UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 23-2416

Brian Heath Davis

Petitioner - Appellant

v.

Randy Gibbs; Kris Karberg

Respondents - Appellees

Appeal from U.S. District Court for the Southern District of Iowa - Central
(4:21-cv-00176-JEG)

JUDGMENT

Before LOKEN, BENTON, and GRASZ, 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.

August 10, 2023

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

/s/ Michael E. Gans

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

BRIAN HEATH DAVIS, Petitioner, v. RANDY GIBBS, ET AL, Respondent.	No. 4:21-cv-00176-JEG-HCA **ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS**

Brian Heath Davis brings this petition for writ of habeas corpus under 28 U.S.C. § 2254. ECF No. 1. Davis is challenging the validity of his 2015 Iowa conviction for first-degree murder. *Id.* at 1. Counsel represents Davis. *See* Initial Review Order and Notice of Appearance, ECF Nos. 4-5.

The parties have submitted briefs to support their respective positions. *See* Petitioner's Brief, ECF No. 18; Respondent's Brief, ECF No. 21; Petitioner's Reply Brief, ECF No. 24. Respondent also provides relevant state court documents. *See* ECF Nos. 11, 12, 13. For the following reasons, the Court denies the petition for federal habeas corpus relief.

I. FACTUAL AND PROCEDURAL BACKGROUND

Following a bench trial, the Iowa District Court for Fremont County convicted Davis of murdering his fiancé, Holly Durben. *State v. Davis*, No. 15-0666, 2017 WL 108278, *2-3 (Iowa Ct. App. 2017) ("*Davis I*"). The fundamental issue at trial was whether Durben had committed suicide or whether Davis had killed her. *Id.* at *3; Petitioner's Brief, ECF No. 18 at 3. On direct appeal, the Iowa Court of Appeals outlined the facts underlying Davis's conviction as follows:

> On the morning of July 18, 2009, local law enforcement officers arrived at the Shenandoah farmhouse shared by Brian Davis and Holly Durben after Davis reported to dispatch that Durben shot herself in the head. In an upstairs bedroom, two Fremont County deputies found Durben's body prostrate on the bed with a

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massive gunshot wound to the left side of her head. Durben's left hand was on the pistol grip of a twelve-gauge shotgun with an eighteen-inch barrel, and her left thumb rested on the trigger. Although the gun was in Durben's hand, the only fingerprint suitable for identification on the gun belonged to Davis. In their inspection of the scene, officers saw a broken mirror in a bathroom, Durben's engagement ring on the kitchen floor, and an empty box of ammunition along with a few empty twelve-gauge casings in the yard.

Paramedics attended to Davis, who was "thrashing" on the highway adjacent to the home. Davis smelled strongly of alcohol and appeared to be losing consciousness....

Victor Murillo, an Iowa Division of Criminal Investigation (DCI) criminalist, examined the shotgun found in Durben's hand. He discovered a shell casing still inside the gun, which he noted was consistent with suicide because a shell casing must be manually discharged after firing a shotgun. Murillo testified it was possible to fire the gun one-handed, but it would be more difficult to hold. He concluded the gun's placement was consistent with Durben having shot herself but did not opine on who fired the gun or whether the gun had been manipulated after it was fired.

Associate State Medical Examiner Dr. Jerri McLemore performed the autopsy on Durben. Dr. McLemore found the entrance wound was consistent with a shotgun fired at very close distance or in contact with the skin on Durben's left cheek. The doctor noticed areas of faint discoloration on both the right and left sides of Durben's jawline and on the lower part of her neck. Dr. McLemore discussed the marks, explaining:

> [F]or anyone that comes in with a possible self-inflicted wound, especially if she is a woman, a neck exam is always important to make sure that there is no bruising of the neck that may indicate something that might have happened prior or that might add to the circumstances. In this case, there were areas of discoloration that actually had bleeding into the soft tissue underneath, especially on the left hand side that because of their location, symmetrical on the jawline and down at the ... lower part of the neck were concerning for a possible pressure against the neck in these areas, such as a what's call[ed] a sleeper hold.

.....The defense maintained Durben took her own life. The district court found Davis guilty, specifically discrediting Davis's statements and placing particular importance on the marks on Durben's neck. The court concluded:

> I am firmly convinced that Durben did not kill herself. I am firmly convinced despite the uncertainty in the medical evidence because I have been able to consider all of the evidence including Davis'[s]

> own statements. I am firmly convinced that Brian Davis choked Holly Durben [and] then shot her.

Davis I, 2017 WL 108278 *2-3.

The trial court sentenced Davis to life in prison. *Id. See Davis v. State*, No. 18-2073, 2021 WL 592226 (Iowa Ct. App. 2021) at *1 ("*Davis II*"). The Iowa Court of Appeals affirmed the conviction. *Id.* The Iowa courts also denied Davis's application for postconviction relief. *Id.*

Davis now brings this petition for federal habeas corpus relief. ECF No. 1.

II. STANDARD OF REVIEW

A federal court may consider an application "for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). For claims properly before a federal court, a writ of habeas corpus shall be granted only if the prior adjudication of the claim:

> (1) resulted 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
>
> (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) (1) and (2).

"[A]n 'unreasonable application of' those holdings must be 'objectively unreasonable,' not merely wrong; even 'clear error' will not suffice." *White v. Woodall*, 572 U.S. 415, 419 (2014) (quoting *Lockyer v. Andrade*, 538 U.S. 63, 75–76 (2003)). This "difficult to meet" standard requires a petitioner to demonstrate "that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id.* at

419–20 (quoting *Harrington v. Richter*, 562 U.S. 86, 103 (2011)); *see also Woods v. Etherton*, 578 U.S. 113, 116 (2016) (per curiam) (reiterating standard).

Federal court review of underlying state court decisions is limited and deferential. *Fenstermaker v. Halvorson*, 920 F.3d 536, 540 (8th Cir. 2019). Except for certain kinds of error that require automatic reversal, even when a state petitioner's federal rights are violated, "relief is appropriate only if the prosecution cannot demonstrate harmlessness." *Davis v. Ayala*, 576 U.S. 257, 267 (2015). "Harmlessness" in the context of § 2254 means "the federal court has grave doubt about whether a trial error of federal law had substantial and injurious effect or influence in determining the jury's verdict." *Id.* at 267–68 (internal citations omitted). This standard requires "more than a 'reasonable possibility' that the error was harmful." *Id.* at 268. These strict limitations reflect that habeas relief is granted sparingly, reserved for "extreme malfunctions in the state criminal justice systems" and "not as a means of error correction." *Greene v. Fisher*, 565 U.S. 34, 38 (2011). Informed and constrained by this stringent standard of review, the Court analyzes the pivotal facts and proceedings in this case.

III. DISCUSSION OF CLAIMS

Davis raises multiple grounds for relief based on ineffective assistance of trial counsel and insufficiency of the evidence. Petitioner's Brief, ECF No. 18 at 11, 21, 25, 28. To demonstrate ineffective assistance of counsel under the Sixth Amendment to the United States Constitution, a petitioner must show (1) counsel's representation was deficient, and (2) the deficiency was prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The first prong is established when a petitioner shows counsel's performance fell below an objective standard of reasonableness. *Id.* at 687–88. Prejudice is demonstrated with "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable

probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. Review of ineffective assistance of counsel claims in § 2254 actions is "doubly deferential." *Cullen v. Pinholster*, 563 U.S. 170, 202 (2011). That is, "federal courts are to afford 'both the state court and the defense attorney the benefit of the doubt.'" *Etherton*, 136 S. Ct. at 1151 (internal quotation omitted).

The Court reviews each of Davis's claims below. The Court addresses the issues in the order set out in Petitioner's brief (ECF No. 18), rather than in the order the issues are set forth in the pro se petition.

A. Failure to Adequately Cross-Examine Medical Examiner

On the morning of July 18, 2009, Davis called the Fremont County 911 Center to report that Durben had shot herself in the head. Sheriff's deputies responded to the call and found Durben lying on a bed with a massive gunshot wound to the left side of her head. Durben's left hand was on the pistol grip of a shotgun, and her left thumb rested on the trigger. The key issues for determination by the medical examiner were: 1) whether Durben died of the gunshot wound and 2) if the gunshot was the cause of death whether it was self-inflicted.

At trial, Deputy State Medical Examiner Dr. Jerri McLemore testified that she was not able to determine the cause and manner of death. She testified the entrance wound was consistent with a shotgun fired at close distance and noted faint areas of discoloration on the right and left sides of Durben's jawline and lower neck. McLemore testified she examined the neck for signs indicating something might have happened prior to the gunshot. McLemore noted there were areas of discoloration on Durben's body that raised concern pressure had been applied to Durben's neck prior to death, such as a "sleeper hold." At trial, McLemore referred to the location of the gunshot wound as "highly unusual" for a self-inflicted gunshot wound. Because of the unexplained

bruising and the location of the wound, McLemore testified she could not say whether Durben had been incapacitated before the gunshot wound or whether she died of the gunshot wound.

Davis contends trial counsel's cross-examination of McLemore was constitutionally defective in: 1) failing to present McLemore with statements by two witnesses claiming Durben had suicidal ideation; 2) failing to adequately confront McLemore's assumption that there was evidence of high-velocity blood splatter on Davis's clothing; 3) failing to challenge McLemore's bolstering of her opinion (with testimony her co-workers agreed with her conclusions); and 4) failing to challenge McLemore's testimony that the wound's location was "highly unusual" for a self-inflicted shotgun wound as lacking adequate foundation. Pet'r's Brf., ECF No. 18 at 12-19.

In order to be entitled to relief on any of these challenges, Davis must show counsel's performance fell below an objective standard of reasonableness and "a reasonable probability that, but for counsel's unprofessional errors, the result of his trial would have been different.

1. Suicidal Ideation

Davis contends counsel was ineffective for failing to challenge McLemore's opinion that Durben's cause of death could not be determined by presenting McLemore specific witness testimony showing Durben had threatened to commit suicide. ECF No. 18 at 14. In her autopsy report, McLemore stated lack of suicidal ideation raised the possibility of homicide. At trial, counsel asked McLemore if suicidal ideation on the day of death or 5 months preceding it would have changed her conclusion regarding cause of death and McLemore said "probably not." Trial Tr. 394:13-396:4; ECF No. 11-3. She testified cause of Durben's death could not be determined because there were findings during the autopsy that could not be explained, and suicidal ideation did not resolve those uncertainties.

The Iowa Court of Appeals concluded counsel adequately confronted McLemore about her reliance on a lack of suicidal ideation and alerted the trial court to the issue. *Davis II*, 2021 WL 592226 at *4. The evidence considering suicidal ideation (or the lack thereof) and McLemore's awareness of Durben's suicidal ideation were issues explored at trial. This Court finds no failure of the Iowa Court of Appeals in correctly determiningcounsel did not perform deficiently as to this issue.

Relief on this claim must be denied.

2. Blood splatter evidence

Law enforcement seized clothing Davis was wearing the morning Durben's body was discovered. *Id.* at *3. Davis's shirt and shorts were sent for forensic testing. *Id.* In his deposition, the criminologist charged with testing the clothing explained no high velocity blood spatter testing was done because the area of splatter on the shorts was too small. *Id.* Dr. McLemore's autopsy report referenced "possible high-velocity blood spatter" on Davis's clothing, but McLemore made no mention of the blood spatter in her testimony and did not reference that as a basis for her conclusion that the cause of Durben's death could not be determined. *Id.* at * 4.

Nevertheless, Davis argues McLemore's cause of death opinion was influenced by her belief there was high velocity blood splatter on Durben's clothing (which would indicate he was in the room when the gunshot happened) and counsel should have confronted her regarding the issue. ECF No. 18 at 16. The Iowa Court of Appeals found Davis was not prejudiced by defense counsel's decision not to confront the blood spatter issue more directly or seek to have the reference deleted from the autopsy report prior to trial. *Davis II,* 2021 WL 592226 at *4. This Court must agree.

Dr. McLemore's conclusion never purported to hinge on blood splatter. McLemore's report referred to *possible* high velocity blood splatter, and McLemore's ultimate opinion focused on bruising and location of the gunshot wound as the basis for inconclusive cause of death. The Iowa Court of Appeals correctly determined counsel did not perform deficiently as to this issue.

Relief on this claim must be denied.

3. Location of gunshot wound

At trial, McLemore testified that the gunshot wound's location was "highly unusual" for a self-inflicted gunshot wound. *Davis II,* 2021 WL 592226 at *5. Davis concedes trial counsel objected to that testimony on the basis it was outside the minutes of testimony. Davis contends, however, that counsel was ineffective for not making further objections to that testimony. ECF No. 18 at 16. He contends counsel should have also challenged the foundation for the opinion or should have sought a continuance to obtain opposing expert testimony. Davis's postconviction attorney argued trial counsel was ineffective for failing to raise these objections.

The Iowa Court of Appeals rejected the claim. The Court noted defense counsel made a "reasonable and strategic objection to the testimony," which was denied by the trial court.

> Defense counsel, as well as the State at trial, acknowledged that a foundational objection also could have been made. However, in his deposition, defense counsel explained his strategy in avoiding a foundation objection and in not pursuing a line of questioning related to the witness's expertise and knowledge. In the view of counsel, Dr. McLemore's testimony left clear reasonable doubt and the testimony as favorable to the defense. Defense counsel did not want to "bolster" the witness for the State. He explained, "True expert witnesses will bolster their testimony whether they have any real basis to bolster it or not.... It's not our job to bolster that. And so I felt any foundational questions about that would only assist the State ...." Defense counsel also noted the potential risk of lodging a foundational objection, "Well, you take a risk on that. Any time you're going to ask—if I ask to voir dire a witness, I'm going to say what's your experience in this area, and she then throws out that she's got [eighty-two] papers in it, I have helped the State." A member of the defense counsel team testified in his deposition taken in advance of the PCR trial that he did not anticipate that Dr. McLemore would be testifying that the location of the wound was "highly unusual." Thus, when presented with the

> unanticipated testimony, counsel made a strategic decision to object to the offered testimony being outside the scope of the trial information and her prior deposition. This effectively brought the issue to the attention of the court and presented the issue. Trial counsel's actions and strategy were reasonable given the circumstances. We find no breach of duty in this regard.

Davis II, 2021 WL 592226 at *5.

Davis asserts that his defense counsel should have sought a continuance when confronted with Dr. McLemore's testimony. The Iowa Court of Appeals found the decision not to seek a continuance was a tactical decision—defense counsel believed the case against Davis was weak and strategically chose to give the State as little time to prepare for trial as possible, demanding speedy trial. *Id.* at *6.

> It was reasonable and consistent with trial strategy not to seek a continuance, thereby forcing the State to prove their case under the expedited timeframe. When confronted with Dr. McLemore's testimony, counsel fulfilled their duty by making a reasonable objection, strategically choosing not to pursue a foundation objection so as to not potentially bolster the witness or alternatively undermine a witness whose overall conclusion they found in line with a finding of not guilty. Given the circumstances and what was known to counsel at the time, this was a reasonable strategy within the range of competent representation.

Id.

In addition, Davis did not offer expert testimony at the pcr trial that would have countered McLemore's statement about the unusual position of the wound. *Id.* For that reason, the Iowa Court of Appeals found Davis failed to show prejudice stemming from the failure to request a continuance. The Court finds nothing objectively unreasonable in the Iowa Court of Appeals denial of relief on this claim.

4. Bolstering

Davis contends McLemore improperly bolstered her determination that the cause of death was inconclusive by stating her co-workers agreed with that determination. ECF No. 18 at 19. He contends counsel should have challenged McLemore's testimony regarding her co-workers

agreeing with her determination. The PCR trial court denied relief on the claim, finding on balance McLemore's testimony (that cause of death was inconclusive) was helpful to the defense and any bolstering therefore did not prejudice Davis. (October 5, 2018, Order at 14-15, *Davis v. State*, PCCV025235, Freemont County; Ex. B). The Court of Appeals did not specifically rule on this issue, although it denied relief on all of Davis's claims. To the extent the claim was presented to the Iowa Court of Appeals, denial of relief on the claim was not unreasonable. Davis fails to show he was prejudiced by any bolstering of McLemore's testimony.

B. Failure to Adequately Question Credibility of Witness Stockwell

Davis contends counsel was ineffective for not more forcefully attacking Jamie Stockwell's testimony at trial. ECF No. 18 at 21. During her deposition, Stockwell testified Durben had told her she was suicidal 5 months prior to her death and again one day before Durben died. *Davis II*, 2021 WL 592226 at *8. At trial, Stockwell denied Durben being suicidal the night before she died. Defense counsel questioned the change in testimony, and Stockwell asserted she was scared of Davis, and that was why she lied during the deposition. *Id.* The Iowa Court of Appeals denied relief on the claim that counsel failed to adequately attack the testimony. Davis contends other statements made by Stockwell indicated she was not afraid of Davis, and counsel should have forcefully pursued these two contradictory answers.

> Stockwell's deposition testimony that Durben made suicidal statements to Stockwell on the morning of her death was helpful for Davis's defense. Therefore, it was imperative for counsel to impeach Stockwell when her trial testimony differed so significantly from what she said in her deposition. Counsel fulfilled this duty by impeaching Stockwell with her inconsistent statement and reading portions of her deposition into the record. Davis acknowledges that counsel impeached the witness with her prior inconsistent statements concerning Durben's statements about suicide. However, Davis argues counsel was required to also use Stockwell's statements to investigators that she was not afraid of Davis to further impeach her. We disagree.

> There are clear strategic advantages in using Stockwell's depositional statements rather than her statements made to investigators for impeachment purposes. "We generally entrust cross-examination techniques, like other matters of trial strategy, to the professional discretion of counsel." *United States v. Villalpando*, 259 F.3d 934, 939 (8th Cir. 2001). The statements most relevant to Davis's defense were that Durben made suicidal statements on the morning of her death. Statements made in a deposition are under oath, allowing them to be considered as substantive evidence when brought in through impeachment. By using the sworn statements to impeach the witness, defense counsel enabled the judge to consider her favorable depositional testimony concerning Durben's suicidal statements as substantive evidence despite her in-court testimony. Use of Stockwell's statements to investigators not under oath could have only been offered as extrinsic evidence to prove she made the inconsistent statement rather than to prove she was not afraid of Davis. *See* Iowa R. Evid. 5.613.
>
> Stockwell's credibility had been attacked on cross-examination; additional impeachment with her statements to investigators would be derivative and would do little to undermine her in-court assertion she was scared during her deposition, which occurred after she made the statements to investigators. Further, this line of questioning risked opening the door to more testimony concerning Stockwell's fear of Davis. Specifically, this line of questioning may have opened the door to previously excluded prior bad acts that were within the knowledge of Stockwell—that Davis had previously shot a man and stabbed another and that he was abusive to a previous girlfriend and had threatened to kill her....
>
> We do not find Davis's counsel was ineffective in the treatment of witness Stockwell. Davis is unable to show prejudice regarding the lack of hearsay objection concerning the text given the cumulative evidence of Stockwell's testimony concerning her conversation with Durben the morning of her death. Counsel competently and strategically impeached Stockwell with her sworn prior inconsistent statements. Counsel did not have an essential duty to pursue further impeachment on statements less relevant to Davis's defense and which posed the risk of introducing adverse testimony.

Id. at *9.

Although Davis discounts the risk created by more rigorous questioning, counsel performed competently in cross-examining Stockwell. Stockwell's partially inconsistent statements were identified for the fact-finder and were raised well enough for the trial court to consider. This Court finds nothing unreasonable in the Iowa Court of Appeals denial of relief on this claim.

C. Failure to Appeal Court's Reliance on Suppressed Statements

Davis contends the verdict contains a statement that relies on suppressed evidence, and counsel was ineffective for failing to raise the issue on appeal. ECF No. 18 at 25. The Court's 15-page verdict contains one sentence stating that when Davis was asked whether he could have been in the room when the shot (that killed Durben) was fired, Davis responded: "I don't believe I was in the room." Verdict, ECF No. 18-1 at 11. Davis contends inclusion of that sentence shows the verdict relied on evidence obtained as the result of an illegal search.

PCR counsel argued that the trial court's reliance on suppressed evidence violated Davis's rights under the Fourth, Fifth and Sixth Amendment's of the United States Constitution as well as the Iowa Constitution. Davis contends inclusion of that sentence shows the verdict relied on evidence obtained as the result of an illegal search.

The Iowa Court of Appeals concluded in postconviction review that the issue was meritless because the decision what to argue on appeal is strategic. *Davis II*, 2021 WL 592226, *9–10. Appellate counsel made a strategic decision not to argue that the district court improperly relied on statements made in response to questions about bloody shorts that were later suppressed at trial. Strategic decisions, virtually unchallengeable outside of habeas review, are, under the doubly deferential § 2254 standard of review, an order of magnitude more unchallengeable. *Richter*, 562 U.S. at 105. This was not one of the limited strategic mistakes that would justify habeas relief.

The Iowa Court of Appeals denial of relief on this claim is not unreasonable.

D. Insufficiency of the Evidence

Davis contends there was insufficient evidence to support the verdict's finding of guilt beyond a reasonable doubt. ECF No. 18 at 29. For sufficient evidence to support a criminal conviction, the Fourteenth Amendment's Due Process clause requires "evidence necessary to

convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense." *Jackson v. Virginia*, 443 U.S. 307, 316 (1979); *Brende v. Young*, 907 F.3d 1080 (8th Cir. 2018). When a habeas petitioner challenges his conviction on the sufficiency of the evidence, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 319 (citing *Johnson v. Louisiana*, 406 U.S. 356, 362 (1972) *overruled on other grounds in Ramos v. Louisiana*, 140 S. Ct. 1390 (2020)). "*Jackson* leaves juries broad discretion in deciding what inferences to draw from the evidence presented at trial, requiring only that jurors 'draw reasonable inferences from basic facts to ultimate facts.'" *Coleman v. Johnson*, 566 U.S. 650, 655 (2012) (quoting *Jackson*, 443 U.S. at 319).

"Under *Jackson*, federal courts must look to state law for 'the substantive elements of the criminal offense,' but the minimum amount of evidence that the Due Process Clause requires to prove the offense is purely a matter of federal law." *Coleman*, 566 U.S. at 655 (quoting *Jackson*, 433 U.S. at 324 n.16) (citation omitted). Once a jury makes a determination, "the only question under *Jackson* is whether that finding was so insupportable as to fall below the threshold of bare rationality." *Id.* at 656; *United States v. Manning*, 738 F.3d 937, 944-45 (8th Cir. 2014). Under AEDPA's "twice-deferential" standard of review, a "state-court decision rejecting a sufficiency challenge may not be overturned on federal habeas unless the decision was objectively unreasonable." *Parker v. Matthews*, 567 U.S. 37, 43 (2012) (*quoting Cavazos v. Smith*, 565 U.S. 1, 2 (2011) (per curiam)) (quotation marks and citation omitted); *see also Coleman*, 566 U.S. at 651 ("We have made clear that *Jackson* claims face a high bar in federal habeas proceedings because they are subject to two layers of judicial deference"; *Nash v. Russell*, 807 F.3d 892, 897 (8th Cir. 2015) (applying *Jackson*'s "narrow standard of review," explaining that, under AEDPA,

a court "may grant relief only if [it] find[s] the [state court's] conclusion that the evidence satisfied the *Jackson* sufficiency of the evidence standard both incorrect and unreasonable" and rejecting a habeas challenge to the sufficiency of the evidence) (quotation marks and citation omitted).

This case was tried to the Court, not a jury. The Court's verdict outlined the evidence supporting guilt.

> Given the strong evidence of Davis' various contrivances, his demeanor during his interviews, his minimization of the arguments with Durben that night, and the inconsistencies in his statements, the court concludes that Davis was not credible in his statements. When the symmetrical bruises on Durben's neck are considered along with all of evidence discussed above, including staging of the death scene, Davis' contrivance with rescue personnel, his contrivance at the hospital, his contrivance during interviews, and significant inconsistencies in Davis' statements, I am firmly convinced that Durben did not kill herself. I am firmly convinced despite the uncertainty in the medical evidence because I have been able to consider all of the evidence including Davis' own statements. I am firmly convinced that Brian Davis choked Holly Durben then shot her.

Verdict, ECF No. 18-1.

In upholding the verdict on direct appeal, the Iowa Court of Appeals outlined the evidence of guilt.

> At trial, the State's proof fit into four categories: (1) evidence demonstrating Davis's intent and motive, (2) expert testimony and forensic evidence either associating Davis with the murder or debunking the suicide theory, (3) evidence suggesting Durben lacked suicidal ideation, and (4) evidence indicating Davis tried to cover up his involvement in Durben's death. Although no one piece of evidence conclusively proved Davis's guilt, taken as a whole, we find the testimony of the State's witnesses, along with the State's exhibits, provided the district court with sufficient evidence to find beyond a reasonable doubt that Davis committed murder. We discuss each category of evidence in turn.
>
> To show intent and motive, the State presented evidence of Davis's prior abuse of Durben. One year before Durben's death, Fremont County Sheriff Kevin Aistrope arrested Davis for domestic-abuse assault after seeing Durben with a black eye and redness on the sides of her neck. Two months later, a weeping Durben flagged down a passing vehicle late at night on the highway near her home, which led to Davis's arrest for violation of a civil protective order. Tracey Waters, an acquaintance of Durben, also observed Durben with injuries—black eyes and bruising on her arm. And at some point in 2009, Waters saw Davis grab Durben "from behind her head" at a local bar and "drag[ ] her across the bar [by her hair] to the back door." Durben's

sister, Heather Richardson, commented on Davis's controlling tendencies: "After [Durben] moved in with Davis, she stopped calling. When I tried to call, he wouldn't allow me to talk to her. He actually bashed her windshield in, so she couldn't drive to come see us anymore." And just three weeks before Durben's death, Nephi Jones, a patrol officer for the Shenandoah Police Department, testified he witnessed, via surveillance footage, Davis "violently pushing" Durben.

The State's proof of Davis's recent history of assaulting Durben supported its theory he had the motive and state of mind to commit murder.....

In marshaling its forensic evidence, the State emphasized the peculiarity of a medical examiner being unable to conclude a person with a "gaping shotgun wound to her head" died from a shotgun wound. The State highlights Dr. McLemore's opinion that the symmetrical discoloration on Durben's neck indicated Durben could have been incapacitated before her death with a "sleeper hold"—the same maneuver Carpenter described Davis demonstrating for him just hours before Durben's death. The State couples that opinion with Dr. McLemore's view that the location of Durben's shotgun wound was "highly unusual."[8] We agree Dr. McLemore's testimony set the stage for the State's theory of the crime.

Other forensic evidence from the investigation also suggested Durben did not take her own life. Although she was right-handed, her left hand held the gun's grip. And the only identifiable fingerprint on the gun belonged to Davis. Carpenter testified the shotgun was loaded and leaning against the kitchen wall of the home shared by Durben and Davis when he left in the early morning hours of July 18, which meant, to kill herself, Durben would have had to walk down the stairs, past Davis, and back up the stairs unnoticed in order to retrieve the gun from the kitchen. As the district court concluded, even if Davis had unloaded the shotgun and put it under the bed as he claimed, the defense theory of suicide was implausible.....

The State also offered testimony that Durben lacked suicidal ideation. Her sister, Heather Richardson, testified about Durben's hopes and plans for the future. According to Richardson, she spoke with Durben just two weeks before her death about moving to Tennessee to live with her after the birth of Richardson's child. Richardson believed Durben was excited about reaching the end of her probationary period at a new job and qualifying for benefits—specifically, a program to help her stop smoking before she would be spending time with Richardson's baby.

Jamie Stockwell, a friend who heard from Durben just hours before her death, provided insight into both Durben's state of mind and the veracity of Davis's statements. In the early hours of July 18, 2009, Durben sent Stockwell a text message that read: "If I need a place to stay, can I?" Stockwell called back several times after receiving the text message and eventually spoke with both Durben and Davis sometime after 4:00 a.m. Stockwell described Durben as "hysterical, scared, and crying." "[Durben] said she was needing some help and she wanted me to help her and that she wanted me to help her get out of there and away from everything."

> Stockwell recalled Davis was "mad about everything" and was "upset" that Stockwell had called to talk with Durben. Stockwell's testimony shows Durben was afraid in the hours leading up to her death, and importantly, it draws into question Davis's version of the evening, which minimized his hostility toward Durben.....
>
> Finally, we turn to the State's evidence that Davis was dishonest in his statements to law enforcement. The State presented recordings of Davis's DCI interviews, arguing inconsistencies between his statements and the other evidence presented at trial suggested Davis was attempting to cover up his involvement in Durben's death.....
>
> Giving deference to the district court's credibility determinations and viewing the evidence in the light most favorable to the State, we find sufficient evidence in the record as a whole to convince a rational fact finder of Davis's guilt beyond a reasonable doubt. Accordingly, we affirm on this issue.
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> *Davis I*, at *4-6.

The Iowa Court of Appeals was neither wrong or or objectively unreasonable in finding the evidence cited above was sufficient to support the Court's verdict. Relief on this claim must be denied.

IV. CONCLUSION

For the reasons discussed above, Davis has failed to show that the decisions of the Iowa Court of Appeals were contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States, 28 U.S.C. § 2254(d) (1). Davis, therefore, is not entitled to habeas relief.

IT IS SO ORDERED that Petitioner Brian Heath Davis's petition for federal habeas corpus relief must be **DENIED**. This case is **DISMISSED**.

Pursuant to Rule 11(a) of the Rules Governing Section 2254 Proceedings in the United States Courts, the district court must issue or deny a certificate of appealability when it enters a final order adverse to the petitioner. District courts have the authority to issue certificates of appealability under 28 U.S.C. § 2253(c) and Fed. R. App. P. 22(b). "A certificate of appealability

may issue under [this section] only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Davis has not made a substantial showing of the denial of a constitutional right, therefore a certificate of appealability must be **DENIED**. Davis may request issuance of a certificate of appealability by a judge on the Eighth Circuit Court of Appeals. See Fed. R. App. P. 22(b).

IT IS ORDERED.

Dated this 22nd day of May, 2023.

JAMES E. GRITZNER, Senior Judge
U.S. DISTRICT COURT

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 23-2416

Brian Heath Davis

Appellant

v.

Randy Gibbs and Kris Karberg

Appellees

Appeal from U.S. District Court for the Southern District of Iowa - Central
(4:21-cv-00176-JEG)

ORDER

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

September 18, 2023

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

/s/ Michael E. Gans

C