No. 19-5415

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

DARRYL DEWAYNE WILLIAMS — PETITIONER
(Your Name)

vs.

LORI DAVIS — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

FIFTH CIRCUIT COURT OF APPEALS
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

DARRYL DEWAYNE WILLIAMS
(Your Name)

9601 Spur 591
(Address)

Amarillo, Texas 79107
(City, State, Zip Code)

(806) 381-7080
(Phone Number)

QUESTION(S) PRESENTED

1) Whether Applicant is entitled to a certificate of appealability or review by the Supreme Court when the Court of Appeals departed from the accepted and usual course of judicial proceedings of governed law in determining whether to grant his COA, by not considering the elements of the district court's application of A.E.D.P.A to Applicant's constitutional claims to determine whether that resolution was debatable amongst jurists of reason?

2) Whether 28 U.S.C. § 2254(f) modified 28 U.S.C. § 2254(e)(1)'s presumption of correctness afforded to § 2254(d)(2)'s standard, to grant Applicant relief under § 2254(d)(1) and (d)(2) when Applicant challenged the state court's discrete explicit evidentiary findings of fact and conclusions of mixed fact and law as being deficient which, left unresolved insufficient evidence adduced in the state habeas proceeding to support the state court's determination of factual issues regarding his constitutional claims?

3) Whether the district court abused its discretion in failing to duly follow and act upon the instructions outlined in 28 U.S.C. § 2254(f) regarding Applicant's sufficiency of the evidence challenge to the state court's determination of factual issues pertaining to his constitutional claims to entitle him to relief under 28 U.S.C. § 2254(d)(1) and (d)(2)?

4.) Whether the district court and state court standard of review application of Strickland V. Washington contrary to, and involved an objectively unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States, under 28 U.S.C. § 2254 (d)(1), and objectively unreasonable based on the facts and circumstances in light of the evidence presented in State habeas court proceeding under 28 U.S.C. § 2254 (d)(2), to entitle applicant to relief of his two constitutional claims under 28 U.S.C. § 2254 (d)(1) and (d)(2).

5.) Whether the State habeas court's failure to conduct the Krezdorn Test (U.S. V. Krezdorn,718 F2d 1360 at 1365(5th cir.1983)), to applicant's IAC vindictive indictment of prosecutorial misconduct claim resulted in insufficient factual determinations that was objectively unreasonable based on the facts and circumstances in light of the evidence presented in State habeas court proceeding under 28 U.S.C. § 2254 (d)(2), to entitle applicant to relief under 28 U.S.C. § 2254 (d)(1) and (d)(2).

LIST OF PARTIES

[] Allparties in the caption of the case on the cover page.

[X] All parties **do not** appear in the caption of the case on the cover page.

U.S. COURT OF APPEALS

FIFTH CIRCUIT

600 S. Maestri Place

New Orleans, LA 70130

U.S. DISTRICT COURT

WESTERN DISTRICT OF TEXAS

WACO DIVISION

800 Franklin Avenue

Waco, Texas 76701

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19 th JUDICIAL DISTRICT COURT

501 Washington Avenue

Waco, Texas 76701

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the 19th Judicial District Court court appears at Appendix C to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

JURISDICTION

[X] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was Feburary 25, 2019.

[X] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[X] An extension of time to file the petition for a writ of certiorari was granted to and including July 25, 2019 (date) on May 3, 2019 (date) in Application No. 18 A 1130.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was 3/08/2017. A copy of that decision appears at Appendix N/A.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution's Fifth Amendment, and by proxy, the Fourteenth Amendment holds that "no person shall 'be deprived of life, liberty, or property without due process of law!!"

The Sixth Amendment to the U.S. Constitution holds the "In all criminal prosecutions the accused shall enjoy the right ... to have the Assistance of Counsel for his defense."

STATUTORY PROVISIONS

28 U.S.C. §:

2253(c)(1) Unless a circuit justice or judge issues a COA, an appeal may not be taken to the court of appeals from --

2253(2) A COA may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

2254(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertaining to a determination of the sufficiency of the evidence to support such determinations. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order

directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

2254(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant 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.

2254(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

Texas Code of Criminal Procedure, art 16.01 When the accused has been brought before a magistrate for an examining trial that officer shall proceed to examine into the truth of the accusation made, allowing the accused, however, sufficient time to procure counsel. In a proper case, the magistrate may appoint

to represent an accused in such examining trial only, to be compensated as otherwise provided in this code. The accused in any felony case shall have the right to an examining trial before indictment in the county having jurisdiction of the offense, whether he be in custody or on bail, at which time the magistrate at the hearing shall determine the amount or sufficiency of bail, if a bailable case. If the accused has been tranferred for criminal prosecution after a hearing under section 54.02, Family Code, the accused may be granted an examining trial at the direction of the court.

Artical 11.07 §3(d) If the convicting court decides that there are controverted, previously unresolved facts which are material to the legality of the applicant's confinement, it shall enter an order within 20 days of the expiration of the time allowed for the State to reply, designating the issues of fact to be resolved. To resolve those issues the court may order affidavits, depositions, interrogatories, and hearings, as well as using personal recollection. Also, the convicting court may appoint an attorney or a magistrate to hold a hearing and make findings of fact.

STATEMENT OF THE CASE

Darryl Dewayne (Williams) challenged the Director's custody of him pursuant to a judgment and sentence from the 19th Judicial District Court of McLennan County, Texas by indictment cause number 2012-0750-C1.

Williams was seperately charged and warrant(s) issued from two Waco Police Complaints (WPC) on Janurary 9, 2012, with offenses of delivery by actual transfer of less than one gram of cocaine in a drug-free zone on November 9, 2011, to Officer (Allovio) -- WPC #2011-23518 (518) and his agent, John (Grisham) -- WPC #2011-23517 (517). See State 11.07 application (SA) Ex#s 1,2,5,6,7, and 8: see also Clerk's Record (CR) V1:Pp. 37 and 40 and CR V2: Pp. 191-195. Williams was arrested March 1, 2012 and booked in jail under seperate booking numbers concerning both WPC numbers [1]. See again SA Ex#s 5,6,7, and 8. Williams posted bond on both cases March 30, 2012. See CRV1:Pp. 18,37 and 40.

On April 3, 2012, Williams filed a pro se motion requesting an examination trial regarding both cases: WPC's 517 and 518. See Texas Code of Criminal Procedure, Art. 16.01; see also Reporter's Record (RR) V3:P. 7; and SA Ex#3. This motion was granted on April 5, 2012, and a hearing was scheduled for April 26, 2012. See SA Ex#4.

On April 11, 2012, the State presented WPC #518 to the Grand

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[1] Booking number 840998 is located on the face of indictment #2012-0750-C1 which corresponds to WPC 518, see SA Ex#s5 and 7. Booking number 840999 is located on the face of indictment #2012-0835-C1 which corresponds to WPC 517. See SA Ex#s 6 and 7.

Jury which returned indictment #2012-0750-C1 (750) that charged Williams with delivery by actual transfer of less than a gram of cocaine in a drug-free zone to Allovio, on or about November 9, 2011. See SA Ex#s 5 and 7. This indictment terminated Williams' statutory right to an examining trial on WPC 518. With a day remaining before the scheduled examining trial on WPC 517, the State presented WPC 517 to the Grand Jury on April 25, 2012, which returned indictment #2012-0835-C1 (835) that charged Williams with delivery by actual transfer of less than a gram of cocaine in a drug-free zone to Allovio, on or about November 20, 2011. See SA Ex#s 6 and 8. This indictment terminated Williams' statutory right to an examination trial on WPC #517.

On January 21, 2014, a jury trial commenced on indictment 750 where Williams pled not guilty to the indictment.

During the State's case-in-chief, Allovio testified to establish that the Waco Drug Enforcement Unit utilized Grisham, a drug addict and paid informant (CI) to introduce undercover officers to Williams and set up a drug buy. RRV:10:Pp. 56-91. Allovio attested that Grisham had purchased crack cocaine from Williams in the past and that it would not be a problem to set up an introduction. Id at 56. Allovio also testified that Williams sold $40.00 worth of crack cocaine to Grisham and based on Grisham's introduction, Williams also sold Allovio $40.00 worth of crack that Williams had been holding in his hand. Id at 65-67. See SA Ex#s 1 and 2

Defense counsel presented an entrapment defense premised upon the trust of the fact that Williams and Grisham had a trust-reliance relationship with each other, and that they had a busi-

ness-type relationship. Id at 144-160 and 175-176. Grisham testified that before police involvement he had made 10-15 crack purchases from Williams that caused them to rely on one another and that they had a business-type relationship. Id at 175-176. Counsel went on to try and demonstrate that without Grisham the drug deal would not have occurred. See Id at 157-159. Counsel showed that Allovio used Grisham to make the introduction to Williams Id at 157-159, 83, and that without Grisham calling Williams back to the car after he started walking away to sell to Allovio, it would not have happened. Id at 83,85-87, and 157-159. In rebutting counsel's entrapment defense the State cross-examined Grisham, Id at 165, where Grisham attested that he did not persuade or force Williams to sell Allovio or him drugs, but only provided Williams with an opportunity to make some money Id at 165. The State then proceeded to question Grisham about other transactions to refute that Williams was induced to do something that he would not normally do, Id at 168-175, 197-200, and 202-208. Allovio essentially and materially testified to the same facts as Grisham concerning the November 18th drug sale, Id at 187-193.

After the Defense and State rested a discussion ensued concerning the Court's Charge, Id at 209. The State objected to the inclusion of an entrapment instruction, alleging that the defense could not demonstrate inducement by persuasion, and based on the contention that Williams had engaged in drug transaction with Grisham 10 to 15 times prior to police involvement and was predisposed to commit delivery, Id at 211-220. The trial court

repeatedly disagreed that Willaims was induced to deliver drugs to Officer Allovio, Id at 213-219. Counsel admitted on the record that if Williams' case was about delivery to Grisham, they could not argue entrapment and he didn't think there is an entrapment defense to Williams' delivery to Grisham that day, Id at 220. The court finally decided to give Williams the entrapment instruction but explicitly indicated its reason for doing so by expressing ... "I can't get reversed with letting you have it." Id at 221. The jury was instructed on the law of delivery by actual and constructive transfer, a drug-free zone, the law of burden and proof standard as to the charge of delivery of a controlled substance and all of the elements in Williams' indictment, the law of entrapment, the law surrounding law enforcement agents and instructed that Grisham was such an agent, the elements and how to decide the issue of entrapment of Williams' case, and that the testimony of Williams committing other crimes or wrongs, or acts may only be considered in rebutting the defense's contention that the defendant was entrapped into committing the offense of delivery of a controlled substance: cocaine in a drug-free zone. RRV11:pp. 5-13.

In closing, the State argued that there is no dispute that Williams did deliver cocaine to Allovio in a drug-free zone and attacked the entrapment defense by highlighting that Williams was not induced by police actions to commit an offense he was already inclined to commit, Id at 17-21 and 31-37.
Defense counsel admitted on the record "that Willaims is not charged with delivering in this trial to Grisham. If they want

to file charges on him for that, thats a different scenario. That's a different charge." See Id at 24-25,27. Counsel also argued that Allovio did not engage in any improper conduct and is not the crux of this case. Id at 25.

The jury found Williams guilty on January 23, 2014 and assessed punishment at life in prison. See RRV12:p. 7. The following day the court granted the State's motion to dismiss indictment #835. See SA Ex#10.

Williams appealed and the Tenth Court of Appeals affirmed the conviction on July 23, 2015. See Williams V. State, No. 10-14-00030 Cr (Tex.App.-Waco 2015, pet. ref'd)(Not designated for publication). On October 20, 2015, Williams petitioned the Texas Court of Criminal Appeals (CCA) for discretionary review which was refused on December 16, 2015. See Williams V. State, PD-1147-15 (Tex.Crim.App. 2015). Williams did not seek certiorari.

STATE HABEAS CORPUS PROCEEDINGS

On December 13, 2016, Williams filed a state habeas corpus application pursuant to Tex.C.Crim.P., art. 11.07 in the convicting court. Accompanying that application was a memorandum of law in support, ten documentary exhibits, a request for trial counsel's affidavit (Rod Gobel), as well as a document titled "First set of Interrogatories For The Honorable Rod Gobel."

In Williams' memorandum he presented claims that he was 1) vindictively indicted in indictment #835 for exercising his statutory right to seek an examining trial regarding both WPCs; 2) received ineffective assistance of counsel (IAC) through

counsel's entrapment defense; 3) prejudiced by counsel's failure to investigate the grand jury's abuse; 4) was prejudiced by the failure to dismiss the indictment on that basis with prejudice; 5) was prejudiced by counsel's failure to move to suppress the evidence and allegations from either indictment to be presented; and 6) prejudiced by a double jeopardy violation related to the second indictment. See application.

On December 27, 2016, the State filed an answer to Williams' habeas application. See APPX D. The State first asserted there were no controverted, previously unresolved facts to necessitate a hearing because Williams' claims could be resolved by referring the record and the court's recollection. Id. Second, the State generally denied each of Williams' allegations, and last, recommended the court deny the application as unsupported by factual assertions and affirmatively controverted by the record and the court's recollection. Id. In briefing, the State asserted that the charged offense committed on November 9, 2011, was part of a single criminal episode wherein applicant delivered controlled substances to Allovio, a peace officer, and to a CI. Id. Two probable cause affidavits were produced out of this episode, reflecting the deliveries to the CI and the named police officer. Id. However, only one indictment was returned, that being the delivery to the police officer. Id. A different indictment was returned under cause #835, alleging a different offense of delivery of a controlled substance committed November 20, 2011. Id.

Also in briefing, the State asserted that Williams failed to present allegations suggestive of prosecutorial vindictiveness

in regard to the presentation of this case to the grand jury, there was no reasonable legal basis to attack the indictment in this case, reference to the record and the court's own recollection will reflect that the pursuit of an entrapment defense was a reasonable trial strategy based on the facts and circumstances of the case at bar, and applicant has further failed to demonstrate prejudice suffered due to trial counsel's pursuit of an entrapment strategy. Id.

On December 28, 2016, the State habeas court adopted the State's answer and suggestions and made discrete explicit evidentiary findings of facts and conclusions of mixed fact and law, without holding a hearing and without giving Williams an opportunity to present evidence, denying Williams' application. See APPX C. The State court also recommended the CCA deny Williams' application. Id. (Findings)

Because Williams was unaware of any state court findings, he filed a precise reply to the State's answer on January 11, 2017. After Williams received a copy of the findings (January 17, 2017), he filed an objection on January 23, 2017 into the court. On March 8, 2017, the CCA adopted the findings and denied relief without a written order.

FEDERAL HABEAS CORPUS PROCEEDINGS

On May 15, 2017, Williams filed his federal writ of habeas corpus petition pursuant to 28 U.S.C. § 2254, into the Western District Court, Waco Division out of McLennan County, Texas. See Document(Doc) #1. Williams' memorandum of law in support of his petition was filed June 19, 2017. See Doc #6.

Williams presented only two grounds for relief in his § 2254 petition: 1) IAC for presenting an unreasonable defense theory: entrapment and 2) IAC when counsel failed to move the trial court, pretrial, for dismissal of indictment #835 with prejudice based on a vindictive indictment/prosecutorial misconduct. See Doc #1. In Williams' federal memorandum he also challenged the sufficiency of the evidence "based entirely on the state habeas court record," adduced in [the state habeas court proceedings] to support the factual determinations made by the state court's discrete explicit evidentiary findings of fact and conclusions of mixed fact and law. See Doc #6:Pp. 1-2 and 6-14. Williams asserted the state court's decisions are not entitled to deference because the fact finding procedure employed was deficient and not adequate to afford him a full and fair hearing on his claims. Id. Williams also demonstrated that the state court's factual determinations of his claims were decisions contrary to, involved an unreasonable application of clearly established federal law as determined by the Supreme Court of the United States, and the factual determinations were based on an unreasonable determination of the facts in light of the evidence presented in the state habeas court proceeding. Id.

The Director timely answered on September 15, 2017. See Doc #10. To support her answer regarding Williams' second claim presented in the district court, the Director shifted Williams' argument into a double jeopardy claim, agreeing with state court findings of Williams' double jeopardy claim presented in state court, see Id at pp.2, 11-12 and Findings:Pp.2,(3) and (4), all because the Director restated Williams' claim into a different allegation,

and intentionally misrepresented the state court's findings regarding Williams' vindictive indictment/prosecutorial misconduct IAC claim. Id. The state court's findings of Williams' IAC;vindictive indictment/prosecutorial misconduct was addressed seperately from the double jeopardy claim. Id. See also Findings Pp. 2-3,(5),(6), and (7). Williams did not present a double jeopardy claim during federal habeas. See Doc #s 1 and 6.

The Director argued that Williams' IAC claim regarding the presentation of an impossible and unreasonable defense of entrapment fails on the merits and suggests that "[w]ithout a better defense clearly available counsel must be presumed to be operating based on trial strategy." See Doc #10:p. 10. In support of her answer she argued that the evidence in this case shows that Williams was caught "red-handed" selling crack to an undercover officer, and under these circumstances, counsel could reasonably believe that an entrapment defense is the best defense, even if ... such a defense had a low likelihood of success. Id. The Director also asserted that Williams failed to establish prejudice because he does not attempt to show how the outcome of the trial would have changed ..., and that a review of the transcript torpedoes the applicability of Cronic in this case. Id.

The Director did not make a general denial nor did she substantially argue Williams' challenge to the sufficiency of the evidence adduced in [the state habeas proceeding] to support the state court's determination of the factual issues of his two constitutional claims that he argued in district court. See Doc #6:Pp. 6-14.

On November 20, 2017, Williams filed a traverse to Director's

Answer to Show Cause, and a Petitioner's Request for an Evidentiary hearing and Leave of Court to Expand the Record by Conducting Discovery With His Suggestions In Support. See Doc #s 14 and 15. On February 14, 2018, Judge Robert Pittman denied Williams' motion for evidentiary hearing, his application and denied Williams of a certificate of appealability (COA). See Doc #s 17 and 18; APPX B . The district court did however acknowledge that Williams asserted in his applicetion, factual questions, which have not been addressed, has not been provided a full and fair hearing, and he is entitled to an evidentiary hearing to resolve the factual questions left unresolved by the state court. See Doc #17:P. 3. In denying the request for an evidentiary hearing, the district court stated: "he ... asserts ... he is entitled to an evidentiary hearing because the state court's factual determination was not supported by the record." Id at 5-6. Williams challenge to the sufficiency of the evidence to support the state court's factual determinations was two-part. First he challenged the fact-finding procedure as being deficient. Second, Williams argued that as a result, evidence adduced in the state habeas court was insufficient to support the state court's determination of the factual issues. See Doc #14: Pp. 2,6-8,17-18, and 20. See also Doc #15. The district court adopted the state court's assessment of Strickland V. Washington's standard of review application to Williams' two constitutional claims. See Doc #17:Pp. 7-12.

COURT OF APPEALS COA PROCEEDINGS

On May 16, 2018, Williams filed a Certificate of Appealability (COA) application pursuant to 28 U.S.C. § 2253(c) into the Fifth Circuit Court of Appeals. See COA. Williams presented three issues as to why a COA should be granted: 1) whether the district court erred in failing to consider and act upon Williams' § 2254(f) sufficiency challenge to the state court's factual determinations and decisions on his IAC claims; 2) whether Williams received ineffective assistance: constructive denial of counsel when his trial attorney presented an impossible and unreasonable entrapment defense; and 3) whether Williams received ineffective assistance of counsel because his attorney failed to fully investigate his case and thereby failed to move to dismiss his indictments based on prosecutorial vindictiveness?

On February 25, 2019, U.S. District Judge Don Willet for the Fifth Circuit denied Williams's COA. See COA Order: APPX A. The Court of Appeals restated Williams's third issue into a different allegation, then cited case law regarding a double jeopardy claim; a case adjudicated in the Fifth Circuit, to support their stated reasons to deny Williams' COA. See COA:Pp. 1-2; COA Order:APPX A. Williams demonstrated in his COA application that he should be granted a COA with respect to his three issues. See COA.

REASONS FOR GRANTING THE PETITION

REASONS FOR GRANTING THE PETITION ARE WARRANTED FOR TWO REASONS. FIRST, BECAUSE THE COURT OF APPEALS DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS IN DETERMINING WHETHER TO GRANT DARRYL DEWAYNE WILLIAMS A CERTIFICATE OF APPEALABILITY AND SECOND, TO RESOLVE AN UNRESOLVED ISSUE OF NATIONAL IMPORTANCE THAT IT IS CONNECTED TO HIS CONSTITUTIONAL CLAIMS WHICH, IF LEFT UNRESOLVED AND UNCORRECTED WILL DEEPLY UNDERMINE CONFIDENCE IN THE CRIMINAL JUSTICE SYSTEM?

I.

REASON TO GRANT PETITION PRESENTED IN QUESTION ONE

The Court of Appeals adopted the method of the Director to deny Williams a COA. The Director intentionally restated Williams' second constitutional claim into a different allegation. See Doc #s 10:Pp.2,11-12 and #1. See also Doc #6:Pp.1-2. To support their answer in addressing Williams' second IAC claim, the Director shifted Williams' argument into a double jeopardy claim by agreeing with the state court's findings of Williams' double jeopardy claim presented in state habeas. See Doc #10:Pp.2, 11-12; Findings:p.2:Pars 3 and 4; APPX C; and Doc #14:Pp.16-18. The state court's findings of Williams' IAC vindictive indictment/ prosecutorial misconduct claim was addressed seperately from the findings of Williams' double jeopardy claim. See Findings Pp. 2-3, (5),(6) and (7). Williams' second claim presented in the district court is the same claim he presented as a third issue in

his COA application. See Doc #s1 and #6:Pp. 1-2 and COA:Pp. 2-3. The Court of Appeals adopted the method that was used by the Director, by restating Williams' third issue into a different allegation, and by citing a double jeopardy claim to support their stated reasons to deny Williams of his three issues presented to the court. See COA Order: APPX A. Williams did not present a double jeopardy claim in federal habeas. See Doc #s1 and #6; and COA.

The Court of Appeals considered the factual or legal basis of the double jeopardy argument adduced in the Director's answer, to support their threshold inquiry analysis in determining whether Williams should be granted a COA.

As the Supreme Court explained in Miller-El V. Cockrell, the COA determination under 28 U.S.C. § 2253(c) requires an overview of the claims and a general assessment of their merits. The court of appeals must look to the district court's application of A.E.D.P.A. to petitioner's constitutional claims and determine whether the resolution was debatable amongst jurists of reason. this threshold inquiry does not require full consideration of the factual or legal basis adduced in support of the claims. In fact, the statute forbids it. When a court of appeals side-steps this process by first deciding the merits of an appeal ... it is in essence deciding an appeal without jurisdiction. Id at 537 U.S. 336-37, 123 S.Ct. 1029 (2003).

The Court of Appeal's decision denying Williams a COA did not adhere to this clearly established law. Instead, in departing from that standard, it relied on an inappropriate, piecemeal

merits analysis, ignored overriding significance of counsel's effectiveness, and ultimately failed to acknowledge the debate-ability of the district court's decisions. Although the court of appeals "paid lipservice to the principles guiding issuance of a COA," Tennard V. Dretke, 542 U.S. 274,283 (2004), by properly identifying the governing law, see APPX A; (quoting Miller-El V. Cockrell, 537 U.S. 322,336 (2003); Slack V. McDaniel, 529 U.S. 473,484 (2000), it failed to conduct the narrow analysis required by this law. Continuing a "troubling" pattern, Jordan V. Fisher, 135 S.Ct. 2647,2652 n.2 (2015)(Sotomayer dissenting), the court of appeals improperly "decided the merits of Williams' appeal, and then justified its denial of a COA based on its adjudication of the actual merits." Miller-El, 537 U.S. at 336-37. The district court's application of A.E.D.P.A. to Williams' constitutional claims was "Strickland V. Washington, 466 U.S. 668 (1984)," framework. See Doc #17:Pp.7-12. Williams' first issue within his COA application demonstrated that jurists of reason can find it debatable that the district court's factual findings resulted in clear error. See COA Pp. 2-5. The district court's failure to recognize and duly follow the instructions outlined in section 2254(f) is something reasonable jurists could debate as being an abuse of discretion. Id. The issue deserves encouragement to proceed further as the failure of the district court to adhere to section 2254(f), denied Williams the opportunity and ability to challenge the sufficiency of the state court's factfinding, and resulted in the erroneous presumption of correctness afforded the state court's factual determination. Id.

Williams' second COA issue demonstrated that jurists can find that the district court's failure to act on the sufficiency challenge is an abuse of discretion and that the factual determinations made are clear error, and jurists of reason could find that this ineffective assistance/constructive denial of counsel is debatable and deserves encouragement to proceed further. Id. at 5-11. Williams' third issue demonstrates that the issue deserves encouragement to proceed further. Id at pp. 3-5, 11.

The Court of Appeals' threshold inquiry requires consideration of a COA request against a backdrop of the elements of Williams' two district court IAC claims. The Court of Appeals did not consider these elements in reviewing the district court's ruling, for COA purposes, on whether Williams made the requisite 28 U.S.C. § 2253(c)(2) threshold: "A substantial showing of a denial of a constitutional right."

This error by the Court of Appeals is a decision in conflict with governing law: Miller-El V. Cockrell, 537 U.S. 322,336 (2003) and Slack V. McDaniel, 529 U.S. 473,484 (2000), the principle guiding issuance of a COA that all U.S. Circuit Courts must apply. Its of national importance for the Supreme Court to correct this error which will keep confidence in the criminal justice system for other citizens who are similarly situated in seeking COA to exhaust their appeal.

II.

REASON TO GRANT PETITION PRESENTED IN QUESTION TWO

In district court, Williams challenged the sufficiency of the evidence adduced in the state court proceedings to support the state court's determinations of the factual issues. See Doc #6: Pp. 5-14. First, Williams challenged the fact-finding procedure as being deficient, Doc #s14:Pp. 1-2,6-8and #15 and requested an evidentiary hearing and expansion of the record through discovery. Id. Second, Williams argued that as a result of the state court making discrete explicit evidentiary findings of fact and conclusion of mixed fact and law without holding an evidentiary hearing or any other factfinding procedure, evidence adduced in that proceeding was insufficient to support the state court determination of the factual issues. See Doc #s14:Pp.2, 5-21 and #15. Williams also argued that the state habeas court's factual determinations of his two constitutional claims was objectively unreasonable in light of the evidence before the state habeas court. See Doc #6:Pp. 6-14. The district court failed to duly follow the instructions outlined in 28 U.S.C. § 2254(f) to Williams' sufficiency of the evidence challenge of the state court's determinations of the factual issues. See COA:pp. 2-7 and Doc #17:Pp. 3,5-6. Nor did the Court of Appeals grant Williams' COA on this issue of whether the district court abused its discretion in failing to follow the instructions outlined in 28 U.S.C. § 2254(f).

For the reasons stated above, Williams was entitled to a state habeas evidentiary hearing or any other fact-gathering

hearing procedure according to Texas Law, Texas Code of Criminal Procedure, Art. 11.07 § 3(d). See Doc #s6:Pp. 5-14, #14:Pp. 1-2, 5-21, and #15. Williams was not afforded a full and fair hearing of his two constitutional claims in state or federal court. He has shown good cause for discovery, and exercised due diligence to entitle him to an evidentiary hearing. See Michael Williams V. Taylor, 120 S.Ct. 1479 (2000); Harris V. Nelson, 89 S.Ct. 1082 (1969); and Townsend V. Sain, 83 S.Ct. 745 (1963). Williams exercised the only available remedy he had, by challenging the sufficiency of the evidence by the state court's determinations of the factual issues, to develop the habeas record in order to demonstrate that he is confined illegally and is therefore entitled to relief. The error made by the district court is a decision in conflict with all the U.S. district Courts governed by A.E.D.P.A. that authorizes the application 28 U.S.C. § 2254(f) to all U.S. citizens who were not afforded a full and fair hearing of their constitutional claims in state courts. Its of national importance for the U.S. Supreme Court to resolve this now unresolved question dividing the courts of appeal on whether 28 U.S.C. § 2254(e)(1) applies in every case presenting a challenge under 28 U.S.C. § 2254(d)(2). See Woods V. Allen, 130 S.Ct. 841 (2010) and Register V. Thayler, 681 F3d 623 (5th Cir. 2012). It has yet to be resolved whether § 2254(f) has mandated the review of § 2254(d). See Rice V. Collins, 126 S.Ct. 969 (2006). Correcting this error and resolving this question will give the lower courts guiding principles to follow; governing law that keeps confidence in the criminal justice system.

III.

REASON TO GRANT PETITION PRESENTED IN QUESTION THREE

Williams demonstrated in his argument that the district court abused its discretion in failing to duly follow and act upon the instructions outlined in 28 U.S.C. § 2254(f) regarding Williams' sufficiency of the evidence challenge to the state court's determination of factual issues of his two constitutional claims. See COA:Pp. 2-7. The state court, the CCA, the district court, and the Fifth Circuit failed to order or conduct an evidentiary hearing or any other fact-gathering procedure of Williams' two constitutional claims. As discussed in question two, Williams echoes his reasons to grant this petition.

IV.

REASON TO GRANT PETITION PRESENTED IN QUESTION FOUR

In district court, Williams demonstrated that he is entitled to relief under 28 U.S.C. § 2254(d)(1) and (d)(2), and was not provided certain procedures in state court that he was entitled to regarding his two constitutional claims. See Doc #6:Pp. 1-2, 5-14 and #14:Pp. 1-2,5-21 and #15. As discussed in question two, Williams echoes his reasons to grant this petition.

V.

REASON TO GRANT PETITION PRESENTED IN QUESTION FIVE

There was a genuine dispute between Williams and the State as to whether only one or two indictments were returned from the two probable cause affidavits produced from the single criminal episode: delivery of cocaine to Officer John Allovio and his CI on November 9, 2011. Williams produced convincing evidence and allegations that the return of indictments 750 and 835 were part and parcel to the two probable cause affidavits attached to WPCs 517 and 518 and that he was vindictively indicted in cause number 835 for exercising his statutory legal right to an examining trial on both WPCs. See SA Memorandum:Pp. 5-7,9-14, 17-24; SA Ex#s 1,2,3,4,5,6,7, and 8; CR I:Pp.18,37, and 40; CR II:Pp.191-195; Doc#6:Pp.6-14; Doc#14:Pp.2,6-10,12-13, and 16-21; and Doc#15:Pp.1-4 and 10-20. The State produced a bald allegation: "that only one indictment was returned from the two probable cause affidavits produced out of the single criminal episode ..., and a different indictment was returned under cause number 835, alleging a different offense ..." SA:P.2; APPX D. The State court relied on this bald allegation to address Williams' double jeopardy claim in its findings in paragraphs 3 and 4. See Findings:P.2,(3) and (4); APPX C. The State court also relied on the State's perjured statement to justify reasons for denying Williams' IAC:prosecutorial vindictiveness claim in its findings in paragraphs 5,6 and 7. See paragraph 7: "As discussed above, it has not been demonstrated that the indictment in this case resulted from prosecutorial vindictiveness.

Applicant has not shown a reasonable legal basis to attack the indictment in this case ..." See Findings:Pp.2-3(7). Williams was penalized by the State for doing what the law allowed, which violated his constitutional due process rights. See Bordenkircher V. Hayes, 98 S.Ct. 663 at 363.

Under Texas law and based on these facts, Williams was entitled to have the state habeas court conduct certain procedures not provided him. See Texas Code of Criminal Procedure, Art. 11.07 § 3(d). The error made by the state court is a decision that is in conflict with all state courts in the United States authorized under their state law to conduct procedures provided to them by their state Legislature or the Supreme Court to address a petitioner's constitutional claim. It is of national importance for the United States Supreme Court to correct this error by the lower court which will keep confidence in the criminal justice system by all United State citizens that seek justice in exhausting their appeals in state courts who are similarly situated.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Darryl Dewayne Williams

Date: July 18, 2019