

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 18-2884

Kenneth D. Sills

Petitioner - Appellant

v.

Anne L. Precythe

Respondent - Appellee

Appeal from U.S. District Court for the Eastern District of Missouri - St. Louis
(4:15-cv-01095-RWS)

JUDGMENT

Before COLLOTON, WOLLMAN, and BENTON, Circuit Judges.

This appeal comes before the court on appellant's application for a certificate of appealability. The court has carefully reviewed the original file of the district court, and the application for a certificate of appealability is denied. The appeal is dismissed.

The motion to proceed in forma pauperis is denied as moot.

March 18, 2019

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

REDACTED SILLS,)	
)	
Petitioner,)	
)	
v.)	Case No. 4:15-CV-01095-RWS-NCC
)	
STANLEY PAYNE, ¹)	
)	
Respondent.)	

**REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE**

This matter is before the court on Petitioner's Amended Petition under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody (Doc. 16). This matter was referred to the undersigned United States Magistrate Judge pursuant to 28 U.S.C. § 636(b) (Doc. 11). After reviewing the case, the undersigned has determined that Petitioner is not entitled to relief. As a result, the undersigned will **RECOMMEND** that the Petition be **DENIED** and the matter **DISMISSED**.

I. BACKGROUND

On December 9, 2010, Petitioner was convicted by a jury in the Circuit Court of St. Louis City, of one count of first degree murder and one count of armed criminal action (Resp. Exh. E at 1). On March 11, 2011, the Circuit Court sentenced Petitioner to concurrent terms of life without the possibility of parole for the murder charge and ten years' imprisonment on the armed criminal action charge (*Id.* at 87). Petitioner appealed the judgment, raising three claims:

(1) The trial court erred in overruling Petitioner's challenges to the prosecution's use of peremptory strikes to remove black venire members Whitely-Williams, Waller, Scruggs,

¹ Petitioner is currently incarcerated at Potosi Correctional Center in Mineral Point, Missouri (Doc. 14). Stanley Payne is the Warden and proper party respondent. *See* 28 U.S.C. § 2254, Rule 2(a).

and Hubbard because the race-neutral explanations proffered by the state for those strikes were unfounded, contrary to the record, and pretextual;

(2) The trial court plainly erred in failing to provide the jury with a remedial instruction or declare a mistrial after the prosecuting attorney preconditioned jurors to consider the absence of motive evidence irrelevant [sic] to the determination of guilt and then invoked the jurors' purported assurance that they would not hold the absence of motive evidence against the state because that omission deprived Petitioner of fundamental fairness and a trial before neutral jurors; and

(3) The trial court plainly erred in failing to provide prospective jurors or the jury with a remedial instruction or declare a mistrial after the prosecuting attorney gave an improper definition of proof beyond a reasonable doubt during his examination of the venire, and in particular after counsel told the prospective jurors that the state was not required to prove any details of the charged crimes beyond a reasonable doubt because that definition was erroneous and likely to confuse jurors and diminish the state's burden of proof and thereby deprived Petitioner of a fair trial before impartial jurors.

(Resp. Exh. B). On March 27, 2012, the Missouri Court of Appeals affirmed Petitioner's conviction and sentence on direct appeal (Resp. Exh. F; *State v. Sills*, 365 S.W.3d 263 (Mo. Ct. App. 2012)).

On August 27, 2012, Petitioner, with the assistance of counsel, filed a Motion to Vacate, Set Aside or Correct the Judgment or Sentence under Missouri Supreme Court Rule 29.15 (Resp. Exh. G at 4-13). On November 28, 2012, new counsel filed an Amended Motion to Vacate, Set Aside or Correct Judgment and Sentence on behalf of Petitioner (Resp. Exh. G at 14-25). The post-conviction relief court, without conducting an evidentiary hearing, denied Petitioner's post-conviction motion on November 21, 2014 (*Id.* at 64-70). Petitioner filed an appeal raising the following two issues:

(1) The motion court clearly erred when it denied Petitioner's motion for post-conviction relief without a hearing because Petitioner alleged facts not conclusively refuted by the record which, if proven, would entitle him to relief in that he was denied his right to effective assistance of counsel, a fair trial, and an impartial jury because trial counsel failed to adequately challenge the state's peremptory strikes of five African American venirepersons by failing to allege why the state's alleged race neutral reasons for those strikes were merely pretextual; and

(2) The motion court clearly erred when it denied Petitioner's motion for postconviction relief without a hearing because Petitioner alleged facts not conclusively refuted by the record which, if proven, would entitle him to relief in that he was denied his right to effective assistance of counsel because trial counsel failed to adequately challenge the state's peremptory strikes of five African American venirepersons and his failure to object resulted in this issue not being preserved for appellate review.

(Resp. Exh. H). On December 1, 2015, the Missouri Court of Appeals affirmed the dismissal of Petitioner's post-conviction relief motion (Resp. Exh. I;² *Sills v. State*, 477 S.W.3d 183 (Mo. Ct. App. 2015)).

On July 15, 2015, Petitioner filed his Petition under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody (Doc. 1). On May 6, 2016, Petitioner filed an Amended Petition in which he raises the following three grounds for relief:

- (1) Trial counsel was ineffective in failing to protect the Petitioner's right to a public trial when he did not object to the trial court's decision to close the courtroom to the public during a portion of the jury's deliberation (Doc. 16 at 7 (citing Resp. Exh. A-4 at 57));
- (2) Trial counsel was ineffective for failing to request a mistrial based on the prosecutor's "improper" statements during closing arguments (*Id.* at 8 (citing Pet. Exh. B)); and
- (3) Trial counsel was ineffective for failing to properly object to the prosecution's pretextual explanation for his peremptory strikes of black jurors (*Id.* at 9).

As a preliminary matter, because Petitioner's Amended Petition supersedes his original Petition, the Court will recommend that Petitioner's original Petition be denied as moot. *See In re Wireless Tel. Fed. Cost Recovery Fee Litig.*, 396 F.3d 922, 928 (8th Cir. 2005) ("It is well-established that an amended complaint supercedes an original complaint and renders the original complaint without legal effect.").

² Respondent's Exhibit I, the post-conviction appellate court's opinion, was submitted by Respondent as an attachment to his Response to Petitioner's Amended Petition (Doc. 17-1). The remaining exhibits were attached to Respondent's response to Petitioner's original Petition (Docs. 6-1 to 6-11) and incorporated by reference in Respondent's most recent response (*See* Doc. 17 at 3).

II. DISCUSSION

“In the habeas setting, a federal court is bound by the AEDPA³ to exercise only limited and deferential review of underlying state court decisions.” *Lomholt v. Iowa*, 327 F.3d 748, 751 (8th Cir. 2003). Under this standard, a federal court may not grant relief to a state prisoner unless the state court’s adjudication of a claim “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 “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).

A state court decision is contrary to clearly established Supreme Court precedent if “the state court arrives at a conclusion opposite to that reached by [the] Court on a question of law or . . . decides a case differently than [the] Court has on a set of materially indistinguishable facts.” *Williams v. Taylor*, 529 U.S. 362, 413 (2000). A state court decision is an unreasonable application of clearly established federal law if it “correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner’s case.” *Id.* at 407-08. Finally, a state court decision involves an unreasonable determination of the facts in light of the evidence presented in the state court proceedings only if it is shown that the state court’s presumptively correct factual findings do not enjoy support in the record. 28 U.S.C. § 2254(e)(1); *Ryan v. Clarke*, 387 F.3d 785, 790 (8th Cir. 2004).

A. Procedural Default

Grounds 1 and 2 are procedurally defaulted and may not give rise to federal habeas relief. To avoid defaulting on a claim, a petitioner seeking habeas review must have fairly presented the substance of the claim to the state courts, thereby affording the state courts a fair opportunity to apply controlling legal principles to the facts bearing on the claim. *Wemark v. Iowa*, 322 F.3d

³ The Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254.

1018, 1020-21 (8th Cir. 2003) (quotation marks omitted). A claim has been fairly presented when a petitioner has properly raised the same factual grounds and legal theories in the state courts that he is attempting to raise in his federal petition. *Id.* at 1021. Claims that have not been fairly presented to the state courts are procedurally defaulted. *Id.* at 1022 (quoting *Gray v. Netherland*, 518 U.S. 152, 161-62 (1996)). Claims that have been procedurally defaulted may not give rise to federal habeas relief unless the petitioner can demonstrate cause and prejudice for the default. *Id.* “[T]he existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel’s efforts to comply with the State’s procedural rule.” *Murray v. Carrier*, 477 U.S. 478, 488 (1986).

Petitioner failed to raise Grounds 1 and 2 before the state courts. Citing *Martinez v. Ryan*, 566 U.S. 1 (2012), Petitioner suggests that his procedural default of these claims should be excused because post-conviction counsel acted unreasonably in failing to develop these claims (Docs. 16 at 10, 18 at 1). The Supreme Court held in *Martinez v. Ryan* that:

Where, under state law, claims of ineffective assistance of trial counsel must be raised in an initial review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.

566 U.S. at 17. However, *Martinez* does not apply in this instance.

First, the Court finds that post-conviction counsel did not provide Petitioner with ineffective assistance of counsel. Petitioner does not provide the Court with any suggestion of counsel’s purported ineffectiveness other than counsel’s alleged failure to recognize these claims from the face of the record (Doc. 18 at 1). However, the presumption of effective assistance of counsel can generally only be overcome when the ignored issues are clearly stronger than those

presented. *Link v. Luebbers*, 469 F.3d 1197, 1205 (8th Cir. 2006). In this case, upon review of the record and addressed in more detail below, the undersigned finds that post-conviction counsel determined that the claims presented in the amended motion were the most meritorious claims and the ones that could be supported by evidence. Therefore, post-conviction counsel's decision not to include Grounds 1 and 2 in the amended motion "falls within the wide range of reasonable professional assistance" under *Strickland's* deferential standards. See *Strickland v. Washington*, 466 U.S. 668, 689 (1984).

Second, even if the Court were to find that counsel provided ineffective assistance of counsel, the default may be excused *only if* any of the eliminated grounds of ineffective assistance of trial counsel was "substantial," "which is to say that the prisoner must demonstrate that the claim has some merit." *Id.* at 1318. The Court does not find that to be the case here.

In considering whether the ineffective assistance claims alleged in Grounds 1 and 2 are substantial, the Court must evaluate the claims under the standard set in *Strickland*. 466 U.S. at 694. *Sund v. Young*, No. 5:14-CV-05070-KES, 2015 WL 4249405, at *4 (D.S.D. July 13, 2015) (listing cases). Therefore, for an ineffective assistance of counsel claim to be substantial, a habeas petitioner must show that: "(1) his counsel so grievously erred as to not function as the counsel guaranteed by the Sixth Amendment; and (2) his counsel's deficient performance prejudiced his defense." *Auman v. United States*, 67 F.3d 157, 162 (8th Cir. 1995) (citing *Strickland*, 466 U.S. at 687). The "performance" prong of *Strickland* requires a showing that "counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Id.* at 690. To overcome this presumption, a petitioner must prove that, in light of all the circumstances, the

identified acts or omissions were outside the wide range of professionally competent assistance.

Id. Even if a petitioner satisfies the performance component of the analysis, he is not entitled to relief unless he can prove sufficient prejudice. *Id.* at 697. To do so, a petitioner must prove that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 669. The court is not required to address both components of the effective assistance of counsel inquiry if a petitioner makes an insufficient showing on one component. *Id.* at 697.

Ground 1: Closed Courtroom

In Ground 1, Petitioner asserts trial counsel was ineffective in failing to protect the Petitioner's right to a public trial when he did not object to the trial court's decision to close the courtroom to the public during a portion of the jury's deliberation (Doc. 16 at 7). Specifically, Petitioner asserts that trial counsel was ineffective in failing to protect Petitioner's right to a public trial when the courtroom was closed and the trial court did not state any reasons for the closure (*Id.*). Further, Petitioner notes that he was not advised of the closure by trial counsel (*Id.*). In support of his assertion, Petitioner attached a portion of the trial transcript (Pet. Exh. A). (*See also* Resp. Exh. A-4 at 57). Indeed, a criminal defendant has a constitutional right to a public trial. *See Presley v. Georgia*, 558 U.S. 209, 212 (2010). However, the Petitioner misconstrues the events underlying the courtroom being closed to the public. Upon a full review of the complete transcript, the closure occurred during jury deliberation and not a portion of Petitioner's trial (*See* Resp. Exh. A-4 at 53-63). Jury deliberation commenced at 11:02 AM and, in response to a note from the jury, counsel met with the trial court in chambers at 12:20 PM (*Id.* at 53-54). The Jury requested to see certain exhibits, including a video (*Id.*). Due to technical issues, the video needed to be played in the courtroom (*Id.* at 56). The trial court found it

reasonable for counsel to be present because they were needed to operate the machinery and, out of a sense of “fairness,” the trial court also determined that defendant would be present (*Id.* at 56-57). While Petitioner is correct in his assertion that he is entitled to a public trial in all critical stages of a criminal trial, jury deliberation is not one of those stages. In fact, jury deliberation usually occurs outside of the courtroom and is always closed to the public. *See United States v. Olano*, 507 U.S. 725, 737 (1993) (“the primary if not exclusive purpose of jury privacy and secrecy is to protect the jury’s deliberations from improper influence.”). Any objection to the trial court’s decision to close the courtroom to the public would not have been meritorious and trial counsel cannot be found to be ineffective for failing to raise a non-meritorious objection. *Thomas v. United States*, 951 F.2d 902, 904 (8th Cir. 1991) (counsel not ineffective for failure to raise meritless issue). Thus, because Petitioner cannot show that the underlying claim would be substantial, the undersigned will recommend that Ground 1 be denied as procedurally defaulted.

Ground 2: Prosecution’s Statements during Closing Argument

In Ground 2, Petitioner argues trial counsel was ineffective for failing to request a mistrial based on the prosecutor’s “improper” statements during closing arguments (Doc. 16 at 8). In support of his assertion, Petitioner provides the Court with a selection of comments made by the prosecution during closing argument and attaches selected portions of the trial transcript (*Id.*; Pet. Exh. B). “In determining whether the prosecutor’s closing argument violated the defendant’s due process rights, the pertinent inquiry is whether the prosecutors’ comments so infected the trial with unfairness as to make the resulting conviction a denial of due process.” *Sublett v. Dormire*, 217 F.3d 598, 600 (8th Cir. 2000) (internal quotation marks omitted) (quoting *Darden v. Wainwright*, 477 U.S. 168, 181 (1986)). Habeas relief is only warranted if

the argument was so inflammatory and so outrageous that any reasonable trial judge would have *sua sponte* declared a mistrial. *Id.*

Here, Petitioner has failed to show that the prosecutor's comments, even if improper, so tainted the trial proceedings that Petitioner's right to due process was denied. Petitioner identifies as improper the following four statements made by the prosecution during closing argument:

- (1) "We know the person that put three bullets in [the victim's] brain . . . is the defendant" (Resp. Exh. A-4 at 13).
- (2) "[T]hat is deliberation, to put three rounds into someone's face from point blank range, then to walk back to a car and fire five more shots" (*Id.* at 14).
- (3) "Now, [defense counsel] didn't bring it up because he can't . . . [Petitioner] says no one saw him walk up and shoot. He is correct. Well, a bunch of people did, but they never came forward" (*Id.* at 44).
- (4) "Now, the records of the calls, all right. If I am saying something, I am going to bring in something to back it up. She didn't bring it in. He tried to put that back on me. She didn't bring any records in. If they exist, why wouldn't they have brought it in to support her testimony" (*Id.* at 50).

However, trial counsel objected to all four allegedly objectionable statements and the trial court sustained the objections to statements 2 and 3 and overruled counsel's objections to statements 1 and 4 indicating that the prosecution's statements were "argument" (Resp. Exh. A-4 at 13, 14, 44, 50-51). Even if the Court were to find the remaining two statements, statements 1 and 4, to have crossed the line into improper argument, this Circuit has long recognized the jury's "common sense ability to put aside a particular type of overzealous advocacy with the help of the court's standard instruction that arguments of counsel are not evidence." *Sublett*, 217 F.3d at 600. Further, the undersigned finds, considering all four statements together, the allegedly objectionable conduct does not rise to the level of egregiousness necessary to require the declaration of a mistrial. Thus, any motion for a mistrial would not have been meritorious and

trial counsel cannot be found to be ineffective for failing to raise a non-meritorious issue.

Thomas, 951 F.2d at 904.

Therefore, because Petitioner has failed to establish that the claims underlying these grounds are substantial, the Court will recommend that Grounds 1 and 2 be denied as procedurally defaulted.

B. Merits

In Petitioner's remaining claim, Ground 3, Petitioner asserts that trial counsel was ineffective for failing to properly object to the prosecution's pretextual explanation for his peremptory strikes of African American jurors (Doc. 16 at 9). In order to state a claim of ineffective assistance of trial counsel, Petitioner must demonstrate that his counsel's performance was deficient and that he was prejudiced by that performance. *Strickland*, 466 U.S. at 687. Deficient representation means counsel's conduct fell below the conduct of a reasonably competent attorney. *Id.* To establish prejudice, Petitioner must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. Federal habeas review of a *Strickland* claim is highly deferential, because "[t]he question is not whether a federal court believes the state court's determination under the *Strickland* standard was incorrect but whether the determination was unreasonable — a substantially higher threshold." *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009) (internal quotations and citations omitted).

During voir dire, the prosecution used five of its six peremptory challenges to remove African American venirepersons from the panel (Resp. Exh. A-2 at 27). Defense counsel raised

a *Batson*⁴ challenge, and upon inquiry by the trial court, the prosecution asserted race-neutral reasons for the strikes. Specifically, the prosecution indicated that he struck two of the jurors because they arrived late to court (*Id.* at 28); one because she stated she would require fingerprint evidence as well as the gun (*Id.* at 28-29); another because she made statement that her family had been mistreated by the system as a whole (*Id.* at 29); and the final juror because she had concerns about the degree of the murder charge arising from her own uncle's murder and the murderer's subsequent conviction (*Id.*). The trial court accepted these reasons as race neutral (*Id.* at 27-29). Defense counsel did not object to the state's allegedly race-neutral reasons (*See id.*). Relevant to the current inquiry, A.S. was seated at a juror (*Id.* at 30).

The motion court found that Petitioner was not entitled to a hearing or relief on his claim because he had not suffered juror bias or any prejudice as a result of counsel's allegedly ineffective decision not to raise a further *Batson* challenge (Resp. Exh. G at 66). Additionally, the motion court noted that there were race-neutral reasons for the strikes supported by the record (*Id.*). The post-conviction appellate court affirmed the motion court's decision (Resp. Exh. I at 8). In doing so, the post-conviction appellate court found that while the Petitioner raised, for the first time on appeal, two specific allegations of prejudice, the post-conviction appellate court could not address these new allegations of prejudice never presented to the motion court (*Id.* at 6). Further, the post-conviction appellate court determined that Petitioner's amended 29.15 motion was filed untimely and therefore the motion court was deprived of jurisdiction to consider any conclusory allegation of prejudice in Petitioner's amended motion (*Id.* at 7-8). Regardless, the post-conviction appellate court concluded that, even upon review of

⁴ *Batson v. Kentucky*, 476 U.S. 79 (1986) holds that that the Equal Protection Clause of the Fourteenth Amendment prohibits prosecutors from exercising peremptory challenges on the basis of race.

both of Petitioner's Rule 29.15 motions, Petitioner failed to establish that he was prejudiced by trial counsel's failure to adequately object to the State's peremptory strikes (*Id.* at 8).

The Missouri Courts reasonably applied *Strickland*. The post-conviction appellate court properly found that Petitioner failed to establish he suffered any prejudice as a result of trial counsel's alleged failure. Indeed, upon review of Petitioner's Rule 29.15 Motions, Petitioner did not raise any suggestion of prejudice in his original motion and raised only conclusory allegations of prejudice in his untimely amended motion (*See* Resp. Exh. G at 4-13 (original motion); Resp. Exh. G at 19-20 (amended motion) ("Mr. Sills was prejudiced by counsel's failure to adequately address the prosecutor's peremptory strike of African-American venirepersons. If counsel would have adequately challenged these strikes, there is a reasonable probability that the outcome of the trial would have been different as the jury empaneled would not have been in violation of Mr. Sills' constitutional rights.")). For the first time on post-conviction appeal, counsel asserted that Petitioner suffered identifiable prejudice because of trial counsel's failure to object to the race-neutral reasons proffered by the State. Specifically, post-conviction appellate counsel asserted that as a result of these strikes, juror A.S. was empaneled but was "unqualified" and, therefore, the resulting trial was unfair (Resp. Exh. H at 17-18). However, "[a] movant is entitled to a presumption of prejudice resulting from counsel's ineffective assistance during the jury selection process *only if* the movant can show that a biased venireperson ultimately served on the jury." *Jones v. Steele*, No. 4:15CV475 JCH, 2017 WL 4310268, at *2 (E.D. Mo. Sept. 28, 2017) (emphasis added). Here, post-conviction appellate counsel argued that A.S. was unqualified because A.S. may have been confused by certain legal topics (Resp. Exh. H at 17-18). Thus, even if the Court could consider this procedurally defaulted assertion of prejudice, the reasoning fails to meet the standard under *Batson*. There has

not been any allegation that a biased venireperson ultimately served on the jury in the instant case and therefore Petitioner has failed to establish that he was prejudiced by trial counsel's alleged ineffectiveness. *See United States v. Dawn*, 897 F.2d 1444, 1447-49 (8th Cir. 1999) (petitioner failed to make prima facie showing of *Batson* violation where prosecutor used six of seven peremptory challenges to exclude African-American venirepersons, prosecutor offered race-neutral reasons for the strikes, and defendant failed to present any other evidence of racial discrimination). Further, to the extent Petitioner now raises an issue of prejudice resulting from trial counsel's failure to preserve his *Batson* challenge on appeal, as addressed above, such a challenge would have been meritless and counsel cannot be found to be ineffective for failing to raise a non-meritorious issue. *Thomas*, 951 F.2d at 904. Therefore, the undersigned will recommend that Ground 3 be denied.

IV. CONCLUSION

For the reasons stated above, the Court finds that Petitioner is not entitled to federal habeas relief. Furthermore, Petitioner has failed to make a substantial showing of the denial of a constitutional right, which requires a demonstration "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right." *Khaimov v. Crist*, 297 F.3d 783, 785 (8th Cir. 2002) (quotation omitted). Thus, the Court will not recommend a certificate of appealability issue or that in forma pauperis be granted on appeal. 28 U.S.C. § 2253(c).

Accordingly,

IT IS HEREBY RECOMMENDED that Petitioner's Petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 (Doc. 1) be **DENIED, as moot.**

IT IS FURTHER RECOMMENDED that Petitioner's Amended Petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 (Doc. 16) be **DENIED** and this case be **DISMISSED**.

IT IS FURTHER RECOMMENDED that no certificate of appealability should issue and in forma pauperis not be granted on appeal. 28 U.S.C. § 2253.

The parties are advised that they have fourteen (14) days in which to file written objections to these recommendations pursuant to 28 U.S.C. § 636(b)(1), unless an extension of time for good cause is obtained, and that failure to file timely objections may result in a waiver of the right to appeal questions of fact. *See Thompson v. Nix*, 897 F.2d 356 (8th Cir. 1990).

Dated this 10th day of July, 2018.

/s/ Noelle C. Collins
NOELLE C. COLLINS
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

KENNETH SILLS,

Plaintiff,

V.

MICHAEL BOWERSOX,

Defendant.

Case No. 4:15 CV 1095 RWS

MEMORANDUM AND ORDER

Plaintiff Kenneth Sills seeks a writ of habeas corpus, under 28 U.S.C. § 2254, arguing that he was denied effective assistance of counsel on direct appeal and in his post-conviction proceeding. I referred this petition to United States Magistrate Judge Noelle Collins for a report and recommendation on all dispositive matters pursuant to 28 U.S.C. § 636(b). The Magistrate Judge recommended that I deny Sills' petition, because two of his three claims were procedurally defaulted and Sills fails to meet the standard for ineffective assistance of counsel for his third claim. Sills does not have an underlying substantial claim of ineffective assistance of counsel. For that reason, Martinez v. Ryan, 566 U.S. 1 (2012), does not apply to his two defaulted claims. Additionally, Sills does not show that he has been prejudiced by the prosecution's use of peremptory strikes. As a result, I will deny Sills' petition and dismiss this matter.

BACKGROUND

Sills was convicted by a jury of first degree murder on December 9, 2010, and sentenced to life in prison without the possibility of parole on March 11, 2011. Sills was also sentenced to ten years' imprisonment for armed criminal action. Sills filed this petition for a writ of habeas corpus under 28 U.S.C. § 2254 on July 7, 2015. In his amended petition, Sills argues that his trial counsel was ineffective for (1) failing to assert his right to a public trial when a video was replayed for the jury during deliberations; (2) failing to request a mistrial based on the prosecutor's allegedly improper comments; and (3) failing to object to the prosecutor's allegedly pretextual use of peremptory strikes on black jurors.

Upon my referral, the Magistrate Judge recommended that I deny the first two claims because Sills did not raise them in his motion for post-conviction relief. The Magistrate Judge also recommended that I deny the third claim because Sills did not meet the Strickland requirement that he was prejudiced. Sills objects to both of these conclusions. [No. 22]. Sills argues that his first two claims "were apparent from the face of the record" and that they provide prima facie evidence that post-conviction counsel did not act reasonably. (ECF No. 24 at 1). He also argues that his third claim satisfies the Strickland prejudice requirement because the peremptory strikes allowed an allegedly unqualified juror to serve on the jury that convicted him.

LEGAL STANDARD

I must conduct a de novo review of the Magistrate Judge's report and recommendation pursuant to 28 U.S.C. § 636(b). To prevail under § 2254, Sills must show that he has exhausted his state court remedies or that no effective process exists in state courts for protecting his rights. 28 U.S.C. § 2254(b). Sills must also show that the state court's adjudication of his claim "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 "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). Because he pleads ineffective assistance of counsel, Sills must also show that his counsel's performance fell below an objective standard of reasonableness and that he was prejudiced by the deficient representation. Strickland v. Washington, 466 U.S. 668, 687-88 (1984). "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694.

ANALYSIS

In support of his habeas petition, Sills argues that his trial counsel was ineffective for three reasons. First, Sills argues that his trial counsel should have objected when the judge allowed the jury into the courtroom during jury

deliberations to view a video. The video could not be played in the jury deliberation room. This viewing was closed to the public, but the judge allowed the parties' counsel to be present, so that the counsel could operate the audio-visual equipment. Out of "fairness," the judge also allowed the defendant to be present. (ECF No. 6-4 at 284). Sills argues that this sequence violated his right to a public trial. Second, Sills argues that his counsel should have requested a mistrial based on allegedly improper comments the prosecutor made in his closing arguments. Third, Sills argues that his counsel should have objected to the prosecutor's allegedly pretextual use of peremptory strikes on black jurors.

I. Procedural Default of Sills' First Two Ineffective Assistance of Counsel Claims

I may not review procedurally defaulted claims for habeas relief. To warrant review under 28 U.S.C. § 2254, a defendant must fairly present the substance of his claim to the state court, providing an opportunity for adjudication in that forum. Wemark v. Iowa, 322 F.3d 1018, 1020-21 (8th Cir. 2003). An exception may apply, however, if a petitioner alleges that his post-conviction counsel was ineffective for failing to claim ineffective assistance of the trial counsel. Martinez v. Ryan, 566 U.S. 1, 17. To satisfy this exception, the underlying ineffective assistance of counsel claim must be a "substantial one, which is to say that the prisoner must demonstrate that the claim has some merit." Id. As with any

ineffective assistance of counsel claim, the petitioner must show that counsel's performance fell below an objective standard of reasonableness and that the petitioner was prejudiced as a result of that failure. Strickland v. Washington, 466 U.S. 668, 687-88.

Sills' trial counsel's performance did not fall below an objective standard of reasonableness for either of Sills' defaulted claims. First, jury deliberation is always closed to the public. See United States v. Olano, 507 U.S. 725, 737, (citing "the cardinal principle that the deliberations of the jury shall remain private and secret"). The unusual circumstance of the jury viewing a video in the courtroom, during their deliberations, due to an inability to show the video elsewhere, does not make those proceedings open to the public. Jury deliberations simply are not an event to which the right to a public trial applies. As a result, Sills' trial counsel would have been in error to object to this circumstance. His conduct did not fall below an objective standard of reasonableness. See Strickland v. Washington, 466 U.S. at 688. Sills has no substantial ineffective assistance of counsel claim on this point.

Sills' trial counsel also did not err in failing to request a mistrial because of the prosecutor's closing statements. Trial counsel objected to all of the four statements that Sills' believes should have resulted in a mistrial. Those four statements are as follows:

(1) “We know the person that put three bullets in [the victim’s] brain . . . is the defendant.” (ECF No. 6-4 at 13).

(2) “[T]hat is deliberation, to put three rounds into someone’s face from point blank range, then to walk back to a car and fire five more shots.” (Id. at 14).

(3) “Now, [defense counsel] didn’t bring it up because he can’t [Petitioner] says no one saw him walk up and shoot. He is correct. Well, a bunch of people did, but they never came forward.” (Id. at 44).

(4) “Now, the records of the calls, all right. If I am saying something, I am going to bring in something to back it up. She didn’t bring it in. He tried to put that back on me. She didn’t bring any records in. If they exist, why wouldn’t they have brought it in to support her testimony.” (Id. at 50).

The trial court sustained trial counsel’s objections to statements 2 and 3 and overruled objections to statements 1 and 4 because the latter were “argument.” I agree with the Magistrate Judge that “the allegedly objectionable conduct does not rise to the level of egregiousness necessary to require the declaration of a mistrial.” (ECF No. 22 at 9). Sills’ objection that the “sheer number of improper comments,” (ECF No. 24 at 3), required a mistrial is unpersuasive. As a result, Sills has no substantial underlying ineffective assistance of counsel claim concerning the prosecutor’s closing arguments.

II. The Strickland Requirements for Sills’ Third Ineffective Assistance of Counsel Claim

Sills properly presented his third claim in state court post-conviction proceedings. He argues that his trial counsel was ineffective for failing to object, under Batson, to the prosecutor’s allegedly pretextual explanation for its

peremptory challenges. In his state law criminal case, the prosecutor used five of six peremptory challenges against black venirepersons. Sills' trial counsel raised a Batson objection, arguing that those challenges were based on race. In response, the prosecutor stated the following reasons for exercising his challenges against those persons: two of them arrived late to court, one stated she would need fingerprint evidence to convict, one said that her family had been mistreated by the criminal justice system, and the fifth was influenced by her uncle's murder and the resulting judicial process.

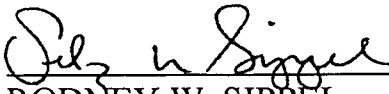
Sills now argues that his trial counsel should have objected to these explanations as pretextual. He also argues that the failure to object prejudiced him in that it allowed an allegedly unqualified juror, A.S., to become empaneled on the jury. Sills presents this argument most clearly in his post-conviction appeal, where he claims that A.S. was confused by certain legal concepts. (ECF No. 6-11 at 18). When trying to understand the concept of accomplice liability, A.S. stated that she would "have problems applying that to something if it was physical harm or murder." (Id.) After hearing another explanation, A.S. stated that she understood and could apply the concept of accomplice liability. (Id.) At another point during voir dire, A.S. stated that she did not understand a statement about the legal concept of alibi. (Id. at 19). Defense counsel had explained to the panel "if you are some place else and we can prove that, it's proven, you are not here then ... not

guilty, of course, if he is some place else.” (sic) (Id.). This latter statement, on its face, has unclear syntax. Defense counsel followed up by saying that the concept of an alibi was “not something you are going to hear in the case at all.” (Id.)

I conclude that these statements do not demonstrate that A.S. was unqualified to serve on the jury. As a result, Sills does not demonstrate that he was prejudiced by his counsel’s failure to object to allegedly pretextual explanations. Furthermore, Sills has not met his burden to establish that his counsel’s performance fell below an objectively reasonable standard. He offers no evidence, beyond the number of excluded black jurors, that his counsel should have suspected the prosecutor’s explanations were pretextual. “[N]umbers alone are not sufficient to establish or negate a prima facie [Batson] case.” United States v. Dawn, 897 F.2d 1444, 1448 (8th Cir. 1990). Additionally, counsel should be careful that arguments at trial concerning peremptory strikes do “not become a trial within the trial.” Id. at 1449. With these holdings and principles considered, I conclude that Sills’ counsel acted reasonably when he objected to the prosecutor’s peremptory challenges but did not object to the prosecutor’s explanation for those challenges. As a result, Sills does not meet the Strickland requirements for ineffective assistance of counsel and his petition must be denied.

Accordingly,

IT IS HEREBY ORDERED that Petitioner Kenneth Sills petition for writ of habeas corpus, [No. 1], is **DENIED**. An appropriate judgment will accompany this Memorandum and Order.



RODNEY W. SIPPEL
UNITED STATES DISTRICT JUDGE

Dated this 22nd day of August, 2018.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

KENNETH SILLS,

Plaintiff,

V.

MICHAEL BOWERSOX,

Defendant.

Case No. 4:15 CV 1095 RWS

JUDGMENT

In accordance with the Memorandum and Order entered this same date,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that the
Petitioner Kenneth Sills petition for a writ of habeas corpus pursuant to 28 U.S.C.
§ 2254 is **DENIED**.

IT IS FURTHER ORDERED that this Court will not issue a certificate of appealability.

Sitz u. Singer

RODNEY W. SIPPÉL
UNITED STATES DISTRICT JUDGE

Dated this 22nd day of August, 2018.

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 18-2884

Kenneth D. Sills

Appellant

v.

Anne L. Precythe

Appellee

Appeal from U.S. District Court for the Eastern District of Missouri - St. Louis
(4:15-cv-01095-RWS)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

May 03, 2019

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans