

**UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT**

CHRISTOPHER DUMAS,	:	
Petitioner,	:	
	:	
v.	:	Civil Action No. 3:00CV963(CFD)
	:	
DAVID STRANGE, WARDEN,	:	
Respondent.	:	

RULING

I. Introduction

The petitioner, Christopher Dumas (“Dumas”), an inmate confined at the State of Connecticut Carl Robinson Correctional Institution in Enfield, Connecticut, brings this action for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. For the reasons set forth below, the petition is denied.

II. Procedural Background

On June 25, 1997, after a court trial, a judge of the Connecticut Superior Court found Dumas guilty of one count of carrying a dangerous weapon in violation of § 53-206 of the Connecticut General Statutes; one count of criminal attempt to commit second degree larceny in violation of §§ 53a-49(a)(2) and 123(a)(3) of the Connecticut General Statutes; and one count of criminal attempt to commit first degree robbery in violation of §§ 53a-49(a)(2) and 134(a)(3) of the Connecticut General Statutes. (See Doc. # 7, Ex. D, Record in Conn. App. Ct., Judgment File, at 21-21a.) In addition, the court found that Dumas had violated the terms of his probation imposed as a result of a previous offense. (See id., at 21b-21c.) On September 18, 1997, the court sentenced Dumas to twelve years

imprisonment, execution suspended after eight years, to be served consecutive to a six year term of imprisonment for the probation violation. (See id. at 21-21c.) The court also sentenced Dumas to five additional years of probation. (See id.)

On September 14, 1999, the Appellate Court of Connecticut affirmed the judgment on direct appeal, see State v. Dumas, 739 A.2d 1251, 1264 (Conn. App. Ct. 1999), and later denied Dumas's motion for reargument or reargument en banc. (See Doc. # 10, Rul. Mot. Reargument En Banc, at 42a.) On December 7, 1999, the Connecticut Supreme Court denied Dumas's petition for certification. (See id., Ord. Pet. Cert. Appeal, at 43a.) The Connecticut Supreme Court also dismissed Dumas's "Motion to Supreme Court for Writ of Mandamus Directing the Appellate Court to Read the Defendant's Brief and Address the Issues Therein." (See id., Ord. Denying Mot. Writ, at 44a.)

Dumas filed the present petition for federal habeas corpus relief pursuant to 28 U.S.C. § 2254 on May 24, 2000. In support of his petition, Dumas claims that the evidence at trial was insufficient to support a finding of guilt beyond a reasonable doubt, in violation of the Due Process Clause of the Fourteenth Amendment of the United States Constitution. He further contends that his due process rights were violated when the court applied a "double standard" in refusing to permit an examination of the complainant's eyesight. Finally, he argues that his due process rights were violated when the prosecutor argued in his closing argument that the judge should draw a negative inference from the fact that Dumas contested the issue of identity during the trial, and

when the Connecticut Appellate Court failed to adequately consider this argument in its decision.¹

III. Factual Background

Based on the evidence at trial, the Connecticut Appellate Court stated that the following facts were necessary for resolution of Dumas's appeal:

On August 16, 1996, at approximately 9:15 a.m., the victim, Sheldon Taubman, was walking on a sidewalk in downtown New Haven. The defendant ran into the victim, pinned him against an iron fence and held a knife pointed downward at him. The victim then felt a tugging on a backpack that he was carrying on his left shoulder. The defendant, however, was unable to take the victim's backpack.

The victim escaped from the defendant and ran toward Olive Street. Before reaching Olive Street, the victim looked behind him and saw the defendant walking quickly in the opposite direction. The victim yelled for help from some nearby people. After the victim began yelling for help, the defendant started running. The victim then chased the defendant. During the chase, the victim saw a police officer, told him about the incident and gave him a description of the perpetrator.

Approximately one hour later, some officers brought the victim back to the scene of the incident. The officer who brought the victim back then asked him to observe the defendant as some officers removed him from the police car across the street. The victim told the officer that everything about the defendant was consistent with the appearance of the perpetrator, even though he had not been able to observe the perpetrator's face clearly during the incident.

...

The victim testified that the defendant, as he pinned the victim against the fence, was holding a "fairly long" knife. The victim then testified that even though he could not say exactly how long the knife's blade was, he thought "it was probably in the five to six inch range." The knife was never

¹Dumas's petition also included a claim that his rights were violated when he was required to sit at defense table for a witness identification, but he states in his memorandum that he has withdrawn this claim.

introduced into evidence. Moreover, the defendant did not have a permit to carry a dangerous weapon.

State v. Dumas, 739 A.2d at 1255-56, 1257.

As to the issue of the eye examination, the appellate court found the following additional facts were necessary for resolution of the claim:

On the first day of trial, the state called Officer Brian Donnelly to prove, inter alia, that the defendant was the person that he had arrested after the crimes were reported. Before Donnelly took the stand to testify, however, the defendant requested that the trial court permit him to leave the courtroom so that Donnelly could not identify him as the person that he arrested. In response, the state filed a motion to obtain nontestimonial evidence pursuant to Practice Book § 776, now § 40-32, to take the defendant's fingerprints. The defendant objected to the state's motion and further argued that the victim should submit to an eye examination. The defendant argued that if the trial court were to grant the state's motion then it would have a duty to grant the defendant's motion "in order to avoid a double standard." The defendant, during his cross-examination of the victim, however, never asked him any questions regarding his eyesight. The trial court granted the state's motion and denied the defendant's motion. In granting the state's motion, the trial court stated that there was good cause to grant it because the issue of whether the defendant was the person arrested was unforeseen, and the fingerprint evidence was therefore material in determining whether the defendant committed the offenses. In denying the defendant's motion, the trial court concluded that there was no evidence presented that the victim had a vision problem and, therefore, an eye examination was unnecessary.

Id. at 1260-61.

Finally, the appellate court stated that the following facts were necessary to resolve Dumas's claim that the prosecutor's closing statement was prejudicial:

During the trial, the defendant requested that he be permitted to leave the courtroom during the testimony of the arresting officers so that the officers could not identify him. The trial court denied the defendant's request. After the state rested, the defendant rested without presenting any evidence. During the state's closing argument, the prosecutor stated that "[t]he defendant has no burden, obviously, to prove anything. And counsel

has made that abundantly clear. The defendant put the state to its proof, including the proof that the man seated in the courtroom was the man who was arrested, including the proof that the man in the courtroom was the person who was convicted back in 1990. That's his prerogative. He's done it. In my humble opinion, it would not have been done in front of a jury for the very reason that the jury in hearing a litany of wild defense claims being posed, a defendant trying a case to a jury would have realized what the backlash of that would be because what a juror would conclude is that with no defense to the charges, whether they're in the criminal file or in the [violation of probation] file, the defense embarked through a series of obstacles in front of the state in an effort to see if they could trip them up, there being no true defense to the charges that we're here on, either on the [violation of probation] or in the criminal offense. That's how I saw it. I think the defense looks to Your Honor not to draw the same negative inference from it."

Id. at 1258.

IV. Discussion

A. The AEDPA

In general, Dumas's habeas corpus petition is governed by the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 ("AEDPA"), as he filed his petition after April 24, 1996, the effective date of AEDPA. The AEDPA provides, in relevant part:

(d) 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 proceeding 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)(1). Under AEDPA, state court determinations of factual issues “shall be presumed to be correct,” and the statute puts the burden on the petitioner to rebut the presumption of correctness by “clear and convincing evidence.” 28 U.S.C. § 2254(e)(1); see also Yung v. Walker, Docket. No. 01-2299, 2002 WL 1393902, at *4 (2d Cir. June 27, 2002).

“‘Clearly established federal law, as determined by the Supreme Court,’ refers to the ‘holdings, as opposed to the dicta, of [the Court’s] decisions as of the time of the relevant state-court decision.’” Kennaugh v. Miller, 289 F.3d 36, 42 (2d Cir. 2002) (quoting Williams v. Taylor, 529 U.S. 362, 412 (2000)). “In order to grant the writ there must be ‘[s]ome increment of incorrectness beyond error,’ although ‘the increment need not be great; otherwise, habeas relief would be limited to state court decisions so far off the mark as to suggest judicial incompetence.’” Brown v. Artuz, 283 F.3d 492, 501 (2d Cir. 2002) (quoting Francis S. v. Stone, 221 F.3d 100, 111 (2d Cir. 2000) (internal quotation marks omitted)).

As to the “contrary to” clause of § 2254(d)(1):

A state-court decision will certainly be contrary to [Supreme Court] clearly established precedent if the state court applies a rule that contradicts the governing law set forth in [Supreme Court] cases. . . . A state-court decision will also be contrary to [the Supreme] Court’s clearly established precedent if the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from [Supreme Court] precedent.

Williams, 529 U.S. at 405-06; see also Yung, 2002 WL 1393902 at *4; Kennaugh, 289 F.3d at ; Davis v. Strack, 270 F.3d 111, 1333 (2d Cir. 2001) (concluding that a writ cannot be justified under the “contrary to” clause where there is no indication that the

state court construed the due process clause in a manner that is “opposite to” the Supreme Court’s rulings).

As to the “unreasonable application” clause of § 2254(d)(1), “habeas corpus relief . . . is warranted only when (1) ‘the state court identifies the correct governing legal rule from [the Supreme Court’s] cases but unreasonably applies it to the facts of the particular state prisoner’s case’; or (2) ‘the state court either unreasonably extends a legal principle to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply.’” Jenkins v. Artuz, --F.3d--, 2002 WL 483547, * 6 (2d Cir. Apr. 1, 2002) (quoting Williams v. Taylor, 529 U.S. at 407 (opinion of O’Connor, J.)); see also Kennaugh, 289 F.3d at 42. “An unreasonable application of federal law is more than an incorrect application, but the petitioner need not show that all reasonable jurists would agree that a state court determination is incorrect in order for it to be unreasonable.” Yung, 2002 WL 1393902 at *4. Unreasonableness should be evaluated using an objective standard. Id.

B. Sufficiency of the Evidence

Dumas argues that the evidence at trial was insufficient to support the convictions for criminal attempt to commit larceny and robbery, carrying a dangerous weapon, and violation of probation. In particular, he contends that the evidence did not show beyond a reasonable doubt that he had the requisite intent for the robbery and larceny conviction, and did not show that the knife was a dangerous weapon for purposes of the robbery conviction or was of the requisite length for the conviction of carrying a dangerous weapon. As a result, he argues, his due process right under the Fourteenth Amendment to

the United States Constitution was violated. Dumas further maintains that the court's conclusions with respect to these elements were unreasonable applications of Supreme Court precedent under § 2254(d)(1) of the AEDPA and unreasonable determinations of the facts in light of the evidence presented pursuant to § 2254(d)(2) of the AEDPA. The Connecticut Appellate Court considered Dumas's claim of insufficient evidence on direct appeal, and thus "this Court's evaluation of the sufficiency of evidence at trial is limited to a consideration of whether the state court's decision was contrary to, or unreasonably applied, clearly established Federal law, or whether the decision was based on an unreasonable determination of the facts." Huber v. Schriver, 140 F. Supp. 2d 265, 276 (E.D.N.Y. 2001).

The Due Process Clause of the Fourteenth Amendment prohibits conviction "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which [the defendant] is charged." In Re Winship, 397 U.S. 358, 364 (1970). A petitioner who advances "a claim based on insufficiency of the evidence bears a very heavy burden." United States v. Soto, 716 F.2d 989, 991 (2d Cir. 1983). A state criminal conviction will be upheld if "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979) (emphasis in original). This standard "does not require a court to ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt." Id. (emphasis in original) (quotations and citations omitted). The court must decide whether the record is "so totally devoid of evidentiary support that a due process issue is raised." Bossett v.

Walker, 41 F.3d 825, 830 (2d Cir. 1994) (quotation and citation omitted). “[I]t could not seriously be argued that . . . a ‘modicum’ of evidence could by itself rationally support a conviction beyond a reasonable doubt.” Jackson, 443 U.S. at 320. The petitioner “bears the burden of rebutting the presumption that all factual determinations made by the state court were correct.” Farrington v. Senkowski, 214 F.3d 237, 241 (2d Cir. 2000) (citing § 2554(e)).

1. Intent

When considering the sufficiency of the evidence of a state conviction, “[a] federal court must look to state law to determine the elements of the crime.” Quartararo v. Hanslmaier, 186 F.3d 91, 97 (2d Cir.1999), cert. denied 528 U.S. 1170 (2000). As explained above, Dumas was convicted of one count of criminal attempt to commit second degree larceny in violation of §§ 53a-49(a)(2) and 123(a)(3) of the Connecticut General Statutes and one count of criminal attempt to commit first degree robbery in violation of §§ 53a-49(a)(2) and 134(a)(3) of the Connecticut General Statutes.² Both convictions

² Conn. Gen. Stat. § 53a-133 provides, in relevant part,

A person commits robbery when, in the course of committing a larceny, he uses or threatens the immediate use of physical force upon another person for the purpose of: (1) Preventing or overcoming resistance to the taking of the property or to the retention thereof immediately after the taking; or (2) compelling the owner of such property of another person to deliver up the property or to engage in other conduct which aids in the commission of the larceny.

Conn. Gen. Stat. § 53a-133. In this case, Dumas does not appear to challenge whether there was sufficient evidence for a finding that he used physical force for the purposes listed in the robbery statute.

Under Conn. Gen. Stat. § 53a-134,

require proof beyond a reasonable doubt that a person acted with intent to deprive another of property or to appropriate the same to himself. See Conn. Gen. Stat. § 53a-119 (larceny requires “intent to deprive another of property or to appropriate the same to himself or a third person”); § 53a-133 (“A person commits robbery when, in the course of committing a larceny”); § 53a-49 (stating that the mental state required for an attempt to commit a crime is the kind of mental state required for the commission of the crime). “A person acts ‘intentionally’ with respect to a result or to conduct described by a statute defining an offense when his conscious objective is to cause such result or to engage in such conduct.” Conn. Gen. Stat. § 53a-3(11).

[T]he accused must *intend* both to take the property of another and to retain it. State v. Kurvin, 186 Conn. 555, 588, 442 A.2d 1327 (1982). “The requisite intent for retention is permanency.” Id., [at] 568 [, 442 A.2d 1327]; see General Statutes § 53a-118(a)(3) (“deprive” means “withhold [property] or cause it to be withheld from [the victim] permanently. . . .”) Intent, however, can be inferred both from the defendant’s conduct and his statements *at the time of the crime*; State v.

A person is guilty of robbery in the first degree when, in the course of the commission of the crime of robbery as defined in section 53a-133 or of immediate flight therefrom, he or another participant in the crime: (1) Causes serious physical injury to any person who is not a participant in the crime; or (2) is armed with a deadly weapon; or (3) uses or threatens the use of a dangerous instrument

Conn. Gen. Stat. § 53a-134.

“A person commits larceny when, with intent to deprive another of property or to appropriate the same to himself or a third person, he wrongfully takes, obtains, or withholds such property from an owner.” Conn. Gen. Stat. § 53a-119. A person is guilty of larceny in the second degree when he commits larceny, as defined in section 53a-119, and: . . . (3) the property, regardless of its nature or value, is taken from the person of another. Conn. Gen. Stat. § 53a-123(a).

Ghere, 201 Conn. 289, 296, 513 A.2d 1226 (1986); State v. Morrill, 193 Conn. 602, 609, 478 A.2d 994 (1984); and “whether such an inference should be drawn is properly a question for the jury to decide. State v. Sober, [166 Conn. 81, 93, 347 A.2d 61 (1974)].” State v. Morrill, *supra*, at 609, 478 A.2d 994. To be convicted of robbery in the first degree, therefore, it is not necessary for the jury to find that the defendant actually kept the property in question, but rather, that at the moment he took the property he intended to retain it permanently. See State v. Coston, 182 Conn. 430, 436, 438 A.2d 701 (1980) (evidence sufficed to sustain a conviction of larceny in the fourth degree where the defendant took a pair of shoes and thereafter returned them).

State v. Anderson, 561 A.2d 897, 904-05 (Conn. 1989) (emphasis in original).

Dumas argues that it was unreasonable to conclude that he intended to take any property for several reasons:³ he never made any verbal demands, Taubman could not say for sure whether he tugged on his backpack, and he did not wield the knife in a way that demonstrated an intent to take property. Instead, Dumas maintains that Dumas merely “bumped” Taubman, an action that was sufficient to support several lesser crimes, but not the robbery or larceny convictions. When the evidence is viewed in the light most favorable to the prosecution, however, a rational trier of fact could have found that Dumas intended to deprive Taubman of property. Taubman testified that Dumas blocked his path and pinned him against an iron fence while holding a fairly long knife pointed downward. (See Doc. # 8, Ex. H, Tr. June 5, 1997, at 40, 43-44.) Taubman also testified that he felt a tugging on the backpack that he was carrying over his left shoulder. (See id. at 51-52.) Together, this evidence is sufficient to support the intent element of the two convictions

³The Court recognizes that during the trial Dumas contested whether he was the individual who was involved in the incident with Taubman. Given that he is not contesting the sufficiency of the evidence on this point here, the Court will refer to the perpetrator as Dumas.

and the probation violation,⁴ and thus satisfies Jackson v. Virginia. Accordingly, the Connecticut Appellate Court's conclusion with respect to this issue was neither contrary to clearly established federal law, nor an unreasonable application of it. Further, its factual determinations were not unreasonable in light of the evidence.

2. Knife

Dumas argues that the evidence at trial was not sufficient to sustain the conviction for first degree robbery, an element of which is that the perpetrator "uses or threatens the use of a dangerous instrument," Conn. Gen. Stat. § 53a-134(a)(3), which is defined as "any instrument, article or substance which, under the circumstances in which it is used or attempted to threatened to be used, is capable of causing death or serious physical injury," Conn. Gen. Stat. § 53a-3(7). He also maintains that there is insufficient evidence for a conviction for carrying a dangerous weapon under Conn. Gen. Stat. § 53-206(a), which provides that "[a]ny person who carries upon one's person any . . . knife the edged portion of the blade of which is four inches or over in length . . . shall be fined not more than five hundred dollars or imprisoned not more than three years or both." Taubman testified that the knife Dumas was holding during the incident was probably five or six inches. (See Doc. # 8, Ex. H, Tr. June 5, 1997, at 49.) This evidence is sufficient for a rational trier of fact to conclude that the knife was a dangerous weapon and contained a blade that was four inches or more, and thus was sufficient to support the convictions under §53a-134(a) and § 53-206(a), as well as the probation violation. Thus, the Jackson standard is

⁴It appears that the state must show a violation of probation by a preponderance of the evidence. See State v. Davis, 641 A.2d 370, 378 (Conn. 1994).

satisfied. Accordingly, the Connecticut Appellate Court’s conclusion with respect to this issue was neither contrary to clearly established federal law, nor an unreasonable application of it, and its factual determinations were not unreasonable in light of the evidence.

3. AEDPA

Courts in this circuit follow the Jackson approach when examining claims of insufficient evidence, even after the enactment of the AEDPA. Cf. Francis S., 221 F.3d at 115 (“The conclusion of a federal habeas corpus court that the jury’s verdict was not ‘reasonably’ supported by the evidence [under § 2254(d)(2) of the AEDPA] would not meet Jackson’s high standard.”).⁵ Several district courts have acknowledged, however, that the AEDPA may have altered the Jackson standard, and thus also analyze sufficiency of the evidence claims under § 2254(d) independently of Jackson. See, e.g., Ferguson v. Walker, No. 00CIV1356LTSAJ, 2001 WL 869615, at *4-6 and n.11 (S.D.N.Y. Aug. 2, 2001). Thus, this Court has examined whether the Appellate Court’s decision on Dumas’ claims of insufficient evidence was an unreasonable application of the clearly established federal law requiring the prosecution to prove each element of an offense beyond a reasonable doubt, see § 2254(d)(1), and whether the Appellate Court’s factual conclusions regarding intent and the length of the blade were unreasonable determinations in light of

⁵The Second Circuit explained that the “negative constraint on the authority of a federal habeas corpus court [set forth in § 2254(d)(2)] does not necessarily carry the affirmative implication that whenever a state court adjudication is based on ‘an unreasonable determination of the facts in light of the evidence,’ the writ should issue.” Francis S., 221 F.3d at 115.

the evidence presented, see § 2254(d)(2). The state court’s conclusions were not unreasonable applications of the clearly established federal law regarding proof beyond a reasonable doubt, and its factual determinations were not unreasonable in light of the evidence presented.⁶

C. Evidentiary Rulings

Dumas next contends that his rights to equal protection, due process, fair trial, and cross-examination under the Fifth, Sixth, and Fourteenth Amendments were violated by the Connecticut Appellate Court’s failure to acknowledge a “double standard” in the trial court’s decision to permit the state to elicit additional evidence regarding identification, (see Doc. # 10, State’s Mot. Obtain Non-Testimonial Evidence from Def., at 86a), but to deny the petitioner’s request for the similar evidence, (see id., Mot. Eye Exam Complainant, at 93a). Dumas also contends that the Connecticut Appellate Court’s failure to adequately address this issue in its decision violated his due process rights.

As an initial matter, the Court will consider whether it lacks jurisdiction over this claim. In his brief to the Connecticut Appellate Court, Dumas raised the same claim he does here: that the decision granting the state’s fingerprints motion and denying his motion for an eye exam of the complainant evinces a “double standard” that denied him several constitutional rights. In the section of its opinion addressing evidentiary issues, the

⁶Dumas argues that the issue of whether he had the intent necessary to support the robbery and larceny convictions is a mixed question of law and fact that would require de novo review by the Court, rather than the deference owed under the AEDPA. It is clear, however, that under Connecticut law intent is a question of fact, see State v. Cofone, 319 A.2d 381, 383 (Conn. 1972) (stating this rule in the context of a robbery conviction), and it appears that the length of the knife blade also is a factual determination.

appellate court clearly addressed whether it was proper for the trial court to have granted the state's motion for nontestimonial evidence, and concludes that the trial court did not abuse its discretion in doing so. See State v. Dumas, 739 A.2d at 1261. As to the claimed "double standard," the Court explained:

The defendant also claims that because "the defendant's motion and the state's motion were similar, and since the defendant's motion stated that both motions should be treated evenhandedly, the court by granting the state's motion and denying the defendant's motion," violated a number of his constitutional rights. The defendant fails to provide any authority to support his claim. "Where a claim is asserted in the statement of issues but thereafter receives only cursory attention in the brief without substantive discussion or citation of authorities, it is deemed to be abandoned. . . . Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly." (Citations omitted; internal quotation marks omitted.) Cummings v. Twin Tool Mfg. Co., 40 Conn.App. 36, 45, 668 A.2d 1346 (1996). We conclude, therefore, that the trial court properly ruled on each motion individually and was not under any duty to grant the defendant's motion merely because the court granted the state's motion. Accordingly, the trial court did not abuse its discretion in denying the defendant's motion.

State v. Dumas, 739 A.2d at 1261.

When a state court judgment rests upon an adequate and independent state law ground, federal courts lack jurisdiction on direct review to consider questions of federal law decided by the state court. See Coleman v. Thompson, 501 U.S. 722, 728 (1991). For reasons of comity and federalism, the same doctrine "bar[s] federal habeas when a state court declined to address a prisoner's federal claims because the prisoner had failed to meet a state procedural requirement." Coleman, 501 U.S. at 729-730. When the state court discusses both state and federal law, however, it can be "difficult to determine if the state law discussion is truly an independent basis for decision or merely a passing reference." Id. at 732.

For administrative convenience, see id. at 737, the Supreme Court has established a presumption to guide our analysis:

[Federal courts] will presume that there is no independent and adequate state ground for a state court decision when the decision “fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion.”

Id. at 734-35 (quoting Michigan v. Long, 463 U.S. 1032, 1040-41 (1983)); see also Harris v. Reed, 489 U.S. 255, 266 (1989). In Harris, the Court held that “a procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case clearly and expressly states that its judgment rests on a state procedural bar.” Harris, 489 U.S. at 263 (internal quotation marks omitted). We apply the Long /Harris presumption to the last “reasoned state judgment”--in this case, the appellate [court’s] opinion. See Ylst v. Nunnemaker, 501 U.S. 797, 803 (1991).

Jones v. Stinson, 229 F.3d 112, 117-18 (2d Cir. 2000); see also Aparicio v. Artuz, 269 F.3d 78, 91-92 (2d Cir. 2001). Neither party has raised this issue in their briefs.

Here, it appears that the appellate court may have declined to address Dumas’s double standard argument because he had failed to adequately brief it on appeal. This is evident from the court’s citation to Cummings for the proposition that claims are deemed to have been abandoned under these circumstances. However, the court then stated that it therefore concluded that the trial court ruled on the two motions individually and was under no duty to grant Dumas’s motion merely because it had granted the state’s motion. This statement suggests that the appellate court did not consider the claim to have been procedurally defaulted in its entirety. Thus, because the “adequacy and independence of any possible state law ground is not clear from the face of the opinion,” see Coleman, 229

F.3d at 118, the Court concludes that it has jurisdiction over the claim and will address the applicability of the ADEPA.⁷

One of the requirements for review under the ADEA is that a claim must have been “adjudicated on the merits” in state court. See 28 U.S.C. § 2254. A state court adjudicates a claim on the merits “when it (1) disposes of the claim ‘on the merits,’ and (2) reduces its disposition to judgment . . . even if the state court does not explicitly refer to either the federal claim or to relevant federal case law.” Sellan v. Kuhlman, 261 F.3d 303, 312 (2d Cir. 2001); see also Rudenko v. Costello, 286 F.3d 51, 68-69 (2d Cir. 2002). “In analyzing this two-part test, we consider ‘(1) what 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.’” Brown v. Artuz, 283 F.3d 492, 498 (2d Cir. 2002) (quoting Sellan, 261 F.3d at 314). In other words, “[a]djudicated on the merits’ has a well settled meaning: a decision finally resolving the parties’ claims, with res judicata effect, that is based on the substance of the claim advanced, rather than on a procedural, or other, ground.” Rudenko, 286 F.3d at 68 (quoting Sellan, 261 F.3d at 311). A state court need not have cited relevant case law in order for its ruling to constitute an adjudication on the merits. Brown, 283 F.3d at 498.

Again, it is unclear from this passage whether the appellate court adjudicated the unconstitutional double standard claim on the merits. On one hand, the court cited Cummings for the proposition that a claim not adequately analyzed in an appellate brief is

⁷The state does not claim that Dumas failed to exhaust his administrative remedies.

deemed to have been abandoned. On the other hand, it acknowledged Dumas's constitutional double standard argument, concluded that the trial court's rulings were proper, and stated that the defendant was not entitled to have his motion granted simply because the court granted a similar motion by the state. It appears, however, that the appellate court considered this conclusion to have been compelled by Dumas's procedural failings. Accordingly, the Court concludes that the appellate court decided Dumas's unconstitutional double standard claim on procedural grounds and thus did not adjudicate it on the merits. As a result, the pre-AEDPA standard of review, which reviews questions of law and mixed questions of law and fact de novo, must be applied. Washington v. Schriver, 255 F.3d 45, 55 (2d Cir. 2001).

“The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations.” Chambers v. Mississippi, 410 U.S. 284, 294 (1973); see also Washington v. Texas, 388 U.S. 14, 19 (1967). “The Supreme Court has made clear that the erroneous exclusion of critical, corroborative defense evidence may violate both the Fifth Amendment due process right to a fair trial and the Sixth Amendment right to present a defense.” DePetris v. Kuykendall, 239 F.3d 1057, 1062 (9th Cir. 2001) (citing Chambers, 410 U.S. at 294; Washington v. Texas, 388 U.S. at 18-19). Thus, “state rules of evidence may not be ‘inflexibly applied’ so that they deprive a defendant of a fundamentally fair trial.” Morales v. Portuondo, 154 F. Supp. 2d 706, 722 (S.D.N.Y. 2001) (citation omitted). These rules do not abridge a defendant's right to present a defense unless they are arbitrary or disproportionate to the purposes they are designed to serve. See United States v. Scheffer, 523 U.S. 303, 308 (1998). The

exclusion of evidence is unconstitutionally arbitrary or disproportionate where it has “infringed upon a weighty interest of the accused.” Id. However, “federal habeas corpus relief does not lie for errors of state law.” Estelle v. McGuire, 502 U.S. 62, 67 (1991) (internal quotation marks omitted). “[T]he introduction of relevant evidence can be limited by the State for a ‘valid’ reason.” Montana v. Egelhoff, 518 U.S. 37, 53 (1996).

“In addition to ruling that a state may not arbitrarily apply evidentiary standards, the Supreme Court has also focused its criticism on a particular variety of arbitrariness: the unjustified and uneven application of evidentiary standards in a way that favors the prosecution over defendants.” Gray v. Klauser, 282 F.3d 633, 646 (9th Cir. 2002). Dumas cites Wardius v. Oregon, 412 U.S. 470 (1973), for this proposition. In that case, the Supreme Court held that a criminal defendant could not be required to comply with Oregon’s rule requiring him to notify the state in advance of his planned use of an alibi defense in the absence of fair notice that he would have the opportunity to discover the state’s rebuttal witnesses. See Wardius, 412 U.S. at 479. The Court explained that “[a]lthough the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded, . . . it does speak to the balance of forces between the accused and his accuser,” and it noted that “discovery must be a two-way street.” Id. at 474-75. Several other Supreme Court cases reflect these principles. In Washington v. Texas, for example, the Court held that a state rule that applied unequal standards to defendants and the state was not rational. 388 U.S. at 22. In Green v. Georgia, 442 U.S. 95 (1979), the Court held that the trial court’s exclusion of testimony offered by the defense pursuant to the state’s hearsay rules violated due process where the state’s rules

allowed the state to introduce the same evidence in a co-defendant's trial. Green, 442 U.S. at 97. Similarly, in Webb v. Texas, 409 U.S. 95 (1972), the Supreme Court held that a trial judge's admonishing of the defendant's witness, which resulted in that witness's refusal to testify, when he did not give the same admonition to state witnesses, deprived the defendant of his due process right to call witnesses and present a defense. See Webb, 409 U.S. at 97-98.

The trial judge here, however, did not exclude the identity evidence arbitrarily or in a disproportionate manner. There was a valid reason to support the trial court's decisions. The court explained that there was good cause for fingerprint examination, despite the fact that it was filed during trial, because the issue of whether the defendant was the same individual arrested was unforeseen. (Doc. #8, Ex. H., Tr. June 10, 1997, at 12). See Conn. Practice Book § 41-4, formerly § 810 (failure to make requests that must be made prior to trial waives right to make such requests unless good cause is shown); § 40-13, formerly § 743 (permitting late disclosure of witnesses upon good cause shown); § 40-32, formerly § 776 (permitting non-testimonial evidence when a judicial authority finds probable cause to believe that "[t]he evidence sought may be of material aid in determining whether the defendant committed the offense charged" and "[t]he evidence sought cannot practicably be obtained from other sources"). Dumas points out that the identity of the perpetrator of an offense is always at issue in a criminal case, and he clearly contested it in this case. The question of identity which prompted the state's motion, however, was different. As the trial court noted, Dumas also disputed whether he in fact was the person who was arrested on August 16, 1996 and charged with the offenses in this case. (See

Doc. # 8, Ex. H, Tr. June 5, 1997, at 172-74; Tr. June 10, 1997, at 12.) The nontestimonial evidence sought and obtained by the state were Dumas's fingerprints, which were taken during the trial and compared to the fingerprints of the person arrested on August 16, 1996. Thus, they was used to confirm that Dumas was the individual arrested and incarcerated for the offenses in this case. Although Dumas argues that the state should have anticipated his identity argument and conducted pretrial discovery, the particular variation of Dumas's claims provided a valid reason to support the trial court's decision to grant the state's motion to obtain nontestimonial evidence. Further, in denying Dumas's motion for an eye exam of Taubman, the trial court correctly noted that there had been no testimony that Taubman had a vision problem. (Id. at 16.) Thus, in light of these explanations, the Court cannot conclude that the trial court's application of evidentiary rules was unjustified or uneven in a way that favored the prosecution over defendants. Habeas corpus relief is not justified on this claim.

Dumas also argues that the Connecticut Appellate Court's failure to address adequately his constitutional "double standard" claim denied his right to due process in that the court disregarded the portions of his appellate brief containing analysis and citation to case authority. He notes that he sought reconsideration en banc so that these materials could be addressed. Upon a de novo review, the Court concludes that any omission by the appellate court also does not rise to the level of a constitutional deprivation because, as explained above, Dumas's underlying argument that the trial court's determinations regarding the evidence demonstrated a constitutional double standard must fail.

D. State's Closing Argument

Finally, Dumas argues that the state's closing argument violated his rights to due process and a fair trial by penalizing him for exercising his right to put the state to its proof on all of the elements of the offenses at issue. He maintains that the trial judge was improperly influenced by the prosecutor's inappropriate comments and should have stated on the record that he would not consider those comments when reaching a decision in the case. Dumas contends that the Appellate Court's determination that his rights were not violated was an unreasonable application of U.S. Supreme Court precedent pursuant to § 2254(d)(1).

The appellate court explained its ruling on this issue in the following way:

The defendant failed to raise this claim at trial and now seeks review pursuant to State v. Golding, 213 Conn. 233, 239-40, 567 A.2d 823 (1989).⁸ “[T]o deprive a defendant of his constitutional right to a fair trial ... the prosecutor’s conduct must have so infected the trial with unfairness as to make the resulting conviction a denial of due process. . . . We do not focus alone, however, on the conduct of the prosecutor. The fairness of the trial and not the culpability of the prosecutor is the standard for analyzing the constitutional due process claims of criminal defendants alleging prosecutorial misconduct. . . . [M]oreover . . . [Golding] review of such a claim is unavailable where the claimed misconduct was not blatantly egregious and merely consisted of isolated and brief episodes that did not reveal a pattern of conduct repeated throughout the trial. . . . State v. Atkinson, 235 Conn. 748, 769, 670 A.2d 276 (1996).” (Internal quotation

⁸ Under Golding, “a defendant can prevail on a claim of constitutional error not preserved at trial only if all of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation clearly exists and clearly deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt.” (Emphasis in original.) State v. Golding, supra, 213 Conn. at 239-40, 567 A.2d 823.

marks omitted.) State v. Correa, 241 Conn. 322, 356-57, 696 A.2d 944 (1997).

We will review the defendant's second claim because the record is adequate for review and because the defendant's claim of prosecutorial misconduct is of constitutional magnitude alleging the violation of a fundamental right. The record in this case, however, does not support a claim that the defendant was clearly deprived of a fair trial and, therefore, fails under the third prong of Golding. Here, the challenged statements merely described the defendant's trial strategy. The prosecutor clearly stated that the defendant had the right to proceed as he did. Further, the defendant does not raise any other claims of prosecutorial misconduct. "We will not afford Golding review to [unpreserved] claims of prosecutorial misconduct where the record does not disclose a pattern of misconduct pervasive throughout the trial or conduct that was so blatantly egregious that it infringed on the defendant's right to a fair trial." (Internal quotation marks omitted.) State v. Villanueva, 44 Conn. App. 457, 461, 689 A.2d 1141, cert. denied, 240 Conn. 930, 693 A.2d 302 (1997).

Further, the prosecutor's comments were directed to the court, not to a jury. "While this fact alone would not excuse an egregious violation of the rule, it is properly taken into consideration as part of the context in which it is made. An indirect comment in argument to the court on a point of law is less serious than a comment in jury summation that asks the jury to infer that the defendant's silence is evidence of guilt. See United States v. Robinson, 485 U.S. 25 (1988)." State v. Cobb, 27 Conn. App. 601, 607, 605 A.2d 1385 (1992).

State v. Dumas, 739 A.2d at 1258-59.

The state argues that the appellate court's limited consideration of this issue deprives this Court of jurisdiction because the appellate court's application of Golding is an adequate and independent state ground for its decision. Although the appellate court's decision did not cite federal precedent, it did consider the third prong of the Golding test, whether an alleged constitutional violation clearly exists and clearly deprived the defendant of his right to a fair trial. It appears that the appellate court's decision is at least interwoven with federal law and thus that there is no adequate and independent state

ground for the decision. See Coleman, 229 F.3d at 118. Accordingly, the Court will consider this claim under the AEDPA.

First, the Court notes that the Connecticut Appellate Court addressed Dumas's claim on the merits, thus satisfying that requirement of § 2254(d). Again, while the court did not explicitly refer to federal case law, it stated that it was choosing to review Dumas's claim, it recited that claim, and it clearly explained that the record does not support the claim that he was deprived of a fair trial. Although the Golding context affected the court's consideration of the issue, it nevertheless considered Dumas's constitutional right to a fair trial as well as the conduct of the prosecutor. Accordingly, it adjudicated the improper argument claim on the merits and the Court therefore will proceed to examine that decision under the standards of the AEDPA.

“Standing alone, a prosecutor's comments upon summation can ‘so infect [a] trial with unfairness as to make the resulting conviction a denial of due process.’” Jenkins v. Artuz, Docket Nos. 01-2355, 01-2328, 2002 WL 483547, at *8 (2d Cir. Apr. 1, 2002) (quoting Darden v. Wainwright, 477 U.S. 168, 181 (1986)). Courts must consider the probable effect a prosecutor's statements would have on the trier of fact's ability to judge the evidence fairly. United States v. Young, 470 U.S. 1, 12 (1985) (stating this rule in the context of a jury trial). “Remarks of the prosecutor in summation do not amount to a denial of due process unless they constitute ‘egregious misconduct.’” United States v. Shareef, 190 F.3d 71, 78 (2d Cir. 1999) (quoting Donnelly v. DeChristoforo, 416 U.S. 637, 647 (1974)). “In assessing whether the comments complained of meet this test, we

consider the severity of the misconduct, the measures adopted to cure it, and the certainty of conviction in the absence of the misconduct.” Id. (citation and quotation omitted).

The severity of the misconduct, the measures adopted to cure the misconduct, or the certainty of conviction absent the misconduct indicates that the state’s closing remarks did not constitute a due process violation in this case. First, the misconduct was not severe; it essentially included comments by the prosecutor that the defendant had put the state to its proof on each of the elements at issue and a statement that the defense would not have done so in the presence of a jury because the jury would have drawn a negative inference from it. While Dumas argues that the trial judge should have stated that he did not consider the allegedly improper comments in reaching his decision, see Hawkins v. LeFevre, 758 F.2d 866, 878 (2d Cir. 1985), a judge is presumed to have considered only admissible evidence in making its findings, see United States v. Foley, 871 F.2d 235, 240 (1st Cir. 1989). Second, the case was a bench trial, so it was not a situation where the judge could have attempted to cure any prejudice by an instruction to the jury. Finally, the misconduct did not affect the certainty of the conviction. Dumas principally argues that the state’s summation was improper because it asked the trial judge to draw a negative inference from the fact that he challenged the identity issue. While Taubman did not make an in-court identification of Dumas, he recognized him roughly an hour after the incident, primarily because of the distinctive shirt he was wearing. (See Doc. # 8, Ex. H, Tr. June 5, 1997, at 28.) Further, the state offered the testimony of New Haven Police Officer Edwin Ingraham, an expert in fingerprint examination, that the fingerprint samples taken on the date of arrest and from the defendant during the trial were from the same

individual. (See id. at 40-41.) Therefore, even if the prosecutor’s comments were improper, they did not affect the certainty of conviction as to the identity element. Accordingly, the appellate court’s conclusion was neither a contrary to, nor an unreasonable application of, clearly established federal law.

In addition, Dumas contends that the prosecutor’s comments punished him for exercising a constitutional right, which “is a due process violation ‘of the most basic sort.’” United States v. Goodwin, 457 U.S. 368, 372 (1982) (citing Bordenkircher v. Hayes, 434 U.S. 357, 363)).⁹ In Goodwin, the Supreme Court held that a presumption of prosecutorial vindictiveness was not appropriate where a defendant was indicted and convicted of a felony charge after he decided to plead not guilty to a previously pending misdemeanor charge and to request a jury trial, and where there was no actual evidence of vindictiveness. See Goodwin, 457 U.S. at 382-84. Without such a presumption, no due process violation can be established. Id. at 384. Here, there is no evidence to support the presumption of vindictiveness, as the prosecutor’s comments do not warrant such an inference. Further, as discussed above, there is no indication that the trial court sentenced Dumas in a more severe manner as a result of the comments. Therefore, this claim also must fail.

V. Conclusion

For the foregoing reasons, the petition is DENIED. The Clerk is ordered to close this case.

⁹Dumas also cites North Carolina v. Pearce, 395 U.S. 711 (1969) for this proposition, but that decision was overruled by Alabama v. Smith, 490 U.S. 794 (1989).

