UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 21-2424

Timothy McClendon

Petitioner - Appellant

v.

Chris Brewer, Warden

Respondent - Appellee

Appeal from U.S. District Court for the Western District of Missouri - Kansas City
(4:20-cv-00735-HFS)

JUDGMENT

Before GRUENDER, KELLY, and KOBES, Circuit Judges.

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

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

November 22, 2021

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

/s/ Michael E. Gans

A-1

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 21-2424

Timothy McClendon

Appellant

v.

Chris Brewer, Warden

Appellee

Appeal from U.S. District Court for the Western District of Missouri - Kansas City
(4:20-cv-00735-HFS)

ORDER

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

January 05, 2022

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

/s/ Michael E. Gans

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

TIMOTHY McCLENDON,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 20-0735-CV-W-HFS-P
	)	
CHRIS BREWER,	)	
	)	
Respondent.	)	

ORDER DENYING PETITION FOR A WRIT OF HABEAS CORPUS AND DECLINING TO ISSUE A CERTIFICATE OF APPEALABILITY

Petitioner filed this case *pro se*, seeking habeas corpus relief pursuant to 28 U.S.C. § 2254 from his convictions following a jury trial in the Circuit Court of Jackson County, Missouri, for murder in the first degree and armed criminal action. Doc. 1 (petition). The Missouri Court of Appeals affirmed Petitioner's convictions, *State v. McClendon*, 477 S.W.3d 206 (2015), and the denial of his motion for post-conviction relief, Doc. 9-10 (unpublished opinion).

Petitioner's convictions stem from his involvement in a gun fight at a Kansas City car wash. Although Petitioner was not the initial aggressor, and Petitioner acted in self-defense when he initially shot at the victim, ultimately, Petitioner shot the victim 32 times, killing him while he was lying incapacitated on the ground. *McClendon*, 477 S.W.3d at 209-11. The facts are set out fully in *McClendon, id.*, and will be restated in this Order only as needed to resolve Petitioner's claims.

Petitioner claims 15 grounds for federal relief. Doc. 1-1, pp. 1-49 (attachment to petition). The Court may grant habeas corpus relief "only on the ground that [Petitioner] is in custody in violation of the Constitution or laws or treaties of the United States." § 2254(a).

B-1

The Claims Preserved for Federal Review – Grounds (1)-(9)

Alleged Error by the Trial Court – Grounds (1) and (2)

As ground (1), Petitioner claims the trial court erred by denying his motion to suppress a statement he made to the police because it "was elicited using a 'two stage' interrogation which allowed for an unconstitutional 'end run' around the prohibitions in Miranda[.]" Doc. 1-1, p. 1 (attachment to petition).[1] The Missouri Court of Appeals considered and rejected this claim. *McClendon*, 477 S.W.3d at 211-15. Petitioner made three statements to the police; he made the first two before police had reviewed videotape and other evidence of the crimes. *Id.* at 210-11. In rejecting ground (1), the Missouri Court of Appeals wrote:

> McClendon argues that the second and third statements made to police were in response to a coordinated two-step interrogation technique. McClendon claims that despite Detective Lenoir's statement that during the second interview he understood that McClendon had acted in self-defense, the detective knew there was a videotape to be examined and remaining evidence that could still implicate McClendon. Thus, the detective's questioning of McClendon, prior to the viewing of the tape, was an opportunity to talk to McClendon prior to *Mirandizing* him and, therefore, a violation of his constitutional rights. The State argues that there is no evidence that the police deliberately withheld *Miranda* warnings trying to obtain an advantage in interrogation.
>
> McClendon's argument that the police deliberately used a two-step interrogation technique to undermine his constitutional rights is not supported by the record. Detective Lenoir, who interviewed McClendon in the hospital during his second un-*mirandized* suppressed statement, testified that when he spoke with McClendon early in the morning following the shootings, he did not believe McClendon had done anything other than act in self-defense as McClendon had claimed and continued to

[1] "The two-step interrogation process is an intentional tactic by law enforcement to circumvent *Miranda* requirements by deliberately delaying the warnings in order to provoke a confession." *United States v. Magallon*, 984 F.3d 1263, 1283 (8th Cir. 2021) (citation and quotation marks omitted) (underscore added). The United States Supreme Court prohibited this practice in *Missouri v. Seibert*, 542 U.S. 600 (2004).

> claim. At that time, the detective had not yet viewed the videotape footage of the incident and had no information regarding the identity of the victim or details regarding how many shots had been fired and by whom. It is also reasonable to infer that he would not have any information from the autopsy, [which] occurred on the same day. As the second interview took place [in the early morning,] it is reasonable to infer the autopsy results were not yet available to police.
>
> It was only after reviewing the videotape seven hours later that police brought McClendon into the police station for questioning, where he subsequently waived his *Miranda* rights. Detective Lenoir specifically testified that he did not and does not intentionally fail to *mirandize* someone when he considers them a suspect because he knows the statement would be inadmissible. There is simply no evidence in the record that police deliberately decided to withhold *Miranda* warnings pursuant to a strategy to elicit information first and *mirandize* later. There is also no indication that the trial court found the detective's testimony to be anything other than credible.
>
> . . .
>
> Finally, in order for a statement to be admissible after finding that there was no improper two-step interviewing technique employed, the statements must have been knowingly and voluntarily made. Apart from his argument that police used an improper two-step interrogation technique, McClendon does not contest a knowing and voluntary waiver of his *Miranda* rights for his third statement and nothing in the record suggests that the waiver was not knowingly and voluntarily made.

McClendon, 477 S.W.3d at 213-15 (certain citations omitted).

The Missouri Court of Appeals' resolution of Petitioner's *Miranda* claim was not based on "an unreasonable determination of the facts in light of the evidence" or an unreasonable application of "clearly established Federal law." § 2254(d)(1) and (2). *See Thai v. Mapes,* 412 F.3d 970 (8th Cir. 2005) (habeas corpus review of state convictions involving *Miranda* claims). Relief is denied on ground (1).

As ground (2), Petitioner claims the trial court erred by refusing to declare a mistrial when, during closing argument, the prosecutor "asked jurors to consider why [Petitioner] was hanging

out at the car wash all the time with a gun and large amounts of ammunition[.]" Doc. 1-1, p. 5 (attachment to petition). The Missouri Court of Appeals considered this claim and found no error:

> In closing argument, the State argued, in pertinent part, as follows: "Something that's happened through all this is we've forgotten to look at him. He hangs out at the car wash at 43rd and Prospect almost every day for hours on end. What's he doing? He has at least 61 rounds of ammunition on him."
>
> McClendon's counsel immediately objected to the argument, challenging the State's alleged implication that McClendon was engaged in uncharged illegal conduct at the car wash. Counsel moved for a mistrial. The court refused to grant a mistrial but instructed the jury to disregard the State's question of "What's he doing there?" All of the facts contained in this statement were previously admitted into evidence in the trial.
>
> Assuming, as the trial court found, that the implication the State was trying to make was improper propensity evidence, the question is whether the court's remedy, the instruction to the jury to disregard the comment, sufficiently removed the prejudice to McClendon or whether a mistrial was required. As stated *supra,* a mistrial is a drastic remedy and is only required where prejudice to the defendant cannot be removed in any other way. Normally, an instruction to the jury to disregard inadmissible evidence or improper argument is a sufficient remedy, as we must presume the jury has followed the court's instructions.
>
> The trial court, being in the best position to judge the prejudicial effect of improper arguments on the jury, is given discretion in its determination of whether a mistrial is warranted. The only portion of the argument by the State that was not a fact in evidence was the question asking what McClendon was doing at the car wash. The jury was instructed to disregard the comment and we must assume that they followed this instruction. Given the trial court's curative instruction to the jury to disregard the improper argument, we cannot say the trial court abused its discretion in refusing to grant a mistrial.

McClendon, 477 S.W.3d at 215-16 (citations and footnote omitted).

The Missouri Court of Appeals' resolution of Petitioner's closing argument/mistrial claim was not based on "an unreasonable determination of the facts in light of the evidence" or an unreasonable application of "clearly established Federal law." § 2254(d)(1) and (2). *See Sublett*

v. Dormire, 217 F.3d 598, 600 (8th Cir. 2000) (on a claim of improper closing argument, federal habeas relief will be denied unless "the prosecutor['s] comments so infected the trial with unfairness as to make the resulting conviction a denial of due process") (quotation marks omitted), *cert. denied*, 531 U.S. 1128 (2001); *United States v. Earles*, 955 F.2d 1175, 1179 (8th Cir. 1992) ("the decision whether to grant a mistrial, which is a very drastic remedy, lies within the sound discretion of the [trial] court"). Relief is denied on ground (2).

Alleged Ineffectiveness of Trial Counsel – Grounds (3)-(9)

In ground (3), Petitioner faults his attorney for failing to secure the trial testimony of Reginald Thomas or to read all of Thomas' deposition testimony to the jury. Doc. 1-1, p. 7 (attachment to petition). Petitioner states that Thomas would have testified that the victim "didn't know [Petitioner, but was at the car wash] to kill him because he thought [Petitioner] was the person who shot him in 2004." *Id.* Petitioner argues: "There is a reasonable probability that, if the jury had heard Mr. Thomas' complete testimony, it would have found that [Petitioner], after being suddenly shot three times by a complete stranger . . . , did not instantly recover control of his emotions, make a decision to kill [the victim], and coolly reflect on that decision before shooting [the victim]." *Id.* at 8.

The Missouri Court of Appeals found no constitutional violation regarding ground (3), noting that "trial counsel had concluded that it was advantageous to the defense that Thomas not appear as a live witness at trial," and that it was preferable that he "read [to the jury] the parts of Thomas's [deposition] testimony that supported [the] self-defense theory." Doc. 9-10, pp. 7-8 (unpublished opinion) (footnotes omitted).

In ground (4), Petitioner asserts that trial counsel was ineffective for failing to test the blood that was splattered on Petitioner's vehicle, arguing that his claim of self-defense would have

been bolstered if he could have been shown that the blood came from the victim. Doc. 1-1, pp. 10 (attachment to petition). The Missouri Court of Appeals disagreed, noting:

> At the evidentiary hearing [on Petitioner's motion for post-conviction relief pursuant to Missouri Supreme Court Rule 29.15], trial counsel testified that it was an important component of his trial strategy to argue that the blood spatter on [Petitioner's] vehicle was [the victim's] blood because "[i]t would enhance the argument that perhaps the lethal wounds were received during the lawful self-defense." Trial counsel testified that his strategy for not testing the blood before trial was based on concern that such testing might have established that it was [Petitioner's] blood . . . . Trial counsel further testified that he discussed this strategy with [Petitioner, who] agreed that they should not have the blood tested.
>
> In its findings of fact and conclusions of law . . . , the motion court found that trial counsel's strategy in declining to have the blood droplets tested was not unreasonable. We agree.

Doc. 9-10, pp. 9-10 (unpublished opinion).

In the grounds for relief indicated, Petitioner argues that his attorney was ineffective for not objecting during closing argument when the prosecutor (5) misstated the law regarding deliberation, Doc. 1-1, p. 12 (attachment to petition), (6) argued that Petitioner and the victim "knew each other and had a history," *id.* at 16 (internal quotation marks omitted); (8) argued that the jury should send a message on taking the law into your own hands, *id.* at 21; and (9) argued that Petitioner shot the victim knowing he was out of ammunition, *id.* at 23.

The Missouri Court of Appeals considered and rejected each of these arguments, concluding: (5) "the State's argument about deliberation was not a misstatement of the law," Doc. 9-10, p. 12 (unpublished opinion) (citation omitted); (6) "it was a reasonable inference from the evidence presented at trial that . . . there was some history between these two men and [that the murder was] not a random act of violence, and the State was allowed to argue such," *id.* at 14 (quotation marks omitted); (8) Petitioner was not prejudiced by the taking-the-law-into-your-own-

hands argument, "particularly . . . given the strength of the evidence of guilt in this case," *id.* at 16; and (9) "the arguments advanced by the State and McClendon concerning whether McClendon believed [the victim] was out of ammunition were both plausible under the evidence and thus not objectionable," *id.* at 18.

In ground (7), Petitioner asserts that trial counsel suffered from a conflict of interest because he had represented the victim "in an unrelated criminal proceeding." Doc. 1-1, p. 19 (attachment to petition). The Missouri Court of Appeals rejected this claim, finding that Petitioner "failed to plead or prove that trial counsel's representation of [the victim] in a wholly unrelated case nearly a decade earlier constituted an actual conflict of interest." Doc. 9-10, p. 20 (unpublished opinion).

The factual findings that underlie the Missouri Court of Appeals' legal conclusions regarding the performance of trial counsel are presumed to be correct, § 2254(e)(1), and the Court finds that Petitioner has not rebutted this presumption by clear and convincing evidence. *See* Doc. 13 (Petitioner's reply). Moreover, the Missouri Court of Appeals' resolution of Petitioner's ineffective-assistance claims was not based on an "unreasonable application [of] clearly established Federal law[.]" § 2254(d)(1); *see Strickland v. Washington*, 466 U.S. 668, 694 (1984) (in order to establish ineffective assistance of counsel, habeas petitioner must show that his attorney's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced the defense). Relief is denied on grounds (3)-(9).

The Claims Not Preserved for Federal Review – Grounds (10)-(15)

In remaining grounds (10)-(15), Petitioner claims he was denied effective assistance of counsel on direct appeal and at trial. Doc. 1-1, pp. 25-49 (attachment to petition). "Before seeking federal relief under § 2254, a petitioner ordinarily must fairly present the federal claim to

the state courts. By exhausting all available state court remedies, [a petitioner] gives a state the opportunity to pass upon and correct alleged violations of . . . federal rights." *Murphy v. King*, 652 F.3d 845, 848-49 (8th Cir. 2011) (citations and quotation marks omitted), *cert. denied*, 565 U.S. 1221 (2012). "If a petitioner has not presented his habeas corpus claim to the [appropriate] state court, the claim is generally defaulted." *Id.*

Petitioner defaulted grounds (10)-(15) by not presenting these claims to the Missouri Court of Appeals. *See Sweet v. Delo*, 125 F.3d 1144, 1149-50 (8th Cir. 1997) (claims that have not been presented in the appropriate Missouri appellate court are procedurally defaulted), *cert. denied*, 523 U.S. 1010 (1998). 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 v. Thompson*, 501 U.S. 722, 750 (1991).

Petitioner concedes his default of grounds (10)-(15), but he urges the Court to review the substance of these claims under the exception to the doctrine of procedural default created by *Martinez v. Ryan*, 566 U.S. 1 (2012). Doc. 1-1, pp. 26, 30, 33, 37, 43, and 47 (attachment to petition). In *Martinez*, the Court announced that "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, . . . counsel in that proceeding was ineffective." 566 U.S. at 17. To show cause under *Martinez*, Petitioner "must demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that [Petitioner] must demonstrate that the claim has some merit." *Id.* at 14 (citation omitted).

Petitioner's underlying claims are that he was denied effective legal assistance because: (10) counsel on direct appeal was "incapable of providing effective assistance due to excessive case volume," Doc. 1-1, p. 25 (attachment to petition); (11) counsel on direct appeal failed to argue

that the victim was killed by a shot fired in self-defense, *id.* at 30; (12) trial counsel failed to have blood on Petitioner's vehicle examined for the purposes of showing that it was the victim's blood and that the victim died by a shot or shots fired in self-defense,[2] *id.* at 33; (13) trial counsel failed to request a curative instruction or other relief when the trial judge denied Petitioner's motion for a mistrial "on the basis that members of the alleged victim's family disrupted the proceedings by outbursts and emotional displays in and outside of the courtroom," *id.* at 37; (14) trial counsel failed to challenge the admissibility of evidence regarding Petitioner's first statement to the police, *id.* at 43; and (15) trial counsel failed to locate and present the testimony of a crime scene reconstruction expert for the purpose of showing that the victim was killed by a shot fired in self-defense, *id.* at 47.

Martinez provides no help to Petitioner on grounds (10) and (11), which relate to the performance of counsel on direct appeal. *See Dansby v. Hobbs*, 766 F.3d 809, 833 (8th Cir. 2014) (*Martinez* does not extend to claims of ineffective assistance of appellate counsel), *cert. denied*, 577 U.S. 828 (2015). As for grounds (12)-(15), which involve the performance of trial counsel, the Court has reviewed the record and finds that none of these claims is substantial enough to trigger the "narrow exception" created by *Martinez*, 566 U.S. at 9. "[G]iven the strength of the evidence of guilt in this case," Doc. 9-10, p. 16 (characterization of the evidence by the Missouri Court of Appeals in its unpublished opinion – a characterization with which this Court agrees), Petitioner is unable to demonstrate the prejudice required by *Strickland*, 466 U.S. at 694.

As for all of Petitioner's defaulted claims, the Court finds that further review is not required to prevent a fundamental miscarriage of justice. *See* Doc. 13 (Petitioner's reply);

---

[2] Petitioner describes this claim as a "derivative" of ground (4). Doc. 1-1, p. 33 (attachment to petition).

Bowman v. Gammon, 85 F.3d 1339, 1346 (8th Cir. 1996) (in order to demonstrate that a failure to consider defaulted claims will result in a fundamental miscarriage of justice, habeas petitioner must show that he is "probably actually innocent" of the crimes for which he was convicted) (citation omitted), *cert. denied*, 520 U.S. 1128 (1997).

Conclusion

For the reasons explained above, Petitioner's application for a writ of habeas corpus is denied, and the Court declines to issue a certificate of appealability. *See* 28 U.S.C. § 2253(c)(2) (certificate of appealability may be issued "only if [Petitioner] has made a substantial showing of the denial of a constitutional right"). The Clerk of the Court shall enter judgment accordingly and dismiss this case.

So **ORDERED**.

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

Dated: June 10, 2021.