UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 16-2

ANTHONY BERNARD JUNIPER,

Petitioner - Appellant,

v.

MELVIN C. DAVIS, Warden, Wallens Ridge State Prison,

Respondent - Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. John A. Gibney, Jr., Senior District Judge. (3:11-cv-00746-JAG)

Submitted: March 3, 2023 Decided: April 24, 2023

Before GREGORY, Chief Judge, and WYNN and DIAZ, Circuit Judges.

Affirmed by unpublished opinion. Judge Wynn wrote the opinion, in which Chief Judge Gregory and Judge Diaz joined.

ON BRIEF: Elizabeth Hambourger, Johanna Jennings, CENTER FOR DEATH PENALTY LITIGATION, Durham, North Carolina, for Appellant. Jason S. Miyares, Attorney General, Mark P. Herring, Attorney General, Charles H. Slemp, III, Chief Deputy Attorney General, Matthew P. Dullaghan, Senior Assistant Attorney General, Andrew N. Ferguson, Solicitor General, Erika L. Maley, Principal Deputy Solicitor General, Kevin M. Gallagher, Deputy Solicitor General, M. Jordan Minot, Assistant Solicitor General, OFFICE OF THE ATTORNEY GENERAL OF VIRGINIA, Richmond, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

WYNN, Circuit Judge:

Petitioner-Appellant Anthony Juniper appeals the district court's rejection of his argument that he can demonstrate ineffective assistance of habeas counsel. Specifically, he seeks, pursuant to *Martinez v. Ryan*, to excuse the procedural default of his claim that his trial counsel were ineffective when they failed to adequately raise a challenge under *Batson v. Kentucky* related to the prosecution's strikes of potential jurors. Because under the Supreme Court's decision in *Shinn v. Ramirez* we may not consider evidence crucial to Juniper's *Batson* claim, we must affirm.

I.

In 2005, a Virginia jury convicted Juniper of four murders.[1] Juniper, who is African American, raised a *Batson* challenge during jury selection and on direct appeal, but the appeal was unsuccessful. *Juniper v. Commonwealth*, 626 S.E.2d 383, 393, 412–13 (Va. 2006) (citing *Batson v. Kentucky*, 476 U.S. 79 (1986)). His counsel did not raise a *Batson* claim during state post-conviction relief proceedings. *See Juniper v. Warden of the Sussex I State Prison*, 707 S.E.2d 290 (Va. 2011) (en banc).

Juniper first filed a federal habeas petition in 2012, still represented by post-conviction relief counsel. The following year, the district court denied habeas relief but

[1] At the time, Juniper was sentenced to death. But in 2021, Virginia abolished the death penalty and commuted Juniper's sentence to life without parole. 2021 Special Session I Va. Acts 826, 851 cl. 3 (providing that "any person under a sentence of death imposed for an offense committed prior to July 1, 2021, but who has not been executed by July 1, 2021, shall have his sentence changed to life imprisonment, and such person who was 18 years of age or older at the time of the offense shall not be eligible for (i) parole, (ii) any good conduct allowance or any earned sentence credits . . . , or (iii) conditional release").

granted a certificate of appealability on, in relevant part, whether Juniper was entitled to appointment of independent counsel pursuant to *Martinez* who could raise claims related to ineffective assistance of post-conviction relief counsel. *See Juniper v. Pearson*, No. 3:11-CV-00746, 2013 WL 1333513, at *1 (E.D. Va. Mar. 29, 2013); *Juniper v. Davis*, 737 F.3d 288, 289 (4th Cir. 2013); *Martinez v. Ryan*, 566 U.S. 1 (2012). We vacated the district court's decision in part and remanded for appointment of *Martinez* counsel. *Juniper*, 737 F.3d at 290.

On remand, *Martinez* counsel filed an amended habeas petition raising several *Martinez* claims, including a *Batson*-based challenge. In 2015, the district court dismissed the amended petition and denied a certificate of appealability. *Juniper v. Zook*, 117 F. Supp. 3d 780, 809 (E.D. Va. 2015). Juniper timely appealed. We granted a certificate of appealability as to, in relevant part, the *Batson*-based *Martinez* claim.

In 2017, we vacated another of the district court's decisions and remanded for further proceedings related to a different habeas claim—one brought pursuant to *Brady v. Maryland*. *Juniper v. Zook*, 876 F.3d 551, 556 (4th Cir. 2017) (citing *Brady v. Maryland*, 373 U.S. 83 (1963)). We "decline[d] to resolve" the *Batson*-based *Martinez* claim at that time, reasoning that if, on remand, the district court ruled in Juniper's favor on the *Brady* claim and awarded him a new trial, the *Martinez* claim "would be moot." *Id.* at 556 n.1.

However, the district court ultimately rejected Juniper's *Brady* claim. *Juniper v. Davis*, No. 3:11CV746, 2021 WL 3722335, at *1 (E.D. Va. Aug. 23, 2021). That decision is the subject of another appeal presently before us, Case No. 21-9. Relevant here, after the district court issued its opinion on the *Brady* matter, we reopened this case to resolve the

still-pending *Martinez* issue. Shortly thereafter, we granted Juniper's motion to place the case in abeyance for the Supreme Court's decision in *Shinn v. Ramirez*. Once that opinion issued in May 2022, *Shinn v. Ramirez*, 142 S. Ct. 1718 (2022), we directed briefing in this case.

II.

This Court reviews de novo a district court's decision to grant a respondent's motion to dismiss a habeas petition. *Gordon v. Braxton*, 780 F.3d 196, 200 (4th Cir. 2015).

"A federal habeas court generally may consider a state prisoner's federal claim only if he has first presented that claim to the state court in accordance with state procedures. When the prisoner has failed to do so, and the state court would dismiss the claim on that basis, the claim is 'procedurally defaulted,'" and typically a federal court will not consider it. *Shinn*, 142 S. Ct. at 1727–28. But there are exceptions. For example, "[a] prisoner may obtain federal review of a defaulted claim by showing cause for the default and prejudice from a violation of federal law." *Martinez*, 566 U.S. at 10 (citing *Coleman v. Thompson*, 501 U.S. 722, 750 (1991)).

In its 2012 decision in *Martinez v. Ryan*, the Supreme Court noted one way a prisoner could show cause for defaulting a claim. Under *Martinez*, "a federal habeas court [may] find 'cause,' thereby excusing a defendant's procedural default, where (1) the claim of 'ineffective assistance of trial counsel' was a 'substantial' claim; (2) the 'cause' consisted of there being 'no counsel' or only 'ineffective' counsel during the state collateral review proceeding; (3) the state collateral review proceeding was the 'initial' review proceeding in respect to the 'ineffective-assistance-of-trial-counsel claim'; and (4) state

law *requires* that an 'ineffective assistance of trial counsel [claim] . . . be raised in an initial-review collateral proceeding.'"[2] *Trevino v. Thaler*, 569 U.S. 413, 423 (2013) (quoting *Martinez*, 566 U.S. at 14, 17).

The Supreme Court's 2022 decision in *Shinn v. Ramirez*, however, limited the reach of *Martinez*. *See Shinn*, 142 S. Ct. at 1747 (Sotomayor, J., dissenting). *Shinn* considered the implications for *Martinez* cases of § 2254(e)(2)'s bar on evidentiary hearings. Section 2254(e)(2) states that "[i]f the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant" meets certain strict requirements that Juniper concedes he cannot satisfy. 28 U.S.C. § 2254(e)(2). The "question presented" by *Shinn* was "whether the equitable rule announced in *Martinez* permits a federal court to dispense with § 2254(e)(2)'s narrow limits because a prisoner's state postconviction counsel negligently failed to develop the state-court record." *Shinn*, 142 S. Ct. at 1728 (majority opinion). The Court concluded the answer was no. *Id.*

Shinn reasoned that, "under § 2254(e)(2), a prisoner is 'at fault' *even when state postconviction counsel is negligent*." *Id.* at 1735 (emphasis added). So "a federal court may order an evidentiary hearing or otherwise expand the state-court record only if the prisoner can satisfy § 2254(e)(2)'s stringent requirements." *Id.*; *accord id.* at 1734 ("[U]nder § 2254(e)(2), a federal habeas court may not conduct an evidentiary hearing or otherwise

[2] Because Virginia law provides that "[c]laims raising ineffective assistance of counsel must be asserted in a habeas corpus proceeding and are not cognizable on direct appeal," only the first two *Martinez* elements are in dispute in this case. *Lenz v. Commonwealth*, 544 S.E.2d 299, 304 (Va. 2001).

consider evidence beyond the state-court record based on ineffective assistance of state postconviction counsel."). In other words, a petitioner pursuing a *Martinez* claim based on the ineffectiveness of state habeas counsel must rely *only* on the evidence developed during trial or while the petitioner was represented by that very same counsel, unless he can satisfy the strict standards of § 2254(e)(2). Because Juniper concedes he cannot meet those strict standards, his *Martinez* claim must rely solely on the record developed in state court.

To satisfy *Martinez*'s first requirement—that his ineffective-assistance-of-trial-counsel claim was a "substantial" claim—Juniper "must demonstrate that the claim has some merit," a standard that the Supreme Court has likened to the certificate-of-appealability standard. *Martinez*, 566 U.S. at 14. However, this Court has clarified that the fact that we have granted a certificate of appealability does not preclude us from "reconsidering the substantiality of the underlying claim" "[i]n the *Martinez* context"—and, accordingly, we have found a claim to be insubstantial even after granting a certificate of appealability. *Owens v. Stirling*, 967 F.3d 396, 425 (4th Cir. 2020); *see id.* at 425–26.

To show ineffective assistance of trial counsel, Juniper "must demonstrate that (1) his counsel's performance was deficient and (2) such deficient performance prejudiced his defense." *Witherspoon v. Stonebreaker*, 30 F.4th 381, 393 (4th Cir. 2022). In assessing deficiency, we must consider prevailing professional norms and potential strategic reasons for counsel's actions, and our review is "highly deferential." *Id.*

To satisfy the prejudice prong of the ineffective-assistance analysis, Juniper must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* (quoting *Strickland v. Washington*, 466 U.S.

668, 694 (1984)). We assume, without deciding, that the "proceeding" in question is the deficient or absent *Batson* challenge. *See Doe v. Ayers*, 782 F.3d 425, 432 (9th Cir. 2015) ("[The petitioner] has the burden to demonstrate prejudice by showing that there is a reasonable probability that the [*Batson*] claim [that his counsel] failed to raise at trial would have prevailed, either at trial or on appeal."); *cf. Eagle v. Linahan*, 279 F.3d 926, 943 (11th Cir. 2001) ("To determine whether the failure to raise a [*Batson*] claim on appeal resulted in prejudice, we review the merits of the omitted claim."); *Drain v. Woods*, 595 F. App'x 558, 583 (6th Cir. 2014) ("Because a *Batson* violation constitutes a structural error, the failure to object and to remedy the error constitutes error *per se*. Where counsel's ineffective representation lets stand a structural error that infects the entire trial with an unconstitutional taint, there is no question that Petitioner and our system of justice suffered prejudice.").

In *Batson*, the Supreme Court "ruled that a State may not discriminate on the basis of race when exercising peremptory challenges against prospective jurors in a criminal trial." *Flowers v. Mississippi*, 139 S. Ct. 2228, 2234 (2019); *accord Batson*, 476 U.S. at 86 ("The Equal Protection Clause guarantees the defendant that the State will not exclude members of his race from the jury venire on account of race . . . ."). "The burden-shifting framework for proving a *Batson* violation is firmly established. First, the defendant must make a prima facie showing that the government exercised a peremptory challenge on the basis of race. Second, once the defendant has made such a prima facie showing, the burden shifts to the government to provide a non-discriminatory reason for its use of the peremptory challenge. Third, the defendant . . . must establish that the government's

proffered reasons were pretextual, and that the government engaged in intentional discrimination." *United States v. Dinkins*, 691 F.3d 358, 380 (4th Cir. 2012); *see Batson*, 476 U.S. at 96–98. Where, as here, the prosecution "articulated the reasons for its peremptory challenge," we proceed straight to the second step of the inquiry without considering whether the defendant made a prima facie showing. *Dinkins*, 691 F.3d at 380 n.17.

To summarize, for Juniper to use *Martinez* to excuse the procedural default of his *Batson*-related ineffective-assistance-of-trial-counsel claim, he must show that his underlying claim would have had "some merit." This includes a showing that trial counsel's errors, such as they were, prejudiced his defense—meaning that, but for those alleged errors, there is a reasonable probability that the *Batson* challenge would have succeeded. And *that* requires a showing of a reasonable probability that the trial or appeals court would have agreed with him that the Commonwealth's proffered reasons for the challenged juror strikes were pretextual, and that the Commonwealth engaged in intentional discrimination.

For the reasons given below, we conclude that Juniper cannot demonstrate a reasonable probability that the trial or appellate court would have agreed with his *Batson* challenge if counsel had raised the arguments he claims they should have; accordingly, his *Martinez* claim fails.

III.

Juniper argues that his trial counsel provided ineffective assistance because, although counsel raised a *Batson* challenge, counsel failed to make certain arguments in

support of that challenge that Juniper contends would have changed the outcome. Specifically, he argues that his counsel should have called the trial court's attention to (1) the prosecution's decision to strike a Black juror whom he contends was similarly situated to a white juror who was not struck (the "comparator argument"); and (2) the prosecution's disparate strike rates between Black and white venire members (the "strike-rate argument").

But, under *Shinn*, we may only consider the state-court record. Because Juniper's *Batson* claim was not developed during state post-conviction-relief proceedings, the only relevant state-court record evidence before us is the jury-selection transcript from trial. And while the jury-selection transcript provides the races of the venire members who were struck, it does *not* provide any racial demographic data about those who were kept on the jury, nor about the pool as a whole. Thus, Juniper's comparator argument fails, because we know only the race of the struck juror—not the comparator who was kept on the jury.[3] And his strike-rate argument likewise fails because there is no information from which to deduce the comparative strike rates, except the trial court's statements supporting that the strike rates were reasonable. Specifically, the trial court concluded that the Commonwealth's decision to strike two white and two Black venire members when selecting the jury from a panel of twenty was "in reasonable proportion to the number by race on" that panel, and similarly that the Commonwealth's decision to strike four Black and three white venire members out of the full panel of twenty-nine potential jurors and

[3] Juniper contends that the juror who remained on the jury was white, but he relies on evidence outside of the state-court record to support that assertion.

alternates was "generally in fairly good proportion from the total mix on which they had to strike." J.A. 312, 316.[4]

Accordingly, in light of *Shinn*, Juniper's *Batson* claim is meritless. He therefore cannot use *Martinez* to excuse the procedural default of his ineffective-assistance-of-trial-counsel claim.[5]

[4] Citations to the "J.A." refer to the Joint Appendix filed by the parties in this appeal.

[5] On March 3, 2023, two business days before this case was scheduled for oral argument—and mere minutes before this Court entered its order submitting the case on the briefs—Juniper filed a motion for leave to file a supplemental appendix, followed later that day by a related motion to seal the supplemental appendix. He represented that on that same day, he had "obtained a copy of the file of the Norfolk Clerk of Court pertaining to [his] trial," which "contain[ed] documents pertaining to jury selection, including handwritten notes listing the . . . race and gender" of the venire members—notes that Juniper "believe[d]" to have been produced by the trial judge. ECF Docket No. 137 at 2. Juniper made no representation as to when during the nearly ten months since *Shinn* was released his counsel had sought the file from the Norfolk Clerk of Court. Respondent opposed the motion.

If granted, Juniper's motion would likely require a remand for the district court to consider this new evidence in the first instance. But a remand is unnecessary. The notes reflect the same demographic data about the venire members as trial counsel's notes, which Juniper submitted to the district court on federal habeas review and to this Court in the Joint Appendix, and which the parties extensively briefed. *See* District Court Docket No. 144-2 at 1–2; J.A. 459–60.

We have reviewed the new evidence, the state-court record, the parties' briefs, and the district court's reasoning. We conclude that, even if we could consider Juniper's late-breaking evidence as to the races of all of the venire members, it would not demonstrate a reasonable likelihood that the trial or appellate court would have found his *Batson* challenge to have merit had his counsel raised the arguments he now contends they should have. Because the evidence would not change the analysis in this case, and because it matches evidence that was already placed before the district court, we need not remand for the district court to consider it in the first instance.

IV.

For the reasons stated, we affirm the district court's dismissal of Juniper's *Martinez*-based habeas claim. In light of this decision, we deny as moot Juniper's motion for leave to file a supplemental appendix and motion to seal that appendix.

AFFIRMED