UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-6210

JAVON LAREN MARTIN,

Petitioner - Appellant,

v.

HAROLD W. CLARKE, Director, Virginia Department of Corrections,

Respondent - Appellee,

and

BARRY KANOKE, Warden, River North Correctional Center,

Respondent.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. Douglas E. Miller, Magistrate Judge. (2:18-cv-00111-DEM)

Submitted: June 20, 2019 Decided: June 25, 2019

Before NIEMEYER, AGEE, and RICHARDSON, Circuit Judges.

Dismissed by unpublished per curiam opinion.

Javon Laren Martin, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.

APPENDIX: A

PER CURIAM:

Javon Laren Martin seeks to appeal the magistrate judge's order denying relief on his 28 U.S.C. § 2254 (2012) petition. The order is not appealable unless a circuit justice or judge issues a certificate of appealability. 28 U.S.C. § 2253(c)(1)(A) (2012). A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2) (2012). When the district court denies relief on the merits, a prisoner satisfies this standard by demonstrating that reasonable jurists would find that the district court's assessment of the constitutional claims is debatable or wrong. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see Miller-El v. Cockrell*, 537 U.S. 322, 336-38 (2003). When the district court denies relief on procedural grounds, the prisoner must demonstrate both that the dispositive procedural ruling is debatable, and that the petition states a debatable claim of the denial of a constitutional right. *Slack*, 529 U.S. at 484-85.

We have independently reviewed the record and conclude that Martin has not made the requisite showing. Accordingly, we deny a certificate of appealability, deny leave to proceed in forma pauperis, and dismiss the appeal. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

DISMISSED

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

JAVON LAREN MARTIN (#1471656),

Petitioner,

v. **No. 2:18-cv-111**

HAROLD CLARKE, Director,
Virginia Department of Corrections,

Respondent.

AMENDED OPINION AND ORDER

Petitioner Javon Laren Martin ("Martin") is a Virginia inmate currently serving a twenty-seven-year sentence on 2013 convictions for first-degree murder and robbery. In this pro sé federal habeas petition, Martin asserts three claims for relief, each alleging ineffective assistance of trial counsel in some fashion. Respondent filed a Motion to Dismiss the petition, (ECF No. 12), and both parties consented to proceed before the undersigned United State Magistrate Judge pursuant to 28 U.S.C. § 636(c). For the reasons explained below, the court finds that Martin has not demonstrated that he is entitled to relief. The court therefore GRANTS Respondent's Motion and DISMISSES Martin's petition.

I. Statement of the Case

On February 13, 2013, a jury in the Circuit Court for Arlington County rendered guilty verdicts on two charges against Martin: first-degree murder in violation of Virginia Code section

18.2-32 (Case No. CR12-16), and robbery in violation of section 18.2-58 (Case No. CR12-15). Pet. For Writ of Habeas Corpus 1-2 (ECF No. 1 at 1-2). On September 12, 2013, the court sentenced Martin to twenty (20) years on the murder charge and seven (7) on the robbery charge, in addition to imposing costs. Id. at 1.

Martin, by counsel, appealed to the Court of Appeals of Virginia, raising four grounds for relief. Id. at 2. The Court of Appeals denied Martin's claims in a Per Curiam opinion. Martin v. Commonwealth, No. 2183-13-4 (Va. Ct. App. Oct. 14, 2014) (ECF No. 13-1). A three-judge panel of the court affirmed the denial two days later. Martin v. Commonwealth, No. 2183-13-4 (Va. Ct. App. Oct. 16, 2014) (ECF No. 13-2).

Martin then petitioned the Virginia Supreme Court for appeal, raising three grounds for relief. Pet. for Appeal, Martin v. Commonwealth, No. 150122 (Va. Jan. 15, 2015) (ECF No. 13-3). After briefing, the Virginia Supreme Court refused the petition on August 18, 2015. (ECF No. 13-5).

On August 18, 2016, Martin, by counsel, filed a state Petition for Writ of Habeas Corpus in Arlington County Circuit Court. Pet., Martin v. Walrath, No. CL16-2130 (Va. Cir. Ct. Aug. 18, 2016) (ECF

No. 13-6). That petition raised three claims[1] related to ineffective assistance of trial counsel. Id. The court denied and dismissed his petition. Order, Martin v. Walrath, No. CL16-2130 (Va. Cir. Ct. Mar. 8, 2017) (ECF No. 13-7). Martin then petitioned the Virginia Supreme Court for an appeal of this denial. Pet. for Appeal, Martin v. Walrath, No. 170763 (Va. June 7, 2017) (ECF No. 13-8). The petition for appeal raised eight assignments of error, though each was directed toward an overarching ineffective assistance of counsel claim related to a peremptory strike challenge under Batson v. Kentucky, 476 U.S. 79 (1986), echoing the first assignment of error in the circuit court habeas petition. (ECF No. 13-8). Martin did not raise any assignments of error as to the second and third claims from his circuit court petition. Id. The Virginia Supreme Court found no reversible error and refused the petition on November 3, 2017. (ECF No. 13-9).

Martin timely filed this federal habeas petition on February 1, 2018. Martin raises three grounds for relief, all related to alleged ineffective assistance of counsel at trial. Martin claims his attorneys were ineffective for (1) failing to properly

[1] A fourth claim in the petition did not raise an independent ground for relief but simply reiterated that Martin's ineffective trial counsel prejudiced his defense. (See ECF No. 13-6 at 22-23).

challenge a peremptory strike as racially discriminatory, (2) failing to call an expert witness regarding historical cell site data, and (3) declining the trial judge's offer of a curative instruction during cross-examination of a defense witness. See Pet. 6-8 (ECF No. 1 at 6-8). Respondent filed a Rule 5 Answer and Motion to Dismiss, as well as the notice to pro sé plaintiffs required by Roseboro v. Garrison, 528 F.2d 309 (4th Cir. 1975). (ECF Nos. 11-14). Respondent contends that all of Martin's claims are without merit. Respondent further argues that claims two and three are procedurally defaulted and therefore barred from federal review, see Wainwright v. Sykes, 433 U.S. 72 (1977), and that Martinez v. Ryan, 566 U.S. 1 (2012), does not apply to excuse that default. Martin filed his response on June 6, 2018, (ECF No. 20), and the matter is ripe for review.

II. Federal Review of Habeas Claims by State Prisoners

A. Procedural requirements for federal habeas petitioners under 28 U.S.C § 2254

As a person in custody pursuant to the judgment of a state court, Martin's petition for a writ of habeas corpus is governed by the Anti-terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254. AEDPA requires that before seeking a writ in federal court, a person in state custody must exhaust all the remedies available in the state courts or demonstrate that such remedies are unavailable or ineffective to protect his rights.

Id. § 2254(b)(1). The exhaustion requirement reflects the strong interest in allowing state courts the first opportunity to correct constitutional errors in state proceedings. See Coleman v. Thompson, 501 U.S. 722, 731 (1991); Breard v. Pruett, 134 F.3d 615, 619 (4th Cir. 1998). "To satisfy the exhaustion requirement, a habeas petitioner must fairly present his claim to the state's highest court." Matthews v. Evatt, 105 F.3d 907, 911 (4th Cir. 1997), abrogated in part on other grounds by Miller-El v. Dretke, 545 U.S. 231 (2005). "Fair presentation" requires clarity and completeness—the claim must encompass "the operative facts and the controlling legal principles." Baker v. Corcoran, 220 F.3d 276, 289 (4th Cir. 2000) (quoting Matthews, 105 F.3d at 911); see also Breard, 134 F.3d at 619 ("The exhaustion requirement is not satisfied if the petitioner presents new legal theories or factual claims for the first time in his federal habeas petition.").

Failure to properly exhaust claims in state court may give rise to procedural default, barring federal habeas review. Procedural default results when a petitioner fails to comply with state procedural rules for raising a claim. Because noncompliance with the state procedural rule constitutes an independent and adequate state law ground for decision, a federal court has no power to review it. See Coleman, 501 U.S. at 729-30; Bassette v. Thompson, 915 F.2d 932, 936-37 (4th Cir. 1990). This consequence

is apparent on direct review of state court judgments—if the Supreme Court's "resolution of a federal question cannot affect the judgment, there is nothing for the Court to do." Coleman, 501 U.S. at 730. By contrast, federal habeas courts proceeding under § 2254 do not "review a judgment, but the lawfulness of the petitioner's custody *simpliciter*." Id. But the Supreme Court has explained that this difference is immaterial. "When a federal habeas court releases a prisoner held pursuant to a state court judgment that rests on an independent and adequate state ground, it renders ineffective the state rule just as completely as if [the Supreme] Court had reversed the state judgment on direct review." Id.

A federal habeas petitioner whose claims are procedurally defaulted must demonstrate "cause and prejudice" to excuse the default. See Wolfe v. Johnson, 565 F.3d 140, 158 n.27 (4th Cir. 2009). "Cause" under this standard ordinarily requires a showing "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). To establish "prejudice," a petitioner must demonstrate "not merely that the errors at his trial created a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage, infecting

his entire trial with error of constitutional dimensions." United States v. Frady, 456 U.S. 152, 170 (1982).

B. Standard of review under 28 U.S.C. § 2254

Federal courts review exhausted habeas claims under the deferential standard established by AEDPA, 28 U.S.C. § 2254(d)(1)-(2). Section 2254(d)(1) permits a federal court to grant relief on a claim adjudicated on the merits in state court if the state adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law." Section 2254(d)(2) permits relief if the state adjudication "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."

The "contrary to" and "unreasonable application of" clauses in § 2254(d)(1) define two distinct "categories" of cases in which federal habeas relief is available. Williams v. Taylor, 529 U.S. 362, 404-05 (2000). A state court decision is "contrary to" clearly established federal law if it reaches the opposite conclusion to that of the Supreme Court on a point of law, or if it decides a case differently than the Supreme Court on a materially indistinguishable set of facts. Barnes v. Joyner, 751 F.3d 229, 238 (4th Cir. 2014) (citing Williams, 529 U.S. at 413). A state court decision is an "unreasonable application of" clearly

established federal law if it identifies the correct legal principle but "unreasonably applies that principle to the facts of the prisoner's case." Id. (quoting Williams, 529 U.S. at 413).

"Unreasonable" as used in § 2254(d)(1) means more than merely "incorrect." Williams, 529 U.S. at 410. The state court ruling must be "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Barnes, 751 F.3d at 238 (quoting White v. Woodall, 572 U.S. 415, 420 (2014)). As for § 2254(d)(2), an unreasonable determination of fact is one that is not supported by evidence in the record. See Wiggins v. Smith, 539 U.S. 510, 528-29 (2003).

III. Findings of Fact and Conclusions of Law

A. Claim One fails on its merits because Martin has not shown deficient performance by counsel as to his Batson claim.

In Martin's first claim for relief in his federal habeas petition, he alleges that his trial counsel was ineffective for failing to properly challenge a peremptory strike during voir dire. Martin properly exhausted this claim when he presented it to the Supreme Court of Virginia on appeal from the circuit court's denial of his state habeas petition. (ECF No. 13-8). The record, however, reveals no deficiency on the part of defense counsel, nor indeed *any* plausible argument by which Martin might have succeeded with a Batson claim. Martin cannot, as a result, demonstrate that the

state court's resolution of the claim failed to satisfy the deferential review due under § 2254(d). Claim One therefore fails on its merits.

1. Factual Summary

Transcripts from Martin's trial show that at the close of voir dire, defense counsel pointed out that the prosecution's last peremptory strike removed one of only two African Americans from the jury panel. Jan. 28, 2013 Trial Tr. 115, Commonwealth v. Martin, CR No. 12-15-16 (Va. Cir. Ct. 2013). Defense counsel therefore wanted to "clarify any potential Batson issues." Id.

The prosecutor immediately provided an explanation:

> The race neutral issue is that she is an advocate for mental health laws and so I think that profession is one that I typically strike. Anybody that has anything to do with mental health, from a jury, I find them to be especially liberal, especially defense oriented. I also found her to be very quiet when she was talking.
>
> I think she would be pushover [sic] back there. I don't sense her to have a strong personality, but it was mainly for her profession.

Id. at 115-16. Defense counsel responded, "Well, Judge, I don't know that -- I mean, I -- I don't know that simply because you work in a mental health field you're -- well, I don't think that overcomes the race neutral reason." Id. at 116.

The judge interjected to note that the prosecutor cited the prospective juror's work with lawyers as well. Id. at 116-17. Defense counsel continued:

> Well, Judge, just knowing how it is to work with lawyers, sometimes it takes a pretty strong personality to deal with lawyers, so I don't know that she would be a pushover. I don't think that there's anything particularly about the mental health field that disqualifies her as a lawyer [sic], and frankly, I don't think that that overcomes the --

Id. at 117. The judge then interrupted to ask what the standard for a Batson challenge was. Neither attorney was able to immediately provide it, so the judge retrieved it from the benchbook. Reading from the benchbook, the judge explained:

> "Peremptory strikes cannot be based solely on the race or gender of the prospective juror. Batson's antidiscrimination test applies to the use of peremptory challenges by prosecutors and criminal defendants, litigants in civil trial, et cetera. Three steps. Party making the motion must make out a prima facie case by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose."
>
> [Judge:] So that's you making the motion so prima facie was that she is one of only two African Americans on the panel.
>
> "Once a prima facie case has been made out, the burden shifts to the other party to explain adequately the racial or gender exclusion by offering permissible race neutral or gender neutral justifications for the strikes.
>
> "If a race neutral or gender neutral explanation is tendered, the challenging party may then provide reasons why explanations were pretextual and the strikes were discriminatory, regardless of the stated explanations.

> The trial court must then decide whether the opponent of the strike has proved purposeful discrimination."
>
> [Judge:] So the standard is whether there's purposeful discrimination. Let me see here. So your comment is that in general, mental health fields shouldn't be a race neutral reason.

Id. at 118-19.

The judge went on to explain that under Batson, the party opposing the strike has the burden in step three to show that a race-neutral justification was pretextual, and the strike was in fact purposeful discrimination. See id. at 120-21. With the standard clarified, defense counsel argued, "Judge, I can't imagine a circumstance where solely because somebody is in the mental health field that that somehow makes them less a juror or less capable a juror or less objective or unbiased or anything else a juror." Id. at 121. The prosecutor responded:

> Well, your honor, that's not the standard. I mean, we're not trying to strike for the cause. And I can tell you as a prosecutor that those are the first people that I strike. Somebody who is in the mental health field because I find them to be especially liberal, especially biased, if you will, towards the defense, and it's not -- again, it's not the standard.
>
> We're not striking somebody for cause. I mean, we can use our discretion in using professions to strike. We're still allowed to do that.

Id. at 121-22.

The judge then voiced her initial conclusion that the strike was not discriminatory. See id. at 122. After a brief discussion

of the struck juror's purported "soft-spoken" personality, the judge reiterated this conclusion, and specifically found that the prosecution's proffered justification was "not a pretext." See id. at 123-24. The Virginia Court of Appeals affirmed the trial court's decision on the matter, (ECF No. 13-1 at 2), and the Virginia Supreme Court refused the petition for appeal, (ECF No. 13-5).

In Martin's state habeas proceeding, the Circuit Court rejected his ineffective assistance of counsel claim on the issue:

> The Court finds that petitioner has failed to show that his attorney erred by not properly presenting a challenge to a peremptory strike by the Commonwealth. The Court further finds that the attorney raised the issues and argued the available reasons for his position. The Court further finds that the petitioner has not shown that there were any other viable arguments which the attorney failed to present. The Court further finds that the petitioner has not established that the peremptory strike was discriminatory.

(ECF No. 13-7 at 2). The Virginia Supreme Court refused the subsequent petition for appeal. (ECF No. 13-9).

2. Analysis

Because Claim One is exhausted, this court views it through the lens of § 2254(d). Martin must demonstrate that the state court's conclusions were contrary to, or an unreasonable application of, clearly established United States Supreme Court precedent or were based on an unreasonable determination of the facts.

An ineffective assistance of counsel claim consists of two parts. See Strickland v. Washington, 466 U.S. 668, 687 (1984). To satisfy the "performance" prong, Martin must show that "counsel's representation fell below an objective standard of reasonableness," such that "counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 687-88. To satisfy the "prejudice" prong, Martin 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. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. "[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. at 690.

To succeed on such a claim in the context of § 2254, Martin must demonstrate that the state court unreasonably applied this two-part test. This creates a "double-deference" standard of review that "effectively cabins [the court's] review to a determination of 'whether there is any reasonable argument that counsel satisfied Strickland's deferential standard.'" Morva v. Zook, 821 F.3d 517, 528 (4th Cir. 2016) (quoting Harrington v. Richter, 562 U.S. 86, 105 (2011)). The difficulty of obtaining relief under this standard is intentional. Harrington, 562 U.S. at

102. "Section 2254(d) reflects the view that habeas corpus is a 'guard against extreme malfunctions in the state criminal justice systems,' not a substitute for ordinary error correction through appeal." Id. at 102-03 (quoting Jackson v. Virginia, 443 U.S. 307, 332 n.5 (1979) (Stevens, J., concurring in judgment)).

In Batson, the Supreme Court ruled that prosecutors may not exercise peremptory challenges to strike potential jurors solely based on race or on the assumption that jurors will be biased in favor of defendants of their same race. 476 U.S. at 89. Although Batson declared that such race-based challenges violate the Equal Protection Clause, it did not otherwise raise the bar for what justifies a valid challenge. See id. (noting that prosecutors can ordinarily exercise challenges for any reason they view as bearing on the outcome of the case). Trial lawyers are still free to rely on "instinct" in making challenges, so long as their reasons do not violate the Equal Protection Clause. See Golphin v. Branker, 519 F.3d 168, 180 (4th Cir. 2008); United States v. Thompson, 827 F.2d 1254, 1260 (9th Cir. 1987).

Nothing in the record suggests that the trial judge erred in rejecting Martin's Batson claim, let alone that the state habeas

court unreasonably applied Strickland in any way.[2] Although the correct method of analysis briefly eluded the judge and parties, the challenge eventually proceeded as usual. Defense counsel established the prima facie case for discrimination by noting that the prosecutor struck one of only two African-American panelists. The prosecutor then provided race-neutral justifications: the belief that the struck juror's profession indicated she would be biased against the government's case and that her quiet demeanor would make her a "pushover" among the other jurors. Finally, defense counsel argued that profession alone was not a good indicator of bias—in other words, that the judge should discard this explanation as pretextual. The judge rejected this argument and the Batson claim in general.

That decision aligns with the prevailing view on peremptory challenges based on profession. Courts relying on the same Supreme Court precedent have long acknowledged that profession-associated bias is a valid justification for peremptory challenges by the prosecution. See Thompson, 827 F.2d at 1260 ("Excluding jurors because of their profession … is wholly within the prosecutor's

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[2] This court may "look through" the Virginia Supreme Court's summary order refusing the petition for appeal to find the last state court opinion offering relevant rationale, in this case the Circuit Court's opinion denying habeas. See Wilson v. Sellers, 138 S. Ct. 1188, 1192 (2018).

prerogative."); Jackson v. Commonwealth, 499 S.E.2d 538, 547 (Va. 1998) (rejecting Batson challenge where prosecutor relied on perceived bias among social services employees). Martin argues that cases accepting profession-associated bias as valid justification often consider that bias as one of several factors. See Pet'r's Reply to Answer and Mot. to Dismiss 8-9 (ECF No. 20 at 8-9). But Batson does not require that any challenge be analytically sound, only that it be free of racial discrimination. See Thompson, 827 F.2d at 1260 ("Such reasons may not be logical, but that's what peremptory challenges are all about.").

The record does suggest that Martin's trial counsel was not perfectly up to speed on the mechanics of a Batson challenge. See, e.g., Trial Tr. 120. Nonetheless, he identified the issue, made out the required prima facie case, and contested the prosecutor's race-neutral justification. The judge considered both sides and even expressed doubt about the prosecutor's "quiet demeanor" justification, but ultimately concluded that the challenge was not discriminatory.

As such, the state court's application of Strickland was entirely reasonable. Strickland requires that counsel "bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." 466 U.S. at 688. The state court found that counsel "raised the issues and argued the available

reasons for his position." (ECF No. 13-7 at 2). It further found that "petitioner has not shown that there were any other viable arguments which the attorney failed to present." Id. Martin thus failed to satisfy either the cause or prejudice prongs of Strickland. The state court's decision was not contrary to, nor an unreasonable application of, clearly established federal law. Furthermore, the state court's determination is fully supported by the facts in the record. Accordingly, Claim One must be dismissed.

B. Claims Two and Three are procedurally defaulted and no circumstances exist to excuse the default.

Martin's second and third claims allege that his trial counsel was ineffective for failing to call an expert witness regarding historical cell site data and for declining the trial judge's offer of a cautionary instruction, respectively. Martin presented these claims to the Circuit Court in his state habeas petition, (ECF No. 13-6 at 17), but did not raise them in his petition for appeal to the Supreme Court of Virginia, (see ECF No. 13-8). Because Virginia state law would now preclude assertion of either claim, see Va. Code § 8.01-654(B)(2) (barring successive petitions), they are simultaneously exhausted and procedurally defaulted. See George v. Angelone, 100 F.3d 353, 363 (4th Cir. 1996). As such, federal habeas review is barred unless Martin can show cause and prejudice to excuse the default, Coleman, 501 U.S. at 750, or that failure

to review his claims will result in a fundamental miscarriage of justice, see Carrier, 477 U.S. at 495-96.

Martin has alleged no factor external to his defense which prevented him from raising the now-defaulted claims in his petition for appeal to the State Supreme Court. In his reply to Respondent's Motion to Dismiss, Martin states that his attorney failed to include those claims in the petition for appeal. (ECF No. 20 at 1). Attorney error, however, is not an "external" factor unless it violates the constitutional right to counsel. Coleman, 501 U.S. at 752-54. Because that right does not extend to state post-conviction proceedings, Martin cannot claim a violation here. See id.

Martin insists that he may claim the benefit of the Supreme Court's decision in Martinez v. Ryan, 566 U.S. 1 (2012), to excuse his default. In Martinez, the Court established a narrow exception to Coleman's general rule that that attorney error does not constitute cause to excuse procedural default. See id. at 9. The Court held that in so-called "initial-review collateral proceedings,"[3] inadequate assistance of counsel "may establish cause for a prisoner's procedural default of a claim of ineffective

[3] "Initial-review collateral proceedings" are those proceedings which, under state law, "provide the first occasion to raise a claim of ineffective assistance at trial." Martinez, 566 U.S. at 8.

assistance at trial." Id. Thus, if state law requires that prisoners raise ineffectiveness claims in collateral proceedings rather than on direct review (as Virginia does, see Lenz v. Commonwealth, 544 S.E.2d 299, 304 (Va. 2001)), a federal habeas court may excuse default if a petitioner was without counsel or if state habeas counsel was constitutionally deficient. See Martinez, 566 U.S. at 9. In such cases, however, a petitioner must also show that the underlying ineffective-assistance-of-trial-counsel claim is "substantial"—that is, "has some merit." Id. at 14.

Martinez is inapplicable here for two reasons. First, Martin's default did not arise in an initial-review collateral proceeding. Instead, it arose when Martin failed to include present claims two and three in his petition for appeal to the Supreme Court of Virginia. Martinez does not apply to such proceedings. Id. at 16. Second, Martin's defaulted claims are not substantial.

1. Claim Two - Failure to call expert witness

Martin's second claim alleges that his attorney was ineffective for failing to call an expert witness to testify regarding cell site tracking. (ECF No. 1 at 7). Among the government's evidence at trial was historical cell site location data used to track Martin's location. Martin's trial counsel filed a motion to exclude the prosecution's expert, conducted voir dire at trial, and cross-examined her. See Jan. 30, 2013 Trial Tr. 88-

99, 187-215. The state habeas court rejected Martin's ineffectiveness claim, writing:

> The Court further finds that the petitioner has not shown that the attorney was ineffective for not presenting an expert on cellphone site tracking. The Court further finds that the petitioner has not presented an affidavit from any expert setting forth the testimony that expert would have given if called and has not proffered what testimony should have been presented by counsel at trial. The Court further finds that the expert testimony presented by the Commonwealth has been recognized as reliable.

(ECF No. 13-7 at 2).

Because Martin offered no evidence of what a potential defense expert would have said, the state court—which rejected his initial ineffectiveness claim on this ground—could not say that failure to present such evidence was prejudicial. Cf. Teleguz v. Kelly, 824 F. Supp. 2 672, 696 (W.D. Va. 2012) (finding that state court acted reasonably in rejecting ineffective assistance claim for failure to call expert witness because petitioner offered no evidence to establish probative value of testimony), vacated in part on other grounds sub nom. Teleguz v. Pearson, 689 F.3d 322 (4th Cir. 2012). Furthermore, the choice not to call an expert witness is within trial counsel's discretion, particularly when, as here, counsel contests a prosecution witness by other means. See Harrington, 562 U.S. at 107; Moore v. Hardee, 723 F.3d 488, 497 (4th Cir. 2013). Finally, as the state court acknowledged, historical cell site information is widely recognized as a reliable (and increasingly

ubiquitous) element of criminal investigations. See Carpenter v. United States, 138 S. Ct. 2206, 2217-18 (2018) ("[C]ell phone tracking is remarkably easy, cheap, and efficient compared to traditional investigative tools."). Given the "wide latitude" afforded both trial counsel and state courts in choosing to offer and admit expert witness testimony, Harrington, 562 U.S. at 106-07, this court finds that Martin has not demonstrated that Claim Two is substantial.

2. Claim Three - Declining curative instruction

Martin's third claim relates to his attorney's choice to decline a curative jury instruction during trial. On cross-examination of a defense character witness, the prosecutor asked whether the witness was "aware of any incidents of violence" that involved Martin. Jan. 31, 2013 Trial Tr. 134. The witness said she was not and that she would be "shocked" to hear of such incidents. Id. at 135. The prosecutor then asked, "Well, do you have any knowledge about him being involved --" before being cut off. The attorneys then conducted a brief sidebar, which included the following exchange:

> MR. THRASH [Defense counsel]: I am going to ask Your Honor to instruct the jury to disregard the Commonwealth's attorney's -- this impression has been created regarding some incident that is not going to come in.
>
> THE COURT: Do you want me to highlight that?

> MR. THRASH: Yeah. They know.
>
> THE COURT: What do you want me to instruct them?
>
> MR. THRASH: Just that the Commonwealth --
>
> MR. HASAN [Defense co-counsel]: There is no other crime.
>
> THE COURT: I am not telling them that. I will tell them just disregard the question.
>
> MR. THRASH: Disregard the Commonwealth's attorney's questions regarding any incidents of violence by this man.
>
> MR. HASAN: This whole sidebar has brought attention to it.
>
> MR. THRASH: No, no, Judge. Don't do anything. Just leave it.

Id. at 137-38.

The Circuit Court rejected Martin's ineffectiveness claim:

> The Court further finds that the petitioner has not shown that the attorney was ineffective for not accepting the offer of a cautionary instruction about references to "incidents of violence." The Court further finds that the attorney made a reasonable tactical decision not to have a cautionary instruction given. The Court further finds that the decision was reasonable because of the possibility that the instruction might have increased the effect of any alleged improperly admitted evidence.

(ECF No. 13-7 at 2).

The choice to forego a curative instruction is well within counsel's "wide range of reasonable professional assistance." Strickland, 466 U.S. at 689; see also Humphries v. Ozmint, 397 F.3d 206, 234 (4th Cir. 2005) ("[I]t is well established that failure to object to inadmissible or objectionable material for

tactical reasons can constitute objectively reasonable trial strategy under Strickland."). Even if this court proceeded to a genuine merits review, the state court's opinion explicitly sets forth a "reasonable argument that counsel satisfied Strickland's standard." Harrington, 562 U.S. at 105. Accordingly, this court finds that Martin has failed to show that Claim Three is "substantial."

Because Claims Two and Three are procedurally defaulted, and because Martin has not demonstrated that this court's failure to review those claims will result in a fundamental miscarriage of justice, those claims must be dismissed.

C. Martin's claims can be resolved without an evidentiary hearing.

The decision whether to grant an evidentiary hearing is generally left to the discretion of the district court. Schriro v. Landrigan, 550 U.S. 465, 473 (2007). Because review of the record alone is sufficient to decide the controlling issues of this case, no hearing is required. See id. at 474.

Conclusion

For the foregoing reasons, Respondent's Motion to Dismiss (ECF No. 12) is GRANTED. Martin's petition for a writ of habeas corpus under 28 U.S.C. § 2254 is DENIED and his claims are DISMISSED with prejudice.

Petitioner is ADVISED that he may appeal from the judgment entered pursuant to this Amended Order by forwarding a written notice of appeal to the Clerk of the United States District Court, U.S. Courthouse, 600 Granby Street, Norfolk, Virginia, 23510. Written notice must be filed with the Clerk within thirty (30) days from the date of this Dismissal Order. For the reasons stated above, pursuant to Rule 11 of the Rules Governing Section 2254 Cases in United States District Courts and Rule 22(b) of the Federal Rules of Appellate Procedure, the court declines to issue a certificate of appealability.

/s/
Douglas E. Miller
United States Magistrate Judge

DOUGLAS E. MILLER
UNITED STATES MAGISTRATE JUDGE

Norfolk, Virginia

January 24, 2019

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