UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-1342
Summary Calendar

DONALD G. WILLIAMS,

Petitioner-Appellant,

versus

WAYNE SCOTT, Director,
Texas Dept. of Criminal Justice,
Institutional Division,

Respondent-Appellee.

Appeal from the United States District Court for the
Northern District of Texas
(1:92-CV-148-C)

(October 26, 1994)

Before GARWOOD, SMITH and DeMOSS, Circuit Judges.[*]

GARWOOD, Circuit Judge:

Petitioner-appellant Donald Williams (Williams) appeals the dismissal of his 28 U.S.C. § 2254 petition for a writ of habeas corpus. We affirm.

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[*] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

Facts and Proceedings Below

On July 20, 1989, Abilene, Texas law enforcement officers executed a search warrant at 834 1/2 Ash Street, a duplex apartment rented and exclusively controlled by Williams. The search uncovered 114.84 grams of marihuana stashed inside a kitchen cabinet. In the butter dish of the apartment's refrigerator, officers discovered 1.56 grams of cocaine, parceled into 25 individually wrapped packages. Typical of cocaine distribution methods, these packages were made from magazine cuttings folded into rectangles; other, unfolded cuttings were found strewn about the apartment. Besides the narcotics, the officers recovered, among other things, $752 in cash from Williams's front pants pocket, a loaded pistol from underneath Williams's mattress, and an envelope with markings indicative of drug transactions. At the time of his arrest, moreover, Williams, who had reported indigence to his probation officer, wore a gold necklace purchased the month before for $2,000.

Williams went to trial, indicted on both the marihuana and cocaine charges.[1] Although Williams claimed to know nothing of the drugs found in his apartment, a state-court jury convicted him of possessing marihuana, and of possessing cocaine with intent to deliver. The jury determined that Williams should serve concurrent terms of ninety-nine and ten years for the cocaine and marihuana charges, respectively.

Both convictions were affirmed on direct appeal and survived

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[1] The separate marihuana and cocaine indictments were consolidated for trial.

state-court collateral attack. Thereafter, Williams petitioned for, and was denied, a writ of habeas corpus in the court below. Williams filed a notice of appeal, but the district court denied his request for a certificate of probable cause. Almost one year later, Williams sought and obtained a certificate of probable cause from this Court, which directed respondent to brief petitioner's Eighth Amendment claim. Having jurisdiction over Williams's appeal pursuant to 28 U.S.C. §§ 1291 and 2253, we now affirm the denial of his petition.

Discussion

Williams's habeas petition, which challenges only his conviction for possessing cocaine with the intent to deliver, raises the following six issues: whether Williams should have been allowed an opportunity for additional discovery in the court below, whether the sentence was grossly disproportionate to his offense, whether the State withheld exculpatory evidence, whether the indictment was multiplicitous, whether the evidence is sufficient to support the conviction, and whether Williams was denied effective assistance of counsel.

I. The District Court's Refusal to Permit Discovery

Williams argues that the district court erred in not allowing him additional discovery or an evidentiary hearing. Williams sought discovery to bolster his claim that, by introducing into evidence the $752 found on Williams, the State violated principles of double jeopardy. Williams argues that the State should have been collaterally estopped from introducing evidence that implied a connection between the $752 and drugs because, allegedly, the

judge in a prior civil forfeiture proceeding found insufficient evidence to support any such connection. The district court refused to consider the issue because Williams had not presented evidence of a favorable outcome in the forfeiture proceeding. The court, furthermore, declined to conduct an evidentiary hearing or to grant Williams the opportunity to obtain the records of the prior proceeding.

On habeas review, the decision whether to permit discovery is committed to the sound discretion of the district court. 28 U.S.C. § 2254, Rule 6 (governing the availability of discovery in habeas proceedings); *Andrews v. Collins*, 21 F.3d 612, 618 (5th Cir. 1994). Finding no basis for any double jeopardy challenge, we cannot conclude that the district court abused its discretion in not opening up this evidentiary issue for discovery.

Williams's contention, that the judge in a prior forfeiture proceeding found insufficient evidence to link the money to drug proceeds, directly contradicts his testimony at trial. On cross-examination, Williams clearly and unequivocally admitted under oath that the judge at the forfeiture proceeding had linked the money to drugs and therefore had upheld the forfeiture of the entire amount.[2] In his brief, Williams offers no explanation for this

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[2] On cross examination, the following exchange took place:

> "STATE: Isn't that what Judge Solis said, in his decision, is that it was -- that that money was derived from the sale of illegal drugs?
> WILLIAMS: That's what he said."

Before and after making this admission, Williams stressed that he believed the judge at the forfeiture proceeding had erred in upholding the forfeiture, resorting at one point to reading a

striking about-face.[3] He is therefore judicially estopped from arguing on appeal a position in direct contradiction to his testimony at trial. *See Long v. Knox*, 291 S.W.2d 292, 295 (Tex. 1956); *Davidson v. State*, 737 S.W.2d 942, 948 (Tex. Ct. App. 1987); *see also United States v. McCaskey*, 9 F.3d 368, 378 (5th Cir. 1993) (noting that judicial estoppel operates against parties seeking to contradict their own sworn statements). We note, moreover, that Williams, in his motion to supplement the record, has supplied this Court with documentation of the judgment at the forfeiture proceeding, which is the very information upon which he bases his need for additional discovery. This document reveals that the judge indeed found the money liable to forfeiture because of its link to drugs. As a result, Williams could not have raised any collateral estoppel argument, much less one based on the Double Jeopardy Clause.

Indeed, Williams's only feasible double jeopardy challenge is one based on successive prosecutions, that is, that the government, having already won a civil forfeiture proceeding, seeks to prosecute Williams again for the same offense. This argument also

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"law book" on the stand. According to Williams on direct, "this is an error in court and judgment and giving justice as far as seven hundred and fifty-two dollars is concerned, but I intend to go back to get my seven hundred and fifty-two dollars . . . ." On cross, he repeated this sentiment: "I can show you a book that he [the judge] had errored, and I'll be back for my seven hundred and fifty-two dollars, I'll bet you this."

[3] Indeed, in his reply brief, Williams shifted his position once more, implicitly admitting that the money was forfeited but again urging that the forfeiture was "illegal." Williams asks that the money be "returned . . . under terms the Court find [*sic*] justifiable."

fails. Generally, the imposition of both a civil penalty and a criminal conviction on the same core conduct is constitutionally permissible so long as the civil sanction is a remedy and not a separate punishment. *United States v. Halper*, 109 S.Ct. 1892, 1897 (1989). According to the Supreme Court, a civil penalty will amount to a criminal punishment only in the "rare case" where the sanction is so "overwhelmingly disproportionate" to the damages caused by the criminal conduct that it bears "no rational relation" to any legitimate remedial goal. *Id.* at 1902.

Consistent with *United States v. Ward*, 100 S.Ct. 2636, 2644 (1980), we have held that the "forfeiture of proceeds of illegal drug sales serves the wholly remedial purposes of reimbursing the government . . . and reimbursing society for the costs of combatting the allure of illegal drugs." *United States v. Tilley*, 18 F.3d 295, 299 (5th Cir. 1994). The goal of the prior civil forfeiture proceeding was remedial, not punitive, and consequently jeopardy did not attach. *Accord Fitzgerald v. Superior Court*, 845 P.2d 465 (Ariz. Ct. App. 1993) (holding, under similar facts, that no jeopardy attached to the prior civil forfeiture). Accordingly, Williams's double jeopardy challenge, however construed, must fail.

Given the foregoing, the court's decision not to allow discovery was not an abuse of discretion.

II. The Jury Sentence

Williams argues that the sentence imposed by the jury is grossly disproportionate to his offense. Williams faced a discretionary sentence ranging from five years to life. Before trial, Williams requested that the jury impose his punishment. On

the edge of its discretion but still within the legislated range, the jury sentenced Williams to ninety-nine years in prison.

The final clause of the Eighth Amendment prohibits the infliction of "cruel and unusual punishments." U.S. CONST. amend. VIII; *see Robinson v. California*, 82 S.Ct. 1417 (1962) (holding that the Eighth Amendment is binding on the States through the Fourteenth). Although the Supreme Court has interpreted that clause to forbid sentences grossly disproportionate to the offense, *Solem v. Helm*, 103 S.Ct. 3001, 3009 (1983), outside the context of capital punishment, the Court may have been somewhat equivocal in its application of the proportionality rule. *See Harmelin v. Michigan*, 111 S.Ct. 2680, 2702 (1991) (Kennedy J., concurring) (acknowledging that the Court's decisions on proportionality have been neither consistent nor clear).

In *Rummel v. Estelle*, 100 S.Ct. 1133 (1980), the defendant was convicted in a Texas criminal court of obtaining $120.75 by false pretenses. This felony conviction was his third, following one for fraudulently using a credit card to obtain $80 worth of goods and another for passing a forged check for $28.36. Under the Texas recidivist statute, defendant received a life sentence with the benefit of parole. Noting that successful proportionality attacks were "exceedingly rare," the Supreme Court rejected defendant's Eighth Amendment claim. *Id.* at 1138. The Court stressed both the generosity of Texas's parole policy and its reluctance to review legislative judgments.

Two years after its decision in *Rummel*, the Court again rejected an Eighth Amendment challenge to a term of imprisonment.

Hutto v. Davis, 102 S.Ct. 703 (1992) (per curiam). In *Davis*, a jury had sentenced defendant to forty years in prison, following convictions for possession and distribution of nine ounces of marihuana. The Court, implicitly rejecting any distinction between discretionary and mandatory sentences, emphasized its reluctance to interfere with punishment regimes set up by a state legislature.

Once again visiting the proportionality issue in *Solem v. Helm*, 103 S.Ct. 3001 (1983), the Court overturned, as a violation of the Eighth Amendment, defendant's sentence of life imprisonment without parole. The defendant there, like the defendant in *Rummel*, was convicted under a recidivist statute, this time triggered by his pleading guilty to a charge of writing a no-account check for $100. His prior convictions were for third-degree burglary, false pretenses, grand larceny, and driving while intoxicated. The Court noted that the defendant's prior offenses "were all relatively minor. All were nonviolent and none was a crime against a person." *Id.* at 3013.

Appearing to retreat somewhat from *Rummel* and *Davis*, the Court in *Solem* held definitively that a noncapital sentence is subject to proportionality review under the Eighth Amendment and identified three objective factors to guide analysis: (1) the gravity of the offense relative to the harshness of the penalty, (2) the sentences imposed for other crimes in the jurisdiction, and (3) the sentences imposed for the same crime in other jurisdictions. *Id.* at 3011. The Court purported not to overrule *Rummel* in holding the sentence unconstitutionally severe under these factors. The Court emphasized the minor and nonviolent nature of the offense relative

to the austere punishment of life imprisonment without parole.

As we recognized in *McGruder v. Puckett*, 954 F.2d 313, 315 (5th Cir.), *cert. denied*, 113 S.Ct. 146 (1992), *Solem* must now be filtered through the Court's most recent and, indeed, most fractured decision on proportionality, *Harmelin v. Michigan*, 111 S.Ct. 2680 (1991). In *Harmelin*, the Court reviewed defendant's mandatory life sentence without parole for possession of more than 650 grams of cocaine. Five Justices held that the sentence was constitutional, but split three to two over the grounds for the holding. The split left only pieces of precedent and, consequently, little unified guidance for the lower courts. Nevertheless, in *McGruder*, this Court synthesized the Supreme Court's proportionality cases and came to the following conclusions:

> "By applying a head-count analysis, we find that seven members of the Court [in *Harmelin*] supported a continued Eighth Amendment guaranty against disproportional sentences. Only four justices, however, supported the continued application of all three factors in *Solem*, and five justices rejected it. Thus, this much is clear: disproportionality survives; *Solem* does not." *McGruder*, 954 F.2d at 316.

On this basis, we chose to rely on Justice Kennedy's concurring opinion in *Harmelin*, which called for a threshold inquiry into *Solem*'s first factor, the gravity of the offense relative to the severity of the sentence. *Id.* at 316. According to Justice Kennedy's concurrence, we need consider the other two factors only if we first conclude that the defendant's sentence was "grossly disproportionate" to his offense. *Harmelin*, 111 S.Ct. at 2707 (Kennedy, J., concurring).

In approaching this threshold determination, we note that the facts of this case most closely resemble those of *Hutto v. Davis*, where the defendant was sentenced to forty years in prison for the possession and distribution of nine ounces of marihuana. There, unlike the other cases, the punishment imposed was for the precise offense committed. *Rummel* and *Solem*, on the other hand, involved the application of a recidivist statute which mandated punishment far in excess of the sentence available for the underlying offense alone. Indeed, in *Rummel*, the defendant received a mandatory life sentence for "predicate offenses [which] were non-serious." *McGruder*, 954 F.2d at 317.[4] To the extent that we are reluctant to interfere with legislative determinations in these cases, we are especially so here, where the state legislature set the range for the very offense Williams was convicted of committing. As with all sentencing ranges, the maximum punishment contemplates the minimum applicable offense. It is therefore appropriate that the defendant bears a heavy burden in establishing that his punishment is grossly disproportionate to his offense.

Turning first to the gravity of the offense committed, we observe that the evidence must be viewed in the light most favorable to the verdict. *See United States v. Willis*, 6 F.3d 257, 264 (5th Cir. 1993). Unlike the defendant in *Solem*, whose sentence was overturned, and even unlike the defendant in *Rummel*, whose sentence was upheld, Williams cannot claim that his offense is minor, nonviolent, or victimless. As Justice Kennedy noted in his

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[4] Rummel's predicate offense was punishable by two to ten years in prison. *Rummel*, 100 S.Ct. at 1135.

Harmelin concurrence, drug-related offenses are especially grave:

> "Quite apart from the pernicious effects on the individual who consumes illegal drugs, such drugs relate to crime in at least three ways: (1) A drug user may commit crime because of drug-induced changes in physiological functions, cognitive ability, and mood; (2) A drug user may commit crime in order to obtain money to buy drugs; and (3) A violent crime may occur as part of the drug business or culture." *Harmelin*, 111 S.Ct. at 2706 (Kennedy, J., concurring).

These drug-related impacts on society certainly establish the reasonableness of the state's decision to punish severely those convicted of dealing cocaine, a crime somewhat more serious than that in *Davis*.

The jury, moreover, heard ample evidence that Williams was an active player in the drug trade. A search of Williams's apartment uncovered a loaded gun and narcotics packaged for distribution. These items were presented to the jury along with evidence that handwritten documents found in the apartment were Williams's records of prior drug sales. The state also raised a strong inference that Williams's $2,000 gold necklace was funded with drug proceeds. Furthermore, over his attorney's objection and the warning of the trial judge, Williams insisted on discussing the forfeiture proceeding in front of the jury, admitting finally the link established between the $752 and drugs. Finally, on cross-examination, Williams admitted to the jury that he was on probation for a prior arson conviction.[5]

Turning to the severity of the sentence, we emphasize what the

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[5] The record, furthermore, indicates that Williams's credibility was seriously challenged on the stand. His repeated contradictions and implausible assertions justified the jury's apparent disbelief of his defense.

Supreme Court has repeatedly indicated may be an important factor: the availability of parole. As the Court noted in *Rummel*, Texas "has a relatively liberal policy of granting 'good time' credits to its prisoners, a policy that historically has allowed a prisoner serving a life sentence to become eligible for parole in as little as 12 years." *Rummel*, 100 S.Ct. at 1142. Although sentenced to ninety-nine years in prison, Williams, like the defendant in *Rummel*, will be eligible for parole when his time served plus good-conduct time equals one-fourth of either the maximum sentence imposed or fifteen years, whichever is less. TEX. CRIM. PROC. ANN. § 42.18(8)(b)(4) (Vernon 1991). The generous availability of parole and good-time credits[6] mitigates the severity of Williams's sentence.

Given the seriousness of Williams's crime and the nature of his sentence, we conclude that Williams's punishment is in no way grossly disproportionate to his offense. We therefore do not consider the second or third factors of the *Solem* analysis. We reject Williams's Eighth Amendment claim. *See Rummel*; *Davis*; *Harmelin*.

III. Exculpatory evidence

Williams's defense at trial was that someone else must have stowed the cocaine packets in the butter dish of the refrigerator. To support this claim, Williams subpoenaed and called to the stand his landlord and employer, Alexander Prince. Prince testified that

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[6] Depending on his classification, an inmate accrues either ten or twenty days good time for each thirty days actually served. TEX. GOV'T CODE ANN. § 498.03(b) (Vernon Supp. 1993).

Williams had lived in the apartment for approximately two months, that the refrigerator was supplied with the apartment, and that the apartment had not been cleaned or inspected after the departure of the prior tenant. Prince also testified that he had not been in the apartment since Williams moved in and that, to his knowledge, only he and Williams had keys to the apartment.

Citing *Brady v. Maryland*, 83 S.Ct. 1194 (1963), Williams now argues that the State withheld exculpatory evidence by failing, in its impeachment of Prince, to elicit Prince's prior drug conviction. Such evidence, Williams asserts, would have bolstered his theory that someone other than him, namely Prince, had placed the drugs in the refrigerator.

We note first that the record contains no evidence of a drug conviction of Prince. Even if we assume Prince did have a prior conviction, the record is also bare of any indication that the State knew of it. Because the conclusory allegations of a habeas petitioner are simply inadequate to raise a constitutional issue, *Koch v. Puckett*, 907 F.2d 524, 530 (5th Cir. 1990), Williams has failed to establish the first element of a *Brady* violation, that the prosecution withheld evidence of which it was aware.

Setting these problems aside, we still find no merit in Williams's argument, which incorrectly and without citation to any legal authority, presumes that the State is under a constitutional obligation to impeach a *defense* witness or to reveal to the defense the criminal records of its own witness. We can locate no authority for this dubious proposition, and we doubt any exists.

IV. Multiplicitous Indictment

Williams argues that the district court erred in failing to make findings concerning his claim that the indictment was multiplicitous. This argument is frivolous. The district court did consider Williams's claim and properly rejected it. The indictment was simply not multiplicitous; it merely alleged, in separate and alternative counts, both an offense and a lesser included offense, that is, possession of cocaine with intent to deliver and possession of cocaine. Because the judge explicitly instructed the jury to consider these charges alternatively, there was absolutely no danger that Williams would receive more than one sentence (or conviction) for the same offense. *See United States v. Cooper*, 966 F.2d 936, 942 n.9 (5th Cir.), *cert. denied*, 113 S.Ct. 481 (1992).

V. Sufficiency of the Evidence

Williams claims that the evidence at trial was insufficient to support a conviction. More specifically, he claims the State failed to prove an intent to deliver. On direct appeal, the Texas court of appeals rejected this argument, finding evidence sufficient to support the conviction.

This Court can grant habeas relief only if the evidence, viewed in the light most favorable to the verdict, is so lacking that no rational trier of fact could have found therefrom, beyond a reasonable doubt, the essential elements of the offense. *Young v. Guste*, 849 F.2d 970, 972 (5th Cir. 1988) (citing *Jackson v. Virginia*, 99 S.Ct. 2781 (1979)). We accord careful consideration to the determination of a state appellate court that the evidence

at trial was sufficient. *Porretto v. Stalder*, 834 F.2d 461, 467 (5th Cir. 1987). Moreover, the evidence may be sufficient even though entirely circumstantial. *Schrader v. Whitley*, 904 F.2d 282, 287 (5th Cir.), *cert. denied*, 111 S.Ct. 265 (1990); *see also Shippy v. State*, 556 S.W.2d 246, 249 (Tex. Crim. App.) (ruling that an intent to deliver may be proved by circumstantial evidence), *cert. denied*, 98 S.Ct. 422 (1977).

As recounted above, the evidence introduced at trial amply supported the determination of both the jury and the state court of appeals that Williams had an intent to deliver. Williams's possession of the cocainesQwhich the jury could properly infer was knowingsQpermits only two plausible explanations. Williams possessed the drugs either for personal use or for distribution. The jury could have found unreasonable the inference that the drugs were for personal use, given, among other things, the packaging of the drugs, Williams's denial that he was a drug user, and the writings indicative of drug transactions. The record, in short, supports the findings made by the jury and the state court of appeals.

VI. Ineffective Assistance of Counsel

Finally, Williams argues that his trial counsel was unconstitutionally ineffective. To succeed on this claim, Williams must establish not only that his attorney's performance was deficient, but also that the deficiencies prejudiced his defense. *United States v. Smith*, 915 F.2d 959, 963 (5th Cir. 1990). With regard to deficiency, Williams must show that his attorney's conduct "fell below an objective standard of reasonableness,"

Strickland v. Washington, 104 S.Ct. 2052 (1984), confronting a "strong presumption" that counsel's representation fell "within the wide range of reasonable professional competence." *Bridge v. Lynaugh*, 838 F.2d 770, 773 (5th Cir. 1988). To demonstrate prejudice, Williams must show that counsel's deficient performance caused the result of the trial to be unreliable or rendered the proceeding fundamentally unfair. *Lockhart v. Fretwell*, 113 S.Ct. 838, 844 (1993). We may reject a Sixth Amendment challenge on an inadequate showing of prejudice, side-stepping an inquiry into any alleged deficiencies. *United States v. Fuller*, 769 F.2d 1095, 1097 (5th Cir. 1985).

Although on appeal Williams alleges several instances of deficient performance, we consider only those presented to the district court. *Self v. Blackburn*, 751 F.2d 789, 793 (5th Cir. 1985).[7] At the district court, Williams alleged that his attorney "failed to investigate or file any brady motions." The conclusory allegation that his attorney "failed to investigate" will not sustain a Sixth Amendment challenge. *United States v. Green*, 882 F.2d 999, 1003 (5th Cir. 1989). Precedent makes clear that such a claim must state specifically what the investigation would have revealed and how it likely would have changed the outcome of the trial. *Id.* Williams has not alleged how this failure is deficient or, moreover, how his defense was prejudiced. His argument therefore fails.

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[7] Likewise, we do not consider those allegations raised for the first time in Williams's reply brief. *N.L.R.B. v. Cal-Maine Farms, Inc.*, 998 F.2d 1336, 1342 (5th Cir. 1993).

Williams also makes the argument, again conclusory, that his attorney's failure to file a *Brady* motion prejudiced his case. As we have discussed above, the basis for Williams's claim, that the State was under a constitutional obligation to impeach his own witness, is meritless. Counsel was not deficient in failing to press a frivolous point. *Koch v. Puckett*, 907 F.2d 524, 527 (5th Cir. 1990). In any event, Williams's allegations fail to show any prejudice.

Finally, Williams contends that his attorney was deficient in not objecting to the introduction of the $752 found in Williams's pocket. The record indicates, however, and Williams's reply brief even concedes,[8] that counsel made a proper, albeit unsuccessful, objection. Furthermore, given Williams's admission that the forfeiture judge found a link between the money and drugs, the attorney was correct to have based his objection on relevance and not on collateral estoppel. *See* section I, *supra*.

Conclusion

For the foregoing reasons, we AFFIRM the district court's denial of Williams's petition for a writ of habeas corpus.[9]

AFFIRMED

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[8] Citing to the page of the record on which his attorney objected to the admission of the money, Williams remarked in his reply brief, "My attorney objected twice to my money being taken."

[9] We also deny Williams's motion to supplement the record. Even assuming the materials submitted were actually before the trial court, which they were not, they do not alter our disposition.