UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 20-1741

Richard W. Williams

Petitioner - Appellant

v.

Sherie Korneman, Warden

Respondent - Appellee

Appeal from U.S. District Court for the Western District of Missouri - Kansas City
(4:19-cv-00724-HFS)

JUDGMENT

Before BENTON, SHEPHERD, and ERICKSON, 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 on appeal in forma pauperis is denied as moot.

October 06, 2020

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

/s/ Michael E. Gans

United States Court of Appeals
For The Eighth Circuit
Thomas F. Eagleton U.S. Courthouse
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St. Louis, Missouri 63102

Michael E. Gans
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October 06, 2020

Mr. Richard W. Williams
WESTERN MISSOURI CORRECTIONAL CENTER
307771
609 E. Pence Road
Cameron, MO 64429-0000

RE: 20-1741 Richard Williams v. Sherie Korneman

Dear Mr. Williams:

Enclosed is a copy of the dispositive order in the referenced appeal. Please note that FRAP 40 of the Federal Rules of Appellate Procedure requires any petition for rehearing to be filed within 14 days after entry of judgment. Counsel-filed petitions must be filed electronically in CM/ECF. Paper copies are not required. This court strictly enforces the 14 day period. **No grace period for mailing is granted** for pro-se-filed petitions. A petition for rehearing or a motion for an extension of time must be filed with the Clerk's office within the 14 day period.

Michael E. Gans
Clerk of Court

NDW

Enclosure(s)

cc: Mr. Patrick Joseph Logan
Ms. Paige A. Wymore-Wynn

District Court/Agency Case Number(s): 4:19-cv-00724-HFS

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Appeal from U.S. District Court for the Western District of Missouri - Kansas City
(4:19-cv-00724-HFS)

ORDER

The petition for rehearing by the panel is denied.

December 21, 2020

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

/s/ Michael E. Gans

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

RICHARD W. WILLIAMS,	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No. 19-00724-CV-W-HFS-P
	)	
SHERIE KORNEMAN,	)	
	)	
Respondent.	)	

ORDER

Petitioner is a convicted state prisoner and filed this pro se matter pursuant to 28 U.S.C. § 2254. He challenges his conviction and sentences for murder in the first degree and armed criminal action, which were entered in the Circuit Court of Buchanan County, Missouri. For the reasons set forth below, this case is DISMISSED and a certificate of appealability is DENIED.[1]

I. Background[2]

In the underlying criminal case, Williams was charged with one count of murder in the first degree and one count of armed criminal action. Williams was convicted of both offenses following a jury trial and sentenced to life in prison without the possibility of parole for murder in the first degree and to a consecutive term of thirty years for armed criminal action. His convictions were affirmed by this Court in case number WD73962. The memorandum accompanying our order affirming Williams's convictions recited the following facts from the underlying criminal case:

> On May 4, 2010, [Williams] met John Joslin through his friend Alonzo Teague. [Williams], Joslin, and Teague spent the majority of the day in St. Joseph, Missouri, drinking and buying and smoking crack. At the time, [Williams] was living at Budget Inn. When Joslin asked [Williams] to be his roommate in order to

[1] Upon of review of the record and the law, the Respondent's position is found to be persuasive. Portions of Respondent's brief are adopted without further quotation designated.

[2] "[F]ederal habeas courts must make as the starting point of their analysis the state courts' determinations of fact . . . ." *Williams v. Taylor*, 529 U.S. 362, 387 (2000). "[A] determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1). In this case, Petitioner fails to rebut any of the state court's determination of the facts with clear and convincing evidence. Accordingly, the Court adopts without alteration the facts as set out by the Missouri Court of Appeals in the affirmance of the denial of post-conviction relief, noting that Petitioner did not challenge the sufficiency of the evidence on direct appeal. Doc. 11-8 at 4-5.

> help Joslin pay the bills, [Williams] agreed. [Williams] retrieved his belongings from Budget Inn and rode with Teague and Joslin to buy more crack from Joslin's dealer. The three then went to Joslin's home to smoke the crack they purchased. Teague left Joslin's home late that evening. On May 5, 2010, Joslin was found dead in his home from multiple stab wounds. Later that evening, Police arrested [Williams] and charged him with the murder of Joslin. [Williams] admitted to killing Joslin but claimed he did so in self defense after Joslin sodomized him.
>
> After this Court issued its mandate in the direct appeal, Williams timely filed a *pro se* motion for post-conviction relief. Post-conviction counsel was appointed and filed an amended motion raising some of Williams's *pro se* claims in addition to new claims. An evidentiary hearing was held at which the motion court heard testimony from Williams and his trial counsel. The motion court denied Williams's post-conviction claims.
>
> Williams appealed, arguing that the amended motion filed by his appointed counsel was untimely. The State agreed, and this Court remanded the case to the motion court for an abandonment inquiry. *Williams v. State*, 503 S.W.3d 301 (Mo. App. W.D. 2016).
>
> Before the motion court could conduct its abandonment inquiry, Williams waived the claims contained in the amended motion and requested the motion court "proceed on his pro se motion for post-conviction relief." The motion court thereafter issued findings of fact and conclusions of law denying the claims asserted in the *pro se* motion.

Doc. 11-8 at 4-5 (footnotes omitted).

After the motion court's ruling, Petitioner sought post-conviction relief under Missouri Supreme Court Rule 29.15, the denial of which was affirmed on appeal. Doc. 11-8. Further facts are set forth as necessary.

II. Standard

State prisoners who believe that they are incarcerated in violation of the Constitution or laws of the United States may file a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Before doing so, petitioners must exhaust their state remedies. *See Coleman v. Thompson*, 501 U.S. 722, 732 (1991).

"[H]abeas corpus is a guard against extreme malfunctions in the state criminal justice systems, not a substitute for ordinary error correction through appeal." *Harrington v. Richter*, 562 U.S. 86, 102-03 (2011) (internal quotation and citation omitted). This Court's review of the petition for habeas corpus is limited by the Antiterrorism and Effective Death Penalty Act

("AEDPA"), 28 U.S.C. § 2254. *Id.* at 97. AEDPA "bars relitigation [in federal court] of any claim adjudicated on the merits in state court, subject only to the exceptions in §§ 2254(d)(1) and (2)." *Harrington*, 562 U.S. at 98. Accordingly, a state habeas petitioner is not entitled to relief unless the state court proceedings:

> (1) resulted in a decision that is contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. §§ 2254(d).

As to § 2254(d)(1), a state court violates the "contrary to" clause if it "applies a rule that contradicts the governing law set forth" by the Supreme Court or if the state court "confronts a set of facts that are materially indistinguishable from a decision of [the] Court and nevertheless arrives at a [different] result." *Williams v. Taylor*, 529 U.S. 362, 406 (2000). A state court violates the "unreasonable application" clause of § 2254(d)(1) if it "identifies the correct governing legal rule from [the Supreme] Court's cases but unreasonably applies it to the facts of the particular state prisoner's case." *Id.* at 407. "It is not enough for us to conclude that, in our independent judgment, we would have applied federal law differently from the state court; the state court's application must have been objectively unreasonable." *Flowers v. Norris,* 585 F.3d 413, 417 (8th Cir. 2009) (citation omitted).

As to § 2254(d)(2), "a petitioner must show that the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." *Perry v. Kemna*, 356 F.3d 880, 889 (8th Cir. 2004) (internal quotation omitted). A state court's factual determinations are presumed correct and will stand unless the petitioner rebuts this presumption with clear and convincing contrary evidence. 28 U.S.C. § 2254(e)(1); *Grass v. Reitz*, 749 F.3d 738, 743 (8th Cir. 2014). Additionally, federal courts afford great deference to a state court's credibility findings. *Smulls v. Roper*, 535 F.3d 853, 864 (8th Cir. 2008) (en banc).

III. Analysis

Petitioner brings ten grounds, six of which are procedurally defaulted. For ease of analysis, the claims are addressed out of order.

A. Ground One: Ineffective Assistance of Counsel regarding Venue

Petitioner contends that his counsel was ineffective for failing to seek a change of venue. To prevail on a claim of ineffective assistance of counsel, a habeas petitioner must show that: (1) "counsel's representation fell below an objective standard of reasonableness"; and (2) "the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687, 688 (1984). "The first prong requires a showing 'that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment.'" *White v. Dingle*, 757 F.3d 750, 752 (8th Cir. 2014) (quoting *Strickland*, 466 U.S. at 687). "The second prong requires a showing that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Id.* at 753 (quoting *Strickland*, 466 U.S. at 694).

"[W]hen reviewing an ineffective-assistance-of-counsel claim, 'a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" *Woods v. Donald*, 135 S.Ct. 1372, 1375 (2015) (quoting *Strickland*, 466 U.S. at 689). "Establishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is all the more difficult." *Harrington v. Richter*, 562 U.S. 86, 105 (2011). "The standards created by *Strickland* and § 2254(d) are both 'highly deferential,' and when the two apply in tandem, review is 'doubly' so." *Id.* (internal citations omitted). To grant relief under § 2254, this Court must conclude that the state court unreasonably applied the *Strickland* test or that, in reaching its conclusion regarding the performance of Petitioner's attorney, it made unreasonable factual conclusions. *Gabaree v. Steele*, 792 F.3d 991, 996 (8th Cir. 2015) (citing *Harrington*, 562 U.S. at 131 (additional citation omitted)).

Here, the Missouri Court of Appeals noted the *Strickland* standard and analyzed the claim in part as follows:

> Williams testified that he told trial counsel that he was concerned about getting a fair trial in Buchanan County based on the media coverage of his case. According to Williams, trial counsel told him "the Judge wouldn't let us get it moved to Kansas City, and that if they went to another county, that the county they would send to [sic] would be more racist than the county that I was already in." Trial counsel confirmed that she discussed with Williams whether filing for a change of venue was "strategically wise."
>
> In its findings of fact and conclusions of law, the motion court found that the filing of a motion for change of venue was discussed with Williams, "but such

decisions are trial strategy and therefore not subject to attack if reasonable. Nothing in the record indicates otherwise." The motion court denied the claim.

"A change of venue is required when it is necessary to assure the defendant a fair and impartial trial." *Patterson v. State*, 467 S.W.3d 395, 404 (Mo. App. E.D. 2015) (citing *State v. Deck*, 994 S.W.2d 527, 532 (Mo. banc 1999)). "In assessing the impact of potentially prejudicial publicity on prospective jurors, the critical question is not whether they remember the case, but whether they have such fixed opinions regarding the case that they could not impartially determine the guilt or innocence of the defendant." *Id.* (citation omitted). "The mere existence of pretrial publicity does not automatically require a change of venue." *Id.* (citation omitted). "A decision not to seek a change of venue demonstrates no incompetence by counsel unless it is manifestly wrong." *Id.* (citation omitted).

Here, both Williams and trial counsel testified that they discussed seeking a change of venue. Williams testified that trial counsel believed the case would not be moved to Kansas City and that a change of venue would risk a transfer to a more challenging jurisdiction. It cannot be said that this strategy was unreasonable. *See Clouse*, 964 S.W.2d at 864-65 (finding that "[t]he motion court did not clearly err in determining that trial counsel was competent in that his decision not to ask for a change of venue was reasonable trial strategy, and that this decision was agreed to by the defendant").

In addition, regardless of whether trial counsel's failure to seek a change of venue was reasonable trial strategy, Williams has failed to allege or prove prejudice. Although Williams testified that his case received media coverage in the St. Joseph media market, he presented no evidence that any of the jurors were improperly influenced by the publicity. *See Strickland*, 466 U.S. at 694.

Doc. 11-8 at 10-10 (footnotes omitted).

Given the record and thorough *Strickland*-based analysis, the state court's determinations did not result 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 in "a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *See* 28 U.S.C. § 2254(d)(1) and (2); *see also Cox v. Norris*, 133 F.3d 565, 573 (8th Cir. 1997) (holding that counsel's decision not to seek change of venue because he believed other counties were prone to harsher sentences was a tactical decision and not outside of the range of professional competence).

Additionally, the Court finds that Petitioner cannot establish prejudice under *Strickland* because of the overwhelming evidence of guilt at trial. 466 U.S. at 694. Specifically, a review of the record includes, *inter alia*, that the following evidence was presented at trial: Defendant was introduced to the victim by a mutual friend as the three spent the day consuming drugs and alcohol. Doc. 11-13 at 11. At around 10 or 11pm, the mutual friend left the other two alone at

victim's residence. Doc. 11-13 at 11. At some point during the next several hours, on May 5, 2010, Defendant stabbed the victim to death. Doc. 11-14 at 50.

An autopsy of the victim's body determined that the cause of death was blood loss from twelve to twenty stab wounds including to the right and left neck, right back of head, right shoulder, right back of torso, right upper chest, and right lower chest. Doc. 11-13 at 103-04. Crime scene photos depicted massive blood loss at the head and pillow of victim's bed. Doc. 11-13 at 58. The victim's body was found lying bedroom floor in a large pool of blood. Doc. 11-13 at 83. A toxicology report determined the victim had ingested alcohol, cocaine, and prescription sleep medication. Doc. 11-13 at 102. The morning after the murder, Petitioner left the house on foot and started walking to a bus station with the intention of getting a ride out of town. Doc. 11-14 at 51. Petitioner was arrested across the street from the station in a friend's car waiting for a bus to Kansas City. Doc. 11-14 at 23; Doc. 11-13 at 120.

During the next several hours, Petitioner gave police two confessions that purport to describe what occurred after the friend left Petitioner alone with the victim, both of which were read aloud at trial. Doc. 11-14 at 26-29. The first confession explains that as the evening wore on, the victim began to verbally and physically assault Petitioner, culminating in the victim inserting his finger into Petitioner's rectum, which immediately provoked the murder. Doc. 11-14 at 26-29. When the interrogating officer discussed using a DNA test to confirm this detail, the uninjured Petitioner began to waiver. Doc. 11-14 at 29

Two hours after his first confession, he gave another formal statement to the police explaining that he had lied about the extent of the alleged sexual conduct. Doc. 11-14 at 38-39. In this version, Defendant was forced to perform oral sex on the victim, who then went to bed. Doc. 11-14 at 38-39. The confession goes on to explain that after standing over the sleeping victim for several minutes and thinking that "if he woke up, he would make me do it to him again," Defendant stabbed the victim three times. Doc. 11-14 at 38.

Defendant's testimony at trial presented yet another new account of the moments leading up to the murder. Doc. 11-14 at 56-57. This third version differed from the second in that the sleeping victim awoke when Defendant snuck into the bedroom. Doc. 11-14 at 56-57. The testimony was that the victim, lying in bed, opened his eyes and then Defendant inflicted the first stab wound. Doc. 11-14 at 50. While Defendant commented that victim had a particular "look"

in his eyes at this critical moment, he did not testify that the victim made any threatening comments or gestures. Doc. 11-14 at 50.

Defendant also gave testimony regarding his other options. He agreed that he could have walked out the front door and escaped the alleged threat. Doc. 11-14 at 53. He testified that he used his personal cell phone to call his friend six or seven times during the course of the evening and that he called his sister after the murder to arrange bus transportation out of town. Doc. 11-14 at 38, 49, 55. Finally, he confirmed that the victim had left him alone at the house for at least half an hour. Doc. 11-14 at 52.

Based on the state court's decision and a review of the record, Ground One is denied.

B. Ground Two: Ineffective Assistance of Counsel regarding Venire Panel

Petitioner alleges ineffective assistance of counsel concerning the racial composition of the jury panel. Under *Strickland*, the Missouri Court of Appeals analyzed the claims as follows:

> In Point III, Williams alleges that the motion court erred in denying his claim that his trial counsel was ineffective for failing to object to the lack of racial diversity in the jury pool.
>
> In his *pro se* motion, Williams alleged that his trial counsel was ineffective for failing to object to the lack of racial diversity of the venire panel because none of the fifty prospective jurors "was of Hispanic or Latino, Asian, African-American, Native American or other ethnic decent [sic]." Williams further alleged that "[i]t is well known that St. Joseph, Mo. has a racial problem that exist [sic] between blacks and whites in the community." Williams claimed that trial counsel "failed to use *Batson* law cases to object to the make-up of the venire panel being all [C]aucasians." Williams did not allege in his is *pro se* motion that he was prejudiced by a lack of racial diversity on the venire panel or explain what trial counsel should have done differently.
>
> During *voir dire*, trial counsel announced that "we would like to put it on the record that there are no African-American jurors which creates an issue under Batson. We wanted to put it on the record that there's no constitutional issue [sic] and there's no diverse individual on the panel."
>
> Trial counsel made this record but did not seek any relief.
>
> At the evidentiary hearing, trial counsel testified that the venire panel included 45 to 60 individuals, which was typical for a murder trial in Buchanan County. Trial counsel stated that the venire panel was "primarily Caucasian; however, we did have other ethnicities." Trial counsel was unable to recall the ethnic makeup of the venire panel and testified that Williams raised no concern about the diversity of the venire panel.
>
> Williams testified that he was told by trial counsel that there would be African-Americans on the jury, yet there were none in the venire. Williams explained that he believed trial counsel should have objected because Buchanan County is statistically only eighty-five percent white:

> The makeup of the, according to the Buchanan County Census of 2013, there were 85 percent white and 5.9 percent black, or African-American. There was 6 percent Native American or Alaskan natives, and 1.1 percent Asian and 0.3 percent Pacific islanders, 2.2 percent two or more races, and 5.8 percent were Hispanics, and none of them was on my Jury, not one single other nationality other than white.
>
> "A criminal defendant does have a constitutional right to the unbiased selection of a jury drawn from a cross-section of the community." *Ringo v. State*, 120 S.W.3d 743, 746-47 (Mo. banc 2003) (citation omitted). "To establish a prima facie violation of the fair cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this under-representation is due to systematic exclusion of the group in the jury-selection process." *Id.* at 747 (citation omitted). "Unless it is shown that the difference between the percentage of the individuals in the identifiable group and those within the venires as a whole is greater than 10%, a prima facie case has not been made." *Id.* (citation omitted). "Even if [a defendant's] individual panel was underrepresented by [a certain community], 'a single panel that fails to mirror the makeup of the community is insufficient to establish a prima facie case of systematic exclusion.'" *Id.* (citations omitted).
>
> Williams admits that "there is an extremely high bar for challenging the racial makeup of the jury, which [he] would be unable to meet with the underlying record." We agree. Williams alleged in his *pro se* motion only that his own venire panel lacked racial and ethnic diversity. There was no evidence presented at the evidentiary hearing about the ethnic composition of his venire other than Williams's unsupported allegation that there was no diversity on the panel which was contradicted by trial counsel's testimony that the venire "did have other ethnicities." Further, the record completely lacks evidence regarding the racial or ethnic composition of other venires in Buchanan County. Without alleging sufficient evidence to show that counsel could have made a meritorious objection at trial, Williams cannot succeed on his ineffective assistance of counsel claim. *See Taylor v. State*, 198 S.W.3d 636, 644 (Mo. App. S.D. 2006) (finding that evidence as to the composition of a single venire panel is insufficient to show that a meritorious objection could have been made by trial counsel and cannot result in a finding of ineffective assistance of counsel). Point denied.

Doc. 11-8 at 12-14 (footnotes omitted).

Once again, given the record and thorough *Strickland*-based analysis, the state court's determinations did not result 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 in "a decision that was based on an unreasonable determination of the facts in

light of the evidence presented in the State court proceeding." *See* 28 U.S.C. § 2254(d)(1) and (2). *See also Wharton-El v. Nix*, 38 F.3d 372, 376 (8th Cir. 1994) (applying the above three-factor test). Further, as set out as to Ground One, Petitioner has not established prejudice under *Strickland*. Ground Two is denied.

C. Ground Three: Ineffective Assistance of Counsel regarding Venire Panel

Petitioner alleges ineffective assistance of counsel concerning the "potentially hostile and biased venirepersons" in the jury panel. Under *Strickland*, the Missouri Court of Appeals analyzed the claims as follows:

> In Point IV, Williams claims that the motion court erred in denying his claim that his trial counsel was ineffective for failing to "take any action regarding the six jurors who knew the prosecutor and his allies."
>
> During *voir dire*, six prospective jurors stated that they knew either the prosecutor, someone who works for the prosecutor's office, police detectives who worked on the case, or other potential witnesses in the case. All six veniremembers confirmed that they could be fair and impartial despite these relationships and that they would evaluate the testimony of the witnesses they knew in the same manner they would evaluate the testimony of other witnesses. These six veniremembers were seated on the jury.
>
> In his *pro se* motion, Williams alleged that his trial counsel was ineffective for "allowing [six] potential hostile jurors on the jury panel." At the evidentiary hearing, trial counsel testified that she had discussed striking these six jurors with Williams but noted that there was no basis to strike them for cause because each had been sufficiently rehabilitated. Trial counsel further testified that she and Williams concluded that "there were other jurors that he wanted off more strongly than the jurors that knew various people." Trial counsel explained that "in every trial I had in Buchanan County, everyone on the venire panel knew either a police officer or the prosecutor or the Judge or had some contact with the Court in some way" and that Williams did not make any complaints to her about the six jurors once the jury was seated.
>
> The motion court denied this claim, finding that "[t]rial counsel testified she discussed the venire panel with Movant as to who Movant felt most strongly should be struck. Movant cannot claim error for his own decisions."
>
> "A defendant is entitled to a fair and impartial jury." *Brown v. State*, 450 S.W.3d 450, 453 (Mo. App. W.D. 2014) (quoting *Moore v. State*, 407 S.W.3d 172, 175 (Mo. App. E.D. 2013)). "Each venireperson must be able to serve on the jury with an open mind, free from bias and prejudice." *Id.* (quoting *Moore*, 407 S.W.3d at 175). A prospective juror who is unable to be fair or impartial must be stricken from the jury unless he or she is further questioned and is "rehabilitated by giving unequivocal assurances of impartiality." *Id.* (citations omitted). A possibility of bias or prejudice is not enough; "instead, '[i]t must clearly appear from the evidence that the challenged venireperson was in fact prejudiced.'" *Id.* (citations omitted). "To succeed in his motion for post-conviction relief, Movant

must prove actual bias on the part of the venireperson." *Moore*, 407 S.W.3d at 176 (citation omitted).

Williams did not allege, let alone prove, any actual bias on the part of any of the six jurors. Although all six jurors had various levels of familiarity with the prosecutor, prosecutor's office, law enforcement, or other witnesses involved in the trial, all six jurors stated that they could put aside these familiarities and weigh the testimony of these witnesses in the same manner as they would the testimony of the other witnesses. Because Williams has not shown that any of the six jurors were unqualified to decide his case, his claim of ineffective assistance of counsel must fail.

Doc. 11-8 at 14-16.

Once again, given the record and thorough *Strickland*-based analysis, the state court's determinations did not result 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 in "a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *See* 28 U.S.C. § 2254(d)(1) and (2); *see also Williams v. Norris*, 612 F.3d 941, 955 (8th Cir. 2010) (holding that *Strickland* claim could not succeed because the petitioner could not show that juror was impermissibly biased, that counsel's failure to object to the juror was deficient performance, or that empaneling the juror deprived the petitioner of a fair trial); *United States v. Evans*, 272 F.3d 1069, 1079 (8th Cir. 2001) (federal review is limited to abuse of discretion due to the substantial discretion given to district courts in conducting voir dire, and a district court's finding that a prospective juror can put aside any pretrial opinion and render a verdict based upon the evidence will not be overturned unless the error is manifest). Additionally, as set out above, Petitioner cannot establish prejudice. Ground Three is denied.

D. Ground Eight: Self-Defense Instruction

Petitioner contends that he is entitled to relief because the trial court denied the use of a self-defense instruction.

As noted above, federal habeas actions are allowed "only on the grounds that [the petitioner] is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). "[F]ederal courts are limited to deciding whether a state conviction violated the federal Constitution or laws." *Schleeper v. Groose*, 36 F.3d 735, 737 (8th Cir. 1994) (citation omitted). "A federal court may not re-examine a state court's interpretation of and

application of state law." *Id.*; *see also Carter v. Armontrout*, 929 F.2d 1294, 1296 (8th Cir. 1991) (claims that do not reach constitutional magnitude cannot be addressed in a petition for habeas corpus).

"A defendant has a due process right to a self-defense instruction if the evidence satisfies the requirements of the applicable law on self-defense." *Lannert v. Jones*, 321 F.3d 747, 754 (8th Cir. 2003) (citing *Woods v. Solem*, 891 F.2d 196, 199 (8th Cir. 1989) (holding that "if [a defendant] is entitled to a self-defense instruction under [state] law, the trial court's refusal to issue such an instruction violate[s] due process"). *See also Crump v. Caspari*, 116 F.3d 326, 328 (8th Cir. 1997) (petitioner did not show he had a reasonable belief he was in imminent danger of unlawful force under Missouri law; therefore, "the refusal of a self-defense instruction did not result in a miscarriage of justice or omission inconsistent with the demands of fair procedure.").

Here, viewing the evidence in the light most favorable to Petitioner, the Missouri Court of Appeals analyzed this claim extensively, as follows:

> At trial, Appellant testified that, as the evening progressed, Joslin became increasingly aggressive toward Appellant, choking him, picking him up, and slinging him to the ground. Joslin's increased aggression toward Appellant was one of the reasons Teague left Joslin's home. After Teague left, Joslin asked Appellant if Appellant had any more money. When Appellant told Joslin that he did not, Joslin called Appellant a lying " n****r", approached Appellant, and began hitting him and saying "let's fight." Joslin then sat down in the chair closest to the front door and continued to call Appellant derogatory names. Appellant told Joslin he would leave, but Joslin told him "you still ain't going nowhere. You my n****r b***h now."
>
> While Joslin made a phone call, Appellant called a girl he had met to tell her he had moved in with Joslin. When Joslin heard Appellant mention his name, Joslin became angry, approached Appellant, grabbed him by the throat, and hit him a couple of times. Appellant refused to fight and went into the kitchen to light a cigarette off the stove. Appellant thought about sneaking out the back door, but the door was locked from the inside and required a key to get it open. Appellant then grabbed two knives from the kitchen, putting one in his sock and the other in his belt. Appellant did not try to leave out the front door because Joslin was sitting by it.
>
> When he returned from the kitchen, Appellant heard Joslin on the phone saying "Hey, man, you want to come over and get some of his black ass." When Joslin got off the phone, he told Appellant "F**k you, man, your ass is mines tonight." Joslin then went out the front door and appeared to walk over to the next-door neighbor's home. Appellant did not leave because he believed Joslin might be outside the door waiting with the other person Joslin had just called on the phone. While Joslin was gone, Appellant called Teague seven or eight

times and left voicemail messages telling Teague to come get him. Joslin returned home thirty to forty-five minutes later.

Joslin again began to choke and hit Appellant, telling Appellant that he would kill him. He then threw Appellant on the couch and told him to "sit your ass down." Joslin went over to the door and did something with the lock. He then went into the bedroom and returned five minutes later, naked. He forced Appellant into his bedroom and told Appellant to perform fellatio upon him. Appellant initially refused, but Joslin hit him several times in the head. Appellant eventually complied. Following the incident, Joslin ordered Appellant to get out of the room. Appellant was sitting on the living room couch when Joslin came to the doorway of the bedroom and told Appellant that he would make Appellant do it again in the morning.

Appellant began pacing and crying. He went to the kitchen and got a knife. He planned to go in to Joslin's bedroom and tell him to leave him alone. Appellant went in to Joslin's bedroom. Joslin was laying on the bed with his eyes shut. Appellant stood over him, crying. Joslin heard Appellant sniffling, opened his eyes, and gave Appellant the same "look" he had given Appellant when he had previously choked him. Appellant reacted by stabbing Joslin in the chest with the knife. Joslin reached for and grabbed Appellant, so Appellant stabbed him again. When Joslin attempted to stand up, he slouched down off the bed and fell to the floor. Appellant remembers stabbing Joslin three times. Joslin suffered from approximately twelve to twenty stab wounds.

After the stabbing, Appellant called a few family members requesting they purchase him a bus ticket. Appellant then found the key to the back door and fled from Joslin's home. Police arrested Appellant sitting on a bench in front of the YMCA across from the bus station.

After his arrest, Appellant gave two different statements to the police. The first statement was similar to his testimony at trial but provided that Appellant stabbed Joslin immediately after Joslin forced him into the bedroom, made Appellant take off his clothes, and attempted to stick his fingers in Appellant's rectum. In his second statement, Appellant stated that portions of his previous statement were untrue and indicated that Joslin had forced Appellant to perform fellatio upon him. It further provided that, after returning to the couch, Appellant got angry. He went and looked in at Joslin, who was lying on the bed. He then went to the kitchen, got a knife, returned to the bedroom, and stood over Joslin with the knife. Appellant got so angry that "he snapped and stabbed [Joslin] in the neck." Joslin sat up, yelled, and tried to grab Appellant, so Appellant stabbed him again. At one point, Appellant was on the bed stabbing Joslin. When Joslin tried to get off the bed, he fell and slid off the bed onto the floor.

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"[S]elf defense is a person's right to defend himself or herself against attack." *Fisher v.* State, 359 S.W.3d 113, 118 (Mo. App. W.D. 2011) (internal quotation omitted). Section 563.031.2 limits the justifiable use of deadly force

upon another person to situations where the actor reasonably believes that such force is necessary to protect himself or another against, among other things, death, serious physical injury, or a forcible felony. *Id.* at 118-19. In situations involving the use of deadly force, the self-defense instruction should be given only when the evidence shows:

> (1) an absence of aggression or provocation on the part of the defender; (2) a real or apparently real necessity for the defender to kill in order to save himself from an immediate danger of serious bodily injury or death; (3) a reasonable cause for the defendant's belief in such necessity; and (4) an attempt by the defendant to do all within his power consistent with his personal safety to avoid the danger and the need to take a life. *Thomas*, 161 S.W.3d at 379 (citing *State v. Chambers*, 671 S.W.2d 781, 783 (Mo. banc 1984)).

The evidence, viewed in the light most favorable to Appellant, establishes that Joslin had physically assaulted Appellant throughout the course of the evening. Joslin then forced Appellant to perform fellatio. After the fellatio, Joslin permitted Appellant to leave the bedroom. Joslin then told Appellant that he would make him do it again in the morning. Appellant went to the kitchen and got a knife. He walked into Joslin's bedroom with the intention of letting Joslin know he was not going to touch him again. Joslin was lying on the bed with his eyes shut while Appellant stood over him. Joslin opened his eyes and gave Appellant a "look." Appellant then stabbed Joslin multiple times.

Appellant contends that, based upon this evidence, the jury should have been permitted to determine the reasonableness of his actions. Appellant emphasizes the circumstances preceding the stabbing, particularly that Joslin was twice his size, had been physically assaulting him all evening, had just forced Appellant to perform fellatio, and was threatening to make him do it again in the morning. Although such facts suggest Appellant had a reason to fear Joslin, they do not demonstrate a real or apparent necessity for Appellant to exert deadly force against Joslin in order to save himself from an immediate danger of serious bodily injury, death, or a forcible felony.

For a person to be justified in using deadly force to protect oneself from the commission of a forcible felony, "the person must reasonably believe that the felony is actually occurring or is imminent." *State v. Clinch*, 335 S.W.3d 579, 587 (Mo. App. W.D. 2011). To use deadly force, there must be "some affirmative action, gesture, or communication by the person feared indicating the immediacy of danger, the inability to avoid or avert it, and the necessity to use deadly force as a last resort." *Fisher*, 359 S.W.3d at 119 (internal quotation omitted). The use of deadly force, therefore, requires something more than fear. *Id.*

The circumstances of this case do not establish the requisite imminence of a forcible felony to justify Appellant's use of deadly force. Appellant did not use deadly force to protect himself during the sodomy or to escape after

the sodomy occurred. Rather, after being permitted to exit the bedroom, Appellant chose to go to the kitchen, grab a knife, and return to threaten Joslin, who was lying on the bed with his eyes closed. Appellant then stabbed Joslin multiple times after Joslin opened his eyes and gave Appellant "that look." Thus, the altercation between Appellant and Joslin had ended prior to Appellant's use of deadly force.

Furthermore, the giving of a look does not indicate the immediacy of danger. Appellant contends that the look in the context of the facts preceding the sodomy and Joslin's threat that he would make Appellant "do it again in the morning" indicate Appellant had a reasonable belief that there was an imminent risk Joslin would sodomize him again. Such circumstances, however, do not negate the fact that Joslin permitted Appellant to leave the bedroom following the sodomy. Appellant then remained in the front room alone and unrestrained while Joslin returned to the bedroom, lay down on the bed and closed his eyes. Thus, while Appellant may have feared the look Joslin gave him, it occurred after Appellant chose to return to the bedroom and confront Joslin, and therefore, did not constitute conduct by Joslin indicating the immediacy of danger required to justify the use of deadly force.

Doc. 11-3 at 4-10.

After careful review, the Court finds that Petitioner's broad claims here fail to allege facts that meet the high burden required to receive federal habeas review on a state-court evidentiary ruling. *See Lannert*, 321 F.3d at 754 (the refusal of a self-defense instruction did not result in a miscarriage of justice or omission inconsistent with the demands of fair procedure under Missouri law). Ground Eight is denied.

E. Grounds Four, Five, Six, Seven, Nine, and Ten: Procedurally Defaulted

In his fourth ground, Petitioner alleges trial counsel was ineffective for failing to investigate all of the documents needed for an expert witness. In his fifth ground, Petitioner alleges the prosecutor committed misconduct by "endorsing" jurors that he knew. In his sixth ground, Petitioner alleges trial counsel was ineffective for failing to object to the trial court's failure to inquire about the impartiality of the venire. In his seventh ground, Petitioner alleges the trial court erred by excluding the contents of a voicemail made by the victim. In his ninth ground, Petitioner alleges trial counsel was ineffective for failing to object to the verdict directors for murder and armed criminal action. In his tenth ground, petitioner alleges trial counsel was ineffective for being "objectively deficient."

These grounds Petitioner raises in his federal petition were not properly presented to the state courts. As noted above, a petitioner must exhaust state remedies. In other words, to avoid

procedurally defaulting on a claim, a federal habeas petitioner must have first fairly presented the substance of the claim to the state courts to afford the state courts a fair opportunity to apply controlling legal principles to the facts pertinent to the claim. *Wemark v. Iowa*, 322 F.3d 1018, 1020–21 (8th Cir. 2003) (citation omitted); *see also Baldwin v. Reese*, 541 U.S. 27, 29 (2004). 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. *Wemark*, 322 F.3d at 1021 (internal quotation marks and citations omitted). 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)); *Smith v. Groose*, 998 F.2d 1439, 1441 (8th Cir. 1993) (citation omitted) (holding that failure to comply with state procedural requirements "serves as an adequate and independent state procedural bar to review").

A federal court may not review procedurally defaulted claims "unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman*, 501 U.S. at 750. To demonstrate cause, a petitioner must show that "some objective factor external to the defense impeded [the petitioner's] efforts to comply with the State's procedural rule." *Murray v. Carrier*, 477 U.S. 478, 491 (1986). To establish prejudice, a petitioner must demonstrate that the claimed errors "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); *Ivy v. Caspari*, 173 F.3d 1176 (8th Cir. 1999) (noting standard in plea context). Lastly, in order to assert the fundamental miscarriage of justice exception, a petitioner must "'present new evidence that affirmatively demonstrates that he is innocent of the crime for which he was convicted.'" *Murphy v. King*, 652 F.3d 845, 850 (8th Cir. 2011) (quoting *Abdi v. Hatch*, 450 F.3d 334, 338 (8th Cir. 2006)).

After careful review of the record, Petitioner's allegations fail to establish a substantial claim, nor does Petitioner establish cause to excuse his procedural default.

Petitioner fails also to show that a fundamental miscarriage of justice will result if his defaulted claim is not considered. *See Murphy*, 652 F.3d at 850 (a petitioner must present new evidence that affirmatively demonstrates that he is actually innocent of the crime for which he was convicted in order to fit within the fundamental miscarriage of justice exception).

Further, to the extent Petitioner seeks relief under *Martinez v. Ryan*, any such claim fails procedurally and/or because Petitioner fails to establish that the claims are "substantial" inasmuch as his allegations are "wholly without factual support." 566 U.S. 1, 14-16 (2012).[3] Additionally, on review of the record, including the evidence admitted at trial as detailed in Ground One, Petitioner cannot establish prejudice because the evidence of guilt was overwhelming.

Here, Petitioner has not shown good cause and actual prejudice to overcome his default, nor has he established a fundamental miscarriage of justice or the right to relief under *Martinez*. The remaining grounds are denied.

VI. Certificate of Appealability

Under 28 U.S.C. § 2253(c), the Court may issue a certificate of appealability only "where a petitioner has made a substantial showing of the denial of a constitutional right." To satisfy this standard, Petitioner must show that "reasonable jurists" would find the district court ruling on the constitutional claim(s) "debatable or wrong." *Tennard v. Dretke*, 542 U.S. 274, 276 (2004). Because Petitioner has not met this standard, a certificate of appealability will be denied.

VII. Conclusion

For the foregoing reasons, Petitioner's petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 is DENIED, a certificate appealability is DENIED, and this case is DISMISSED.

IT IS SO ORDERED.

/s/ Howard F. Sachs
HOWARD F. SACHS
UNITED STATES DISTRICT JUDGE

DATED: April 3, 2020

[3] To establish "cause" to overcome procedural default under *Martinez*, a petitioner must show: (1) the underlying ineffective assistance of trial counsel claim is "substantial," (2) the "cause" consisted of there being no counsel or ineffective counsel during the post-conviction relief proceeding, (3) the state post-conviction relief proceeding was the initial review proceeding, and (4) state law required (or forced as a practical matter) the petitioner to bring the claim in the initial review collateral proceeding. *Trevino v. Thaler*, 133 S. Ct. 1911, 1918 (2013).

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