IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 18-50207

DARRYL DEWAYNE WILLIAMS,

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:

In January 2014, a jury convicted Darryl Dewayne Williams, Texas prisoner # 1910015, of delivery of a controlled substance (cocaine) in a drug-free zone and sentenced him as a habitual offender to life imprisonment. He seeks a certificate of appealability (COA) to appeal the district court's denial of his 28 U.S.C. § 2254 application. To obtain a COA, Williams must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). And when, as here, the district court rejects the constitutional claims on the merits, he "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

"Appendix A"

In his COA request before this court, Williams argues that (1) the district court erred by ignoring his sufficiency challenge to the state court's factual determinations; (2) his trial counsel was ineffective for relying on an entrapment defense; and (3) his trial counsel was ineffective for failing to investigate, and seek dismissal based on, a second indictment. Williams has not made the requisite showing. *See id.*; *see also United States v. Munoz-Fabela,* 896 F.2d 910-11 (5th Cir. 1990).

Accordingly, Williams's motion for a COA is DENIED.

Don R. Willett

DON R. WILLETT
UNITED STATES CIRCUIT JUDGE

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

DARRYL DEWAYNE WILLIAMS	§	
#1910015	§	
	§	
V.	§	**W-17-CA-132-RP**
	§	
LORIE DAVIS	§	

FINAL JUDGMENT

Before the Court is the above styled and numbered cause. On this date, the Court denied Petitioner Darryl Dewayne Williams's Application for Habeas Corpus Relief and determined that a certificate of appealability shall not be issued. Accordingly, as all issues in the cause have been resolved, the Court renders the following Final Judgment pursuant to Federal Rule of Civil Procedure 58.

It is therefore **ORDERED** that Petitioner Darryl Dewayne Williams's Application for Habeas Corpus Relief is hereby **DENIED**.

It is finally **ORDERED** that the above styled and numbered cause is hereby **CLOSED**.

SIGNED on February 14, 2018.

ROBERT PITMAN
UNITED STATES DISTRICT JUDGE

"Appendix B"

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

DARRYL DEWAYNE WILLIAMS	§	
#1910015	§	
	§	
V.	§	**W-17-CA-132-RP**
	§	
LORIE DAVIS	§	

ORDER

Before the Court are Petitioner's Application for Habeas Corpus Relief under 28 U.S.C. § 2254 (#1); Memorandum in Support (#6); Respondent's Answer (#10); Petitioner's Reply (#14); and Petitioner's Motion for Hearing (#15). Petitioner, proceeding pro se, has been granted leave to proceed in forma pauperis. 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 19th District Court of McLennan County, Texas. Petitioner was charged by indictment with delivery of a controlled substance in a drug free zone. *Ex parte Williams*, App. No. 80,536-02 (SHCR (#11-35) at 77)). Petitioner was found guilty by a jury on January 23, 2014. *Id.* at 106. Petitioner was enhanced to habitual offender status and the jury assessed punishment at life imprisonment and judgment was entered accordingly. *Id.*

Petitioner appealed his conviction and on July 23, 2015, the Tenth Court of Appeals affirmed. *Williams v. State*, 10-14-00030-CR, 2015 Tex. App. LEXIS 7621 (Tex. App.–Waco 2015, pet.

ref'd). Petitioner filed a petition for discretionary review, which the Court of Criminal Appeals refused on December 16, 2015. PDR No. 1147-15 (#11-8). Petitioner then filed a state application for writ of habeas corpus on December 13, 2016. *See* SHCR (#11-35) at 18. The Texas Court of Criminal Appeals denied the application without written order on the findings of the trial court without a hearing on March 8, 2017. SHCR (#11-29). Petitioner filed this petition on May 15, 2017. Pet. (#1) at 10.

B. Factual Background

The Tenth Court of Appeals summarized the facts of the case as follows, noting there was no challenge to the sufficiency of the evidence:

> Officer John Allovio, with the Waco Police Department, testified that he received information from a confidential informant that Williams was selling cocaine. Officer Allovio asked the confidential informant to call Williams and arrange a purchase of cocaine. Officer Allovio and the confidential informant drove to Williams's residence, and they each purchased cocaine from Williams. The residence was located within 1000 feet of a school.

Williams, 2015 Tex. App. LEXIS 7621 at *1.

C. Petitioner's Grounds for Relief

Petitioner raises the following grounds for relief:

1. He received ineffective assistance of counsel or constructive denial of counsel because his trial counsel presented an impossible and unreasonable entrapment defense.

2. He received ineffective assistance of counsel because his trial counsel failed to fully investigate his case and move to dismiss his indictments based on prosecutorial vindictiveness.

Pet. (#1) at 6, 11; Memo. (#6) at 1-2; Reply (#14) at 1.

D. Request for Evidentiary Hearing

Petitioner asserts that his application for habeas relief raises factual questions, which have not been addressed by the state courts and that the state has failed to provide Petitioner with a full and fair hearing concerning his application. Petitioner concludes that he is entitled to an evidentiary hearing to resolve the factual questions left unresolved by the state courts.

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. He only asserts his claims for relief and that he is entitled to an evidentiary hearing because the state court factual

determination was not supported by the record. Accordingly, Petitioner's request for an evidentiary hearing is denied.

C. Timeliness

Federal law establishes a one-year statute of limitations for state inmates seeking federal habeas corpus relief. *See* 28 U.S.C. § 2244(d). That section provides, in relevant part:

> (d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of--
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Petitioner's conviction became final at the latest, on March 15, 2016. *See* SUP. CT. R. 13.1 ("A petition for a writ of certiorari seeking review of a judgment of a lower state court that is subject to discretionary review by the state court of last resort is timely when it is filed with the Clerk within 90 days after entry of the order denying discretionary review."). Therefore, Petitioner had until March 15, 2017, to timely file his federal application. Petitioner executed his first state application on December 13, 2016. Thus, it tolled the limitations period until it was denied on March 8, 2017. Consequently, Petitioner had until June 8, 2017, to timely file his federal application.

On May 22, 2017, Petitioner timely filed his federal application for habeas corpus (#1). At the same time, Petitioner filed a request for thirty additional days to file a memorandum of law in support of his application (#3) indicating that the inmate who had previously been assisting him had been transferred and that he had only recently found another inmate to assist him. The Court granted his motion and required him to file any memorandum on or before June 21, 2017 (#5).

Respondent argues that Petitioner's motion is barred by the statute of limitations. In calculating the deadline, Respondent wholly ignores Petitioner's filing of his petition on May 22, 2017 (#1). Instead, Respondent asserts that Petitioner filed on June 26, 2017, at the time he filed his memorandum of law in support of his petition. However, Petitioner's petition was complete as filed on May 22, 2017. Respondent does not address the impact of any of this. Even if Petitioner had not filed a memorandum of law, his original petition sufficiently stated his claims. Petitioner is not barred by the statute of limitations.

D. Ineffective Assistance of Counsel

1. AEDPA Impact

Petitioner alleges his trial counsel was ineffective because his trial counsel (1) presented an impossible and unreasonable entrapment defense, and (2) failed to fully investigate his case and move to dismiss his indictments based on prosecutorial vindictiveness. 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. The Entrapment Defense

Petitioner alleges counsel presented an entrapment defense that had no chance of success and thus deprived him of his rights. Specifically, he appears to argue that because the entrapment defense had little to no chance of success, because Petitioner was caught selling crack to an undercover officer, that his counsel was ineffective for failing to pursue a different course of action. Petitioner admits that he does not have an alternative defense to propose. Reply (#14) at 15. Petitioner states that "[t]he facts here demonstrate that no defense existed for Williams's delivery" of crack, but that "the fact a defense did not exist does not mean that prejudice did not occur." *Id.*

Even assuming counsel was deficient in attempting to raise an entrapment defense, Petitioner offers no alternative defense and fails to show prejudice. In fact, Petitioner admits that there was no other defense counsel could have raised and that the facts made the case virtually unwinnable. Petitioner has failed to show any reasonable probability that the result of the proceeding would have been any different if counsel had adopted a different strategy. 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 trial counsel when counsel pursued an entrapment offense.

4. Indictment Issue and Failure to Investigate

Petitioner argues that if counsel had properly investigated the facts behind his indictments, counsel would have moved to dismiss the indictments. Petitioner's assertion rests on his claim that indictment 2012-0835-CI was a vindictive indictment sought only in response to Petitioner's request for an examining trial on his original indictment, 2012-0750-CI. Two probable cause affidavits were produced from Petitioner's delivery of controlled substances to two different people on November 9, 2011. However, only one indictment, 2012-0750-CI, was returned–for delivery to the police officer. A different indictment, 2012-0835-CI, was returned alleging delivery of a controlled substance committed on November 20, 2011. Petitioner was convicted of delivery of a controlled substance, committed on November 9, 2011. Following Petitioner's conviction for the delivery on November 9, 2011, the subsequent indictment for his actions on November 20, 2011 was dismissed.

Petitioner agrees with these facts. Reply (#14) at 17. What Petitioner alleges, while somewhat unclear, is that somehow the state's decision to indict him for the second offense may have been in retaliation for Petitioner's actions upon being indicted on the first offense. Petitioner provides no evidence to support this bare allegation. Instead, Petitioner appears to suggest that his counsel should have further investigated this issue. Petitioner fails to identify what facts counsel would have discovered that would support a dismissal of the indictment, or how such an action would have changed the outcome of Petitioner's trial regarding the November 9, 2011, offense

In order to show vindictive prosecution, Petitioner would need to provide some evidence of actual vindictiveness, or, in certain circumstances, may show sufficient facts to give rise to a presumption of vindictiveness. Petitioner has not provided any evidence of actual vindictiveness. Instead he appears to rely on the presumption, but he misunderstands the law. The presumption of

vindictiveness applies in situations where a prosecutor pursues additional charges after a defendant has successfully either defeated a charge or attacked a conviction, rather than for pre-trial issues. *See United States v. Saltzman*, 537 F.3d 353, 360-361 (5th Cir. 2008) (citing *Bodenkircher v. Hayes*, 434 U.S. 357, 363 (1978) (explaining that a change in the charging decision made after an initial trial is completed is much more likely to be improperly motivated than is a pretrial decision). Further, prior to trial "a defendant is expected to invoke procedural rights that inevitably impose some 'burden' on the prosecutor and '[i]t is unrealistic to assume that a prosecutor's probable response to such motions is to seek to penalize and to deter.'" *Id.* (quoting *Bodenkircher*, 434 U.S. at 381).

In addition, " a defendant who alleges a failure to investigate on the part of his counsel must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the trial." *United States v. Green*, 882 F.2d 999, 1003 (5th Cir. 1989). Petitioner fails to identify what information counsel should have uncovered with regard to his indictments, or how that information would have given counsel a valid legal reason to move to quash the indictment. Instead, Petitioner argues that counsel should have investigated the issue of prosecutorial vindictiveness, when the record shows such a pursuit would not have led to a dismissal of the indictments. Counsel is not required to file frivolous motions or make frivolous objections. *Green v. Johnson*, 160 F.3d 1029, 1037 (5th Cir. 1998).

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 trial counsel for his failure to investigate and for his failure to seek dismissal of the indictment.

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 therefore **ORDERED** that Petitioner's Motion for Hearing (#15) is **DENIED.**

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 February 14, 2018.

ROBERT PITMAN
UNITED STATES DISTRICT JUDGE

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