

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

No: 22-3180

Joel Suarez

Appellant

v.

Chris Brewer, Warden, WMCC

Appellee

Appeal from U.S. District Court for the Western District of Missouri - Kansas City
(4:22-cv-00413-DGK)

ORDER

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

January 17, 2023

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
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No: 22-3180

Joel Suarez

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Appeal from U.S. District Court for the Western District of Missouri - Kansas City
(4:22-cv-00413-DGK)

MANDATE

In accordance with the judgment of December 2, 2022, and pursuant to the provisions of Federal Rule of Appellate Procedure 41(a), the formal mandate is hereby issued in the above-styled matter.

January 24, 2023

Clerk, U.S. Court of Appeals, Eighth Circuit

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

No: 22-3180

Joel Suarez

Petitioner - Appellant

v.

Chris Brewer, Warden, WMCC

Respondent - Appellee

Appeal from U.S. District Court for the Western District of Missouri - Kansas City
(4:22-cv-00413-DGK)

JUDGMENT

Before LOKEN, ERICKSON, and STRAS, 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. Appellant's motion for leave to proceed on appeal in forma pauperis and the motion for appointment of counsel are denied as moot. The appeal is dismissed.

December 02, 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
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

JUDGMENT IN A CIVIL CASE

JOEL SUAREZ,

Petitioner,

v.

Case No. 22-0413-CV-W-DGK-P

CHRIS BREWER,

Respondent.

- JURY VERDICT.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.
- DECISION OF THE COURT.** This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED: 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.

Entered on: September 12, 2022.

PAIGE WYMORE-WYNN
CLERK OF COURT

/s/ K. Willis
(By) Deputy Clerk

2022 SEP 12 PM 09:57
U.S. DISTRICT COURT CLERK'S OFFICE
WESTERN DISTRICT OF MISSOURI

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

JOEL SUAREZ,)
Petitioner,)
vs.) Case No. 22-0413-CV-W-DGK-P
CHRIS BREWER,)
Respondent.)

**ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS
AND DENYING THE ISSUANCE OF A CERTIFICATE OF APPEALABILITY**

Petitioner, a convicted state prisoner currently confined at the Western Missouri Correctional Center in Cameron, Missouri, has filed *pro se* a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges his 2016 convictions and sentences for first-degree murder, first-degree burglary, and two counts of armed criminal action, which were entered in the Circuit Court of Jackson County, Missouri. Doc. 1, p. 1. Petitioner's convictions were affirmed on direct appeal. Doc. 6-6. Petitioner's motion for post-conviction relief filed pursuant to Mo. Sup. Ct. R. 29.15 was denied following an evidentiary hearing (Doc. 6-8, pp. 48-60; Doc. 6-7), and that denial was affirmed on appeal therefrom (Doc. 6-11). For the reasons set forth below, the petition for writ of habeas corpus is DENIED, a certificate of appealability is DENIED, and this case is DISMISSED.

I. Background

In affirming on direct appeal, the Missouri Court of Appeals, Western District, set forth the following facts:

Suarez and Diana Pilar were in a romantic relationship for five or six years, during which they had a child together. After ending their relationship, Suarez and Pilar split custody of their child so that Suarez watched the child during the day and Pilar had the child overnight.

In the summer of 2014, Pilar began dating Victor Alvarran ("Victim"). Pilar often spent the night at Victim's house.

On November 29, 2014, Pilar went to Suarez's house to pick up the child. Suarez told Pilar the child was sick and suggested that Pilar stay the night. Pilar declined the offer and Suarez refused to give the child to Pilar. Pilar left and spent the night at Victim's home. That night, Suarez sent several text messages to Pilar, including, "enjoy your night with your ***hole," "wouldn't do any good to become pregnant[,]" "come here f***ing bitch[,] and "right now I will burn that ***hole's car[.]"

The next morning, Suarez wanted Pilar to come get the child at Pilar's parents' house. Instead, the two met at a nearby gas station. While there, Suarez told Pilar that he "was tired of it[,"] asked where Victim was, and said that he was "going to kill that f***ing bitch[.]" Suarez then drove toward Victim's house, which was approximately an eight-minute drive. Pilar followed in her vehicle. While driving to Victim's house, Pilar attempted to call both Suarez and Victim multiple times. Pilar also received a text message from Suarez stating, "right now you're going to see what I'm capable of, Diana."

When Suarez arrived at Victim's house, he took out a knife and slashed a tire on Victim's vehicle. Suarez then kicked open the front door and went inside. Pilar, who had arrived soon after Suarez, followed Suarez into the house and witnessed him stabbing Victim. Pilar pleaded for him to stop. Suarez eventually ran from Victim's house and drove off in his vehicle. Pilar yelled for help, and neighbors called police.

Arriving officers found the front door frame splintered, broken, and separated. The door's locking mechanism was on the floor in the living room. A bedroom door was also broken. Officers entered the bedroom and observed the bed sheets strewn about and a pull-up bar on the bed with blood on it. There was blood on the floor and Pilar was holding Victim, who was lying on the bathroom floor. There was blood on the floor and walls of the bathroom. The toilet was knocked over and detached from the pipe in the floor. Pilar was crying and speaking Spanish, but Victim was not responding.

Pilar told officers that Suarez had kicked in the front door and the bedroom door and had attacked Victim with a knife inside the bedroom and the adjacent bathroom.

The medical examiner determined that Victim's cause of death was multiple stab wounds. Victim had eighteen total wounds: eleven stab wounds and seven incise wounds. One stab wound had penetrated Victim's left lung, heart, and liver. A different stab wound had penetrated the right side of the heart. The medical examiner testified that either of these wounds alone would have been fatal. The medical examiner determined that the manner of Victim's death was homicide.

Several days later, officers located Suarez's vehicle between two large trucks at a salvage lot. There was blood on the vehicle's entry keypad and on the

driver's side door handle. Officers searched Suarez's apartment and found bloody clothing in the trash in his bathroom. There was also blood on the door and on the floor in the bathroom.

Officers arrested Suarez at a house on 82nd Street that they had been surveilling based on information from Pilar's family. During questioning, Suarez stated that he went to Victim's house to confront Victim about threats Victim had made to both Suarez and Pilar. Suarez said that upon arriving at Victim's house, he slashed a tire on Victim's vehicle and set off its alarm before kicking in the front door. Suarez said that he found Victim in his underwear trying to close and lock the bedroom door, so Suarez forced open that door and confronted Victim. Suarez stated that his intent was to scare Victim, but Victim threw something at him causing him to assault Victim with a knife. Suarez explained that once Victim threw the object at him, he lost control.

Suarez was charged with murder in the first degree, burglary in the first degree, and two counts of armed criminal action. Suarez waived his right to a jury trial. . . .

...

The trial court then found Suarez guilty. Suarez was sentenced to 15 years for burglary, and to a concurrent 10 years for the associated armed criminal action; to life imprisonment without the possibility of parole for murder in the first degree, and to a concurrent 20 years for the associated armed criminal action. The sentences for murder in the first degree and its associated armed criminal action were ordered to run consecutive to the sentences for burglary and its associated armed criminal action. . . .

Doc. 6-6, pp. 3-6 (ellipses added, all other alterations in original, footnotes omitted).

Before the state court findings may be set aside, a federal court must conclude that the state court's findings of fact lack even fair support in the record. *Marshall v. Lonberger*, 459 U.S. 422, 432 (1983). Credibility determinations are left for the state court to decide. *Graham v. Solem*, 728 F.2d 1533, 1540 (8th Cir. en banc), *cert. denied*, 469 U.S. 842 (1984). It is Petitioner's burden to establish by clear and convincing evidence that the state court findings are erroneous. 28 U.S.C. § 2254(e)(1).¹ Because the state court's findings of fact have fair support in the record and because Petitioner has failed to establish by clear and convincing evidence that the state court findings are

¹In a proceeding instituted by an application for writ of habeas corpus by a person in custody pursuant to a judgment of a State court, 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).

erroneous, the Court defers to and adopts those factual conclusions.

II. Discussion

In his petition and attached memorandum, Petitioner raises the following five grounds for relief:² (1) the trial court judge should have recused himself due to a bias he held on the issue of deliberation; (2) alternatively to Ground 1, the trial court misunderstood the law regarding deliberation; (3) trial counsel was ineffective for failing to negotiate and communicate the State's plea offer for all offenses other than murder; (4) trial counsel was ineffective for failing to object to the trial court's mischaracterization of the deliberation requirement necessary to convict for first-degree murder; and (5) trial counsel was ineffective for failing to investigate and present evidence in Petitioner's defense. Doc. 1, pp. 5-14; Doc. 1-1.

Respondent contends that Grounds 1 and 3 are without merit and that Grounds 2, 4, and 5 are procedurally defaulted. Petitioner has submitted a reply thereto, wherein he further discusses Grounds 1-4. Doc. 15. Regarding Ground 5, Petitioner writes, "Petitioner does not wish to present this claim in his habeas corpus." *Id.* at 27. As a result, this Court finds that Ground 5 has been abandoned and will address Petitioner's Grounds 1-4 below.

A. Ground 1 is without merit.

In Ground 1, Petitioner argues that the trial court judge should have recused himself due to a bias regarding the issue of deliberation, in that, during the trial court's pronouncement of its guilty verdict, the trial court judge expressed a belief that any number of stab wounds over two proves deliberation. Doc. 1, pp. 5-6; Doc. 1-1, pp. 2-5.

On direct appeal, the Missouri Court of Appeals set forth the relevant trial record and applicable law and denied Ground 1 as follows:

Suarez relies on the following statement to show that the trial court was biased: "I tell them that I'll give you one stab, I'll give you one shot, I'll give you one, maybe even two plunges of the knife, but at three or five or eight or ten or 18, those subsequent plunges of that knife take deliberation, at the very least." Suarez argues that this statement was "a fundamentally incorrect prejudging of the facts" of his case. Suarez alleges that eighteen stab wounds was consistent with either first-degree murder, second-degree murder, or manslaughter.

² Petitioner raises three grounds for relief in his petition and two additional grounds of ineffective assistance of trial counsel in his attached memorandum. Doc. 1, pp. 5-14; Doc. 1-1. Respondent construed Petitioner's pleadings as raising five grounds for relief, and Petitioner adopted that construction in his reply. Doc. 6, pp. 13-14; Doc. 15. This Court adopts the same construction of Petitioner's claims.

First, Suarez asks us to view the trial court's comment in isolation, but it is improper to review the trial court's statement out of context. . . . Here, the trial court's general statements about deliberation were in the context of a lengthy recitation of the evidence in this case that supported a finding of deliberation, including the fact that there were multiple stab wounds.

When viewed in the context of the trial court's full statement, we do not find it reflected a pre-judgment of the case. Although the trial court stated, in general, that multiple stab wounds "take deliberation," the trial court also stated that "there's so much more in this case that indicates to me cool reflection upon the matter for any length of time no matter how brief." The trial court then went through all of the evidence that supported deliberation, including that Suarez drove over to Victim's house armed with a knife; that Suarez kicked down two doors in order to get to Victim; and that Suarez stabbed Victim eighteen times. The trial court also noted the text messages that Suarez sent Pilar indicating his intent to kill Victim. The trial court stated that it did not find credible Suarez's defense that he "flew off the handle and stopped when he saw the blood," because there was such a large amount of blood present in more than one location, including next to the toilet that was dislodged during the attack. In closing, the trial court noted that "[i]n doing criminal law for almost 30 years, this is as bad as any crime scene that I've ever seen, not indicative of anything other than a deliberate massacre." This extensive explanation confirms the trial court engaged in an appropriate evaluation of the totality of the evidence in finding the deliberation element satisfied and did not, as Suarez alleges, pre-judge the case through a singular focus on the number of stab wounds. Therefore, we find the trial court's recusal was not required.

Doc. 6-6, pp. 7-10 (alterations in original, footnotes omitted).

It was reasonable for the state appellate court to find that the trial court's pronouncement of its verdict, when viewed in its entirety, did not indicate that the trial court had pre-judged the case or otherwise held a bias that required recusal. *See Williams v. Pennsylvania*, 579 U.S. 1, 8-9 (2016) (explaining that, when examining a judicial bias claim, "[t]he Court asks not whether a judge harbors an actual, subjective bias, but instead whether, as an objective matter, the average judge in his position is likely to be neutral, or whether there is an unconstitutional 'potential for bias.'") (internal citations and quotations omitted). Because the state court's determinations as to Ground 1 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), Ground 1 is denied.

B. Ground 3 is without merit.

In Ground 3, Petitioner argues that trial counsel was ineffective for failing to negotiate and communicate the State's plea offer for all offenses other than murder. Doc. 1-1, pp. 14-17; Doc. 1-1, pp. 11-17. In order for Petitioner to successfully assert a claim of ineffective assistance of trial counsel, petitioner must demonstrate that his attorney's performance "fell below an objective standard of reasonableness" and that "the deficient performance" actually prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). "A court considering a claim of ineffective assistance of counsel must apply a 'strong presumption' that counsel's representation was within the 'wide range' of reasonable professional assistance." *Harrington v. Richter*, 562 U.S. 86, 104 (2011) (quoting *Strickland*, 466 U.S. at 689). Petitioner must show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687.

To satisfy the prejudice prong, a petitioner must "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *Id.* at 694. Moreover, this Court may not grant habeas relief unless the state appellate court's decision "was contrary to, or an unreasonable application of, the standard articulated by the [United States] Supreme Court in *Strickland*." *Owens v. Dormire*, 198 F.3d 679, 681 (8th Cir. 1999), *cert. denied*, 530 U.S. 1265 (2000).

In affirming the denial of post-conviction relief, the Missouri Court of Appeals highlighted the relevant facts in the record, articulated the *Strickland* standard, and denied Ground 3 as follows:

The motion court did not clearly err in concluding that trial counsel's performance was not deficient because trial counsel communicated all of the terms of the State's plea offers (including the plea offer we presume Suarez is referring to as the "most favorable"). This finding is supported by trial counsel's testimony at the evidentiary hearing, the written plea offer which reflected that Suarez could accept a sentence of twenty-five years on an amended charge of second-degree murder and that his ten year sentences for his two remaining charges would run concurrently, and the prosecutor's statement before trial (and in Suarez's presence) that "the only charge that we have really negotiated on is the murder in the first degree count [and] we assume the other ones would fall in line with that." Trial counsel testified that he conveyed the State's open plea offer to Suarez and explained that under the plea agreement, twenty-three years would be the maximum amount of time that he would spend in prison and that there would not be a sentence that would run consecutively to the murder charge. He also testified that Suarez understood the terms of each plea offer, including the floors and lids, but he chose to reject those offers and exercise his right to trial. Based on the evidence, the

motion court found that trial counsel's testimony was credible, and that the record "clearly shows that [Suarez] was present when the State outlined the plea negotiations in the case" -- which included the State's most favorable plea offer -- yet, Suarez "did not express that he had not received a plea offer or was unaware of the plea negotiations;" rather, his trial attorney acknowledged that Suarez had indeed rejected the offers.

Suarez testified that if trial counsel had told him that his other charges, if not dismissed, would have run concurrent to his murder charge, that he would have accepted the open plea offer. Suarez's testimony directly refuted trial counsel's testimony. However, the motion court found trial counsel's testimony to be credible, and in the process, implicitly found Suarez's testimony to be not credible. . . . Trial counsel's credible testimony established that he did inform Suarez that under the open plea agreement any sentences he would receive as to the burglary or armed criminal action charges would run concurrent to his murder charge; however, Suarez rejected the offer.

Suarez has not established that trial counsel failed to explain all of [the] terms of the State's plea offers, including the effect of any plea on all of the pending charges. The motion court did not clearly err in finding that trial counsel's performance was not deficient. Because Suarez has not established that trial counsel's performance was deficient, we need not address the Strickland prejudice prong.

Doc. 6-11, pp. 3-13 (alterations added, footnote omitted).

Petitioner fails to establish that it was unreasonable for the state appellate court to find that trial counsel had not failed to explain all of the terms of the State's plea offers. Insofar as the state courts' decisions rested on credibility determinations at Petitioner's post-conviction evidentiary hearing, credibility determinations are left for the state courts to decide. *Graham*, 728 F.2d at 1540. The state courts' determinations as to Grounds 3 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). Therefore, Ground 3 is denied.

C. Grounds 2 and 4 are procedurally defaulted.

Finally, Respondent argues that Grounds 2 and 4 are procedurally defaulted. Doc. 6, pp. 14-15, 21-25, 31-35. In reply, Petitioner argues that this Court should review Ground 2 for plain error and that post-conviction counsel was ineffective for not raising Ground 4 in his post-conviction proceedings. Doc. 15, pp. 9-16, 19-

“A habeas petitioner is required to pursue all available avenues of relief in the state courts before the federal courts will consider a claim.” *Sloan v. Delo*, 54 F.3d 1371, 1381 (8th Cir. 1995), *cert. denied*, 516 U.S. 1056 (1996). “[S]tate prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State’s established appellate review process” before presenting those issues in an application for habeas relief in federal court. *O’Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999). “If a petitioner fails to exhaust state remedies and the court to which he should have presented his claim would now find it procedurally barred, there is a procedural default.” *Sloan*, 54 F.3d at 1381.

Ground 2 was not properly preserved at trial through objection. Although the Missouri Court of Appeals, at its discretion, reviewed Ground 2 for plain error (Doc. 6-6, pp. 10-11), a state court’s discretionary review for plain error does not excuse the procedural default of an unpreserved claim. *Clark v. Bertsch*, 780 F.3d 873, 875-77 (8th Cir. 2015) (citing *Hayes v. Lockhart*, 766 F.2d 1247, 1253 (8th Cir. 1985)). Ground 4 was raised in Petitioner’s initial post-conviction proceedings but was not reasserted on appeal therefrom. Doc. 6-8, pp. 26-37, 52-56; Doc. 6-9. Therefore, Grounds 2 and 4 are procedurally defaulted. *Sweet v. Delo*, 125 F.3d 1144, 1149 (8th Cir. 1997) (recognizing that failure to present claims in the Missouri Courts at any stage of direct appeal or post-conviction proceedings is a procedural default), *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). Under the cause and prejudice test, cause “must be something *external* to the petitioner, something that cannot fairly be attributed to him.” *Id.* at 753 (emphasis in original).

Insofar as Petitioner argues that the procedural default of any of his grounds for relief are due to the ineffective assistance of post-conviction counsel, in *Coleman, supra*, the United States Supreme Court held that, because there is no constitutional right to counsel in a state post-conviction proceeding, an attorney’s ignorance or inadvertence in a post-conviction proceeding does not qualify as cause to excuse a procedural default. *Coleman*, 501 U.S. at 752-54. In *Martinez v. Ryan*, 566 U.S. 1 (2012), however, the Court recognized a “narrow exception” to *Coleman* by holding that “[i]nadequate assistance of counsel at initial-review collateral

proceedings may establish cause for a prisoner’s procedural default of a claim of ineffective assistance at trial.” *Martinez*, 566 U.S. at 9.

Initially, the Court notes that *Martinez* cannot excuse the procedural default of Petitioner’s claim of trial court error in Ground 2. The United States Court of Appeals for the Eighth Circuit has specifically declined to extend the narrow exception in *Martinez* to claims alleging ineffective assistance of appellate counsel or trial court error. *See Dansby v. Hobbs*, 766 F.3d 809, 833-34 (8th Cir. 2014). The *Dansby* Court reasoned that “there is no logical necessity to expand *Martinez* from the ineffectiveness claim itself to the underlying claims” because “[a]s a practical matter, a petitioner in federal habeas needs only one winning claim to gain relief – if he’s got a winning ineffectiveness claim he doesn’t need another.” *Id.* at 833-34 (internal quotation omitted).

As to Ground 4, although articulated as a claim of ineffective assistance of trial counsel, *Martinez* remains inapplicable, because Ground 4 was raised in Petitioner’s post-conviction motion and defaulted in his post-conviction appeal. The *Martinez* Court held that its holding did not “concern attorney errors in other kinds of proceedings, including appeals from initial-review collateral proceedings . . .” *Martinez*, 566 U.S. at 16. Accordingly, “*Martinez* offers no support . . . for the contention that the failure to preserve claims on appeal from a postconviction proceeding can constitute cause.” *Arnold v. Dormire*, 675 F.3d 1082, 1087 (8th Cir. 2012). The *Arnold* Court explained that, because “Arnold’s multiple ineffective assistance claims were litigated in his initial-review collateral proceeding, but not preserved on appeal . . . Arnold has already had his day in court; deprivation of a second day does not constitute cause.” *Id.*

Insofar as Petitioner takes issue with how any of his grounds were presented and reviewed in his initial post-conviction proceeding, to excuse the procedural default of a claim of ineffective assistance of trial counsel under *Martinez*, Petitioner must establish that either (1) “the state courts did not appoint counsel in the initial-review collateral proceeding for a claim of ineffective assistance at trial,” or (2) “appointed counsel in the initial-review collateral proceeding . . . was ineffective under the standards of *Strickland v. Washington*, 466 U.S. 668 (1984).” *Martinez*, 566 U.S. at 14. To satisfy the second circumstance, “the assistance rendered must have been constitutionally substandard and prejudice must have resulted therefrom.” *Evans v. Luebbers*, 371 F.3d 438, 445 (8th Cir. 2004) (citing *Strickland*, 466 U.S. at 687). Furthermore, “[t]o overcome the default, a prisoner must also demonstrate that the underlying ineffective-assistance-of-trial-

counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the [underlying] claim has some merit.” *Martinez*, 566 U.S. at 14.

Petitioner fails to establish that post-conviction counsel’s alleged failures meet the *Strickland* standard of ineffective assistance. Instead, the record of Petitioner’s post-conviction proceedings, including Petitioner’s amended post-conviction motion and the evidentiary hearing transcript, illustrates that Petitioner’s post-conviction counsel performed a full review of Petitioner’s case and was familiar with the evidence presented at trial and the relevant legal issues. Doc. 6-7; Doc. 6-8, pp. 25-47. Accordingly, Petitioner fails to establish that post-conviction counsel’s decision to raise certain issues in the amended post-conviction motion and omit others was not a reasonable exercise of professional judgment. *See Gee v. Groose*, 110 F.3d 1346, 1352 (8th Cir.1997) (“Reasonable appellate strategy requires an attorney to limit the appeal to those issues counsel determines have the highest likelihood of success.”). In light of the presumption that post-conviction counsel acted reasonably, Petitioner fails to show that post-conviction counsel provided substandard assistance by failing to adequately raise Grounds 2 and 4.

Furthermore, based upon this Court’s review of the record, this Court also finds that Petitioner fails to establish that he was prejudiced by post-conviction counsel’s alleged failures. Petitioner likewise fails to show the underlying claims in his grounds for relief have “some merit” that would render the claims sufficiently “substantial” for purposes of the *Martinez* “narrow exception.” Therefore, the conduct of post-conviction counsel does not excuse the procedural default of Grounds 2 and 4. None of Petitioner’s ancillary arguments or claims otherwise establish cause and prejudice for the procedural defaults of Grounds 2 and 4.

Petitioner fails also to show that a fundamental miscarriage of justice will result if his defaulted claims are not considered. *See Abdi v. Hatch*, 450 F.3d 334, 338 (8th Cir. 2006) (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), *cert. denied*, 549 U.S. 1036 (2006). As a result, Grounds 2 and 4 are procedurally defaulted and are denied.

The Court further notes that, even if Petitioner could overcome the procedural default of Grounds 2 and 4, the state appellate court’s finding of no plain error in Ground 2 and the post-conviction motion court’s denial of Ground 2 were not decisions that were contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme

Court of the United States" and were not "decision[s] that [were] 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). Therefore Grounds 2 and 4 are procedurally defaulted and are denied.

III. 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, a petitioner must show that a "reasonable jurist" 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.

IV. 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/ Greg Kays
GREG KAYS
UNITED STATES DISTRICT JUDGE

Dated: September 19, 2022.

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