United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

August 5, 2019

Before

KENNETH F. RIPPLE, *Circuit Judge*

MICHAEL B. BRENNAN, *Circuit Judge*

No. 18-3398

PETER GAKUBA,
Petitioner-Appellant,

v.

MICHELLE NEESE,
Respondent-Appellee.

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

No. 3:17-cv-50337

Frederick J. Kapala,
Judge.

ORDER

On consideration of the amended petition for rehearing and for rehearing en banc filed by Petitioner-Appellant on July 17, 2019, no judge in active service has requested a vote on the petition for rehearing en banc, and all of the judges on the original panel have voted to deny rehearing.

Accordingly, the petition for rehearing is DENIED.

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted May 30, 2019
Decided June 24, 2019

Before

KENNETH F. RIPPLE, *Circuit Judge*

MICHAEL B. BRENNAN, *Circuit Judge*

No. 18-3398

PETER GAKUBA,
Petitioner-Appellant,

v.

MICHELLE NEESE,
Respondent-Appellee.

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

No. 3:17-cv-50337

Frederick J. Kapala,
Judge.

ORDER

Peter Gakuba 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. Gakuba's pending motions are DENIED.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

Peter Gakuba,	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No: 17 C 50337
	)	
Christine Brannon,	)	
	)	
Respondent.	)	Judge Frederick J. Kapala

ORDER

The clerk is directed to substitute Michelle Neese for Christine Brannon as respondent. Petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 [1] is denied. Certificate of appealability is denied. All pending motions are denied as moot. This case is closed.

STATEMENT

Petitioner, Peter Gakuba, is an inmate at the Illinois Department of Corrections' Robinson Correctional Center, where respondent, Michelle Neese, is the Acting Warden.[1] Gakuba is serving a total prison term of 12 years' imprisonment after he was convicted in the Circuit Court for the Seventeenth Judicial Circuit, Winnebago County, Illinois, of three counts of aggravated sexual abuse of a 14-year-old boy. Before the court is Gakuba's petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. For the following reasons, the petition is denied and the court declines to issue a certificate of appealability.

I. BACKGROUND

The following facts are drawn from the Illinois Appellate Court's opinion in petitioner's direct appeal, People v. Gakuba, 2017 IL App (2d) 150744-U, which this court presumes are correct:

> On November 4, 2006, J.S. and K.S. reported to the Rockton police department that M.S., their 14-year-old son, was missing. After M.S. was located, he was interviewed by the Rockton police. . . .
>
> After being briefed about the situation, Sergeant Charles O'Brien and Detective Daniel Balsley of the Illinois State Police spoke to M.S. and prepared reports of the encounter. M.S. told the officers that during his contact online, Phil described himself as an 18-year-old self-employed businessman who was going to

[1] At the time petitioner filed his petition Christine Brannon was the Warden but has since been replaced by Neese. Accordingly, Neese is now the appropriate respondent in a § 2254 action and the clerk is directed to substitute Neese for Brannon.

be in the Rockford area on business. At approximately 4 p.m. on November 3, 2006, M.S. called Phil to give him directions to M.S.'s neighborhood. . . . Phil picked up M.S. around the corner from his home in a silver sedan. M.S. told the officers that Phil did not appear to be 18 years old and he did not resemble a photograph posted online. Phil took M.S. to several stores in Rockford to look at video games and to a room at the Marriott Courtyard hotel. M.S. drew a diagram of the room's location. Phil then took M.S. to a Hollywood Video store, where they rented five movies, and to a restaurant for food.

M.S. told O'Brien and Balsley that upon returning to the hotel, he and Phil watched a movie on Phil's laptop. After the movie, Phil began masturbating and then undressed both himself and M.S. Phil then "touched" M.S. and had M.S. perform oral sex on him. Phil ejaculated in M.S.'s mouth. Phil then had anal intercourse with M.S. M.S. reported that Phil also performed oral sex on him. M.S. reported that the incident lasted about 30 minutes. M.S. stated that he and Phil slept in the same bed together, clothed, and that Phil never threatened him. The next morning, Phil took M.S. to Denny's for breakfast. While at Denny's, Phil received a phone call from the Rockton police department asking him about M.S. being a runaway. Phil then dropped off M.S. at a bowling alley in South Beloit.

After concluding the interview with M.S., O'Brien and Balsley advised J.S. and K.S. that M.S. would have to be taken to a hospital to have a sexual assault kit administered. O'Brien then went to the Marriott Courtyard hotel in Rockford, where he . . . was able to determine that the room described by M.S. was room 101. [The hotel desk clerk] checked the registration entries and reported that room 101 had been booked through Travelocity by a Peter Gakuba on November 3, 2006, with a check-out date of November 5, 2006. O'Brien went to the area where room 101 is located and noted that it was adjacent to an exit door. O'Brien observed a silver, four-door Ford Taurus in the first parking stall outside the exit door. . . .

O'Brien then spoke by telephone to Merlin Peacey, a manger for a Hollywood Video store in Loves Park. Peacey told O'Brien that an individual named Peter Gakuba had rented six movies from the store on November 3, 2006. . . . Thereafter, O'Brien returned to the hotel where he, Master Sergeant Easton, and the assistant manager of the hotel went to room 101. . . . O'Brien used a hotel master key to open the door. Upon entering the room, O'Brien and Easton identified themselves as police officers. Defendant was standing next to a desk. There was a laptop computer nearby that was in the process of shutting down. The officers informed defendant that they were conducting an investigation which required him to come to their office. Defendant asked if he was under arrest. O'Brien told defendant that he was not, but that he "had no option to decline." . . . The only personal item taken from the room was defendant's New York driver's license.

Upon arriving at the police facility, defendant was placed in an interview room. . . . Defendant initially denied that anyone spent the previous night in his hotel room. He later acknowledged that he had met M.S. online and that M.S. had spent

the night in the hotel room. Defendant stated that he met with M.S. to obtain drugs. Defendant explained that he meets many people online and makes contact with them when he travels to obtain marijuana and crystal methamphetamine. However, defendant later stated that if he was involved in drugs he would not be able to be in his line of work (a hedge fund investor). When asked if he had any sexual contact with M.S., defendant replied either "no" or "no comment." Defendant was asked if "no comment" meant "yes" since he had used the phrase several times during the interview. Defendant responded by stating, "if I say yes," and then picking up the waiver form and pointing to the second warning, "anything you say can be used against you in court and other proceedings." The interview concluded at 8:55 p.m. Defendant was subsequently charged by criminal complaint with two counts of aggravated criminal sexual abuse. . . . Defendant posted bond and was released from custody. . . .

Meanwhile, in the early morning hours of November 5, 2006, O'Brien filed complaints for a search warrant of room 101 at the Marriott Courtyard hotel in Rockford and of the Ford Taurus located in the hotel's parking lot. In the affidavits filed in support of the search warrants, O'Brien asserted that M.S. stated that it was "Peter 'Phil' Gakuba" who assaulted him in Room 101 of the Marriott Courtyard hotel in Rockford on November 4, 2006. As part of the search warrant for the hotel room, O'Brien also requested permission to search and seize the laptop computer observed in the hotel room. Shortly before 2:00 a.m. on November 5, 2006, the circuit court of Winnebago County granted permission to execute the search warrants. On November 6, 2006, O'Brien filed a complaint for a seizure warrant requesting that a blood or buccal sample be taken from defendant. In the affidavit filed in support of the seizure warrant, O'Brien also stated that M.S. reported that "Peter 'Phil' Gakuba" assaulted him in room 101 of the Marriott Courtyard hotel in Rockford on November 3, 2006. At 11:20 a.m. on November 6, 2006, the circuit court of Winnebago County granted permission to seize blood and a buccal swab sample from defendant. The seizure warrant was executed the same day, with a buccal swab collection from defendant's mouth area.

On December 20, 2006, defendant was charged by indictment with three counts of aggravated criminal sexual abuse. . . . Defendant initially retained attorney Debra Schafer to represent him. Assistant State's Attorney Kate Kurtz was assigned to prosecute the case. The case was eventually placed on the docket of Judge John Truitt.

. . . Schafer filed several pretrial motions. She moved to suppress statements defendant made to police in his hotel room and later at the police station. . . . The court . . . denied defendant's motion to quash the search warrant and suppress physical evidence taken from the hotel room. However, the court granted the motion to quash the search warrant and suppress physical evidence taken from the rental car on the basis that the search warrant failed to describe the items to be seized.

After several continuances, the trial was scheduled to begin on September 20,

2010. On that date, however, Schafer moved to continue the matter. The request for a continuance was premised on defendant's representation that he conducted an investigation and had discovered information that allegedly showed that M.S. was posting personal ads on Craigslist and other sites seeking an older male companion. Schafer indicated that she did not think the individual posting the ads was M.S. However, defendant insisted that the individual who posted the ads "had a story which was too similar to the alleged victim not to be him." Defense counsel requested the continuance to allow defendant to issue a subpoena for the material at issue. The State objected to the continuance. The State argued that the evidence did not appear to be related to M.S., but that regardless, information relating to M.S.'s purported actions years after the offenses were committed lacked relevance and that any sexual history would be barred by the Rape Shield Act (725 ILCS 5/115–7 (West 2010)). The court denied the motion to continue, finding the information was not relevant and that, in any event, it would not be admissible. At that point, defendant produced a pro se motion entitled "Motion for Continuance & Motion for Substitution of Counsel by Reason of Ineffective Counsel."

In his motion, defendant argued, inter alia, that Schafer had failed to conduct discovery, refused to conduct independent forensic testing of the hard drive of defendant's computer and M.S.'s computer, and failed to adequately prepare for trial. . . . In response to defendant's allegations, Schafer moved to withdraw from the case.

The court denied defendant's motion, finding that the allegations contained therein lacked merit. The court also opined that defendant's motion was brought as a delay tactic. The court stated that defendant "sandbagged" the court and his attorney by waiting to file his motion until the court denied his attorney's motion to continue. Nevertheless, the court granted Schafer's motion to withdraw.

Thereafter, defendant retained new counsel, Beau Brindley and Michael Thompson. On January 11, 2011, they filed a document entitled "Consolidated Motions to Supress [sic] Statements and Evidence Pursuant to Previously Uncited Authority." In the motion, defendant's attorneys argued that: (1) the law enforcement officers' initial entry into defendant's hotel room on November 4, 2006, constituted an illegal and unreasonable entry in violation of his fourth amendment rights; (2) any inculpatory statements made by defendant on November 4, 2006, were a direct result of the illegal entry into his hotel room and must be suppressed; and (3) evidence obtained pursuant to the search and seizure warrants, including the contents of defendant's hotel room, his computer, and the buccal swab, must be suppressed pursuant to Franks v. Delaware, 438 U.S. 154 (1978), because the affidavits in support of the warrants contained false statements and material omissions. Over the State's objection, the court allowed the motion to the extent it raised new grounds not litigated in any of defendant's prior motions.

Initially, the trial court denied defendant's request for a Franks hearing. . . . At a subsequent hearing, however, the court granted defendant's motion to suppress statements. In making its ruling, the trial court stated that there was probable cause

to arrest defendant based on information provided by M.S. as well as the investigation which corroborated much of M.S.'s statement to police. Indeed, the court found that the police engaged in "good police work" in attempting to corroborate the information provided by M.S. Nevertheless, the court rejected the reasons stated by O'Brien at the hearing for entering the hotel room (exigent circumstances, risk of flight, and destruction of evidence) and granted the motion to suppress statements, finding that the police should have obtained a warrant prior to entering defendant's hotel room.

Following the court's ruling, defense counsel asked the court to reconsider its ruling on the motion to quash the warrants. Defense counsel noted that the court denied defendant's request for a Franks hearing because, even if the allegedly false statements in O'Brien's affidavits in support of the search warrants were omitted, the warrant was salvaged by defendant's statements to police. Defense counsel asserted that because the court ruled that defendant's statements were illegally obtained and cannot be used, there was "nothing left" to identify the name of the person or the room number to be searched. The court found that defendant's statements could no longer be considered in support of the affidavit to secure the search warrants. Moreover, the court found that the affidavit contained "material misrepresentations" when it stated that M.S. identified defendant as "Peter Gakuba" and he provided the room number at the hotel. The court therefore reconsidered and quashed the search and seizure warrants.

Thereafter, the State moved to obtain a new buccal sample since the prior swab was suppressed as a result of the court's ruling. The State argued that it had a lab report that suggested there was genetic material on swabs from M.S.'s rape kit that showed a mixture of two males, and, based on M.S.'s statements, the corroboration of those statements, and the lab report, there was probable cause to obtain a buccal sample pursuant to Illinois Supreme Court Rule 413 (eff. Jan. 1, 1982). The court agreed, and on September 29, 2011, entered an order compelling defendant to submit to a buccal sample pursuant to Rule 413.

Defense counsel also sought leave to file a motion to suppress evidence under the Video Privacy Protection Act (Video Privacy Act), 18 U.S.C. § 2710 (2006). That legislation prohibits video rental providers from disclosing "personally identifiable information" concerning any consumer to a law enforcement agency without a valid court order, subpoena, or warrant. Defense counsel contended that "personally identifiable information" regarding defendant was obtained by the police from Hollywood Video in violation of the Video Privacy Act. The court remarked that it had "never heard of such a bizarre thing," but granted defendant leave to file the motion. Ultimately, the trial court granted defendant's motion and suppressed certain information received from Hollywood Video.

Meanwhile, on April 26, 2013, approximately 2½ weeks before trial was set to begin, defendant filed two pro se motions: (1) a motion to modify a protective order and (2) a motion to "substitute" his attorneys for "ineffectiveness" and to

impose sanctions against them. On April 30, 2013, Brindley and Thompson moved to withdraw, alleging an actual conflict of interest making it impossible for them to ethically represent defendant. The court reluctantly granted the motion to withdraw. . . .

Defendant informed the court that he intended to represent himself, and the court admonished defendant about proceeding pro se. Defendant then filed several motions . . . On June 5, 2013, defendant filed several more motions . . . .

At a hearing on July 19, 2013, immediately after the trial court denied several of defendant's motions, defendant filed a motion to substitute Judge Truitt for cause. On July 22, 2013, defendant filed an amended motion to substitute Judge Truitt for cause, adding complaints about Judge Truitt's rulings on July 19, 2013. Defendant subsequently withdrew the amended motion to substitute Judge Truitt for cause, and trial was set for February 24, 2014. Thereafter, defendant again filed a variety of motions, including a "second amended motion" to substitute Judge Truitt for cause. Following an evidentiary hearing, Judge Joseph McGraw denied defendant's "second amended motion" to substitute Judge Truitt for cause. In January and February 2014, defendant filed several more pro se motions, including a motion to continue trial. Over the State's objection, the trial court granted defendant's motion to continue trial, but set an "absolute cutoff date" of February 28, 2014, for filing any pretrial motions.

At a status hearing on March 5, 2014, defendant requested leave to file more than 15 additional motions. The trial court denied defendant's request. Defendant then filed a notice of appeal to this court. On May 5, 2014, this court dismissed defendant's appeal for lack of a final order. Thereafter, defendant filed various documents in the trial court, including a motion to recuse judge. Judge Truitt declined to recuse, so defendant filed another motion to substitute him for cause. Judge McGraw denied the motion to substitute Judge Truitt for cause after a hearing. As Judge McGraw began to announce his ruling, defendant interrupted and moved to substitute Judge McGraw for cause. That motion was denied. Thereafter, defendant continued to file additional motions in the trial court. He also filed an interlocutory appeal to this court, which was denied. On October 24, 2014, Judge Truitt set a trial date of April 27, 2015.

On November 25, 2014, defendant filed a motion for court-appointed counsel. At a hearing on December 9, 2014, the trial court acknowledged that defendant had the right to court-appointed counsel. The court asked defendant why he was requesting counsel after representing himself for more than a year and a half. Defendant cited difficulties he was having with the discovery process, including issuing subpoenas. The trial court then admonished defendant that if it were to appoint the public defender to represent defendant, it would not be simply for the limited purpose of assisting defendant with ministerial duties, but rather that counsel would be representing defendant. The court also admonished defendant that it [sic] he appoints a public defender and, as trial approaches, defendant indicates that he has

a problem with counsel, that if the court determined the allegations were not meritorious, counsel would proceed to trial for defendant. The court stated, however, that if it found defendant's allegations meritorious, he could proceed pro se. The court also stated that it would not continue the matter any further. Defendant indicated he understood. The court then appointed the public defender's office to represent defendant.

. . . .

On March 31, 2015, defendant filed pro se a "Motion to Substitute Court–Appointed Counsel–Ineffective Representation." Defendant alleged, in part, that [Assistant Public Defender] Gustafson was ineffective because she had only four to five months to prepare for trial. . . . The court denied defendant's motion to substitute counsel. Defendant informed the court that if it would not allow him to substitute counsel, he would proceed pro se. In response, the court stated:

> "I anticipated that very thing, and that's denied, as well, Mr. Gakuba, for–on the basis that on December 9 you stood before the court, indicated to the effect that you had no idea how to issue a subpoena, cause to be [sic] a subpoena to be served. You asked for assistance.
>
> I know exactly where this thing would go if you were allowed to again return to being pro se. You'd appear most likely before the court on April 23, indicate that you either haven't had time or still aren't quite sure how to have subpoenas served, necessitating another delay on a nine year old case. Eight and a half years. I'm sorry. Only eight and a half years."

The court also noted that this was the third time "on the eve of trial or certainly within a month of trial" that defendant wanted to discharge his attorney. The court found that defendant's actions were precipitated by a desire to delay the trial.

[D]efendant's trial began on April 27, 2015. M.S. testified that he was born on January 25, 1992. . . . In October 2006, M.S. met an individual online who identified himself as an 18-year old male named "Phil." . . . . M.S. "chatted" online with Phil and believed they were having a romantic relationship. During their conversations, M.S. and Phil discussed Phil buying M.S. a phone and a laptop. They also discussed buying a car and a house in the town where M.S. lived so that they could see each other.

M.S. testified that Phil asked him for proof that he was actually 14 years old. To that end, M.S. called Phil both from a pay phone at school and from his mother's cell phone so that defendant could hear his voice. Additionally, M.S. faxed Phil a copy of his school identification card. Phil told M.S. that he received the fax.

M.S. and Phil eventually agreed to meet. To that end, on November 3, 2006, Phil drove a rental car to the street where M.S. resided. Upon approaching the vehicle, M.S. noted that the driver did not appear to be Phil's stated age, but he got

into the car anyway. In court, M.S. identified defendant as the driver of the car. Defendant then drove to Rockford where he and M.S. went to several stores, including Best Buy, Walmart, and Hollywood Video. Defendant bought several video games for M.S's portable video game device. . . . [D]efendant and M.S. went to defendant's room at the Marriott Courtyard hotel in Rockford.

In the hotel room, M.S. and defendant ate and watched movies on defendant's laptop computer. When the movie was over, defendant told M.S. that they were "gonna have fun." Defendant took off his clothes and then took off M.S.'s clothes. Defendant began to kiss M.S. on the lips and "around his whole body," including M.S.'s anus and penis. Defendant also placed M.S.'s penis in his mouth. Defendant then pushed M.S's head toward defendant's penis. Defendant told M.S. to perform oral sex on him and that defendant would reciprocate on M.S. M.S. performed oral sex on defendant, and defendant ejaculated on M.S.'s mouth. Defendant then inserted his penis in M.S.'s anus after applying some "lube." Defendant did not use a condom. M.S. went to bed after defendant finished.

The next morning . . . defendant dropped off M.S. at a bowling alley in South Beloit. He then called his father to pick him up.

. . . .

O'Brien testified that he met with M.S. in November 2006 and ascertained that he was 14 years old. M.S. described what had happened and indicated both verbally and by drawing a diagram the location of the hotel and room where he was taken. O'Brien then went to the hotel, which he determined was the Marriott Courtyard in Rockford. O'Brien testified that as a result of his investigation into the matter, "Peter Gakuba" was arrested. At that point, the State asked O'Brien whether, in processing the paperwork for defendant's arrest, he learned of defendant's birth date. Over defense counsel's objection, O'Brien answered in the affirmative. Kurtz then asked O'Brien for defendant's date of birth. Before O'Brien responded, defense counsel requested a sidebar. During the sidebar, the parties discussed whether the police had obtained defendant's date of birth independently from the suppressed evidence. After a short recess, during which the court allowed Kurtz and O'Brien to speak, O'Brien testified that he asked defendant his date of birth during the "booking process that began with this defendant at 9:20 on November 4, 2006," and that defendant stated that he was born on November 21, 1969. Defense counsel did not cross-examine O'Brien.

Dr. Robert Escarza testified that he is a staff physician in the emergency room at Rockford Memorial Hospital. On November 4, 2006, Dr. Escarza, using swabs, took oral and rectal samples from M.S. for the sexual assault kit. After taking the samples, Dr. Escarza gave the swabs to the nurse assisting him. On cross-examination, Dr. Escarza testified that he also physically examined M.S. and noted no trauma to the rectum. On redirect, Dr. Escarza noted that rectum is "designed to expand."

. . . .

Charles Davidson testified that in September 2011, he was a special agent for the Illinois State Police. On September 29, 2011, Davidson took a buccal sample from defendant by swabbing the inside of his cheek. Davidson then placed the swab in a buccal swab kit and sealed it.

Blake Aper, a forensic scientist with the Illinois State Police Crime Lab in Rockford, . . . conducted testing on the rectal swabs taken from M.S. against known standards taken from both M.S. and defendant. Aper testified that, based on a reasonable degree of scientific certainty, he found (1) a mixture of DNA of two people on one of the anal swabs that was consistent with that of defendant and M.S. and (2) sperm with a "clean, single source male DNA profile" that matched defendant. Aper testified that the DNA profile from the sperm testing would only be found in 1 in 79 quintillion white unrelated individuals, 1 in 550 quintillion black unrelated individuals, and 1 in 1 sextillion Hispanic unrelated individuals.

. . . . The jury found defendant guilty of all three counts charged.

. . . Ultimately, the court sentenced defendant to a separate term of four years' imprisonment on each count with the sentences to run consecutively.

Id. ¶ ¶ 4-43 (footnote omitted); see also 28 U.S.C. § 2254(e)(1) (providing that state court factual findings are presumed correct during federal habeas review unless petitioner rebuts them with clear and convincing evidence).

On direct appeal, the Illinois Appellate Court, Second District, rejected each of the following seven arguments and affirmed petitioner's conviction and sentence: (1) the trial court erred in allowing Sergeant O'Brien to testify regarding petitioner's name and birth date; (2) the trial court erred in granting the State's motion to take a buccal sample of petitioner; (3) the evidence was insufficient to sustain his convictions; (4) that his Sixth Amendment right to self-representation was violated when his request to proceed to trial pro se was denied; (5) the trial court erred in denying his motions to disqualify the assistant state's attorney; (6) the trial court erred in denying his motions to disqualify two judges; and (7) the trial court erred in sentencing him to a term of imprisonment rather than probation and in imposing consecutive sentences. People v. Gakuba, 2017 IL App (2d) 150744-U.

As is pertinent to the § 2254 petition pending before this court, the Illinois Appellate Court held that "defendant's name and age were derived from sources independent of any illegal police conduct." Id. ¶ 49. The Illinois Appellate Court also rejected defendant's second argument holding that the trial court did not err in admitting the second buccal sample pursuant to Illinois Supreme Court Rule 413. Id. ¶¶ 60-69. In rejecting defendant's third argument, the Illinois Appellate Court held that the evidence was sufficient to support defendant's convictions. Id. ¶¶ 71-84. As for defendant's fourth argument, the Illinois Appellate Court held the trial court did not abuse its discretion in denying defendant's motion to represent himself less than a month prior to the scheduled trial date. Id. ¶¶ 86-88. Thereafter, the Illinois Supreme Court denied petitioner leave to appeal. People v. Gakuba, No. 122289, 2017 WL 4386407 (Ill. Sept. 27, 2017).

Petitioner presents the same seven contentions as his grounds for relief under § 2254. Petitioner also states in his petition that he has pending before the Illinois Appellate Court an appeal of the trial court's dismissal of his post-conviction petition in which he has raised the ineffective assistance of trial counsel. See People v. Gakuba, No. 2-17-0744. This court previously dismissed grounds five through seven for failure to exhaust in state court and has permitted Gakuba to proceed on grounds one through four.

II. ANALYSIS

A federal court is permitted to issue a writ of habeas corpus on behalf of a person in custody pursuant to a state court judgment "on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). But federal courts are permitted to issue a writ of habeas corpus only if the state court's determination of the petitioner's claim "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1)-(2); Williams v. Taylor, 529 U.S. 362, 375-76 (2000). For a decision to be "contrary to clearly established federal law" it must either apply "a rule that contradicts a prior Supreme Court case" or reach "a different result than the Supreme Court has reached on a materially indistinguishable set of facts." Hall v. Zenk, 692 F.3d 793, 798 (7th Cir. 2012). "[A]n unreasonable application of federal law is different from an incorrect application of federal law." Harrington v. Richter, 562 U.S. 86, 101 (2011). "A state court's determination that a claim lacks merit precludes federal habeas relief so long as fairminded jurists could disagree on the correctness of the state court's decision." Id. In deciding whether a habeas corpus petition merits relief, a reviewing court looks to the "last reasoned state-court opinion" to address the petitioner's claims. Ylst v. Nunnemaker, 501 U.S. 797, 804 (1991); Ford v. Wilson, 747 F.3d 944, 949 (7th Cir. 2014) ("[O]ur inquiry focuses entirely on what occurred in the state court. In so doing, we look at the decision of the last state court to rule on the merits of the petitioner's claim.").

Ground One: The Trial Court Erred When it Assumed that Petitioner's Name and Date of Birth Came from His Answer to a Routine Booking Question Resulting in Napue Violations at Trial; this Identity Evidence Illegally Obtained in Violation of Video Privacy Protection Act (VPPA) and Corroborated by the Illegal Seizure of Petitioner's Driver's License, also Violated the Fourth Amendment as a Brown Claim

Respondent maintains that, to the extent petitioner's ground one is based on the Illinois court's misapplication of the Fourth Amendment, it is barred by Stone v. Powell, 428 U.S. 465 (1976). This court agrees.

"So long as a habeas petitioner enjoyed an 'opportunity for full and fair litigation of a Fourth Amendment claim' in state court, federal habeas review of the claim is barred." Miranda v. Leibach, 394 F.3d 984, 997 (7th Cir. 2005) (citing Stone 428 U.S. at 481-82)). A petitioner has had an opportunity for full and fair litigation of a Fourth Amendment claim when "(1) he clearly apprised the state court of his Fourth Amendment claim along with the factual basis for that claim, (2) the state court carefully and thoroughly analyzed the facts, and (3) the court applied the proper constitutional case law to those facts." Id. The role of a federal court on habeas review is "not to

second-guess the state court on the merits of the petitioner's claim, but rather to assure [itself] that the state court heard the claim, looked to the right body of case law, and rendered an intellectually honest decision." Monroe v. Davis, 712 F.3d 1106, 1114 (7th Cir. 2013). "It takes more than an error in the state court's analysis to surmount the Stone bar to collateral relief." Id. Only if the error "betray[s] an unwillingness on the part of the [state] judiciary to treat [the petitioner's] claim honestly and fairly" will that error provide a basis for a merits review of a Fourth Amendment claim in a federal habeas case. Id.

Gakuba apprised the state courts of his Fourth Amendment claims, and that the state courts analyzed the facts and applied the proper constitutional law. In fact, petitioner prevailed on his Fourth Amendment claims before the trial court and it suppressed the items taken from petitioner's hotel room including his driver's license, the statements petitioner made to police that were the direct result of the unlawful entry into his hotel room, and the evidence obtained through the search and seizure warrants including the first buccal swab. Ultimately, applying the independent-source and inevitable-discovery doctrines espoused in Nix v. Williams, 467 U.S. 431 (1984), the Illinois courts determined that O'Brien learned defendant's name and determined his date of birth from sources independent of the suppressed evidence. Specifically, that the petitioner's name was derived from the hotel clerk and petitioner's date of birth was derived from petitioner himself during routine booking questions. Petitioner contends that the Illinois courts misapplied the law to the facts because it should not have admitted O'Brien's testimony concerning the information petitioner gave during booking. That, however, is exactly the claim that this court does not have the authority to review. Nevertheless, this court discerns no error in allowing O'Brien to testify that petitioner told him his date of birth during the booking process. See Pennsylvania v. Muniz, 496 U.S. 582, 601 (1990) (recognizing a "routine booking question exception which exempts from Miranda's coverage questions to secure the biographical data necessary to complete booking or pretrial services"); People v. Cruz, 162 Ill. 2d 314, 374-75 (1994) ("Relevant admissions of a party, whether consisting of a statement or conduct, are admissible when offered by the opponent as an exception to the hearsay rule."). Petitioner filed an affidavit in the trial court on June 5, 2014 indicating that he never told O'Brien his date of birth. However, this affidavit was not admitted at trial, nor could it have been, and it is therefore irrelevant. Thus, petitioner had a full and fair opportunity to litigate his Fourth Amendment claims in state court and, consequently, to the extent that ground one is based on the Fourth Amendment, it is not cognizable.

Petitioner also premises his ground one on the VPPA violation which resulted in the trial court's order suppressing petitioner's personally identifiable information. See 18 U.S.C. § 2710 (d) ("Personally identifiable information obtained in any manner other than as provided in this section shall not be received in evidence in any trial, hearing, arbitration, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision of a State."). However, there is nothing about the Illinois courts' ruling that petitioner's name and date of birth were obtained from independent sources that was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." See 28 U.S.C. § 2254(d)(1). As noted, the Illinois Appellate Court cited Nix v. Williams, which recognize that the independent-source and inevitable-discovery doctrines allow for the admission of illegally obtained evidence when the government is able to prove by a preponderance of the evidence that an

independent source or ongoing investigation would have led law enforcement to the same evidence. 467 U.S. at 448-50. The Court in Nix explained that:

> [T]he interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a worse, position that they would have been in if no police error or misconduct had occurred. When the challenged evidence has an independent source, exclusion of such evidence would put the police in a worse position than they would have been in absent any error or violation.

Id. at 443 (footnote and citations omitted). The Illinois Appellate Court concluded that O'Brien learned petitioner's name and date of birth from sources other than the personally identifiable information illegally obtained from Hollywood Video in contravention of the VPPA. Nothing in the record, and nothing argued by petitioner, demonstrates that this "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." See 28 U.S.C. § 2254(d)(2). For these reasons, petitioner will not be afforded relief on his first § 2254 ground.

Ground Two: The Trial Court Erred When it Re-Admitted Petitioner's DNA Profile into Evidence after Quashing a "Buccal Swab Search/Seizure Warrant" as Franks and Brown Violations; the Warrant Was Functionally an Illinois Supreme Court Rule 413 Motion and the Doctrines of Estoppel and Res Judicata Controlled

Respondent argues that the Illinois Appellate Court rejected this contention on state-law grounds. On direct appeal, petitioner argued that the trial court erred in ordering a second buccal sample pursuant to Illinois Supreme Court Rule 413 because the doctrines of estoppel and res judicata precluded such an order in view of the suppression of the first buccal sample due to incorrect statements in the affidavit submitted in support of the seizure warrant. In rejecting this argument, the Illinois Appellate Court held that the trial court found that there was a different basis for the State's Rule 413 discovery request, namely the results of the anal swab of M.S. taken during the administration of the sexual assault kit at Rockford Memorial Hospital. The Court also found the cases cited by the petitioner applying res judicata and judicial estoppel inapplicable.

The application of the doctrines of res judicata and estoppel are matters of state law. See Gartman v. Pierce, No. 05-CV-3123, 2012 WL 1932118, at *11 (N.D. Ill. May 29, 2012) (finding non-cognizable petitioner's argument that the state court misapplied the Illinois doctrines of waiver and res judicata); Gilliam v. Battaglia, No. 05-CV-803-JPG, 2009 WL 4800300, at *10 (S.D. Ill. Dec. 10, 2009) (noting that estoppel has been recognized as an independent and adequate state law ground). Therefore, the Illinois courts resolved this contention on adequate and independent state-law grounds making it non-cognizable as a § 2254 ground for relief. See Foster v. Chatman, 136 S. Ct. 1737, 1745 (2016) (holding that federal courts lack "jurisdiction to entertain a federal claim on review of a state court judgment if that judgment rests on a state law ground that is both independent of the merits of the federal claim and an adequate basis for the court's decision."); see also Thomas v. Williams, 822 F.3d 378, 384 (7th Cir. 2016) (holding that where "the state court judgment rests on an independent and adequate state ground ... principles of comity and federalism dictate against upending the state-court conviction, and instead, finding that the petitioner's claim is procedurally

defaulted"). The discovery mechanism within Supreme Court Rule 413 does have language making its application "subject to constitutional limitations." See Ill. S. Ct. R. 413(a)(vii). However, to the extent that petitioner's ground two is premised on the contention that the Illinois courts ran afoul of the Fourth Amendment in permitting the second buccal swab, it is barred by Stone. For these reasons, petitioner's second ground for § 2254 relief is denied.

Ground Three: The Cummulative Evidentiary Errors by the Trial Court Resulted in Petitioner Being Convicted with Legally Insufficient Evidence; False/Fabricated Evidence (Napue); Manifestly Insufficient Evidence; and Deprived Petitioner of a Fair Trial by Barring Use of Impeachment Evidence

Section 2254 relief may be afforded where the state court's decision was contrary to, or was an unreasonable application of, clearly established federal law. See 42 U.S.C. § 2254(d)(1). In this case, however, the Illinois Appellate Court identified the applicable constitutional standard for claims that the evidence presented at trial was insufficient to sustain the conviction. See Gakuba, 2017 IL App (2d) 150744-U, ¶ 72 (citing People v. Wheeler, 226 Ill. 2d 92, 114 (2007) ("When reviewing a challenge to the sufficiency of the evidence, this court considers whether, viewing the evidence in the light most favorable to the State, " 'any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. ' " People v. Collins, 106 Ill.2d 237, 261 (1985), quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979).."). Accordingly, the decision of the Illinois Appellate Court was not contrary to federal law. See Price v. Vincent, 538 U.S. 634, 640 (2003) (holding that a state court decision is not contrary to federal law if it identifies and affirms the principles of the relevant Supreme Court precedent).

Nor can this court conclude that the Illinois Appellate Court's holding that the trial evidence was sufficient to support his convictions resulted from an unreasonable application of Jackson. In so holding, the Illinois Appellate Court reasoned that the:

> evidence establishes that M.S. was born on January 25, 1992, making him at least 13 years of age but under 17 years of age in November 2006. The evidence further establishes that defendant was born on November 21, 1969, making him at least 5 years older than M.S. Moreover, a rational trier of fact could have reasonably concluded that the contact described by M.S. constituted "sexual penetration" as that term is defined by statute. In this case, M.S. testified that defendant placed M.S.'s penis in his mouth. M.S. further testified that defendant placed his penis in M.S.'s mouth and in M.S.'s anus. This conduct clearly falls within the statutory definition of "sexual penetration." Accordingly, based on this evidence, we cannot say that no rational trier of fact could have found defendant guilty of the charges alleged in the indictment.

Gakuba, 2017 IL App (2d) 150744-U, ¶ 79.

Nor does petitioner satisfy his burden of showing an unreasonable determination of the facts under the standard stated in § 2254(d)(2). Petitioner argues that the evidence was insufficient to sustain his convictions because he believes that M.S., and nearly every other witness that testified at his trial, was not credible. In particular, petitioner contends that O'Brien lied about how he learned petitioner's name and date of birth. However, the assessment of the credibility of the

witnesses is beyond the scope of federal habeas corpus review of a claim of insufficient evidence because the Supreme Court has noted that the federal habeas statute "gives federal habeas courts no license to redetermine credibility of witnesses whose demeanor has been observed by the state trial court, but not by them." Marshall v. Lonberger, 459 U.S. 422, 434 (1983); see also Kines v. Godinez, 7 F.3d 674, 678 (7th Cir. 1993).

Petitioner also argues, under his third ground, that he was deprived of his constitutional right to present a meaningful defense when he was denied the opportunity to impeach M.S. with evidence of M.S.'s internet activities involving salacious and vulgar sexual activity. Petitioner maintains that the trial court erred in finding that this evidence was irrelevant and barred by the Illinois Rape Shield Act. On September 20, 2010, the day trial was first scheduled to begin, petitioner moved for a continuance to conduct an investigation into information that M.S. was posting personal ads on Craigslist seeking an older male companion. The trial court denied the motion to continue the trial finding the purported evidence was irrelevant and, in any event, not admissible. However, the court has not been directed to the portion of the record showing any attempt by petitioner to admit this evidence during his trial. Nevertheless, "[b]ecause the admissibility of evidence in state courts is a matter of state law, evidentiary questions are not subject to federal review under § 2254 unless there is a resultant denial of fundamental fairness or the denial of a specific constitutional right." United States ex rel. DiGiacomo v. Franzen, 680 F.2d 515, 517 (7th Cir. 1982). Petitioner has made no such showing. To the extent this purported impeachment evidence was excluded under the Illinois Rape Shield Act, 725 ILCS 5/115-7, that ruling was clearly based on state law and therefore not cognizable on § 2254 review. See Thomas, 822 F.3d at 384. For these reasons, the court will not afford petitioner § 2254 relief on his third ground.

Ground Four: The Trial Court Erred in Denying Petitioner's Sixth Amendment Right to Self-Representation Three to Six Weeks Before Trial Despite Making a Record Five to Six Months Earlier That the Trial Court Anticipated It, and Would Allow it as a Matter of Law as Petitioner Was "Pro Se" for Some 18 Months Before Being Granted Appointed Counsel at the Time the Trial Court Made its Anticipatory/Prospective Ruling Known for the Record

Respondent contends that petitioner has not shown that the Illinois Appellate Court, in rejecting petitioner's Sixth Amendment self-representation claim, rendered a decision contrary to or constituting an unreasonable application of clearly established Federal law as required under § 2254(d)(1). The court agrees.

The Illinois Appellate Court identified the Sixth Amendment and Faretta v. California, 422 U.S. 806 (1975), as the pertinent federal law establishing a criminal defendant's right to self-representation. Gakuba, 2017 IL App (2d) 150744-U, ¶ 87. The Court also correctly noted that the right to self-representation is not absolute and a defendant may forfeit the right where his motion to proceed pro se is just an attempt to delay trial. Id.; see also Imani v. Pollard, 826 F.3d 939, 947 (7th Cir. 2016) ("Where a defendant invokes his right so late as to delay a trial or engages in serious and obstructionist misconduct, a judge may deny the exercise of the right of self-representation." (citing Faretta, 422 U.S. at 834-35 & n.46)). Thus, the decision of the Illinois Appellate Court was not contrary to federal law. See Price, 538 U.S. at 640.

Nor can this court say that the Illinois Appellate Court's decision affirming the trial court's denial of petitioner's motion to proceed pro se–based on the trial court's finding that the motion was interposed as a delay tactic–was an unreasonable application of Faretta. In holding that the trial court's finding was supported by the record, the Illinois Appellate Court wrote:

> [A]t the time defendant requested to proceed pro se in March 2015, his case had been pending for approximately 8½ years. During that time, defendant was out on bond. Defendant was initially represented by attorney Schafer. On the day of trial, however, defendant sought to have Schafer removed. Defendant then retained attorneys Brindley and Thompson to represent him. Again, shortly before trial was set to begin, defendant requested the removal of his attorneys. Defendant then informed the court that he intended to proceed pro se. During the course of his self representation, defendant, by our count, filed more than 50 motions, many of them duplicative of filings previously tendered to the court by either defendant himself or his former attorneys. In addition, on at least two occasions, defendant sought relief in [the Illinois Appellate Court] seeking to challenge the trial court's rulings prematurely. On November 25, 2014, after almost 19 months of self representation, defendant requested the appointment of counsel. The trial court granted defendant's request and appointed the public defender's office to represent defendant. On March 31, 2015, less than a month before the scheduled trial date of April 27, 2015, defendant again requested the substitution of counsel. When that request was denied, defendant insisted on representing himself. The trial court denied the request, explaining that it was merely the latest in a series of tactics precipitated by a desire to delay the commencement of defendant's trial.

Gakuba, 2017 IL App (2d) 150744-U, ¶ 88. Given these facts–particularly the fact that petitioner had on two previous occasions fired his counsel right before trial was scheduled to begin–petitioner has failed to meet his burden of showing that the state court applied Faretta's delay-of-trial exception in an objectively unreasonable manner. See Woodford v. Visciotti, 537 U.S. 19, 25 (2002) (holding that it is the "habeas applicant's burden to show that the state court applied [the constitutional standard] to the facts of his case in an objectively unreasonable manner.").

Respondent also contends that petitioner's fourth ground for § 2254 relief falls short of the unreasonable determination of the facts standard of § 2254(d)(2). As indicated, the record is replete with instances that could support the conclusion that petitioner was merely engaged in delay when he asked to represent himself shortly before trial. Petitioner disagrees that he was motivated by a desire to delay the trial but does not in any meaningful way dispute the facts relied upon by the trial court and recited by the Illinois Appellate court in support of their conclusions. As such, this court agrees that petitioner has not demonstrated that the Illinois courts' determination of the self-representation issue "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the [s]tate court proceeding." 28 U.S.C. § 2254(d)(2). Consequently, petitioner will not be afforded relief on his fourth § 2254 ground.

III. CONCLUSION

For the foregoing reasons, petitioner's § 2254 petition is denied. Pursuant to Rule 11(a) of

the Rules Governing § 2254 Cases, the court must issue or deny a certificate of appealability "when it enters a final order adverse to the applicant." A district court should only issue a certificate of appealability "if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To make a substantial showing of the denial of a constitutional right, the petitioner must demonstrate that "reasonable jurists could debate whether . . . the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." Slack v. McDaniel, 529 U.S. 473, 484 (2000). In this case, petitioner has not shown that reasonable jurists could debate whether the petition should have been resolved in a different manner. Therefore, a certificate of appealability will not issue.

Date: 10/24/2018

ENTER:

FREDERICK J. KAPALA
District Judge

A42

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS

Peter Gakuba,	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No: 17 C 50337
	)	
Christine Brannon,	)	
	)	
Respondent.	)	Judge Frederick J. Kapala

ORDER

Petitioner's motion to proceed in forma pauperis [3] is granted. Grounds five through seven are dismissed without prejudice. Respondent is directed to answer or otherwise respond to the remaining claims within 30 days. Petitioner's reply, if any, to be filed within 30 days of the response.

"MIXED PETITION" CONTRARY TO SPARKS V DOROTHY 2018 US LEXIS 32265 #1-3 (7TH 2018) (CITES ROSE V. LUNDY 455 US 509 (1982); RHINES V. WEBER 544 US 269 (2005))

STATEMENT

Following a jury trial in the Seventeenth Judicial Circuit, Winnebago County, Illinois, petitioner, Peter Gakuba, was convicted of three counts of aggravated criminal sexual abuse and was sentenced to four years' imprisonment on each count with the sentences to run consecutively. On direct appeal, the Illinois Appellate Court, Second District, rejected the following seven arguments and affirmed petitioner's conviction and sentence: (1) the trial court erred in allowing Sergeant O'Brien to testify regarding petitioner's name and birth date; (2) the trial court erred in granting the State's motion to take a buccal sample of petitioner; (3) the evidence was insufficient to sustain his convictions; (4) that his Sixth Amendment right to self-representation was violated when his request to proceed to trial pro se was denied; (5) the trial court erred in denying his motions to disqualify the assistant state's attorney; (6) the trial court erred in denying his motions to disqualify two judges; and (7) the trial court erred in sentencing him to a term of imprisonment rather than probation and in imposing consecutive sentences. People v. Gakuba, 2017 IL App (2d) 150744-U, ¶ 47. Petitioner's petition for leave to appeal was denied. People v. Gakuba, No. 122289, 2017 WL 4386407 (Ill. Sept. 27, 2017).

Petitioner presents the same seven contentions as his grounds for relief under § 2254. Petitioner also states in his petition that he has pending before the Illinois Appellate Court an appeal of the trial court's dismissal of his post-conviction petition in which he has raised the ineffective assistance of trial counsel. See People v. Gakuba, No. 2-17–0744.

Rule 4 of the Rules Governing § 2254 Cases requires prompt examination by the court and provides, "[i]f it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the judge must dismiss the petition and direct the clerk to notify

the petitioner." A claim must be presented as a federal constitutional claim in the state court proceedings in order to be exhausted. See Duncan v. Henry, 513 U.S. 364, 365-66 (1995). It is clear from the record that petitioner's § 2254 grounds five through seven were not presented to the Illinois courts as federal constitutional claims and, therefore, are not exhausted. See People v. Gakuba, 2017 IL App (2d) 150744-U.

In particular, with regard to ground five, the Illinois Appellate Court rejected petitioner's contention that the trial court erred in denying his motions to disqualify the assistant state's attorney because it abused its discretion under the standard delineated in Marshall v. County of Cook, 2016 IL App (1st) 142864, ¶ 22, and violated the Illinois Counties Code, 55 ILCS 5/4-2003. Gakuba, 2017 IL App (2d) 150744-U, ¶¶ 91-99. As for ground six, the Illinois Appellate Court rejected petitioner's contention that the trial court erred in denying his motions to substitute two judges pursuant to 725 ILCS 5/114-5. The Court held that the trial court's finding that there was no indicia of judicial prejudice against petitioner was not against the manifest weight of the evidence as that standard has been articulated by the Illinois Supreme Court in People ex rel. Baricevic v. Wharton, 136 Ill. 2d 423, 439 (1990), and People v. Patterson, 192 Ill. 2d 93, 131 (2000). Id. ¶ 102. With respect to ground seven, in rejecting petitioner's sentencing arguments, the Illinois Appellate Court held that the trial court did not abuse its discretion under Illinois law in choosing incarceration over probation, id. ¶ 115, or in imposing consecutive sentences under 730 ILCS 5/5-8-4(b), id. ¶ 117.

Thus, the record is clear that grounds five through seven were not presented as federal constitutional claims nor decided as such. Those grounds are dismissed without prejudice for failure to exhaust. Consequently, petitioner will be permitted to proceed on only grounds one through four.

"MIXED PETITION" CONTRARY TO SPARKS v. DORETHY 2018 US LEXIS 32265 #1-3 (7th 2018) (CITES ROSE v. LUNDY 455 US 509 (1982); RHINES v. WEBER 544 US 269 (2005))

Date: 11/20/2017

ENTER:

FREDERICK J. KAPALA
District Judge