UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 23-2415

Joseph Rendon

Petitioner - Appellant

v.

Beth Skinner, Director

Respondent - Appellee

Iowa Department of Corrections

Respondent

Appeal from U.S. District Court for the Southern District of Iowa - Central
(4:22-cv-00093-JEG)

JUDGMENT

Before SHEPHERD, GRASZ, 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. The appeal is dismissed.

October 13, 2023

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

/s/ Michael E. Gans

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

JOSEPH RENDON, Petitioner, v. BETH SKINNER, Respondent.	No. 4:22-cv-00093-JEG **ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS**

Joseph Rendon brings this petition for writ of habeas corpus under 28 U.S.C. § 2254. ECF No. 1. He is challenging the validity of his 2015 Iowa convictions for first-degree burglary and nine counts of first-degree robbery. *Id.* at 1. The Court appointed counsel to represent Rendon. *See* Initial Review Order and Notice of Appearance, ECF Nos. 3–4.

The parties have submitted briefs to support their respective positions. *See* Petitioner's Brief, ECF No. 16; Respondent's Brief, ECF No. 18. Respondent also provides relevant state court documents. *See* ECF Nos. 6, 17. For the following reasons, the Court denies the petition for federal habeas corpus relief.

I. FACTUAL AND PROCEDURAL BACKGROUND

On direct appeal, the Iowa Court of Appeals stated the following:

> On September 24, 2014, Thomas Dean hosted an illegal high-stakes poker game in an outbuilding at his home on 86th Street in Johnston. Rendon had previously attended a poker tournament at Dean's home and knew there would be a large amount of cash at the game. At about 1:30 a.m. on September 25, four men—Garvis Thompson, Arthur Benson, Jacari Benson (Jacari), and David Moore—came into the outbuilding. Three of the men carried guns, and the fourth had a bag. The intruders took money and cell phones from the people participating in the poker game. The intruders made the poker players lay on the floor, and then ran out to their get-a-way vehicle, a Chevrolet Impala, driven by Benson's girlfriend, McKenzie McCracken.

> One of the poker players, Justin Lisk, ran out, got into his pickup truck, and followed the Impala south on 86th Street. Lisk's cell phone had not been taken by the intruders and he called 911 to inform officers of the intruders' location. McCracken lost control of the Impala and it struck another vehicle. The occupants of the Impala abandoned it and fled on foot. Officers set up a perimeter in an attempt to capture the criminals. The only vehicle to come through the perimeter was a maroon SUV.
>
> Officers found paperwork addressed to Moore in the Impala. Also, fingerprints from Thompson and Jacari were found on the door handles of the Impala and Thompson's DNA was found on a black ski mask. Officers picked up Thompson, Benson, Jacari, and Moore, and analyzed their cell phones. They found a pattern of calls between the men and with Rendon. The subscriber for Thompson's cell phone was Rendon. Video taken by a security camera on the corner of 86th Street and Meredith Avenue from the night in question showed the Impala, followed by Lisk's pickup, followed by a maroon SUV. On September 26, a maroon SUV, driven by Rendon, was stopped by State troopers and given a warning for speeding on eastbound Interstate 80.

State v. Rendon, No. 15-1832, 2016 Iowa App. LEXIS 1114, at *1–3 (Iowa Ct. App. 2016). The Court will provide additional details as necessary to address individual claims.

The jury convicted Rendon of first-degree burglary and nine counts of first-degree robbery. *Id.* at *6. The trial court sentenced him to a total of seventy-five years in prison. *Id.* The Iowa Court of Appeals affirmed the conviction. *Id.* at *19. The Iowa courts also denied Rendon's application for postconviction relief. *See Rendon v. State*, No. 20-0384, 2022 Iowa App. LEXIS 96, at *12, (Iowa Ct. App. 2022).

Rendon now bring 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).

III. DISCUSSION OF CLAIMS

Rendon raises multiple grounds for relief based on due process violations and ineffective assistance of trial counsel. ECF No. at 2–3. 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 Rendon's claims below.

A. Prior Bad Acts Evidence

Prior to the start of trial, the district court ruled evidence of Rendon's prior drug involvement would be admitted "at least to some extent" because its relevance would outweigh any unfair prejudice. *Rendon*, 2016 Iowa App. LEXIS 1114, at *6–7. Without a final ruling on the admissibility of such evidence, "an objection when the evidence was offered was required in order to preserve error." *Id.* at *8.

After the trial began, Rendon filed a motion in limine to prohibit the State from mentioning the types of drugs he sold. *Id.* The motion, however, did not address the general subject of evidence of drug dealing. *Id.* Consequently, the Iowa Court of Appeals held the

motion was insufficient to preserve error on a claim that the district court improperly permitted evidence of Rendon participating in the distribution of illegal drugs. *Id.*

Thompson testified Rendon supplied him with drugs, Thompson distributed the drugs to Benson and Jacari Benson, who also helped sell the drugs. *Id.* at *4. Thompson also testified he and Rendon planned to use the money from the robbery to be able to purchase more drugs for distribution. *Id.* at *5. Defense counsel did not object to these questions. *Id.* at *8–9. However, at the conclusion of Thompson's direct examination, counsel moved for a mistrial on the basis that the prosecutor pursued the drug connection more intensely than anticipated. *Id.* at *8. The district court denied the motion, finding any undue prejudice was not sufficient to warrant such a sanction. *Id.* at *9. The Court of Appeals agreed that under Iowa law, Rendon had "not shown the prosecutor's conduct led to a situation where an impartial verdict could not be reached." *Id.* at *9.

In addition to arguing the district court erred by denying his motion for mistrial, Rendon also raised on direct appeal that trial counsel was ineffective for failing to timely object to any of Thompson's testimony related to drug trafficking. *Id.* at *14. Even if counsel had objected, the Court of Appeals reasoned the objection would have been denied. *Rendon*, 2016 Iowa App. LEXIS 1114, at *16–17. The State wanted "to present evidence Rendon and Thompson were engaged in selling drugs in order to show a motive and plan." *Id.* at *16. The Court of Appeals found such "evidence was admissible to prove a fact or element other than Rendon's general criminal disposition," that is, to show the motive for the robbery was to expand their drug trafficking. *Id.* Moreover, the Court of Appeals found the probative value of the evidence was not substantially outweighed by unfair prejudice to Rendon because the evidence of drug trafficking "was not wholly independent of the offenses for which Rendon was on trial." *Id.*

Without a showing of prejudice, the Court of Appeals found no merit to the ineffective assistance of counsel claim on this issue.

Rendon argues here that the State did not need to introduce evidence of a drug trafficking enterprise to establish a motive for the robbery because stealing a $100,000 cash prize from an illegal poker game was in no need of further motive. ECF No. 16 at 12. He asserts evidence of his drug trafficking was irrelevant and highly prejudicial. *Id.* Even if true, this does not demonstrate the outcome of the trial would have been different without Thompson's testimony regarding drug trafficking. The jury also heard from Rendon's accomplices who all testified Rendon was involved in the robbery. *Rendon*, 2016 Iowa App. LEXIS 1114, at *4–5. The law enforcement officers testified the accomplices were in contact with Rendon and each other before and after the robbery. *Id.* at *5–6. As noted by Rendon, the motive for stealing $100,000 cash is self-evident.

Consequently, even if the trial court had excluded this testimony, no reasonable probability exists that the result of the proceeding would have been different had counsel made an objection. Without the requisite showing of prejudice, the claim for ineffective assistance of counsel must fail. *Strickland*, 466 U.S. at 687 (requiring a showing of both deficient representation and that deficiency was prejudicial).

Finally, in his pro se petition, Rendon presented Ground One as a due process claim only, contending he was "denied Due Process and a fair trial" when the State introduced prior bad acts evidence at his trial. ECF No. 1 at 2. The evidence of his drug trafficking was admitted without objection. *Rendon*, 2016 Iowa App. LEXIS 1114, at * 14. As stated by the Iowa Court of Appeals, even with an objection, the testimony was admissible under Iowa law. *Id.* at *16–17. "[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law

questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States." *Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991). Rather, this Court may only "determine whether an alleged error infringes upon a specific constitutional protection or is so prejudicial as to be a denial of due process." *Brende v. Young*, 907 F.3d 1080, 1084 (8th Cir. 2018) (further citations omitted). State evidentiary rulings violate due process "only if there was an impropriety so egregious that it made the entire proceeding fundamentally unfair," so that the outcome of the trial probably would have been different. *Skillicorn v. Luebbers*, 475 F.3d 965, 972 (8th Cir. 2007).

Rendon does not argue this testimony was so egregious that it made the entire proceeding fundamentally unfair. To the extent Rendon has raised a claim under the Due Process Clause, the claim must fail.

B. Admission of Expert Testimony Regarding Cell Phone Records

At trial, Detective Tyler Tompkins of the Johnston Police Department testified about cell phone records. *Rendon*, 2016 Iowa App. LEXIS 1114, at *5. Specifically, Tompkins testified the phone records showed Rendon, Thompson, Moore, and Jacari Benson "were often in contact with each other before the robbery and after the robbery." *Id.* at *5–6. The cell phone records showed what cell phone towers were used, and this was consistent with the testimony of the alleged accomplices. *Id.* at *6.

Trial counsel objected to this testimony on the ground that Tompkins was not qualified as an expert to testify about cell phone records. *Id.* at *10. Tompkins received cell phone records training from 2008 to 2012, and Rendon argued this knowledge was obsolete by the time of the trial in 2015. *Id.* The trial court overruled Rendon's objection. *Id.* The Court of Appeals affirmed, holding Tompkins "had sufficient knowledge, skill, experience, and training" to

interpret the records for the jury. *Id.* at *11. Rendon was free to question whether the officer's knowledge was dated, but such challenge "goes to the weight of his testimony, not its admissibility." *Id.* at *10–11.

Alternatively on direct appeal, Rendon argued trial counsel was ineffective for failing to object to the testimony of a second officer about cell phone records and the frequency of calls between Rendon and Thompson. *Id.* at *13–14. The Court of Appeals held such testimony was based on personal examination of the records, and therefore, admissible. *Id.* at *14. The Court of Appeals also found trial counsel did not object to the testimony of Tompkins regarding frequency of calls between Rendon and Thompson. *Id.* Consequently, it found no ineffective assistance of counsel regarding the testimony of either officer. *Id.*

The claim in Rendon's petition is based solely on the grounds he was denied due process and a fair trial when the trial court allowed Tompkins to testify as an "expert" in cell phone records. ECF No. 1 at 2. Even so, in his brief, Rendon states "[t]he Court of Appeals also concluded trial counsel was not ineffective in failing to properly object to the cell phone testimony." ECF No. 16 at 13. It is not clear whether Rendon intended to also raise ineffective assistance of counsel with respect to these facts, and the memorandum in support of Rendon's petition does not provide clarification. While it sets out the procedural history of his claims, no argument or discussion exists as to either claim. *See id.* at 13–14. Regardless, for the following reasons, the Court finds both claims must fail.

First, Rendon's claim on direct appeal was based on the admissibility of expert testimony under Iowa law. *See* Direct Appeal Appellant's Brief 51–60, Respondent's App., ECF No. 6–10. The Court of Appeals reviewed the claim in light of Iowa Rule of Evidence 5.702. No federal claim was presented to the Iowa courts to review, and whether the testimony of the officer

qualified as expert testimony under Iowa law is not reviewable by this Court. *Estelle*, 502 U.S. at 67–68 ("it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions."). The review by this Court is limited to determining "whether an alleged error infringes upon a specific constitutional protection or is so prejudicial as to be a denial of due process." *Brende*, 907 F.3d at 1084. Rendon does not argue this testimony was so egregious that it made the entire proceeding fundamentally unfair. See *Skillicorn*, 475 F.3d at 972 (state evidentiary rulings violate due process "only if there was an impropriety so egregious that it made the entire proceeding fundamentally unfair."). Thus, Rendon's due process claim with respect to this testimony fails.

Similarly, Rendon does not argue how counsel's failure to object to the testimony of the law enforcement officers constituted ineffective assistance of counsel. Because the officers testified based on personal examination of the records, any objection would have been overruled. *Rendon*, 2016 Iowa App. LEXIS 1114, at *14. "Failure to raise a meritless objection cannot support a claim of ineffective assistance." *Sittner v. Bowersox*, 969 F.3d 846, 853 (8th Cir. 2020) (citing *Gray v. Bowersox*, 281 F.3d 749, 756 n.3 (8th Cir. 2002)). Moreover, the testimony of the officers was consistent with the testimony of the accomplices as to their movements. *Rendon*, 2016 Iowa App. LEXIS, at *14. Even if neither officer had testified about the cell phone records, there was other evidence of Rendon's movements at the time of the robbery and shortly thereafter. Consequently, Redon cannot demonstrate the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 694 (1984). Therefore, Rendon's claims of ineffective assistance of counsel for failing to object to testimony regarding cell phone records by law enforcement officers is without merit.

C. Ineffective Assistance of Counsel

In his pro se petition, Rendon raises five grounds of ineffective assistance of trial counsel. ECF No. 1 at 2–3. The Court addresses each below.

1. Facebook Photograph of Cash

During the trial, the State introduced an exhibit showing a photo from Rendon's Facebook page depicting a large amount of cash next to a bottle of liquor. *Rendon*, 2016 Iowa App. LEXIS 1114, at *12. The photo was actually posted before the robbery occurred, and therefore, was irrelevant. *See id.* at *12–13. Although irrelevant, the Iowa Court of Appeals held Rendon could not show prejudice because "[t]he mistake concerning when the picture was posted was thoroughly discussed during the trial." *Id.* at *13.

Rendon argues this conclusion is an unreasonable determination of law. ECF No. 16 at 14. He argues "[t]he photo reenforced the testimony that Rendon was a drug trafficker and an outlaw unworthy of the presumption of innocence." *Id.* Rendon asserts the photo allowed the jury to conclude that Rendon acquired the cash illegally and was posting in on his Facebook page to "brag." *Id.*

This argument is without merit. To show prejudice, Redon must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. Trial counsel thoroughly cross-examined the law enforcement officer who discovered the photograph about the time it was posted to Facebook. Trial Transcript 524–27, ECF No. 6-3. On cross-examination, the officer admitted the photograph was posted five hours before the robbery took place, and therefore, was not evidence of Rendon's participation in the robbery. *Id.* Even the prosecutor conceded during redirect examination that the photograph was uploaded before the robbery occurred. *Id.* at 528.

The time of the photograph was clearly established at trial. The jury understood the photograph was posted to Facebook before the robbery occurred, and therefore, was irrelevant as to whether Rendon committed the underlying crime. The Court agrees "[t]he mistake concerning when the picture was posted was thoroughly discussed ruling the trial," and the proceeding would not have been different had counsel made an objection. *Rendon*, 2016 Iowa App. LEXIS 1114, at *13.

Even more, counsel specifically chose not to make such an objection. Trial Tr. 85, Respondent's App. 22, ECF No. 17-1. She knew about the photograph before the officer testified and knew the officer was wrong about the time. *Id.* At the postconviction relief hearing, counsel testified she made a tactical decision to "show how absolutely bumbling" the officers were." *Id.* Counsel testified she believed "it was better to show how they jumped to conclusions than to keep it out." *Id.* at 86. "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland*, 466 U.S. at 690–91.

The decision of the Court of Appeals finding no ineffective assistance of counsel was not a decision contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States. This claim must be denied.

2. Accomplice Corroboration

At trial, alleged accomplices Moore, Thompson, and Jacari Benson all testified against Rendon about his involvement in the robbery. *Rendon*, 2016 Iowa App. LEXIS 1114, at *4–5. At the end of trial, Rendon moved for judgment of acquittal. *Id.* at *11. The motion, however, did not specifically raise the issue of whether the testimony of accomplices was sufficiently

corroborated by other evidence. *Id.* at *11–12. Consequently, when Rendon raised the issue on direct appeal, the Iowa Court of Appeals found the issue was not adequately preserved. *Id.* at *12 ("We conclude Rendon has failed to preserve error because the issue he raises on appeal was not raised in the motion for judgment of acquittal."). Rendon alternatively argued on appeal that counsel was ineffective for failing to preserve this error. *Id.* at *17. The Iowa Court of Appeals denied relief under this theory because Rendon could not show prejudice as a result of counsel's alleged deficient performance. *Id.* at *18–19.

Under Iowa law, a defendant may not be convicted on the testimony of an accomplice alone, but rather, there must be other corroborating evidence to connect a defendant with the offense charged. Iowa Rule of Crim. P. 2.21(3). "'Corroborative evidence need not be strong as long as it can fairly be said that it tends to connect the accused with the commission of the crime and supports the credibility of the accomplice.'" *Id.* at *17–18 (quoting *State v. Barnes*, 791 N.W.2d 817, 824 (Iowa 2010)). Applying this rule, the Iowa Court of Appeals found sufficient evidence in the record to corroborate the testimony of Rendon's alleged accomplices. *Id.* at *18. Specifically,

> Independent evidence showed Rendon drove a maroon SUV. A videotape from a security camera showed a maroon SUV following Lisk's vehicle as Lisk followed the Impala the intruders used to drive away from the robbery. Also, officers saw a maroon SUV within the perimeter they set up in an attempt to catch the intruders, who had fled on foot. The maroon SUV, driven by Rendon, was stopped for speeding and given a warning on eastbound Interstate 80 on September 26, 2014, which corroborates Thomson's testimony Rendon drove him from Des Moines to the Quad Cities on that day. Furthermore, the cell phone records corroborate the relationships between Rendon, Thompson, Benson, Jacari, and Moore, and their locations on the night of the robbery.

Id. at *18. The Iowa Court of Appeals found any motion to acquit for lack of corroborating evidence would have been denied by the trial court had it been raised. *Id.* at *18–19.

Rendon argues this evidence does not even "remotely" independently implicate Rendon in the offense. ECF No. 16 at 16. He asserts that at best, the sighting of a generic maroon vehicle in the general vicinity at the time of the offense and the cell phone records demonstrate the testifying accomplices knew each other. *Id.*

"[S]tate laws requiring corroboration do not implicate constitutional concerns that can be addressed on habeas review." *Harrington v. Nix*, 983 F.2d 872, 874 (8th Cir. 1993) (citing *Redding v. Minnesota*, 881 F.2d 575, 578 (8th Cir. 1989); *Gipson v. Lockhart*, 692 F.2d 66, 68 (8th Cir. 1982) (per curiam)). "There is also no constitutional requirement that accomplice testimony be corroborated." *Id.* (citing *DuBois v. Lockhart*, 859 F.2d 1314, 1317 (8th Cir. 1988)); *see also Loeblein v. Dormire*, 229 F.3d 724, 727 (8th Cir. 2000) (reaffirming "corroboration requirement is a matter of state law which does not implicate a constitutional right cognizable on habeas review").

When the record contains evidence "substantial enough as a matter of law to support the jury's finding," there is no reasonable probability the court of appeals would have decided differently even if counsel had properly reserved this claim. *Martin v. Norris*, 82 F.3d 211, 217 (8th Cir. 1996) ("the corroborating evidence was substantial enough as a matter of law to support the jury's implicit finding that Mr. Henry's testimony was truthful.") (citing *Strickland*, 466 U.S at 694). The corroborative evidence against Rendon is not, in and of itself, especially strong, but is sufficient to connect him with the underlying crime and support the credibility of the alleged accomplices. If trial counsel had properly raised and preserved the claim, the Iowa courts would have denied and affirmed the denial of a motion to acquit based on lack of corroborative evidence. Rendon cannot demonstrate prejudice as a result of his attorney's failure to make this argument in the motion for judgment of acquittal. *See Moore v. Wachtendorf*, No. C18-2011-

LRR, 2019 U.S. Dist. LEXIS 161590, at *21 (N.D. Iowa Sep. 23, 2019) ("Because Johnson's testimony was corroborated by the evidence cited by the Iowa Court of Appeals, petitioner cannot establish that counsel's allegedly deficient performance resulted in prejudice.").

3. Failure to Investigate Alibi

At the time of the robbery, Rendon lived with his aunt, Carla Treanor. *Rendon*, 2022 Iowa App. LEXIS, at *7. At the postconviction relief hearing, Rendon and his mother both testified they informed defense counsel, Amy Kepes, that Treanor would have a potential alibi for Rendon. Postconviction Relief Transcript 89–90, Respondent's App., ECF No. 6-16; *id.* at 169–70. Kepes did not call Treanor as a witness at the trial. *Id.* at 126. Rendon contends Kepes was ineffective for failing to investigate and call Treanor as an alibi witness. *See* ECF No. 16 at 17.

Rendon raised this claim in his postconviction relief action. *Rendon*, 2022 Iowa App. LEXIS 96, at *7. The Iowa Court of Appeals summarized the potential alibi evidence as follows:

> [Treanor] testified Rendon came to their home early in the evening of September 24, 2014, he was still home when she left for work the next morning, and she would have noticed if he left the home during the night.
>
> Treanor testified she never spoke to Kepes until Rendon's trial, and Kepes testified she did not recall speaking to Treanor about the night of the robbery prior to the trial. However, Kepes testified that had Rendon told her that Treanor could account for his presence during the robbery, she "would have followed up on that" because it "could have given him an alibi." Kepes added that Treanor's testimony could only "have given him an alibi as to whether he was the guy in the truck driving by in Johnston. It doesn't give him an alibi as to whether he was involved in this thing." Even if Treanor had been called to testify, her account of the evening—that Rendon came home drunk and alone, showered, and went to bed—differs from Rendon's PCR testimony that he drove home with his paramour. He also testified that he drove his paramour back to her home later in the evening, which again conflicts with Treanor's account that Rendon did not leave the home again that evening.
>
> Additionally, Rendon was adamant that he never intended to have his paramour testify at trial. Rendon acknowledged he decided he would not testify in his own defense at trial at least in part because that would allow the State to call his

> paramour as a rebuttal witness. By not testifying in his own defense, Rendon prevented the State from questioning his paramour about her drug use, which could endanger her custody of her child. In a recorded jailhouse call, Rendon admitted he refused to call other potential alibi witnesses in order to similarly protect his paramour.

Id. at *7–9.

The district court concluded Rendon affirmatively decided against pursuing any alibi defense to protect his then-girlfriend. *Id.* at *9. The Court of Appeals agreed, noting "Kepes could not have been ineffective for failing to investigate Treanor about an alibi defense Rendon did not want to present." *Id.*

The Court of Appeals also agreed with the district court that "other evidence in the record established Rendon was not home on the night of the robbery. *Id.* Consequently, the Court of Appeals found "Rendon has not shown the outcome of his trial would have been different if Treanor had testified, and we reject Rendon's claim that Kepes was ineffective for failing to present Treanor as an alibi witness." *Id.* at *9–10.

Regardless of whether Kepes knew about Treanor's potential testimony, Rendon cannot show the requisite prejudice. First, the record supports the findings of the Iowa courts that Rendon firmly conveyed he would not pursue an alibi defense in order to protect his girlfriend from collateral prosecution or child custody proceeding. *Rendon*, 2022 Iowa App. LEXIS 96, at *8–9. As found by the Iowa Court of Appeals, "Kepes could not have been ineffective for failing to investigate Treanor about an alibi defense Rendon did not want to present." *Id.* at *9. If Rendon would not testify, counsel had no duty to further investigate alibi witnesses. *See Strickland*, 466 U.S. at 691("when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable.").

Second, the Iowa courts found inconsistencies between Treanor's account and the version of events given by Rendon. *Rendon*, 2022 Iowa App. LEXIS 96, at *9. Treanor testified at the postconviction relief hearing that Rendon was home asleep in his bed all night. *Id.* at *8. Rendon's testimony at the hearing, however, was that he drove home with his girlfriend, then drove his girlfriend back to her home later in the evening. *Id.* The Iowa Court of Appeals also pointed to other evidence in the record demonstrating Rendon was not home on the night of the robbery, including testimony from others regarding his role in the robbery and cell phone records showing Rendon's cell phone was moving around town. *Id.* at *9. Even if Treanor had been called as an alibi witness, other evidence in the record contradicted her version of events. For this reason, the Iowa Court of Appeals found Rendon could not show the outcome of his trial would have been different if Treanor had testified. *Id.*

This Court must agree. Given this record, Rendon has not demonstrated Kepes was ineffective for failing to present Treanor as an alibi witness. This claim must be denied.

4. Inadequate Impeachment of Accomplices

At trial, accomplices, Thompson, Moore, and Jacari Benson admitted to participating in the robbery and testified against Rendon as part of a favorable plea agreement. *Rendon*, 2022 Iowa App. LEXIS 96, at *10. Rendon argues here that trial counsel failed to adequately impeach or discredit these witnesses at trial. ECF No. 16 at 18. For example, Rendon asserts Thompson and Jacari Benson had prior convictions which should have been raised to discredit their credibility. *Id.* at 18–19. Rendon also argues trial counsel should have explored Thompson feeling "double crossed" by Rendon and was testifying for that reason. *Id.* at 18.

The Court of Appeals found the outcome of the trial would not have been different if the jury knew about the previous felony convictions of the witnesses, "considering they already

admitted at trial to participating in the robbery and burglary—serious crimes on their own." *Rendon*, 2022 Iowa App. LEXIS 96, at *10. Regarding his alleged grudge, the Iowa Court of Appeals found "Thompson was apparently upset Rendon did not use his proceeds from the robbery to purchase drugs for Thompson to sell, so this line of questioning would be unlikely to help Rendon at trial." *Id.* at *10–11.

In his brief, Rendon points to other examples of ways Kepes should have impeached the testimony of the alleged accomplices. ECF No. 16 at 18. These include inconsistencies in trial testimony and statements given to police regarding alibis, the quantity of drugs used, the amount of money received, the type of vehicles used, and whether other identified individuals were involved in the robbery. *Id.* at 19–20.

Rendon cannot prevail on this claim for two reasons. First, as Respondent has argued, this claim is procedurally defaulted. To satisfy the exhaustion requirement of 28 U.S.C. § 2254((b)(1)(A), "'state 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." *Welch v. Lund*, 616 F.3d 756, 758 (8th Cir. 2010) (quoting *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999)). In a state such as Iowa, which uses a "deflective appellate structure," a petitioner "must file an application for further review in the Supreme Court of Iowa to exhaust his claims properly in the state courts." *Id.* at 759. This issue was not raised on further review of the postconviction relief appeal.[1] *See* Appl. for Further Review 3, Respondent's App., ECF No. 6-

[1] The only question presented for review was "Does the proponent of an ineffective assistance of counsel claim need to show that the outcome of the trial would have been different, or do they only need to undermine confidence in the outcome?" ECF No. 6-22 at 3.

22. Because Rendon did not fairly present the claim through one complete round of state court review, he has failed to exhaust this claim.

Second, even if the claim was fully exhausted, Rendon cannot show the requisite prejudice. At the postconviction relief hearing, Kepes testified she was concerned "about 'beating a dead horse' by spending more time on impeachment, which could lead to jurors 'growing tired and frustrated' and the defense 'looking weak.'" *Id.* at *11. As stated previously, "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland*, 466 U.S. at 690–91.

This claim must be dismissed.

5. Cumulative Prejudice

Rendon asserts cumulative prejudice by counsel's ineffectiveness denied him a fair trial. ECF No. 1 at 3. "Iowa recognizes the cumulative effect of ineffective assistance of counsel claims when analyzing prejudice under *Strickland*." *State v. Clay,* 824 N.W.2d 488, 501 (2012), Under federal law, however, "[e]rrors that are not unconstitutional individually cannot be added together to create a constitutional violation. Neither cumulative effect of trial errors nor cumulative effect of attorney errors are grounds for habeas relief." *Wainwright v. Lockhart*, 80 F.3d 1226, 1233 (8th Cir. 1996). *See also Shelton v. Mapes*, 821 F.3d 941, 950 (8th Cir. 2016) ("*Strickland* does not authorize a cumulative inquiry of counsel's performance.").

This claim must denied. The Court does not need to determine whether it was also procedurally defaulted for failure to raise it on further review to the Iowa Supreme Court.

IV. CONCLUSION

For the reasons discussed above, Rendon 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). Rendon, therefore, is not entitled to habeas relief.

IT IS SO ORDERED that Petitioner Joseph Rendon's petition for federal habeas corpus relief is **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). Rendon has not made a substantial showing of the denial of a constitutional right, therefore a certificate of appealability must be **DENIED**. Rendon 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 15th day of May, 2023.

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

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 23-2415

Joseph Rendon

Appellant

v.

Beth Skinner, Director

Appellee

Iowa Department of Corrections

Appeal from U.S. District Court for the Southern District of Iowa - Central
(4:22-cv-00093-JEG)

ORDER

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

November 21, 2023

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

/s/ Michael E. Gans

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