

UNITED STATES DISTRICT COURT  
DISTRICT OF CONNECTICUT

ROBERT WHITFORD, :  
Petitioner, :  
v. : PRISONER  
Case No. 3:03cv867(WWE)  
COMMISSIONER OF CORRECTION, :  
Respondent. :

MEMORANDUM OF DECISION

The petitioner, Robert Whitford ("Whitford"), a Connecticut-sentenced inmate currently confined at the Greensville Correctional Center in Jarratt, Virginia, brings this action for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. He challenges his conviction on a charge of assault in the first degree. For the reasons set forth below, the petition will be denied.

I. Procedural Background

After a jury trial in the Connecticut Superior Court for the Judicial District of New Britain, Whitford was convicted of one count of assault in the first degree. In June 2000, he was sentenced to a total effective term of imprisonment of ten years.

Whitford raised six issues on direct appeal: (1) the

trial court improperly failed to define the term "initial aggressor" when it charged the jury on self-defense, (2) the trial court improperly instructed the jury on Whitford's duty to retreat, (3) the trial court improperly instructed the jury on provocation as an exception to self-defense, (4) the trial court improperly instructed the jury on the degree of force used by Whitford against the victim, (5) the trial court improperly excluded evidence of prior incidents during which the victim had acted violently when intoxicated and (6) the trial court improperly instructed the jury to consider the comparative credibility of Whitford's and the victim's descriptions of the events leading to the assault charge. Whitford's conviction was affirmed on direct appeal. See State v. Whitford, 260 Conn. 610, 799 A.2d 1034 (2002).

In 2003, Whitford filed this petition for writ of habeas corpus challenging his state conviction on three grounds: (1) the trial court violated his constitutional rights when it charged the jury on his claim of self-defense in that it failed to define the term "initial aggressor," instructed the jury on the duty to retreat as an exception to the self-defense doctrine when that exception was not supported by the evidence and instructed the jury on the subjective/objective test only with regard to the use of deadly force; (2) the

trial court violated his constitutional rights when it excluded evidence that the victim, when intoxicated, had attempted to strangle other persons; and (3) the trial court violated his constitutional rights when it diluted the state's burden of proof by telling the jury to weigh Whitford's account of the events against the victim's account. The state court actions underlying each ground were raised in Whitford's direct appeal.

## II. Factual Background

The Connecticut Supreme Court determined that the jury reasonably could have found the following facts:

The victim, Anthony Pernal, shared an apartment in Bristol with Bonnie Courchaine and Anna Holcomb. Approximately one week prior to the incident, the defendant, Robert F. Whitford, drove to Connecticut from Georgia and began to stay at the apartment at Courchaine's invitation. His motivation for coming was twofold: first, to rekindle a romantic relationship with Courchaine; and second, to ensure that the victim, who did not get along with his roommates, vacated the apartment.

The victim and the defendant had had little contact over the course of the week leading up to their encounter. The victim had begun moving his belongings out of the apartment and planned to vacate the premises permanently on Sunday, March 14, 1999.

On Friday, March 12, 1999, Courchaine left for Georgia, where she previously had resided with the defendant, in order to

retrieve some items from storage. That evening, the victim and Holcomb drank late into the night. The victim then spent the majority of the following day frequenting several bars with his cousin. Upon returning to the apartment, the victim began arguing with Holcomb, who also had been drinking. Holcomb called the police to have him arrested. Although the police responded to the call, they failed to take the victim into custody, and instead attempted to defuse the situation by asking Holcomb temporarily to leave the apartment.

After Holcomb had returned and the police had left, Holcomb remarked to the defendant, "See how nothing happens to him? He's moving out. We need to do something to him." The defendant, who also had been drinking, responded by telling the victim, "You're getting out of here now." The victim, choosing to ignore the defendant, turned and walked into his bedroom. The defendant followed and pushed the victim into his dresser. The victim felt something hit his side a few times, accompanied by sharp pains. The defendant then retreated to the living room and the victim was left alone in the bedroom, blood from his side seeping onto the carpet near the dresser. Soon thereafter, the victim walked into the living room, where the defendant told him, "I just got you good and I got you twice." The victim then dropped to his knees from the intensity of his pain.

Holcomb had been unconscious during the altercation but awoke just in time to see the victim fall. She grabbed a towel and held it against his side in an effort to stop the bleeding. She then suggested that he lie down and get some sleep, to which the victim responded, "I think this guy really stabbed me." Holcomb insisted that she had "seen everything," and told the

victim, "You just got nicked when you got pushed against the dresser."

Although the victim attempted to call for help, Holcomb ripped the telephone away from him and refused to let him use it. The victim rested briefly on the living room couch and then returned to his bedroom. Once there, he lifted his shirt to find that he had been stabbed twice, once on the arm and once in the side. He then decided to flee the apartment in an effort to seek help. He grabbed his jacket, headed out the front door and into the street, trying to locate one of the patrol cars that typically frequented the area. After seeing none, he walked down the street, trying the door of a Subway restaurant, which was locked. He continued for another block until he happened upon the Downtown Café. Once inside, he explained to the bartender that he had been stabbed and that he needed to use the telephone to call an ambulance.

The victim eventually was taken to Bristol Hospital. Upon admission, he was inebriated, abusive and belligerent. The victim remained hospitalized for one week, having suffered a superficial stab wound on his left arm and a more serious wound just below his rib cage that had penetrated through the bottom part of his lung and diaphragm, nicked his intercostal artery, and punctured his spleen. The victim's injuries could have been fatal had they not been timely identified and treated.

Although admitting that he had stabbed the victim,<sup>1</sup> the defendant claimed at trial

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<sup>1</sup>"The defendant testified that he recalled stabbing the victim only once, despite the fact that the victim's injuries consisted of two knife-inflicted wounds." State v. Whitford, 260 Conn. 610, 614 n.3 799 A.2d 1034, 1037 n.3 (2002).

that he had done so in self-defense. He submitted the following version of events to the jury in support of his claim. After the police had left the apartment on Saturday evening, he and the victim were alone in the living room drinking and watching television; Holcomb was in her bedroom. The defendant began to discuss the problems that the roommates had been having and asked the victim why he continued to live at the apartment when he knew that Holcomb and Courchaine wanted him to move out. Suddenly, the victim jumped on top of the defendant, who was seated on the couch, and began choking him, screaming, "Nobody tells me what to do in my fucking apartment!" The defendant attempted to pull the victim's hands away from his neck, but the victim maintained his grip. In a further effort to free himself, the defendant grabbed a pocketknife off a nearby cabinet and stabbed the victim. The victim then retreated momentarily to his bedroom. He returned to the living room, whereupon Holcomb awoke and entered the room in time to see the victim fall to the carpet. The victim moved to the couch and lifted up his shirt; Holcomb saw that he was bleeding and got him a towel to hold against his wound. Shortly thereafter, the victim grabbed his jacket from his bedroom and left the apartment. Neither the defendant nor Holcomb recalled preventing the victim from using the telephone.

Whitford, 260 Conn. at 612-15, 799 A.2d at 1036-38.

### III. Standard of Review

The federal court may entertain a habeas corpus petition filed by a person in state custody pursuant to the judgment of a State court only on the ground that the petitioner is in

custody in violation of the Constitution or federal laws or treaties. See 28 U.S.C. § 2254(a). A claim that a state conviction was obtained in violation of state law is not cognizable in the federal court. See Estelle v. McGuire, 502 U.S. 62, 68 (1991); Dunnigan v. Keane, 137 F.3d 117, 125 (2d Cir. 1998).

Collateral review of a conviction is not merely a "rerun of the direct appeal." Lee v. McCaughtry, 933 F.2d 536, 538 (7<sup>th</sup> Cir.), cert. denied, 502 U.S. 895 (1991). Thus, a claim that would require reversal of a conviction on direct appeal may be insufficient to support a collateral attack on a state court judgment in the federal court. See Brecht v. Abrahamson, 507 U.S. 619, 634 (1993) (citations omitted).

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (1996), significantly amended 28 U.S.C. §§ 2244, 2253, 2254, and 2255. The amendments apply new restraints on the ability of a federal court to grant habeas corpus relief to a state prisoner with respect to claims adjudicated on the merits in state court. See Williams v. Taylor, 529 U.S. 362, 412 (2000) (taken from the portion of the opinion delivered by Justice O'Connor). The federal court cannot grant a petition for a writ of habeas corpus filed by a person in state custody with

regard to any claim that was rejected on the merits by the state court unless the adjudication of the claim in state court either:

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). The federal law defined by the Supreme Court "may be either a generalized standard enunciated in the Court's case law or a bright-line rule designed to effectuate such a standard in a particular context." Kennaugh v. Miller, 289 F.3d 36, 42 (2d Cir. 2002).

A state court decision would be contrary to clearly established federal law if the state court applied a rule that was different from the governing law as stated in Supreme Court cases, or if it reached a different result that the Supreme Court had when considering cases with materially indistinguishable facts. See Bell v. Cone, 535 U.S. 685, 694 (2002). A state court decision would be an unreasonable application of clearly established federal law if the state court correctly identified the governing legal principle as set forth in Supreme Court decisions but unreasonably applies those principles to the facts of the case before it. See id.



When considering the unreasonable application clause, the focus of the inquiry is whether the state court's application of clearly established federal law was objectively unreasonable. See id. The Court has emphasized that "an unreasonable application is different from an incorrect one." Id. (citing Williams, 529 U.S. at 411 (holding that a federal court may not issue a writ of habeas corpus under the unreasonable application clause merely because the federal court would have reached a different result if it had considered the facts de novo). In both scenarios, federal law is considered to be clearly established if it may be found in holdings, not dicta, of the Supreme Court as of the date of the relevant state court decision. See Williams, 519 U.S. at 412.

When reviewing a habeas petition, the federal court presumes that the factual determinations of the state court are correct. The petitioner has the burden of rebutting that presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). See Boyette v. Lefevre, 246 F.3d 76, 88-89 (2d Cir. 2001) (noting that deference or presumption of correctness is afforded state court findings where state court has adjudicated constitutional claims on the merits).

#### IV. Discussion

The respondent argues that the federal court should deny the petition because Whitford has not demonstrated that any of the state court decisions were contrary to or an unreasonable application of clearly established federal law.

A. Jury Instructions on Self-Defense

Whitford first challenges the trial court's jury instructions regarding self-defense as violating his constitutional rights to present a defense, to due process and to a fair trial. Specifically, he contends that the trial court failed to define the term "initial aggressor," instructed the jury on the duty to retreat as an exception to the self-defense doctrine when that exception was not supported by the evidence and instructed the jury on the subjective/objective test only with regard to the use of deadly force.

The burden of proof on a state prisoner regarding a claim of improper jury instruction is greater than the showing required to prove plain error on direct appeal. He must show that the objectionable instruction "by itself so infected the entire trial that the resulting conviction violates due process." He cannot merely show that the instruction is erroneous or "even universally condemned." Henderson v. Kibbe, 431 U.S. 145, 154 (1977) (internal quotation marks and

citations omitted). Further, jury instructions in state court normally are a matter of state law. Thus, unless petitioner can establish that the purported error deprived him of a federal constitutional right, the federal court will not review the claim in a petition for writ of habeas corpus. See United States ex rel. Stanbridge v. Zelker, 514 F.2d 45, 50 (2d Cir.), cert. denied, 423 U.S. 872 (1975).

The Connecticut Supreme Court noted that Whitford did not submit a request to charge regarding the term initial aggressor and did not object to the instruction as it was given at trial. Because Whitford did not preserve his objection at trial, the Connecticut Supreme Court applied the test set forth in State v. Golding,<sup>2</sup> 213 Conn. 233, 567 A.2d 823 (1989), to determine whether the claim was reviewable on appeal.

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<sup>2</sup>In Golding, the Connecticut Supreme Court held that "a defendant can prevail on a claim of constitutional error not preserved at trial only if all of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation clearly exists and clearly deprived the defendant of a fair trial; and (4) if subjected to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt." Id. at 239-40. The Connecticut Supreme Court will review a claim if the first two conditions are satisfied. See State v. George B., 258 Conn. 779, 784, 785 A.2d 573 (2001).

Upon review, the Connecticut Supreme Court noted that neither party emphasized the initial aggressor doctrine at any time during the presentation of evidence, opening argument or closing argument. No one suggested that Whitford should be considered the initial aggressor simply because he initiated a conversation with the victim that led to their physical altercation. The testimony of Whitford and the victim presented differing views on who initiated physical contact. The Connecticut Supreme Court concluded that there was no reasonable possibility that the trial court's failure to define the term initial aggressor misled the jury. Thus, although it determined that the failure to define the term was improper, the Connecticut Supreme Court concluded that any error was harmless.

Whitford also contends that his right to due process was violated because the trial court instructed the jury on the duty to retreat as an exception to self-defense when there was no evidence to support that exception.

The Connecticut Supreme Court agreed that the instruction was improper but, again, concluded that any error was harmless. The court noted that the jury's resolution of the case centered on the credibility afforded to the two versions of the incident. Neither version included facts suggesting

that retreat was an available option. Thus, the Connecticut Supreme Court concluded that inclusion of the instruction could not reasonably be said to have influenced the jury.

Finally, Whitford argues that the jury instruction was unconstitutional because the trial court instructed the jury on the subjective/objective test only with regard to the use of deadly force. Although this is the only claim regarding deadly force included in statement of issues raised in the petition, Whitford states in his supporting facts that the trial court erred in instructing on provocation, misled the jury by linking the subjective/objective test only to deadly force, and removed from the jury its function of determining the degree of force used.

During the portion of the charge relating to self-defense, the trial court instructed the jury, in accordance with state law, that it must reject Whitford's self-defense claim if the state had proved beyond a reasonable doubt that Whitford had provoked the victim's use of force. The trial court explained further that state law required the state to show that Whitford intended both to cause physical injury and to provoke. On direct appeal, Whitford argued that the instruction should not have been given because the state presented no evidence regarding his intent to provoke the

victim. The Connecticut Supreme Court agreed that the instruction was improper, but again concluded that any error was harmless. See State v. Whitford, 260 Conn. at 628, 799 A.2d at 1045.

At trial, Whitford objected to the trial court's instruction regarding deadly force and imminent harm on the ground that the instruction removed from the jury the resolution of the factual issue regarding the degree of force used. The state agreed and the trial court included a supplemental instruction to clarify this issue. When questioned by the trial court, Whitford agreed that the supplemental instruction was a satisfactory statement of the law.

On direct appeal, the Connecticut Supreme Court rejected Whitford's challenge to this instruction as an attempt to rehash the objection at trial. The court determined that Whitford had waived any objection when he agreed to the supplemental charge and, thus, had not articulated any reviewable claim. See id. at 634, 799 A.2d at 1048.

In reviewing these challenges, the Connecticut Supreme Court considered the jury charge in its entirety and in conjunction with the evidence presented at trial as is required under Supreme Court law. See California v. Brown,

479 U.S. 538, 541 (1987); Cupp v. Naughten, 414 U.S. 141, 146-47 (1973). Whitford has identified no clearly established Supreme Court law that was misapplied or disregarded by the Connecticut Supreme Court and the court can discern none. Thus, Whitford has not established that the Connecticut Supreme Court's decision regarding the jury instruction on self-defense was contrary to or an unreasonable application of Supreme Court law. The petition for writ of habeas corpus will be denied as to the first ground for relief.

B. Exclusion of Evidence

Whitford next challenges the trial court's exclusion of evidence that the victim previously had exhibited violent behavior when intoxicated. He argues that the Connecticut evidentiary rules permitted the introduction of this evidence.

At trial, Whitford sought to introduce the testimony of three witnesses who each would state that the victim had violently attacked and attempted to strangle him or her when he was intoxicated. The trial court excluded the evidence on the grounds that specific acts of violence were inadmissible to prove character and that there were too few incidents to prove habit. Although the trial court permitted Whitford to make an offer of proof outside the presence of the jury, he offered the testimony of only one of the three witnesses. See

State v. Whitford, 260 Conn. at 635, 799 A.2d at 1048-49.

Whitford's argument in support of this claim on direct appeal was based on state law. His brief to the Connecticut Supreme Court contains only one reference to Supreme Court precedent, a conclusory statement, without argument, followed by a citation. (See Resp't's Mem. Opp'n Ex. C at 30.) The Connecticut Supreme Court based its ruling on this issue on the Connecticut Code of Evidence. See id. at 635-642, 799 A.2d at 1049-53. The Code is a codification of Connecticut common law. See Connecticut Code of Evidence § 1-2 and Commentary thereto. As noted above, claims for violation of state law are not cognizable in a federal habeas petition. See Dunnigan v. Keane, 137 F.3d at 125. Thus, the petition for writ of habeas corpus will be denied on this ground.

Whitford asks the court to hold an evidentiary hearing to permit him to elicit testimony from the three witnesses. The federal court holds an evidentiary hearing on a petition for writ of habeas corpus only in limited circumstances. Where the petitioner failed to develop the factual record for his claim in state court, the federal court will not hold an evidentiary hearing unless the claim presented in the federal petition relies on a new rule of constitutional law made retroactive to cases on collateral review by the Supreme Court



that would have been unavailable to petitioner while his case was pending in the state courts, or is based upon a factual predicate that could not have been discovered earlier through the exercise of due diligence, or unless the facts underlying the claim demonstrate that, but for constitutional error, no reasonable factfinder could have found him guilty of the underlying charges. See 28 U.S.C. § 2254(e)(2).

Whitford does not state why the court should hold an evidentiary hearing. He appears to seek an evidentiary hearing to provide another chance to argue the evidentiary issues from trial.

Whitford does not rely on a new rule of constitutional law made retroactive to cases on collateral review. While Whitford's petition may be construed to argue that his claim is based on new factual evidence, namely the testimony of the two witnesses who did not testify during the offer of proof at trial, Whitford presents no evidence suggesting that this evidence could not have been presented to the state court had he exercised due diligence. Thus, the first basis for holding an evidentiary hearing is inapplicable. Whitford does not argue in this petition or in any submission to the state courts that, but for constitutional error, the jury could not have found him guilty of assault. Thus, the second basis also

is inapplicable. Because Whitford does not meet either basis for conducting an evidentiary hearing, his request for evidentiary hearing will be denied.

C. Dilution of State's Burden of Proof

Finally, Whitford argues that the trial court improperly diluted the state's burden of proof when it instructed the jury that they had to choose between Whitford's and the victim's descriptions of the incident.

The Connecticut Supreme Court noted that the objectionable instruction was one small portion of a charge containing multiple descriptions of and references to the presumption of innocence and the state's burden of proof beyond a reasonable doubt. The court concluded that, when viewed in the context of the entire charge, the one reference to the jury determining the credibility of Whitford and the victim would not dilute the state's burden of proof. See Whitford, 260 Conn. at 645-46, 799 A.2d at 1054.

Again, Whitford has identified no Supreme Court precedent that was not followed by the Connecticut Supreme Court. In accordance with the requirements set forth in In re Winship, 397 U.S. 358, 361 (1970), the Connecticut Supreme Court evaluated the objectionable instruction in the context of the entire charge and determined that the instructions did not

violate any constitutionally protected right. Because Whitford has not demonstrated that the decision of the Connecticut Supreme Court is contrary to or an unreasonable application of Supreme Court precedent, the petition for writ of habeas corpus will be denied on this ground as well.

V. Conclusion

The amended petition for a writ of habeas corpus [**doc. #6**] is **DENIED**. Because Whitford has not made a showing of the denial of a constitutional right, a certificate of appealability will not issue. The Clerk is directed to enter judgment in favor of the respondent and close this case.

**SO ORDERED** this 27<sup>th</sup> day of April, 2004, at Bridgeport, Connecticut.

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Judge

\_\_\_\_\_/s/\_\_\_\_\_  
Warren W. Eginton  
Senior United States District