

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 18-13713-F

MICHAEL BOYKIN,

Petitioner-Appellant,

versus

SECRETARY, DEPARTMENT OF CORRECTIONS,
ATTORNEY GENERAL, STATE OF FLORIDA,

Respondents-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

Before: MARTIN and JILL PRYOR, Circuit Judges.

BY THE COURT:

Michael Boykin has filed a motion for reconsideration of this Court's September 17, 2019, order denying his motion for a certificate of appealability to review the denial of his federal habeas corpus petition, 28 U.S.C. § 2254. Upon review, his motion for reconsideration is DENIED because he has offered no meritorious arguments to warrant relief.

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ORDER:

Michael Boykin, a Florida prisoner serving a life sentence, seeks a Certificate of Appealability ("COA") from this Court to challenge the District Court's dismissal of his 28 U.S.C. § 2254 petition for writ of habeas corpus. In his § 2254 petition before the District Court, Mr. Boykin raised the following six grounds for relief:

- (1) his trial counsel was ineffective for failing to elicit that witness Robert Walyus took medication for his epilepsy;

- (2) his trial counsel was ineffective for failing to elicit that Mr. Walyus was a convicted sex offender who lived with Mr. Boykin's codefendant, Luis Batiz, without signing the lease;
- (3) his trial counsel was ineffective for failing to elicit that Mr. Walyus left voicemails with Mr. Batiz's girlfriend, indicating that he feared retaliation from Mr. Batiz or others;
- (4) his trial counsel was ineffective for failing to call Donald Gordon as a witness;
- (5) his trial counsel was ineffective for failing to introduce the out-of-court statements of Mr. Batiz; and
- (6) cumulative error warranted relief.

The District Court dismissed Mr. Boykin's § 2254 petition, ruling that Mr. Boykin procedurally defaulted on all six of his claims and that his claims did not meet the exception for procedural default under Martinez v. Ryan, 566 U.S. 1, 132 S. Ct. 1309 (2012).

To obtain a COA, a petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Where the District Court denied a habeas petition on procedural grounds, the petitioner must show that jurists of reason would find debatable (1) whether the petition states a valid claim of the denial of a constitutional right, and (2) whether the District Court was correct in its procedural ruling. Slack v. McDaniel, 529 U.S. 473, 484, 120 S. Ct. 1595, 1604 (2000). If the petitioner fails to satisfy either prong of this two-part test, this Court denies him a COA. Id.

Further, a petitioner must exhaust his federal claims by raising them in state court before presenting them in a federal habeas petition. 28 U.S.C. § 2254(b)(1)(A). Failure to exhaust state remedies that are no longer available results in procedural default that bars federal habeas review. Smith v. Jones, 256 F.3d 1135, 1138 (11th Cir. 2001). However, a federal court may consider the merits of a procedurally defaulted claim if the petitioner can show both “cause” for the default and “prejudice” from a violation of his constitutional rights. Wainwright v. Sykes, 433 U.S. 72, 84–85, 97 S. Ct. 2497, 2505 (1977). In Martinez v. Ryan, 566 U.S. 1, 132 S. Ct. 1309 (2012), the Supreme Court extended this exception, holding that “a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the [State’s] initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.” Id. at 14, 132 S. Ct. 1318–20.

To make this showing under Martinez, a petitioner must establish that “(1) a State requires a prisoner to raise an ineffective-assistance-of-trial-counsel claim in a collateral proceeding, as opposed to on direct appeal; (2) appointed counsel in the initial-review collateral proceeding, where the claim should have been raised, was ineffective under the standards of [Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)]; and (3) the underlying ineffective-assistance-of-trial-counsel

claim is a substantial one.” Hittson v. GDCP Warden, 759 F.3d 1210, 1260–61 (11th Cir. 2014) (quotation marks omitted).

Mr. Boykin conceded before the District Court that his claims were unexhausted because he failed to raise them in his direct appeal or in his Florida Rule of Criminal Procedure 3.850 postconviction proceedings. And if Mr. Boykin now attempted to raise his claims in state court, they would be subject to dismissal as successive. Foster v. State, 614 So. 2d 455, 458 (Fla. 2012). As a result, reasonable jurists would not debate the District Court’s ruling that Mr. Boykin’s claims were procedurally defaulted. Smith v. Jones, 256 F.3d 1135, 1138 (11th Cir. 2001). A COA is not warranted on this issue.

Reasonable jurists would also not debate the District Court’s determination that Mr. Boykin’s claims do not meet the exception provided by Martinez, 566 U.S. at 14, 132 S. Ct. at 1318–20. This is because Mr. Boykin’s ineffective assistance claims of counsel claims are not substantial. To make a successful claim of ineffective assistance of counsel, a defendant must show both that (1) his counsel’s performance was deficient; and (2) the deficient performance prejudiced his defense. Strickland, 466 U.S. at 687, 104 S. Ct. at 2064. Deficient performance “requires showing that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” Id. Prejudice occurs when there is a “reasonable probability that,

but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694, 104 S. Ct. at 2068. Failure to establish either prong is fatal and makes it unnecessary to consider the other. Id. at 697, 104 S. Ct. at 2069.

In Claim 1, Mr. Boykin argued his counsel was ineffective for failing to elicit that Mr. Walyus took medication for his epilepsy. Mr. Boykin said the record reflects that Mr. Walyus took Dilantin for his condition. Reasonable jurists would not debate the District Court's denial of this claim. Mr. Walyus testified at trial that he was not taking any medication on the night of the murder, so his later use of Dilantin does not establish deficient performance by Mr. Boykin's trial counsel. Strickland, 466 U.S. at 687, 104 S. Ct. at 2064. Mr. Boykin also failed to establish he was prejudiced by counsel's failure to investigate the effects of Dilantin because his trial counsel vigorously cross-examined Mr. Walyus's memory of the night of the incident. Id. at 694, 104 S. Ct. at 2068. The denial of this claim does not merit a COA.

In Claim 2, Mr. Boykin argued his trial counsel was ineffective for failing to elicit that Mr. Walyus was a convicted sex offender who lived with Mr. Boykin's codefendant, Mr. Batiz. Reasonable jurists would not debate the District Court's denial of this claim. The jury was informed at trial that Mr. Walyus was convicted of a felony and sentenced to seven years of probation with two years of community

control. The jury was also informed that Mr. Batiz gave him a place to live. Evidence of Mr. Walyus's sex offender status would have been prejudicial and irrelevant. As a result, Mr. Boykins's counsel was not ineffective for failing to elicit Mr. Walyus's specific crime of conviction. Id. at 687, 104 S. Ct. at 2064. And the nature of Mr. Walyus's prior conviction, by itself, would not have changed the outcome of the trial. Id. at 694, 104 S. Ct. at 2068. No COA is therefore warranted for the denial of this claim.

In Claim 3, Mr. Boykin argued his trial counsel was ineffective for failing to elicit that Walyus left voicemails with Mr. Batiz's girlfriend, indicating that he feared retaliation from Mr. Batiz. Reasonable jurists would not debate the District Court's denial of this claim. Although the voicemail evidence might have bolstered Mr. Boykin's theory that Mr. Walyus was intimidated into testifying against Boykin, Walyus testified at trial he was afraid of Mr. Batiz. Mr. Boykin's trial counsel also argued that Mr. Walyus's fear of Mr. Batiz influenced his trial testimony. As a result, Mr. Boykin failed to establish a Strickland violation. Id. at 687, 694, 104 S. Ct. at 2064, 2068. No COA is warranted for the denial of this claim.

Mr. Boykin also argued his trial counsel was ineffective for failing to call Mr. Gordon as a witness. He said Mr. Gordon would have testified that Mr. Batiz threatened to cut off Mr. Walyus's finger, showing that Walyus was motivated to

pin the murder on Mr. Boykin. Reasonable jurists would not debate the District Court's denial of this claim. Mr. Boykin failed to present an affidavit from Mr. Gordon establishing that he would have testified consistently with Mr. Boykin's assertions. See Johnson v. Alabama, 256 F.3d 1156, 1187 (11th Cir. 2001) (noting that "speculation that the missing witnesses would have been helpful . . . is insufficient to carry the burden of a habeas corpus petitioner" (quotation marks omitted)). Even assuming the accuracy and admissibility of this evidence, Mr. Boykin failed to establish prejudice because Mr. Walyus's trial testimony already indicated he feared Mr. Batiz. The denial of this claim does not merit a COA.

In Claim 5, Mr. Boykin argued his trial counsel was ineffective for failing to introduce the out-of-court statements of Mr. Batiz. He contends that Mr. Batiz said in an interview that the victim's brother was the type of person who kills people that get in his way. Reasonable jurists would not debate the District Court's denial of this claim because Mr. Batiz's out-of-court statements would have been inadmissible hearsay. See Fla. Stat. Ann. § 90.801(c) (stating that "hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted"). Although Mr. Boykin argues these statements are admissible, he points to no evidentiary exception establishing their admissibility. No COA is therefore warranted for the denial of this claim.

In Claim 6, Mr. Boykin argued cumulative error warranted relief. Reasonable jurists would not debate the District Court's denial of this claim. As set out above, Mr. Boykin failed to establish a constitutional violation under Strickland. He therefore failed to show cumulative error. See Morris v. Sec'y, Dep't of Corr., 677 F.3d 1117, 1132 (11th Cir. 2012) (holding that petitioner's claim of cumulative error was without merit because none of his individual claims of error or prejudice were meritorious). No COA is warranted on this claim. Because Mr. Boykin has not established that reasonable jurists would debate the District Court's denial of his § 2254 petition, his motion for a COA is **DENIED**.



UNITED STATES CIRCUIT JUDGE