Case No.

IN THE SUPREME COURT OF THE UNITED STATES

SUNG HO PARK,

Petitioner - Appellant,

v.

TAMMY FOSS, Warden,

Respondent - Appellee.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether Park, Who Was Physically Incapacitated When The Police Interrogated Him, Could Not Make A Voluntary Statement; Whether Trial Counsel Rendered Ineffective Assistance?

II. Whether The Prosecutor's Prejudicial Misconduct During Closing Deprived Park Of Due Process And A Fair Trial; Whether Trial And Appellate Counsel Rendered Ineffective Assistance?

III. Whether The Trial Court Violated Park's Right To Counsel By Admitting Park's Video Recorded Confession; Whether Park Invoked His Constitutional Right To Counsel?

IV. Whether The Trial Court Deprived Park Of Due Process And A Fair Trial By failing To Instruct The Jury With The Lesser Offense Of Simple Assault?

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Case No.

IN THE SUPREME COURT OF THE UNITED STATES

SUNG HO PARK,
Petitioner - Appellant,

v.

TAMMY FOSS, Warden,
Respondent - Appellee.

Petitioner, SUNG HO PARK, petitions for a writ of certiorari to review the United States Court of Appeals for the Ninth Circuit's Order denying Park's request for a certificate of appealablity. (Appendix A)

OPINION BELOW

On March 15, 2019, the Ninth Circuit Court of Appeals denied Park's request for a certificate of appealablity. (Appendix A)

JURISDICTION

The jurisdiction of this Court is 28 U.S.C. § 2254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. Amends. V, VI, XIV; 28 U.S.C.§ 2254.

STATEMENT OF THE CASE

A. State Court Trial Proceedings

The jury found Park guilty of several sex offenses involving three victims. As to Rebecca W., he was convicted of forcible oral copulation (Cal. Penal Code § 288a(c)(2)(A)) and sexual battery while the victim was restrained. Cal. Penal Code § 243.4(d). As to Y.Y., he was convicted of assault with intent to commit rape, sodomy, or oral copulation during the commission of first degree burglary. Cal. Penal Code § 220(b). As to Rebecca W. And Y.Y., he was convicted of first degree burglary with another person present. Cal. Penal Code §§ 459, 460(a), 667.5(c)(21). As to "Jone Doe No. 1," Park was convicted of forcible rape (Cal. Penal Code § 261(a)(2)) and forcible oral copulation. Cal. Penal Code § 288a(c)(2)(A). The incident involving Jane Doe No. 1 occurred three months before the incident invlving Rebecca W. And Y.Y. The jury found true several life term sentencing enhancements.

The trial court sentenced Park to 120 years to life. (5RT3307-3310.)

B. State Appellate Proceedings

On December 2, 2014, the California Court of Appeal affirmed his conviction. (Case No. B249730) (Appendix C) On March 11, 2015, the California Supreme court denied review. (Case No. S223762) (Appendix C)

C. Federal Habeas Corpus Proceedings

On June 6, 2016, Park filed a Petition for Writ of Habeas Corpus in the United States District Court. On June 25, 2018, the district court denied the petition and a Certificate of Appealability. (Case No. 16-cv-03960) (Appendix B)

D. Ninth Circuit Appeal

Park appealed and requested a certificate of appealability. On March 15, 2019, the Ninth Circuit denied his request. (Appendix A)

REASONS FOR GRANTING CERTIORARI

I. A COA SHOULD HAVE ISSUED TO DECIDE IF PARK, WHO WAS PHYSICALLY INCAPACITATED WHEN THE POLICE INTERROGATED HIM, COULD NOT MAKE A VOLUNTARY STATEMENT; AND TO DECIDE IF TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE

The District Court minimizes the impact of Park's hospitalization, injuries and compromised physical condition. RR 11[1]. The District Court finds Park understood what Lopez told him and Park voluntarily agreed to speak to Lopez. RR 11. Park disagrees.

Although Park seemed to understand and respond to Lopez' questions, Park's physical condition required that Park's statements be deemed involuntary. Traumatized, in pain, and heavily medicated, Park could not have understood when Lopez asked him "Do you understand what happened to you today? Why you're here? Park responded with only, 'Yes'." (2CT 242-284)

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[1] RR refers to USMJ's Report and Recommendation. (Doc. No. 22)

The District Court finds Park presents no evidence to prove Park's medical incapacitation. RR 11. Not so. A "'totality of circumstances' test . . . determine[s] the voluntariness of a confession. [Citations.] Among the factors to be considered are '"the crucial element of police coercion [citation]; the length of the interrogation [citation]; its location [citation]; its continuity" as well as "the defendant's maturity [citation]; education [citation]; physical condition [citation]; and mental health."' [Citation])" *People v. Massie*, 19 Cal.4th 550, 576 (1998).

The District Court finds Park had been seen by "emergency and trauma teams" so it was unreasonable for Park to conclude he had not been seen by a medical doctor when the police interrogated him. RR 9, fn. 24. Park disagrees. Even though Park had already been seen by emergency and trauma teams, Lopez interrogated Park while Park lay on a hospital gurney with a neck restraint, and his hands and legs bandaged. (3RT1218; 4RT 2207-2213) The paramedics could not "sit [Park] up due to his

condition." (Exh. B, 14; Exh.D, 67-72)[2]

Park wore a neck restraint and Lopez told Park, " . . . *Don't shake your head cuz I know you have that neck restraint. Correct*? Do you feel coherent? Like you understand what I'm saying?" Park responded, "Not perfectly but mostly likely (Unintelligible)." (2CT 242) (Italics added.)

To determine Park's competency, Lopez asked Park very basic questions like the day and the date. He also asked some compound, ambiguous questions like, "Okay. Are you under medication where you don't understand what's happening? Do you understand what happened to you today? Why you're here?" When Lopez asked Park if he wished to continue to talk, Park made an unintelligible response. (2CT 242, lines 27-28)

The District Court finds Park's statement was voluntary and trial counsel did not render ineffective

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[2] Exhibits refer to the exhibits in Park's USDC habeas petition. (Doc. No. 1-1)

assistance. Park disagrees. Trial counsel tried to exclude Park's statement on *Miranda* grounds. Despite Park's compromised physical condition, trial counsel failed to challenge the voluntariness of Park's statement. A ". . . single, serious error may support a claim of ineffective assistance of counsel"--including counsel's failure to file a motion to suppress. *Kimmelman v. Morrison,* 477 U.S. 365, 383, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986).

Park did not make a voluntary statement and Park's statement should have been excluded. Trial counsel rendered ineffective assistance of counsel by failing to challenge Park's involuntary confession. *Strickland v. Washington,* 466 U.S. 668 (1984).

II. A COA SHOULD HAVE ISSUED TO DECIDE IF THE PROSECUTOR'S PREJUDICIAL MISCONDUCT DURING CLOSING DEPRIVED PARK OF DUE PROCESS AND A FAIR TRIAL; AND TO DECIDE IF TRIAL AND APPELLATE COUNSEL RENDERED INEFFECTIVE ASSISTANCE

A. Introduction

During closing argument, the prosecutor committed prejudicial misconduct. The prosecutor told the jury Park was guilty, appealed to the jury's sympathies and passions by urging the jury to speculate Park would have committed more crimes, and by disparaging defense counsel. The District Court finds no prosecutorial misconduct occurred. RR 13.

The District Court finds the prosecutor did not argue the jury had a duty to find Park guilty. The District Court does agree a prosecutor may not express a personal opinion as to the guilt of an accused. RR 13. The District Court finds the prosecutor "did not overtly state it was her personal opinion that [Park] was guilty." RR 13.

Park disagrees. A prosecutor may not state that the

duty of the jury is to find the defendant guilty. See *United States v. Polizzi,* 801 F.2d 1543, 1558 (9th Cir. 1986) (improper for prosecutor to tell jury it had any obligation other than weighing evidence); *United States v. Sanchez*, 176 F.3d 1214, 1224-25 (9th Cir. 1999) (Prosecutor did not tell the jury that it had a duty to find the defendant guilty only if every element of the crime had been proven beyond a reasonable doubt. Nor did he remind the jury that it had the duty to acquit Sanchez if it had a reasonable doubt regarding his guilt).

The District Court finds that even if the prosecutor made "improper" statements, the prosecutor made "brief conclusions" after the prosecutor argued the evidence proved Park's guilt. RR 14. The District Court finds, in light of overwhelming evidence of Park's guilt, no prejudice resulted. RR 14. Park disagrees. The prosecutor's statement infected the trial with such "'unfairness as to make the resulting conviction a denial of due process.'" *Darden v. Wainwright,* 477 U.S. 168, 181 (1986).

B. The Prosecutor Improperly Appealed to the Jury's Passions and Prejudice

The District Court agrees that a prosecutor may not appeal to the passions of the jurors. RR 14. The District Court finds the prosecutor did not appeal to the jury's passions and prejudices. The District Court claims the prosecutor properly argued "reasonable inferences from the evidence." RR 14. Park disagrees. The prosecutor improperly encouraged the jury to speculate Park would have committed more crimes if Rebecca W. did not call 911. (5RT 2751-2752) See, *People v. Williams*, 22 Cal.App.3d 34, 48 (1971) (prosecutor improperly invited jury to speculate that there could have been altercation between defendant and homicide victim) (5RT 2751-2752)

The District Court finds no prejudice resulted and the prosecutor "did not comment on evidence that had not been placed before the jury" and the trial court instructed the jury not to let sympathy sway its determination. RR15. Park disagrees. To get a conviction, the prosecutor improperly

wanted to arouse the jury's passions or prejudices to divert the jury's attention from its proper role and invite an irrational, purely subjective response.

C. The Prosecutor Committed Misconduct by Disparaging Defense counsel

The District Court finds the prosecutor fairly responded to defense counsel's remarks. RR 15-16. The District Court finds the prosecutor challenged the strength of the defense's case. RR 15. Park disagrees. The prosecutor improperly disparaged defense counsel. See *People v. Young*, 34 Cal.4th 1149, 1193 (2005) (accusing defense counsel of lying to the jury); *People v. Cummings,* 4 Cal.4th 1233, 1302 (1993) (accusing defense counsel of engaging in deception to the jury.) The prosecutor argued defense counsel told the jury to disobey the law. The prosecutor argued, "He's at that point of desperation where he's asking you to disobey the law. Do not do it." The prosecutor also accused defense counsel of trying to "transform reasonable doubt into reason to doubt." (5RT 2805-2806) (Exh. E 80-81)

The District Court finds the trial court's instructions cured any error and the jury would have followed the trial court's instructions. RR 16. Park disagrees. "You can't unring a bell." *People v. Hill*, 17 Cal.4th 800, 845, (1998) citing *People v. Wein*, 5 Cal.2d 382, 423 (1958). "[I]if you throw a skunk into the jury box, you can't instruct the jury not to smell it." *United States v. Garza,* 608 F.2d 659, 666 (5th Cir. 1979)[internal quotation marks omitted].) Once the jury heard the comments, no instruction, admonition nor the brevity of the comments mattered.

The District Court finds neither trial nor appellate counsel rendered ineffective assistance by failing to raise the issue. RR 17. The District Court finds appellate counsel had no duty to raise a meritless argument. RR17. Park disagrees. Appellate counsel must "argue all issues that are arguable." *People v. Feggans,* 67 Cal.2d 444, 447 (1967); see also *People v. Wende,* 25 Cal.3d 436 (1979); *People v. Barton,* 21 Cal.3d 513, 519 (1978). A habeas petitioner need not prove his case would have been reversed to show

prejudice in the denial of effective appellate counsel. *People v. Rhoden,* 6 Cal.3d 519, 524 (1972).

III. A COA SHOULD HAVE ISSUED TO DECIDE IF THE TRIAL COURT VIOLATED PARK'S RIGHT TO COUNSEL BY ADMITTING PARK'S VIDEO RECORDED CONFESSION; AND TO DECIDE IF PARK INVOKED HIS CONSTITUTIONAL RIGHT TO COUNSEL

In violation of *Miranda,* Lopez induced Park to make inculpatory statements. Lopez interrogated Park as he lay in pain on a hospital gurney awaiting treatment. (4RT 2207, 2213.) Park, born in Korea, spoke broken English and used a Korean interpreter at trial. Park asked for an attorney; Lopez ignored the request. (2CT 242-244.)

Lopez never determined if Park felt coherent. When asked about his English proficiency, Park said, "Not perfectly but mostly likely (Unintelligible). (Exh. C, 22) Lopez proceeded because Park knew the correct day and date. (Exh. C, 22) When Lopez asked if he wanted to continue to talk, Park responded, "Unintelligible." (Exh. C, 22) When Park asked if he could have a lawyer, Lopez responded, "You can have your lawyer at any time but right now we're in a hospital." (Exh. C, 22) Lopez also said, "Right

now I am here and I'd like to talk to you right now." (Exh. C, 23) When Lopez told Park he could get an attorney free of charge, Park responded twice, "Can I do that?" Instead of responding with a simple "yes." Lopez told Park, "The courts are the one that determine if you get an attorney appointed for you for free." (Exh. C, 24) When Lopez again explained to Park about giving up his rights to an attorney, Park responded, "I don't (Unintelligible). Its [sic] kind of (Unintelligible)." (Exh. C, 24) Finally, Park agreed to talk to Lopez but Lopez never determined if Park waived his right to an attorney. (2CT 242-245.) (Exh. C)

The District Court finds Park made ambiguous and equivocal comments so that a reasonable officer would have found Park's questions were "ambiguous at best." RR 22. Park disagrees. The record shows that Lopez did not administer "clear and understandable" *Miranda* warnings. The California Court of Appeals failed to consider Lopez' minimizing of the warnings' significance. Requests for counsel are to be "understood as ordinary people would

understand them." *Connecticut v. Barrett,* 479 U.S. 523, 529, 107 S. Ct. 828, 93 L. Ed. 2d 920 (1987)

"Where nothing about the request . . . or the circumstances leading up to the request would render it ambiguous, all questioning must cease." *Smith v. Illinois,* 469 U.S. 91, 98, 105 S. Ct. 490, 83 L. Ed. 2d 488 (1984) (per curiam). It is improper for an officer to attempt to clarify the request; indeed, there is nothing to "clarify." Accordingly, if an officer seeks to clarify an unambiguous request and elicits an equivocal response, the suspect's post-request statements "may not be used to cast retrospective doubt on the clarity of the initial request itself." *Id.* at 100.

IV. A COA SHOULD HAVE ISSUED TO DECIDE IF THE TRIAL COURT DEPRIVED PARK OF DUE PROCESS AND A FAIR TRIAL BY FAILING TO INSTRUCT THE JURY WITH THE LESSER OFFENSE OF SIMPLE ASSAULT

Park asked the trial court to issue an instruction on the lesser included offense of assault to the crime of assault to commit a felony during a burglary. Cal. Penal Code § 220(b) The trial court refused. (5RT 2705.) The trial court erred because the prosecution charged Park with violating Cal. Penal Code § 220 as to YY only. (2CT 296.) Second, the prosecutor relied on two theories of guilt under section 220 (count 3). The first theory was that Park assaulted YY because he intended to sexually abuse YY. The second theory was that Park assaulted YY so he could sexually abuse R.W.

The District Court finds any error did not have a substantial and injurious effect on the jury's verdict. RR 26-27. Park disagrees. Without the lesser included offense, the trial court gave the jury an "all or nothing" choice. The jury could either convict Park of an assault during a burglary

with the intent to a sex crime or let him go. The trial court's failure to instruct the jury on the lesser included offense of assault deprived Park of due process and a fair trial.

CONCLUSION

Park respectfully requests that this Court grant Certiorari because the record and case law shows that the issues are "debatable among jurists of reason," that "a court *could* resolve [the issue] in a different manner," and that it is not "squarely foreclosed by statute, rule, or authoritative court decision." *Barefoot v. Estelle*, 463 U.S. at 893-894. Park met the "minimal showing" required for a Certificate of Appealability and a COA should issue.

DATED: June 12, 2019

/s Fay Arfa

Fay Arfa, Attorney for Petitioner

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SUNG HO PARK, Petitioner-Appellant, v. KIMBERLY HOLLAND, Respondent-Appellee.	No. 18-55871 D.C. No. 2:16-cv-03960-VBF-LAL Central District of California, Los Angeles ORDER

Before: CANBY and WARDLAW, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 2) is denied because appellant has not made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

APPENDIX A

JS-6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

SUNG HO PARK,
Petitioner,
v.
WARDEN KIMBERLY HOLLAND,
Respondent.

No. LA CV 16-03960-VBF-LAL

JUDGMENT

Final judgment is hereby entered in favor of respondent and against petitioner Sung Ho Park. IT IS SO ADJUDGED.

Dated: June 25, 2018

Valerie Baker Fairbank

Honorable Valerie Baker Fairbank
Senior United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

SUNG HO PARK, Petitioner, v. WARDEN KIMBERLY HOLLAND, Respondent.	**No. LA CV 16-03960-VBF-LAL** ORDER Overruling Park's Objections; Adopting the R&R; Denying the Habeas Petition; Directing Entry of Judgment; Terminating the Case (JS-6)

The Court has reviewed the 28 U.S.C. § 2254 Petition for Writ of Habeas Corpus, *see* CM/ECF Document ("Doc") 1, respondent's answer (Doc 13) and lodged documents (Doc 14), petitioner's traverse (Doc 19), Magistrate Judge Lamothe's well-reasoned Report & Recommendation ("R&R") (Doc 22), petitioner's timely objections (Doc 25), and the applicable law. **"As required by Fed. R. Civ. P. 72(b)(3), the Court has engaged in de novo review of the portions of the R&R to which petitioner has specifically objected and finds no defect of law, fact, or logic in the . . . R&R."** *Rael v. Foulk*, 2015 WL 4111295, *1 (C.D. Cal. July 7, 2015), *COA denied*, No. 15-56205 (9th Cir. Feb. 18, 2016).

"The Court finds discussion of [the] objections to be unnecessary on this record. The Magistrates Act 'merely requires the district judge to make a de novo determination of those portions of the report or specified proposed findings or recommendation to which

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objection is made.'" It does not require the district judge to provide a written explanation of the reasons for rejecting objections. *See MacKenzie v. Calif. AG*, 2016 WL 5339566, *1 (C.D. Cal. Sept. 21, 2016) (quoting *US v. Bayer AG*, 639 F. App'x 164, 168-69 (4th Cir. 2016) (per curiam) ("The district court complied with this requirement. Accordingly, we find no procedural error in the district court's decision not to address specifically Walterspiel's objections.")). "This is particularly true where, as here, the objections are plainly unavailing." *Smith v. Calif. Jud. Council*, 2016 WL 6069179, *2 (C.D. Cal. Oct. 17, 2016).

Accordingly, the Court will accept the Magistrate Judge's factual findings and legal conclusions and implement her recommendations.

ORDER

Petitioner's objection **[Doc # 25] is OVERRULED.**

The Report and Recommendation **[Doc # 22] is ADOPTED.**

The petition for a writ of habeas corpus **[Doc # 1] is DENIED.**

Final judgment consistent with this order will be entered separately as required by Fed. R. Civ. P. 58(a). *See Jayne v. Sherman*, 706 F.3d 994, 1009 (9th Cir. 2013).

This action is DISMISSED with prejudice.

The case SHALL BE TERMINATED and closed (JS-6).

Dated: June 25, 2018

Valerie Baker Fairbank

Hon. Valerie Baker Fairbank
Senior United States District Judge

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SUNG HO PARK, Petitioner, v. WARDEN KIMBERLY HOLLAND, Respondent.	Case No. LACV 16-3960-VBF (LAL) **REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE**

This Report and Recommendation is submitted to the Honorable Valerie Baker Fairbank, United States District Judge, under the provisions of 28 U.S.C. § 636 and General Order 194 of the United States District Court for the Central District of California.

I.

PROCEEDINGS

On June 6, 2016, Sung Ho Park ("Petitioner") filed a Petition for Writ of Habeas Corpus by a Person in State Custody pursuant to 28 U.S.C. § 2254 ("Petition"). On June 13, 2017, Respondent filed an Answer. On October 18, 2017, Petitioner filed a Traverse. Thus, this matter is ready for decision.

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II.

PROCEDURAL HISTORY

On April 16, 2013, Petitioner was convicted after a jury trial in the Los Angeles County Superior Court of two counts of forcible oral copulation,[1] one count of sexual battery by restraint,[2] one count of assault with the intent to commit rape, sodomy, or oral copulation during the commission of a first degree burglary,[3] one count of first degree burglary,[4] and one count of forcible rape.[5] (2 Clerk's Transcript ("CT") at 373-78, 380-84, 435-38.) On June 21, 2013, the trial court sentenced Petitioner to a state prison term of 120 years to life. (2 CT at 430-38.)

Petitioner appealed his conviction to the California Court of Appeal. (Lodgments 3-5.) On December 2, 2014, the California Court of Appeal affirmed the judgment against Petitioner. (Lodgment 6.)

Petitioner then filed a petition for review in the California Supreme Court. (Lodgment 7.) On March 11, 2015, the California Supreme Court denied review. (Lodgment 8.)

Next, Petitioner filed a habeas corpus petition in the Los Angeles County Superior Court. (Lodgment 9.) On July 27, 2016, the Los Angeles County Superior Court denied the petition. (Lodgment 10.)

Petitioner then filed a habeas corpus petition in the California Court of Appeal. (Lodgment 11.) On October 13, 2016, the Court of Appeal denied the petition. (Lodgment 12.)

Finally, Petitioner filed a habeas corpus petition in the California Supreme Court. (Lodgment 13.) On December 21, 2016, the California Supreme Court denied the petition. (Lodgment 14.)

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[1] Cal. Penal Code § 288a(c)(2)(a).
[2] Cal. Penal Code § 243.4(d).
[3] Cal. Penal Code § 220(b).
[4] Cal. Penal Code § 459.
[5] Cal. Penal Code § 261(a)(2).

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III.

SUMMARY OF THE EVIDENCE PRESENTED AT TRIAL

In the late morning of June 16, 2011, Jane Doe was asleep in her bed when she was awakened by a sound. (3 RT at 1260.) She opened her eyes to find Petitioner in a mask and a hood standing at the foot of her bed; he was holding a knife. (3 RT at 1260-61, 1287-88.) She screamed twice before he put his hand over her mouth and turned her so that she was face down on her bed. (3 RT at 1261-63.) Petitioner bound Jane Doe's wrists and ankles with zip ties. (3 RT at 1263-64, 1266.) Petitioner asked Jane Doe where the money was and she told him she did not have any money. (3 RT at 1264.) Petitioner then pulled Jane Doe so that her knees were on the floor but her chest was still on her bed. (3 RT at 1266.) Petitioner raped her for about ten minutes. (3 RT at 1267.) Following the rape, Petitioner placed his penis to Jane Doe's anus and asked her if she had "done this before." (3 RT at 1268.) He then forced her to orally copulate him. (3 RT at 1268-70, 1274.) At some point while in the bedroom, Petitioner used a pair of scissors to cut off Jane Doe's clothing and rubbed his knife against her bare skin. (3 RT at 1274-75

Petitioner then moved Jane Doe into her living room. (3 RT at 1276.) Petitioner tried to rape her on her sofa, but she was unable to remember if he was successful. (3 RT at 1277.) He also forced her to orally copulate him again. (3 RT at 1277.) Next, Petitioner placed Jane Doe over his shoulder and carried her into her bathroom. (3 RT at 1277-78.) Jane Doe urinated with her hands bound behind her back. She believed Petitioner wiped her. (3 RT at 1278.)

Petitioner told Jane Doe he had been watching her for some time before the attack. (3 RT at 1278-80.) She estimated he was in her apartment for a total of two hours. (3 RT at 1281.)

Police criminalists detected Petitioner's semen in a sample taken from Jane Doe's bedroom floor. (3 RT at 1587; 4 RT at 1812.) A sample from Jane Doe's breast contained a mixture of DNA from her and Petitioner. (3 RT at 1574, 1582; 4 RT at 1807-12.)

As to the remaining victims, because Petitioner is not challenging the sufficiency of the evidence, after independently reviewing the record, this Court adopts the factual discussion of

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the California Court of Appeal opinion as a fair and accurate summary of the evidence presented at trial:[6]

> Rebecca W. was asleep in bed inside her apartment when appellant, a stranger, entered her bedroom and awakened her. He got on top of her and held a knife to her neck. When she screamed, appellant said in Korean, "Just be quiet or I'm going to kill you and your roommate." Rebecca W.'s roommate was Y.[Y]. They were from Korea and were students at U.C.L.A.
>
> Rebecca W. stopped screaming. Appellant tied her wrists and ankles and put tape over her mouth. He left Rebecca W.'s bedroom and entered Y.Y.'s bedroom. Rebecca W. removed the tape from her mouth and telephoned 911.
>
> Y.Y. was asleep in bed. Appellant awakened her, and she started screaming. He got on top of her while she was lying on her back, held a knife to her neck, and said in Korean, "Stay still, otherwise I'm going kill you." Appellant tied Y.Y.'s wrists and ankles and put tape over her mouth. He turned her over onto her stomach and positioned her so that she was on her knees with her chest and stomach "flat on the bed." Her buttocks were elevated and exposed. Three months earlier, appellant had similarly positioned Jane Doe No. 1 before inserting his penis into her vagina from behind. Appellant touched Y.Y.'s thigh and buttocks. He put his hand close to her vagina but did not touch it. He did not touch her breasts.
>
> Appellant left Y.Y.'s bedroom and went to Rebecca W.'s bedroom. When he left, Y.Y. was still on her knees with her buttocks elevated and exposed. Appellant said, "Stay in that position, otherwise you die."
>
> Appellant told Rebecca W. "that he would have sex with [her] roommate first and then come back for her later." Appellant left Rebecca W.'s bedroom but

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6 "Factual determinations by state courts are presumed correct absent clear and convincing evidence to the contrary . . . ." Miller-El v. Cockrell, 537 U.S. 322, 340, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003) (citing 28 U.S.C. § 2254(e)(1)). Thus, Ninth Circuit cases have presumed correct the factual summary set forth in an opinion of the California Court of Appeal under 28 U.S.C. §2254(e)(1). See, e.g., Moses v. Payne, 555 F.3d 742, 746 n.1 (9th Cir. 2009) (citations omitted); Slovik v. Yates, 556 F.3d 747, 749 n.1 (9th Cir. 2009).

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did not have sex with Y.Y. He returned naked to Rebecca W.'s bedroom and forced her to orally copulate him.

Rebecca W. heard the police banging on the front door. Appellant broke the glass in a bedroom window and jumped through the opening. The police followed a trail of blood that started directly behind the apartment building where Rebecca W. and Y.Y. resided. At the end of the trail, they found appellant and arrested him. Appellant spontaneously said, "I didn't do it."

After waiving his *Miranda* rights, appellant gave the police his version of the incident. He said that he had followed Rebecca W. home because "she was really cute" and "looked like [his] girlfriend." He went to the second floor of the apartment building and stood by the elevator. He saw Rebecca W. get out of the elevator and enter an apartment. Appellant went to the third floor and then returned to the second floor. He walked to the front door of Rebecca W.'s apartment and noticed that it was unlocked. He opened the door and went inside. His mind was thinking "a terrible something." He tied up Rebecca W. and put duct tape over her mouth to stop her from screaming. He then walked into Y.Y.'s bedroom and "tied her up to[o]" because he "was afraid that she's going to run away or call the cop[s] or yell out." He did not intend to commit a sexual act upon Y.Y. He was interested in Rebecca W. As to Y.Y., appellant stated: "She wasn't the girl that I looked at. I wasn't going to expect that she's there." Appellant returned to Rebecca W.'s bedroom and forced her to orally copulate him. When the police knocked on the front door, he ran to a window, kicked out the glass, and jumped. He cut his hand and was bleeding.

(Lodgment 6 at 2-4.)

IV.

PETITIONER'S CLAIMS

Petitioner raises the following claims for habeas corpus relief:

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(1) Petitioner's trial counsel was ineffective for failing to move to exclude Petitioner's statements to police as involuntary;

(2) (a) The prosecutor committed misconduct during closing arguments, and (b) his trial and appellate counsel were ineffective for failing to raise the issue at trial and on appeal;

(3) The trial court violated Petitioner's right to counsel by admitting Petitioner's recorded confession which police obtained after Petitioner requested a lawyer; and

(4) The trial court erred by failing to issue a lesser included offense instruction.

V.

STANDARD OF REVIEW

A. 28 U.S.C. § 2254

The standard of review that applies to Petitioner's claims is stated in 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"):

> (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 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). If these standards are difficult to meet, it is because they were meant to be. As the United States Supreme Court stated in Harrington v. Richter,[7] while the AEDPA "stops short of imposing a complete bar on federal court relitigation of claims already rejected in state proceedings[,]" habeas relief may be granted only "where there is no possibility fairminded

[7] 562 U.S. 86, 131 S. Ct. 770, 786, 178 L. Ed. 2d 624 (2011).

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jurists could disagree that the state court's decision conflicts" with United States Supreme Court precedent. Further, a state court factual determination must be presumed correct unless rebutted by clear and convincing evidence.[8]

B. Sources of "Clearly Established Federal Law"

According to Williams v. Taylor,[9] the law that controls federal habeas review of state court decisions under the AEDPA consists of holdings (as opposed to dicta) of Supreme Court decisions "as of the time of the relevant state-court decision." To determine what, if any, "clearly established" United States Supreme Court law exists, a federal habeas court also may examine decisions other than those of the United States Supreme Court.[10] Ninth Circuit cases "may be persuasive."[11] A state court's decision cannot be contrary to, or an unreasonable application of, clearly established federal law, if no Supreme Court decision has provided a clear holding relating to the legal issue the habeas petitioner raised in state court.[12]

Although a particular state court decision may be both "contrary to" and an "unreasonable application of" controlling Supreme Court law, the two phrases have distinct meanings under Williams.

A state court decision is "contrary to" clearly established federal law if the decision either applies a rule that contradicts the governing Supreme Court law, or reaches a result that differs from the result the Supreme Court reached on "materially indistinguishable" facts.[13] If a state court decision denying a claim is "contrary to" controlling Supreme Court precedent, the reviewing federal habeas court is "unconstrained by § 2254(d)(1)."[14] However, the state court

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8 28 U.S.C. § 2254(e)(1).
9 529 U.S. 362, 412, 120 S. Ct. 1495, 146, L. Ed. 2d 389 (2000).
10 LaJoie v. Thompson, 217 F.3d 663, 669 n.6 (9th Cir. 2000).
11 Duhaime v. Ducharme, 200 F.3d 597, 600 (9th Cir. 1999).
12 Brewer v. Hall, 378 F.3d 952, 955 (9th Cir. 2004); see also Carey v. Musladin, 549 U.S. 70, 77, 127, S. Ct. 649, 649, 166 L. Ed. 2d 482 (2006) (in the absence of a Supreme Court holding regarding the prejudicial effect of spectators' courtroom conduct, the state court's decision could not have been contrary to or an unreasonable application of clearly established federal law).
13 Early v. Packer, 537 U.S. 3, 8, 123 S. Ct. 362, 154 L. Ed. 2d 263 (2002) (per curiam) (citing Williams, 529 U.S. at 405-06).
14 Williams, 529 U.S. at 406.

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need not cite or even be aware of the controlling Supreme Court cases, "so long as neither the reasoning nor the result of the state-court decision contradicts them."[15]

State court decisions that are not "contrary to" Supreme Court law may be set aside on federal habeas review only "if they are not merely erroneous, but 'an unreasonable application' of clearly established federal law, or based on 'an unreasonable determination of the facts.'"[16] Accordingly, this Court may reject a state court decision that correctly identified the applicable federal rule but unreasonably applied the rule to the facts of a particular case.[17] However, to obtain federal habeas relief for such an "unreasonable application," a petitioner must show that the state court's application of Supreme Court law was "objectively unreasonable" under Woodford v. Visciotti.[18] An "unreasonable application" is different from merely an incorrect one.[19]

Where, as here with Claims 3 and 4, the California Supreme Court denied claims without comment on direct review, the state high court's "silent" denial is considered to be "on the merits" and to rest on the last reasoned decision on these claims. In the case of Claims 3 and 4, this Court looks to the grounds the California Court of Appeal stated in its decision on direct appeal.[20] With respect to Claims 1 and (2)(b), this Court looks to the grounds the Los Angeles County Superior Court stated in its decision on habeas corpus review.

Where, as here with respect to Claim (2)(a), the state courts have supplied no reasoned decision for denying the petitioner's claims on the merits, this Court must perform an "'independent review of the record' to ascertain whether the state court decision was objectively unreasonable."[21]

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15 Early, 537 U.S. at 8.
16 Id. at 11 (citing 28 U.S.C. § 2254(d)).
17 See Williams, 529 U.S. at 406-10, 413.
18 537 U.S. 19, 27, 123 S. Ct. 357, 154 L. Ed. 2d 279 (2002).
19 Williams, 529 U.S. at 409-10.
20 See Ylst v. Nunnemaker, 501 U.S. 797, 803-06, 111 S. Ct. 2590, 115 L. Ed. 2d 706 (1991).
21 Himes v. Thompson, 336 F.3d 848, 853 (9th Cir. 2003) (citing Delgado v. Lewis, 223 F.3d 976, 981-82 (9th Cir. 2000)).

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VI.

DISCUSSION

A. Ineffective Assistance of Counsel

1. Background

In Claim One, Petitioner argues his statements to police were involuntary because he was receiving treatment in the hospital and was under the influence of medication at the time of his police interview. Thus, he argues, his trial counsel was ineffective for failing to move to exclude those statements on voluntariness grounds, rather than merely as a violation Petitioner's right to counsel. (Petition at 5; Memorandum of Points and Authorities in Support of Petition ("MPA") at 9-18.)[22]

Petitioner fled from Rebecca W.'s house by kicking through the glass window and jumping out. (2 CT at 270.) After his arrest, paramedics took him to the hospital for treatment for his cuts. (4 RT at 2212-13; MPA, Exh. A at 8.) Hospital staff sutured Petitioner's cuts and splinted his broken wrist. (MPA, Exh. A at 2, 7-9.) Petitioner received Vicodin for pain. (MPA, Exh. A at 10.)[23]

When Los Angeles Police Detective Blanca Lopez met with Petitioner at the hospital, he was not handcuffed. (4 RT at 2213.)[24] Detective Lopez asked Petitioner how he was and he stated he was "fine." (2 CT at 241.) Petitioner told the detective that he could hear her, (2 CT at 241), he understood English except for the word coherent the detective had used, (2 CT at 242),

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[22] It is not clear if Petitioner intended to raise a free-standing claim of involuntariness or if he merely intended to raise his ineffective assistance of trial counsel claim. However, assuming he intended to raise an independent claim challenging the voluntariness of his confession, such a claim fails because, as discussed below, the evidence does not support a finding that his statements to police were involuntary.

[23] Petitioner also notes that he received Keflex. (MPA at 10, 13.) However, his prescription for this antibiotic was not likely to have altered his mental state and, thus, does not weigh on the issue of the voluntariness of his statements.

[24] Petitioner suggests the detective interrogated Petitioner before he was seen by a doctor, citing the detective's statement to Petitioner that the doctors needed to see him. (MPA at 14.) This assertion is contradicted by the record. Petitioner's medical records state he was admitted to the hospital at 10:00 am and was seen immediately by the emergency and trauma teams. (MPA, Exh. A at 8.) The detective did not arrive at the hospital until 10:30-10:45 am. (4 RT at 2213.) By the time she met with Petitioner, his hands were already bandaged. (4 RT at 2213-14.) Significantly, Detective Lopez's interview of Petitioner concluded at 12:06 pm, and her statement that the doctors needed to see him came at the end of that interview. (2 CT at 284.) It is not reasonable to conclude that Petitioner had been in the hospital for two hours, was examined immediately upon arrival, had his hands bandaged, and spoke with the Detective, but had not been seen by a doctor.

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he understood what happened to him that day and why he was in the hospital, (2 CT at 242), and he knew the day of the week and the year, (2 CT at 242). Detective Lopez then read Petitioner his Miranda rights and he stated after each right that he understood. (2 CT at 243-44.) Petitioner then stated he wanted to speak with the detective, (2 CT at 245), and proceeded to engage in an interview with Detective Lopez. (2 CT at 245-84.)

2. State Court Opinion

The Los Angeles County Superior Court denied Petitioner's claim, finding he has not shown he suffered prejudice from his trial counsel alleged ineffective assistance in light of the evidence of his guilt separate from his statements to police. (Lodgment 10 at 1-2.)

3. Legal Standard

In order to prevail on his ineffective assistance of counsel claim under the United States Supreme Court decision in Strickland v. Washington, Petitioner must prove two things: (1) that counsel's performance was deficient, and (2) that he was prejudiced by the deficient performance.[25] A court evaluating an ineffective assistance of counsel claim does not need to address both elements of the test if a petitioner cannot prove one of them.[26]

To prove deficient performance, a petitioner must show that counsel's performance was below an objective standard of reasonableness.[27] There is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."[28] Only if counsel's acts or omissions, examined in light of all the surrounding circumstances, fell outside this "wide range" of professionally competent assistance will petitioner prove deficient performance.[29] Proof of deficient performance does not require habeas corpus relief if the error did not result in prejudice.[30] Accordingly, a petitioner must also show that, but for counsel's unprofessional errors, the result of the proceedings would have been different.[31] Thus, a petitioner will prevail

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25 Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).
26 Id. at 697.
27 Id. at 687-88.
28 Id. at 689.
29 Id. at 690.
30 Id. at 691.
31 Id. at 694.

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only if he can prove that counsel's errors resulted in a "proceeding [that] was fundamentally unfair or unreliable."[32]

4. Analysis

a. Additional Legal Principles

The use of an involuntary confession violates a criminal defendant's right to due process under the Fourteenth Amendment.[33] Before a criminal defendant's statement can be used against him, the government must prove its voluntariness by a preponderance of the evidence.[34] The test for determining whether a confession is involuntary is whether, considering the totality of the circumstances, the confession was obtained by means of physical or psychological coercion or improper inducement such that the suspect's will was overborne.[35] The assessment of the totality of the circumstances may include consideration of the length and location of the interrogation; evaluation of the maturity, education, physical and mental condition of the defendant; and determination of whether the defendant was properly advised of his rights under Miranda.[36] "[C]oercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment."[37]

b. Analysis

Here, there is no evidence Detective Lopez coerced Petitioner. Detective Lopez did not prolong the interview or badger Petitioner. Rather, Detective Lopez was courteous and Petitioner apparently was so comfortable with her that he wanted her to stay with him after the interview ended. (2 CT at 283-84.) Although Petitioner was in the hospital and had received prescription pain medication, the transcript shows that he was coherent and capable of communication. Merely being in the hospital and under the influence of medication, without additional evidence of coercion, did not render Petitioner's statements involuntary.[38]

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[32] Lockhart v. Fretwell, 506 U.S. 364, 369, 113 S. Ct. 838, 122 L. Ed. 2d 180 (1993).
[33] Blackburn v. Alabama, 361 U.S. 199, 205, 80 S. Ct. 274, 4 L. Ed. 2d 242 (1960).
[34] Lego v. Twomey, 404 U.S. 477, 489, 92 S. Ct. 619, 30 L. Ed. 2d 618 (1972).
[35] See Dickerson v. United States, 530 U.S. 428, 434, 120 S. Ct. 2326, 147 L. Ed. 2d 405 (2000).
[36] Withrow v. Williams, 507 U.S. 680, 693-94, 113 S. Ct. 1745, 123 L. Ed. 2d 407 (1993).
[37] Colorado v. Connelly, 479 U.S. 157, 167, 107 S. Ct. 515, 93 L. Ed. 2d 473 (1986).
[38] See United States v. Martin, 781 F.2d 671, 672-74 (9th Cir. 1993) (statements made to police at a hospital were voluntary despite a defendant's being in pain and under the influence of pain medication, where he was conscious, relatively coherent during the questioning, and spoke freely); United States v. Lewis, 833 F.2d 1380, 1384-86 (9th

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Because Petitioner's statements to Detective Lopez were not involuntary, any motion to exclude the statements as involuntary would have been denied. Petitioner's trial counsel was not ineffective for failing to raise this meritless argument at trial.[39] Accordingly, this Court finds that the California courts' denial of Petitioner's claim was neither contrary to, nor involved an unreasonable application of, clearly established federal law, as determined by the United States Supreme Court. Habeas relief is not warranted on Claim One.

B. Prosecutorial Misconduct

1. Background

In Claim Two, Petitioner argues the prosecutor committed misconduct during closing arguments by telling the jury Petitioner was guilty, appealing to the sympathies and passions of the jurors, and disparaging defense counsel. He further argues his trial and appellate counsel were ineffective for failing to challenge the prosecutor's misconduct at trial and on appeal. (Petition at 5-6; MPA at 18-24.)

2. Prosecutorial Misconduct

a. Background

First, Petitioner argues the prosecutor committed misconduct during closing arguments. (MPA at 18-24.)

b. Legal Standard

A habeas petition alleging prosecutorial misconduct will be granted only when the misconduct did "so infect the trial with unfairness as to make the resulting conviction a denial of due process."[40] "[T]he touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor."[41] Under Darden v.

Cir. 1987) (statements taken at a hospital several hours after the defendant was administered a general anesthetic were held to be voluntary where the defendant purported to feel all right, was responsive, and demonstrated unimpaired recollection).

[39] Juan H. v. Allen, 408 F.3d 1262, 1273 (9th Cir. 2005) ("[T]rial counsel cannot have been ineffective for failing to raise a meritless motion.").

[40] Greer v. Miller, 483 U.S. 756, 765, 107 S. Ct. 3102, 97 L. Ed. 2d 618 (1987) (quoting Donnelly v. DeChristoforo, 416 U.S. 637, 643, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974)).

[41] Smith v. Phillips, 455 U.S. 209, 219, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982).

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Wainwright,[42] the first issue is whether the prosecutor's remarks or conduct were improper; if so, the next issue is whether such remarks or conduct infected the trial with unfairness.[43]

A prosecutor is permitted to argue reasonable inferences from the evidence.[44] "Counsel are given latitude in the presentation of their closing arguments, and courts must allow the prosecution to strike hard blows based on the evidence presented and all reasonable inferences therefrom."[45] A prosecutor's statement during closing arguments that is a direct response to a defense argument is not misconduct.[46]

c. Analysis

i. Personal Opinion of Guilt

First, Petitioner challenges the prosecutor's statements that Petitioner was guilty. During the prosecutor's opening summation,[47] she argued that the evidence proved the required elements of the charged crimes. At the end of her argument, she urged the jury to find Petitioner guilty "because he is guilty." (5 RT at 2776.) Similarly, in her final summation, the prosecutor detailed the evidence of Petitioner's guilt and, in the end, asked the jury to "[c]onvict the defendant because he's guilty." (5 RT at 2810.)

Contrary to Petitioner's suggestion, the prosecutor did not argue the jury had a duty to find Petitioner guilty. (See MPA at 20-21.) Thus, the prosecutor did not commit misconduct on this basis. However, it is improper for a prosecutor to express a personal opinion as to the guilt of the accused.[48] Ultimately, though, a prosecutor's statement regarding an opinion of guilt does not violate due process unless it undermines the fundamental fairness of the trial.[49]

Here, the prosecutor did not overtly state it was her personal opinion that Petitioner was guilty. However, even if this Court could find the statements were improper, they did not result

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[42] 477 U.S. 168, 181, 106 S. Ct. 2464, 91 L. Ed. 2d 144 (1986).
[43] Tan v. Runnels, 413 F.3d 1101, 1112 (9th Cir. 2005) (citing Darden, 477 U.S. at 181).
[44] Duckett v. Godinez, 67 F.3d 734, 742 (9th Cir. 1995).
[45] Ceja v. Stewart, 97 F.3d 1246, 1253-54 (9th Cir. 1996).
[46] Darden, 477 U.S. at 182.
[47] Respondent states the prosecutor made her opening statement at the end of trial. (Answer at 11 n.3.) This is not accurate. The prosecutor made her opening statement at the beginning of trial. (2 RT at 628-33.) At the end of trial, she gave her opening closing argument, (5 RT at 2747-76), and her final closing argument, (5 RT at 2804-10), as is typical for a criminal trial.
[48] United States v. Young, 470 U.S. 1, 17-18, 105 S. Ct. 1038, 84 L. Ed. 2d 1 (1985).
[49] Id. at 17.

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in fundamental unfairness. The statements were brief conclusions after the prosecutor argued the evidence was sufficient to prove Petitioner's guilt. It should have come as no surprise to the jury that the prosecution sought to prove Petitioner's guilt and elicit a guilty verdict. Moreover, the evidence of Petitioner's guilt was overwhelming. He confessed to his involvement in the Rebecca W. and Yunjin Y. crimes and his DNA linked him to all of the crimes. In light of this evidence, the prosecutor's personal opinion of Petitioner's guilt, even if briefly expressed to the jury, would not have resulted in such unfairness as to violate due process.

ii. Passions of the Jury

Next, the prosecutor did not commit misconduct by appealing to the passions of the jurors. The prosecutor urged the jury to consider what would have happened had Rebecca W. had not called 911, a call which led to Petitioner's capture. The prosecutor argued that had she not called 911, Petitioner would have been successful in raping her and Yunjin Y., and forcing Yunjin to orally copulate him. Then, the prosecutor argued, Petitioner would have escaped. (5 RT at 2751-52.) The prosecutor further argued that, without Rebecca's 911 call and Petitioner's arrest, the authorities would not have obtained Petitioner's DNA to compare to the evidence from the Jane Doe crime. The prosecutor suggested that Rebecca brought Petitioner to justice through her 911 call. (5 RT at 2753.)

Counsel may not make arguments calculated to arouse the passions or prejudices of the jury.[50] Nevertheless, "counsel are given latitude in the presentation of their closing arguments, and courts must allow the prosecution to strike hard blows based on the evidence presented and all reasonable inferences therefrom."[51]

The prosecutor here did not appeal to the jury's passions, but rather presented a narrative about Petitioner's guilt and apprehension through reasonable inferences based on the evidence. First, as discussed in Section D., below, to prove the charge of assault with intent to commit rape, sodomy, or oral copulation during the commission of a first degree burglary, it was necessary for the prosecutor to show that Petitioner intended to commit further offenses against

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50 Viereck v. United States, 318 U.S. 236, 247-48, 63 S. Ct. 561, 566, 87 L. Ed. 734 (1943).
51 Ceja v. Stewart, 97 F.3d 1246, 1253-54 (9th Cir.1996).

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Rebecca W. and Yunjin Y.[52] To this end, the prosecutor made a reasonable inference from the evidence that Petitioner intended to commit additional crimes against Rebecca and Yunjin but did not because he was interrupted by police following Rebecca's 911 call. In addition, the prosecutor's statements tied the evidence together and connected the Jane Doe crime to the crimes against Rebecca W. and Yunjin Y.

Moreover, even if this Court had a basis on which to find the prosecutor's argument improper, it did not result in fundamental unfairness. The prosecutor did not comment on anything the evidence had not already placed before the jury for consideration. Significantly, the trial court instructed the jury that it was not to let bias or sympathy for the witnesses or victims influence its decision. (2 CT at 328.) This Court presumes the jury followed this instruction.[53]

iii. Disparaging Defense Counsel

Finally, Petitioner's claim fails to the extent he argues the prosecutor committed misconduct by disparaging Petitioner's trial counsel.

Petitioner's counsel argued to the jury that it could not assess Yunjin's credibility because she did not appear personally at trial. Defense counsel also suggested it was unfair to try a defendant with a witness who did not appear at trial. (5 RT at 2803.) In addition, Petitioner's counsel argued there was "reasonable to doubt" the prosecution's case. (5 RT at 2793, 2800.) In response, the prosecutor presented the following argument:

> The defense attorney has resorted to asking you to do what's contrary to the law. You all took an oath as jurors, and you must follow the law.
>
> Instruction No. 317, former testimony of unavailable witness. The testimony that Yunjin Y. has given under oath was read to you because she is not available. You must evaluate this testimony by the same standards that you apply to a witness who testified here in court.

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[52] Cal. Penal Code § 220(b).

[53] Weeks v. Angelone, 528 U.S. 225, 234, 120 S. Ct. 727, 145 L. Ed. 2d 727 (2000).

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> He's at that point of desperation where he's asking you to disobey the law. Do not do it. You have taken a solemn oath in this case to follow the law. You have to do that. That's justice.
>
> Mr. Leonard has also resorted to trying to transform the burden of proof in --
>
> [Defense counsel]: Objection. Misconduct, disparaging against counsel.
>
> The Court: Ladies and gentlemen of the jury, it's just argument. Please take it as such.
>
> You may proceed.
>
> [The prosecutor]: The defense attorney repeated over and over again in his closing argument "reason to doubt, reason to doubt." He's trying to transform reasonable doubt into reason to doubt.
>
> Reasonable doubt is defined in the jury instructions, and that is the definition that you will apply in this case and no other.

(5 RT at 2805-06.)

When read in context, the prosecutor's comments were not improper and did not render Petitioner's trial fundamentally unfair. Clearly the prosecutor's comments were made in response to defense counsel's argument.[54] Further, when Petitioner's trial counsel objected to the prosecutor's argument, the trial court reminded the jury that it was to take the prosecutor's statements as nothing more than argument. This was reinforced by the trial court's instruction to the jury that nothing the attorneys say is evidence, including statements made during opening statements or closing arguments. (2 CT at 332.) Again, this Court must assume the jury followed the instructions.[55] Thus, the argument does not warrant habeas relief.

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[54] Young, 470 U.S. at 11-13 ("[I]f the prosecutor's remarks were 'invited,' and did no more than respond in order to 'right the scale,' such comments would not warrant reversing a conviction."); United States v. de Cruz, 82 F.3d 856, 863 (9th Cir. 1996) (holding prosecutor's improper rebuttal argument to be harmless in part because it was an invited response).

[55] Weeks, 528 U.S. at 234.

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3. Ineffective Assistance

Petitioner also argues his trial and appellate counsel were ineffective for failing to challenge the prosecutor's arguments at trial and on appeal. (MPA at 24.)

As explained above, a finding of ineffective assistance of trial counsel requires a showing that trial counsel's performance was deficient and that the petitioner was prejudiced by the deficient performance.[56] The Strickland standard also applies to claims of ineffective assistance of appellate counsel based on the failure of counsel to raise particular claims on appeal.[57] A habeas petitioner must show that, but for appellate counsel's failure to raise the relevant claim(s), there is a reasonable probability that the petitioner would have been successful on appeal. In the absence of such a showing, neither Strickland prong is satisfied.[58] There is, of course, no obligation to raise meritless arguments on a client's behalf.[59] The weeding out of weaker issues is widely recognized as one of the duties of effective appellate lawyers, and counsel is not deficient for failing to raise a weak issue.[60] In order to prove prejudice in this context, Petitioner must show that he probably would have been successful on appeal but for appellate counsel's errors.[61]

As explained above, Petitioner's prosecutorial misconduct claim lacks merit. Accordingly, his trial and appellate counsel were not ineffective for failing to raise this claim in the state courts.[62]

For all these reasons, this Court finds that the California courts' denial of Petitioner's claim was neither contrary to, nor involved an unreasonable application of, clearly established federal law, as determined by the United States Supreme Court. Habeas relief is not warranted on Claim Two.

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56 Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).
57 Smith v. Robbins, 528 U.S. 259, 285, 120 S. Ct. 746, 145 L. Ed. 2d 756 (2000).
58 See Pollard v. White, 119 F.3d 1430, 1435-37 (9th Cir. 1997).
59 See Strickland, 466 U.S. at 687-88 (requiring a showing of deficient performance as well as prejudice).
60 Miller v. Keeney, 882 F.2d 1428, 1434 (9th Cir. 1989).
61 Id. at 1434 n.9.
62 Juan H. v. Allen, 408 F.3d 1262, 1273 (9th Cir. 2005) ("[T]rial counsel cannot have been ineffective for failing to raise a meritless motion."); Wildman v. Johnson, 261 F.3d 832, 840 (9th Cir. 2001) ("Wildman cannot sustain his claim for ineffective assistance of appellate counsel because the issues he raises are without merit.").

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C. Right to Counsel

1. Background

In Claim Three, Petitioner argues the trial court violated his right to counsel by admitting his statements to Detective Lopez, despite the detective obtaining the statements after Petitioner requested counsel. (MPA at 25-54.)[63]

The California Court of Appeal accurately detailed the background underlying Petitioner's claim:

Miranda Advisement

At the time of the *Miranda* advisement, appellant was in an emergency room receiving treatment for his injuries. The advisement was given in English. Appellant told the officer who gave the advisement, Detective Lopez, that he understood English. The advisement was recorded. Pursuant to a transcript of the recording, the following colloquy occurred:

"[Detective Lopez]: If you cannot afford an attorney, one will be appointed for you free of charge before any question if you want. Do you understand?

"[Appellant]: Can I ask you one question?

"[Detective Lopez]: Yeah.

"[Appellant]: I could have the lawyer to?

"[Detective Lopez]: What's that?

"[Appellant]: I could have a lawyer to?

"[Detective Lopez]: You can have your lawyer at any time but right now we're in a hospital.

"[Appellant]: Okay.

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[63] To the extent Petitioner argues Detective Lopez's Miranda advisement was insufficient because she misadvised him "that he could only speak to her without an attorney," his claim also fails. (MPA at 32.) Detective Lopez explained they were in the hospital at that moment and that if Petitioner wanted an attorney appointed for free a court would have to make that order. (2 CT at 243-44.) Detective Lopez then explained if Petitioner wanted to talk to her at that moment, he would have to waive his Miranda rights. (2 CT at 244.) These were accurate statements.

"[Detective Lopez]: Right now I am here and I'd like to talk to you right now.

"[Appellant]: Okay.

"[Detective Lopez]: The way this reads is, you cannot afford an attorney one will be appointed for you free of charge before any question if you want.

"[Appellant]: Can I do that?

"[Detective Lopez]: What's that?

"[Appellant]: Can I do that then?

"[Detective Lopez]: Can I what?

"[Appellant]: *The very last one is the attorney for free*. [Italics added.]

"[Detective Lopez]: The courts are the one that determine if you get an attorney appointed for you for free.

"[Appellant]: Okay.

"[Detective Lopez]: The only way we can talk right now okay? Is you have to waive those rights. Meaning you have to say you understand those rights. The last question I'm going to ask you if you want to talk to me right now obviously without an attorney present. Okay? In order for me to get your version of the story right now you have to waive that right. Meaning you have to give up that right.

"[Appellant]: Okay.

"[Detective Lopez]: Okay. Do you understand that?

"[Appellant]: So in order to talk to you, I have to give up those rights?

"[Detective Lopez]: Right now. Yes. If you want to. Okay?

"[Appellant]: I don't (Unintelligible). It's kind of (Unintelligible).

"[Detective Lopez]: Okay. The rights that I'm reading to you, that's called your Miranda rights. Meaning those are the rights that you have. After I read each one to you, I said, 'Do you understand?' and you said you do. Okay? The last question I asked you, I said if you cannot afford an attorney, one will be

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appointed for you free of charge before any questioning if you want. Okay? Do you understand that?

"[Appellant]: Yes I do.

"[Detective Lopez]: Okay. The last question is do you want to talk to me about what happened? Do you want to talk to me about, tell me your version of what happened? Because all I have is what somebody else tells me. I don't, without listening to you I don't know what you want me to say, what you want, what you were thinking, what you don't want me to say. Okay?

"[Appellant]: Yeah. Yes I do want to talk to you.

"[Detective Lopez]: Okay. So you want to talk to me?

"[Appellant]: Yes.

"[Detective Lopez]: Yes. Okay. Mr. Park can you tell me what happened this morning?"

Trial Court's Factual Finding

After listening to the recording of appellant's *Miranda* advisement, the trial court found that "[t]he transcript [of the recording] is wrong" in indicating that appellant's statement, "The very last one is the attorney for free," is an "assertion." The court remarked that this statement "appears to be in the interrogatory form." The court continued: "[This] is not a declaration of a desire for an attorney, rather it is a request for clarification . . . ."

(Lodgment 6 at 4-6.)

2. State Court Opinion

The California Court of Appeal denied Petitioner's claim on direct review, as follows:

Appellant's references to an attorney were ambiguous and equivocal so that a reasonable officer would have understood them to mean that he *might* be invoking his right to counsel, not that he was actually invoking that right. Appellant questioned Detective Lopez about his right to counsel. He never

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"clearly asserted his right to have counsel present during custodial interrogation." (*Davis v. United States*, *supra*, 512 U.S. at p. 454.) We accept the trial court's finding that appellant's statement, "The very last one is the attorney for free," was a question rather than an assertion. (*People v. Enraca*, *supra*, 53 Cal.4th at p. 753.)

Detective Lopez did not mislead appellant when he said, "You can have your lawyer at any time but right now we're in a hospital." "[A]dvising an accused that appointed counsel is presently unavailable does not violate *Miranda*. [Citation.]" (*People v. Lujan* (2001) 92 Cal.App.4th 1389, 1402.) ". . . *Miranda* does not require that attorneys be producible on call or that police 'keep a suspect abreast of his various options for legal representation.' [Citation.]" (*People v. Smith* (2007) 40 Cal.4th 483, 503.)

Nor did Detective Lopez mislead appellant when he said, "The courts are the one that determine if you get an attorney appointed for you for free." In *People v. Enraca*, *supra*, 53 Cal.4th at p. 756, our California Supreme Court concluded: "There is no merit to defendant's claim that [Detective] Schultz should have told him that he could consult with appointed counsel immediately. Defendant was correctly informed that he could acquire his own counsel or, if he was eligible, counsel would be appointed when he was arraigned. 'That is in fact when his right to counsel attached. [Citations.]' "

"Finally, any ambiguity regarding [appellant's] meaning was dispelled" when, at the end of the advisement, he said that he understood his right to free appointed counsel before questioning but that he wanted to talk to Detective Lopez now. (*People v. Tully* (2012) 54 Cal.4th 952, 991.) "Thus, appellant did not unambiguously invoke his right to counsel during the . . . interrogation and the police were not required to cease their questioning." (*Ibid.*)

(Lodgment 6 at 6-7.)

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3. Legal Standard

Prior to beginning a custodial interrogation, law enforcement officials must warn a suspect "that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed."[64] Once warned, a suspect may invoke his right to either silence or to counsel thereby halting the interrogation.[65] The interrogation may resume after counsel is provided or the suspect reinitiates contact with law enforcement.[66] Alternatively, a suspect may waive his rights, either expressly or impliedly by actions and words, in a "voluntary, knowing, and intelligent" fashion.[67] If a suspect makes an ambiguous reference to counsel, clearly established law states that police are not required to stop questioning.[68] Whether the reference to counsel is ambiguous is an objective determination considered from the point of view of a "reasonable officer."[69]

4. Analysis

Here, when Detective Lopez advised Petitioner of his Miranda rights he asked for clarification of his right to counsel. Although one might argue Petitioner's questions amounted to an equivocal desire for counsel, a reasonable officer could conclude Petitioner's statemenst were ambiguous at best. The Supreme Court does not require the police to stop questioning or clarify a suspect's statements when they are ambiguous such as they were here.[70] Because Detective Lopez did not erroneously obtain Petitioner's statements, the trial court did not err in admitting the statements at trial.

Accordingly, this Court finds that the California courts' denial of Petitioner's claim was neither contrary to, nor involved an unreasonable application of, clearly established federal law,

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64 Miranda v. Arizona, 384 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).
65 Id. at 473-74.
66 Minnick v. Mississippi, 498 U.S. 146, 111 S. Ct. 486, 112 L. Ed. 2d 489 (1990).
67 Miranda, 384 U.S. at 473-74; North Carolina v. Butler, 441 U.S. 369, 374-75, 99 S. Ct. 1755, 60 L. Ed. 2d 286 (1979).
68 Davis v. United States, 512 U.S. 452, 459, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994) (finding that qualifiers such as "I think," or "maybe" constitute ambiguous references that do not require police to stop or ask for clarification).
69 Id.
70 Id. at 461-62 ("When a suspect makes an ambiguous or equivocal statement it will often be good police practice for the interviewing officers to clarify whether or not he actually wants an attorney," but such clarification is not required.)

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as determined by the United States Supreme Court. Habeas relief is not warranted on Claim Three.

D. Lesser Included Offense Instruction

1. Background

Finally, in Claim Four, Petitioner argues the trial court erred by failing to instruct the jury on simple assault as a lesser included offense of assault with intent to commit rape, sodomy, or oral copulation during the commission of first degree burglary. Petitioner argues that because he did not intend to rape, sodomize, or engage in oral copulation with Yunjin, his assault on her was nothing more than simple assault. (MPA at 55-68.)

2. State Court Opinion

The California Court of Appeal detailed the factual background underlying Petitioner's claim and denied the claim on the merits, as follows:

> As to Y.Y., appellant was convicted of assault with intent to commit rape, sodomy, or oral copulation during the commission of first degree burglary in violation of section 220, subdivision (b). The statute provides: "(b) Any person who, in the commission of a burglary of the first degree, . . . assaults another with intent to commit rape, sodomy, oral copulation, or any violation of Section 264.1, 288, or 289 shall be punished by imprisonment in the state prison for life with the possibility of parole." Appellant contends that the trial court erroneously refused to instruct the jury on the lesser included offense of simple assault in violation of section 240.
>
> The trial court initially stated that it was required to instruct on simple assault. It said: "[Appellant] said he didn't intend to sexually assault [Y.Y.]. So that would support the [section] 240 [lesser included offense]." The court continued: "[T]he jury might credit [appellant's] statement . . . because there was no actual sex offense perpetrated on [Y.Y]., at least no alleged offense." But the prosecutor argued that if the jury "believed [appellant's] interview with

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[Detective] Lopez that he had no attraction to [Y.Y.] and no sexual interest in her at all," appellant would still be guilty of the greater offense because he had assaulted her with the intent of "furthering the sexual assault on Rebecca W."

The following day, the trial court decided that appellant could be convicted of violating section 220, subdivision (b) if he had assaulted Y.Y. with the intent of committing rape, sodomy, or oral copulation upon Rebecca W. The court concluded that this "removes any justification for a lesser included offense of [section] 240" since "if the jury were to believe [appellant's] statement that he tied [Y.Y.] with the intent to assault [Rebecca W.]," he would still be guilty of the greater offense.

In interpreting section 220, subdivision (b), the trial court relied on *People v. Green* (1924) 65 Cal.App. 234 (*Green*). At the time of the *Green* decision, section 220 provided: " 'Every person who assaults another with intent to commit rape, the infamous crime against nature [sodomy], mayhem, robbery, or grand larceny, is punishable by imprisonment in the state prison not less than one nor more than fourteen years.' " (*Id.*, at p. 235.) In *Green* the defendant was charged with assaulting Paul Maupin with the intent to commit the infamous crime against nature. The defendant contended that the information was insufficient because although it named Maupin as the victim of the assault, it did not name "the intended victim of the infamous crime which constituted the object of the assault." (*Ibid.*) The appellate court rejected defendant's contention: "The ultimate fact constituting the offense, as defined by section 220 of the Penal Code, was an assault upon the person of Paul Maupin, with such intent [to commit the infamous crime], and if [defendant's] objective were Maupin or another person the statute was nevertheless violated, and no allegation of the other intended offense except by way of naming it was necessary." (*Id.*, at p. 237.) Thus, "had [defendant] intended committing a simple assault upon the said Maupin for the purpose of ridding himself of the latter's opposition, in order that he might accomplish his

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[sexual] purpose upon the person of another . . . we think [the defendant's acts] would still fall within the scope of section 220 of the Penal Code and would amount to no lesser offense." (Id., at p. 236.)

Appellant does not contend that *Green* was wrongly decided. He argues that the trial court erroneously refused to instruct on the lesser included offense of simple assault because substantial evidence supported that offense. An instruction on a lesser included offense is " ' "required whenever evidence that the defendant is guilty only of the lesser offense is 'substantial enough to merit consideration' by the jury. [Citations.] 'Substantial evidence' in this context is ' "evidence from which a jury composed of reasonable [persons] could . . . conclude[ ]" ' that the lesser offense, but not the greater, was committed." [Citation.]' [Citation.]" (*People v. Sattiewhite* (2014) 59 Cal.4th 446, 477.)

The record contains no substantial evidence that appellant was guilty only of simple assault. Based on appellant's version of events, he assaulted Y.Y. with the intent of facilitating the commission of a sexual offense against Rebecca W. Appellant told the police that he had tied up Y.Y. because he was afraid that she was "going to run away or call the cop[s] or yell out." In his opening brief, appellant asserts that Rebecca W. "was [his] target." Pursuant to *Green*, an assault upon Y.Y. with the intent to commit rape, sodomy, or oral copulation upon Rebecca W. constitutes a violation of section 220. Thus, even if the jury had believed appellant, it could not reasonably conclude "that the lesser offense, but not the greater, was committed." [Citation.]' [Citation.]" (*People v. Sattiewhite, supra*, 59 Cal.4th at p. 477.)

(Lodgment 6 at 8-10.)

3. Legal Standard

Preliminarily, the United States Supreme Court held in Beck v. Alabama that failure to instruct the jury on a lesser-included offense in a capital case would be constitutional error if

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there was evidence to support the instruction.[71] The Beck Court, however, did not decide whether the due process clause would require the giving of a lesser-included offense instruction in a non-capital case.[72] The Ninth Circuit, noting this uncertainty of Beck's applicability, declined to extend the Beck holding to non-capital cases.[73]

On the other hand, in Solis,[74] the Ninth Circuit recognized that a clearly established and cognizable constitutional claim may be stated where a state court has refused a requested lesser-included offense instruction that is consistent with the defendant's theory of defense.[75] As the court made clear, however, this possible exception does not apply if there is insufficient evidence supporting the proffered lesser offense instruction.[76] Even if the trial court committed instructional error, however, habeas corpus relief is warranted only if the error had a "substantial and injurious effect or influence in determining the jury's verdict."[77]

4. Analysis

Even if the trial court erred by failing to instruct on the lesser-included offense in the face of a defense request, the error was harmless.

First, the evidence was sufficient to support a finding that Petitioner assaulted Yunjin with the intent to commit a sexual offense against her. Petitioner bound her and spread her legs before positioning her on her bed so that she was face down with her buttocks in the air. Petitioner laid on top of Yunjin and asked her if she had ever had sex before. Petitioner touched her thigh, buttocks, and panty line. (2 RT at 929-35, 964.) Although Petitioner did not commit

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71 447 U.S. 625, 638, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980).

72 See id. at 638 n.14.

73 See Solis v. Garcia, 219 F.3d 922, 929 (2000) (holding that "the failure of a state court to instruct on a lesser offense [in a noncapital case] fails to present a federal constitutional question and will not be considered in a federal habeas corpus proceeding.") (citations omitted) (internal quotation marks omitted).

74 See id. (stating that "the defendant's right to adequate jury instructions on his or her theory of the case might, in some case, constitute an exception to the general rule") (citing Bashor, 730 F.2d at 1240).

75 In light of the foregoing authorities, petitioner's instructional error claim is not barred by Teague v. Lane, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989) to the extent it is predicated upon the trial court's failure to instruct on a lesser included offense where that theory of the defense and the evidence warranted instruction on the lesser included offense. See, e.g., Clark v. Singh, 2009 WL 82279, at *5 (C.D.Cal.2009).

76 Solis, 219 F.3d at 929-30 (finding no constitutional error in refusal to give lesser-included voluntary manslaughter instruction where there was no substantial evidence to support the instruction under state law).

77 Brecht v. Abrahamson, 507 U.S. 619, 637, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993) (internal quotation marks omitted).

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sex crimes against Yunjin, the jury reasonably could have concluded from this evidence and the evidence of Petitioner's acts against Rebecca W. and Jane Doe that Petitioner intended to sexually assault Yunjin before being interrupted by the police.

Second, even if the jury accepted Petitioner's claim that he was not attracted to Yunjin and, thus, did not intend to sexually assault her, the state courts found that state law allows for a conviction under California Penal Code 220(b) when a suspect assaults an individual with the intent of committing rape, sodomy, or oral copulation on a second individual. This Court must defer to the state court's interpretation of its own law.[78]

Petitioner admitted that his assault on Yunjin was for the purpose of facilitating his attack on Rebecca. (2 CT at 263, 265, 272.) Under these circumstances, the jury would not have convicted Petitioner of the lesser-included offense of simple assault, even if the jury had received the instruction on the lesser-included offense. Thus, any error by the trial court in failing to issue the lesser-included offense instruction could not have had a substantial and injurious effect on the jury's verdict.

Accordingly, the state courts' rejection of Petitioner's lesser-included offense claim was not contrary to, or an unreasonable application of, federal law. Habeas relief is not warranted on Claim Four.

VII.

RECOMMENDATION

IT THEREFORE IS RECOMMENDED that the District Court issue an Order: (1) approving and accepting this Report and Recommendation; and (2) directing that Judgment be entered denying the Petition and dismissing this action with prejudice.

DATED: March 5, 2018

Louise A. La Mothe

HONORABLE LOUISE A. LA MOTHE
United States Magistrate Judge

[78] Bradshaw v. Richey, 546 U.S. 74, 76, 126 S. Ct. 602, 163 L. Ed. 2d 407 (2005) ("a state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in federal habeas").

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Appellate Courts Case Information

Supreme Court

Change court ▼

Court data last updated: 06/04/2019 11:36 AM

Docket (Register of Actions)

PEOPLE v. PARK
Division SF
Case Number S223762

Date	Description	Notes
01/13/2015	Petition for review filed	Defendant and Appellant: Sung Ho Park Attorney: Nancy L. Tetreault Pursuant to CRC, rule 8.25(b)
03/11/2015	Petition for review denied	
03/20/2015	Returned record	petition for review

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Filed 12/2/14 P. v. Park CA2/6

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. SUNG HO PARK, Defendant and Appellant.	2d Crim. No. B249730 (Super. Ct. No. SA078815) (Los Angeles County)

Sung Ho Park appeals from the judgment entered after a jury convicted him of offenses involving three victims. As to Rebecca W., he was convicted of forcible oral copulation (Pen. Code, § 288a, subd. (c)(2)(A))[1] and sexual battery while the victim was restrained. (§ 243.4, subd. (d).) As to Y.Y., he was convicted of assault with intent to commit rape, sodomy, or oral copulation during the commission of first degree burglary. (§ 220, subd. (b).) As to Rebecca W. and Y.Y., he was convicted of first degree burglary with another person present. (§§ 459, 460, subd. (a), 667.5, subd. (c)(21).) As to the third victim, identified only as "Jane Doe No. 1," appellant was convicted of forcible rape (§ 261, subd. (a)(2)) and forcible oral copulation. (§ 288a, subd. (c)(2)(A).) The incident involving Jane Doe No. 1 occurred three months before

[1] All statutory references are to the Penal Code unless otherwise stated.

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the incident involving Rebecca W. and Y.Y. The jury found true several sentencing enhancements. Appellant was sentenced to prison for 120 years to life.

Appellant contends that the trial court erroneously admitted statements he made to the police following his arrest for the offenses committed against Rebecca W. and Y.Y. He maintains that the statements were obtained in violation of *Miranda* (*Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602, 16 L.Ed.2d 694) because the police questioned him after he had invoked his right to counsel. Appellant's other contention concerns his conviction of assaulting Y.Y. during the commission of first degree burglary with the intent to commit rape, sodomy, or oral copulation. (§ 220, subd. (b).) Appellant argues that the trial court erroneously refused to instruct the jury on the lesser included offense of simple assault. We affirm.

Facts

With one exception, the facts relating to the offenses committed against Jane Doe No. 1 are not relevant to the issues on appeal. We limit our summary of the facts to this one exception and the offenses committed against Rebecca W. and Y.Y.

Rebecca W. was asleep in bed inside her apartment when appellant, a stranger, entered her bedroom and awakened her. He got on top of her and held a knife to her neck. When she screamed, appellant said in Korean, "Just be quiet or I'm going to kill you and your roommate." Rebecca W.'s roommate was Y.J. They were from Korea and were students at U.C.L.A.

Rebecca W. stopped screaming. Appellant tied her wrists and ankles and put tape over her mouth. He left Rebecca W.'s bedroom and entered Y.Y.'s bedroom. Rebecca W. removed the tape from her mouth and telephoned 911.

Y.Y. was asleep in bed. Appellant awakened her, and she started screaming. He got on top of her while she was lying on her back, held a knife to her neck, and said in Korean, "Stay still, otherwise I'm going kill you." Appellant tied Y.Y.'s wrists and ankles and put tape over her mouth. He turned her over onto her stomach and positioned her so that she was on her knees with her chest and stomach "flat on the bed." Her buttocks were elevated and exposed. Three months earlier, appellant had

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similarly positioned Jane Doe No. 1 before inserting his penis into her vagina from behind. Appellant touched Y.Y.'s thigh and buttocks. He put his hand close to her vagina but did not touch it. He did not touch her breasts.

Appellant left Y.Y.'s bedroom and went to Rebecca W.'s bedroom. When he left, Y.Y. was still on her knees with her buttocks elevated and exposed. Appellant said, "Stay in that position, otherwise you die."

Appellant told Rebecca W. "that he would have sex with [her] roommate first and then come back for her later." Appellant left Rebecca W.'s bedroom but did not have sex with Y.Y. He returned naked to Rebecca W.'s bedroom and forced her to orally copulate him.

Rebecca W. heard the police banging on the front door. Appellant broke the glass in a bedroom window and jumped through the opening. The police followed a trail of blood that started directly behind the apartment building where Rebecca W. and Y.Y. resided. At the end of the trail, they found appellant and arrested him. Appellant spontaneously said, "I didn't do it."

After waiving his *Miranda* rights, appellant gave the police his version of the incident. He said that he had followed Rebecca W. home because "she was really cute" and "looked like [his] girlfriend." He went to the second floor of the apartment building and stood by the elevator. He saw Rebecca W. get out of the elevator and enter an apartment. Appellant went to the third floor and then returned to the second floor. He walked to the front door of Rebecca W.'s apartment and noticed that it was unlocked. He opened the door and went inside. His mind was thinking "a terrible something." He tied up Rebecca W. and put duct tape over her mouth to stop her from screaming. He then walked into Y.Y.'s bedroom and "tied her up to" because he "was afraid that she's going to run away or call the cop[s] or yell out." He did not intend to commit a sexual act upon Y.Y. He was interested in Rebecca W. As to Y.Y., appellant stated: "She wasn't the girl that I looked at. I wasn't going to expect that she's there." Appellant returned to Rebecca W.'s bedroom and forced her to orally

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copulate him. When the police knocked on the front door, he ran to a window, kicked out the glass, and jumped. He cut his hand and was bleeding.

Miranda Advisement

At the time of the *Miranda* advisement, appellant was in an emergency room receiving treatment for his injuries. The advisement was given in English. Appellant told the officer who gave the advisement, Detective Lopez, that he understood English. The advisement was recorded. Pursuant to a transcript of the recording, the following colloquy occurred:

"[Detective Lopez]: If you cannot afford an attorney, one will be appointed for you free of charge before any question if you want. Do you understand?

"[Appellant]: Can I ask you one question?

"[Detective Lopez]: Yeah.

"[Appellant]: I could have the lawyer to?

"[Detective Lopez]: What's that?

"[Appellant]: I could have a lawyer to?

"[Detective Lopez]: You can have your lawyer at any time but right now we're in a hospital.

"[Appellant]: Okay.

"[Detective Lopez]: Right now I am here and I'd like to talk to you right now.

"[Appellant]: Okay.

"[Detective Lopez]: The way this reads is, you cannot afford an attorney one will be appointed for you free of charge before any question if you want.

"[Appellant]: Can I do that?

"[Detective Lopez]: What's that?

"[Appellant]: Can I do that then?

"[Detective Lopez]: Can I what?

"[Appellant]: *The very last one is the attorney for free*. [Italics added.]

"[Detective Lopez]: The courts are the one that determine if you get an attorney appointed for you for free.

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"[Appellant]: Okay.

"[Detective Lopez]: The only way we can talk right now okay? Is you have to waive those rights. Meaning you have to say you understand those rights. The last question I'm going to ask you if you want to talk to me right now obviously without an attorney present. Okay? In order for me to get your version of the story right now you have to waive that right. Meaning you have to give up that right.

"[Appellant]: Okay.

"[Detective Lopez]: Okay. Do you understand that?

"[Appellant]: So in order to talk to you, I have to give up those rights?

"[Detective Lopez]: Right now. Yes. If you want to. Okay?

"[Appellant]: I don't (Unintelligible). It's kind of (Unintelligible).

"[Detective Lopez]: Okay. The rights that I'm reading to you, that's called your Miranda rights. Meaning those are the rights that you have. After I read each one to you, I said, 'Do you understand?' and you said you do. Okay? The last question I asked you, I said if you cannot afford an attorney, one will be appointed for you free of charge before any questioning if you want. Okay? Do you understand that?

"[Appellant]: Yes I do.

"[Detective Lopez]: Okay. The last question is do you want to talk to me about what happened? Do you want to talk to me about, tell me your version of what happened? Because all I have is what somebody else tells me. I don't, without listening to you I don't know what you want me to say, what you want, what you were thinking, what you don't want me to say. Okay?

"[Appellant]: Yeah. Yes I do want to talk to you.

"[Detective Lopez]: Okay. So you want to talk to me?

"[Appellant]: Yes.

"[Detective Lopez]: Yes. Okay. Mr. Park can you tell me what happened this morning?"

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Trial Court's Factual Finding

After listening to the recording of appellant's *Miranda* advisement, the trial court found that "[t]he transcript [of the recording] is wrong" in indicating that appellant's statement, "The very last one is the attorney for free," is an "assertion." The court remarked that this statement "appears to be in the interrogatory form." The court continued: "[This] is not a declaration of a desire for an attorney, rather it is a request for clarification . . . ."

Standard of Review

" ' "[W]e accept the trial court's resolution of disputed facts and inferences, and its evaluations of credibility, if supported by substantial evidence. We independently determine from the undisputed facts and the facts properly found by the trial court whether the challenged statement was illegally obtained." [Citation.]' [Citation.]" (*People v. Enraca* (2012) 53 Cal.4th 735, 753.)

Appellant Did Not Clearly Assert His Right to Counsel

The United States Supreme Court has "held that law enforcement officers must immediately cease questioning a suspect who has clearly asserted his right to have counsel present during custodial interrogation." (*Davis v. United States* (1994) 512 U.S. 452, 454 [114 S.Ct. 2350, 129 L.Ed.2d 362].) "[T]he suspect must unambiguously request counsel. . . . [H]e must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney. If the statement fails to meet the requisite level of clarity, [the law] does not require that the officers stop questioning the suspect. [Citation.]" (*Id.*, 512 U.S. at p. 459.) Thus, "if a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel, [the high court's] precedents do not require the cessation of questioning. [Citations.]" (*Ibid.*)

Appellant's references to an attorney were ambiguous and equivocal so that a reasonable officer would have understood them to mean that he *might* be invoking his

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right to counsel, not that he was actually invoking that right. Appellant questioned Detective Lopez about his right to counsel. He never "clearly asserted his right to have counsel present during custodial interrogation." (*Davis v. United States*, *supra*, 512 U.S. at p. 454.) We accept the trial court's finding that appellant's statement, "The very last one is the attorney for free," was a question rather than an assertion. (*People v. Enraca*, *supra*, 53 Cal.4th at p. 753.)

Detective Lopez did not mislead appellant when he said, "You can have your lawyer at any time but right now we're in a hospital." "[A]dvising an accused that appointed counsel is presently unavailable does not violate *Miranda*. [Citation.]" (*People v. Lujan* (2001) 92 Cal.App.4th 1389, 1402.) ". . . *Miranda* does not require that attorneys be producible on call or that police 'keep a suspect abreast of his various options for legal representation.' [Citation.]" (*People v. Smith* (2007) 40 Cal.4th 483, 503.)

Nor did Detective Lopez mislead appellant when he said, "The courts are the one that determine if you get an attorney appointed for you for free." In *People v. Enraca*, *supra*, 53 Cal.4th at p. 756, our California Supreme Court concluded: "There is no merit to defendant's claim that [Detective] Schultz should have told him that he could consult with appointed counsel immediately. Defendant was correctly informed that he could acquire his own counsel or, if he was eligible, counsel would be appointed when he was arraigned. 'That is in fact when his right to counsel attached. [Citations.]' "

"Finally, any ambiguity regarding [appellant's] meaning was dispelled" when, at the end of the advisement, he said that he understood his right to free appointed counsel before questioning but that he wanted to talk to Detective Lopez now. (*People v. Tully* (2012) 54 Cal.4th 952, 991.) "Thus, appellant did not unambiguously invoke his right to counsel during the . . . interrogation and the police were not required to cease their questioning." (*Ibid*.)

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Trial Court's Refusal to Instruct on Lesser Included Offense of Simple Assault

As to Y.Y., appellant was convicted of assault with intent to commit rape, sodomy, or oral copulation during the commission of first degree burglary in violation of section 220, subdivision (b). The statute provides: "(b) Any person who, in the commission of a burglary of the first degree, . . . assaults another with intent to commit rape, sodomy, oral copulation, or any violation of Section 264.1, 288, or 289 shall be punished by imprisonment in the state prison for life with the possibility of parole." Appellant contends that the trial court erroneously refused to instruct the jury on the lesser included offense of simple assault in violation of section 240.

The trial court initially stated that it was required to instruct on simple assault. It said: "[Appellant] said he didn't intend to sexually assault [Y.Y.]. So that would support the [section] 240 [lesser included offense]." The court continued: "[T]he jury might credit [appellant's] statement . . . because there was no actual sex offense perpetrated on [Y.Y]., at least no alleged offense." But the prosecutor argued that if the jury "believed [appellant's] interview with [Detective] Lopez that he had no attraction to [Y.Y.] and no sexual interest in her at all," appellant would still be guilty of the greater offense because he had assaulted her with the intent of "furthering the sexual assault on Rebecca W."

The following day, the trial court decided that appellant could be convicted of violating section 220, subdivision (b) if he had assaulted Y.Y. with the intent of committing rape, sodomy, or oral copulation upon Rebecca W. The court concluded that this "removes any justification for a lesser included offense of [section] 240" since "if the jury were to believe [appellant's] statement that he tied [Y.Y.] with the intent to assault [Rebecca W.]," he would still be guilty of the greater offense.

In interpreting section 220, subdivision (b), the trial court relied on *People v. Green* (1924) 65 Cal.App. 234 (*Green*). At the time of the *Green* decision, section 220 provided: " 'Every person who assaults another with intent to commit rape, the infamous crime against nature [sodomy], mayhem, robbery, or grand larceny, is punishable by imprisonment in the state prison not less than one nor more than

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fourteen years.' " (*Id*., at p. 235.) In *Green* the defendant was charged with assaulting Paul Maupin with the intent to commit the infamous crime against nature. The defendant contended that the information was insufficient because although it named Maupin as the victim of the assault, it did not name "the intended victim of the infamous crime which constituted the object of the assault." (*Ibid*.) The appellate court rejected defendant's contention: "The ultimate fact constituting the offense, as defined by section 220 of the Penal Code, was an assault upon the person of Paul Maupin, with such intent [to commit the infamous crime], and if [defendant's] objective were Maupin or another person the statute was nevertheless violated, and no allegation of the other intended offense except by way of naming it was necessary." (*Id*., at p. 237.) Thus, "had [defendant] intended committing a simple assault upon the said Maupin for the purpose of ridding himself of the latter's opposition, in order that he might accomplish his [sexual] purpose upon the person of another . . . we think [the defendant's acts] would still fall within the scope of section 220 of the Penal Code and would amount to no lesser offense." (Id., at p. 236.)

Appellant does not contend that *Green* was wrongly decided. He argues that the trial court erroneously refused to instruct on the lesser included offense of simple assault because substantial evidence supported that offense. An instruction on a lesser included offense is " ' "required whenever evidence that the defendant is guilty only of the lesser offense is 'substantial enough to merit consideration' by the jury. [Citations.] 'Substantial evidence' in this context is ' "evidence from which a jury composed of reasonable [persons] could . . . conclude[ ]" ' that the lesser offense, but not the greater, was committed." [Citation.]' [Citation.]" (*People v. Sattiewhite* (2014) 59 Cal.4th 446, 477.)

The record contains no substantial evidence that appellant was guilty only of simple assault. Based on appellant's version of events, he assaulted Y.Y. with the intent of facilitating the commission of a sexual offense against Rebecca W. Appellant told the police that he had tied up Y.Y. because he was afraid that she was "going to run away or call the cop[s] or yell out." In his opening brief, appellant asserts that

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Rebecca W. "was [his] target." Pursuant to *Green*, an assault upon Y.Y. with the intent to commit rape, sodomy, or oral copulation upon Rebecca W. constitutes a violation of section 220. Thus, even if the jury had believed appellant, it could not reasonably conclude "that the lesser offense, but not the greater, was committed." [Citation.]' [Citation.]" (*People v. Sattiewhite*, *supra*, 59 Cal.4th at p. 477.)

Disposition

The judgment is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

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Mark E. Windham, Judge

Superior Court County of Los Angeles

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Nancy L. Tetreault, under appointment by the Court of Appeal, for Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Linda C. Johnson, Supervising Deputy Attorney General, Tita Nguyen, Deputy Attorney General, for Plaintiff and Respondent.

APPENDIX C