

**UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT**

-----X	:	
DANA MOZELL,	:	
	:	
Petitioner,	:	
	:	
v.	:	Civil Action No.
	:	3:98CV02368 (AWT)
	:	
GEORGE WEZNER,	:	
	:	
Respondent.	:	
-----X	:	

RULING ON PETITION FOR WRIT OF HABEAS CORPUS

For the reasons set forth below, the court concludes that the instant petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 should be dismissed or, in the alternative, denied.

I. FACTUAL BACKGROUND

Petitioner Dana Mozell was convicted, after a jury trial in Connecticut Superior Court, of second degree manslaughter and conspiracy to commit murder. On January 2, 1996, the Connecticut Appellate Court affirmed the petitioner's conviction on direct appeal. See State v. Mozell, 40 Conn. App. 47, 668 A.2d 1340 (1996).¹ The Connecticut Appellate Court concluded that the jury reasonably could have found the following facts supporting the petitioner's conviction:

The defendant was a member of a gang that sold illegal narcotics in New Haven. For several weeks preceding the death of the victim, Richard Coleman, the defendant's gang was involved in a dispute with Shelton

¹ The petitioner was also convicted, in a separate proceeding, of various narcotics offenses. See State v. Mozell, 36 Conn. App. 631, 652 A.2d 1038, cert. denied, 232 Conn. 917, 655 A.2d 261 (1995). Those convictions are not at issue in the instant federal habeas petition.

Tucker, Sean Green and Rodney Lewis over control of the drug trade on Arthur Street. On December 29, 1989, at approximately 6:30 p.m., several members of the defendant's gang, including the defendant, his brother Troy Mozell, Eric Morton, Ronald Douglas and Matthew Bowden arrived at Arthur Street in a gray Jeep Cherokee. Meanwhile, Tucker and Lewis were walking across Arthur Street toward Tucker's residence at 2 Arthur Street. The victim, a bystander, was walking past Tucker's residence.

As Tucker and Lewis crossed Arthur Street, the defendant, together with Morton and Bowden, exited the Jeep carrying handguns. Tucker and Lewis noticed the vehicle and the gunmen and began to run toward Tucker's residence. The trio chased Tucker and Lewis and simultaneously fired their weapons at them several times. To avoid the gunshots, Tucker and Lewis hid behind a vehicle that was parked in front of Tucker's house. When the shooting ceased, Tucker and Lewis saw that the victim was lying on the sidewalk in front of 6 Arthur Street. The victim was struck in the chest by a single 9 millimeter bullet and died later that evening.

Tucker and Lewis informed Detective Samuel Cotto of the New Haven police department that Troy Mozell and other members of the defendant's gang were responsible for the shooting. Lewis specifically named Robert Henderson and Douglas, and described a third participant as "a kid in a green jacket." The New Haven police obtained search warrants for Henderson's apartment at 288 Front Street, the defendant's apartment at 16 Peck Street and the gray Jeep Cherokee that was owned by the defendant's mother, Alice Mozell. The police recovered two loaded 9 millimeter ammunition clips from Henderson's apartment, six live 9 millimeter cartridges from the defendant's apartment, and a green jacket from inside the Jeep.

The police initially arrested only Troy Mozell and Douglas. At a probable cause hearing on February 27, 1990, Tucker was called to testify. While testifying, Tucker saw the defendant sitting in the courtroom gallery among several other spectators and recognized him as one of the shooters. Tucker's identification of the defendant led police to investigate further and resulted in the defendant's arrest.

State v. Mozell, 40 Conn. App. at 49-50. On February 21, 1996, the Connecticut Supreme Court denied the petitioner's petition for certification to appeal. See State v. Mozell, 236 Conn. 910, 671 A.2d 824 (1996).

On September 27, 1996, the petitioner, proceeding pro se, filed in this court a Petition for a Writ of Habeas Corpus (Doc. No. 2) (the "Petition"), and a show cause order was issued by the court. See Mozell v. Armstrong, 3:96CV1990 (AWT). However, the petitioner failed to comply with the court's March 24, 1997 order to serve the respondent with a copy of the petition and the show cause order by April 24, 1997. In November of 1997, the court ordered the petitioner to provide proof of service, and the petitioner moved for an extension of time to comply with the court's March 24, 1997 order. The motion for an extension of time was granted; the court issued a supplemental order that the petitioner was to serve the respondent with a copy of the petition and the show cause order on or before February 20, 1998. The petitioner failed to timely comply with the supplemental order. His certification of service as to those documents states that they were sent out by him on April 15, 1998, and the postmark on the envelope is May 1, 1998.

On August 31, 1998, the court took note of the fact that the petitioner had never signed his petition as required under then Local Rule 6 (now Local Rule 10), and ruled that , consequently, the petition was deficient. See D. Conn. L. Civ. R. 10. The court dismissed the petition without prejudice, with leave to file a signed amended petition within 30 days. The court's order read as follows:

It has come to the court's attention that the petition for writ of habeas corpus filed in this action was never signed by the petitioner. As such, the petition is deficient. Accordingly, the court vacated the Order to Show Cause entered on March 24, 1997 and dismisses the petition without prejudice. The petitioner is granted leave to file a signed amended petition within thirty days of the date of this order. Should the petitioner fail to file an amended petition within the prescribed time, the Clerk is directed to enter judgment and close this case.

The petitioner did not comply with the requirement that he file a signed petition within 30 days. The court waited until October 9, 1998 and then dismissed the 1996 habeas petition. The judgment of dismissal read as follows:

On August 31, 1998, the Court vacated its Order to Show Cause and dismissed the habeas petition filed in this action because it was not signed. The Court granted the petitioner leave to file an amended signed petition within thirty days of the date of the Court's order. The court advised the petitioner that if he failed to submit an amended petition within the time specified, the Clerk would enter judgment and close the case. The petitioner has failed to file a signed amended petition within the time specified.

Therefore, it is ORDERED and ADJUDGED that the petition is dismissed in accordance with the Court's order that the case is closed.

(Mem. in Opp'n to Pet. for Writ of Habeas Corpus (Doc. No. 40), Ex. H.)

The petitioner filed the instant petition on December 1, 1998. The petitioner's sworn declaration on the petition is dated October 26, 1998 (Petition, at 7), but the petitioner's certification that he was mailing a copy of the petition to Connecticut's attorney general states that it was mailed on November 28, 1998. Consequently, it does not appear that there was any delay by prison officials in forwarding the instant petition to the court. The instant petition makes no mention of the prior federal habeas action. Rather, the petitioner represents in the instant petition that he did not previously file any federal or state habeas petition attacking the judgment that is the subject of the instant habeas petition.

On July 29, 1999, this court denied the instant habeas petition, *sua sponte* without requiring any response by the respondent. This court's ruling stated that the petition is barred by the statute of limitations set forth in 28 U.S.C. § 2244(d)(1) for federal habeas petitions. On December 20, 1999, the Second Circuit issued a

certificate of appealability, appointed counsel for the petitioner and consolidated the petitioner's appeal with three other appeals presenting the same issues. The Second Circuit concluded that this court should not have dismissed the petition *sua sponte* under 28 U.S.C. § 2244(d) without providing the petitioner prior notice and an opportunity to be heard. Accordingly, on August 9, 2000, the Second Circuit vacated this court's judgment and remanded the case.

On November 17, 2000, this court issued to the respondent an order to show cause why the relief prayed for in the petition should not be granted. The respondent filed a motion to dismiss on the grounds that the instant petition was not timely filed pursuant to 28 U.S.C. § 2244(d). In his opposition to the motion to dismiss, the petitioner conceded that the petition was untimely but argued that the untimeliness should be excused under the doctrine of equitable tolling or, in the alternative, the petition should be treated as a motion for relief from judgment under Rule 60(b) of the Federal Rules of Civil Procedure. On or about March 8, 2002, the respondent filed a reply brief.

On March 29, 2002, this court denied the respondent's motion to dismiss without prejudice. In the order denying that motion, the court expressed its concern that there might be "an issue as to whether the August 1998 Order contains an appropriate explanation to the petitioner of the consequences of not following required procedures and, if it does not, whether that is a material consideration for purposes of the motion to dismiss." (Endorsement Order (Doc. No. 37), at 2). The court noted that the parties had not theretofore addressed that question. At a subsequent status conference with

counsel, the court decided that the respondent's next filing would address all relevant grounds upon which to dismiss or deny the petition.

II. DISCUSSION

The respondent contends that the instant petition should be dismissed because it was untimely filed pursuant to 28 U.S.C. § 2244(d), and that, in any event, it should be denied because the petitioner's claims fail to merit federal habeas corpus relief under 28 U.S.C. §§ 2254(a) and 2254(d). The court agrees with the respondent as to both points.

A. The Petition Was Untimely Filed

The applicable limitations period is set forth in 28 U.S.C. § 2244(d)(1)(A), which provides as follows:

A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of --

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review; . . .

28 U.S.C. § 2244(d)(1)(A). Section 2244(d)(2) provides that "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection." 28 U.S.C. § 2244(d)(1)(A). In Duncan v. Walker, 533 U.S. 167, 181-82 (2001), the Supreme Court held that, while § 2244(d) provides for tolling of the one-year limitation while a state habeas petition is pending, this tolling

provision does not apply to the period during which a previous federal habeas action may have been pending.

The applicable provisions of 28 U.S.C. § 2244 became effective April 24, 1996. Ross v. Artuz, 150 F.3d 97, 101 (2d Cir. 1998). If a state conviction became final before the effective date of the statute, there was a one-year grace period from the effective date of the statute. Id., at 102-03.

Here, the Connecticut Supreme Court denied the petitioner's petition for certification to appeal the decision of the Connecticut Appellate Court on February 21, 1996. The petitioner then had 90 days, or until May 21, 1996, to file any petition for a writ of certiorari to the United States Supreme Court, but he did not file such a petition. Nor did the petitioner file any other challenges in state court to his convictions. The petitioner did not file his federal petition until December 1, 1998, over 30 months after the Connecticut Supreme Court denied certification.

The petitioner argues that his failure to comply with the limitations period in § 2244(d) should be excused under the doctrine of equitable tolling.

Equitable tolling applies only in the "rare and exceptional circumstance[]." Turner v. Johnson, 177 F.3d 390, 391-92 (5th Cir.), cert. denied, 528 U.S. 1007 (1999). In order to equitably toll the one-year period of limitations, [a petitioner] must show that extraordinary circumstances prevented him from filing his petition on time. See Johnson v. Nyack Hosp., 86 F.3d 8, 12 (2d Cir. 1996) (noting that [the Second Circuit] has applied equitable tolling doctrine "'as a matter of fairness' where a plaintiff has been 'prevented in some extraordinary way from exercising his rights'"(citation omitted). In addition, the party seeking equitable tolling must have acted with reasonable diligence throughout the period he seeks to toll. See id.

Smith v. McGinnis, 208 F.3d 13, 17 (2d Cir. 2000) (per curiam), cert. denied, 531 U.S. 840 (2000).

Courts in the Second Circuit “have established only a limited number of circumstances that may merit equitable tolling, such as where an attorney’s conduct is so outrageous and incompetent that it is truly extraordinary, and where prison officials intentionally obstruct a prisoner’s ability to file his petition by confiscating his legal papers.” Doe v. Menefee, 391 F.3d 147, 159-60 (2d Cir. 2004) (citing Baldayaque v. United States, 338 F.3d 145 (2d Cir. 2003); Valverde v. Stinson, 224 F.3d 129 (2d Cir. 2000)). For example, simple attorney error is not sufficient to establish extraordinary circumstances. See Smaldon v. Smenkowski, 273 F.3d 133, 138 (2d Cir. 2001). Nor, does a petitioner’s inability to obtain court documents constitute extraordinary circumstances. See Brigian v. Artuz, 37 Fed. Appx. 559, 562 (2d Cir. 2002) (citing Davis v. McCoy, 2000 WL 973752 (S.D.N.Y. 2000)). See also United States v. Cicero, 214 F.3d 199, 203 (D.C. Cir. 2000) (“[t]he prisoner’s ignorance of the law or unfamiliarity with the legal process will not excuse his untimely filing, nor will a lack of representation during the applicable filing period.”); Harris v. Hutchinson, 209 F.3d 325, 330 (4th Cir. 2000) (neither a petitioner’s lack of awareness of the one-year period set forth in § 2244, nor even misadvice by counsel as to the period of limitation, satisfies the strict requirements for equitable tolling); Klein v. Neal, 45 F.3d 1395, 1400 (10th Cir. 1995) (petitioner’s “assertions he is not a lawyer and he was unaware of [the statute of limitation’s] existence are insufficient as a matter of law to constitute ‘cause’” to excuse his failure to comply). Moreover, a court need not even consider the question of extraordinary circumstances where the petitioner “failed to exhibit reasonable diligence.” Warren v. Garvin, 219 F.3d 111, 113-14 (2d Cir. 2000).

The petitioner emphasizes that the instant petition was filed “a mere 61 days” after the expiration of the 30-day period the court gave him on August 31, 1998 in which to file a properly signed amended petition in his 1996 habeas action. (Pet’r’s Br. in Opp’n to Mot. to Dismiss (Doc. No. 34), at 5-6.) However, it is not appropriate to focus on that 61-day period because the petitioner’s lack of diligence extended over a much lengthier period of which the 61-day period he emphasizes is only the tail end. As stated in Smith, the party seeking equitable tolling must have acted with reasonable diligence throughout the period he seeks to toll. The Connecticut Supreme Court denied the petitioner’s petition for certification on February 21, 1996, but the petitioner did not file his 1996 habeas petition until September 21, 1996. Then, after the petitioner was ordered to serve the respondent with a copy of the 1996 petition and the show cause order by April 24, 1997, he not only failed to do so by April 24, 1997 but neglected to do so until approximately February 1998. It is noteworthy that he did so only after being prompted by the November 1997 order from the court and being given an extension of time in which to serve the respondent, and it is especially noteworthy that, even then, he failed to comply with the order granting him an extension of time. Thus, the petitioner was continuing a pattern of not acting diligently when he took no action to pursue his claims for the “mere 61 days” after the deadline for filing a signed amended petition in the 1996 habeas action had passed. The petitioner failed to act diligently over an extended period of time, not just over a period of 61 days.

Moreover, even if it were fair to characterize the petitioner’s conduct as a failure to act diligently over a period of 61 days, he nevertheless failed to act diligently

throughout the period he seeks to toll because he did not act diligently during that period of 61 days.

Of greater significance, however, is the fact that there are no extraordinary circumstances that prevented the petitioner from timely filing his petition. The court concludes that the language in the August 31, 1998 order made it clear that the petitioner would lose this right to pursue his claims if he did not timely file a signed amended petition. That order states explicitly that the 1996 petition is deficient, that it is being dismissed, and that the case would be closed if the petitioner failed to file the amended petition with the prescribed time. This potential area of concern was raised by the court; the petitioner has pointed to nothing else that could be considered as an extraordinary circumstance. This is not a case where a petitioner was caught up in “procedural complexities” of his case. Zarvela v. Artuz, 254 F.3d 374, 378 (2d Cir. 2001). At each stage where the petitioner was given an order from the court with which he failed to timely comply, it concerned a simple, straightforward matter that any litigant should be expected to follow through on. Therefore, the court concludes that this is not a case where the doctrine of equitable tolling applies.

The petitioner also argues that the court’s August 31, 1998 order failed to give the petitioner sufficient notice that the consequence of his failure to comply with the order would be that his federal habeas rights would be lost forever. Thus, the petitioner contends, it would be appropriate for the court to vacate the October 9, 1998 dismissal of the 1996 habeas action. For the reasons discussed above, and the fact that the August 31, 1998 order explicitly stated that the Clerk was directed to enter judgment if the petitioner failed to timely file an amended petition, the court concludes that the

petitioner was given sufficient notice of the consequences of his failure to comply with the court's order.

Accordingly, the court concludes that the instant petition should be dismissed as untimely under 28 U.S.C. § 2244(d).

B. The Petitioner's Claims Lack Merit

If, for some reason, the instant petition should not be dismissed as untimely filed, then it should be denied because none of the four claims stated in the petition satisfies the standards for federal habeas corpus relief set forth in 28 U.S.C. § 2254. Claim One fails to state a claim upon which federal habeas corpus relief may be granted under 28 U.S.C. § 2254(a) because it was presented in the state courts solely as a question of state law. Claims Two, Three and Four should be denied because the state courts' rulings at issue were not contrary to, or an unreasonable application of, clearly-established United States Supreme Court precedent, as required under 28 U.S.C. § 2254(d)(1).

1. Claim One

Claim One in the petition is that "the trial court abused its discretion by allowing the State to establish a 'motive' by means of evidence of prior misconduct committed by persons other than the defendant and of guilt by association." (Petition at iii.)

The Connecticut Appellate Court addressed Claim One as follows:

The defendant first claims that the trial court improperly admitted testimony that (1) he was a member of a gang, (2) the gang was involved in a dispute with a rival gang that included Tucker and Lewis, and (3) the dispute was marked by recent violent confrontations. He argues that the challenged evidence was inadmissible because it constituted evidence of prior misconduct by third persons. The evidence, he asserts, was more

prejudicial than probative because it improperly attempted to establish his guilt by proof of his association with a gang.

The following facts were established from the challenged evidence. Several days prior to the fatal shooting, Tucker and Lewis confronted Thomas Sanders, another member of the defendant's gang, in front of Tucker's residence on Arthur Street. Tucker and Lewis shoved Sanders and instructed him not to deal drugs in front of Tucker's residence. Later that night, Henderson, Douglas, and Bowden returned to Arthur Street and threatened Tucker and Lewis with a gun. They said that unless Tucker and Lewis left Sanders alone there would be trouble. Earlier on the day of the fatal shooting, Troy Mozell drove past Tucker's house in the gray Jeep and fired several gunshots from the vehicle at Tucker and Lewis as they stood on the front porch.

"[T]here are two components to relevant evidence: materiality and probative value.... [E]vidence is relevant if it has a tendency to establish the existence of a material fact...." (Citations omitted; internal quotation marks omitted.) State v. Wieler, 35 Conn.App. 566, 576-77, 645 A.2d 1032 (1994), *aff'd*, 233 Conn. 552, 660 A.2d 740 (1995). "Evidence of motive is a highly relevant factor for assessing the guilt or innocence of a defendant." State v. Murdick, 23 Conn.App. 692, 696, 583 A.2d 1318, *cert. denied*, 217 Conn. 809, 585 A.2d 1233 (1991). Relevant evidence, although prejudicial in nature, "is admissible if the trial court, in the exercise of its sound discretion, determines that its probative value, for one or more of the purposes for which it is admissible, outweighs its prejudicial impact on the accused." State v. Ramsundar, 204 Conn. 4, 15, 526 A.2d 1311, *cert. denied*, 484 U.S. 955, 108 S.Ct. 348, 98 L.Ed.2d 374 (1987). "We will make every reasonable presumption in favor of upholding the trial court's ruling, and only upset it for a manifest abuse of discretion." State v. Kulmac, 230 Conn. 43, 61, 644 A.2d 887 (1994).

The challenged evidence was relevant to prove the defendant's motive. The evidence tended to establish that the defendant had conspired with members of his gang to kill a rival drug dealer to protect the gang's drug sales territory. It established that the defendant participated in the shooting that resulted in Coleman's death. The trial court properly conducted the requisite balancing test before it ruled that the challenged evidence was admissible. The court conducted several hearings outside the presence of the jury, heard lengthy offers of proof from counsel, and carefully weighed the probative value of the evidence against its adverse impact before rejecting the defendant's claim that the evidence was impermissibly prejudicial. Making every reasonable presumption in favor of the trial court's ruling, we cannot conclude, under

the circumstances of this case, that the trial court abused its discretion by admitting the challenged evidence.

State v. Mozell, 40 Conn. App. at 50-52.

Pursuant to 28 U.S.C. § 2254(a), "a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only 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). Federal habeas corpus relief does not extend to perceived errors of state law. Estelle v. McGuire, 502 U.S. 62, 67 (1991); Pulley v. Harris, 465 U.S. 37, 41 (1984); Lockett v. Montemango, 784 F.2d 78, 81 n.7 (2d Cir.), cert. denied, 479 U.S. 832 (1986).

Before the state appellate courts, the petitioner presented this claim solely as one involving state evidentiary law. He made no mention of any violation of the Constitution or laws of the United States, nor did he rely upon any case dealing with such a violation. In his federal petition, to which he appears to attach portions of his state appellate brief, the petitioner again relies solely upon state evidentiary case law. Thus, because the petitioner does not assert in Claim One that he is in custody "in violation of the Constitution or laws or treaties of the United States," 28 U.S.C. § 2254(a), he cannot qualify for federal habeas relief on Claim One.

The petitioner argues that because he was proceeding pro se at the time he drafted his petition, it should be construed liberally and, thus, interpreted by the court to state a claim that he is in custody in violation of the Constitution, laws or treaties of the United States. However, it is well established that a constitutional claim must be fairly presented to state courts because "exhaustion of state remedies requires that

petitioners fairly present federal claims to the state courts in order to give the State the opportunity to pass upon and correct alleged violations of its prisoners' federal rights." Duncan v. Henry, 513 U.S. 364, 365 (1995) (citing Picard v. Connor, 404 U.S. 270, 275 (1971) (internal quotation marks omitted)). While pro se complaints are to be construed liberally, see Haines v. Kerner, 404 U.S. 519, 520 (1972) (allegations of a pro se complaint are held to a "less stringent standard[] than formal pleadings drafted by lawyers"), this does not mean they should be construed to include claims they clearly do not include. See Fleming v. United States 146 F.3d 88, 90 (2d Cir. 1998) ("where . . . a [pro se] complaint fails even vaguely to suggest an essential element of a claim for relief, the district court is not required to overlook the deficiency").

2. Claim Two

Claim Two in the petition is that the petitioner was "denied his constitutional rights to compulsory process and due process of law by the trial court's denial of his request for a continuance." (Petition at iii.) Under § 2254(d)(1), the petitioner must show that the adjudication of the claim in the state courts "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." 28 U.S.C. § 2254(d)(1).

The Connecticut Appellate Court addressed Claim Two as follows:

The defendant next claims that the trial court deprived him of his state and federal constitutional rights of compulsory process and due process of law when it denied his motion for a continuance, made at the conclusion of the evidence, to permit him to bring an additional witness to testify. The defendant asserts that the witness would have directly refuted the testimony of a state's witness who testified that he had heard the defendant admit his involvement in the shooting.

The following additional facts are relevant to the resolution of this claim. Immediately after the shooting, the defendant and the other gunmen returned to the Jeep, fled from the Arthur Street area, and drove to Henderson's apartment at 388 Front Street. Douglas testified for the state that several people, including Daryl Jackson, were present and playing cards when the defendant and Bowden arrived after the shooting and announced that they had just engaged in a shootout with Tucker and Lewis. Troy Mozell, who was also present, informed the group that someone had been killed. Upon hearing this, the defendant and Bowden began arguing with each other over which one of them had fired the fatal shot, each trying to blame the other.

On October 8, 1992, the defendant notified the trial court that he had two witnesses ready to testify and that he intended to call Jackson as a third witness. Because Jackson was recovering from a gunshot wound, the defendant requested a continuance for at least one week. The court reserved its decision on the continuance until after the defendant's available witnesses testified. On October 9, 1992, after the testimony of the available witnesses, the defendant renewed his request for a continuance and represented that Jackson had been served with a subpoena to compel his attendance on the next scheduled court date, Tuesday, October 13, 1992. As part of his offer of proof, the defendant submitted a statement signed by Jackson in which Jackson claimed that he was not present at Henderson's apartment on the night of the shooting. Jackson further claimed that neither the defendant nor Bowden had admitted their complicity in the shooting to Jackson at any other time. The state objected to the continuance claiming that the proffered testimony was neither relevant nor probative. The trial court denied the motion for continuance.

"The determination of whether to grant a request for a continuance is within the discretion of the trial court, and will not be disturbed on appeal absent an abuse of discretion. State v. Aillon, 202 Conn. 385, 394, 521 A.2d 555 (1987). A reviewing court is bound by the principle that [e]very reasonable presumption in favor of the proper exercise of the trial court's discretion will be made. Ridgeway v. Ridgeway, 180 Conn. 533, 538, 429 A.2d 801 (1980); State v. Beckenbach, [198 Conn. 43, 47, 501 A.2d 752 (1985)]. To prove an abuse of discretion, an appellant must show that the trial court's denial of a request for a continuance was arbitrary. State v. Beckenbach, supra, at [47, 501 A.2d 752]. There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied." (Emphasis in original;

internal quotation marks omitted.) State v. Hamilton, 228 Conn. 234, 239-40, 636 A.2d 760 (1994).

For us to determine whether the trial court's denial of the request for a continuance was arbitrary, we must first determine whether the court properly ruled on the relevancy of Jackson's testimony. "[T]here are two components to relevant evidence: materiality and probative value.... [E]vidence is relevant if it has a tendency to establish the existence of a material fact.... One fact is relevant to another fact whenever, according to the common course of events, the existence of the one, taken alone or in connection with other facts, renders the existence of the other either certain or more probable.... No precise and universal test of relevancy is furnished by the law, and the question must be determined in each case according to the teachings of reason...." (Citations omitted; internal quotation marks omitted.) State v. Wieler, supra, 35 Conn.App. at 576-77, 645 A.2d 1032.

The proffered testimony of Jackson would not have had the tendency to establish the existence of a material fact. At best, Jackson's testimony would have established that Jackson was not present at Henderson's apartment, as Douglas testified, when the defendant and Bowden arrived there after the shooting. It would not have directly contradicted, contravened or negated Douglas' testimony that Douglas overheard the defendant and Bowden argue about which of them had fired the shot that killed Coleman. To the extent that Jackson's testimony was offered for the purpose of impeaching Douglas, it would have indicated only that Douglas was mistaken as to the identity of one of several people present in the apartment, which is a collateral matter. Thus, the trial court properly found that Jackson's testimony would not have been relevant.

Because the trial court properly determined that the proffered testimony of Jackson was not relevant, we conclude that the court did not act arbitrarily, and, therefore, did not abuse its discretion by denying the continuance.

State v. Mozell, 40 Conn. App. at 52-55.

Under 28 U.S.C. § 2254(d)(1), the first question a federal habeas court must ask is whether the claim presented by the habeas petition has been addressed by the United States Supreme Court. A petitioner's reliance upon lower court opinions is insufficient. Mask v. McGinnis, 252 F.3d 85, 90 (2d Cir. 2001) (no relief afforded where

“petitioner has established, at most, that the state courts unreasonably applied clearly established *Second Circuit* precedent”) (emphasis in original). If the petitioner’s claim is not supported by Supreme Court precedent, federal habeas relief must be denied, without regard to how a lower federal court believes the Supreme Court might resolve the issue if confronted with it. Williams v. Taylor, 529 U.S. 362, 412-13 (2000).

If the Supreme Court has clearly addressed the particular question raised by the habeas petition, then the federal habeas court must determine whether the state court opinion is contrary to or involves an unreasonable application of that Supreme Court case law. Id., at 404-05. With respect to the “contrary to” clause in § 2254(d)(1):

a state court decision can be “contrary to” [the Supreme Court’s] clearly established precedent in two ways. First, a state-court decision is contrary to this Court’s precedent if the state court arrives at a conclusion opposite to that reached by this Court on a question of law. Second, a state-court decision is also contrary to this Court’s precedent if the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to ours.

Williams, 529 U.S. at 405. The Court explained that “the state court’s decision must be substantially different from the relevant precedent of [the Supreme Court].” Id. The Court distinguished that situation from the

run-of-the-mill state-court decision applying the correct legal rule from [Supreme Court cases] to the facts of a prisoner’s case [which] would not fit comfortably within § 2254(d)(1)’s “contrary to” clause. Assume for example, that a state court decision on a prisoner’s ineffective-assistance claim correctly identifies Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984)] as the controlling legal authority and, applying that framework, rejects the prisoner’s claim. Quite clearly, the state-court decision would be in accord with [the Court’s] decision in Strickland as to the legal prerequisites for establishing an ineffective-assistance claim, even assuming the federal court considering the prisoner’s habeas application might reach a different result applying the Strickland framework itself.

Williams, 529 U.S. at 406. Emphasizing the deference owed state court decisions, the Court then stated that “[a]lthough the state-court decision may be contrary to the federal court’s conception of how Strickland ought to be applied in that particular case, the decision is not ‘mutually opposed’ to Strickland itself.” Id. See also Gilchrist v. O’Keefe, 260 F.3d 87, 97 (2d Cir. 2001) (state court decision that petitioner “forfeited” his right to counsel through misconduct was not “contrary to” clearly established Supreme Court precedent because no Supreme Court case had held that a defendant may not forfeit (as opposed to waive) his right to counsel absent certain procedural safeguards).

With respect to the “unreasonable application” clause, the Court stated that “the most important point is that an *unreasonable* application of federal law is different from an *incorrect* application of federal law.” Williams, 529 U.S. at 410 (emphasis in original). Thus, under this clause, “a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.” Id. at 411. See also Jones v. Stinson, 229 F.3d 112, 121 (2d Cir. 2000) (“On direct review, we might have concluded that [the excluded evidence] created reasonable doubt that did not otherwise exist. As a habeas court, however, our review is limited to whether the [state court]’s ruling was objectively reasonable, not whether it was correct.”); Francis S. v. Stone, 221 F.3d 100, 113 (2d Cir. 2000) (“As an initial question of federal constitutional law, unconstrained by section 2254(d)(1), we might well rule that [a constitutional] violation has been shown. Applying the standard of ‘objective unreasonableness’ required by section 2254(d)(1), however,

we cannot say that it was objectively unreasonable” for the state courts to reject the petitioner’s claim).

In the present case, the decision of the state courts’ was not either “contrary to” or an “unreasonable application of” clearly established United States Supreme Court precedent. Neither the instant federal petition nor the petitioner’s state appellate brief, which was prepared by counsel, cites any United States Supreme Court decision with which the state trial court’s rulings conflict.

It was established in Washington v. Texas, 388 U.S. 14 (1967), that, under certain circumstances, state court action which precludes the presentation of critical defense witnesses could implicate constitutional concerns. However, this rule was expressly recognized by the Connecticut Appellate Court in this case. See State v. Mozell, 40 Conn. App. at 53 (discussing standard “for deciding when a denial of a continuance is so arbitrary as to violate due process.”). It is important to note that Washington does not stand for the proposition that any state court action which may affect a defendant’s ability to present evidence is a constitutional violation. To the contrary, the Supreme Court has held that it is not a violation of due process to exclude evidence that is " 'repetitive ... only marginally relevant' or poses an undue risk of 'harassment, prejudice, [or] confusion of the issues.'" Crane v. Kentucky, 476 U.S. 683, 689-90 (1986) (quoting Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986)) . Such action should be deemed “unconstitutionally arbitrary or disproportionate only where it has infringed upon a weighty interest of the accused.” United States v. Scheffer, 523 U.S. 303, 308 (1998) (citing, inter alia, Washington, 388 U.S. at 22-23). Thus, in Scheffer, for example, the Court held that a federal rule of evidence which precludes

the introduction of polygraph evidence in all military trials was not unconstitutional because it was “neither arbitrary nor disproportionate in promoting [its] ends” and did not “implicate a sufficiently weighty interest of the defendant to raise a constitutional concern under our precedents.” Scheffer, 523 U.S. at 309 .

In Washington, the Supreme Court held unconstitutional a state statute which absolutely barred the testimony of a key defense witness who was “physically and mentally capable of testifying to events that he had personally observed and whose testimony would have been relevant and material to the defense.” Washington, 388 U.S. at 23. This holding was neither contravened nor unreasonably applied in the present case. Here, the Connecticut Appellate Court found no constitutional violation in the denial of a continuance to present the testimony of a witness who, at best, may have impeached one state witness as to whether the latter “was mistaken as to the identity of one of several people present in the apartment, which is a collateral matter.” State v. Mozell, 40 Conn. App. at 54. See Van Arsdall, 45 U.S. at 679 (not a constitutional violation to exclude “marginally relevant” evidence). Regardless of whether this court might have reached a different result, it cannot be said that the state courts were unreasonable in concluding that the defendant did not have such a sufficiently weighty interest in the introduction of the impeachment evidence on a collateral issue that the denial of the continuance rose to a constitutional level.

Accordingly, this claim does not warrant federal habeas corpus relief under 28 U.S.C. § 2254(d).

3. Claim Three

Claim Three in the petition is that the petitioner “was harmed by the trial court’s improper rulings.” (Petition at iii.) Claim Three simply states that the state court’s allegedly improper rulings on the other claims were harmful. While the harm, if any, flowing from such rulings would be relevant to the question of whether relief should be granted based on any finding of error, this does not constitute an independently-cognizable claim for federal habeas corpus relief.

4. Claim Four

Claim Four in the petition is that “the trial court’s instruction on accessorial liability allowed the jury to convict the defendant upon proof of a less culpable mental state than that required by Conn. Gen. Stat. § 53a-8.” (Petition at iii.) This claim is also analyzed under § 2254(d)(1).

The Connecticut Appellate Court addressed Claim Four as follows:

The defendant's last claim is that the trial court improperly instructed the jury on the mental state required for accessorial liability for manslaughter in the second degree. He argues that the court improperly informed the jury that it could convict the defendant upon a finding that he had "recklessly" aided the principal in causing Coleman's death. He asserts that the court's instruction was contrary to the statutory scheme and misled the jury into convicting him of manslaughter in the second degree on a finding of a less culpable mental state than that required by § 53a-8. The defendant failed to preserve this claim at trial and now seeks review pursuant to State v. Golding, 213 Conn. 233, 567 A.2d 823 (1989).^[2]

² Under Golding, the defendant can prevail on an unpreserved claim of constitutional error "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 subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a

The first two prongs of Golding are satisfied. The defendant has provided an adequate record for review and has alleged a claim of constitutional magnitude arguing that the trial court failed to instruct the jury properly on an essential element of the crime charged. See State v. Tweedy, 219 Conn. 489, 510, 594 A.2d 906 (1991); State v. Williamson, 206 Conn. 685, 708, 539 A.2d 561 (1988). We must now determine whether the alleged error in the jury instructions clearly misled the jury and clearly deprived the defendant of a fair trial.

"In reviewing a constitutional challenge to the trial court's instructions, we must consider the jury charge as a whole to determine whether it is reasonably possible that the instruction misled the jury.... A jury instruction is constitutionally adequate if it provides the jurors with a clear understanding of the elements of the crime charged, and affords them proper guidance for their determination of whether those elements were present.... The purpose of a charge is to call the attention of the members of the jury, unfamiliar with legal distinctions, to whatever is necessary and proper to guide them to a right decision in a particular case...." (Citations omitted; internal quotation marks omitted.) State v. Lemoine, 39 Conn.App. 657, 665-67, 666 A.2d 825 (1995). In evaluating the propriety of the supplemental charge, we must examine both the main and supplemental charge as a whole. State v. Williams, 199 Conn. 30, 41, 505 A.2d 699 (1986).

A review of the main and supplemental charges reveals that the trial court carefully and correctly instructed the jury as to the elements of accessory liability and as to each of the homicide charges, including manslaughter in the first and second degrees, and criminally negligent homicide. The court thoroughly explained the meaning of the terms "intent" and "recklessness" as applied to the charges and properly instructed the jury on the requisite mental state required to establish accessory liability. On twelve separate occasions, in both the main and supplemental charges, the court properly instructed the jury that it could find the defendant guilty as an accessory if it found that he solicited, requested, commanded, importuned or "intentionally" aided another person in the commission of one of the underlying homicide offenses. The record further discloses, however, that the court also improperly instructed on accessory liability four times by stating that a person is an

reasonable doubt. In the absence of any one of these conditions, the defendant's claim will fail. The appellate tribunal is free, therefore, to respond to the defendant's claim by focusing on whichever condition is most relevant in the particular circumstances." State v. Golding, supra, 213 Conn. at 239-40, 567 A.2d 823.

accessory when he "recklessly" solicits, requests, commands, importunes or "intentionally" aids the principal. The defendant asserts that this flawed instruction misled the jury into convicting him of manslaughter in the second degree on a lesser mental state than that required for conviction and thereby deprived him of a fair trial.

While it is of paramount importance that jury instructions be clear and accurate regarding the essential elements of the crime charged; State v. Griffin, 175 Conn. 155, 163, 397 A.2d 89 (1978); they " 'need not be exhaustive, perfect or technically accurate....' " State v. Theriault, 38 Conn.App. 815, 819, 663 A.2d 423 (1995). Applying the standard of review demanded of this court when the defendant claims that the instructions of the trial court violated constitutional due process, we cannot say, reading the instructions as a whole, that they were so deficient that it was reasonably possible that the jury was misled. State v. Allen, 28 Conn.App. 81, 84, 611 A.2d 886, cert. denied, 223 Conn. 920, 614 A.2d 826 (1992). Although the challenged portions of the instructions were less than perfect, the requisite understanding and guidance was provided by the charge as a whole. Viewed in their entirety and measured against the factual context of the case, the main and supplemental charges sufficiently communicated to the jury that it was necessary to find that the defendant intentionally acted as an accessory before it could find him guilty under § 53a-8. There exists no reasonable possibility, therefore, that the jury was misled or that the defendant did not receive a fair trial.

We conclude that because the defendant failed to establish that he was deprived of a fair trial, his claim fails to satisfy the third prong of Golding.

State v. Mozell, 40 Conn. App. at 55-58.

As with Claim Two, the petitioner did not cite, in either his habeas petition or his state appellate court brief, any United States Supreme Court precedent with which the state courts' rulings conflict. In Cupp v. Naughten, the Supreme Court stated that:

[b]efore a federal court may overturn a conviction resulting from a state trial [on the basis of a claimed jury instruction], it must be established not merely that the instruction is undesirable, erroneous, or even "universally condemned," but that it violated some right which was guaranteed to the defendant by the Fourteenth Amendment . . .

[A] single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge. . . While this does not mean that an instruction by itself may never rise to the level of constitutional error. . . it does recognize that a judgment of conviction is commonly the culmination of a trial which includes testimony of witnesses, arguments of counsel, receipt of exhibits in evidence, and instruction of the jury by the judge. Thus not only is the challenged instruction but one of many such instructions, but the process of instruction itself is but one of several components of the trial which any result in the judgment of conviction.

414 U.S. 141, 146 (1973) (internal citations omitted). In United States v. Frady, 456 U.S. 152 (1982), the Court elaborated on this rule by explaining that

the degree of prejudice we have required a prisoner to show before obtaining collateral relief for errors in the jury charge [is] " 'whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process,' not merely whether 'the instruction is undesirable, erroneous, or even universally condemned.' " [Henderson v. Kibe,] 431 U.S., at 154, 97 S.Ct., at 1736 (quoting Cupp v. Naughten, [*supra*]). We reaffirm this formulation, which requires that the degree of prejudice resulting from instruction error be evaluated in the total context of the events at trial.

Frady, 456 U.S. at 169 (footnote omitted).

Here the Connecticut Appellate Court reasonably applied these principles in concluding that, in the context of both the instructions and the trial in the case as a whole, the jury was adequately instructed on the elements of the crime and that the court's erroneous inclusion of the term "recklessness" in some instances was not reasonably likely to have misled the jury "in the context of the overall charge." Cupp 414 U.S. at 147. Regardless of whether this court would have reached the same conclusion, it cannot be said that the Connecticut Appellate Court's conclusion was either contrary to, or an unreasonable application of, the relevant precedent of the United States Supreme Court.

Accordingly, this claim does not merit federal habeas corpus relief under § 2254(d).

III. CONCLUSION

_____ For the foregoing reasons, the Petition under 28 U.S.C. § 2254 for Writ of Habeas Corpus (Doc. No. 2) is hereby DISMISSED, or in the alternative, DENIED.

The Clerk shall enter judgment in favor of the respondent and close this case.

It is so ordered.

Dated this 8th day of June 2006, at Hartford, Connecticut.

/s/ (AWT)

Alvin W. Thompson
United States District Judge