United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted June 7, 2018
Decided June 14, 2018

Before

JOEL M. FLAUM, *Circuit Judge*

DIANE S. SYKES, *Circuit Judge*

No. 17-3444

GUSTAVO TORRES-MEDEL,
Petitioner-Appellant,

v.

JACQUELINE LASHBROOK,
Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 16-cv-02846

Robert M. Dow, Jr.,
Judge.

ORDER

Gustavo Torres-Medel has filed a notice of appeal from the denial of his petition under 28 U.S.C. § 2254 and an application for a certificate of appealability. We have reviewed the final order of the district court and the record on appeal. We find no substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2).

Accordingly, the request for a certificate of appealability is DENIED.

APPENDIX-A-1

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

GUSTAVO TORRES-MEDEL,	)	
	)	
Petitioner,	)	Case No. 16-cv-2846
	)	
v.	)	Judge Robert M. Dow, Jr.
	)	
KIMBERLY BUTLER, Warden, Menard Correctional Center,	)	
	)	
	)	
Respondent.	)	

MEMORANDUM OPINION AND ORDER

Petitioner Gustavo Torres-Medel ("Petitioner") is an inmate at the Menard Correctional Center in the custody of Warden Kimberly Butler ("Respondent"). Petitioner is serving a 45-year sentence for first degree murder for beating and crushing his 3-month old son. Before the Court is Petitioner's application for a writ of habeas corpus under 28 U.S.C. § 2254 in which he argues that his state conviction and sentence should be vacated because (1) the State failed to prove his intent to kill beyond a reasonable doubt; (2) his sentence is excessive; and (3) trial counsel was ineffective in a number of ways. See [1]. For the reasons set forth below, the Court denies Plaintiff's petition [1], declines to certify any issue for appeal pursuant to 28 U.S.C. § 2253(c)(2), and directs the Clerk to enter judgment in favor of Respondent.

APPENDIX-B-1

I. Background[1]

Petitioner was charged with first degree murder in DuPage County, Illinois. He waived his right to a jury and was convicted following a bench trial. The evidence at trial established the following facts. See Ex. A (*People v. Torres-Medel*, 2012 IL App (2d) 110701-U (2012)).[2]

Petitioner lived in a basement apartment with Perla Salgado ("Perla") and their two children. Ex. A at ¶ 3. One of the children was three-month-old Gustavo Jr. *Id.* Perla went to work early on April 27, 2009, leaving Petitioner alone with the children. *Id.* at ¶ 4. When Perla left, Gustavo Jr. was healthy and had no bruises on his face or chest. *Id.*

At 1:00 p.m., Petitioner called Perla at work and "nervous[ly]" told her to come home because something tragic had happened. *Id.* Perla arrived to find Gustavo Jr. in a carseat draped with a blanket. Ex. A at ¶ 5. She demanded to know what had happened, and Petitioner replied that he would be "responsible for any charges that he received." *Id.* Perla rushed to the baby and lifted him out of the carseat. *Id.* He was cold, motionless, and not breathing. *Id.* Aside from severe bruising on his cheeks, Gustavo Jr.'s face was colorless. *Id.* Perla began yelling at Petitioner, repeatedly asking what had happened to the baby. *Id.* at ¶ 6. Petitioner told her to "shut up" and left the apartment. *Id.*

Petitioner contacted his friend Alfredo Escobar ("Escobar") and asked him to inform his family in Mexico that he was going to jail because of a tragedy. Ex. A at ¶ 7. When Escobar asked Petitioner why he was going to jail, Petitioner said that "he had struck the boy because [the

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[1] Documents filed in this case are referred to by docket entry number and enclosed in brackets (such as "[1]"), except for the state court record supplied by Respondent ([16-1] through [16-24]). The state court record is cited by reference to exhibit letter (such as "Ex. A"), except for the Report of Proceedings (Exs. O, P, and Q), which is cited by reference to the transcripts' native pagination (such as "R.491").

[2] State-court factual findings are presumed correct on federal habeas review unless the Petitioner rebuts them with clear and convincing evidence. 28 U.S.C. § 2254(e)(1); *see* also *Burt v. Titlow*, 134 S. Ct. 10, 15 (2013). Petitioner makes no serious attempt to rebut the state-court factual findings; therefore, the Court accepts them as true.

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boy] was crying," that Petitioner was "just desperate," and that Petitioner's actions were "not going to be forgiven." *Id.*[3]

While Petitioner was gone, Perla held her baby and cried. Ex. A at ¶ 8. She called the store where she worked, and her manager and two co-workers arrived shortly after with a police officer whom the manager knew. Petitioner's neighbor, Rex Vanwinkle, a retired firefighter and paramedic, also heard about the incident on his firefighter pager and rushed to Petitioner's apartment to help. *Id.* at ¶ 9. Although Gustavo Jr. appeared to be dead, someone may have attempted CPR. *Id.* When Perla's manager saw her speaking to Petitioner on the telephone, he grabbed it and asked Petitioner what he had done. *Id.* at ¶ 10. Petitioner responded, "I did something wrong." *Id.* West Chicago paramedic Jeffrey Keefe arrived at the apartment around 1:20 p.m. *Id.* at ¶ 11. His "initial impression was [that] the child was dead" and "had been dead for some time." *Id.*

Dr. Jeffrey Harkey performed Gustavo Jr.'s autopsy. Ex. A at ¶ 12. Dr. Harkey testified, consistent with photographs, that bruises "covered all of the [baby's] cheek area" and that his chest bore at least fifteen distinct bruises. *Id.* Each of the baby's buttocks bore a U-shaped bruise resembling a bite mark. *Id.* In addition to those external injuries, Gustavo Jr. suffered broken ribs and extensive subarachnoid hemorrhaging in his brain. *Id.* at ¶ 13. Dr. Harkey concluded that the baby's cause of death was "abusive traumatic injuries of the head and chest" resulting from "being beaten and crushed." *Id.* Dr. Harkey opined that Gustavo Jr. suffered all of these injuries while he was still alive. *Id.*

Dr. Harkey rejected the notion that a fall and improper CPR could have caused Gustavo Jr.'s injuries. He noted that the baby's hands, arms, legs, and feet were not bruised, as they

[3] On cross-examination, Escobar acknowledged that he had not initially told police that Petitioner said he was desperate and would not be forgiven. *Id.* Escobar explained that he was nervous when he first spoke to police. *Id.* at ¶ 7.

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would have been by a fall. *Id.* at ¶ 14. He also explained that, in the approximately 2,900 autopsies he had performed in his career, he had never seen a case where improper CPR resulted in rib fractures. *Id.* According to Dr. Harkey, CPR would not even cause bruising unless "very improperly applied." *Id.*

At the conclusion of the bench trial, the trial court found that Petitioner had "ferociously beat[en]" Gustavo Jr. and was guilty of first degree murder. Ex. A. at ¶ 15. Reviewing photographs in evidence, the trial found, "There are so many bruises on [the baby's] face that flow together that nearly the entire cheek on each side is covered with dark purple discoloration." R.524.

The trial court rejected defense counsel's suggestion that some of Gustavo Jr.'s injuries "may have resulted from the improper administration of CPR." R.526. While it considered testimony by Perla and her manager that Vanwinkle attempted CPR, the court found Vanwinkle's testimony that he did not perform CPR "credible." *Id.* It cited Vanwinkle's statement that when he first saw the "cold," "limp" infant, "he believed the baby was dead." *Id.* Additionally, since Vanwinkle was a trained paramedic, the court rejected the notion that he would have performed CPR badly enough to break Gustavo Jr.'s ribs. R.526-27. The court also considered Perla's testimony that one of her coworkers attempted CPR, but concluded that such intervention "would not explain the diffuse bruising all over the [infant's] trunk." R.527. In any event, the court found that because "circulation was present" when Gustavo Jr.'s ribs were broken, "the inference is that the ribs were not broken by any improper CPR that was administered sometime after death." R.525. The court also determined that the baby "had been dead for some time" when Petitioner called Perla at work around 1 p.m., before any would-be rescuers intervened. R.528.

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The trial court also found that an accidental fall could not have caused the infant's extensive facial injuries. R.527. Rather, "overwhelming[]" evidence—including photos of "various sizes and types of injuries" to Gustavo Jr.'s "face, chest, front, back, hip area, and the back of the head"—showed that Petitioner inflicted the baby's injuries by "repeatedly" and "savagely" beating him with "knowing and intentional blows." R.527-29. The trial court further found that Petitioner acknowledged his guilt in his statements to Escobar. R.528-29.

At Petitioner's sentencing hearing, Petitioner told the court that he did not intend to kill his son. Ex. A at ¶ 17. He testified that, after drinking beer on the morning of the murder, he grabbed the baby because the baby was crying. *Id.* He admitted that he squeezed the baby and bit the baby's face and buttocks. *Id.* He insisted, however, that he did not hit the infant. *Id.* After this attack, Petitioner claimed that he placed Gustavo Jr. in his carseat, accidentally hitting the baby's head on the carseat's handle. *Id.* Petitioner claimed that he then fell asleep, only realizing when he awoke what he had done. *Id.* Petitioner blamed his son's death on his intoxication. R583-85.

After considering the mitigating evidence presented by Petitioner, the trial court sentenced Petition to forty-five years imprisonment—fifteen years less than the maximum sixty-year sentence that could have been imposed. Ex. A at ¶¶ 19, 32.

On direct appeal, Petitioner argued that (1) he should be resentenced because the State provided insufficient evidence to prove that he intended to kill his son, and (2) he deserved an additional day of sentencing credit. Ex. A at ¶ 2; Ex. D at 19 (Appellant's Brief, *People v. Torres-Medel*, No. 2-11-0701). Petitioner's opening brief explained that he was "not arguing that his sentence should be reduced because it is excessive." Ex. D at 19. Rather, Petitioner

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based his request for resentencing on his argument that the State failed to prove his intent to kill. *Id.*

The Illinois Appellate Court held that, viewing the evidence in the light most favorable to the State, a rational trier of fact could have found that Petitioner acted with the requisite intent when he killed his son. Ex. A at ¶¶ 23, 29. It reasoned that the trial court could have rationally inferred Petitioner's intent to kill from the infant victim's extensive injuries, Dr. Harkey's conclusion that those injuries did not result from an accidental fall, and Petitioner's admissions to Escobar. *Id.* at ¶¶ 26-29. The Appellate Court held that Petitioner had forfeited his sentencing challenge because he failed to advance it in the trial court. *Id.* at ¶¶ 30-31. And even if Petitioner was eligible for plain-error review despite his forfeiture, the court held, his sentence was not excessive because it fell within the applicable sentencing range, and Petitioner presented no evidence that the court failed to properly weigh the aggravating and mitigating factors. *Id.* at ¶¶ 31-34.

Petitioner filed a petition for leave to appeal ("PLA") to the Illinois Supreme Court, arguing that he should be resentenced because the State provided insufficient evidence to prove that he intended to kill his son. Ex. G at 6 (PLA, *People v. Torres-Medel*, No. 115556). The PLA also explained that Petitioner was "not arguing that his sentence should be reduced because it is excessive." *Id.* The Illinois Supreme Court denied Petitioner's PLA.

Petitioner subsequently filed a pro se postconviction petition under 725 ILCS 5/122-1, *et seq.*, arguing that his trial attorney was ineffective for failing to (1) hire an expert to counter Dr. Harkey and testify that improper CPR broke Gustavo Jr.'s ribs; (2) show that Dr. Harkey's testimony "is interpreted as an entramped [sic] defense"; (3) call Officer Cadena of the West Chicago Police Department; (4) properly object to Escobar's testimony; and (5) use Vanwinkle's

testimony to show that improper CPR broke Gustavo Jr.'s ribs. Ex. H at 2-4 (Postconviction Petition, *People v. Torres-Medel*, No. 09 CF 1023).

The trial court summarily dismissed the petition as frivolous and patently without merit. Ex. B at 4 (Order, *People v. Torres-Medel*, No. 09 CF 1023). It rejected arguments (1) and (3) as "unsupported by affidavit or other evidence" as required by Illinois procedural law. *Id.* at 1-2 (citing 725 ILCS 5/122-2). It rejected argument (2) as failing to allege a constitutional violation. *Id.* at 2. It refused to consider argument (4) because Petitioner failed to specify what aspect of Escobar's testimony was objectionable, noting that "nonspecific" and "conclusory" assertions are subject to summary dismissal under Illinois law. *Id.* And it found that argument (5) had no evidentiary support and was affirmatively rebutted by the record. *Id.* at 2-3.

Petitioner sought to appeal the trial court's order. Petitioner's appointed post-conviction appellate counsel moved to withdraw on the basis that any appeal would be frivolous. Ex. I at 1 (Motion to Withdraw, *People v. Torres-Medel*, No. 2-13-1148). Counsel stated that Petitioner's ineffective-assistance claim was "without arguable merit"; that arguments (1) and (3) could be dismissed solely because Petitioner failed to comply with the Illinois procedural rule that postconviction petitions must be supported by affidavit or other evidence; and that Petitioner failed to explain how Cadena's testimony would have aided him, how Vanwinkle's testimony could have generated reasonable doubt that Petitioner broke his son's ribs, or how counsel could have better cross-examined Dr. Harkey or Escobar. *Id.* at 9-12.

In response to his attorney's motion to withdraw, Petitioner argued that counsel at trial and on direct appeal failed to present unspecified "witness statements/documents" to show that Petitioner "did not intend to kill" and that Gustavo Jr.'s murder was an "accident caused by

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drugs (crack cocaine) and alcohol." Ex. J at 2 (Response to Motion to Withdraw, *People v. Torres-Medel*, No. 2-13-1148).

The Illinois Appellate Court granted Petitioner's attorney's motion to withdraw as post-conviction appellate counsel and summarily affirmed the trial court's order denying post-conviction relief. Ex. C at ¶ 6 (*People v. Torres-Medel*, 2014 IL App (2d) 131148-U). The Appellate Court held that "all of the claims [Petitioner] raised in his petition could have been raised on direct appeal, but they were not," and therefore were "forfeited." *Id.* at ¶ 5. (citing *People v. Blair*, 831 N.E.2d 604, 614-15 (Ill. 2005)). In the alternative, the court rejected arguments (1) and (3) because Petitioner failed to attach affidavits or other evidence to support them. *Id.* (citing 725 ILCS 5/122-2). It rejected the argument that Vanwinkle's testimony could have helped Petitioner, finding that "the record affirmatively rebutted any contention that the baby's injuries were caused by anyone other than [Petitioner]." *Id.* It also determined that the record affirmatively rebutted Petitioner's claim that counsel failed to properly cross-examine Escobar. *Id.*

Petitioner filed a PLA seeking Supreme Court review of the Appellate Court's order. The PLA did not advance any specific arguments that his trial counsel was ineffective, but instead complained generally that Petitioner received "[b]oiler plate representation as opposed to vigorous defending," and that postconviction appellate counsel "made no attempt to secure a[n] affidavit from a[n] expert witness or contact the fireman and officers to see if a[n] ineffective [assistance] claim was viable against the attorney on direct appeal or the Petitioner's attorney at trial." Ex. K at 2-3 (PLA, *People v. Torres-Medel*, No. 118918). Petitioner did not explain who "the fireman and officers" were or what "the expert witness" would have testified about. *Id.*

The Illinois Supreme Court denied the PLA. See Ex. L (Notice of PLA Denial, *People v. Torres-Medel*, No. 118918).

Petitioner now seeks federal habeas relief under 28 U.S.C. § 2254. Petitioner argues that (1) the State failed to prove his intent to kill beyond a reasonable doubt; (2) his sentence is excessive; and (3) trial counsel was ineffective for failing (a) to hire an expert to analyze the Gustavo Jr.'s injuries, (b) to challenge Dr. Harkey's testimony that Gustavo Jr. was "beaten and crushed" to death on the basis that it conflicted with a post-mortem report, (c) to challenge other alleged and unspecified inconsistencies between Harkey's testimony and his written reports, (d) to hire an expert to testify that Gustavo Jr. was killed when Petitioner "accidentally" threw or dropped him or by CPR attempts, (e) to call Officer Cadena to testify that would-be rescuers performed CPR on Gustavo Jr.; (f) to present police reports showing that Vanwinkle performed CPR on Gustavo Jr. and "handled [the baby] improperly," that Gustavo Jr. bore no "obvious signs of physical trauma," and that Gustavo Jr.'s "body was still warm to the touch in some areas"; and (g) to "more effectively" cross-examine Escobar and the State pathologist on unspecified matters. [1] at 15, 17, 20-31.

II. Legal Standards

"Because this case entails federal collateral review of a state conviction," it is governed by 28 U.S.C.§ 2254(d), as amended by the Antiterrorism and Effective Death Penalty Act of 1996" ("AEDPA"). *Long v. Pfister*, -- F.3d --, 2017 WL 4707324, at *1 (7th Cir. Oct. 20, 2017) (en banc). Under that statute, Petitioner is not entitled to relief "with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted

in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

Under this highly deferential standard, "[a] petitioner cannot prevail by showing simply that the state court's decision was wrong." *Makiel v. Butler*, 782 F.3d 882, 896 (7th Cir. 2015) (citing *White v. Woodall*, 134 S. Ct. 1697, 1702 (2014)). Instead, "[a] petitioner 'must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.'" *Id.* (quoting *Harrington v. Richter,* 562 U.S. 86, 103 (2011).

"Our review under § 2254(d) is limited to the record that was before the state court." *Makiel*, 782 F.3d at 896. Further, the state court's factual findings are "presumed to be correct," and the Petitioner bears the "burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1); see *also Toliver v. McCaughtry*, 539 F.3d 766, 772 (7th Cir. 2008).

III. Analysis

A. Sufficiency of the Evidence Claim

Petitioner argues that the state failed to prove beyond a reasonable doubt his intent to kill Gustavo Jr. Petitioner explains that there was "no evidence that [he] admitted that he intended to kill" and argues that the circumstantial evidence was not strong enough to support the guilty verdict because "the precise circumstances of how the baby suffered his fatal injuries were never proved." [1] at 16. According to Petitioner, Dr. Harkey's testimony "fail[s] to exclude the reasonable possibility that [Petitioner], in his desperate attempt to quiet the baby, struck the baby

in the face and squeezed the baby's ribs, but then unintentionally dropped the baby, causing the fatal blow to the head." *Id.* at 17.

After reviewing the state court record and the parties' arguments, the Court concludes that the state appellate court's rejection of petitioner's insufficient-evidence claim was not "contrary to" or an "unreasonable application of" federal law. 28 U.S.C. § 2254(d). *Jackson v. Virginia*, 443 U.S. 307 (1979), articulates the "clearly established federal law" applicable to Petitioner's insufficient evidence claim. *Johnson v. Bett*, 349 F.3d 1030, 1034 (7th Cir. 2003). Under *Jackson*, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 319 (emphasis in original).

In this case, the record amply supports the Illinois Appellate Court's judgment affirming petitioner's murder conviction. As the Illinois Appellate Court observed, Illinois law permits a factfinder to infer intent to kill from surrounding circumstances, such as the character of an attack, the extent of a victim's injuries, and a disparity in size and strength between victim and attacker. See *Nelson v. Thieret*, 793 F.2d 146, 148 (7th Cir. 1986); *People v. Williams*, 649 N.E.2d 397, 403 (Ill. 1995); *People v. Scott*, 648 N.E.2d 86, 89 (Ill. App. 1994). Such circumstantial evidence is "sufficient to sustain a conviction if it satisfies proof beyond a reasonable doubt of the elements of the crime charged." *People v. Gomez*, 574 N.E.2d 822, 827 (Ill. App. 1991). Under this standard, "[t]he State is not required to exclude every reasonable hypothesis of innocence, and the jury need not be satisfied beyond a reasonable doubt of each link in the chain of circumstances." *People v. Larson*, 885 N.E.2d 363, 374 (Ill. App. 2008).

The Illinois Appellate Court reasonably concluded that, viewing the evidence in the light most favorable to the State, a rational trier of fact could have found that Petitioner acted with the

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requisite intent when he killed his son. Ex. A at ¶¶ 23, 29. As the Appellate Court explained, the trial court could have inferred petitioner's intent to kill from Gustavo Jr.'s extensive injuries (all of which were sustained while the baby was in Petitioner's care), Dr. Harkey's conclusion that those injuries did not result from an accidental fall or the application of CPR, and Petitioner's admissions to Escobar. Ex. A at ¶¶ 26-29. The evidence presented at trial showed that Petitioner beat his son with enough force to cause extensive subarachnoid hemorrhaging in the baby's brain and break seven of the baby's ribs. Ex. A at ¶ 13; R525. The evidence also showed that these injuries were inflicted while the baby was alive. Ex. A at ¶¶ 7, 13. The Court agrees with the Appellate Court and Respondent that "it is reasonable to infer that an adult who 'intentional[ly],' 'savagely,' 'ferociously,' and 'repeatedly' beats and crushes a three-month-old infant badly enough to cause extensive brain, facial, and skeletal injuries—as Petitioner did— intends to kill." [15] at 18.

The Court is unmoved by Petitioner's argument that Dr. Harkey failed to exclude the possibility that his son's death was caused by Petitioner unintentionally dropping the baby (after grabbing the baby, squeezing his ribs, and biting his buttocks). In fact, Dr. Harkey opined that Gustavo Jr.'s injuries were not the result of a fall, because he would expect the baby's hands, arms, legs, and/or feet to also have been injured by a fall. Ex. A at ¶ 14; R.484-88. But even if Dr. Harkey had not rebutted Petitioner's hypothetical scenario about how his son incurred a severe head injury while in his care, the State was not required to "exclude every reasonable hypotheses consistent with [Petitioner's] innocence" in order to prove his guilt beyond a reasonable doubt. Ex. A at ¶ 29 (citing *Larson*, 885 N.E.2d at 374).

Further, the Court is not persuaded by Petitioner's insinuation that others' CPR attempts were Gustavo Jr.'s "tru[e] cause of death." [1] at 23-24. The evidence presented at trial showed

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that the baby was already dead when Perla returned from work, before her coworkers or Mr. Vanwinkle arrived to help. R.528. As the trial court found, because "circulation was present" when Gustavo Jr.'s ribs were broken, "the inference is that the ribs were not broken by any improper CPR that was administered sometime after death." R.525. Accordingly, the trial court and Appellate Court both reasonably rejected Petitioner's attempt to blame his son's injuries on emergency responders.

For these reasons, the Court concludes that a "rational trier of fact" could easily have found beyond a reasonable doubt that Petitioner acted with the requisite intent to commit first degree murder, *Jackson*, 443 U.S. at 319, and therefore Petitioner is not entitled to habeas relief based on his sufficiency of the evidence claim.

B. Excessive Sentence and Ineffective Assistance of Counsel Claims

Petitioner argues that his sentence was excessive because it "was 18 years greater than what defense recommended, but only five years less than what the state sought," and because "few aggravating factor[s] [we]re present." [1] at 19. Petitioner also identifies seven ways in which his trial counsel's performance allegedly was constitutionally deficient. Specifically, Petitioner faults his attorney for failing (a) to hire an expert to analyze the infant's injuries, (b) to challenge Dr. Harkey's testimony that Gustavo Jr. was "beaten and crushed" to death on the basis that it conflicted with a post-mortem report, (c) to challenge other alleged and unspecified inconsistencies between Harkey's testimony and his written reports, (d) to hire an expert to testify that Gustavo Jr. was killed when Petitioner "accidentally" threw or dropped him or by CPR attempts, (e) to call Officer Cadena to testify that would-be rescuers performed CPR on Gustavo Jr.; (f) to present police reports showing that Vanwinkle performed CPR on Gustavo Jr. and "handled [the baby] improperly," that Gustavo Jr. bore no "obvious signs of physical

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trauma," and that Gustavo Jr.'s "body was still warm to the touch in some areas"; and (g) to "more effectively" cross-examine Escobar and the State pathologist on unspecified matters. [1] at 15, 17, 20-31.

The State argues that these claims are all procedurally defaulted because Petitioner failed to fairly present them at each state of state-court review. "A federal habeas petitioner's claim is subject to the defense of procedural default if he does not fairly present his claim through a complete round of state-court review." *Brown v. Brown*, 847 F.3d 502, 509 (7th Cir. 2017). Accordingly, an Illinois prisoner's claim is procedurally defaulted unless he advanced it in both the Illinois Appellate Court and Illinois Supreme Court. *O'Sullivan v. Boerckel*, 526 U.S. 838, 843-45 (1999); *Perruquet v. Briley*, 390 F.3d 505, 514 (7th Cir. 2004). In addition, the "independent and adequate state ground doctrine . . . applies to bar federal habeas when a state court declined to address a prisoner's federal claims because the prisoner had failed to meet a state procedural requirement." *Coleman v. Thompson*, 501 U.S. 722, 729-30 (1991).

The Court concludes that Petitioner's ineffective assistance claims are procedurally defaulted because he failed to fairly present his ineffective assistance claims to the Illinois Supreme Court in his post-conviction PLA. In his PLA, Petitioner alleged only that he had received "[b]oiler plate representation as opposed to vigorous defending." Ex. K at 2. Petitioner did not provide the Illinois Supreme Court with any of "the operative facts" that he now asserts in his habeas petition, giving the court no opportunity "to adjudicate squarely th[e] federal issues." *Verdin v. O'Leary*, 972 F.2d 1467, 1474 (7th Cir. 1992); see also *Sturgeon v. Chandler*, 552 F.3d 604, 610 (7th Cir. 2009) (arguments "must be placed in the petitioner's brief to the court" and must not require the "judge [to] go outside the four corners of the document in order to understand the contention's nature and basis").

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Further, two of Petitioner's ineffective-assistance arguments are doubly defaulted because the Illinois courts rejected them on independent and adequate state-law procedural grounds. During post-conviction proceedings, the Illinois Appellate Court rejected Petitioner's arguments that counsel should have hired an expert (argument a) and should have called Officer Cardena (argument e) because Petitioner failed to attach affidavits or other evidence to support them. Ex. C at ¶ 5 (citing 725 ILCS 5/122-2).

The Court concludes that Petitioner's excessive sentence claim is doubly procedurally defaulted, as well. As the Appellate Court found on direct appeal, Petitioner forfeited this argument by failing to raise it in the trial court. See Ex. A at ¶¶ 30-31. Petitioner also failed to fairly present this argument to the Illinois Appellate Court and Illinois Supreme Court by disclaiming any excessive-sentence claim in his opening appellate brief and PLA. See Ex. D at 19; Ex. G at 6.[4]

"A prisoner can overcome procedural default by showing cause for the default and resulting prejudice, or by showing he is actually innocent of the offense." *Brown*, 847 F.3d at 509. A claim of actual innocence is credible only when the petitioner "'support[s] his allegations of constitutional error with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial.'"

[4] Even if it had not been procedurally defaulted, Petitioner's excessive sentence claim would not be cognizable in this habeas action because it does not allege that the sentence violates the United States Constitution, laws, or treaties. Instead, Petitioner argues that the trial court misapplied state sentencing guidelines. See *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) ("[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States.").

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United States v. Hernandez v. Pierce, 429 F. Supp. 2d 918, 926 (N.D. Ill. 2006) (quoting *Schlup v. Delo*, 513 U.S. 298, 324 (1995)).

Petitioner argues that the "actual innocence" exception applies because he is attaching to his habeas reply brief "'clear and convincing evidence' to rebut the state-court factual determination" that he intentionally killed his son. [17] at 4. But Petitioner waived his actual innocence claim by asserting in his response to his appellate counsel's motion to withdraw that he "is not claiming that he's innocent of the crime." Ex. J at 2. Petitioner also fails to demonstrate that the evidence he relies on now was not presented at trial.

Further, none of the evidence cited by Petitioner supports his claim that he did not intentionally kill his son. First, Petitioner points to statements recorded in a West Chicago Police Department Follow-Up Report, prepared by Officer Federico Cadena, "to rebut the trial court determination that the Petitioner . . . 'brutally' 'savagely' ferociously' and 'repeatedly' beat [Gustavo,] Jr. to death." [17] at 4; see also [1] at 46. Cadena reported that he spoke to WCFPD Firefighter/Paramedic Jeff Keefe, who stated that when Gustavo Jr. arrived at the hospital he "presented with mottling around the mouth, lividity in the feet, hands and back" and "was not breathing and did not have a pulse," but did not have "any obvious signs of physical trauma." [1] at 46. Keefe's observation of the mottling around the mouth and lividity (bruising) on the feet, hands and back is consistent with the trial court's factual determination that Petitioner beat his son to death. Although Keefe also said he did not see "obvious signs of physical trauma," this in no way convinces the Court that Petitioner is innocent. *Id.* Gustavo Jr.'s broken ribs and brain hemorrhaging, which are internal injuries, may not have been "obvious" to Keefe when he first saw the baby. *Id.*

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Second, Petitioner points to Dr. Harkey's post-mortem examination report and argues that "Dr. Harkey himself can not prove how the baby sustain[ed] the injuries in the chest and abdomen" and therefore his testimony should have been excluded under Federal Rule of Evidence 403. [17] at 5. But Dr. Harkey's alleged inability to identify the exact cause of certain injuries does not show that Petitioner is innocent, and the Federal Rules of Evidence had no application in Petitioner's trial, which was held in state court.

Third, Petitioner cites to a Major Crime Task Force report that "the contusion to [Gustavo Jr.'s] buttocks an[d] shoulder were found to be out of the ordinary as the patterns were consistent but the mechanism as to how they occurred could not be explained." [17] at 6. Petitioner does not explain how this is evidence of his innocence, especially when Petitioner admitted at sentencing that he grabbed his son, squeezed him, and bit his buttocks when he would not stop crying.

Fourth, Petitioner cites to (a) the coroner's investigation report, which recorded that Vanwinkle "saw a lot of blood pooling around the mouth an[d] the cheeks" and thought that this "indicate[d] that the infant was originally lying on its face or stomach" and (2) preliminary hearing testimony from Perla "that she gave Jr. mouth to mouth resuscitation," and argues that if Dr. Harkey had seen this evidence he might have concluded that there was "a perfectly reasonable explanation that Petitioner did not cause the other bruises in the entire face and chest of Jr.['s] body." [17] at 6. It is not apparent how Vanwinkle's observation would shed any light on whether Petitioner caused the bruising on Gustavo Jr.'s chest. And Dr. Harkey considered and rejected the hypothesis that the bruises on Gustavo Jr.'s chest were caused by CPR, as explained above.

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Petitioner also makes a half-hearted "cause and prejudice" argument for waiving his procedural default. Petitioner argues that he was unable to present the evidence just discussed in post-conviction proceedings because he was not represented by counsel. [17] at 7-8. But Petitioner had no constitutional right to court-appointed counsel in post-conviction proceedings. See *United States ex rel. Coleman v. Chandler*, 843 F. Supp. 2d 880, 893 (N.D. Ill. 2012) ("it is well-established that ineffective assistance of post-conviction counsel claims are not cognizable on collateral review because criminal defendants do not have a Sixth Amendment right to post-conviction counsel" (citing *Coleman v. Thompson*, 501 U.S. 722, 752 (1991)). And Section 2254 expressly provides that "[t]he ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254." 28 U.S.C. § 2254(i). Further, even if Petitioner's claim was cognizable under Section 2254, he could not demonstrate prejudice because none of the evidence he cites seriously calls into question the trial court's conclusion that he intentionally murdered his son.

For these reasons, the Court concludes that Petitioner's excessive sentence and ineffective assistance of counsel claims have been procedurally defaulted and must be denied.

IV. Certificate of Appealability

A habeas Petitioner does not have an absolute right to appeal a district court's denial of his habeas petition; instead, he must first request a certificate of appealability. See *Miller-El v. Cockrell*, 537 U.S. 322, 335 (2003); *Sandoval v. United States*, 574 F.3d 847, 852 (7th Cir. 2009). A habeas Petitioner is entitled to a certificate of appealability only if he can make a substantial showing of the denial of a constitutional right. *Miller-El*, 537 U.S. at 336. Under this standard, Petitioner must demonstrate that reasonable jurists would find the Court's assessment

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of his Section 2254 claims debatable or wrong. *Id.*; *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). In view of the analysis set forth above, the Court concludes that Petitioner has not made a substantial showing that reasonable jurists would differ regarding the merits of his claim. The Court therefore declines to issue a certificate of appealability.

V. Conclusion

For these reasons, the Court denies Petitioner's application for a writ of habeas corpus under 28 U.S.C. § 2254 [1]. The Court declines to certify any issues for appeal under 28. U.S.C. § 2253(c)(2). The Clerk is instructed to enter a judgment in favor of Respondent and against Petitioner. Civil Case Terminated.

Dated: November 13, 2017

Robert M. Dow, Jr.
United States District Judge

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