.S.C. § 2254, as amended by the AEDPA, bars habeas corpus relief on Petitioner's claim that counsel was ineffective for failing to challenge the constitutional validity of the cell phone search.

4. Failure to Object to the Admission of Prejudicial Photos

Petitioner argues that trial counsel was ineffective for failing to object to the admission of photos taken of Petitioner after his arrest. Petitioner alleges these prejudicial photos stripped him of the presumption of innocence because he was handcuffed and therefore deprived him of a fair trial.

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[4] In addition, *Riley*, and the three subsequent district court cases, were all decided after Petitioner's trial. Even if *Riley* stood for the proposition argued by Petitioner, counsel would not be ineffective for failing to object based on the law at the time of trial.

Petitioner cites numerous cases in support of this claim, many of which are irrelevant, and the rest of which relate to Texas state court rules of admissibility. It is well established that there may be a due process violation if a defendant is compelled to stand trial in the presence of the jury while in prison clothing or shackled. *See Estelle v. Williams*, 425 U.S. 501 (1976). Here, Petitioner argues that the use of two photographs, one which shows Petitioner lying face down in handcuffs and the other which shows him sitting in a chair with his arms behind his back, presumably, though not visibly, handcuffed. Ex. M (#5). Petitioner cites several TCCA cases that appear to discuss the standard for admissibility of similar photographs under Texas law. Petitioner does not cite, and the Court cannot locate, any federal case extending the general rule regarding shackling during trial to the admissibility of photographs showing a defendant in handcuffs.

The TCCA determined that these photographs were admissible under state law and that counsel was not ineffective for failing to object to their admission. SHCR (#11-23 at 160-61). Where a state court's denial of a *Strickland* claim is necessarily based upon the interpretation and application of state law on questions of deficiency and prejudice, this Court is bound by those state court determinations. *See Schaetzle v. Cockrell*, 343 F.3d 440, 448–49 (5th Cir. 2003) (citing *Weeks v. Scott*, 55 F.3d 1059, 1063 (5th Cir. 1995) (explaining that it is not the function of the federal habeas court to review a state's interpretation of its own law).

Having independently reviewed the entire state court record, this Court finds nothing unreasonable in the state court's application of clearly established federal law or in the state court's determination of facts in light of the evidence. Accordingly, the Court is of the opinion that 28 U.S.C. § 2254, as amended by the AEDPA, bars habeas corpus relief on Petitioner's claim that he received ineffective assistance of counsel for his failure to object to the admission of photographs.

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 circuit justice or 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.* "When a district court denies a habeas petition on procedural grounds without reaching the petitioner's underlying constitutional claim, a COA should issue when the petitioner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *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 further **ORDERED** that Petitioner's Application for Habeas Corpus Relief under 28 U.S.C. § 2254 is **DENIED**.

It is further **ORDERED** that a certificate of appealability is **DENIED**.

SIGNED on December 4, 2017.

ROBERT PITMAN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-50025

LAMONT RENARD STEWART,

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

Before SOUTHWICK, HAYNES, and HO, Circuit Judges.

PER CURIAM:

A member of this panel previously denied Appellant's Motion for Certificate of Appealability. The panel has considered appellant's motion for reconsideration. IT IS ORDERED that the motion is DENIED.