

UNITED STATES DISTRICT COURT  
DISTRICT OF CONNECTICUT

ANTHONY CARTER :  
 :  
 v. : PRISONER  
 : Case No. 3:04CV1691 (JBA)  
 :  
 JAMES DEREENZDA and :  
 THERESA LANTZ :

RULING ON PETITION FOR WRIT OF HABEAS CORPUS

The petitioner, Anthony Carter ("Carter"), is an inmate currently confined at the Cheshire Correctional Institution in Cheshire, Connecticut. He brings this action pro se for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254, to challenge his 2002 conviction for assault, attempted assault, risk of injury to a child and criminal possession of a firearm. Respondents contend that Carter has not exhausted his state court remedies and, in the alternative, that the petition should be denied on the merits. For the reasons that follow, the petition is denied.

I. Standard of Review

The federal court "shall entertain an application for a writ of habeas corpus in behalf of a person in state 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). A federal court may not reexamine a state court's determination on a state-law issue. See Estelle v. McGuire, 502 U.S. 62, 67-68 (1991); see also Dunnigan v. Keane, 137 F.3d 117, 125 (2d Cir. 1998) (claim that a

state conviction was obtained in violation of state law not cognizable in federal habeas petition).

## II. Procedural History

On May 20, 2002, after a jury trial in the Connecticut Superior Court for the Judicial District of Hartford, Carter was convicted of assault, attempted assault, risk of injury to a child and criminal possession of a firearm. He was sentenced to a total effective term of imprisonment of twenty-seven years.

Carter appealed his conviction on nine grounds: (1) the trial court improperly applied the doctrine of transferred intent in this case because Carter was unaware of the presence of the victim, (2) there was insufficient evidence to support his conviction for assault and risk of injury to a child because the state did not prove that Carter shot the child, (3) the trial court violated his right to due process by instructing the jury on transferred intent when the state neither charged that theory in the information nor presented sufficient evidence to support it, (4) the trial court failed to instruct the jury that his conduct must have been wilful and deliberate and proximately caused the injury to support conviction for risk of injury to a child, (5) there was insufficient evidence to support his conviction for risk of injury to a child, (6) the trial court improperly admitted evidence of prior misconduct to prove motive because the prejudicial impact outweighed the probative value,

(7) the trial court improperly denied Carter's motion for acquittal, (8) the trial court improperly instructed the jury regarding the firearm element in counts one, two and four of the information and (9) the trial court improperly convicted him of risk of injury to a child when the information did not charge any of the fact necessary for that crime. The Connecticut Appellate Court affirmed Carter's conviction. See State v. Carter, 84 Conn. App. 263, 853 A.2d 565 (2004). Carter was denied permission to file a petition for certification that exceeded the page limit by four pages. See Resp'ts' Answer App. F & G. He sought certification to appeal on two grounds: (1) application of the doctrine of transferred intent where Carter was unaware of the presence of the victim and (2) failure to inform the jury that, to support a conviction for risk of injury to a child, Carter's conduct must have been willful and deliberate and the proximate cause of the victim's injuries. On October 13, 2004, the Connecticut Supreme Court denied certification. See State v. Carter, 271 Conn. 932, 859 A.2d 931 (2004). Carter commenced this action by petition dated September 30, 2004.

### III. Factual Background

The Connecticut Appellate Court described the underlying incident as follows.

In the early part of July, 2001, [Carter] and Maurice Miller became involved in a dispute over the sale of marijuana in a particular area of Hartford. On July 1, 2001, [Carter] telephoned Miller and told him that he

could either engage [Carter] in a fair fistfight or [Carter] would shoot him on sight. In response, Miller armed himself with a Glock handgun.

On the evening of July 4, 2001, Miller and another man called "Shorty" were standing by the side of a building in or near an alleyway on Enfield Street. [Carter] arrived in a rented red Blazer, exited the vehicle and then chased Miller along the alleyway while shooting at him. Miller saw a handgun in [Carter's] hand and noticed the muzzle flash. A bullet fired from [Carter's] struck and injured the victim, [a seven-year-old child,] who was standing about one block away near a vehicle listening to music. After [Carter] stopped shooting, Miller turned around and began chasing him. Miller fired his weapon repeatedly at [Carter] until [Carter] reentered the red Blazer. Miller fired the weapon again as [Carter] drove away in the red Blazer.

The police arrived on the scene shortly after 6:45 p.m. They discovered eight .45 caliber shell casings. Forensic analysis led to the conclusion that all eight had been fired from the same handgun. The officers also discovered five nine millimeter Luger shell casings and one nine millimeter Luger metal jacket bullet. Later forensic analysis established that all of the nine millimeter casings had been fired from the same handgun.

On July 5, 2001, [Carter] informed the Manchester police about a hole in his rented Blazer. Through a forensic examination, the hole was identified as a bullet hole. [Carter] did not inform the police officer of the gunfight, but implied that the damage might have been caused by fireworks.

While incarcerated in September, 2001, [Carter] told William Brunson, his cell mate, about his dispute with Miller and the events of July 4, 2001. He also admitted that a bullet fired from his gun struck the victim.

State v. Carter, 84 Conn. App. at 266-67, 853 A.2d at 568.

#### IV. Discussion

Carter challenges his conviction on two grounds: (1) he was

denied his Fourteenth Amendment right to due process and Sixth Amendment right to proper notice of the charges against him on counts one, two and four of the amended information because the state did not identify the type of firearm and (2) he was denied his Sixth Amendment right to proper notice of the charges against him on count three because the state failed to charge all of the elements of risk of injury to a child. Respondents contend that Carter did not exhaust his state court remedies for these claims and, even if he had, the petition should be denied.

A. Exhaustion of State Court Remedies

Respondents first argue that Carter has not exhausted his state court remedies with regard to either ground for relief.

A prerequisite to habeas corpus relief under 28 U.S.C. § 2254 is the exhaustion of all available state remedies. See O'Sullivan v. Boerckel, 526 U.S. 838, 842 (1999); Rose v. Lundy, 455 U.S. 509, 510 (1982); Daye v. Attorney General of the State of New York, 696 F.2d 186, 190 (2d Cir. 1982), cert. denied, 464 U.S. 1048 (1982); 28 U.S.C. § 2254(b)(1)(A). The exhaustion requirement is not jurisdictional; rather, it is a matter of federal-state comity. See Wilwording v. Swenson, 404 U.S. 249, 250 (1971) (per curiam). The exhaustion doctrine is designed not to frustrate relief in the federal courts, but rather to give the state court an opportunity to correct any errors which may have crept into the state criminal process. See id. "Because the

exhaustion doctrine is designed to give the state courts a full and fair opportunity to resolve federal constitutional claims before those claims are presented to the federal courts, . . . state prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." See O'Sullivan, 526 U.S. at 845.

The Second Circuit requires the district court to conduct a two-part inquiry. First, the petitioner must have raised before an appropriate state court any claim that he asserts in a federal habeas petition. Second, he must have "utilized all available mechanisms to secure appellate review of the denial of that claim." Lloyd v. Walker, 771 F. Supp. 570, 573 (E.D.N.Y. 1991) (citing Wilson v. Harris, 595 F.2d 101, 102 (2d Cir. 1979)). "To fulfill the exhaustion requirement, a petitioner must have presented the substance of his federal claims to the highest court of the pertinent state." Bossett v. Walker, 41 F.3d 825, 828 (2d Cir. 1994), cert. denied, 514 U.S. 1054 (1995) (internal citations and quotation marks omitted). See also Pesina v. Johnson, 913 F.2d 53, 54 (2d Cir. 1990) ("[T]he exhaustion requirement mandates that federal claims be presented to the highest court of the pertinent state before a federal court may consider the petition."); Grey v. Hoke, 933 F.2d 117, 119 (2d Cir. 1991) (same).

The two grounds for relief contained in this petition were included in the additional pages that Carter sought to add to his petition for certification to appeal to the Connecticut Supreme Court. When the court denied leave to exceed the ten-page limit, Carter did not include these arguments in the petition for certification that he filed. The inclusion of these grounds in the motion for leave to file a fourteen-page petition is insufficient to satisfy the exhaustion requirement. When the motion was denied, Carter had several options: he could have eliminated one of the other grounds and included the grounds he now presents; reduced the space devoted to each ground and presented all four grounds in ten pages; or eliminated the grounds he now raises. Carter chose the last option. Because these grounds were not presented to the Connecticut Supreme Court for review, Carter has not exhausted his state court remedies on these grounds for relief. Thus, the petition could be dismissed for failure to exhaust state court remedies.

B. Merits of the Grounds for Relief

“An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.” 28 U.S.C. §2254(b)(2). Respondents argue that the court should proceed to address the merits of Carter’s claims because his conviction is not in violation of the constitution or other

federal law.

To prevail on his claims, Carter must show that the state court's actions "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 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 decision is "contrary to" clearly established federal law "if the state court applies a rule different from the governing law set forth in [Supreme Court] cases, or if it decides a case differently than [the Supreme Court] has done on a set of materially indistinguishable facts." Bell v. Cone, 535 U.S. 685, 694 (2002). A state court decision is an "unreasonable application" of clearly established federal law "if the state court correctly identifies the governing legal principle from [the Supreme Court's] decisions but unreasonably applies that principle to the facts of the particular case." Id. When considering the unreasonable application clause, the focus of the inquiry "is on whether the state court's application of clearly established federal law is objectively unreasonable." Id. The Court has emphasized that "an unreasonable application is



different from an incorrect one.” Id. (citing Williams v. Taylor, 529 U.S. 362, 411 (2000)) (holding that a federal court may not issue a writ of habeas corpus under the unreasonable application clause “simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly”). In both scenarios, federal law is “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. Williams, 519 U.S. at 412.

1. Counts One, Two and Four of the Amended Information

Carter first argues that he was deprived of his Fourteenth Amendment right to due process and his Sixth Amendment right to proper notice of the charges against him in counts one, two and four of the amended information because the state did not identify the type of firearm used.

“An indictment is required to set forth the elements of the offense sought to be charged.” United States v. Debrow, 346 U.S. 374, 376 (1953). An indictment is sufficient if it puts the criminal defendant on notice of the elements of the crime with which he has been charged and what he should be prepared to defend against. See id. The indictment may use the words of the statute as long as the statutory language adequately sets forth the elements of the crime. See Hamling v. United States, 418

U.S. 87, 117 (1974).

Counts one, two and four of the amended information involved the use or possession of a firearm. A comparison of the statutes with the language in the amended information reveals that Carter was informed of the elements of the crimes and what he was required to defend against.

The first count charged Carter with assault in the first degree in violation of Connecticut General Statutes § 53a-59(a)(5). That statute provides that a "person is guilty of assault in the first degree when . . . with intent to cause physical injury to another person, he causes such injury to such person or to a third person by means of the discharge of a firearm." The crime has three elements: (1) Carter intended to cause physical injury to another person, (2) he did cause serious physical injury to the intended person or another person and (3) Carter caused that injury by discharging a firearm. The amended information provided in count one:

James E. Thomas, State's Attorney for the Judicial District of Hartford accuses Anthony Carter of Hartford of the crime of ASSAULT IN THE FIRST DEGREE, in violation of Connecticut General Statutes § 53a-59(a)(5), and charges that at or near 479 Garden Street, Hartford, Connecticut on or about July 4, 2001 at approximately 6:45 P.M., with intent to cause physical injury to another person, the accused caused said injury to [redacted], a child under ten years of age, by means of the discharge of a firearm.

Answer App. B at 13. The language of count one tracks the statutory language and sets forth the three elements of the crime

of assault in the first degree.

Count two of the amended information charged Carter with attempt to commit assault in the first degree in violation of Connecticut General Statutes § 53a-49(a)(2). The statute provides that a

person is guilty of an attempt to commit a crime if, acting with the kind of mental state required for commission of the crime, he . . . intentionally does or omits to do anything which, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime.

Count two of the amended information provided:

And the said Attorney further accuses said defendant of the crime of ATTEMPT TO COMMIT ASSAULT IN THE FIRST DEGREE, in violation of Connecticut General Statutes §§ 53a-49(a)(2) and 53a-59(a)(5), and charges that at or near 479 Garden Street, Hartford, Connecticut on or about July 4, 2001 at approximately 6:45 P.M., with intent to cause physical injury to Maurice Miller, the accused intentionally discharged a firearm, which under the circumstances as the defendant believed them to be, was an act constituting a substantial step in the course of conduct planned to culminate in the commission of the crime of Assault in the First Degree.

Answer App. B at 13. The language of count two tracks the language of section 53a-49(a)(2) and references section 53a-59(a)(5), which was set forth in the previous count.

The fourth count of the amended information charged Carter with criminal possession of a firearm in violation of Connecticut General Statutes § 53a-217(a)(1). The statute provides that a "person is guilty of criminal possession of a firearm . . . when such person possesses a firearm . . . and . . . has been

convicted of a felony . . . ." Count four of the amended information provided:

And the said Attorney further accuses said defendant of the crime of CRIMINAL POSSESSION OF A FIREARM, in violation of Connecticut General Statutes § 53a-217(a)(1), and charges that at or near 479 Garden Street, Hartford, Connecticut on or about July 4, 2001 at approximately 6:45 P.M., the defendant, having previously been convicted of a felony, possessed a firearm.

Answer App. B at 14. Again, the language of count four clearly tracks the statutory language.

Carter argues that the amended information is insufficient to put him on notice of the charges against him<sup>1</sup> because the state did not specify the type of firearm and refers the court to Russell v. United States, 369 U.S. 749 (1962). In Russell, the defendants were charged with refusing to answer questions put to them by the House Committee on Un-American Activities. The Supreme Court previously had ruled that a witness could refuse to answer a question if that question were not pertinent to the matter under inquiry. The indictment at issue in Russell failed to identify the matter under inquiry by the Committee. Thus, the

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<sup>1</sup>Carter also states that the state failed to respond to his motion for a bill of particulars, filed in March 2002. The record reveals, however, that in response to his motion, the state filed a long-form information in April 2002, and an amended information in May 2002. Carter did not file another motion for a bill of particulars after the long-form information or amended information and refers to no evidence suggesting that the information contained in the amended information was insufficient for him to prepare his defense. See Resp'ts' Answer App. B at 11-14.

Court held that the indictment was insufficient because, without knowing the matter under inquiry, the defendants could not determine whether the questions at issue were pertinent to the matter under inquiry. Thus, the defendants were not sufficiently informed of what they should defend against. See Id. at 764, 768.

Carter also relies on Castillo v. United States, 530 U.S. 120 (2000). In that case, the defendants were charged, inter alia, with violating 18 U.S.C. § 924(c)(1),<sup>2</sup> which prohibits knowingly using or carrying a firearm during the commission of a crime of violence. The Court determined that, because the possible punishment varied with the type of firearm used, the type of firearm was an element of the crime, thus it must be included in the indictment.

These cases are not relevant to crimes with which Carter was charged. Under Connecticut law, a firearm is defined as "any sawed-off shotgun, machine gun, rifle, shotgun, pistol, revolver or other weapon, whether loaded or unloaded from which a shot may

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<sup>2</sup>That section provides in relevant part: "any person who, during and in relation to any crime of violence . . ., uses or carries a firearm . . . shall, in addition to the punishment provided for such crime of violence . . ., be sentenced to a term of imprisonment of not less than five years . . . [and if the firearm . . . is a short barreled rifle [or a] short barreled shotgun, the person shall be sentenced to a term of imprisonment of not less than ten years[] or [if the firearm] is a machinegun or a destructive devise, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than thirty years."

be discharged.” Conn. Gen. Stat. § 53a-3(19). Thus, as respondents contend, Carter could be convicted of the three crimes, assault in the first degree, attempted assault in the first degree and criminal possession of a firearm, included in counts one, two and four of the amended information if he possessed any firearm. The type of firearm is not an element of any of the crimes and the possible punishment was not dependent on the type of firearm used.

In addition to tracking the statutory language, the amended information identifies each crime by name and statutory provision and provides the place, date and time of the each crime as well as the actual<sup>3</sup> and intended victims. The court concludes that the amended information complies with the federal requirements. The failure to specify the firearm in the amended information, did not violate Carter’s right to proper notice of the charges against him. Carter’s conviction on counts one, two and four of the amended information is not in violation of the constitution or federal law.

## 2. Count Three of the Amended Information

Carter challenges his conviction on the third count of the amended information on the ground that the amended information did not include all of the elements of the statute, thereby

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<sup>3</sup>The actual victim’s name was included in the amended information. It has been redacted in the copies filed in this case.

depriving Carter of proper notice of charge of risk of injury to a child.

Connecticut General Statutes § 53-21(a) (1) provides:

Any person who (1) wilfully or unlawfully causes or permits any child under the age of sixteen years to be placed in such a situation that the life or limb of such child is endangered, the health of such child is likely to be injured or the morals of such child are likely to be impaired, or does any act likely to impair the health or morals of any such child . . . shall be guilty of a class C felony . . . .

Thus, section 53a-21(a) (1) contains two provisions. A person may be convicted of risk of injury to a child if he wilfully or unlawfully causes a child to be placed in a situation where the child's life or limb is endangered, the child's health is likely to be injured or the child's morals are likely to be impaired. A person may be convicted of risk of injury to a child under the second provision if he "does any act likely to impair" the child's health. See State v. McClary, 207 Conn. 233, 240, 541 A.2d 96, 99 (1988) (holding that the second provision of section 53a-21(a) (1) requires no intent to injure the child; the only intent required is intent to perform the action that caused the injury to the child).

Count three of the amended information stated:

And the said Attorney further accuses said defendant of the crime INJURY TO A CHILD, in violation of Connecticut General Statutes § 53-21(a) (1), and charges that at or near 479 Garden Street, Hartford, Connecticut on or about July 4, 2001 at approximately 6:45 P.M., the defendant discharged a firearm and thereby impaired the health of [redacted], a child

under sixteen years of age.

Answer App. B at 14. Thus, Carter was charged under the second provision of the statute.

Carter raised this claim before the Connecticut Appellate Court. Because Carter did not claim at trial that he lacked proper notice of this charge, the Connecticut Appellate Court reviewed the claim under the standard for unpreserved claims of error and found that count three of the amended information was sufficient to put Carter on notice of the charge against him.

The sixth amendment to the United States constitution and article first, § 8 of the Connecticut constitution guarantee a criminal defendant the right to be informed of the nature and cause of the charges against him with sufficient precision to enable him to meet them at trial.... When the state's pleadings have informed the defendant of the charge against him with sufficient precision to enable him to prepare his defense and to avoid prejudicial surprise, and were definite enough to enable him to plead his acquittal or conviction in bar of any future prosecution for the same offense, they have performed their constitutional duty.... A defendant can gain nothing from [the claim that the pleadings are insufficient] without showing that he was in fact prejudiced in his defense on the merits and that substantial injustice was done to him because of the language of the information.... Further, [w]e have held that [u]nder our practice, it is sufficient for the state to set out in the information the statutory name of the crime with which the defendant is charged, leaving to the defendant the burden of requesting a bill of particulars more precisely defining the manner in which the defendant committed the offense."

(Citations omitted; internal quotation marks omitted.)  
State v. Spigarolo, supra, 210 Conn. at 381-82, 556 A.2d 112.

Count three charged [Carter] with injury to a minor in that he "discharged a firearm and thereby impaired the health of [the victim], a child under sixteen years of



age." Further, count three enumerated the specific statute, § 53-21(a)(1), under which [Carter] was charged.

Here, the count in question clearly apprised [Carter] of the specific statute that he had violated and the nature of the violation. As a consequence, [Carter's] final claim fails.

State v. Carter, 84 Conn. App. at 282-83, 853 A.2d at 576-77.

Carter now argues:

Because the states pleadings do not state that "the discharged firearm" was either "willful or unlawful" and that it either "placed the child in a situation" "thereby impairing the health" or it was "an act likely to impare the health" of the child, the states pleading in count 3 is defective for not alleging elements clearly expressed in the language of the statue.

Pet. at second unnumbered page following page 8.

As stated above, an indictment or information need only put the criminal defendant on notice of the elements of the crime with which he has been charged and make him aware of what he must defend against. See Debrow, 346 U.S. at 376. The provision of the statute under which Carter was charged did not require that his action of discharging the firearm be wilful or unlawful. Thus, Carter's claim lacks merit. The court concludes that count three of the amended information put Carter on notice of the crime with which he had been charged and the decision of the Connecticut Appellate Court affirming Carter's conviction on this count was neither contrary to nor an unreasonable application of Supreme Court law. Accordingly, the petition is denied on this ground.

IV. Conclusion

The petition for writ of habeas corpus [**doc. #1**] is **DENIED**. The Clerk is directed to enter judgment in favor of respondents and close this case.

The court concludes that Carter has not shown that he was denied a constitutionally or federally protected right. Thus, any appeal from this order would not be taken in good faith and a certificate of appealability will not issue.

**SO ORDERED** this 29th day of July, 2005, at New Haven, Connecticut.

\_\_\_\_\_/s/\_\_\_\_\_  
Janet Bond Arterton  
United States District Judge