

Not To Be Published:

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
EASTERN-WATERLOO DIVISION**

TYRE DAMOND ADAMS,

Petitioner,

vs.

JOHN AULT, Warden,

Respondent.

No. C99-2110-MWB

**MEMORANDUM OPINION AND
ORDER REGARDING REPORT AND
RECOMMENDATION OF
MAGISTRATE JUDGE**

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Despite the tremendous interest federal courts have in ensuring that constitutional rights have been respected throughout the criminal justice process, petitioners seeking *habeas corpus* relief often tie the courts’ hands by not exhausting their federal claims in state court. Because of its intricacy and complexity, *habeas* law has been indicted as being what Justice Frankfurter termed “an untidy area of our law.” See *Sunal v. Large*, 332 U.S. 174, 184 (1947) (Frankfurter, J., dissenting). By this point in time, however, it is clear that, subject to certain exceptions, petitioners must exhaust their federal constitutional claims in state court before a federal court will be able to grant relief on those claims. It seems to the court that petitioners, or perhaps their lawyers, tend to pursue new and different claims each time a state court rejects a claim. Because of the extreme difficulty in overcoming state procedural defaults, petitioners seeking to preserve the federal *habeas* remedy should take care to properly exhaust their claims in state court in order to avoid procedural defaults. Or, in other words, they should

hold tightly to the adage, if at first you don't succeed, try, try again.

I. INTRODUCTION AND PROCEDURAL BACKGROUND

In this action, petitioner Tyre Damon Adams (“Adams”) seeks *habeas corpus* relief pursuant to 28 U.S.C. § 2254 from his February 18, 1994 convictions in Iowa state court of three counts of robbery in the first degree.¹ On March 29, 1994, Adams was sentenced to an indeterminate sentence not to exceed twenty-five years on each count. Adams’s sentences on Counts I and III were to run consecutively with each other, while his sentence on Count II was to run concurrently with the other counts.

Adams filed a direct appeal to the Iowa Supreme Court, raising only one issue for the court’s consideration: “He contend[ed] the district court abused its discretion in imposing consecutive sentences on counts I and III.” Decision Affirming Conviction, *State*

¹Adams was convicted pursuant to Iowa Code sections 711.1 and 711.2. Section 711.1 defines robbery in general:

A person commits a robbery when, having the intent to commit a theft, . . . does any of the following acts to assist or further the commission of the intended theft or the person’s escape from the scene thereof with or without the stolen property:

1. Commits an assault upon another.
2. Threatens another with or purposely puts another in fear of immediate serious injury.
3. Threatens to commit immediately any forcible felony.

It is immaterial to the question of guilt or innocence of robbery that property was or was not actually stolen.

IOWA CODE § 711.1.

Section 711.2 defines robbery in the first degree as follows: “A person commits robbery in the first degree when, while perpetrating a robbery, the person purposely inflicts or attempts to inflict serious injury, or is armed with a dangerous weapon. Robbery in the first degree is a class “B” felony.” *Id.* § 711.2.

v. Adams, Sup. Ct. No. 94-600 (Iowa Jan. 3, 1995). Adams argued that the sentencing court abused its discretion by considering only the grievous nature of the offense when it refused Adams's plea for a deferred judgment or concurrent sentences. *Id.* The Iowa Supreme Court rejected Adams's contention and held that the record demonstrated that the sentencing court did not rely solely on the nature of the offense in imposing the consecutive sentences, and, consequently, the court did not abuse its discretion in imposing sentences that were within statutory guidelines. *Id.*

Upon the rejection of his direct appeal, Adams filed a timely petition for post-conviction relief, which the post-conviction relief court ("PCR court") heard on January 29, 1998. The PCR court identified Adams's issues for review as follows:

In his application for post-conviction relief, Petitioner claims ineffective assistance of counsel for (1) failing to adequately investigate and impeach Andre Newell, Petitioner's accomplice, (2) failing to move for a mistrial on the basis of an unconstitutional jury selection process, (3) failing to move for a mistrial because a juror was sleeping, and (4) substituting alternate defense counsel for the reading of the verdict rather than being personally present. He also claims that the trial court erred by (1) failing to provide a jury panel which included African-Americans and (2) permitting the State to argue its case during voir dire. Finally, he claims that there was no probable cause for his arrest.

Adams v. State, PCR Hrg. No. PCCV076137 (Iowa Dist. Ct. Black Hawk Cty. Jan. 30, 1998). Adams and his counsel both agreed that these were the issues presented to the PCR court. PCR Tr., at 2-3, ll. 13-3, 6, 16. After receiving evidence, hearing testimony from Adams and his trial attorney, Mr. John Ackerman, and reviewing the trial transcript, the PCR court rejected each of Adams's claims.

Adams next appealed the dismissal of his post-conviction action to the Iowa Court of Appeals, arguing that the PCR court was not fair and impartial. Namely, he asserted that the PCR judge's statement that he hoped Adams's conviction would stand demonstrated

impermissible bias that resulted in the denial of due process of law. In rejecting Adams's claim, the appellate court ruled that Adams did not properly preserve his bias claim because he failed to make a timely objection. Further, the court held that, even if Adams had made an objection, he failed to prove the merits of his due process claim.

In his *pro se* application for *habeas* relief, Adams asserted myriad myriads of claims. Of the thirteen original grounds asserted, however, petitioner wisely narrowed the focus of his assertions of error and briefed only five of his original claims.³² The issues Adams pursued are: (1) The destruction of a portion of the trial transcripts as a violation of Adams's Fifth Amendment due process rights and Sixth Amendment right to effective assistance of counsel; (2) unconstitutional jury selection, in violation of the Sixth Amendment and the Equal Protection Clause of the Fourteenth Amendment; (3) conflicted representation, denying Adam's right to conflict-free counsel and due process of law (4) the Iowa sentencing statute's failure to establish guidelines for sentencing judges as arbitrary and capricious, in violation of the Fifth Amendment's Due Process Clause; and (5) the alleged bias of the PCR judge, in violation of the Fifth Amendment's Due Process Clause. Pet.'s Br., at 1 (#31). Further, Adams requested an evidentiary hearing on his claims of conflicted representation and unconstitutional jury selection.

Magistrate Judge Paul A. Zoss filed a Report and Recommendation on September 5, 2001. In the Report and Recommendation, Judge Zoss concluded that all of Adams's claims were procedurally defaulted with the exception of the PCR court bias claim. With respect to the PCR court bias claim, Judge Zoss found that the Iowa Court of Appeals decided the

²Issues raised by petitioner in his original petition but not briefed are deemed abandoned. *See Posters 'N Things, Ltd. v. United States*, 511 U.S. 513, 527 (1994); *see also Hatley v. Lockhart*, 990 F.2d 1070, 1073 (8th Cir. 1993). Furthermore, in his objections to the Report and Recommendation, Adams does not object to Judge Zoss's characterization of the claims on which he seeks relief, nor does he object to Judge Zoss's conclusion that the issues raised in his original petition but not briefed are abandoned.

claim on independent and adequate state grounds, barring federal review. Accordingly, Judge Zoss recommends denial of all of Adams's claims for relief and recommends entry of judgment in favor of the respondent. Judge Zoss further recommends that petitioner's request for an evidentiary hearing be denied and that, in addition, a certificate of appealability be denied. Adams filed objections to the Report and Recommendation, through counsel, on September 17, 2001. In his objections, Adams objects to (1) the magistrate judge's inadvertent failure to address Adams's claim that the destruction of the trial transcripts violates his constitutional rights, (2) the finding that his PCR court bias claim was decided on independent and adequate state grounds when the Iowa court also reached the merits, (3) Judge Zoss's recommendation that an evidentiary hearing be denied, because Adams asserts that his *habeas* petition cannot meaningfully be reviewed absent a hearing concerning the destruction of the trial transcript, and, furthermore, he argues that any procedural default in that regard is due to ineffective assistance of counsel, thus excusing his failure to properly present the issues of conflicted representation and jury selection to the Iowa courts, (4) the conclusion that a federal constitutional issue was not fairly presented to the state court, thereby foreclosing federal review, with regard to Adams's claim that his right to due process was violated when the district court imposed consecutive twenty-five year sentences upon him, and (5) the finding that Adams made no substantial showing of a deprivation of any constitutional right, and, consequently, Adams objects to the recommendation that a certificate of appealability be denied.

II. ANALYSIS

A. Standard Of Review

The standard of review to be applied by the district court to a Report and Recommendation of a magistrate judge is established by statute:

A judge of the court shall make a de novo determination of

those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate [judge].

28 U.S.C. § 636(b)(1). The Court of Appeals for the Eighth Circuit has repeatedly held that it is reversible error for the district court to fail to conduct a *de novo* review of a magistrate judge's report when such review is required. See, e.g., *Hosna v. Grosse*, 80 F.3d 298, 306 (8th Cir.) (citing 28 U.S.C. § 636(b)(1)), *cert. denied*, 519 U.S. 860 (1996); *Grinder v. Gammon*, 73 F.3d 793, 795 (8th Cir. 1996) (citing *Belk v. Purkett*, 15 F.3d 803, 815 (8th Cir. 1994)); *Hudson v. Gammon*, 46 F.3d 785, 786 (8th Cir. 1995) (also citing *Belk*, 15 F.3d at 815). However, the plain language of the statute mandates *de novo* review only for "those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1). Therefore, those portions of the proposed findings or recommendations contained in the magistrate judge's report and recommendation to which no objections are filed are reviewed only for "plain error." See *Griffini v. Mitchell*, 31 F.3d 690, 692 (8th Cir. 1994) (reviewing factual findings for "plain error" when no objections to the magistrate judge's report were filed). Adams has filed five objections to the Report and Recommendation, and the court will consider each in turn.

B. Missing Transcript Claim

First, Adams points out that the Report and Recommendation fails to address his claim that the destruction of Volume II of the trial transcript substantially prejudiced Adams from pursuing this *habeas* action. In the way of background, Adams's trial court transcript consists of a three volume set. The second volume is missing, having been either lost or destroyed. Although Adams requested a copy from the court reporter, the court reporter was unable to prepare a copy, because the office apparently disposed of that volume of the transcript.

1. Exhaustion requirement generally

Adams has never presented this claim with regard to the destruction of a portion of his trial transcript to an Iowa court. “Before a federal court may grant habeas relief to a state prisoner, the prisoner must exhaust his remedies in state court. In other words, the state prisoner must give the state courts an opportunity to act on his claims before he presents those claims to a federal court in a habeas petition.” *O’Sullivan v. Boerckel*, 526 U.S. 838, 842 (1999) (citing *Ex parte Royall*, 117 U.S. 241 (1886), and acknowledging that exhaustion requirement is now codified at 28 U.S.C. § 2254(b)(1)); accord *Abdullah v. Groose*, 75 F.3d 408, 411 (8th Cir. 1996) (citing *Pollard v. Armontrout*, 16 F.3d 295, 297 (8th Cir. 1994)).

In *Picard v. Connor*, 404 U.S. 270, 92 S. Ct. 509, 30 L. Ed. 2d 438 (1971), [the United States Supreme Court] made clear that 28 U.S.C. § 2254 requires a federal habeas petitioner to provide the state courts with a “fair opportunity” to apply controlling legal principles to the facts bearing upon his constitutional claim. *Id.*, at 276-277, 92 S. Ct., at 512-513. It is not enough that all the facts necessary to support the federal claim were before the state courts, *id.*, at 277, 92 S. Ct., at 513, or that a somewhat similar state-law claim was made. See, e.g., *Gayle v. LeFevre*, 613 F.2d 21 (2d Cir. 1980); *Paullet v. Howard*, 634 F.2d 117, 119-120 (3d Cir. 1980); *Wilks v. Israel*, 627 F.2d 32, 37-38 (7th Cir.), cert. denied, 449 U.S. 1086, 101 S. Ct. 874, 66 L. Ed. 2d 811 (1980); *Connor v. Auger*, 595 F.2d 407, 413 (8th Cir.), cert. denied, 444 U.S. 851, 100 S. Ct. 104, 62 L. Ed. 2d 67 (1979). In addition, the habeas petitioner must have “fairly presented” to the state courts the “substance” of his federal habeas corpus claim. *Picard*, supra, 404 U.S. at 275, 277-278, 92 S. Ct. at 512, 513-514. See also, *Rose v. Lundy*, 455 U.S. 509, ----, 102 S. Ct. 1198, 1204, 71 L. Ed. 2d 379 (1982).

Anderson v. Harless, 459 U.S. 4, 6 (1982) (per curiam); accord *Duncan v. Henry*, 513 U.S. 364, 365-66 (1995) (requiring habeas petitioners to “fairly present” federal claims to state

courts or such claims are procedurally defaulted); *Picard v. Connor*, 404 U.S. 270, 275 (1971) (same); *Tyler v. Gunter*, 819 F.2d 869, 870 (8th Cir. 1987) (same).

Failure to exhaust federal claims in state court bars a federal court from granting *habeas* relief. 28 U.S.C. § 2254(b)(1)(A). Even though under Iowa law ineffective assistance of appellate counsel may excuse a defendant's failure to raise claims on direct appeal, the claims still must be brought in post-conviction relief proceedings in order to avoid procedural default. See *May v. Iowa*, 251 F.3d 713, 717 (8th Cir. 2001); see also *Ledezma v. State*, 626 N.W.2d 134, 141-42 (Iowa 2001) (same). Because Adams failed to present this claim at any stage of proceedings, it is axiomatic that the claim is not exhausted and, thus, is procedurally defaulted.

2. Right of appellate counsel to obtain complete trial transcript

Adams argues, however, that the missing transcript issue could not have been brought before a state court and that the assertion of error, consequently, is properly before this court. Adams contends that the missing transcript violates his rights to due process and effective assistance of counsel, as guaranteed by the Fifth and Sixth Amendments, respectively. In support of this contention, Adams cites *Hardy v. United States*, 375 U.S. 277 (1964). In *Hardy*, the Supreme Court held that complete trial transcripts were crucial in order for appellate counsel, who did not also serve as trial counsel, of an indigent defendant to fully discharge his or her duties. *Id.* at 426-27. This is so because “[t]he right to notice ‘plain errors or defects’ is illusory if no transcript is available[,] at least to one whose lawyer on appeal enters the case after the trial is ended. *Id.* at 427 (citing *Ingram v. United States*, 315 F.2d 29, 30-31 (D.C. Cir. 1962)).

While this court agrees wholeheartedly with the ruling of *Hardy*, there are several important distinguishing facts in Adams's case that make the *Hardy* Court's ruling inapposite here. The timing of the disappearance of Adams's transcript is critical. The trial transcript did not disappear until after Adams had exhausted his state appeals.

Adams's counsel requested the missing volume of the trial transcript on June 13, 2000 in connection with this *habeas* action. The evidence indicates that at the time of Adams's post-conviction relief action, which occurred *after* Adams's direct appeal to the Iowa Supreme Court, Adams's counsel had access to the complete transcript. First, at the PCR hearing, Adams's counsel submitted into evidence "the transcript of the trial beginning on February 15. *This is a three volume transcript* concluding on page 437." PCR Tr., at 31, ll. 21-24 (emphasis added). Second, on January 30, 1998, Adams's PCR counsel filed in Iowa district court an itemization of fees and expenses, which included billing for 2.7 hours to review *400+ pages of trial transcript*. Lastly, the PCR court stated that it "carefully reviewed the trial transcript." Furthermore, Adams's next appeal to the Court of Appeals of Iowa was premised on an allegation of the PCR court's bias, and, thus, nothing in the trial transcript would have affected the outcome of that court's decision regarding the PCR court's bias, because the appellate court's ruling was based on statements made during the PCR hearing and not at Adams's trial.

The fact that Adams indeed had the entire trial transcript throughout his appeals process is significant to the outcome of this case and is what distinguishes his case from *Hardy*. As stated previously, a federal *habeas* court may only grant relief when the petitioner has "fairly presented" his or her claims to state court. In *Hardy*, the transcript was necessary in order to fully pursue the indigent defendant's appeal. *Hardy*, 375 U.S. at 427. In Adams's case, his appeal was pursued at the state level while Adams at all times had access to his trial transcript. It was not until after the state appeals process was exhausted and until Adams petitioned the federal court for a writ of *habeas corpus* that the transcript turned up missing. At that point when seeking *habeas* relief, the only claims reviewable by the federal court are those that have been presented to the state courts. 28 U.S.C. § 2254(b)(1)(A). Therefore, Iowa courts must have been given an opportunity to rule upon the claims that Adams contends depend upon his access to the entire trial

transcript before the destruction of the transcript can be considered as a ground for relief. Thus, if the claims that Adams contends require the transcript are procedurally defaulted, unless excused, the issue of the missing volume of his trial transcript is moot.

Adams asserts in his brief that the complete transcript is necessary to pursue his claim of ineffective assistance of counsel on the grounds of counsel's failure to raise sufficiency of the evidence on appeal and the failure of counsel to adequately cross-examine and impeach one of Adams's accomplices who testified against Adams, Andre Newell. Adams stated that "[i]t is impossible for a full and fair review of the claims of insufficiency of the evidence given that the only copy of one of the volumes of the transcript has been destroyed. . . . Further, it does not appear that Mr. Newell's testimony can be reviewed because it is in the destroyed volume. . . ." Pet.'s Br., at 3. Adams also contends that not having access to the entire transcript violates his Fifth Amendment right to due process of law.

3. *Ineffective assistance of counsel: Cross-examination of witness*

While Adams raised the issue of his counsel's cross-examination of Mr. Newell before the PCR court, he did not renew that claim before the Iowa Court of Appeals. The only issue presented to the appellate court was whether the PCR court exhibited impermissible bias against the petitioner.

A claim that is presented to the state court on a motion for post-conviction relief is procedurally defaulted if it is not renewed in the appeal from the denial of post-conviction relief. *Lowe-Bey v. Groose*, 28 F.3d 816, 818 (8th Cir. 1994). *See also Reese v. Delo*, 94 F.3d 1177, 1181 (8th Cir. 1996) (a claim presented in a motion for post-conviction relief but not advanced on appeal is abandoned).

Anderson v. Groose, 106 F.3d 242, 245 (8th Cir. 1997); *see also Tunstall v. Hopkins*, 151 F. Supp. 2d 1049, 1064 (N.D. Iowa 2001) (stating that failure to renew a claim in appeal from denial of post-conviction relief raises a procedural bar to *habeas* relief) (citing *Lamp*

v. Iowa, 122 F.3d 1100, 1104 (8th Cir. 1997) (“The failure to raise the ineffective assistance claims in an appeal from the denial of [post-conviction] relief raises a procedural bar to pursuing those claims in federal court.”) (citation omitted)). Thus, Adams’s ineffective assistance claim with respect to his trial counsel’s cross-examination and impeachment of Mr. Newell is procedurally defaulted, precluding this court from considering the claim as a ground for *habeas* relief, because Adams did not advance this argument on appeal. Moreover, he asserts no “cause” for having failed to pursue this claim, and the court is unable to discern one.

4. Ineffective assistance of counsel: Sufficiency of the evidence

Adams also contends that the transcript is necessary to pursue his ineffective assistance of counsel claim with regard to his appellate counsel’s failure to raise sufficiency of the evidence on appeal. The court notes preliminarily that it will address this claim with regard to the direct appeal of Adams’s conviction, and not Adams’s PCR counsel’s performance. The court is compelled to address Adams’s ineffective assistance of appellate counsel claim in this manner for two principle reasons. First, Adams’s petition for writ of *habeas corpus* specifically states that “[a]ppellate counsel was ineffective for failure to raise *on direct appeal*” what Adams later construes to be sufficiency of the evidence. See Pet. Addendum A, at (c) (emphasis added); *and compare with* Pet.’s Br., at 2 (“[O]ne of the grounds alleged was insufficiency of the evidence (subparagraph c). There the issue was couched as ineffective assistance of appellate counsel for not raising insufficiency of evidence on appeal.”).

Second, because a prisoner has no constitutional right to PCR counsel, any alleged deficiency of Adams’s PCR counsel cannot be the basis of *habeas* relief. *Compare Coleman v. Thompson*, 752 (1991) (holding no Sixth Amendment right to post-conviction relief counsel) (citing *Pennsylvania v. Finley*, 481 U.S. 551 (1987); and *Murray v. Giarratano*, 492 U.S. 1 (1989)), *with Wainwright v. Torna*, 455 U.S. 586 (1982) (holding that when there

is no constitutional right to counsel, there can be no deprivation of effective assistance). Adams's objections to the Report and Recommendation are, at best, ambiguous and may be construed to refer to his PCR action. See Pet's Objections, at 2 (referring to "some of his post-conviction claims"). However, because his petition for relief does not specify this ground and because the ineffectiveness of post-conviction counsel "may not serve as 'cause,'" to excuse a procedural default, the court need only address the effectiveness of Adams's counsel on direct appeal, and not whether his PCR counsel's failure to assert sufficiency of the evidence was ineffective.

a. Ineffective assistance of counsel as ground for habeas relief

Adams's claim that he is entitled to relief on the ground that his appellate counsel was ineffective for failing raise sufficiency of the evidence on direct appeal is likewise procedurally defaulted. To have preserved this claim for federal *habeas* review, Adams should have raised it at his post-conviction proceeding. Because he failed to do so, his ineffective assistance of appellate counsel claim is procedurally barred, because failure to exhaust a constitutional claim in state court generally bars a federal *habeas* court from granting relief. *E.g.*, *O'Sullivan* 526 U.S. at 842. Indeed, Adams's ineffective assistance of appellate counsel claim for failure to challenge the sufficiency of evidence was at no time presented to any Iowa court. "In this circuit, to satisfy the 'fairly presented' requirement, [a *habeas* petitioner is] required to 'refer to a specific federal constitutional right, a particular constitutional provision, a federal constitutional case, or a state case raising a pertinent federal constitutional issue' in the [Iowa] state court." *Abdullah*, 75 F.3d at 411-12.

b. Ineffective assistance of counsel as "cause"

Nevertheless, this procedural barrier to *habeas* relief is not impenetrable: A petitioner's failure to raise a federal constitutional claim in state court may be excused by showing cause and prejudice or by showing "that a fundamental miscarriage of justice would

result from a failure to entertain the claim.” See *McCleskey v. Zant*, 499 U.S. 467, 493, 495 (1991); accord *Abdullah*, 75 F.3d at 413. Federal courts “normally may proceed to the merits of a procedurally defaulted habeas claim only if the petitioner “‘can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law.’”” *Wyldes v. Hundley*, 69 F.3d 247, 253 (8th Cir. 1995) (quoting *Maynard v. Lockhart*, 981 F.2d 981, 984 (8th Cir. 1992), which in turn quotes *Coleman*, 501 U.S. at 750)). The court has read Adams’s petition and arguments in support of his petition extraordinarily liberally. When read in this light, Adams attempts to establish cause by asserting that his appellate counsel was ineffective, and argues that, if shown, this court is required to consider Adams’s sufficiency of the evidence claim, as a constitutional claim, on the merits in this federal *habeas* proceeding.

This contention is flawed for two reasons. First, as discussed in Section II.B.4(a), Adam’s ineffective assistance of appellate counsel claim is procedurally barred and, consequently, cannot serve as cause sufficient to excuse the procedural deficiencies of his sufficiency of the evidence claim.

This court has recently examined in detail those instances in which failure to exhaust a claim may be excused, in *Farmer v. Iowa*, 153 F. Supp. 2d 1034 (N.D. Iowa 2001). In *Farmer*, this court explained “cause” in the context of an ineffective assistance of counsel claim:

To show “cause” in an attempt to excuse a procedural default, the petitioner must show “some objective external factor impeded him” from timely asserting the claim in state proceedings. See, e.g., *Nims v. Ault*, 251 F.3d 698, 702 (8th Cir. 2001). The court agrees . . . that one example of such an “external factor” is ineffective assistance of counsel. See *id.* (citing *Joubert v Hopkins*, 75 F.3d 1232, 1242 (8th Cir.), cert. denied, 518 U.S. 1029, 116 S. Ct. 2574, 135 L. Ed. 2d 1090 (1996)). However, “ineffective assistance of counsel must be presented to the state court as an independent claim before it

can be used to establish cause for a procedural default.” *Lee v. Kemna*, 213 F.3d 1037, 1038 (8th Cir. 2000) (citing *Wylde v. Hundley*, 69 F.3d 247, 253-54 (8th Cir. 1995), *cert. denied*, 517 U.S. 1172, 116 S. Ct. 1578, 134 L. Ed. 2d 676 (1996)), *cert. granted* — U.S. — , 121 S. Ct. 1186, 149 L. Ed. 2d 103 (2001) (footnote omitted, but indicating that the undersigned, sitting by designation, dissented from the majority opinion in *Lee v. Kemna*, 213 F.3d 1037 (8th Cir. 2000), but on other grounds).

Id. at 1037-38. In *Edwards v. Carpenter*, 529 U.S. 446, 451-52 (2000), the United States Supreme Court likewise ruled that, while an ineffective assistance of counsel claim can be “cause” for the procedural default of another claim, the ineffective assistance of counsel claim itself must not be procedurally defaulted. More precisely, “a procedurally defaulted ineffective-assistance-of-counsel claim can serve as cause to excuse the procedural default of another habeas claim only if the habeas petitioner can satisfy the ‘cause and prejudice’ standard with respect to the ineffective-assistance claim.” *Id.* at 450-51. The Supreme Court reasoned:

The procedural default doctrine and its attendant “cause and prejudice” standard are “grounded in concerns of comity and federalism,” *Coleman v. Thompson*, 501 U.S. 722, 730, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991), and apply alike whether the default in question occurred at trial, on appeal, or on state collateral attack, *Murray v. Carrier*, 477 U.S. 478, 490-492, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986). “[A] habeas petitioner who has failed to meet the State’s procedural requirements for presenting his federal claims has deprived the state courts of an opportunity to address those claims in the first instance.” *Coleman*, 501 U.S., at 732, 111 S. Ct. 2546. We therefore require a prisoner to demonstrate cause for his state-court default of any federal claim, and prejudice therefrom, before the federal habeas court will consider the merits of that claim. *Id.*, at 750, 111 S. Ct. 2546. The one exception to that rule, not at issue here, is the circumstance in which the habeas petitioner can demonstrate a sufficient

probability that our failure to review his federal claim will result in a fundamental miscarriage of justice. *Ibid.*

Although we have not identified with precision exactly what constitutes “cause” to excuse a procedural default, we have acknowledged that in certain circumstances counsel’s ineffectiveness in failing properly to preserve the claim for review in state court will suffice. *Carrier*, 477 U.S., at 488-489, 106 S. Ct. 2639. Not just any deficiency in counsel’s performance will do, however; the assistance must have been so ineffective as to violate the Federal Constitution. *Ibid.* In other words, ineffective assistance adequate to establish cause for the procedural default of some other constitutional claim is itself an independent constitutional claim. And we held in *Carrier* that the principles of comity and federalism that underlie our longstanding exhaustion doctrine—then as now codified in the federal habeas statute, *see* 28 U.S.C. §§ 2254(b), (c)—require that a constitutional claim, like others, to be first raised in state court. “[A] claim of ineffective assistance,” we said, generally must “be presented to the state courts as an independent claim before it may be used to establish cause for a procedural default.” *Carrier, supra*, at 489, 106 S. Ct. 2639.

Id. at 451-52; *accord Mills v. Norris*, 187 F.3d 881, 883-84 (8th Cir. 1999); *Villegas v. Johnson*, 184 F.3d 467, 470-71 (5th Cir. 1999); *Lovasz v. Vaughn*, 134 F.3d 146, 148 (3d Cir. 1998).

The Sixth Circuit Court of Appeals recently applied the *Carpenter* decision and held that the *Carpenter* Court’s ruling bars a *habeas* court’s consideration of an ineffective assistance of counsel as “cause” claim if that claim itself is procedurally defaulted. Thus, “[i]f the [ineffective assistance] claim was procedurally defaulted, then Petitioner cannot use this claim as ‘cause’ to excuse the procedural default of his independent federal claim. . . .” *Jacobs v. Mohr*, — F.3d —, ___, 2001 WL 1024047 (6th Cir. Sept. 10, 2001). In essence, therefore, in order for Adams’s ineffective assistance claim to excuse his procedural default in not raising sufficiency of the evidence in violation of his Fifth

Amendment due process rights, the court must first determine as a threshold matter that Adams's ineffective assistance of appellate counsel claim was properly exhausted.

Adams's *habeas* petition is the first instance in which he has presented any court with both his sufficiency of the evidence claim and his ineffectiveness of appellate counsel claim. Assuming Adams's counsel was deficient for not challenging the sufficiency of the evidence on appeal, ineffectiveness of appellate counsel should have been advanced at the PCR level. *E.g.*, *Farmer*, 153 F. Supp. 2d at 1039 (noting ineffective assistance of appellate counsel claim was procedurally defaulted because petitioner did not raise it at post-conviction relief proceeding); *Hughes v. Lund*, 152 F. Supp. 2d 1178, 1183 (N.D. Iowa 2001) (concluding that failure to raise ineffective assistance of appellate counsel in post-conviction relief proceedings rendered ineffective assistance claim procedurally defaulted) (citing IOWA CODE ch. 822 (post-conviction relief proceedings); *May v. Iowa*, 251 F.3d 713, 717 (8th Cir. 2001) (under Iowa law, ineffective assistance of appellate counsel may excuse a defendant's failure to raise claims on direct appeal, allowing such claims to be considered in state post-conviction relief proceedings); *Ledezma v. State*, 626 N.W.2d 134, 141-42 (Iowa 2001) (same)). Yet, Adams did not raise ineffectiveness of appellate counsel at the PCR hearing. Each ineffectiveness claim asserted in his PCR action related to *trial* counsel's performance. Specifically, in his PCR action Adams claimed ineffective assistance of counsel for "failure to investigate the impeachability of the accomplice witness, Andre Newell; failure to effectively cross-examine the accomplice witness; failure to file a mistrial for the lack of minority representation on the jury; failure to file for a mistrial for a sleeping juror; and finally that the defense counsel had alternate counsel sit in for the verdict rather than being there in person." PCR Tr. at 2-3, ll. 21-3. None of these claims pertains to the performance of Adams's attorney on direct appeal.

The second reason why Adams's ineffective assistance as "cause" argument fails is because the underlying claim for which he contends that ineffective assistance of counsel

might be “cause” to excuse is itself doubly defaulted. In this instance, Adams’s sufficiency of the evidence claim is doubly procedurally defaulted, because not only did he did not raise sufficiency of the evidence on direct appeal, he did not allege insufficiency of the evidence in his PCR action.

c. Merits of ineffective assistance claim

Furthermore, even if this ineffective assistance claim were not procedurally defaulted and the court were able to reach the merits of the claim as a ground for relief, Adams is unable to show that his appellate counsel “made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” See *Strickland v. Washington*, 466 U.S. 668, 687 (1984). “[A]lthough the ‘cause’ element may be satisfied due to ineffectiveness of . . . counsel, *Coleman* makes clear that this will be found only where counsel was ineffective within the meaning of *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).” *Charron v. Gammon*, 69 F.3d 851, (8th Cir. 1995) (citing *Coleman*, 501 U.S. at 752). Adams has made no more than conclusory assertions of ineffective assistance of appellate counsel, without ever attempting to demonstrate that his claim of ineffective assistance satisfies the two prongs of the *Strickland* analysis. See Pet.’s Br., at 2-4 (arguing only that petitioner cannot explore ineffective assistance of counsel claims without the trial transcript).

To show constitutionally defective assistance of counsel, the *Strickland* analysis requires petitioner to demonstrate both (1) “professionally unreasonable” conduct by counsel, and (2) a “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 691, 694. This is a very rigid standard, and there has always been a strong presumption of attorney competence. *Id.* at 689. Furthermore, the burden of proving that counsel’s representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy is on the petitioner. *Kimmelman v. Morrison*, 477 U.S. 365, 381 (1986)

(citing *Strickland*, 466 U.S. at 688-89). “The reasonableness of counsel’s performance is to be evaluated from counsel’s perspective at the time of the alleged error and in light of all the circumstances, and the standard of review is highly deferential.” *Id.* (citing *Strickland*, 466 U.S. at 689).

Again, Adams cannot meet this burden, because he did not present any arguments why his counsel’s failure to raise sufficiency of the evidence on direct appeal would meet the stringent requirements of the *Strickland* test. He states only that access to the complete transcript is necessary to pursue the claim. Yet, at all times during Adams’s state proceedings, he had access to the trial transcript, and neither Adams’s lawyers on direct appeal nor his lawyers at the PCR proceeding decided to raise the claim. It has long been recognized that appellate counsel must exercise professional discretion in determining which arguments to advance on appeal. The “‘process of winnowing out weaker arguments on appeal and focusing on’ those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy.” *Smith v. Murray*, 477 U.S. 527, 536 (1986) (quoting *Jones v. Barnes*, 463 U.S. 745, 751-52 (1983)). The Supreme Court, in *Jones*, quoted Justice Jackson’s view in this regard:

“One of the first tests of a discriminating advocate is to select the question, or questions, that he [or she] will present orally. Legal contentions, like the currency, depreciate through over-issue. The mind of an appellate judge is habitually receptive to the suggestion that a lower court committed an error. But receptiveness declines as the number of assigned errors increases. Multiplicity hints at lack of confidence in any one. . . . [Experience] on the bench convinces me that multiplying assignments of error will dilute and weaken a good case and will not save a bad one.” Jackson, *Advocacy Before the United States Supreme Court*, 25 *Temple L.Q.* 115, 119 (1951).

Jones, 463 U.S. at 752.

The court is unwilling to engage in conjecture that the decision to raise only the issue

of whether the district court abused its discretion in imposing consecutive sentences on counts I and III was constitutionally deficient. Absent contrary evidence, the court must assume that Adams's appellate counsel failed to raise sufficiency of the evidence for reasons of strategy. *See Roe v. Delo*, 160 F.3d 416, 418 (8th Cir. 1998). At the point when the direct appeal was taken, Adams had access to the trial transcript. When his attorneys chose to raise only the issue of his sentences on appeal, it is reasonable to conclude that this decision fell inside the wide range of professional discretion that appellate counsel must exercise.

Moreover, assuming counsel's decision not to raise sufficiency of the evidence fell below professional standards, the court cannot conclude that Adams was prejudiced by any failure to raise the claim. The record reveals that there was substantial evidence that could support the jury's finding of guilt. For example, in a letter from Adams to his uncle, Adams discusses his participation in the robberies, his weapons, the details of the robberies, his motive, and his accomplices. State's Exh. 44 (received into evidence in Trial Tr. vol. III, at 398). Before this court could grant *habeas* relief on the ground of sufficiency of the evidence in violation of the petitioner's due process rights, the court would have to determine that, "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 offense beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). "[T]he habeas judge can only consider the rationality of the verdict and is not to make his or her own evaluation of guilt or innocence." *Stewart v. Coalter*, 48 F.3d 610, 613 (1st Cir. 1995). The court has carefully reviewed the two available volumes of the transcript and the state court documents and cannot say that no rational trier of fact could have found the essential elements of robbery in the first degree beyond a reasonable doubt, even in light of the missing transcript volume. *Cf. United States v. Alvarado-Sandoval*, 997 F.2d 491, 493 (8th Cir. 1993) ("The evidence need not exclude every reasonable hypothesis except that of guilt; it is sufficient

if there is substantial evidence justifying an inference of guilt as found irrespective of any countervailing testimony that may have been introduced.”) (internal quotations omitted); *United States v. Searing*, 984 F.2d 960, 963 (8th Cir. 1993) (“The evidence need not exclude every reasonable hypothesis other than guilt.”); *Perez v. Groose*, 973 F.2d 630, 634 (8th Cir. 1992) (“Contrary to [the petitioner]’s contention, the prosecution is not required to rule out every hypothesis except that of guilt beyond a reasonable doubt. . . . It was for the jury to resolve any conflicting inferences. . . .”); *United States v. Brown*, 921 F.2d 785, 791 (8th Cir. 1990) (“This court will not disturb a conviction if the evidence rationally supports two conflicting hypotheses.”); *United States v. O’Malley*, 854 F.2d 1085, 1088 (8th Cir. 1988) (“While this determination could certainly have been resolved differently, it is not our function as a reviewing court to reverse based on a recognition of alternate possibilities.”). What is more, Adams rested his case without presenting any evidence; thus, there is no danger that any rebuttal evidence may potentially counter the state’s ample evidence of guilt that is available for the court’s review. Consequently, assuming *arguendo* that Adams’s claim of ineffectiveness of appellate counsel were sufficient “cause” to excuse the procedural default of not raising sufficiency of the evidence on appeal, Adams cannot show that he was prejudiced by this omission.³

5. Summary

Therefore, the court will overrule petitioner’s first objection to Judge Zoss’s Report and Recommendation. First, even if Adams had access to the entire transcript, the claim of ineffective assistance of appellate counsel for not raising sufficiency of the evidence is

³The court draws absolutely no negative inference from Adams’s decision to not present evidence. The burden in a criminal case is at all times on the prosecution to prove the elements of the crime charged beyond a reasonable doubt. The court mentions that Adams rested after the state presented its case-in-chief for the sole purpose of noting that the missing transcript volume did not prevent this court from reviewing Adams’s evidence.

procedurally defaulted and could not be brought for the first time on a petition for writ of *habeas corpus*. Second, in order to excuse a procedural default, the petitioner must show that counsel was ineffective within the meaning of the Sixth Amendment, which requires a showing of both deficient performance and prejudice, neither of which petitioner can establish. Third, the procedural default of Adams's underlying claim of sufficiency of the evidence which Adams contends is excused by ineffective assistance of counsel is itself procedurally barred, thus precluding this court's consideration of the issue. Fourth, even if this court were to reach the merits of Adams's sufficiency of the evidence claim, the court could not conclude that no rational fact finder could find the essential elements of first degree robbery beyond a reasonable doubt. And finally, with respect to petitioner's ineffective assistance claim on the ground of trial counsel's allegedly inadequate cross-examination and impeachment of an accomplice witness, that claim, too, is procedurally defaulted.

Because all of the claims for which Adams argues that the transcript is necessary to pursue are procedurally defaulted, the petitioner is not prejudiced by the missing transcript volume. More specifically, Adams had access to the complete transcript throughout his state appeals process, yet never presented his sufficiency of the evidence claim or his ineffectiveness of appellate counsel claim to any Iowa court, nor did he appeal the PCR court's decision concerning his cross-examination claim. Thus, he is not prejudiced by the missing volume of the transcript, because this court could not grant *habeas* relief on any of these claims for the reasons discussed above. Accordingly, Adams's first objection to Judge Zoss's Report and Recommendation must be overruled.

C. Biased PCR Court Claim

In Adams's petition for a writ of *habeas corpus*, he also alleged that he was denied due process because of the alleged bias of the post-conviction relief judge. At the close of

the post-conviction hearing, the PCR court judge stated:

Okay. I've still got the court file. I'll re-review it. I've got the transcripts from the trial; I'll review those. And if any of Mr. Adams's rights were violated and he's entitled to a new trial or some relief, I'll promptly order it.

I certainly hope there is no error because the presentence investigation indicates that Mr. Adams has been involved in criminal activity since the age of thirteen, that he had become a career criminal, and if the minutes of testimony are correct, he and his accomplices terrorized a number of innocent victims because he was a robber. And I hope that the record supports the action taken by the trial court and I hope his conviction stands, but if it doesn't we will certainly grant him every bit of relief he's entitled to. We'll close the hearing. Good luck to you Mr. Adams.

PCR Tr. at 33-34, ll. 21-11. The PCR court later issued a ruling rejecting each of Adams's claims.

Adams appealed the PCR court's ruling to the Iowa Court of Appeals on the ground that the above-quoted statements denied Adams a fair and impartial post-conviction hearing because of the judge's bias. The appellate court, however, rejected Adams's claim of bias on two independent grounds. First, the court ruled that the claim had not been preserved for review because Adams failed to make a timely objection. In the alternative, the court ruled that "[e]ven if the claim had been properly preserved, Adams has not proved the merits of his claim." *Adams v. State*, No. 9-094/98-0351 (Iowa Ct. App. Apr. 30, 1999) (per curiam).

Judge Zoss found that Adams's claim of PCR court bias was Adams's only claim not procedurally defaulted. Nevertheless, Judge Zoss recommends denial of this claim because the Iowa Court of Appeals rejected Adams's claim on state procedural grounds, barring federal *habeas* relief. Adams, however, contends that, because the Iowa court rejected his bias claim on procedural grounds *and* on the merits, the claim is properly preserved for

federal court review.

1. Independent and adequate state ground

“Federal review of a habeas petition is barred when a state court dismisses or rejects a prisoner’s claims on independent and adequate state grounds unless a petitioner can demonstrate either (1) cause and prejudice or (2) actual innocence.” *White v. Bowersox*, 206 F.3d 776, 780 (8th Cir. 2000) (citing *Coleman*, 501 U.S. at 750). “[A] procedural default under state law may constitute independent and adequate state law grounds precluding federal review.” *Reese v. Delo*, 94 F.3d 1177, 1181 (8th Cir. 1996) (citing *Oxford v. Delo*, 59 F.3d 741, 744 (8th Cir. 1995), which in turn cites *Harris v. Reed*, 489 U.S. 255, 262, 109 S. Ct. 1038, 1042-43, 103 L. Ed. 2d 308 (1989), *cert. denied*, 517 U.S. 1124 (1996)). However, a state procedural rule will not immunize federal court review of a constitutional claim unless the state court in fact relied on the procedural rule in rejecting a petitioner’s claim. *Harris*, 489 U.S. at 261. The “plain statement” rule announced by the Supreme Court in *Michigan v. Long* compels federal court review when “a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion.” *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983). In this instance, the Iowa Court of Appeals clearly articulated on the face of its opinion that the basis of its decision was Adams’s failure to make a timely objection to the PCR court judges’s remarks. Specifically, the court stated, “*Because we find Adams has not preserved his claim for appellate review and he cannot prove his substantial burden of proving impartiality, we affirm.*” *Adams*, 9-094/98-0351 (emphasis added).

Furthermore, the state procedural rule will not bar federal court review unless it is firmly established, regularly followed, and readily ascertainable. *Ford v. Georgia*, 498 U.S. 411, 423-24 (1991). The undersigned, sitting by designation on the Eighth Circuit Court of Appeals, explained the rationale of the independent and adequate state ground

doctrine as follows:

The underlying principle is “that failure to follow state procedures will warrant withdrawal of a federal remedy only if those procedures provided the habeas petitioner with a fair opportunity to seek relief in state court.” *Easter v. Endell*, 37 F.3d 1343, 1347 (8th Cir. 1994). Or, as Justice Holmes expressed it, “[w]hatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice.” *Davis v. Wechsler*, 263 U.S. 22, 24, 44 S. Ct. 13, 68 L. Ed. 143 (1923). *White v. Bowersox*, 206 F.3d 776, 780 (8th Cir. 2000). The “adequacy” of a state procedure presents a question of federal law. *Sloan v. Delo*, 54 F.3d 1371, 1379 (8th Cir. 1995), *cert. denied sub nom. Sloan v. Bowersox*, 516 U.S. 1056, 116 S. Ct. 728, 133 L. Ed. 2d 679 (1996). A state law rule is not “adequate” to defeat federal habeas review if the rule is “unclear,” “thwarts the assertion of federal rights,” is “confusing,” or is not “firmly established and regularly followed.” *Id.* at 1379-80; *see also White*, 206 F.3d at 780 (to be “adequate” to bar federal habeas review, a rule must be “firmly established, regularly followed, and readily ascertainable”). A state law ground is not “independent” if it is in any way “linked to or dependent on any federal law.” *Easter*, 37 F.3d at 1345.

Kemna, 213 F.3d at 1041 (Bennett, J., dissenting on ground procedural rule at issue was not adequate).

In this case, the state procedural rule that the Iowa Court of Appeals concluded barred Adams’s bias claim was simple error preservation. Subject to certain exceptions not at issue here, matters to which no timely objections are made are deemed waived and may not be considered for the first time on appeal. *E.g.*, *State v. Jump*, 269 N.W.2d 417, 430 (Iowa 1978) (“Matters not raised in the trial court or in a post-trial motion will not be considered for the first time on appeal.”) (citing *State v. Pardock*, 215 N.W.2d 344, 347 (Iowa 1974); *State v. Greene*, 226 N.W.2d 829, 832 (Iowa 1975)); *State v. Rand*, 268

N.W.2d 642, 650 (Iowa 1978) (same); *State v. Holbrook*, 261 N.W.2d 480, 482 (Iowa 1978) (same); *State v. Chatterson*, 259 N.W.2d 766 (Iowa 1977) (same). Furthermore, the error preservation rule is reflected in the Iowa Rules of Criminal Procedure: “Failure of the defendant to timely raise . . . objections . . . shall constitute waiver thereof. . . .” IOWA R. CRIM. P. 10(3). The Iowa Supreme Court long ago held that its rule requiring contemporaneous objections is well-established:

Our requirement that error has been properly preserved, in situations of pending appeals and of timely appeals, is based on the general principle that we consider only issues which were raised in the trial court. We are a court of review, not a nisi prius court. We cannot “review” an issue unless it was raised in the trial court. The requirement that the issue be raised in the trial court is not something new or a device imposed as a barrier against constitutional rights. It is of long standing and applies generally to claimed errors of all kinds, constitutional and otherwise; nor is it a rule peculiar to Iowa.

Waterbury v. State, 387 N.W.2d 309, 310 (Iowa 1986) (citing *State v. Holbrook*, 261 N.W.2d 480, 482 (Iowa 1978)); accord *Wainwright v. Sykes*, 433 U.S. 72 (1977) (holding that state decision rested on an adequate foundation of state law when state decision was based on contemporaneous objection rule, which required objection at trial to admission of defendant’s confession); *Livingston v. Johnson*, 107 F.3d 297 (5th Cir.) (holding that *habeas* petitioner’s failure to make timely objection to trial court’s definition of mens rea barred *habeas* relief because state’s contemporaneous objection rule was independent and adequate state ground where state strictly and regularly applied rule), *cert. denied*, 522 U.S. 880 (1997).

The purpose of the qualification to the independent and adequate state ground doctrine, which provides for *habeas* review if a state procedural rule is not firmly established, regularly followed, or readily ascertainable, is to ensure that exceptionally obscure or ambiguous state laws do not prevent *habeas* petitioners from pursuing meritorious

constitutional claims. *Cf. NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 457-58 (1958) (“Novelty in procedural requirements cannot be permitted to thwart review in [the United States Supreme] Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional **rights.**”). Thus, in cases in which the state court invokes a clearly defined procedural rule and applies it evenhandedly, routinely, and uniformly, the purpose underlying the exception to the independent and adequate state ground doctrine is not furthered, because it cannot be said that the rule surprised the appellant and thwarted federal review of constitutional claims. This is especially true in rules as longstanding as Iowa’s contemporaneous objection rule.

It is undisputed that Adams failed to object to, and thus comply with, Iowa’s contemporaneous objection rule. Moreover, Iowa courts regularly refuse to hear claims on the ground that appellants failed to preserve their claims for review. *See, e.g., State v. Houts*, 622 N.W.2d 309, 311-12 (Iowa 2001) (“Issues not raised in the district court will not be considered on appeal.”) (citing *State v. Rutledge*, 600 N.W.2d 324, 325 (Iowa 1999); *State v. Damm*, 591 N.W.2d 635, 637 (Iowa 1999)); *State v. Button*, 622 N.W.2d 480 (Iowa 2001) (“In order for this court to review alleged deficiencies in the trial proceedings, these errors must be preserved for review.”) (citing *State v. Ceaser*, 585 N.W.2d 192, 195 (Iowa 1998)); *State v. Taggart*, 430 N.W.2d 423, 425 (Iowa 1988) (“We have repeatedly held that timely objection to jury instructions in criminal prosecutions is necessary in order to preserve any error thereon for appellate review.”) (citing *State v. Burkett*, 357 N.W.2d 632, 634-35 (Iowa 1984); *State v. Blackford*, 335 N.W.2d 173, 177 (Iowa 1983); *State v. Beeman*, 315 N.W.2d 770, 775-76 (Iowa 1982); *State v. Rouse*, 290 N.W.2d 911, 914 (Iowa 1980); *see also State v. Jeffries*, 430 N.W.2d 728, 737 (Iowa 1988); Dunahoo & Thomas, *Preservation of Error and Making the Record in the Iowa Criminal Trial and Appellate Processes*, 36 Drake L. Rev. 45, 78-79 (1986-87)). Thus, the Iowa Court of Appeals’s invocation of the error preservation rule to bar Adams’s claim of bias was not exceptional.

Adams's case does not present a difficult question concerning the adequacy of state law. Because the Iowa Court of Appeals ruled that Adams did not preserve his bias claim for appellate review by failing to make a contemporaneous objection, this court cannot grant *habeas* relief on this ground. When "a state court decline[s] to address a prisoner's federal claims because the prisoner failed to meet a state procedural requirement . . . the state judgment rests on independent and adequate state procedural grounds," barring *habeas* relief in federal court. *Coleman*, 501 U.S. at 729-30.

While it is true ineffective assistance of counsel for failing to preserve an error may, if cause and prejudice are shown, excuse a procedural default, Adams does not advance this argument. The Iowa Supreme Court has ruled that "[i]neffective assistance claims operate as an exception to our error preservation requirements." *Button*, 622 N.W.2d at 483 (citing *State v. Rubino*, 602 N.W.2d 558, 563 (Iowa 1999)); accord *Carpenter*, 529 U.S. 446, 450-51 (ineffective assistance may constitute cause for procedural default). In any event, because Adams did not assert ineffective assistance of PCR counsel at the time he appealed the PCR court's decision, that claim, too, is procedurally defaulted. See *Carpenter*, 529 U.S. at 450-51. Thus, because Adams does not discuss "cause" in his brief to this court, and because ineffective assistance was never raised before a state court, Adams cannot now successfully contend that ineffective assistance of counsel was sufficient "cause" to excuse his procedural default in not making a timely objection to the PCR court judge's remarks.

2. Iowa Court of Appeals's alternative holding on the merits

Adams argues that this court may properly consider his PCR court bias claim because the Iowa Court of Appeals proceeded to reach the merits of the claim, despite having found that Adams had not preserved it for appellate review. The respondent argues that "[t]his failure to follow state procedural error preservation rules now bars *habeas* review, notwithstanding the fact that the appellate court also gratuitously ruled on the merits."

Res.'s Br., at 15.

The Supreme Court has addressed the issue of alternative holdings:

[A] state court need not fear reaching the merits of a federal claim in an alternative holding. By its very definition, the adequate and independent state ground doctrine requires the federal court to honor a state holding that is a sufficient basis for the state court's judgment, even when the state court also relies on federal law. See *Fox Film Corp. v. Muller*, 296 U.S. 207, 210, 56 S. Ct. 183, 184, 80 L. Ed. 158 (1935). Thus, by applying this doctrine to habeas cases, [Wainwright v.] Sykes curtails reconsideration of the federal issue on federal habeas as long as the state court explicitly invokes a state procedural bar rule as a separate basis for decision. In this way, a state court may reach a federal question without sacrificing its interests in finality, federalism, and comity.

Harris v. Reed, 489 U.S. 255, 264 n. 10 (1989).

The United States Supreme Court's decision in *Sochor v. Florida*, 504 U.S. 527 (1992), is controlling on the issue of alternative holdings in cases such as Adams's. In *Sochor*, the Supreme Court ruled that it lacked jurisdiction to address the habeas petitioner's claim that a jury instruction was unconstitutionally vague, because the state supreme court decision indicated with requisite clarity that its rejection of the claim was based on a state procedural bar rule. *Id.* at 534. Like here, the state ground was the state's contemporaneous objection rule. The state supreme court held that "Sochor's next claim, regarding alleged errors in the penalty jury instructions, likewise must fail. None of the complained-of jury instructions were objected to at trial, and, thus, they are not preserved for appeal. *Vaught v. State*, 410 So.2d 147 (Fla. 1982). In any event, Sochor's claims here have no merit." *Id.* (quoting Florida Supreme Court's rejection of petitioner's jury instruction argument). Based on this quoted language, the Supreme Court held that it lacked jurisdiction to hear the constitutional claim because the state court indicated "with requisite clarity that the rejection of [the petitioner's] claim was based on the alternative state ground

that the claim was ‘not preserved for appeal.’” *Id.*

In Adams’s case, the Iowa Court of Appeals began its opinion by discussing Adams’s failure to preserve his claim and held that this failure was determinative of his case, because his claim had not been properly preserved for review. The court stated: “Because no timely objection was made to the statements [of the PCR court judge], the claim has not [been] preserved for appellate review.” *Adams*, No. 9-094/98-0351. Clearly, the Iowa Court of Appeals’s ruling on the issue of error preservation was enough to dispose of Adams’s appeal. Nevertheless, the court continued and opined that “[e]ven if the claim had been properly preserved, however, Adams has not proved the merits of his claim.” *Id.* Similar to the state court’s ruling in *Sochor*, the Iowa Court of Appeals indicated with requisite clarity that the rejection of Adams’s claim was based on the alternative ground that Adams’s bias claim was “not preserved for appellate review.” *See id.*; *accord Glenn v. Bartlett*, 98 F.3d 721, 725 (2d Cir. 1996) (finding contemporaneous objection rule adequate and stating that “to require a state court to use specific talismanic phrases when ruling in the alternative would be undue formalism; it would also intrude on the state court’s autonomy without advancing the federalism and comity interests protected by the independent and adequate state grounds doctrine.”); *Amos v. Scott*, 61 F.3d 333, 341-42 (5th Cir.) (“We decline today to impose on the TCCA [Texas Court of Criminal Appeals] the need to pronounce some shibboleth or incant some magic words guaranteeing safe passage from a holding based on a state procedural bar to an alternative holding on the merits without infecting the opinion with ‘excuse’ and thus dooming it to inadequacy. We likewise decline [the petitioner’s] invitation to hold that a court’s particular choice of words or phrases to reflect the shifting of its focus from a holding grounded on independent state law to an alternative holding based on federal law is dispositive when determining whether that state-law ground is adequate. We remain satisfied instead that when the TCCA holds that a criminal defendant’s federal claim is procedurally barred, then proceeds to address the

merits of the defaulted claim and voice a second holding, the opinion is properly viewed as stating alternative holdings. Only if the TCCA should clearly and unequivocally excuse the procedural default will we view the opinion as one decided on the merits only.”), *cert. denied*, 516 U.S. 1005 (1995); *Thomas v. Lewis*, 945 F.2d 1119, 1122-23 (9th Cir. 1991) (holding that statement “ ‘[e]ven if [the petitioner’s] claims were not waived, relief would be denied’ ” indicated the state court rejected petitioner’s claim on adequate state law procedural grounds, even though the court proceeded to reach the merits).

The fact a court addresses the substance of an appellant’s claim does not obviate or forfeit the court’s ruling dismissing the claim on procedural grounds. *Cf. Woods v. Interstate Realty Co.*, 337 U.S. 535, 537 (1949) (stating that “where a decision rests on two or more grounds, none can be relegated to the category of obiter dictum”); *United States v. Title Ins. & Trust Co.*, 265 U.S. 472, 486 (1924) (stating that “where there are two grounds upon either of which an appellate court may rest its decision, and it adopts both, ‘the ruling on neither is obiter, but each is the judgment of the court, and of equal validity with the other’”) (citations omitted). Thus, Adams’s argument that this court should reach the merits of his PCR court bias claim merely because the Iowa Court of Appeals proceeded to the merits despite having concluded that error was not preserved is clearly flawed. A federal *habeas* court cannot grant relief when a state court has resolved the petitioner’s claim on state grounds, independent of any federal basis for the decision. *See Coleman*, 501 U.S. at 732. The Iowa Court of Appeals relied on the error preservation rule in dismissing Adams’s claim. While the court did address the merits of Adams’s claim, this alternative holding does not negate the dispositive effect of the court’s ruling on state procedural grounds. Accordingly, Adams’s second objection to Judge Zoss’s Report and Recommendation must be overruled because it plainly appears that Adams’s procedural default in failing to object to the PCR court judge’s remarks is an independent basis for the Iowa Court of Appeals’s decision.

D. Evidentiary Hearing

Adams requested an evidentiary hearing on two of his claims. Namely, he sought a hearing on his assertion that he was deprived effective assistance of counsel during the reading of the jury verdict because of conflicted representation and further that he was denied the right to a fair and impartial jury of his peers because of a lack of minority representation on Adams's jury and because of the inadequacy of any mechanism to assure fair representation of minorities on jury panels in general. Judge Zoss recommends denial of Adams's request, because the court found both the conflicted representation and the jury pool claims to be procedurally defaulted. In his objections, however, Adams argues that, with respect to the conflicted representation claim, he is entitled to an evidentiary hearing because he was not at fault for the procedural default. Further, with respect to the jury selection claim, Adams asserts that his direct appellate counsel was ineffective for not raising that issue on appeal, which he contends constitutes "cause" sufficient to excuse his procedural default in state court.

1. Conflicted representation claim

One of the issues raised at Adams's post-conviction relief hearing was ineffective assistance of counsel on the ground "defense counsel had alternate counsel sit in for the verdict rather than being there in person." PCR Tr. at 3, ll. 1-3. It is well established that the right to effective assistance of counsel carries with it "a correlative right to representation that is free from conflicts of interest." *Wood v. Georgia*, 450 U.S. 261, 271 (1981). The PCR court heard evidence that Adams's trial attorney, Mr. Ackerman, was unable to be present for the reading of the verdict; thus, he sent an associate in his stead. This associate, Mr. Mason, allegedly represented one of the witnesses who testified against Adams. Mr. Mason's role while substituting for Mr. Ackerman was very limited: He stated his name to the court and, pursuant to instructions from Mr. Ackerman, polled the jury. The PCR court found the following:

There is no showing that it was necessary for trial counsel to be personally present when the verdict was read. The attorney who stood in for trial counsel polled the jury and there is no showing that there is anymore that he or anyone else could have done or that Petitioner was prejudiced by his trial attorney's absence.

Adams v. State, PCCV076137 (Iowa Dist. Ct. Black Hawk Cty. Jan. 30, 1998). As stated above, the only assertion of error on appeal of the PCR court's decision was the alleged bias of the judge. Adams did not advance any of the substantive claims rejected by the PCR court; instead, he argued that he was denied a fair and impartial post-conviction hearing. As explained previously, a claim is procedurally defaulted if a prisoner raises the claim in a post-conviction relief proceeding but fails to renew that claim in his or her appeal from the denial of post-conviction relief. See *Anderson*, 106 F.3d at 245.

Adams now asserts that, pursuant to a recent Iowa Supreme Court decision, *State v. Watson*, 620 N.W.2d 233 (Iowa 2000), he is entitled to an automatic reversal of his conviction because the trial court knew or should have known of the conflict. Adams contends that an evidentiary hearing is necessary to explore the extent of Mr. Mason's relationship with a prosecution witness.

With respect to Adams's procedural argument, he contends that his claim is not defaulted because *Watson* was a case of first impression, ruling that a reversal was required because of an actual conflict of interest even though no objection was made at trial. The Iowa Supreme Court, furthermore, did not decide *Watson* until the year 2000. Therefore, Adams contends that he had no basis for pursuing his conflicted representation claim until recently and, thus, was not at fault for failing to develop the record within the meaning of 28 U.S.C. § 2254.

Adams asserts that “[a] person who is seeking relief under 28 U.S.C. § 2254 has a very limited right to an evidentiary hearing if he is at fault for not developing the record in state court proceedings. However, if he is not at fault in developing the record, he is

entitled to a hearing.” Pet.’s Obj., at 7-8. The relevant portion of section 2254 that Adams cites in support of this argument provides as follows:

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If 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 shows that—

(A) the claim relies on—

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e).

Although not explicitly stated, it appears that Adams premises his claim on subsection (e)(2)(A)(i), because he states that “[i]t was only when *State v. Watson* was decided in year 2000, several years after Mr. Adams’ state court proceedings were concluded, that there was controlling Iowa precedent that gave Adams a reason and the authority to develop the factual basis for his claim of conflicted representation.” Pet.’s Obj., at 8. Yet, the plain language of section 2254 allows for an evidentiary hearing only when a newly announced rule of constitutional law is made retroactive by *the Supreme Court of the United States*. The “new” rule upon which Adams relies was announced by the Iowa Supreme Court; thus, section 2254(e)(2)(A)(i) does not apply to his case.

To the extent Adams may be relying on section 2254(e)(2)(A)(ii), the provision is clearly inapplicable. Not only was the factual predicate of Adams's conflicted representation claim reasonably discoverable to Adams, he in fact knew that Mr. Mason represented a prosecution witness and raised this claim at his post-conviction relief proceeding.

Moreover, while legal novelty may be cause for failure to present a legal claim for which the factual basis is readily available, Adams's conflicted representation claim is not such a claim. See *Reed v. Ross*, 468 U.S. 1, 13-14 (1984). The Eighth Circuit Court of Appeals has held that legal novelty constitutes cause for procedurally defaulting *habeas* claims only if the claim is so novel that its legal basis is not reasonably available to counsel. *Joubert v. Hopkins*, 75 F.3d 1232 (8th Cir.), cert. denied, 518 U.S. 1029 (1996) (citing *Ross*, 468 U.S. at 13-14); see also *Wallace v. Lockhart*, 12 F.3d 823 (8th Cir. 1994) (double jeopardy claim alleging that convicting petitioner of both offense and lesser included offense violated double jeopardy laws was not novel and thus not cause for petitioner's procedural default). In *Joubert*, the issue was whether the petitioner's claim that the Nebraska death penalty statute's "exceptional depravity" aggravator was unconstitutionally vague was "novel" because explicit state legal precedent on the meaning of the phrase was lacking. *Id.* at 1242. The Court of Appeals held:

An aggravator which was facially vague, and arguably so even as narrowed, under then existent and controlling federal precedent had been applied in Joubert's sentencing. No act of the Nebraska Supreme Court was needed to create or to perfect his constitutional complaint. The mere fact that the Nebraska Supreme Court had not decided the issue, or even a likelihood that they would decide it against him if he raised it, did not render the issue "factually" unavailable to him and cannot constitute cause. See *Engle v. Isaac*, 456 U.S. 107, 130-31, 102 S. Ct. 1558, 1573, 71 L. Ed. 2d 783 (1982) (lack of state precedent on nonnovel constitutional issue is not cause; such a rule would be contrary to the principles supporting Wainwright

v. Sykes).

Id.

Here, Adams claims deprivation of the Sixth Amendment right to counsel due to a conflict of interest. The Supreme Court has addressed this very issue on no fewer than four occasions, in *Glasser v. United States*, 315 U.S. 60 (1942) (holding that defense counsel’s failure to cross-examine a prosecution witness because of a conflict of interest required defendant’s conviction be set aside and a new trial ordered, and did not require a showing of prejudice), *Holloway v. Arkansas*, 435 U.S. 475 (1978) (interpreting *Glasser* to mandate automatic reversal “whenever a trial court improperly requires joint representation over timely objection”), *Cuyler v. Sullivan*, 446 U.S. 335 (1980) (holding that “[u]nless the trial court knows or reasonably should know that a particular conflict exists, the court need not initiate an inquiry”), and *Wood v. Georgia*, 450 U.S. 261 (1981) (remanding case to determine whether actual conflict of interest existed that necessitated relief). Thus, similar to the facts of *Joubert*, Adams’s conflicted representation claim was a clearly recognizable extension of existing federal precedent that existed at the time of his state court actions. Furthermore, although prior to Adams’s PCR appeal the Iowa Supreme Court had not specifically addressed whether ineffective assistance claims were cognizable when objections were not made at trial, the court had ruled “that when defendants make timely objections to joint representation, they need not show an actual conflict of interest when a trial court fails to inquire adequately into the basis of the objection.” *State v. Atley*, 564 N.W.2d 817, 825 (Iowa 1997).

Thus, both state and federal precedent existed to support Adams’s claim of conflicted representation. Therefore, Adams’s claim was neither “factually unavailable” to him nor novel, and, consequently, cannot form the basis of a finding of “cause” to excuse his failure to pursue his conflicted representation claim on appeal from the denial of his petition for post-conviction relief. Accordingly, because Adams raised his conflicted representation

claim at his PCR proceeding but did not renew the argument on appeal, and because Adams has failed to establish cause to excuse his procedural default, the court concludes that his conflicted representation claim is procedurally defaulted.

Furthermore, even if Adams's conflicted representation claim were not defaulted, his argument that *Watson* mandates an automatic reversal of his conviction and a new trial is unconvincing. In *Watson*, the Iowa Supreme Court reversed the defendant's murder conviction, because the trial court should have *sua sponte* held a hearing on whether the defendant's trial counsel suffered from a conflict of interest based on counsel's dual representation of the defendant and a key prosecution witness, David Grunewald. *Id.* at 234. The defendant, Watson, was represented by two attorneys, Tim Ross-Boon and Brian Sissel. *Id.* Grunewald testified that, while Watson and he shared adjoining cells at the county jail, he overheard Watson confess to the killing. *Id.* at 235. Sissel cross-examined Grunewald. *Id.* Of significance to Watson's appeal was Grunewald's testimony that criminal contempt charges were pending against him at the time he came forward with information concerning Watson's incriminating statement. *Id.* The supreme court found that "Ross-Boon simultaneously represented Grunewald and the defendant for some portion of the pre-trial period, including the period during which Grunewald overheard Watson's incriminating statement, reported it to the authorities, and was sentenced on his contempt conviction." *Id.*

Critical to the *Watson* holding was the fact the trial court knew of the conflict of interest and should have inquired into the conflict. *Id.* at 237. Moreover, the trial court knew of the conflict because Grunewald's testimony revealed that he was represented by Ross-Boon during the pre-trial stages of Ross-Boon's representation of Watson. *Id.* at 238-39. In Adams's case, the trial court could not have known of any conflict between Mr. Mason and the prosecution witness because Mr. Mason was not involved in Adams's case at all until the verdict was read. Thus, because Mr. Mason was not yet involved in the

case, at the time the pertinent witness was cross-examined, there was no reason for the trial court to suspect a conflict of interest.

Furthermore, the concerns the Iowa Supreme Court identified as underlying the conflict of interest rules are not implicated in Adams's case. The Iowa court reasoned that when counsel represents a defendant and an adverse witness, counsel's loyalties are divided:

“[The defendant's] interest and [the witness's] interest diverged with respect to [the attorney's] cross-examination of [the witness]. [The attorney] had an obligation to [the defendant] to use all the information at his disposal to impeach [the witness's] credibility. Yet, [the attorney] also had an obligation to [the witness] to maintain the confidentiality of [the witness's] communications with the Defender Association. Given these inconsistent duties, counsel was forced to make a 'Hobson's choice.'”

Id. at 239 (quoting *In re Saladin*, 518 A.2d 1258, 1261-62 (Pa. 1986)) (alterations in original). In this instance, Mr. Mason's limited involvement in the trial included introducing himself to the court and, pursuant to instructions from Adams's attorney, Mr. Ackerman, polling the jury. No substantive decision or act of counsel could have affected the jury's verdict at the point in time when the verdict was read, because, at that point, the jury had reached its decision. The only thing any attorney could have done at that point was to poll the jury. This court agrees with the PCR court's finding that “[t]he attorney who stood in for trial counsel polled the jury and there is no showing that there is anymore that he or anyone else could have done or that Petitioner was prejudiced by his trial attorney's absence.” *Adams*, PCCV076137.

Nevertheless, because Adams failed to advance his conflicted representation claim when he appealed the denial of his post-conviction relief petition, the court must overrule this objection to the Report and Recommendation on the grounds the claim is procedurally defaulted and Adams has failed to establish cause, as explained above.

2. Jury selection claim

Adams's defense counsel objected to the procedure for selecting potential jurors because the panel "is entirely devoid of racial minority members of the black race." Tr., at 4, ll. 12-13. Furthermore, Adams's attorney explained his objection, stating that "[i]t's prejudicial to the defendant that we have a jury panel . . . from which there is absolutely no chance of getting a minority member upon the jury and we ask the Court to take affirmative action in that they should attempt to enlist people who could serve upon this jury. . . ." Tr., at 4, ll. 18-21. After hearing testimony from the Jury Clerk regarding the method of drawing jury pools and the number of minority persons in Adams's pool in particular, the trial court overruled Adams's counsel's objection, and Adams did not pursue this claim on direct appeal. However, Adams raised ineffective assistance of trial counsel for failing to move for a mistrial on the basis of an unconstitutional jury selection process in his post-conviction relief proceedings and again failed to renew it on appeal. It is, therefore, procedurally defaulted, consequently barring federal *habeas* relief on this claim. See *Anderson*, 106 F.3d at 245 ("A claim that is presented to the state court on a motion of post-conviction relief is procedurally defaulted if it is not renewed in the appeal from the denial of post-conviction relief.") (citing *Lowe-Bey*, 28 F.3d at 818; and also *Reese*, 94 F.3d at 1181).

Adams contends, however, that appellate counsel was ineffective for not raising the jury selection claim on appeal. As previously stated, ineffective counsel can constitute "cause" sufficient to excuse the procedural default of an underlying claim if the ineffective claim itself is exhausted and properly before the *habeas* court. See *Coleman*, 501 U.S. at 729-30; see also *Bowersox*, 119 F.3d at 1350. Moreover, Adams again cites section 2254(e)(2) for the proposition that an evidentiary hearing is warranted because Adams was not at fault for failing to develop the record, because the Iowa Court of Appeals decided a somewhat similar issue in the year 2000. In any event, the court must first consider

whether Adams has exhausted his claim that his appellate counsel was ineffective for failing to raise the jury selection issue on appeal.

As noted, Adams raised ineffective assistance of trial, not appellate, counsel at his PCR proceeding. His *habeas* petition is the first instance in which he has presented the issue of ineffective assistance of *appellate* counsel for failing to raise the jury selection claim. In any event, Adams did not appeal the PCR decision on the ground of either trial or appellate counsel's ineffective assistance. Consequently, this claim is procedurally barred, because Adams has not given any Iowa court the opportunity to rule upon it. It cannot, therefore, serve as "cause" to excuse the procedural default of his jury selection claim. *E.g.*, *Coleman*, 501 U.S. at 729-30. "Only if the state courts have had the first opportunity to hear the claim sought to be vindicated in a federal habeas proceeding does it make sense to speak of exhaustion of state remedies. . . . [T]he substance of a federal habeas corpus claim must first be presented to the state courts." *Picard v. Connor*, 404 U.S. 270, 276, 278 (1971); *accord O'Sullivan*, 526 U.S. at 842 ("Federal habeas relief is available to state prisoners only after they have exhausted their claims in state court. . . . Because the exhaustion doctrine is designed to give the state courts a full and fair opportunity to resolve federal constitutional claims before those claims are presented to the federal courts, we conclude that 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.").

Because Adams cannot show "cause" for his procedural default, the court need not address whether he is able to establish prejudice. *E.g.*, *United States v. Frady*, 456 U.S. 152, 168 (1982) (failing to discuss cause after finding no prejudice); *Engle v. Isaac*, 456 U.S. 107, 134 n. 43 (1982) ("Since we conclude that these respondents lacked cause for their default, we do not consider whether they also suffered actual prejudice."); *see also*, *e.g.*, *Battle v. Delo*, 19 F.3d 1547, 1554 (8th Cir. 1994) (no cause), *cert. denied*, 517 U.S.

1235 (1996); *Bell v. Lockhart*, 2 F.3d 293, 299 (8th Cir. 1993) (no cause), *cert. denied*, 510 U.S. 1182 (1994); *Smith v. Lockhart*, 882 F.2d 331, 334 (8th Cir. 1989) (no cause), *cert. denied*, 493 U.S. 1028 (1990).

3. Evidentiary hearing on procedurally barred claims

Because the claims on which Adams requests an evidentiary hearing are themselves procedurally barred and, therefore, could not form the basis of *habeas* relief, “no purpose would be served by inquiring into the defaulted claim[s] by way of an evidentiary hearing.” *See Hatcher v. Hopkins*, 256 F.3d 761, 764 (8th Cir. 2001).

Moreover, section 2254(e)(2)’s fault provision is as inapplicable to Adams’s jury selection claim as it is to his conflicted representation claim for precisely the same reasons. Not only was the factual predicate supporting the jury selection available to Adams, his counsel in fact objected to it at trial. A review of the record reveals that Adams exercised diligence in developing the factual basis of his claim in state court; thus, there is no failure to develop the record that merits an evidentiary hearing. *See* 28 U.S.C. § 2254(e)(2). In addition, a fair hearing had already been held in the state court on the issue of the jury selection process. The presiding judge had taken an active and intelligent part, asking good questions of the jury clerk. Sufficiently full and detailed findings of fact had been rendered, both by the trial court and the PCR court. And furthermore, no additional evidence had been proffered for a federal-court evidentiary hearing.

And finally, section 2254(e)(2)(B) must also be satisfied in order for a court to grant an evidentiary hearing, and that provision mandates a petitioner show that “the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.” 28 U.S.C. § 2254(e)(2)(B). For the reasons discussed in **section** of this opinion, Adams could not satisfy this burden, because the prosecution presented ample evidence of his guilt at trial, which Adams has made no attempt in these

proceedings to rebut.

Accordingly, because the underlying claims are procedurally defaulted and because the petitioner cannot satisfy the requirements of section 2254(e)(2), the court will overrule Adams's objection to Judge Zoss's recommendation that Adams's request for an evidentiary hearing be denied.

E. Due Process Claim: Consecutive Sentences

The petitioner next objects to Judge Zoss's conclusion that a federal constitutional issue was not fairly presented to the state court in Adams's direct appeal. However, his objection does not go to the substance of Judge Zoss's finding; instead he contends, for the first time, that his appellate counsel was ineffective for failing to assert federal constitutional grounds, thereby excusing Adams's failure to assert those grounds when the issue was presented to the state court. This objection is unpersuasive.

1. Fairly presented

Because Adams does not object to the magistrate judge's finding that a federal constitutional issue was not fairly presented to the Iowa Supreme Court in Adams's direct appeal, this court reviews that finding for plain error. On direct appeal, Adams argued only that "the district court abused its discretion by considering only one factor—the nature of the offense—in rejecting his plea for a deferred judgment or concurrent sentences." *Adams*, No. 383/94-600, at 3 (Iowa Jan. 3, 1995). Asserting solely an abuse of discretion does not fairly present a constitutional claim. *Cf. Corder v. Rogerson*, 192 F.3d 1165, 1167-68 (8th Cir. 1999) (due process claim procedurally defaulted because *habeas* petitioner argued only abuse of discretion before Iowa Court of Appeals, which did not fairly present a federal constitutional claim); *Nelson v. Solem*, 714 F.2d 57, 59 (8th Cir. 1983) (per curiam) (state court claim that a trial court instruction improperly nullified petitioner's alibi defense did not sufficiently alert state court to potential federal due process claim); *Wilks v. Israel*, 627

F.2d 32,38 (7th Cir. 1980) (state court claim that trial court abused its discretion in refusing to accept guilty plea to lesser included offense did not sufficiently apprise state court of argument that the refusal violated petitioner’s due process rights), *cert. denied*, 449 U.S. 1086 (1981).

At no time before an Iowa court did Adams argue a due process violation. In his brief, Adams now asserts that “the Code of Iowa fails to establish any guidelines or standards for imposition of consecutive sentences and thus renders the process completely arbitrary and capricious in violation of the Fifth Amendment.” Pet.’s Br., at 6. Claims are not exhausted—that is, have not been “fairly presented” to the state court—unless “the state court rules on the merits of [the petitioner’s] claims, or [the petitioner] presents his claims in a manner that entitles him to a ruling on the merits.” *Gentry v. Lansdown*, 175 F.3d 1082, 1083 (8th Cir. 1999); *see also* 28 U.S.C. § 2254(c) (a claim is not exhausted if the petitioner “has the right under the law of the State to raise, by any available procedure, the question presented”). The Iowa Supreme Court is not clairvoyant and need not address every conceivable claim in order to preserve petitioners’ federal constitutional claims when those claims are not argued before it. In order to satisfy the “fairly presented” requirement, the petitioner must have “refer[red] to a specific federal constitutional right, a particular constitutional provision, a federal constitutional case, or a state case raising a pertinent federal constitutional claim” in state court. *Ashker v. Leapley*, 5 F.3d 1178, 1179 (8th Cir. 1999) (internal quotations and citations omitted). It is not enough that all the facts necessary to support a federal claim are before the state court or that the petitioner asserted a similar state-law claim. *Tyler v. Wyrick*, 730 F.2d 1209, 1210 (8th Cir.) (per curiam), *cert. denied*, 469 U.S. 838 (1984). Because Adams did not present a constitutional claim in any manner to an Iowa court with respect to his consecutive sentences claim, the court concludes that the claim is procedurally defaulted.

2. Ineffective assistance of counsel for failing to fairly present constitutional

claim

a. Waiver

In response to Adams’s contention that his appellate counsel was ineffective for failing to raise the due process argument on appeal, the court finds Adams has waived this argument, because he did not press it before Judge Zoss. Even if the court were to conclude, however, that Adams did not waive his ineffective assistance as cause claim, he could not prevail on the merits.

b. Merits of ineffective assistance claim

“Attorney error short of ineffective assistance of counsel does not constitute cause for a procedural default even when that default occurs on appeal rather than at trial.” *Carrier v. Murray*, 477 U.S. 478, 492 (1986). In order to excuse a procedural default, petitioner’s counsel must have been ineffective within the meaning of the Sixth Amendment. *Id.* at 488. In other words, in order to establish cause for a procedural default, appellate counsel’s failure to raise a claim on appeal must satisfy the performance and prejudice prongs of the *Strickland v. Washington* analysis. *Id.* at 479.

Under the performance prong, the petitioner must demonstrate “counsel’s omission caused his representation of [the petitioner] to fall below acceptable professional standards.” *White v. Helling*, 194 F.3d 937, 941 (8th Cir. 1999) (citing *Strickland*, 466 U.S. at 668); *see also Cox v. Norris*, 133 F.3d 565, 573 (8th Cir. 1997) (“With respect to attorney performance, we must determine whether, in light of all the circumstances, the lawyer’s performance was outside the range of professionally competent assistance.”) (citing *Strickland*, 466 U.S. at 690). In making this determination, the Eighth Circuit Court of Appeals has observed, “We must resist the temptation to use hindsight to require that counsel’s performance have been perfect. Only reasonable competence, the sort expected of the ‘ordinary fallible lawyer’ . . . is demanded by the Sixth Amendment.” *White*, 194 F.3d at 941 (internal citation omitted) (quoting *Nolan v. Armontrout*, 973 F.2d 615, 618 (8th

Cir. 1992)). However, if it is easier to dispose of an ineffective assistance claim on the “prejudice” prong of the analysis, the court may do so, without consideration of whether or not counsel’s performance met professional standards, because “[t]he object of an ineffectiveness claim is not to grade counsel’s performance.” *Goeders*, 59 F.3d at 75 (quoting *Strickland*, 466 U.S. at 697, 104 S. Ct. 2052).

To establish prejudice, the petitioner must show “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *See Strickland*, 466 U.S. at 694. Adams makes no more than a conclusory allegation of ineffective assistance of appellate counsel in this regard. In support of his argument, Adams contends that there could be “no tactical reason to present [abuse of discretion] to the state court without asserting a constitutional basis for the claim. Any reasonably competent attorney would have done so.” Pet.’s Br., at 11. Nowhere has Adams attempted, even in his objections where he asserts this claim for the first time, to demonstrate that he was prejudiced by appellate counsel’s conduct, nor could he succeed if he had attempted to do so.

The Eighth Circuit Court of Appeals’s decision in *Wharton-El v. Nix*, 38 F.3d 372 (8th Cir. 1994) is instructive on this claim. In *Wharton-El*, the court considered the petitioner’s claim that the trial court abused its discretion by imposing consecutive sentences and that this abuse violated his due process rights. *Id.* at 375. The court noted that, like here, Iowa Code section 901.8 allows the sentencing judge to impose consecutive sentences when the defendant is convicted of two or more offenses. *Id.* (citing IOWA CODE § 901.8 (1993)). The court characterized the petitioner’s burden on this due process claim: “To obtain habeas relief for sentencing error when the sentence imposed falls within statutory guidelines, [the petitioner] must show: (1) ‘a clear and convincing case of abuse of discretion;’ or (2) ‘a patent violation of a constitutional guarantee.’” *Id.* (citing *United States v. Garcia*, 785 F.2d 214, 228 (8th Cir.), which in turn quoted *Orner v. United States*,

578 F.2d 1276, 1280 (8th Cir. 1978)), *cert. denied*, 475 U.S. 1143 (1986)). Because the sentencing court “reviewed [the petitioner’s] background, the nature of his offenses, and his chances for rehabilitation” in sentencing him, the Eighth Circuit held that the imposition of consecutive sentences was “neither an abuse of discretion nor a patent violation of any constitutional guarantee.” *Id.*

Similarly, the trial court in Adams’s case imposed consecutive sentences after considering “the serious nature of the offenses; the fact the weapons used were loaded and contained twenty or thirty rounds of ammunition; the fact that hollow-point and blunt-nosed bullets were found at Adams’ residence; Adams’ failure to capitalize on therapy and psychiatric treatment offered him in the juvenile system; Adams’ prior juvenile record; and the need to protect the community and show other juveniles that such crimes will not be tolerate.” *Adams*, No. 383/94-600 (Iowa Jan. 3, 1995) (citing trial court). On review, the Iowa Supreme Court found that Adams failed to show an abuse of discretion and that the district court provided its reasons for the sentences imposed. *Id.* Like the court in *Wharton-El*, this court finds that this is neither an abuse of discretion nor a patent violation of any constitutional guarantee.

However, unlike Adams, the petitioner in *Wharton-El* did not challenge the constitutionality of Iowa’s sentencing scheme. Nevertheless, the court noted that such a challenge would not likely be successful. *Id.* at 375 n. 2. In this instance, Adams asserts that section 901.8 of the Iowa Code is unconstitutional because it imposes no standards to guide a sentencing court’s discretion.⁴ In order to constitute “prejudice,” Adams must

⁴Adams does not specify which section of the Iowa Code he is challenging in this *habeas* action. Because section 901.8 is the section which provides for consecutive sentences, the court assumes this is the section with which the petitioner takes issue. Section 901.8 states: “If a person is sentenced for two or more separate offenses, the sentencing judge may order the second or further sentence to begin at the expiration of the
(continued...) ”

demonstrate that there is a reasonable probability he would have prevailed in making this constitutional challenge. See *Strickland*, 466 U.S. at 694. However, it is well established that trial courts have the inherent authority, absent a statutory prohibition, to impose consecutive sentences. E.g., *State v. Buck*, 275 N.W.2d 194, 197 (Iowa 1979) (stating that “[t]he trial court accordingly possessed the inherent authority to render consecutive sentences”). In this case, the Iowa legislature has recognized this common law authority and has explicitly granted the authority to impose consecutive sentences in section 901.8 of the Iowa Code. Compare *id.*, with IOWA CODE § 901.8. Furthermore, the Supreme Court of the United States has similarly recognized Congress’s analogous inherent power to authorize consecutive sentences with respect to federal crimes. See *Garrett v. United States*, 471 U.S. 773, 793 (1985) (stating that “[t]he presumption when Congress creates two distinct offenses is that it intends to permit cumulative sentences”); see also *Whalen v. United States*, 445 U.S. 684, 688-89 (1980) (“The Fifth Amendment guarantee against double jeopardy embodies in this respect simply one aspect of the basic principle that within our federal constitutional framework the legislative power, including the power to define criminal offenses and to prescribe the punishments to be imposed upon those found guilty of them, resides wholly with the Congress.”) (citing *United States v. Wiltberger*, 18 U.S. 76 (1820); and *United States v. Hudson & Goodwin*, 11 U.S. 32 (1812)). In *Whalen v. United States*, the United States Supreme Court held that the dispositive question regarding the constitutionality of the imposition of cumulative punishment for criminal offenses arising out of the same chain of events (here, rape and unintentional killing) was merely whether the legislature had provided for cumulative punishment. *Whalen*, 445 U.S. at 688-89. The Supreme Court suggested that “[t]he Due Process Clause of the Fourteenth Amendment . . .

⁴(...continued)
first or succeeding sentence.”

would presumably prohibit state courts from depriving persons of liberty . . . as punishment for criminal conduct except to the extent authorized by state law.” *Id.* at 689-90 n. 4. In this case, the Iowa legislature has clearly granted trial courts the authority to impose cumulative sentences for separate offenses. Because Adams’s sentences were “authorized” within the meaning of *Whalen*, a due process challenge would not have been successful.

Therefore, Adams could not have been prejudiced by any failure of his appellate counsel to raise this constitutional claim on direct appeal. Accordingly, because the *Strickland* performance-and-prejudice test for ineffective assistance has not been satisfied, Adams is unable establish “cause” sufficient to excuse his procedural default in failing to fairly present a federal constitutional claim to the Iowa Supreme Court. Thus, upon *de novo* review, the court finds that Judge Zoss did not err in failing to consider whether ineffective assistance of appellate counsel might constitute “cause” for Adams’s procedural default of his federal constitutional claim of deprivation of due process, and, therefore, this objection will be overruled.

F. Certificate of Appealability

Adams’s final objection to the Report and Recommendation asserts that this court should issue a certificate of appealability because Adams “believes that a reasonable jurist could find, for the reasons set forth above, that he is entitled to relief for the various claims he has advanced.” Pet.’s Obj., at 12. A certificate of appealability “may not issue unless ‘the applicant has made a substantial showing of the denial of a constitutional right.’” *Slack v. McDaniel*, 529 U.S. 473, 483 (2000) (citing 28 U.S.C. § 2253(c) (1994 Supp. III) ; see also *Garrett v. United States*, 211 F.3d 1075, 1076-77 (8th Cir.), cert. denied, 531 U.S. 908 (2000); *Mills v. Norris*, 187 F.3d 881, 882 n. 1 (8th Cir.1999); *Carter v. Hopkins*, 151 F.3d 872, 873-74 (8th Cir.), cert. denied, 525 U.S. 1007 (1998); *Ramsey v. Bowersox*, 149 F.3d 749 (8th Cir.1998), cert. denied, 525 U.S. 1166 (1999); *Cox v. Norris*, 133 F.3d 565, 569

(8th Cir.1997), *cert. denied*, 525 U.S. 834 (1998). A substantial showing is a showing that issues are debatable among reasonable jurists, a court could resolve the issues differently, or the issues deserve further proceedings. *Cox*, 133 F.3d at 569 (citing *Flieger v. Delo*, 16 F.3d 878, 882-83 (8th Cir.), *cert. denied*, 513 U.S. 946 (1994)). The Supreme Court recently defined substantial showing as follows:

To obtain a [certificate of appealability] under §§ 2253(c), a habeas prisoner must make a substantial showing of the denial of a constitutional right, a demonstration that, under *Barefoot* [*v. Estelle*, 463 U.S. , at 894,], includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were “‘adequate to deserve encouragement to proceed further.’” *Barefoot*, 463 U.S., at 893, and n. 4, 103 S.Ct. 3383 (“sum [ming] up” the “ ‘substantial showing’ ” standard).

McDaniel, 529 U.S. at 483-84.

When a *habeas* court has dismissed a petitioner’s claims not on the merits but rather on procedural grounds, a certificate of appealability “should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Id.* at 484. However, “[w]here a plain procedural bar is present and the district court is correct to invoke it to dispose of the case, a reasonable jurist could not conclude either that the district court erred in dismissing the petitioner or that the petitioner should be allowed to proceed further. In such a circumstance, no appeal would be warranted.” *Id.*

In this case, this court has concluded that each of Adams’s claims, with the exception of his PCR court bias claim, is procedurally barred. Therefore, the question for purposes of an application for a certificate of appealability on the procedurally defaulted claims is whether or not the petitioner has made a substantial showing of “cause and

prejudice” to overcome the default. *See United States v. Bailey*, 235 F.3d 1069, 1071 (8th Cir.2000) (section 2255 proceeding in which the district court determined that claims were defaulted, but granted a certificate of appealability on the issue of whether the petitioner had made an adequate showing to overcome the default, and the appellate court reviewed only the issue of “actual innocence” to overcome the default, not the underlying claims), *petition for cert. filed*, (June 18, 2001) (No. 00-10797). Here, Adams has made no such substantial showing that he could overcome his procedural default.

With respect to Adams’s PCR court bias claim, the court agrees with Judge Zoss that the Iowa Court of Appeals decision rested on independent and adequate state grounds, barring *habeas* relief on this claim. In any event, Adams has failed to make a substantial showing of a deprivation of constitutional rights, as explained throughout this opinion. Therefore, the court will also overrule Adams’s objection to Judge Zoss’s recommendation that a certificate of appealability be denied.

III. CONCLUSION

Therefore, for the reasons set forth above, the court overrules Adams’s objections to the Report and Recommendation on the following claims: (1) that Adams was denied due process of law because of the PCR court’s bias against him; (2) that he is entitled to an evidentiary hearing on his claims of conflicted representation and unconstitutional jury selection; (3) that Adams’s consecutive sentencing claim was fairly presented to the state court and Adams’s sentencing deprived him of due process of law; (4) that a certificate of appealability should be granted. Finally, the court has reviewed Judge Zoss’s findings on and recommended disposition of issues to which no timely objection was made and finds no “plain error” therein. *See Griffini*, 31 F.3d at 692 (reviewing factual findings for “plain error” where no objections to the magistrate judge’s report were filed).

Accordingly, the court **denies Adams’s petition** for a writ of *habeas corpus* and

orders judgment be entered in favor of the respondent and against Adams.

Furthermore, the court **denies** Adams's request for a **certificate of appealability**.

IT IS SO ORDERED.

DATED this 3rd day of October, 2001.

MARK W. BENNETT
CHIEF JUDGE, U. S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA