No._____

In the
Supreme Court of the United States

MATTHEW TERRELL, Petitioner

v.

C. ARMANT, Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

PETITION FOR WRIT OF CERTIORARI

Charles R. Khoury Jr.
P.O. Box 791
Del Mar, California, 92014
State Bar Nr. 42625
Telephone: (858) 764-0644
Fax: (858) 876-1977
charliekhouryjr@yahoo.com
Attorney for Petitioner

QUESTION PRESENTED

Should a certificate of appealability be granted to review whether there was a violation of *Jackson v. Virginia,* 443 U.S. 307, 317 and the Due Process Clause of the 14th Amendment? There was not substantial evidence that petitioner could be convicted of assault with intent to commit rape or oral copulation.

PARTIES TO THE PROCEEDINGS

There are no parties to the proceeding other than those named in the caption of the case.

TABLE OF CONTENTS

Page

ARGUMENT

TABLE OF AUTHORITIES

CASES

CONSTITUTION

STATUTES

No._____

In the
Supreme Court of the United States

MATTHEW TERRELL, Petitioner

v.

C. ARMANT, Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

PETITION FOR WRIT OF CERTIORARI

Petitioner Matthew Terrell respectfully petitions the Court for a writ of certiorari to review the order of the United States Court of Appeals for the Ninth Circuit denying a certificate of appealability after the district court's denial of the petition for a writ of habeas corpus.

WHY THIS PETITION SHOULD BE GRANTED

This petition should be granted as the standard for granting a certificate of appealability has been met in this case and this court is petitioner's last chance to get a hearing in the Ninth Circuit on his claim there was not substantial evidence for his convictions

A COA must issue if jurists of reason could debate the decision of the district court to deny relief on this ground. It is submitted that this disagreement of "jurists of reason" has already occurred in the state court and in federal courts in cases closely tracking the facts of the instant case.

To obtain a COA, a petitioner "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong."*Slack v. McDaniel*, 529 U.S. 473, 484 (2000). The applicant need not prove that some jurists would grant the habeas corpus petition. *Miller-El v. Cockrell*, 537 U.S.322, 338 (2003). Because a COA does not require a showing that the appeal will succeed, the Court of Appeals should not decline an application for a COA merely because it believes the

applicant will not demonstrate an entitlement to relief. *Id*. at 337. This Court resolves any doubts about issuing a COA in favor of the petitioner. *Rhoades v. Henry*, 598 F.3d 511, 518 (9th Cir. 2010).

This young man, Matthew Terrell, 27 years old, with no prior criminal record , must register as a sex offender for the rest of his life. Any chance of a productive life is essentially over for him. In view of the disagreement with other jurists on sufficiency of the evidence to have that occur, he should have the appeal he is seeking in this petition for certiorari to Order the Ninth Circuit to grant a certificate of appealability.

OPINIONS BELOW

Cases from Federal Courts:

On September 16, 2019, the Ninth Circuit Court of Appeals, in a one page order, denied a motion for reconsideration of the earlier denial of a certificate of appealability.

(Appendix A, 9th Ckt. Order .) That motion for reconsideration is attached as Appendix B.

The Order of the United States District Court for the Central District of California denying the petition for a writ of habeas corpus with prejudice was issued on October 29, 2018, Dkt 11, and is Appendix C.

There was no report and recommendation filed in this case.

The opinion of the CCA is attached as Appendix D.

The Civil Docket of both District Court and Ninth Circuit is appendix E.

JURISDICTION

The Ninth Circuit denied the *second* motion for reconsideration of the denial of the motion for certificate of appealability on September 16, 2019. The jurisdiction of this Court is, thus timely invoked under 28 USC section 1254(1). *Hohn v. United States,* 524 U.S. 236 (1998).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

A defendant in a criminal case must have the right to Due Process of Law , and the Fourteenth Amendments to the U. S. Constitution.

28 U.S.C. section 2254(d) provides:

(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.

STATEMENT OF THE CASE

A. State Court Proceedings

On October 10, 2013, appellant Matthew Terrell was charged with one count of assault with intent to commit rape or oral copulation (Pen. Code, § 220, subd. (a)(1)), and one count of false imprisonment by violence, menace, fraud or deceit (Pen. Code, §§ 236 and 237 (a). (1CT 2.)

Trial commenced with pre-trial motions on December 11, 2013. (1 CT 240.) The case was submitted to the jury on December 17, at 2:09 and the jury returned the next morning and at 9:36 a.m., they rendered verdicts of

guilty as to both counts. (1 CT 93-94, 255.)

The court then sentenced appellant to the upper term of 6 years on count one, assault with intent to commit rape, and stayed the sentence of the upper term of 3 years for Count 2, false imprisonment by violence under Penal Code section 654. (4RT 369-371; 1CT 258.)

Appellant was ordered to pay various fines and to register as a sex offender for the rest of his life.

Appellant timely filed a notice of appeal on February 18, 2014. (1 CT 228.)

On November 2, 1015, the California Court of Appeal affirmed appellant's conviction.

On January 20, 2016, the California Supreme Court denied appellant's petition for review.

B. Federal Court Proceedings

Appellant, through counsel, filed a petition for writ of habeas corpus under 28 U.S.C. 2254 on January 17, 2017 .ECF1 of attached Civil Docket.

On October 26, 2018, the District Court Judge filed an Order Denying both the Petition for Writ of Habeas Corpus and a Certificate of Appealability (COA). ECF 11.

On November 13, 2018, a motion for reconsideration of the judgment was filed. ECF16.

On November 22, 2018, a Notice of Appeal to the Ninth Circuit was filed . ECF18.

On December 14, 2018, the Motion for Reconsideration was denied by the District Court Judge. ECF16.

On Jan 31, 2019 a Motion for Certificate of Appealability (COA) was filed in the Ninth Circuit. Dkt5.

On July 22, 2019, the motion for COA was denied. Dkt 6.

On August 9, 2019, another motion for reconsideration was filed. Dkt. 7.

On September 16, 2019 that motion for reconsideration of the denial of a COA was denied. Dkt. 8.

STATEMENT OF FACTS

The factual and procedural background of the attached CCA opinion is not adopted here because of the mistakes in the opinion. Those errors are set forth below.

At oral argument and again in the opinion, the CCA put great emphasis on two assumptions that are not borne out by the record in this case and helped to form an erroneous conclusion there was substantial evidence to support the conviction of assault with intent to commit rape or oral copulation.

The first one was that appellant "had cut the panty hose liners out of several of the shorts that he brought to the room for the victim to model."(Opn. p. 7.) The problem is that the assumption of "several" of the shorts made in oral argument and then again in the statement of the opinion was not based on fact. The opinion's *own* statement of facts stated "with respect to at least *one* of the pairs of shorts, it appeared the panty liner had been 'cut out or removed'". (Opn. at page 4.) The factual error of the Court looms large in a case where the evidence is of so little substance to support a conviction for assault with intent to commit rape or oral

copulation.

The appearance of *one* shorts liner being cut out could hardly signal to a rational juror that it showed an intent of appellant to have easier access to his model's genitals as stated in the court's opinion.

This Court can take judicial notice of the *purpose* of liners in shorts. They are just that, liners. Their absence does not provide access to genitals. What are they for? They are for comfort of the user to prevent chafing and possibly an element of privacy if the shorts material is too transparent. And the testimony was only that one pair *appeared* to be altered in that way as stated by the beginning of the CCA opinion itself.

A second major factual error of the opinion is that at the bottom of page 6, the opinion states appellant climbed on top of Emily. Not so. The record reveals that Emily testified appellant was "hovering" over her and holding her shoulders down. (2RT 107 lines 27-28 and108 line1.)

The record shows the prosecutor saying to Emily "did it feel like his body, his weight was on top of you?" Emily answered. "It felt like I was being pinned " and the prosecutor continued, "he was pinning you

with hands on both of your shoulders?" A. "Yes." (Id. at lines 10-12.)

Then on the next page the *prosecutor* stated as follows:

Q. So when he's hovering on top of you, his neck is how far away from your face"
A. Couldn't be more than six inches. Can I also go back and say that I bit him before I started screaming. I just wanted to make that clear.
Q. So let me clarify that just so–I'll ask the question to you. When you're on your back–you've been shoved onto the bed. His body–he's on top of you. Hands are–his hand are on your shoulders pushing you down. You said that you are holding your breath, and at some point you bite him. Do you scream before you bite him or after you bite him?
A. After I bite him? (2RT 109 lines9-22.)

It was the prosecutor, not Emily, who used those words "on top of" and Emily never confirmed those words of the prosecutor.

These errors had great weight in the conclusion of the court of appeal that there was substantial evidence in the conviction of assault with intent to commit rape or oral copulation.

Now here are the facts as stated in the light most favorable to conviction:

A. The Incident Involving Emily, The Complaining Witness

Twenty year old Emily had an account with OKCupid website on June 9, 2013. It's an online resource for people who want to meet other people for dating and for friends. People send you messages based on something "of your profile." (2RT 90-91.) She said she did not believe she had anything on her profile saying she was "crazy or kinky." (2RT 92.)

On June 8, 2013 she got a message advertising an opportunity to make $50 an hour plus free athletic wear to have her picture taken wearing athletic wear. It appealed to her because of the $50 an hour. She needed money for the upcoming school year. "So that was enough to make me read the message a couple times." (2RT 93.) She responded and got a response from "Nathan" which allayed any fears that the message was not legitimate. (2RT 94.) Nathan sent her links to the products, Danskin and Nike athletic running shorts and gave her details "about how the shoot and interview would go and that it would go. . . it usually would take place on the beach." (2RT 95.)

He finally arranged to meet her at a Motel 6 in Carlsbad and she wondered why Nike would send an employee to a Motel 6. She was a

bit cautious, told a friend what she was doing and was supposed to meet him the morning of June 9th, a Sunday. She let him know she was going to be late. (2RT 97.)

She arrived at the Motel 6 at about 11:10, 11:15, she identified petitioner as Matthew Nathan Terrell, the young[1] man whom she recognized from the profile. (2RT 98.)

She anticipated that she would sign whatever paperwork she had to sign, she would pick out whatever shorts she was going to wear for pictures, she would change into them and then they would go to the beach to take pictures. (2RT 99.) They made small talk about petitioner's brother's basketball game and if petitioner had played basketball in college. He came across as a normal person with a family life, he was not making any "advance" on her. (2RT 100.)

He selected some shorts and gave them to her and suggested she change in the bathroom. When she came back petitioner said they should take some preliminary photos. He did nothing inappropriate. He

[1] Terrell, petitioner, was 27 at the time. (1CT1.)

asked her if she wanted to pose in a sports bra or, keep her shirt on and she wanted to keep her shirt on. The stretches and poses she did for the pictures were "strictly athletic." (2RT 101.) During these poses he never did anything sexual or make sexual advances. He asked her to do a stretch with a tennis racket, a behind the back pose. She tried to oblige him. (2RT 102.) She demonstrated by having both hands behind her back, grabbing each elbow. He asked her to turn her back to the camera so he could pose her as she was not doing it "quite right." (2RT 103.) He asked specifically if he could put his hands on her and she said "sure." She had her back to him and she turned and saw he was going to zip tie her arms together. (2RT 104.) She said she did not agree to use props and said "What is this thing?" (2RT 105.) He explained to her that it was to help her hold her pose. Then he zip tied her wrists together. He grabbed her by the shoulders and dragged her over to the bed in the center of the room and pushed her down on it. (*Id.*) It was not gentle. (2RT 106.) He did not say anything. He looked detached. She was thrashing and being uncooperative. (2RT 106-7.) Her wrists were still zip-tied and underneath

her body on the bed. He was "hovering over" her. (2RT 107.) He was pinning her down with his hands on both of her shoulders. (2RT 108.)

At that point she bit petitioner on the neck and then started screaming. (2RT 109.) The bite occurred 5 or 6 seconds after she was pushed to the bed. (2RT 109.) He said "Ow" and eased up on the pressure he was putting on her shoulders. She slid off the bed and went to the floor and he went with her, pushing her to the bed. (2RT 110.) He was pushing her shoulders, trying to push her away from the door. (2RT 111.) She was screaming and he put his hand over her mouth and she bit his hand. At this point he said "Stop, stop. I'll let you go. Get your stuff," "but he was not moving out of the way between me and the door." (2RT 112.) She broke free from the zip ties to her wrists. (2RT 113.) She tried to "crush his testicles because that's what your supposed to do" but she thought she missed because he didn't react. She was able to get to her feet more easily and he backed away. She told him to get away from the door. "He, like, makes kind of placating gestures, you know, says, 'This is my first time,[2]'

[2]Although the transcript says "isn't" here the prosecutor treated it as "is"

she did not know how to interpret that. (2RT 114-115.) He moved. She told him to unlock the door and he did. (2RT 122.) She told him to get away from the door and he did. (2RT 122.) She went to the door, opened it and started screaming. Petitioner said nothing more to her. He went over to two or three people "down the hall" and started to talk to them. She thought he might be "explaining his way out of this somehow," so she screamed, "He attacked me, don't listen to him." The prosecutor asked her what she thought was going to happen when she was shoved to the bed with her hands zip tied behind her back. She responded, "Honestly, I'm thinking that I'm dead. This is it, you know, because at that point I have no say in my own fate, you know. I've been restrained. And whatever Nathan decides to do is going to happen to me, so whether that's you know–I'm going to die or be raped. As far as I'm concerned my future is over if I don't get out." (2RT 117.)

She talked to the police who came and went to the police station.

Cross-Exam

---

subsequently. (2RT 114.)

Other than her wrists and forearms and shoulders when he was putting on the zip ties he never touched her anywhere else. He never touched her private parts or asked her to touch his private parts. (2RT 143.) He never made any motion that he was going to take his clothes off and never tried to pull off any of her clothes. (2RT 144.) From the moment he put the zip tie on her to the moment she started screaming was "more like 30 seconds, 30 seconds to a minute." (*Id.*) He never hit her. (2RT 145.)

What she was thinking was she just did not want him to hurt her. There was no sexual-type grabbing at any time. (2RT 149.) Defense counsel asked:

Q. "Obviously you didn't want to be restrained and he violated your space in some level by restraining you; right?"

A. "That's correct."

(2RT 149-150.)

Redirect

The prosecutor asked "When the defense was asking you, 'there's no sexual grabbing,' just so were all clear, he didn't grab your breast or your

private area; correct?"

A. "No. He did not."

(2RT 150.)

The prosecutor asked her a second time what her thought process was when "he's on top of you, within six inches of you, and you're flailing. It's not just that you don't want to be restrained. What is your thought process?"

A. "Well, I'm thinking that now I'm totally vulnerable to whatever this strong person, this person I don't know wants to do. And that's why I fought so hard because it was –it wasn't just fear of having a zip tie put on me, it was fear for my life, because at that point, like once I'm–once restrained, I can't do anything about my fate, which is why I fought so hard and was sore the following day."

(2RT 151.)

Recross

Defense counsel asked her if she was thinking "I could be killed. Something could happen to me. I didn't have control of my life. Right?"

A. "Yes."

She agreed that she "didn't know whether he was–his body was fully on or just his knees, but he was holding you down with his hand on your shoulders?"

A. "Yes."

She was asked by defense counsel, "Did he ever tackle you or just grab you, push you into the ground do anything like that?"

A. "No."

Q "So if you say, 'I had no say in my own fate,' you mean basically Matt Terrell had the say in your fate; right?"

A. "Yes."

Q. "Okay. He didn't rape you; right?"

A. "No."

Q. "He didn't do–well, he didn't, then he let you go; right?"

A. "Yes."

There were no further questions from either counsel for the witness. (2RT 153.)

B. Officer De Valasco

Officer DeValasco came to the motel where this incident occurred and saw that Ms. Miller had abrasions and redness on her wrist that she said occurred when she was trying to take the zip-ties off her wrist and carpet burn on her right knee which she said occurred when she was crawling toward the door to escape and petitioner pulled her back. (2RT 157.) The room was registered to Mr. Terrell. The officer searched the room. (*Id.*) He found a model release form, identifying Terrell, which was the contract for the photo shoot. (2RT 163.) He found something under the bed that the officer had seen in "stings of prostitution. And a lot of times some of the clients participate in strange sexual fantasies. A lot of times they include what's commonly referred to as a ball gag, to where it's a device that's placed over your mouth so you're not able to scream-or you know, or yell. And it's basically meant to silence you. And that's apparently a fantasy that –so I assumed this as being a tool that was used for some type of sexual gratification." (2RT 166.)

It was described as a zip tie with duct tape wrapped around. The bigger end of the zip tie "would probably be strapped deep into the

mouth so the person cannot create any type of noise or emit any type of screams or something like that." He missed finding this at the first search of the room, it was under the bed. (2RT 166-67.) There was no ball on the zip tie, it was just duct taped. (2RT 185.)

Officer Jeffrey Smith looked through the camera that was used to photograph Emily Miller. (2RT 210.) There were photograph shots of her; the first two in stretching poses. (2RT 211.) All eight shots involved her either standing or stretching in front of the door of the motel room. (2RT 212-213.)

James Thibodeaux is a firefighter from Texas who was in the same motel and, because of unavailability, was deposed prior to trial and his testimony appears at (1CT 151-169.) Emily Miller was screaming for help. (1CT 157.) Petitioner walked straight up to him and Thibodeaux realized he was in a "situation." (*Id.*) Petitioner said it was a big misunderstanding and he was sorry and he sat down outside the motel room. (1CT 158.) Emily was inside the room but did not want Thibodeaux to leave her alone. (1CT 159.)

Thibodeaux talked to petitioner and found out they both from Texas. Petitioner seemed distraught. (1CT 159.)

Officer Preston arrived at the scene and he contacted petitioner who was seated in a walkway near room 107 with his back against the wall, leaning against a trash can. (3RT 225.) Petitioner was nervous, his voice was quivering, he had a foul chemical odor coming from his mouth and his person. Preston associated it with "the use of controlled substances." (3RT 227.) He arrested petitioner (3RT 226) but did not have him blood tested. He looked at his eyes but did not see if they were dilated. (3RT 227.)

Both sides rested at this point. (3RT 229, 232.)

ARGUMENT

I

CERTIORARI SHOULD BE GRANTED AND THE CASE REMANDED AND A COA ISSUED AS REASONABLE JURISTS COULD DIFFER ON THE DECISION TO GRANT OR NOT TO GRANT A COA.
A REVERSAL BY ANOTHER CALIFORNIA COURT OF APPEAL ON STRONGER CONVICTION FACTS THAN THIS CASE PROVES THAT POINT

At pages 9-10 of the CCA slip opinion (Appendix C) in Terrell's case appears the following discussing *People v. Greene,* 34 Cal.App.3d 622(1973):

The *Greene* court summarized the evidence concerning the ensuing encounter as follows:

> "The defendant, who approached from the direction in which Linda was walking, put his arm around her waist and turned her around. She thought his conduct was unusual, and she was startled and afraid. Defendant spoke in a soft voice and said, 'Don't be afraid, I have a gun. Don't move.' The defendant was on her right with his left arm around her waist, and she felt something hard against her right side. She did not look down to see whether it was a gun and did not know whether it was his finger, or a piece of metal or wood. The defendant told her to be quiet. At his request she placed her right arm around his waist and they started walking in the opposite direction from which she had been headed. Linda asked the defendant, 'What do you want?' or 'Oh God, what do you want?'and he replied, 'I just want to play with you.' She also remonstrated, 'Don't hurt me.' As they walked slowly the defendant had a hold of Linda and moved his left hand up and down her waistline, a little bit, in a manner which she demonstrated to the jury. An objection was sustained to Linda's volunteered statement, 'He just put his hand where he's not supposed to,' and a question and answer indicating he did 'other things.' When defendant indicated that he was going to play with her, Linda attempted to get away and shook her head and said 'No, no.' The defendant told her to stop it and be quiet. Linda remained quiet and then broke from defendant's embrace without a struggle, screamed and ran to a friend's home. According to Linda she only walked with the

> defendant past a couple of houses, and the whole incident took no more than six or seven minutes." (*Id.* at p. 650.)

In *Greene* the court of appeal was faced with prior sex acts of Green which were introduced into evidence yet that court still found insufficient evidence of assault with intent to commit rape or oral copulation.

The reasons that this CCA rejected *Greene* are unreasonable, because the *Greene* court focused on the lack of evidence of rape and oral copulation compared to other cases. See page 12 of slip opinion.

This CCA relied on non-existent "facts" to distinguish *Greene.*

The CCA had to read non-existent facts into the state court record to support its objectively unreasonable conclusion that substantial evidence existed in this case. The record shows that petitioner did not lay on top of Emily and there is absolutely no evidence whatsoever that what was called a "ball gag", found under a bed, facilitated forcible rape or oral copulation Reasonable judges have differed on the same issue of substantial evidence of assault with intent to commit rape or oral copulation and that is enough to issue a COA in this case.

A. The Exception to the AEDPA litigation bar 2254(d)(1) Was Satisfied

Only one of the two exceptions need be satisfied to attain *de novo* review and here both exceptions were satisfied.

As to 2254(d)(1), the CCA found substantial evidence by disregarding its own state precedents and then by ignoring the paucity of evidence which never began to reach a level of substantiality.

Certainly substantial evidence did not come from Emily. The entire record showed that Emily never at any time testified there was any sexual act of petitioner. She never testified that she discerned any sexual intent whatsoever of petitioner. Her testimony was clear that she was assaulted and imprisoned by petitioner but that she was never touched in a sexual way. The sexual element of the assault was non-existent and left only to speculation. As was pointed out in the memo to support the petition, the jury was urged to convict on the basis of a "what if" scenario. That truly was a scenario to the jury by the prosecutor of speculative *what if*. It was successful but violated Due Process under *Jackson, supra.*

Certainly substantial evidence did not come from petitioner's statements. He did not testify.

Certainly substantial evidence did not exist from the fact that one or more liners were missing from athletic shorts laid out for Emily to wear in the photo shoot. The conclusion that the missing liners allowed access to Emily's genitalia is nothing short of ridiculous and certainly not rational.

As to rejection of *Greene,* at pages 9-10 of the CCA slip opinion in the instant case, that is patently unreasonable, because that reason was that the *Greene* court discussed the lack of evidence of rape and oral copulation ***compared to other cases***. (Emphasis added) See page 12 of slip opinion. Yet that is exactly what reviewing courts do.

An example of that type of analysis is in *Watson v. Nix,* 551 F.Supp. 1 at 9 (U.S. Dist. Ct. For Southern Dist. Of Iowa 1982.)

> A review of some court decisions passing on the sufficiency of evidence in intent to rape cases aids this court in evaluating whether, under the record evidence adduced at petitioner's trial, a rational trier of fact could have found proof of intent to commit rape beyond a reasonable doubt. Most of the cases were reviewed under standards slightly different from the

> Jackson standard -- usually only the evidence in support of guilt was examined -- but they are nevertheless of instructive value.

That court then cited a half a page of cases where there *was* sufficient evidence to sustain a conviction of attempted rape and ended with this statement: "In petitioner's trial, however, there was no evidence of the sort that sustained the convictions in the above cited cases." *Ibid.*

This was exactly the same type of analysis done by the CCA in *Greene* . What was wrong with *Greene's* analysis? Nothing whatsoever. It was unreasonable for the CCA in petitioner's case to reject it out of hand.

As to unreasonable determination of the facts under 2254(d)(2) the Terrell CCA relied on non-existent "facts" to distinguish *Greene.*

The CCA had to read non-existent facts into the state court record to support its objectively unreasonable conclusion that substantial evidence existed in this case.

The record shows that petitioner did not lay on top of Emily and there is absolutely no evidence whatsoever that what was called

a “ball gag”, found under a bed, facilitated forcible rape or oral copulation.

Maybe “kinky” or bondage sex but not rape or oral copulation.

But *Greene* is not the only case where reasonable jurists disagreed with the state court judges below. Here is the argument to the jury by the prosecution which resulted in appellant’s conviction:

> What if he got this device and was able to do what it's supposed to do, what its very purpose is, to gag someone, to prevent them from screaming, to make them silent, to make them completely submissive, so not only does she not have her hands, she doesn't have a voice.
> He's going to take that from her too. If he had gotten the chance, he would have done it. It was ready. It was right there. If only she didn't fight back so hard.

3RT272-273

The entire case of the prosecution was based on what *could have happened.* But what could have happened is not evidence, it is speculation.

What both the prosecution in this case and the CCA opinion was doing was using an absence of evidence and “ its imagination to fill in the blanks.” *Rivera v. Cuomo,* 649 F.3d 132 at 142 (2d Cir. 2011).

In *Rivera* the state court had therefore unreasonably applied *Jackson*

v. Virginia, 443 U.S. 307 (1979) to the case, and habeas relief was appropriate. *Id*. at 140; see also *Juan H. v. Allen,* 408 F.3d 1262, 1279 (9th Cir. 2005), cert. denied 546 U.S. 1137 (2007) ["Speculation and conjecture [that defendant aided and abetted a murder] cannot take the place of reasonable inferences and evidence"].

In *Newman v. Metrish*, 543 F.3d 793 (6th Cir. 2008) the evidence showed that defendant planned to rob drug dealers; the victim was a known dealer who kept drugs in his freezer and had engaged in drug deals with defendant in the past; the freezer was open and empty after he was killed; defendant had a motive to kill because the drug dealer had made a pass at his girlfriend; and defendant had once possessed the murder weapon. *Id*. at 794. This evidence still left a reasonable doubt, said the Sixth Circuit, because there was no evidence the defendant was at the scene at the time of the killing, and "we are limited by what inferences reason will allow us to draw." *Id*. at 797. Therefore the state court's ruling was an unreasonable application of federal law under *Jackson v. Virginia. Ibid*.

The law does not call what *could have happened* evidence; it is called speculation. See *Boise Cascade Corp. v. Federal Trade Commission*, 637 F.2d 573, 579 (9th Cir. 1980) [a theoretical possibility is not evidence]; *Bakalar v. Vavra,* 619 F.3d 136, 151 (2d Cir. 2010) [speculation about what could have happened is not a finding it did happen]; *Lamborn v. Wm. M. Hardie Co.*, 1 F.2d 679, 683 (6th Cir. 1926) [a speculative possibility is not substantial evidence]; *Langston v. Smith*, 630 F.3d 310, 319 (2d Cir. 2011), cert. denied, sub. nom. *Conway v. Langston*, 565 U.S. ___, 132 S.Ct. 366 (2011) [felony assault conviction; State's argument that defendants "must have concluded" that potential robbery victims would try to disarm them was "pure conjecture untethered from the evidence presented at trial"].

II

THE DECISIONS DISCUSSED ABOVE CONCLUSIVELY SHOW THAT REASONABLE JUDGES HAVE DISAGREED WITH THE CCA IN TERRELL'S CASE AND THAT IS THE CRITERIA FOR ISSUANCE OF A CERTIFICATE OF APPEALABILITY

The Certificate of Appealabilty is a "modest standard," the petitioner "must demonstrate that the issues are debatable among jurists of reason, that a court could resolve the issues [in a different manner], or that the questions are adequate to deserve encouragement to proceed further." *Lambright v. Stewart,* 220 F.3d 1022, 1024-25 (9th Cir. 2000) (citations omitted).

In the reasons for granting this writ it was stated that the applicant need not prove that some jurists would grant the habeas corpus petition. *Miller-El v. Cockrell*, *supra*. That is worth repeating as are the following statements of the law:

Because a COA does not require a showing that the appeal will succeed, a reviewing court should not decline an application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief. *Id*. at 337. A Court resolves any doubts about issuing a COA in favor of the petitioner. *Rhoades v. Henry*, 598 F.3d 511, 518 (9th Cir. 2010).

CONCLUSION

Petitioner prays that a COA issue.

Respectfully submitted,
/s/ Charles R. Khoury Jr.
Appointed counsel for appellant

December 14, 2019

IN THE

SUPREME COURT OF THE UNITED STATES

TERRELL v. ARMANT

PROOF OF SERVICE

I hereby certify that I am a member of the Bar of the Supreme Court of the United States and not a party to this action and that on this 14th Day of JULY 2019 a petition for In Forma Pauperis Status and petition for Certiorari with volume of exhibits, were e- mailed to the email of counsel for the Respondent jennifer.jadovitz@doj.ca.gov
I declare under penalty of perjury that the foregoing is true and correct.

Respectfully submitted,
/s/CHARLES R. KHOURY JR.

Executed on December 14, 2019

By: _____
/S/CHARLES R. KHOURY JR.
Attorney for PETITIONER