

**UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT**

PAUL S. VARSZEGI,	:	
Petitioner	:	
	:	
v.	:	Civil Action No.
	:	3:97 CV 910 (CFD)
JOHN ARMSTRONG,	:	
Respondent	:	

RULING ON PETITION FOR WRIT OF HABEAS CORPUS

The petitioner, Paul Varszegi, an inmate confined at the State of Connecticut Garner Correctional Institution at Newtown, Connecticut, brings this action pro se for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. For the reasons set forth below, the petition is denied.

I. Procedural Background

On December 4, 1992, a jury found the petitioner (“Varszegi”) guilty of attempted escape in the first degree in violation of §§ 53a-49 and 53a-169(a) of the Connecticut General Statutes and criminal mischief in the second degree in violation of Connecticut General Statute 53a-116(a)(1) in the Connecticut Superior Court. Those charges related to an attempted escape from the State of Connecticut Bridgeport Correctional Center. On February 19, 1993, the trial court sentenced Varszegi to a total effective sentence of seven years’ imprisonment.¹ On January 13,

¹Varszegi’s seven year state sentence has expired and he is currently serving a five year state sentence imposed on December 3, 1999 for harassment in violation of Conn. Gen. Stat. § 53a-182b. He is also serving a concurrent 240 month federal sentence for conspiracy to import cocaine in violation of 21 U.S.C. § 963 (1990). U.S. v. Varszegi, CR No. B90-66 (D. Conn. April 10, 1992). The five year state sentence will expire on June 2, 2005 and the balance of his federal sentence will begin. Though Varszegi’s sentence for the conviction which he challenges in the present habeas petition has expired, the Court retains habeas jurisdiction under Garlotte v. Fordice, 515 U.S. 39 (1995) (petitioner who is serving consecutive state sentences is “in custody” pursuant to § 2254 and may attack a sentence, even after it has expired, until all sentences have been served).

1995, the Appellate Court of Connecticut affirmed the judgment on direct appeal.² See State v. Varszegi, 653 A.2d 201 (Conn. App. 1995). On March 15, 1995, the Connecticut Supreme Court granted certification in part,³ see State v. Varszegi, 659 A.2d 184 (Conn. 1995), and on March 19, 1996, the Connecticut Supreme Court affirmed the judgment of conviction. See State v. Varszegi, 673 A.2d 90 (Conn. 1996).

Varszegi filed the present petition for federal habeas corpus relief pursuant to 28 U.S.C. § 2254 on May 12, 1997.⁴ In support of his petition, Varszegi claims that the trial court wrongfully

²On appeal, Varszegi claimed that “(1) he did not knowingly and intelligently waive his right to counsel, (2) the impeachment of his credibility by a conviction which was later vacated on appeal violated his constitutional rights, (3) the trial court improperly rejected his defense of necessity, and (4) the trial court improperly admitted into evidence two prior failure to appear convictions.” Varszegi, 653 A.2d at 203.

³The Connecticut Supreme Court granted certification on the following questions: “(1) Was the defendant deprived of a constitutional right when he was impeached at trial by evidence of a prior conviction that was subsequently reversed on the ground of insufficient evidence? (2) If there was such a deprivation, was the error harmless? 3) Was the Appellate Court correct in holding that an objective test is employed in determining whether the defendant was entitled to have submitted to the jury the defense of necessity?” Varszegi, 659 A.2d 184.

⁴The Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), Pub. L. No. 104-132 (Apr. 24, 1996), 110 Stat. 1214 (1996), applies in this case, because Varszegi’s petition postdates the AEDPA. There is a question, not raised by the parties, as to whether the instant petition was filed within the AEDPA limitations period. Under Title I of the AEDPA, Varszegi has one year after the date his conviction became final in which to file a federal habeas petition. 28 U.S.C. § 2244(d)(1) (the limitations period begins to “run from . . . the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review”); see also Williams v. Artuz, 237 F.3d 147, 151 (2d Cir. 2001) (one-year statute of limitations set forth in § 2244(d)(1)(A) begins to run only after “the completion of direct appellate review in the state court system and . . . the completion of certiorari proceedings in the United States Supreme Court. . .”). However, a petitioner whose conviction became final prior to the AEDPA’s effective date of April 24, 1996, has a one-year grace period after April 24, 1996 in which to file a first habeas petition. Ross v. Artuz, 150 F.3d 97, 102-03 (2d Cir. 1998). Additionally, “[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” the limitations period. 28 U.S.C. § 2244(d)(2); Bennett v. Artuz, 199 F.3d 116,

refused to submit his defense of necessity to the jury in violation of the Due Process Clause of the Fourteenth Amendment. He argues that a subjective standard must be used in determining whether circumstances existed that support a necessity defense and that, even under an objective standard, he presented sufficient evidence to entitle him to such an instruction. Additionally, Varszegi claims to have discovered new evidence which would have provided additional support for his defense of necessity.

For the reasons below, the petition for habeas corpus relief is DENIED.

II. Factual Background

Based on the evidence at trial, the Connecticut Supreme Court determined that the jury could have reasonably found the following facts:

On March 1, 1992, the defendant was incarcerated at the Bridgeport correctional center. After having noticed suspicious activity in the defendant's cell, a correction officer inspected the cell and found a hacksaw, which had been used to cut the bars on the cell window. The defendant admitted to the officer that he had cut the bars on the window. The defendant was charged with attempted escape in the first degree and criminal mischief in the second degree.

Varszegi, 672 A.2d at 92. At trial, Varszegi testified and introduced other evidence that he attempted to escape because: (1) he was fearful of assault by other inmates; (2) he was not

118-19 (2d Cir. 1999), aff'd, 531 U.S. 4 (2000). Further, under appropriate circumstances, the limitations period is subject to equitable tolling. See Smith v. Mc. Ginniss, 208 F.3d 13, 17 (2d. Cir. 2000).

Absent circumstances that warrant equitable tolling, Varszegi had until April 24, 1997 to file his petition. He filed the petition, however, on May 12, 1997, and the record does not reflect a petition for certiorari filed with the U.S. Supreme Court, which would have extended his limitations period. See Smaldone v. Senkowski, 273 F.3d 133 (holding that AEDPA limitations period for habeas petitions was not tolled during 90-day period following conclusion of state post-conviction relief proceedings during which petitioner could have, but did not, pursue certiorari in the U.S. Supreme Court). As the parties have neither raised nor addressed this issue, however, the Court declines to deny the petition on this basis.

receiving proper medical care; and (3) he was in danger of contracting tuberculosis. See id.

Specifically,

the defendant testified that his attempted escape was necessary to preserve his life. He claimed that certain gang factions in the Bridgeport correctional center had threatened his life if he did not pay them for his personal protection. He further testified that, after he paid certain extortion fees, gang members had placed a “shank” to his throat and threatened him with death if he did not increase the payments. He claimed that a “code of silence” operated within the correctional center, the effect of which was to enforce the extortion scheme.

In addition, the defendant testified that during his incarceration he suffered from a serious medical condition for which, despite repeated requests, he had received no treatment. He further testified that he faced a continuous threat of contracting tuberculosis in prison and that this situation constituted a specific threat to his life.

Id. at 97 (footnotes omitted).

III. Exhaustion of State Court Remedies

A prerequisite to habeas relief under § 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). Ordinarily, the exhaustion requirement has been satisfied if the federal issue has been properly and fairly presented to the highest state court either by collateral attack or direct appeal. See O’Sullivan, 526 U.S. at 843. “[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.” Pesina v. Johnson, 913 F.2d 53, 54 (2d Cir. 1990).

The Second Circuit requires the district court to conduct a two-part inquiry as to exhaustion. First, Varszegi must have raised before an appropriate state trial court any claim that he asserts in a federal habeas petition. Second, he must “utilize[] 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)).

In his federal habeas petition, Varszegi contends that he was deprived of his “right under the due process clause of the Fourteenth Amendment to present a defense” when the trial court refused to instruct the jury on his asserted defense of necessity to the charge of escape. Varszegi raises three grounds in support of this claim. He argues that: (1) a subjective, rather than objective, standard must be used in determining whether circumstances existed that support a necessity defense, (2) he presented sufficient evidence to entitle him to such an instruction under either an objective or subjective standard, and (3) he has discovered new evidence which would have provided additional support for his defense of necessity.

Varszegi raised before the state trial court, and on direct appeal in the Appellate Court, his claims that a subjective, rather than objective, standard must be used in determining whether circumstances existed that support a necessity defense and that he presented sufficient evidence to entitle him to such an instruction under either an objective or subjective standard. He also presented such arguments to the Connecticut Supreme Court, and that court granted certification in part on the question of whether a subjective, rather than objective, standard must be used in determining whether circumstances existed that support a necessity defense.⁵ Accordingly,

⁵As the Connecticut Supreme Court did not grant certification on the issue of whether Varszegi presented sufficient evidence to entitle him to such an instruction under either an objective or subjective standard, the Appellate Court’s decision on that issue constitutes

Varszegi has “utilized all available mechanisms to secure appellate review” of his claims that a subjective standard must be used in determining whether circumstances existed that support a necessity defense and that he presented sufficient evidence under either an objective or subjective standard.

As to Varszegi’s claim that newly discovered evidence would have provided additional support for his defense of necessity, that claim has not been exhausted. The AEDPA, however, provides that in its discretion, a court may deny on the merits a petition containing an unexhausted claim. See 28 U.S.C. 2254(b)(2) (court has discretion to deny on the merits habeas petitions containing unexhausted claims).⁶ In exercising such discretion, the Court denies Varszegi’s habeas petition as follows.⁷

exhaustion of the claim.

⁶The AEDPA “does not provide a standard for determining when a court should dismiss a petition on the merits rather than requiring complete exhaustion.” Lambert v. Blackwell, 134 F.3d 506, 514 (3d Cir.1998). However, the Supreme Court held in Granberry v. Greer, 481 U.S. 129, 135 (1987), albeit before the AEDPA was enacted, that it is appropriate for a court to address the merits of unexhausted § 2254 federal habeas corpus claims if they fail, as here, to raise even a colorable federal claim, and if the interests of justice would be better served by addressing the merits of the habeas petition. Granberry reasoned that if the court “is convinced that the petition has no merit, a belated application of the exhaustion rule might simply require useless litigation in the state courts.” Id. at 133; see also Ramos v. Keane, No. 98 Civ. 1604 (DLC), 2000 WL 12142, at *5 (S.D.N.Y. Jan. 6, 2000) (dismissing unexhausted claim where “it is obvious, based on established law and a relatively quick reading of the record, that the claim does not raise any issue upon which a habeas court may grant relief.”) (quoting Norman v. New York, No. 97 Civ. 7051(MBM), 1999 WL 983869, at *5 (S.D.N.Y. Oct. 29, 1999)). As the Court makes clear in section IV(B)(3), Varszegi’s newly discovered evidence claim lacks any colorable merit. Accordingly, the Court will not require exhaustion of this claim.

⁷The Court also notes that, even assuming the instant petition was timely, it is likely that the statute of limitations in the AEDPA has run on Varszegi’s unexhausted claim. The filing of a federal habeas petition does not toll the limitations period for any unexhausted claims. See Duncan v. Walker, 533 U.S. 167 (2001) (holding that application for federal habeas review is not an “application for State post-conviction or other collateral review,” within meaning of tolling

IV. Review of Petitioner's Exhausted Claims

At the outset, the Court notes that “it is not the province of a federal habeas court to reexamine state-court determinations of state-law questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States.” Davis v. Strack, 270 F.3d 111, 123 (2d Cir. 2001) (quoting Estelle v. McGuire, 502 U.S. 62, 67-68 (1991)). Where an error with regard to a jury instruction is alleged, “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.” Id. (quoting Cupp v. Naughten, 414 U.S. 141, 146 (1973)). Such is established, not merely where the instruction was faulty or where the trial court failed to give the instruction, but where the error “so infected the entire trial that the resulting conviction violates due process.” Id. (quoting Cupp, 414 U.S. at 147). Keeping in mind that “[s]tates are free to define the elements of, and defenses to, crimes,” id., a court may grant habeas relief for a failure to give a jury charge where the evidence supported such a charge under state law only “where the erroneous failure to give such charge was sufficiently harmful to make the conviction unfair.” Id. at 123-24.

Under this rubric, the Court must answer three questions in order to examine Varszegi's claim that the trial court violated his right to due process in failing to submit his defense of necessity to the jury: (1) was the necessity defense required as a matter of Connecticut law?; (2) if

provision of the AEDPA); Neverson v. Bissonnette, 261 F.3d 120, 125-126 (2d Cir. 2001) (holding that AEDPA limitations period was not tolled during the pendency of petitioner's earlier, federal habeas corpus petition). Thus, it is likely that a return to state court to exhaust this claim would be futile.

so, was the failure to give the charge sufficiently harmful to make the conviction unfair?; and (3) was the state court's failure of such a nature that it is remediable by habeas corpus, given the limitations prescribed by 28 U.S.C. § 2254? See id. at 124 (enumerating such factors). At the outset, the Court notes that, in assessing Varszegi's claim, the Court is required to defer to the state court's factual determinations. See 28 U.S.C. § 2254(d); Matusiak v. Kelly, 786 F.2d 536, 543 (2d Cir. 1986). Varszegi has the burden of rebutting that presumption by clear and convincing evidence. See 28 U.S.C. § 2254(d); see also Houchin v. Zavaras, 107 F.3d 1465, 1470 (10th Cir. 1997) (AEDPA increases deference afforded state court factual determinations); Ford v. Ahitow, 104 F.3d 926, 935 (7th Cir. 1997) (AEDPA requires federal courts to give greater deference to state court determinations than they were required to do prior to the amendment of § 2254).

A. Was a Jury Instruction on a Necessity Defense Required Under Connecticut Law?

In Connecticut, the common law defense of necessity, though not statutorily defined, is available to Connecticut defendants in certain limited circumstances. See State v. Woods, 583 A.2d 639, 640 (Conn. App. 1990) (citing State v. Messler, 562 A.2d 1138 (Conn. App. 1989), and State v. Drummy, 557 A.2d 574 (Conn. App. 1999)).⁸ A defendant's right to such a jury instruction is not a matter of course; before an instruction is warranted, a defendant "bears the initial burden of producing sufficient evidence to inject [the defense] into the case" State v. Carter, 656 A.2d 657 (Conn. 1995) (citations omitted) (internal quotation marks omitted); see also Woods, 583 A.2d at 640. If the court determines that there is sufficient evidence available to

⁸The common law defense of necessity is preserved under the savings statute, Conn. Gen. Stat. § 53a-4, and is thus available to the same extent as the statutorily defined defenses of Chapter 951. See Woods, 583 A.2d at 640.

support the defense of necessity, the defendant is entitled to the defense of necessity instruction as a matter of law. See Woods, 583 A.3d at 640-41.

A defendant charged with attempted prison escape is entitled under Connecticut law to a defense of necessity if he presents sufficient evidence that: (1) he was faced with a specific threat of death, forcible sexual attack, or substantial bodily injury in the immediate future; (2) there was no time for a complaint to the authorities or there exists a history of futile complaints which make any result from such complaints illusory; (3) there was no time or opportunity to resort to the courts. See id. at 641 (adopting the test in People v. Lovercamp, 118 Cal. Rptr. 110 (Cal. App. 1975)).⁹ Varszegi urged the trial court to apply this test viewing the facts from the defendant's subjective point of view. See Varszegi, 673 A.2d at 96 (noting that the defendant asked the trial court "to establish a new standard, under which facts are viewed subjectively, for determining whether, if a defendant has been charged with escape from prison, the common law defense of necessity is available"). However, the trial court rejected that such a subjective standard should apply.

The Appellate Court agreed, holding that "[i]t is inconsistent with the strict limitations of the necessity defense to determine their satisfaction from the defendant's subjective point of view." Varszegi, 653 A.2d at 206. Affirming this holding, the Connecticut Supreme Court stated:

⁹In the instant case, the trial court opined, and the Connecticut Appellate and Supreme Courts agreed, that the fourth and fifth prongs of the Lovercamp test ("(4) there is no evidence of force or violence used towards prison personnel or other innocent persons in the escape; and (5) the prisoner immediately reported to the proper authorities when he attained a position of safety from the immediate threat") are not relevant when a defendant is charged with *attempted* escape. See Varszegi, 673 A.2d at 98 n.18.

At the outset, we note that the defendant has not cited, nor has our research disclosed, any support for the subjective standard that he advocates. Indeed, the objective standard is well established as the approach used in most jurisdictions that have considered the issue in applying the Lowercamp criteria. We find no reason to reject the majority rule regarding the use of an objective standard.

The objective standard is supported by the compelling rationale that the utilization of a subjective standard would be highly impractical in the context of prison escapes. Prisons are not places where reasonable people desire to find themselves. At best, prison conditions are chilling. As the California Court of Appeals cogently noted, “[i]t takes little imagination to conjure stories which could be used to indicate that to the subjective belief of the prisoner, conditions in prison are such that escape becomes a necessity.” People v. Lowercamp, *supra*, 43 Cal.App.3d at 826, 118 Cal.Rptr. 110. Because of the potential for contrived allegations about prison conditions that could constitute the elements of a necessity defense, the defense must be a limited one. In recognition of this, the California Court of Appeals set forth criteria not in terms of the subjective beliefs of a defendant, but in terms of facts that actually are found to exist. *Id.*, at 831, 118 Cal.Rptr. 110 (availability of defense is established “if the following conditions exist” [emphasis added]). “[The subjective] approach would be most unwise as subjective beliefs are easily fabricated and almost impossible to disprove.” United States v. Lopez, *supra*, 885 F.2d at 1433-34. Moreover, “[t]he necessity defense embodies the underlying rationale that public policy favors the commission of a lesser harm (the commission of what otherwise would be a crime) when this would avoid a greater harm.” (Internal quotation marks omitted.) Note, “Escape from Cruel and Unusual Punishment: A Theory of Constitutional Necessity,” 59 B.U.L.Rev. 334, 338 (1979). In other words, because the necessity defense in prison escape cases rests on the principle of justification, we are, in essence, balancing the competing evils of the escape of a legitimately incarcerated person against prison conditions that would specifically threaten that prisoner’s life. Even if justified, however, the “lesser evil,” namely, the presence of an escaped prisoner in our society, is significant. As a matter of public policy, in such a situation we must adopt a standard governing the availability of the defense that provides the most strict indicia of reliability. That standard is the objective one. “To hold otherwise would be to allow escapees the benefit of a necessity defense whenever they claim that they [satisfied the criteria] because, subjectively, they still feared for their lives.” United States v. Lopez, *supra*, 885 F.2d at 1433. We conclude that the objective standard best comports with the narrow parameters that must attend the necessity defense in prison escape cases. The defendant, therefore, was not entitled to a jury instruction on this defense.

Varszegi, 673 A.2d at 99-100 (footnotes omitted).¹⁰

The Court finds that the trial court's use of an objective standard was in keeping with the requirements of Connecticut law. Indeed, the court in Woods viewed the evidence in an objective manner, finding that "there was no credible evidence of an immediate threat to the defendant," and "there was no evidence that the defendant's complaints were futile." Id. at 621. An objective standard follows the logic in Woods that "the application of the necessity defense to criminal escapes must be strictly interpreted" in order to balance the "public's interest in preventing escapes from legitimate detentions with the escaping prisoner's individual exigencies." Woods, 583 A.2d at 641-42.

Turning to Varszegi's claim that, even under an objective standard, he presented sufficient evidence to entitle him to a defense of necessity, Varszegi asserted in the trial court that he attempted to escape because "(1) he was fearful of assault by other inmates, (2) he was not receiving proper medical care, and (3) he was in danger of contracting tuberculosis"

Varszegi, 673 A.2d at 92. As to his allegation regarding threats of assault by other inmates, the trial court found that:

although the defendant testified that he was threatened with substantial bodily injury, he had not reported [the shank episode] to prison authorities despite having three days to do so. The defendant also testified to other threats, none of which were reported to prison authorities. In addition, the trial court found that although the defendant was represented by counsel, to whom he had spoken at the jail, he failed to avail himself of the opportunity to resort to the court.

Varszegi, 653 A.2d at 206. As to Varszegi's claim that was not receiving proper medical care and was in danger of contracting tuberculosis:

¹⁰U.S. v. Lopez was overruled on other grounds by Schmuck v. United States, 489 U.S. 705 (1989).

[t]he trial court found that the defendant's medical complaints were not futile even though they were not answered to his satisfaction. The trial court found that the defendant's fear of a tuberculosis epidemic was not founded in fact. The defendant would have us believe that his fear of contracting tuberculosis was realized, as shown in a subsequent physical examination. In fact, the subsequent tests showed only that the defendant had been exposed to tuberculosis, not that he had contracted the disease.

Varszegi, 653 A.2d at 206. The trial court thus concluded that Varszegi had failed to present legally sufficient evidence to warrant a jury instruction on the defense of necessity. The Appellate Court agreed with the trial court's conclusion.

Applying the AEDPA's deferential standard of review to factual findings, the Court concludes that the trial court did not err in determining that the evidence, when viewed objectively, did not satisfy the elements required under Connecticut law to submit the defense of the necessity to the jury. As in Woods, the petitioner in the instant case did not establish the existence of a credible threat of death, forcible sexual attack, or substantial bodily injury. See id. Moreover, Varszegi did not establish a history of futile complaints or an exigency that made complaints or resort to the courts impossible. See id. Accordingly, the Court finds that the trial court's denial of an instruction on the defense of necessity was not in violation of Connecticut law.

B. Application of 28 U.S.C. § 2254(d)

The AEDPA significantly amended 28 U.S.C. §§ 2244, 2253, 2254, and 2255. The amendments "place[] a new constraint" 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. Williams v. Taylor, 529 U.S. 362, 412 (2000) (opinion of O'Connor, J). Under the AEDPA,

An application for a writ of habeas corpus on behalf of a person in custody

pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(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).

As noted above, when reviewing a habeas petition under the standards set forth in the AEDPA, the federal court presumes that the factual determinations of the state court are correct. Moreover, collateral review of a conviction is not merely a “rerun of the direct appeal.” Lee v. McCaughey, 933 F.2d 536, 538 (7th Cir.), cert. denied, 502 U.S. 895 (1991). Thus, “an error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment.” Brecht v. Abrahamson, 507 U.S. 619, 634 (1993) (citations and internal quotation marks omitted).

1. Was the Instant Case Adjudicated on the Merits?

Varszegi contends that he was deprived of his “right under the due process clause of the Fourteenth Amendment to present a defense” when the trial court refused to instruct the jury on his asserted defense of necessity to the charge of escape. The standards set forth in the AEDPA only apply “with respect to any claim that was adjudicated on the merits in State court proceedings.” 28 U.S.C. § 2254(d). State court decisions adjudicating federal claims are afforded deference under the AEDPA when a state court “(1) disposes of the claim ‘on the merits,’ and (2) reduces its disposition to judgment.” Sellan v. Kuhlman, 261 F.3d 303, 312 (2d

Cir. 2001). The Court determines whether a state court has disposed of a petitioner's claim on the merits by considering:

(1) what the state courts have done in similar cases; (2) whether the history of the case suggests that the state court was aware of any ground for not adjudicating the case on the merits; and (3) whether the state court's opinion suggests reliance upon procedural grounds rather than a determination on the merits.

Id. at 314 (quoting Mercadel v. Cain, 179 F.3d 271, 274 (5th Cir.1999)). Pursuant to that test, the Court finds that the state courts in the instant case adjudicated the case on the merits.¹¹ First, Connecticut courts have engaged in inquiries similar to those undertaken by the state courts in the instant case when determining whether a defendant has submitted legally sufficient evidence to warrant a jury instruction on the defense of necessity. See State v. Woods, 583 A.2d 639 (Conn. App. 1990). Second, the history of the case does not suggest that the state courts were aware of any ground by which they could have decided the case without adjudicating it on the merits. Third, the state court opinions do not rely upon procedural grounds for a determination, but squarely address the substance of the claims here. Accordingly, Varszegi's case has been adjudicated on the merits for the purposes of the AEDPA.

2. Review of Varszegi's First Claim

Under subsection (1) of § 2254(d), in determining whether the Connecticut Supreme Court decision regarding the use of an objective standard was contrary to, or involved an unreasonable application of federal law, the Court must first ascertain whether Varszegi “seeks to apply a rule of law that was clearly established at the time his state-court conviction became

¹¹As both the Appellate Court and Connecticut Supreme Court issued rulings that constitute final state court determinations on the contested issues—the Supreme Court on the objective standard issue and the Appellate Court on the sufficiency of the evidence issue—the Court must examine each ruling under the relevant AEDPA standard of review.

final.” Lurie v. Wittner, 228 F.3d 113, 125 (2d Cir. 2000) (quoting Williams, 529 U.S. at 390). Federal law is clearly established if it may be found in holdings, not dicta, of the U.S. Supreme Court as of the date of the relevant state court decision. See id. (citing Williams, 529 U.S. at 412). A rule of law is “clearly established” if the Supreme Court precedent “‘dictated’ an outcome and the rule sought to be applied d[oes] not ‘break[] new ground or impose[] a new obligation on States.’” Vasquez v. Strack, 228 F.3d 143, 148 (2d Cir. 2000) (quoting Teague v. Lane, 489 U.S. 288, 301 (1989)).

Varszegi’s first claim is that the Fourteenth Amendment Due Process Clause guarantees him a right to present a defense of necessity to prison escape, when the facts, viewed from the perspective of the prisoner, necessitated escape. Varszegi has not cited, nor can the Court find, Supreme Court precedent indicating that the Due Process Clause requires the use of a subjective standard in determining whether a defendant has presented sufficient evidence to entitle him to a jury instruction on the defense of necessity. In fact, the only relevant authority indicates that an objective standard ought to be used. In U.S. v. Bailey, involving the appeal of a federal criminal conviction of escape in violation of 18 U.S.C. § 751, the Supreme Court appears to have endorsed the use of an objective standard in determining whether a defendant is entitled to claim a defense of duress or necessity in a federal criminal trial for prison escape. See U.S. v. Bailey, 444 U.S. 394, 411 (1980). The Court maintained that a defendant is entitled to claim such a defense if “given the imminence of the threat, [prison escape] was his only reasonable alternative.” Bailey, 444 U.S. at 411 (emphasis added); see also id. n.8 (citing cases and code for proposition that, in necessity or duress defense, circumstances must be viewed from point of view of “a person of reasonable firmness in his situation”). Accordingly, the Supreme Court has not “clearly

established” the rule Varszegi is seeking to apply with regard to his first claim. Furthermore, as Varszegi’s first claim involves a pure question of law, the Court need not examine the Connecticut Supreme Court’s decision under subsection (2) of § 2254(d)—whether the decision was based on an unreasonable determination of the facts in light of the evidence presented. Accordingly, Varszegi may not obtain federal habeas relief for his first claim.

3. Review of Varszegi’s Second Claim

The Court also finds that it cannot grant relief under subsection (1) of § 2254(d) for Varszegi’s second claim—that he presented sufficient evidence to entitle him to such an instruction under the Due Process Clause. Again, the law he is seeking to apply is not “clearly established.” While it relates to such an inquiry, Bailey does not clearly establish a defendant’s Fourteenth Amendment due process right to a particular jury instruction in a state criminal trial of prison escape. Varszegi has not pointed to, nor can the Court find, any other cases clearly establishing the law governing such a claim. Accordingly, the Court reviews Varszegi’s second claim only under § 2254(d)(2).

Under § 2254(d)(2), Varszegi may obtain federal habeas relief if the Appellate Court’s decision regarding the insufficiency of Varszegi’s evidence to demonstrate entitlement to a jury instruction on the defense of necessity, was an “unreasonable determination in light of the facts presented.” As noted above, Varszegi claimed three theories in support of his claim of necessity. Varszegi claimed that he attempted to escape because “(1) he was fearful of assault by other inmates, (2) he was not receiving proper medical care, and (3) he was in danger of contracting tuberculosis” Varszegi, 673 A.2d at 92. Employing the test established in Lovercamp, and adopted by Woods, and reviewing the evidence on an objective basis, Appellate Court agreed

with the trial court's conclusion that Varszegi had failed to present legally sufficient evidence to warrant a jury instruction on the defense of necessity.

Presuming, as the Court must, the state court's factual determinations to be true, the Court finds that the Appellate Court's decision regarding the insufficiency of Varszegi's evidence to demonstrate entitlement to a jury instruction on the defense of necessity was not based on an "unreasonable determination of the facts" in light of the evidence presented. As noted above, Varszegi did not establish the existence of a credible threat of death, forcible sexual attack, or substantial bodily injury. Moreover, Varszegi did not establish a history of futile complaints or an exigency that made complaints or resort to the courts impossible. Accordingly, the Court finds that the Appellate Court's decision was not based on an "unreasonable determination of the facts" in light of the evidence presented.

IV. Petitioner's Claim of Newly Discovered Evidence

Although Varszegi's claim of newly discovered evidence has not been exhausted in the state courts, the Court, in exercising its discretion to deny on the merits an unexhausted claim, and reviewing the claim de novo, rejects that Varszegi's newly discovered evidence merits habeas relief. Varszegi maintains that "newly discovered" documents would have provided additional support for his defense of necessity because his "[underlying] mental illness had greatly contributed to Varszegi's fear and bad judgment to escape and would have justified his action for fear of his own life." Pet'r's Br. at 8. The Court, however, has already found that the trial court's view of the facts giving rise to the necessity defense from the perspective of a reasonable person, rather than subjectively as the defendant perceived them, was proper in light of Connecticut and federal law. Accordingly, the "newly discovered" documents regarding

Varszegi's state of mind at the time of his attempted escape would not have been relevant to Varszegi's necessity defense.

Moreover, Varszegi's evidence is not "newly discovered." Varszegi has forwarded to the Court some of the documents he claims constitute new evidence. Those include: (1) seventeen forms signed by a Dr. Mankowitz and requesting that Varszegi report to the Counseling Center at Andrew Warde High School during the period October 22, 1974 through February 17, 1976, and (2) a form DD 214 and certificate indicating that Varszegi was honorably discharged from the U.S. Marine Corps on April 7, 1976. Varszegi has also indicated his "new evidence" includes a psychiatric report prepared by a Dr. Mankowitz when Varszegi was eleven years old and a 1970 report authored by an individual named Dorothy Gondella. The record reflects that Varszegi sought to introduce to the trial court the same evidence he now claims is newly discovered. Varszegi requested, and the trial court denied, subpoenas for Mankowitz and Gondella, and the Veteran's Hospital where his military discharge papers were located. Accordingly, such evidence, even if it were probative on the necessity issue, is not "newly discovered."

V. Conclusion

The Court concludes that trial court's use of an objective standard in determining whether circumstances existed to support a defense of necessity, and its refusal to submit the defendant's claimed defense of necessity to the jury on the ground that the evidence presented did not support such a defense, did not violate Connecticut law. Moreover, the Appellate Court and Connecticut Supreme Court decisions affirming the trial court's ruling were neither contrary to federal law, nor applied federal law unreasonably to the facts of the case, nor were an unreasonable determination in light of the facts presented. The Court also finds that Varszegi's allegedly newly

discovered evidence would not have provided additional support for his defense of necessity.¹²

The petition for a writ of habeas corpus [Doc. #1] is DENIED. In addition, Varszegi's motion for a temporary restraining order [Doc. #37-1], motion for a preliminary injunction [Doc. #37-2], motion for a trial [Doc. #38-1], and motion for dismissal [Doc. #38-2] are DENIED. The Clerk is directed to enter judgment and close this case.

In addition, the court determines that the petition presents no question of substance for appellate review, and that Varszegi has failed to make a "substantial showing" of the denial of a federal right. See Barefoot v. Estelle, 463 U.S. 880, 893 (1983); Rodriguez v. Scully, 905 F.2d 24 (1990). Accordingly, a certificate of appealability will not issue.

SO ORDERED this ____ day of January 2002, at Hartford, Connecticut.

CHRISTOPHER F. DRONEY
UNITED STATES DISTRICT JUDGE

¹² A federal court is not required to hold an evidentiary hearing on issues presented in a habeas petition pursuant to 28 U.S.C. § 2254 unless the factual allegations asserted, if proved, would entitle the petitioner to relief. See Rivera v. Kuhlman, No. 95-2806, 1996 WL 346655, at *1, (2d Cir. June 25, 1996) (citing Tate v. Wood, 963 F.2d 20, 24 (2d Cir. 1992)). Because, as the Court has concluded, the allegations contained in Varszegi's petition, if proved, would be inadequate to show that the trial court wrongfully refused to submit his defense of necessity to the jury in violation of the Due Process Clause of the Fourteenth Amendment or that newly discovered evidence exists to support such claim, the Court finds that an evidentiary hearing is not required.