VERA-NATAL v. HULICK

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MEMORANDUM OPINION AND ORDER DISMISSING PETITION FOR WRIT OF HABEAS CORPUS

Petitioner, Elliot Vera-Natal ("Petitioner" or "Vera-Natal"),seeks a writ of habeas corpus against Respondent, Donald Hulick,Warden of the Hill Correctional Center in Galesburg, Illinois.For the reasons stated below, Vera-Natal's petition for a writ ofhabeas corpus ("Petition") is respectfully denied.

BACKGROUND

Petitioner is imprisoned pursuant to a judgment of the Illinoiscourts. That judgment followed a bench trial in which Vera-Natalwas convicted of first-degree murder and attempted first-degreemurder and was sentenced to consecutive prison terms of thirtyand eight years, respectively.[1] (D.E. 15, Ex. B at 1,15.)[2]

On April 17, 1998, Vera-Natal traveled on a red bicycle to agas station in Waukegan, Illinois. (Id. at 2.) Some members ofthe Maniac Latin Disciples street gang, none of whom was armed, were in and around a white van parked outside of thegas-station store. (Id. at 2, 21.) Vera-Natal (who also went bythe nickname "Big Tiny"), was a member of the Spanish Cobrasstreet gang, one of the rivals of the Maniac Latin Disciples.(Id. at 21.) Vera-Natal exchanged stares with at least two ofthe Maniac Latin Disciples. (Id. at 6, 21.) Brian Vinson("Vinson") and at least one other person in the van also flashed"signs" and exchanged words with Vera-Natal. (Id. at 21.)

After these exchanges, Petitioner rode his bike closer to hiseventual shooting victims and placed his hand at his waist.(Id.) Vinson, while standing near the van, threw a bottle oftransmission fluid at Vera-Natal; the bottle did not hitPetitioner. (Id.) In response, Petitioner got off his bike,drew a .38 caliber firearm from his waistband, and repeatedlyfired at Vinson and the others in the van. (Id.) Eyewitnesstestimony and the position of the shell casings showed thatVera-Natal was walking toward the van as he fired. (Id.)Vera-Natal's shots killed Jose Perez ("Perez") and woundedVinson. Perez sustained a fatal gunshot wound to his side, whileVinson sustained a gunshot wound to the ankle that requiredsurgery. (Id. at 21, 32.) Vinson could not work for severalweeks as a result of his injury. (Id. at 21, 32.)

After the shootings, Vera-Natal fled the gas station, discardedthe gun in an alley gutter, and went into hiding. (Id. at 18.)Two days after the incident, Vera-Natal flew from Chicago toPuerto Rico

under the alias "Alvin Gonzalez." (Id. at 3, 18.)Petitioner made no return flight arrangements. (Id.) Petitionerwas arrested three months later in Puerto Rico on unrelatedcharges. (Id.) On October 21, 1998, a grand jury in LakeCounty, Illinois, indicted Vera-Natal for the shootings at thegas station. (Id.) On February 2, 1999, Vera-Natal waivedextradition, and he was transported back to Illinois two weekslater. (Id.) The evidence that Vera-Natal shot the victims was overwhelming;the only issue at trial was the "imperfect self-defense" argumentoffered on behalf of Vera-Natal by his counsel.[3] (Id.at 20.) Vera-Natal confessed to the Waukegan police that he firedshots at the van and stated that he shot at the van because hewas "scared for his life" because "the Maniacs were looking forhim." (Id. at 17.) Vera-Natal contended that he feared for hislife ever since he had discovered that the Maniac Latin Discipleshad allegedly put out an "SOS" on him — an order from the leadersof the gang to shoot Vera-Natal on sight. (Id. at 16-17.)

A number of eyewitnesses confirmed Vera-Natal's identity as theshooter — either through pretrial photospread identifications;in-court identifications; and/or testimony in which theydescribed the shooter's appearance and clothing, which matchedtestimony describing Vera-Natal's appearance on the day of theshootings. (See, e.g., id. at 4, 5, 9, 11, 13, 14.) In thelatter regard, several witnesses identified the shooter as a manwearing a baby blue shirt and a baseball cap tilted to the leftwho had been riding a red bicycle. (See, e.g., id. at 4, 7, 9,11.) (Witnesses explained that the baby blue or powder blue shirtis a symbol of Vera-Natal's Spanish Cobras street gang, and thatwearing a cap with the brim tilted to the left is a symbol ofdisrespect towards the Maniac Latin Disciples. (See, e.g., id.at 9-11).) Other witnesses testified that Vera-Natal was wearinga pale blue shirt and a tilted baseball cap and was riding a redbicycle at or around the time of the incident. (See, e.g., id.at 3-4, 7, 9, 11.) Vera-Natal did not testify. (Id. at 20.) Hisattorney argued that Vera-Natal had an unreasonable belief thathis use of force was justified, and therefore a second-degreemurder conviction was appropriate. (Id. at 20.) After deliberating, the trial court found Petitioner guilty onall of the counts of the indictment and entered judgment on onecount of first-degree murder and one count of attemptedfirst-degree murder. (Id. at 22.) In rejecting Petitioner'simperfect self-defense claim, "the trial court made detailedfindings of fact." (Id. at 20.) The trial court/factfinderrejected Vera-Natal's defense on the basis of, inter alia, thefollowing evidence: (1) Vera-Natal wore apparel symbolizing hisgang and antagonistic to the Maniac Latin Disciples at the timeof the shootings; (2) he carried a gun with him to the gasstation; (3) none of the Maniac Latin Disciples at the gasstation was armed; and (4) Vera-Natal walked toward and closed onthe van as he fired the shots. (Id. at 22.) The trial courtalso rejected the contention that the existing rivalry betweenthe two gangs, prior gang incidents, and the purported S.O.S.order established that Petitioner feared for his life when heclosed on the van and repeatedly fired on it. (Id.) Instead,"[t]he [trial] court concluded that defendant [i.e., thePetitioner] fired simply because he was angry at members of arival gang." (Id.)

The trial court scheduled a sentencing hearing and ordered apre-sentence investigation. (Id.) As part of the pre-sentenceinvestigation ordered by the Court, Petitioner was examined bytwo mental health professionals. (Id. at 22-23.) The first, Dr.Karen Chantry, observed symptoms that, in her view, suggested "astrong possibility of neurological impairment and/or a seizuredisorder such as temporal

lobe epilepsy." (Id. at 23.) Shereferred Petitioner to a psychologist specializing inneuropsychology to examine him for any neurological impairment.(Id.) That psychologist, Dr. Elizabeth Thompson, determinedthat Petitioner was deficient in "executive functioning," andfurther stated that "defects in executive functioning can cause aperson to misjudge social situations and act irrationally andimpulsively." (Id. at 24.) Dr. Thompson also explained that ifthe Petitioner were taken out of his "normal structure," "he will make poor decisions." (Id.) In offering these observations, Dr.Thompson acknowledged that she did not read any of the policereports related to the shooting and that she had no experience inforensic analysis of first degree or second degree murder cases.(Id. at 24-25.) She also admitted that Petitioner's normalstructure appeared to be gang culture. (Id. at 25.)

At sentencing, the trial court denied Petitioner's motion for anew trial, stating that the putative evidence of his neurologicalimpairment would not have changed the court's findings or verdicton the first-degree murder and first-degree attempted murdercharges. (Id. at 25.) The court sentenced Petitioner to thirtyyears on the first-degree murder conviction and eight years onthe attempt conviction. (Id.) The court, after finding thatPetitioner inflicted severe bodily injury on his murder victim,ordered the sentences to run consecutively pursuant to720 ILCS 5/8-4(a).

On direct appeal, Petitioner argued: (1) his convictions forfirst-degree murder and attempted first-degree murder should bothbe reduced from first to second degree because he met thecriteria for "imperfect" self-defense; (2) he should receivecredit against his sentence for his time in custody after hewaived extradition from Puerto Rico; and (3) the imposition ofconsecutive sentences under 5/8-4(a) violated the constitutionalrequirements set forth in Apprendi v. New Jersey, 530 U.S. 466(2000). (D.E. 15, Ex. B at 1-2.) The appellate court agreed thatVera-Natal should receive credit for time in custody after hewaived extradition, but rejected his two other claims. (Id. at33.) The appellate court affirmed the trial court's factualfindings that Petitioner did not believe in the need forself-defense so as to warrant the shootings, and the Petitionercould not have believe his response to Vinson's aggression wasproportionate. (Id. at 27.) In fact, the Illinois Court ofAppeals stated that "[w]e agree with the trial court thatdefendant did not believe in the need for self-defense when heconfronted Vinson and the others at the Mobil station. Even if wewere to assume that defendant could believe that Vinson became the initial aggressor in the encounter by throwinga plastic bottle at defendant, we could not conclude thatdefendant believed that his response to Vinson's aggression wasproportionate." (Id.)[4] The appellate court alsodetermined that the generic evidence concerning Vera-Natal'spotential neurological defects did not explain or legallymitigate his response to the specific situation he encounteredjust before he shot the victims. (Id. at 30.) Finally, thecourt of appeals observed that the Illinois Supreme Court hasruled that the offense of attempted second-degree murder does notexist in Illinois. (Id. at 31.)

The appellate court also rejected Petitioner's Apprendichallenge to his consecutive sentences. The appellate court notedthat the Illinois Supreme Court decided People v. Carney,752 N.E.2d 1137 (Ill. 2001), while Petitioner's appeal was pending;Carney squarely addressed and rejected a claim virtuallyidentical to Petitioner's claim. (D.E. 15, Ex. B at 31.) Becausedecisions by the Illinois

Supreme Court apply to all pendingcases unless the opinion directs otherwise, the appellate courtapplied Carney to Petitioner's Apprendi claim and rejectedthe claim. (Id.) The appellate court also determined thatPetitioner inflicted severe bodily injury on his attempted-murder victim within the meaning of Illinois lawbecause Vinson missed several weeks of work due to his ankleinjury and resultant surgery. (Id. at 32 (discussing Illinoisstatutory provisions and caselaw).)

Petitioner filed a petition for leave to appeal with theIllinois Supreme Court that advanced the following claims: (1)the trial court denied him due process when it "misinterpreted"his affirmative defense; (2) the trial court erred when itapplied the wrong burden of proof and failed to considermitigating evidence; (3) the trial court abused its discretionwhen it determined that the evidence concerning his neurologicaldisorder would not have changed the verdict; (4) the appellatecourt erred when it determined that Illinois does not recognizethe crime of attempted second-degree murder; and (5) Apprendiinvalidates the consecutive sentences imposed by the trial court.(Id., Ex. C.) The Illinois Supreme Court denied his petition onMay 30, 2002. (Id., Ex. D.)

Petitioner subsequently filed a post-conviction petition in thecircuit court on June 10, 2002. (D.E. 15, Ex. E.) Thepost-conviction petition raised the following claims: (1)ineffective assistance of trial counsel; (2) ineffectiveassistance of appellate counsel; (3) his sentence wasdisproportionate to the crime and to the sentences of otherdefendants in unrelated cases; and (4) the trial court reliedupon improper aggravating factors at sentencing. (Id.) On July31, 2002, the circuit court issued a written order dismissing thepetition as frivolous and patently without merit. (D.E. 15, Ex.F.) Petitioner appealed the circuit court's denial ofpost-conviction relief. (D.E. 14, Ex. G.) The only issue raisedin his appeal was that the mandatory consecutive sentences werebased on the "severe bodily injury" inflicted upon the murdervictim Lopez, not Vinson, who was the victim of attempted murder.(Id. at 4.) This claim was based entirely upon state law anddid not raise any federal constitutional issues. The appellatecourt affirmed the dismissal of Petitioner's post-conviction plea for relief,finding that even though the trial court's reasoning was in error(it had explained that consecutive sentences were appropriatebecause Petitioner inflicted "severe bodily injury" on his murdervictim, and murder is not a qualifying offense for thisenhancement (id. at 3-4), presumably because every murdervictim suffers such an injury), the consecutive sentences werenonetheless proper and required under Illinois law. (Id.) Inthis regard, the Illinois Court of Appeals explained that [D]espite the trial court's error, the consecutive sentences are not void. On the contrary, the consecutive sentences are still mandatory, as defendant did inflict severe bodily injury on Vinson [the attempted murder victim] during the commission of the attempted first-degree murder. [. . . .] Thus, although the trial court's stated justification was improper, its imposition of consecutive sentences was not only proper but required. Indeed, were we to grant defendant's request to make his sentences concurrent, our judgment would be void. See People v. Arna, 168 Ill. 2d 107, 113 (1995) (concurrent sentences are void when consecutive sentences are mandatory).(Id. (underlining in original).)

Petitioner filed a petition for leave to appeal hispost-conviction denial of relief to the Illinois Supreme Court.Petitioner raised a single claim — that his consecutive sentenceswere void because

the trial and appellate courts misconstruedstate law. (D.E. 15, Ex. K.) While the caption claimed this was aviolation of his rights under the Eighth andFourteenth Amendments, the argument cited no federal cases or principles oflaw, nor did it explain why the concurrent sentences were crueland unusual punishment. The Illinois Supreme Court denied hispetition for leave to appeal on October 6, 2004. (D.E. 15, Ex.L.) On March 14, 2005, Petitioner filed a pro se petition for awrit of habeas corpus, pursuant to 28 U.S.C. § 2254. As explainedbelow, the petition is respectfully rejected.

I. Standard of Review

The grounds upon which a federal district court may issue awrit of habeas corpus for a person imprisoned pursuant to a statecourt criminal judgment are subject to meaningful limits. First, habeas relief can be granted "only on the ground that [aprisoner] is in custody in violation of the Constitution or lawsor treaties of the United States." 28 U.S.C. § 2254(a). The Courtcannot grant habeas relief on the grounds that a state courtincorrectly applied state law, except to the extent that suchapplication also violated federal law. See Dellinger v. Bowen,301 F.3d 758, 764 (7th Cir. 2002) ("Federal habeas relief is onlyavailable to a person in custody in violation of theUnited States Constitution or laws or treaties of the United States,see 28 U.S.C. § 2254(a), and is unavailable to remedy errors ofstate law.").

Second, the Court may not provide habeas relief unlessPetitioner has exhausted his available remedies in state courts.28 U.S.C. § 2254(b)(1)(A). Exhaustion occurs when the petitionerhas fairly presented his claim to the state courts by arguingboth the federal legal principles and the salient and operativefacts of the claim, thereby giving the state courts a "meaningfulopportunity to pass upon the substance of the claims laterpresented in federal court." Chambers v. McCaughtry,264 F.3d 732, 737-38 (7th Cir. 2001) (collecting cases) (internalquotation marks and citation omitted).[5] The petition mustalert the state courts that the claim relies on a federalconstitutional provision such that the state courts had ameaningful opportunity to pass on the claim's substance.Perruquet v. Briley, 390 F.3d 505, 513-14 (7th Cir. 2004).Exhausting all state remedies includes presenting each claim onappeal to the Illinois appellate court and in a petition to theIllinois Supreme Court for discretionary review. See, e.g.,O'Sullivan v. Boerckel, 526 U.S. 838, 845 (1999); Hadley v.Holmes, 341 F.3d 661, 664 (7th Cir. 2003) (holding that the rule applies for purposes of habeascorpus under Section 2254). This rule applies to claims presentedin petitions for state post-conviction relief, as well as toclaims contained in direct appeals from criminal courts. See,e.g., White v. Godinez, 192 F.3d 607, 608 (7th Cir. 1999) (percuriam).

Third, habeas relief is ordinarily not available for claimsthat have been "procedurally defaulted" in state proceedings.This means that the Court may not review a claim if "the court towhich the petitioner would be required to present his claims inorder to meet the exhaustion requirement would now find theclaims procedurally barred." Coleman v. Thompson, 501 U.S. 722,735 n. 1 (1991). The Court may excuse procedural default whenthere is cause for the default and prejudice as a result of thealleged violation of federal law or where a refusal to considerthe claim would result in a

fundamental miscarriage of justice.See Dellinger, 301 F.3d at 766. To show cause for a default,Petitioner must offer an excuse that cannot fairly be attributedto him. For example, conduct by a petitioner's counsel that isconstitutionally ineffective under Strickland v. Washington,466 U.S. 668 (1984), constitutes cause. However, a claim that,for example, ineffective assistance was sufficient cause for aprocedural default can itself be procedurally defaulted if itis not properly presented to state courts. See Edwards v.Carpenter, 529 U.S. 446, 451-52 (2000); Dellinger,301 F.3d at 766-67.

In order to establish that a fundamental miscarriage of justicehas occurred, Petitioner must demonstrate by clear and convincingevidence that, but for the alleged violation of federal law inthe state court proceedings, no reasonable juror would haveconvicted him. Id., 301 F.3d at 767 (citing Schlup v. Delo,513 U.S. 298, 327 (1995)). In other words, the exception is"limited to situations where the constitutional violation hasprobably resulted in a conviction of one who is actuallyinnocent." Id. Due to the prior finding of guilt by thefactfinder, a petitioner alleging a fundamental miscarriage of justice bears the burden ofproof. See Buie v. McAdory, 341 F.3d 623, 626-27 (7th Cir.2003).

The Antiterrorism and Effective Death Penalty Act ("AEDPA"),110 Stat. 1214 (1996), placed additional restrictions on federalhabeas relief for persons imprisoned pursuant to the judgment ofa state court. Prior to AEDPA's enactment, "federal courtsdisregarded the state court's legal conclusions and reachedindependent judgments on the issues presented to them, butdeferred to the state court's findings of fact." Agnew v.Leibach, 250 F.3d 1123, 1128-29 (7th Cir. 2001). Under AEDPA,the state court judgment must violate federal law and it musteither be "contrary to, or involve an unreasonable applicationof, clearly established Federal law, as determined by the SupremeCourt of the United States," or be "based on an unreasonabledetermination of the facts in light of the evidence presented inthe State court proceeding." 28 U.S.C. § 2254(d). A judgment is"contrary to" Supreme Court precedent if the state court made astatement of law inconsistent with one made by the Supreme Court,or if the state court decided a case with "materiallyindistinguishable facts" differently from the Court. Huynh v.Bowen, 374 F.3d 546, 548 (7th Cir. 2004) (citing Williams v.Taylor, 529 U.S. 362, 413 (2000)).

A state court decision is an "unreasonable application of"clearly established law "`if the state court identifies thecorrect governing legal principle from the [Supreme] Court'sdecisions but unreasonably applies that principle to the facts ofthe prisoner's case.'" Cossel v. Miller, 229 F.3d 649, 654 (7thCir. 2000) (quoting Williams, 529 U.S. at 413). As the SeventhCircuit has repeatedly instructed, the unreasonable applicationprong of Section 2254(d)(1) is "a difficult standard to meet."Floyd v. Hanks, 364 F.3d 847, 850 (7th Cir. 2003) (citationomitted); Jackson v. Frank, 348 F.3d 658, 662 (7th Cir. 2003)(citation omitted); see also Hardaway v. Young, 302 F.3d 757,762 (7th Cir. 2002) (holding that "unreasonable," for the purposeof Section 2254(d)(1), means "something like lying well outside theboundaries of permissible differences of opinion"). The Court isnot permitted to substitute its independent judgment as to thecorrect outcome; it must only ask if the state-court decision wasreasonable. See Washington v. Smith, 219 F.3d 620, 628 (7thCir. 2000); Huynh, 374 F.3d at 548 ("An unreasonableapplication is not simply what we might deem to be an incorrector erroneous

application of federal law.").[6] Thus, forexample, with respect to ineffective assistance claims underStrickland v. Washington, 466 U.S. 668 (1984), the SeventhCircuit has repeatedly instructed that, in determiningreasonableness, this Court must afford great deference to thestate courts' application of the Strickland standard. SeeMurrell v. Frank, 332 F.3d 1102, 1111 (7th Cir. 2003). TheSeventh Circuit has repeatedly taught that, "`only a clearerror in applying Strickland would support a writ of habeascorpus,'" id. (quoting Dixon v. Snyder, 266 F.3d 693, 700-01(7th Cir. 2001) (emphasis in Murrell), such that the assessmentof the state courts' regarding Strickland was not even"`minimally consistent with the facts and circumstances of thecase.'" Id. at 1112 (quoting Sanchez v. Gilmore,189 F.3d 619, 623 (7th Cir. 1999)). Furthermore, a federal habeas courtmust presume that all of the state court's factualdeterminations, including credibility determinations, arecorrect, unless rebutted by clear and convincing evidence. Id.

II. Issues Raised in the Petition

Petitioner seeks habeas relief on the following grounds: (1)the sentencing court erred when it determined that consecutivesentences were mandatory under Illinois sentencing law; (2) hisconsecutive sentences violate due process under the United Statesand Illinois constitutions; and (3) the Illinois circuit court violated his rights under theFifth, Sixth, and Fourteenth Amendments when it summarilydismissed his ineffective assistance of counsel claim. Thesecontentions are meritless and provide no basis for the Court togrant habeas relief.

A. Misapplication of Illinois Sentencing Law

Petitioner argues that his consecutive sentences are "void dueto process of the law." (D.E. 1 at 5.) Petitioner also casts thisclaim as involving a right "guaranteed by the Eighth Admendment[sic]." (Id. at 9.) This claim was not exhausted because thestate courts were not alerted to the federal basis for the claim;it was presented in state court as a state-law issue. SinceIllinois law would bar Petitioner from raising this federalconstitutional claim in a new state proceeding — see, e.g.,People v. Blair, 831 N.E.2d 604, 614-15 (collecting authoritiesand holding that issues that could have been but were not raisedon direct appeal generally cannot be raised in post-convictionproceedings) — it is procedurally defaulted. See, e.g.,Coleman, 501 U.S. at 735 n. 1. In addition, this claim iswithout merit, as it is settled law that consecutive sentences donot violate the Eighth or Fourteenth Amendments. See Dellinger,301 F.3d at 764-65 & n. 6 (rejecting Due Process challenge toIllinois's imposition of consecutive sentences where attemptedmurder caused severe bodily injury); Carney,752 N.E.2d at 1142; accord, e.g., Lockyer v. Andrade, 538 U.S. 63, 74 & n. 1(2001) (rejecting Eighth Amendment challenge on federal habeasreview to two consecutive 25-year to life sentences fordefendant's theft of approximately $150 in videotapes underCalifornia's "three strikes" law); United States v. Washington,109 F.3d 335, 338 (7th Cir. 1997) ("The cruel and unusualpunishments clause of the Eighth Amendment permits lifeimprisonment for a single drug crime.") (citing Harmelin v.Michigan, 501 U.S. 957 (1991)).

The substance of Petitioner's claim is that the sentencingcourt erred when it imposed "a mandatory consecutive sentence term." (Id.) This claim wasproperly raised in Petitioner's appeal of the denial of hispetition for post-conviction relief (D.E. 15, Ex. G at 4), and inhis petition for leave to appeal to the Illinois Supreme Court.(Id., Ex. K at 3.) However, this claim concerns the properconstruction of an Illinois statute, 720 ILCS 5/5-8-4(a), andIllinois precedent interpreting it, and thus provides no basisfor habeas relief. See, e.g., Dellinger, 301 F.3d at 764. Inaddition, to the extent that this Court's views concerning thatstate law question are even relevant, the claim appears to beclearly meritless. Section 5/5-8-4(a) requires consecutivesentences where an attempted murder causes "serious bodilyinjury"; the evidence at trial demonstrated that Vinson'sinjuries, which resulted from Petitioner's attempt to murder him,were so severe that he needed to have surgery and he missedseveral weeks of work. (D.E. 15, Ex. B at 2, 32.)

B. Due Process Violation from Consecutive Sentences

Vera-Natal argues that the consecutive sentences deprived himof a liberty interest in not being subject to consecutivesentences. This argument is procedurally defaulted because it wasnot raised in any state court proceeding, and Illinois law wouldnot permit him to raise it in a successive petition.

This claim also fails on the merits. As an initial matter, theCourt notes that Petitioner does not coherently explain the basisor nature of his purported liberty interest upon which the Stateof Illinois has infringed. As explained further below, the claimappears to be grounded on the assertion that years before thecommission of Petitioner's crimes, Illinois had adopted a morelenient statutory sentencing regime, under which Petitioner maynot have faced consecutive sentences for first-degree murder ofone victim and first-degree attempted murder of another. In thisregard, Petitioner does not contend that this former and repealedstatutory framework was in existence at the time that he committed the murder and attemptedmurder for which he is imprisoned now.

Such a due process/liberty claim would be facially deficient ifpresented as an ex post facto claim, which is how claimsconcerning legislative shifts in the classification andpunishment of criminal offenses such as first-degree murder andattempted murder are normally presented. Petitioner was tried,convicted, and sentenced well after the Illinois Legislatureamended the Illinois Code to expand the use of consecutivesentences. See Collins v. Youngblood, 497 U.S. 37, 41 (1990)(prohibition on ex post facto laws only applies when the newlegislation punishes as a crime an act previously committed,which was innocent when done; which makes more burdensome thepunishment for a crime, after its commission; or which deprivesone charged with crime of any defense available according to lawat the time when the act was committed) (internal citationsomitted).

In order to circumvent this precedent, Petitioner has couchedhis claim as an alleged due process violation. Although hisfiling is not crystal clear in this regard, Petitioner suggeststhat when a state has created a liberty interest, that libertyinterest merits due process protections. (See D.E. 1 at 6 ("TheUnited States Supreme Court has established principles that mustbe followed to determine

when a state statute has created a rightor liberty interest, which required due process protections."(citing Connecticut Bd. of Pardons v. Dumschat, 452 U.S. 458(1981) (certain internal capitalization omitted for clarity)).)The Court can readily assume that premise arguendo, but it isof no help to Petitioner. The State of Illinois has a statutethat deals with sentencing, and the Illinois Court of Appealstwice determined that the statute was properly applied inaffirming the sentence for Petitioner's first-degree murder andfirst-degree attempted murder convictions. Petitioner cites noauthority even to suggest that the Fourteenth Amendment places limits on a state's ability to amend, reform, or changeits statutory sentencing provisions for first-degree murder andattempted murder — at least outside of, for example, limitsotherwise imposed by Eighth Amendment jurisprudence, which arenot implicated here. Nor does Petitioner present even a colorablesubstantive due process claim, assuming he even could attempt tosalvage what in effect is a fatally flawed ex post facto orEighth Amendment claim as a substantive due process one, inapparent contravention of precedent. See generally, e.g., Casev. Milewski, 327 F.3d 564, 568 (7th Cir. 2003) ("This courtpreviously explained that a seizure that passes muster under theFourth Amendment should also satisfy the requirements of the dueprocess clause. Thus, if this court upholds Case's arrest when itis reviewed under Fourth Amendment rules, Case will not succeedby recasting his challenge in the language of due process.")(citing, inter alia, Albright v. Oliver, 510 U.S. 266, 275(1994); internal quotation marks and citations omitted);McCullah v. Gadert, 344 F.3d 655, 658 (7th Cir. 2003)("[C]onstitutional claims should, where possible, go forwardunder rights rooted in an explicit textual command of theConstitution rather than more generalized notions of substantivedue process.")

In addition, Vera-Natal offers no persuasive argument orauthority even to suggest that he has a fundamental libertyinterest in not being subjected to consecutive sentences afterconviction for first-degree murder of one victim and attemptedfirst-degree murder of another person. It is well-settled thatfirst-degree murderers can be lawfully executed for that crime —see, e.g., Smith v. Farley, 59 F.3d 659, 663 (7th Cir. 1995)(collecting cases) — and Petitioner is not deprived of dueprocess of law by having to suffer an eight-year consecutivesentence for his attempted murder of one victim in addition tohis thirty-year sentence for the first-degree murder of adifferent person. Accord, e.g., Washington v. Glucksberg,521 U.S. 702, 720-21 (1997) (collecting cases).

C. Improper Dismissal of Ineffective Assistance of CounselClaim

In his habeas petition, Vera-Natal claims that he was denied"his fifth, sixth, and fourteenth amendment rights" when thecircuit court summarily dismissed his ineffective assistance ofcounsel claims because it determined that there was not even the"gist" of a cognizable claim under Strickland. (D.E. 1 at 8-9.)Reading this claim generously, it appears that Petitionercontends that the Illinois court failed to follow Illinoispost-conviction procedures by proceeding too quickly to apply theSupreme Court's teaching in Strickland v. Washington,466 U.S. 668 (1984), in rejecting his ineffective assistance claim, asopposed to the "gist of a meritorious constitutional claim"preliminary standard set forth in Illinois law. (D.E. 1 at 8-9.)This claim is flawed for multiple, independent

reasons.

First, despite Petitioner's attempts to phrase this as afederal constitutional claim, the question of whether hisStrickland claim was rejected too quickly under Illinoispost-trial procedural law is not a federal constitutional claimand provides no basis for habeas relief. See Dellinger,301 F.3d at 764 ("Federal habeas relief is only available to a personin custody in violation of the United States Constitution or lawsor treaties of the United States, see 28 U.S.C. § 2254(a), andis unavailable to remedy errors of state law. See Estelle v.McGuire, 502 U.S. 62, 67-68 (1991)"); Evans v. Leibach, No. 03C 2320, 2003 WL 21730116, at *3 n. 2 (N.D. Ill. July 18, 2003)(Aspen, J.) ("Petitioner's contention that the [Illinois]appellate court should have applied a `gist of a constitutionalclaim' standard instead of a `substantial showing' standard ofreview fails because the existence of this component of apost-conviction proceeding is a product of Illinois state law.");accord, e.g., Murrell, 332 F.3d at 1111-12.

While his initial petition did not state a federal ineffectiveassistance of counsel claim, Petitioner has stated such a claim in his "Motion to Show CauseWhy Petition of Habeas Corpus Should Be Granted." (D.E. 16 at3-5.) In this motion, Petitioner argues that he receivedineffective assistance of counsel, in violation of his federalconstitutional rights, when trial counsel did not investigate thecrime scene and develop evidence that would have supported hisclaim of self-defense. (Id.) This claim was not raised ondirect appeal. (D.E. 15, Ex. B.) It was presented in Vera-Natal'spetition for post-conviction relief (Id., Ex. E at 4); however,it was not presented in the appeal of the circuit court's denial(id., Ex. G) or in his petition for leave to appeal to theIllinois Supreme Court. (Id., Ex. K.) Thus, this claim isdefaulted.

Petitioner has not shown cause for the default. Instead, heargues that the default should be excused to avoid a fundamentalmiscarriage of justice. (D.E. 16 at 5.) This exception is"limited to situations where the constitutional violation hasprobably resulted in a conviction of one who is actuallyinnocent." Dellinger, 301 F.3d at 767. Since Petitioner is notalleging actual innocence — there is no dispute that he shot bothof the victims — his default is not excused under this exception.

Even if Petitioner's ineffective assistance of counsel claimwere not defaulted, it would not prevail on the merits because itis substantively baseless. Strickland commands that Petitionermust show both that counsel's performance fell below an objectivestandard of reasonableness and that counsel's poor performanceprejudiced the outcome of the proceedings. Trial counsel'sdecisions whether to present certain witnesses, defenses, orevidence ordinarily receive great deference because they arestrategic judgment calls and because of the distorting effect ofhindsight in making a post hoc assessment of counsel'sstrategic assessments. See, e.g., Strickland, 466 U.S. at 689;Fountain v. United States, 211 F.3d 429, 434 (7th Cir. 2000)("[M]any trial determinations, like so many other decisions thatan attorney must make in the course of representation, are a matter of professional judgment.Thus, we must resist a natural temptation to become a `Mondaymorning quarterback.'") (internal punctuation and citationsomitted); Wright v. Walls, 288 F.3d 937, 946 (7th Cir. 2002).Precedent teaches that courts

generally should be loathe toquestion such choices — see, e.g., Strickland, 466 U.S. at 689(instructing that "a court must indulge a strong presumption thatcounsel's conduct falls within the wide range of reasonableprofessional assistance. . . .") — and precedent articulatesthis directive even more forcefully in the context of federalhabeas review. See, e.g., Murrell, 332 F.3d at 1111-12.

In his "Motion to Show Cause Why Petition of Habeas CorpusShould Be Granted," Vera-Natal argues that his trial counsel wasineffective because counsel failed to develop evidence that theattempted murder victim was hit by a ricocheted bullet. He arguesthat "the att. [sic] first degree murder charge was due to aricochette [sic] bullet which should not constitute severe bodilyinjury in which the petitioner received his consecutivesentences." (D.E. 16 at 3.) This contention is, with all respect,frivolous. Whether the victim of Petitioner's attempted murder(i.e., the person that Petitioner merely shot, as opposed tokilled) was hit by a ricochet bullet or not is irrelevant: thatvictim suffered a substantial injury, requiring surgery and anextensive recovery. Nothing would have been gained by attemptingto undermine the injury because the victim was shot by a ricochetbullet, nor is there any serious argument that the shot whichfelled the victim came from anyone other than Petitioner, as hewas the only person on the scene who was armed.

Petitioner also appears to suggest that his criminal defenseattorney rendered constitutionally-defective counsel by notarguing that the ricochet was evidence that the attempted murderwas an accidental shooting. See id. ("The bodily injury whichwas inflicted was caused by a mere accident from a ricochette [sic], and thatvictim was hit in the ankle as a result."). Petitioner does notaddress how the defense that the purported ricochet shooting ofthe attempted murder victim was an accident could be squared withhis simultaneous killing of the murder victim. Putting that issueaside, even evidence that both victims were hit by ricochetswould not have proven anything other than that Petition is not aparticularly good marksman. Accord People v. Johnson,771 N.E.2d 477, 487-88 (Ill.Ct.App. 2002) ("[P]oor marksmanship isnot a defense to attempted first degree murder"). Petitioner shotrepeated rounds — at least four (D.E. 15, Ex. B at 6, 7, 10, 12)— at a group of rival gang members while closing in on them. Whendoing so, he was the only armed person on the scene, havingelected to bring a pistol on his bike ride to the gas station. Hewas dressed in clothes signaling his own gang membership and hisanimosity towards the other street gang in which his targets weremembers. After the shooting, Petitioner fled the scene andquickly traveled under an alias to Puerto Rico. He was forciblyreturned to Illinois, having made no arrangements to return, onlyafter he was arrested on unrelated charges and extradited back incustody to Illinois. Under those circumstances, there is nostraight-faced argument that his counsel could have advanced thatthe shooting was an accident. Moreover, defense counsel could nothave made this "accidental ricochet" argument and coherentlyadvanced Vera-Natal's claim of imperfect self-defense, as the twotheories are inconsistent explanations for the shooting. Trialcounsel pursued a strategic call that pleading imperfectself-defense was a better option. Strickland affords greatdeference to the strategic decisions of trial counsel, and in theCourt's view (for what it is worth, given that courts aredirected not to readily second-guess criminal defense counsel),the strategic option pursued surely seems like the sounder andmore promising of the two options available.

The only Illinois court to which Petitioner presented hisricochet-bullet theory dismissed it on the grounds that even if there were ricochets, "this factwould not change the result of the trial where the defendantintentionally fired shots toward a van in effect spraying the vanwith gunfire." (D.E. 15, Ex. F at 14 (citing Illinois Court ofAppeals opinion rejecting Petitioner's direct appeal (D.E. 15,Ex. B at 2, 30) (internal quotation marks omitted)).) Petitionerpresents no credible claim that the Illinois court erred, muchless that the court unreasonably applied the Stricklandstandard. Petitioner's Strickland claim is respectfullyrejected.

CONCLUSION

For the reasons stated above, federal habeas relief is notwarranted. Consequently, the Petition for a writ of habeas corpusis denied.

So ordered.