No._____

In the
Supreme Court of the United States

MATTHEW TERRELL, Petitioner

v.

C. ARMANT, Respondents

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

VOLUME OF APPENDICES IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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APPENDIX A
NINTH CIRCUIT ORDER DENYING MOTION FOR RECONSIDERATION OF DENIAL OF COA

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MATTHEW TERRELL, Petitioner-Appellant, v. C. ARMANT; ATTORNEY GENERAL FOR THE STATE OF CALIFORNIA, Respondents-Appellees.	No. 18-56567 D.C. No. 3:17-cv-00088-BTM-AGS Southern District of California, San Diego ORDER

Before: M. SMITH and HURWITZ, Circuit Judges.

Appellant's motion for reconsideration (Docket Entry No. 7) is denied. *See* 9th Cir. R. 27-10.

No further filings will be entertained in this closed case.

APPENDIX B
MOTION TO THE NINTH CIRCUIT FOR RECONSIDERATION OF THE DENIAL OF A COA

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MATTHEW TERRELL, Petitioner, vs. C. ARMANT, Warden, Respondent	Case No. 18-56567 D.C. No. CV 17CV-0088-BTM (AGS) MOTION FOR RECONSIDERATION OF DENIAL OF A CERTIFICATE OF APPEALABILITY

Appeal from the United States District Court
for the Southern District of California
Hon. Barry Ted Moskowitz
U.S. District Court Judge

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MOTION UNDER CIRCUIT RULE 27-10 TO RECONSIDER THE DENIAL OF THE REQUEST FOR CERTIFICATE OF APPEALBILITY FILED BY APRO SE APPELLANT WITH AID OF COUNSEL

Appellant moves this Court to reconsider the denial[1] of his request for a certificate of appealability (COA), which occurred on July 22, 2019.

Circuit Rule 27-10 states that "A party seeking relief under this rule shall state with particularity the points of law or fact which, in the opinion of the movant, the Court has overlooked or misunderstood. " This motion for reconsideration seeks to carry out this intention of rule 27-10 by pointing to numerous specific cases, similar to this case, where reasonable jurists have differed on the decision to grant or not grant relief .

Appellant hereby applies for a certificate of appealability (COA), pursuant to 28 U.S.C. §2253(c)(1)(A), Federal Rule of Appellate Procedure22(b)(1), and Ninth Circuit Rule 22-1(d), so that he may appeal to this Court from the judgment entered by the District Court on October 29, 2018, denying his petition for writ of habeas corpus. District Court

[1] The denial is attached hereto.

Document 12. In that same order, the District Court declined to issue a COA.

A COA SHOULD ISSUE IF REASONABLE JURISTS COULD DIFFER ON THE DECISION TO GRANT OR NOT TO GRANT A COA

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.

STANDARD FOR GRANTING A CERTIFICATE OF APPEALABILITY

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).

STATEMENT OF FACTS

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[2] 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

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

pictures, she would change into them and then they would go to the beach to take pictures. (2RT 99.) They made small talk about his 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 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,[3]' 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,

[3]Although the transcript says "isn't" here the prosecutor treated it as "is" subsequently. (2RT 114.)

"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

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

REASONABLE JURISTS DISAGREED WITH THE CCA DECIDING PETITIONER'S CASE IN THE PUBLISHED OPINION OF *People v.Greene* 34 Cal.App.3d 622 (1973).

At pages 9-10 of the CCA slip opinion in Terrell's case appears the following:

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).

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, 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

This young man, 27 years old, with no prior criminal record when this incident occurred, 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 motion for reconsideration.

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

August 9, 2019

CERTIFICATE OF SERVICE

I hereby certify that on August 9, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system for that Court. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

Petitioner will be served by mail at his place of incarceration.

Respectfully Submitted,

/s/Charles R. Khoury Jr.

For
Petitioner Terrell

APPENDIX C
ORDER OF THE DISTRICT COURT DENYING HABEAS AND COA

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

MATTHEW TERRELL, Petitioner, v. C. ARMANT, Respondent.	Case No.: 17cv0088 BTM (AGS) **ORDER: (1) DENYING PETITION FOR WRIT OF HABEAS CORPUS; and (2) DENYING CERTIFICATE OF APPEALABILITY**

I. INTRODUCTION

Petitioner Matthew Terrell, state prisoner, has filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 challenging his conviction in San Diego Superior Court case no. SCN320008 for assault with intent to commit rape or oral copulation and false imprisonment. (Pet., ECF No. 1 at 2.)[1] Terrell contends the evidence was insufficient to convict him of assault with intent to commit rape or oral copulation. (*Id.*)

The Court has read and considered the Petition, the Memorandum of Points and Authorities in Support of the Petition ("Petition" or "Pet."), the Answer and Memorandum of Points and Authorities in Support of the Answer ("Answer") [ECF No.

[1] Page numbers for docketed materials cited in this Order refer to those imprinted by the Court's electronic case filing system, except for lodgments.

5], the Traverse and Memorandum of Points and Authorities in Support of the Traverse [ECF Nos. 7-8], the lodgments, and the legal arguments presented by both parties. For the reasons discussed below, the Court **DENIES** the Petition and **DENIES** a certificate of appealability.

II. FACTUAL BACKGROUND

This Court gives deference to state court findings of fact and presumes them to be correct; Petitioner may rebut the presumption of correctness, but only by clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1) (West 2006); *see also Parle v. Fraley*, 506 U.S. 20, 35-36 (1992) (holding findings of historical fact, including inferences properly drawn from these facts, are entitled to statutory presumption of correctness). The state appellate court recounted the facts as follows:

> In June 2013, Terrell contacted the 20-year-old victim, Emily M. (Emily), via a Web site. Terrell offered Emily the opportunity to earn $50 an hour and get free athletic wear in exchange for reviewing and modeling athletic wear, and agreeing to be photographed in the clothes. Emily agreed. Terrell told Emily that the photo shoot would take place at the beach the following day, and that she should meet him at his motel room near the beach in order to change into the clothes.
>
> Emily arrived at Terrell's motel room the following day, selected a pair of running shorts that Terrell had placed on the bed, and went into the bathroom to change. When she came out, Terrell asked her if she would like to pose in her sports bra or keep her shirt on. Emily chose to keep her shirt on. Terrell instructed Emily to assume various poses, including a backbend and a handstand, while he took photographs of her. Terrell then asked Emily to assume a pose with her hands behind her back. Emily attempted the pose, but Terrell told her that she was not doing it quite right. After obtaining Emily's permission to touch her, Terrell began to reposition her arms behind her back. While doing so, Terrell placed zip ties around Emily's wrists, explaining that this would help her hold the pose.
>
> Shortly after placing the zip ties around her wrists, Terrell grabbed Emily's shoulders, dragged her toward the bed, and shoved her down on the the bed. Emily was "flailing and struggling," while lying on her back with her wrists zip tied underneath her body. Terrell climbed on top of Emily, holding her shoulders down and pinning her to the bed. A brief struggle

ensued, during which Emily bit Terrell's neck. Terrell eased up momentarily, allowing Emily to slip out from beneath him and off the bed. Emily began screaming loudly.

Terrell pushed Emily back against the bed. She continued to loudly scream, "Help!, help!" Terrell attempted to place his hand over Emily mouth while she was screaming, but she bit his hand. Emily was able to free herself from the zip tie and get to her feet. Terrell told Emily that he would let her go, but blocked the door to the room, preventing her from immediately leaving. Moments later, Terrell moved away from the door and Emily was able to flee the room.

Two other male guests had heard Emily screaming. One of the men called 911 and the other walked toward the room from which the men heard the screaming.

Police arrived and detained Terrell. A search of the room revealed the zip tie that Terrell had used to restrain Emily, as well as two bags of similar zip ties in a cubicle below the television. Police also found nine pairs of women's athletic shorts on the night stand. Six of the shorts did not have "panty liners." [FN 2] With respect to at least one of the pairs of shorts, it

> [FN 2: During questioning, the prosecutor described the panty liner as "a brief/liner in women's running shorts."]

appeared the panty liner had been "cut out or removed." In addition, police found a "ball gag" under the bed. [FN 3] In a backpack, police found

> [FN 3: An officer testified that the ball gag was comprised of a zip tie wrapped in duct tape. The officer described the nature of the ball gag as follows: "The way it's fashioned here, it looks like it's kind of bigger at one end, which would probably be strapped deep in the mouth so the person cannot create any type of noise or emit any type of screams or something like that."]

additional zip ties, duct tape, a belt with a buckle, a pair of scissors, a crescent wrench, several clothes pins, part of an electrical cord, and a panty liner from women's athletic shorts. Police also recovered a camera that contained photographs of Emily, wearing athletic shorts, striking various poses.

/ / /

> Police also searched Terrell's bedroom and found additional zip ties, part of an electrical cord that appeared to match a portion of an electrical cord found in Terrell's backpack, and five panty liners that appeared to have been cut out from shorts or pants.

(Lodgment No. 6 at 2-4.)

III. PROCEDURAL BACKGROUND

On July 12, 2013, the San Diego District Attorney's Office filed a complaint charging Matthew Nathan Terrell with one count of assault with intent to commit rape or oral copulation, a violation of California Penal Code § 220(a)(1), and false imprisonment, a violation of California Penal Code §§ 236 and 237(a). (Lodgment No. 1 at 0001-03.) Following a jury trial, Terrell was convicted of both counts in the complaint. (*Id.* at 0093-94.) Terrell was sentenced to six years in prison. (*Id.* at 0226-27.)

Terrell appealed his conviction to the California Court of Appeal. (Lodgment No. 3.) The state appellate court upheld Terrell's conviction in a written, unpublished opinion. (Lodgment No. 6.) Terrell filed a petition for rehearing, which was denied. (Lodgment Nos. 7-8.) Following that denial, Terrell filed a petition for review in the California Supreme Court. (Lodgment No. 9.) The state supreme court summarily denied the petition for review. (Lodgment No. 10.)

On January 17, 2017, Terrell filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 and a Memorandum of Points and Authorities in Support of the Petition. (ECF No. 1.) Respondent filed an Answer, a Memorandum of Points and Authorities in Support of the Answer, and a Notice of Lodgment on June 12, 2017 (ECF Nos. 5-6); Terrell filed a Traverse on July 17, 2017, and a Memorandum of Points and Authorities in Support of the Traverse on September 13, 2017. (ECF Nos. 7-8.)

IV. DISCUSSION

Terrell contends there was insufficient evidence presented at trial to support his conviction for assault with intent to commit rape or oral copulation because there was no evidence of any sexual acts or intent, and the conviction is therefore based on speculation. (Pet., ECF No. 1 at 6.) Respondent contends the state court's resolution of

Terrell's claims was neither contrary to, nor an unreasonable application of, clearly established Supreme Court law. (Answer, ECF No. 5 at 3-7.)

A. *Standard of Review*

This Petition is governed by the provisions of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). *See Lindh v. Murphy*, 521 U.S. 320 (1997). Under AEDPA, a habeas petition will not be granted with respect to any claim adjudicated on the merits by the state court unless that adjudication: (1) resulted in a decision that was contrary to, or involved an unreasonable application of clearly established federal law; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented at the state court proceeding. 28 U.S.C. § 2254(d); *Early v. Packer*, 537 U.S. 3, 8 (2002). In deciding a state prisoner's habeas petition, a federal court is not called upon to decide whether it agrees with the state court's determination; rather, the court applies an extraordinarily deferential review, inquiring only whether the state court's decision was objectively unreasonable. *See Yarborough v. Gentry*, 540 U.S. 1, 4 (2003); *Medina v. Hornung*, 386 F.3d 872, 877 (9th Cir. 2004).

A federal habeas court may grant relief under the "contrary to" clause if the state court applied a rule different from the governing law set forth in Supreme Court cases, or if it decided a case differently than the Supreme Court on a set of materially indistinguishable facts. *See Bell v. Cone*, 535 U.S. 685, 694 (2002). The court may grant relief under the "unreasonable application" clause if the state court correctly identified the governing legal principle from Supreme Court decisions but unreasonably applied those decisions to the facts of a particular case. *Id*. Additionally, the "unreasonable application" clause requires that the state court decision be more than incorrect or erroneous; to warrant habeas relief, the state court's application of clearly established federal law must be "objectively unreasonable." *See Lockyer v. Andrade*, 538 U.S. 63, 75 (2003). The court may also grant relief if the state court's decision was based on an unreasonable determination of the facts. 28 U.S.C. § 2254(d)(2).

Where there is no reasoned decision from the state's highest court, the court "looks through" to the last reasoned state court decision and presumes it provides the basis for the higher court's denial of a claim or claims. *See Ylst v. Nunnemaker*, 501 U.S. 797, 805-06 (1991). If the dispositive state court order does not "furnish a basis for its reasoning," federal habeas courts must conduct an independent review of the record to determine whether the state court's decision is contrary to, or an unreasonable application of, clearly established Supreme Court law. *See Delgado v. Lewis*, 223 F.3d 976, 982 (9th Cir. 2000) (*overruled on other grounds by Lockyer v. Andrade*, 538 U.S. 63, 75-76 (2003)); *accord Himes v. Thompson*, 336 F.3d 848, 853 (9th Cir. 2003). However, a state court need not cite Supreme Court precedent when resolving a habeas corpus claim. *See Early*, 537 U.S. at 8. "[S]o long as neither the reasoning nor the result of the state-court decision contradicts [Supreme Court precedent,]" *id*., the state court decision will not be "contrary to" clearly established federal law. *Id*. Clearly established federal law, for purposes of § 2254(d),

means "the governing principle or principles set forth by the Supreme Court at the time the state court renders its decision." *Andrade*, 538 U.S. at 72.

B. *Analysis – Sufficiency of Evidence*

Terrell argues the evidence was insufficient to establish that he harbored an intent to rape or orally copulate the victim, Emily, when he assaulted her. (Pet., ECF No. 1 at 6; attach. #1 at 13-23.) Terrell raised this claim in the petition for review he filed in the California Supreme Court. (Lodgment No. 9.) Because that court summarily denied the petition, this Court must "look through" to the state appellate court's opinion denying the claim as the basis for its analysis. After correctly identifying the governing federal and state authority, the court analyzed the claim as follows:

> The people presented evidence that Terrell concocted an elaborate ruse in order the lure the victim to a motel room. Once the victim was in the room, Terrell instructed her to model revealing clothing. After the victim had donned the clothing, Terrell instructed her to assume poses that the jury could have reasonably found were sexually suggestive and began taking

> photographs of her. Then, using another ruse, Terrell bound the victim's wrists in zip ties, before forcibly throwing her on the bed and climbing on top of her. Terrell pinned the victim to the bed by holding her shoulders down. He relented only when the victim bit him on the neck and engaged in a physical struggle during which she was able to slide out from under him. While the victim was screaming, Terrell placed his hand over her mouth in an attempt to silence her. Prior to luring the victim to the motel room, Terrell hid items in the room that could be used to facilitate sexual conduct, including a ball gag and clothes pins. [FN 4] In addition, the People
>
> > [FN 4: The jury was presented with testimony that ball gags are commonly used by clients of prostitutes to engage in sexual fantasies. The prosecutor argued that the clothes pins could be used as "nipple clamps" or "genital clamps."]
>
> presented evidence that Terrell had cut the panty liners out of several of the shorts that he brought to the room for the victim to model. A jury could reasonably infer that Terrell cut the panty liners from the shorts in order to facilitate his access to the victim's genitals. In light of all of the evidence mentioned above, a reasonable jury could find that, at the time Terrell assaulted the victim, he harbored intent to rape or orally copulate her.
>
> Terrell's arguments to the contrary are not persuasive. Terrell notes that "[h]e did not tell [the victim] he wanted to have sexual intercourse." While there is no evidence that Terrell stated his intentions, "intent is rarely susceptible of direct proof . . . ." (*Pre*, *supra*, 117 Cal.App.4th at p. 420.) Terrell also argues that he did not "touch [the victim] sexually." Even assuming that this is true, [FN5] the jury could reasonably infer from the
>
> > [FN 5: The People contend that the jury could reasonably find that Terrell touched the victim in a sexual way, when he threw her down on the bed and climbed on top of her]
>
> evidence discussed above that Terrell intended to sexually assault the victim, and that he was prevented from doing so only by her fierce resistance.

(Lodgment No. 6 at 5-7.)

In assessing a sufficiency of the evidence claim on federal habeas review, the Supreme Court has stated that "the relevant question is whether, after viewing the

evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *see also Juan H. v. Allen*, 408 F.3d 1262, 1275 (9th Cir. 2005). In determining whether sufficient evidence has been presented, the Court must accept the elements of the crime as defined by state law. *See Jackson*, 443 U.S. at 324, n. 16.

Under California Penal Code § 220, a person is guilty of the crime of assault with intent to commit rape/oral copulation by force if he or she "assaults another with intent to commit . . . rape [or] oral copulation . . . ." Cal. Penal Code § 220. "An assault is an unlawful attempt, coupled with a present ability, to inflict a violent injury on a person (§ 240) . . . . The only additional element of assault with intent to commit rape [or oral copulation] is the perpetrator's subjective intent, during the commission of the assault, to commit a rape [or oral copulation]." *People v. Cook*, 8 Cal. App. 5th 309, 313 (2017) (citations omitted). The jury was instructed as follows with regard to the crime of assault with intent to commit rape:

> To prove that the defendant is guilty of [assault with intent to commit rape] the People must prove that:
>
> 1. The defendant did an act that by its nature would directly and probably result in the application of force to a person;
>
> 2. The defendant did that act willfully;
>
> 3. When the defendant acted, he was aware of facts that would lead a reasonable person to realize that his act by its nature would directly and probably result in the application of force to someone;
>
> 4. When the defendant acted, he had the present ability to apply force to a person;
>
> AND
>
> 5. When the defendant acted, he intended to commit a rape and/or oral copulation by force.

> Someone commits an act *willfully* when he or she does it willingly or on purpose.
> The terms *application of force* and *apply force* mean to touch in a harmful or offensive manner. The slightest touching can be enough if it is done in a rude or angry way. Making contact with another person, including through his or her clothing, is enough. The touching does not have to cause pain or injury of any kind.
>
> The People are not required to prove that the defendant actually touched someone.
>
> No one needs to actually have been injured by the defendant's act. But if someone was injured, you may consider that fact, along with all the other evidence, in deciding whether the defendant committed an assault.
>
> To decide whether the defendant intended to commit rape or forcible oral copulation, please refer to the instructions which define those crimes.

(Lodgment No. 1, vol. 1 at 0044-45.)

Rape is defined as "an act of sexual intercourse accomplished with a person not the spouse of the perpetrator . . . [w]here it is accomplished against a person's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another." Cal. Penal Code § 261. Forcible oral copulation is "the act of copulating the mouth of one person with the sexual organ or anus of another person" which is "accomplished against the victim's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person . . . ." Cal. Penal Code § 288a(a), (c)(2)(A). The jury was instructed on the crimes of rape by force, fear or threats and forcible oral copulation as follows:

> To prove the defendant is guilty of [rape by force, fear, or threats], the People must prove that:
>
> 1. The defendant had sexual intercourse with a woman;
>
> 2. He and the woman were not married to each other at the time of the intercourse;

3. The woman did not consent to the intercourse;

AND

4. The defendant accomplished the intercourse by force, violence, duress, menace, or fear of immediate and unlawful bodily injury to the woman or to someone else.

Sexual intercourse means any penetration, no matter how slight, of the vagina or genitalia by the penis. Ejaculation is not required.

Intercourse is *accomplished by force* if a person uses enough physical force to overcome the woman's will.

Duress means a direct or implied threat of force, violence, danger, or retribution that would cause a reasonable person to do or submit to something that she would not do or submit to otherwise. When deciding whether the act was accomplished by duress, consider all the circumstances, including the woman's age and her relationship to the defendant.

Intercourse is *accomplished by fear* if the woman is actually and reasonably afraid or she is actually but unreasonably afraid and the defendant knows of her fear and takes advantage of it.

. . . .

To prove that the defendant is guilty of [oral copulation by force, fear, or threats], the People must prove that:

1. The defendant committed an act of oral copulation with someone else;

2. The other person did not consent to the act;

AND

3. The defendant accomplished the act by force, violence, duress, menace, or fear of immediate and unlawful bodily injury to someone.

Oral copulation is any contact, no matter how slight, between the mouth of one person and the sexual organ or anus of another person. Penetration is

not required.

/ / /

An act is *accomplished by force* if a person uses enough physical force to overcome the other person's will.

Duress means a direct or implied threat of force, violence, danger, hardship, or retribution that causes a reasonable person to do or submit to something that she would not otherwise do or submit to. When deciding whether the act was accomplished by duress, consider all the circumstances, including the age of the other person and her relationship to the defendant.

An act is *accomplished by fear* if the other person is actually and reasonably afraid or she is actually but unreasonably afraid and the defendant knows of her fear and takes advantage of it.

(Lodgment No. 1, vol. 1 at 0046-49 [CALCRIM Nos. 1000, 1015.)

The jury was further instructed that in order to find Terrell guilty of assault with intent to commit rape or oral copulation, it had to conclude he had the specific intent to rape or orally copulate the victim when he assaulted her, and that intent could be proven by circumstantial evidence. (*Id.* at 0058-59, 0062 [CALCRIM Nos. 223, 225, 252.)

Terrell contends the evidence was insufficient to establish that he harbored an intent to rape or orally copulate the victim, Emily. (Mem. of Points and Authorities in Supp. of Pet., ECF No. 1 at 10-23.) She testified that after changing into a pair of running shorts and emerging from the motel room bathroom, Terrell asked if Emily wanted to pose in her sports bra, and she declined. (Lodgment No. 2, vol. 2 at 57.) As the state court noted, the jury could have reasonably concluded Terrell's request was designed to have Emily wear revealing clothing. After Terrell surprised her by forcibly and without her consent zip tying her wrists, he dragged her over to the motel room bed. (*Id.* at 61-62.) Terrell then pushed her down onto the bed with her zip tied hands underneath her and hovered over her, pushing her shoulders down to immobilize her. (*Id.* at 63-64.) Terrell's act of dragging Emily to the bed, a common location for sexual

activities, hovering over her, and immobilizing her could lead a reasonable jury to conclude that he intended to forcibly sexually assault her. Emily also testified that during the period when Terrell was "hovering" over her, he was close enough to her face that she was able to bite him on the neck. (*Id.* at 64.) A reasonable jury could conclude Terrell's proximity to her and his position over her on the bed evidenced his intent to commit a sexual assault against her. After Emily bit Terrell, she was able to slide out from under him to the floor and get to her knees. (*Id.* at 66.) Terrell followed her to the floor and attempted to push her against the bed. (*Id.* at 66-67.) When she attempted to move toward the motel room door on her knees, Terrell again tried to push her back toward the bed, which a reasonable jury could have concluded was further evidence of his intent to sexually assault her. (*Id.* at 67.) Indeed, she testified she thought Terrell was going to rape her. (*Id.* at 68.)

Once police arrived, they searched the motel room and Terrell's backpack. (*Id.* at 114-16.) Police Officer Alonso Devalasco and Community Service Officer Sheldon Berg discovered the following items: the zip tie used on Emily, a bag of zip ties, a duct tape-covered zip tie, several pairs of women's running shorts which either lacked an interior panty liner or with the liner cut out, several clothes pins, a belt with a belt buckle, a piece of an electrical cord, and a roll of duct tape. (*Id.* at 116-34.) Devalasco testified the duct tape-covered zip tie appeared to be a "ball gag" which, in his experience, was used by people while engaging in sexual fantasies. (*Id.* at 121-22.) As the state appellate court noted, the jury could reasonably conclude Terrell removed the panty liners from the shorts in order to make it easier to access Emily's genitalia. And, given that Terrell had zip ties that he used to restrain Emily, the jury could reasonably conclude Terrell intended to use the belt, electrical cord, and duct tape to further restrain her.[2]

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[2] The prosecutor argued during closing argument that Terrell intended to use the clothes pins as "nipple clamps" or "genital clamps." (Lodgment No. 2, vol. 3 at 273.) No evidence was presented to support this contention, and it is not clear to the Court that it would be within a jury's common knowledge that clothes pins could be used in this manner absent expert testimony. Accordingly, the Court does not consider this as evidence supporting Terrell's conviction.

Terrell argues the state court of appeal's opinion was based on an unreasonable determination of the facts. (Pet., ECF No. 1-1 at 18-23.) First, he contends the evidence does not support the court of appeal's conclusion that Terrell removed the liners in the athletic shorts Emily was to model and that even if Terrell had removed the liners it was unreasonable to conclude he did so to facilitate access to her genitals. (*Id.* at 19-20.) Devalasco testified two of the pairs of shorts Terrell had in the motel room had liners that appeared to have been cut out because "it [was] not a very clean cut . . . [and] [a]ny type of hemming would have been – would not have been – professional hemming would [not] have been done that way." (Lodgment No. 2, vol. 2, ECF No. 6-5 at 130-31.) In addition, he testified that nine other pairs of athletic shorts were found in the motel room. Of those, three had panty liners and the rest either did not have them or they had been removed. (*Id.* at 133.) Further, during a search of Terrell's bedroom, several panty liners that had been cut out were located in a bag underneath Terrell's bed. (*Id.* at 160.) While it is undoubtedly true that, as Terrell argues, the purpose of the liners is to "prevent chafing" and provide "privacy," that does not preclude the court of appeal's reasonable conclusion that removing the liners also made it easier to access Emily's genitals.

Second, Terrell contends the court of appeal unreasonably found that the duct tape-covered zip tie was a ball gag which indicated Terrell's intent to sexually assault Emily. (Pet., ECF No. 1-1 at 20.) Devalasco testified that as part of his experience in police work, he was familiar with the type of work the performed by the Vice Squad. (Lodgment No. 2, vol. 2, ECF No. 6-5 at 121.) That work included police "sting" operations involving prostitution in which clients of prostitutes engage in sexual fantasies, sometimes involving various devices. (*Id.* at 121-22.) One of those devices is a "ball gag," which is "a device placed over your mouth so you are not able to scream or – you know, yell." (*Id.* at 122.) Devalasco testified that, with regard to the duct tape-covered zip tie, "[t]he way it's fashioned here, it looks like it's kind of bigger at one end, which 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." (*Id.*) Devalasco

further testified that he "assumed this as being a tool that was used for some type of sexual gratification." (*Id.*) This testimony supports the court of appeal's determination that the duct tape-covered zip tie was a ball gag and that its presence supported the jury's conclusion that Terrell had the intent to rape or orally copulate Emily when he attacked her.

Finally, Terrell contends the court of appeal wrongly asserted the evidence at trial established that he "climbed on top of" Emily during the assault which was evidence of his intent to rape or orally copulate her. (Pet., ECF No. 1 at 20.) As noted, on direct examination, Emily testified she was lying on her back on the bed with her zip tied wrists beneath her while Terrell was above her pushing her shoulders down. (*Id.* at 63.) Terrell was "hovering over [her]," but she was not sure whether he was "fully on the bed or if he's just, you know, at the edge of it and pushing me down onto it, but he's holding my shoulders down." (*Id.* at 63-64.) She also testified that she was being "pinned down" by Terrell and that his face and neck were no more than six inches from her face. (*Id.* at 64-65.) On re-direct examination, the following exchange took place:

> [THE PROSECUTOR]: The entire time he's – he – essentially the grabbing is he moves you from one area in the room and throws you on the bed; correct?
>
> [EMILY]: Yes, I think he was preoccupied with that.
>
> Q. And then *he gets on top of you* and he's within six inches of your face; right?
>
> A: *Yes*.

(*Id.* at 106.)

On re-cross examination, Emily testified that while she was on the bed, Terrell was "[u]sing his body weight to keep me down." (*Id.* at 108.) This evidence is sufficient to support the court of appeal's assertion that Terrell climbed on top of her after zip tying her wrists behind her and shoving her onto the bed. But even if this fact is not considered, there is still overwhelming evidence to support the verdict.

Given the above, there clearly was sufficient evidence to support the jury's conclusion that Terrell had the intent to rape or orally copulate Emily when he assaulted her, and therefore the state court's denial of Terrell's sufficiency of the evidence claim was neither contrary to, nor an unreasonable application of, clearly established Supreme Court law. *Williams*, 529 U.S. at 412-13. Nor was it based on an unreasonable determination of the facts. 28 U.S.C. § 2254(d)(2). Terrell is not entitled to federal habeas corpus relief.

IV. CONCLUSION

For the foregoing reasons, the Court **DENIES** the petition. Rule 11of the Rules Following 28 U.S.C. § 2254 requires the District Court to "issue or deny a certificate of appealability when it enters a final order adverse to the applicant." Rule 11, 28 U.S.C. foll. § 2254 (West Supp. 2013). A certificate of appealability will issue when the petitioner makes a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253; *Pham v. Terhune*, 400 F.3d 740, 742 (9th Cir. 2005). A "substantial showing" requires a demonstration that "'reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong.'" *Beaty v. Stewart*, 303 F.3d 975, 984 (9th Cir. 2002), quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Here, the Court concludes Terrell has not made the required showing, and therefore a certificate of appealability is hereby **DENIED**.

IT IS SO ORDERED.

DATED: _10/26/18_

Barry Ted Moskowitz
Chief Judge, United States District Court

APPENDIX D
STATE COURT APPELLATE DECISION

OPINION OF THE CCA

Filed 11/2/15

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. MATTHEW TERRELL, Defendant and Appellant.	D065431 (Super. Ct. No. SCN320008)

APPEAL from a judgment of the Superior Court of San Diego County, Sim von Kalinowski, Judge. Affirmed.

Charles R. Khoury, Jr., under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Scott C. Taylor and Charles C. Ragland, Deputy Attorneys General, for Plaintiff and Respondent.

I.

INTRODUCTION

A jury found Matthew Terrell guilty of assault with intent to commit rape or oral copulation (Pen. Code, § 220, subd. (a))[1] (count 1) and false imprisonment by force, violence, menace, fraud, or deceit (§§ 236, 237) (count 2). The trial court sentenced Terrell to the upper term of six years on the conviction for assault with intent to commit rape or oral copulation and the upper term of three years on the conviction for false imprisonment. The court stayed execution of the sentence on the false imprisonment conviction pursuant to section 654.

On appeal, Terrell contends that there is insufficient evidence in the record to support the jury's verdict finding him guilty of assault with the intent to commit rape or oral copulation. We affirm the judgment.

II.

FACTUAL AND PROCEDURAL BACKGROUND

In June 2013, Terrell contacted the 20-year-old victim, Emily M. (Emily), via a Web site. Terrell offered Emily the opportunity to earn $50 an hour and get free athletic wear in exchange for reviewing and modeling athletic wear, and agreeing to be photographed in the clothes. Emily agreed. Terrell told Emily that the photo shoot would take place at a beach the following day, and that she should meet him at his motel room near the beach in order to change into the clothes.

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1 Unless otherwise specified, all subsequent statutory references are to the Penal Code.

Emily arrived at Terrell's motel room the following day, selected a pair of running shorts that Terrell had placed on the bed, and went into the bathroom to change. When she came out, Terrell asked her if she would like to pose in her sports bra or keep her shirt on. Emily chose to keep her shirt on. Terrell instructed Emily to assume various poses, including a backbend and a handstand, while he took photographs of her. Terrell then asked Emily to assume a pose with her hands behind her back. Emily attempted the pose, but Terrell told her that she was not doing it quite right. After obtaining Emily's permission to touch her, Terrell began to reposition her arms behind her back. While doing so, Terrell placed zip ties around Emily's wrists, explaining that this would help her hold the pose.

Shortly after placing the zip ties around her wrists, Terrell grabbed Emily's shoulders, dragged her toward the bed, and shoved her down on the bed. Emily was "flailing and struggling," while lying on her back with her wrists zip tied underneath her body. Terrell climbed on top of Emily, holding her shoulders down and pinning her to the bed. A brief struggle ensued, during which Emily bit Terrell's neck. Terrell eased up momentarily, allowing Emily to slip out from beneath him and off the bed. Emily began screaming loudly.

Terrell pushed Emily back against the bed. She continued to loudly scream, "Help, help!" Terrell attempted to place his hand over Emily's mouth while she was screaming, but she bit his hand. Emily was able to free herself from the zip tie and get to her feet. Terrell told Emily that he would let her go, but blocked the door to the room,

preventing her from immediately leaving. Moments later, Terrell moved away from the door and Emily was able to flee the room.

Two other male guests had heard Emily screaming. One of the men called 911 and the other walked toward the room from which the men had heard the screaming.

Police arrived and detained Terrell. A search of the room revealed the zip tie that Terrell had used to restrain Emily, as well as two bags of similar zip ties in a cubicle below the television. Police also found nine pairs of women's athletic shorts on the night stand. Six of the shorts did not have "panty liners."[2] With respect to at least one of the pairs of shorts, it appeared the panty liner had been "cut out or removed." In addition, police found a "ball gag" under the bed.[3] In a backpack, police found additional zip ties, duct tape, a belt with a buckle, a pair of scissors, a crescent wrench, several clothes pins, part of an electrical cord, and a panty liner from women's athletic shorts. Police also recovered a camera that contained photographs of Emily, wearing athletic shorts, striking various poses.

Police also searched Terrell's bedroom and found additional zip ties, part of an electrical cord that appeared to match a portion of an electrical cord found in Terrell's backpack, and five panty liners that appeared to have been cut out from shorts or pants.

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2 During questioning, the prosecutor described the panty liner as "a brief/liner in women's running shorts."

3 An officer testified that the ball gag was comprised of a zip tie wrapped in duct tape. The officer described the nature of the ball gag as follows:

"The way it's fashioned here, it looks like it's kind of bigger at one end, which 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."

III.

DISCUSSION

There is sufficient evidence in the record to support the jury's verdict finding Terrell guilty of assault with the intent to commit rape or oral copulation

Terrell contends that there is insufficient evidence in the record to support the jury's verdict finding him guilty of assault with the intent to commit rape or oral copulation. Specifically, Terrell contends that the jury's verdict rested on speculation that his intent during the assault was to rape or orally copulate the victim.

A. *Governing law and standard of review*

1. *The law governing challenges to the sufficiency of the evidence*

"A state court conviction that is not supported by sufficient evidence violates the due process clause of the Fourteenth Amendment and is invalid for that reason." (*People v. Rowland* (1992) 4 Cal.4th 238, 269, citing *Jackson v. Virginia* (1979) 443 U.S. 307, 313-324.) In determining the sufficiency of the evidence, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (*Jackson v. Virginia*, *supra*, at p. 319.) "[T]he court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) "The standard of

review is the same in cases in which the prosecution relies mainly on circumstantial evidence." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.)

2. *The offense of assault with intent to commit rape or oral copulation*

Section 220, subdivision (a) provides in relevant part: "[A]ny person who assaults another with intent to commit . . . rape . . . [or] oral copulation . . . shall be punished . . . ." "[S]ection 220 requires not only the specific intent to commit the underlying sexual act, but a specific intent to commit that act without the consent of the victim." (*People v. Dillon* (2009) 174 Cal.App.4th 1367, 1378.)

3. *Proof of a defendant's intent*

"Intent is rarely susceptible of direct proof and usually must be inferred from the facts and circumstances surrounding the offense." (*People v. Pre* (2004) 117 Cal.App.4th 413, 420 (*Pre*).) " 'The specific intent with which an act is done may be shown by a defendant's statement of his intent and by the circumstances surrounding the commission of the act.' " (*People v. Craig* (1994) 25 Cal.App.4th 1593, 1597, quoting *People v. Duke* (1985) 174 Cal.App.3d 296, 300 (*Duke*).)

B. *Application*

The People presented evidence that Terrell concocted an elaborate ruse in order to lure the victim to a motel room. Once the victim was in the room, Terrell instructed her to model revealing clothing. After the victim had donned the clothing, Terrell instructed her to assume poses that the jury could have reasonably found were sexually suggestive and began taking photographs of her. Then, using another ruse, Terrell bound the victim's wrists in zip ties, before forcibly throwing her onto the bed and climbing on top

of her. Terrell pinned the victim to the bed by holding her shoulders down. He relented only when the victim bit him on the neck and engaged in a physical struggle during which she was able to slide out from under him. While the victim was screaming, Terrell placed his hand over her mouth in an attempt to silence her. Prior to luring the victim to the motel room, Terrell hid items in the room that could be used to facilitate sexual conduct, including a ball gag and clothes pins.[4] In addition, the People presented evidence that Terrell had cut the panty liners out of several of the shorts that he brought to the room for the victim to model. A jury could reasonably infer that Terrell cut the panty liners from the shorts in order to facilitate his access to the victim's genitalia. In light of all of the evidence mentioned above, a reasonable jury could find that, at the time Terrell assaulted the victim, he harbored the intent to rape or orally copulate her.

Terrell's arguments to the contrary are not persuasive. Terrell notes that "[h]e did not tell [the victim] he wanted to have sexual intercourse." While there is no evidence that Terrell stated his intentions, "intent is rarely susceptible of direct proof . . . ." (*Pre*, *supra*, 117 Cal.App.4th at p. 420.) Terrell also argues that he did not "touch [the victim] sexually." Even assuming that this is true,[5] the jury could reasonably infer from the evidence discussed above that Terrell intended to sexually assault the victim, and that he was prevented from doing so only by her fierce resistance.

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4 The jury was presented with testimony that ball gags are commonly used by clients of prostitutes to engage in sexual fantasies. The prosecutor argued that the clothes pins could be used as "nipple clamps" or "genital clamps."

5 The People contend that the jury could reasonably find that Terrell touched the victim in a sexual way, when he threw her down on the bed and climbed on top of her.

Duke, *supra*, 174 Cal.App.3d 296, cited by Terrell, does not compel a different result. In *Duke*, the defendant groped the clothing covering the intimate parts of three different women. (*Id.* at p. 299.) He was charged with three counts of attempted sexual battery. (*Id.* at p. 298.) At the time, sexual battery required "actual direct contact with the skin of the intimate part of the victim." (*Id.* at p. 299.) On appeal, the defendant challenged the sufficiency of the evidence. (*Id.* at pp. 299-300.)

The *Duke* court reasoned that a judicially imposed limitation on the type of evidence that could be deemed sufficient to satisfy proof of an *attempted* sexual battery was necessitated by the fact the Legislature had mandated that the commission of a completed sexual battery required contact with the victim's skin:

> "Normally, the question whether the circumstances surrounding the act show the required specific intent is for the jury. However, the Legislature has obviously recognized a fact of life—that some sexually assaultive persons get a kick or gratification by touching other persons in the clothed areas of their intimate parts without intending to go farther by touching the skin of the intimate part—absent the victim's consent." (*Duke*, *supra*, 174 Cal.App.3d at p. 300.)

In order to preserve the "legislative policy" (*Duke*, *supra*, 174 Cal.App.3d at p. 300), that direct contact by the defendant to the skin of a victim was required in order to commit a sexual battery, the *Duke* court developed a "bright line" rule (*ibid.*), that "there must be some proof of the defendant's intent to touch the skin of the victim's intimate parts in addition to the mere grabbing or touching of the victim through his or her clothing." (*Id.* at p. 301.) Because there was no such evidence in *Duke*, the Court of Appeal concluded that the evidence did not support the attempted sexual battery verdicts. (*Id.* at p. 302.)

Even assuming that we were to agree with the reasoning of the *Duke* court, we are not aware of any analogous "bright line" rules (*Duke*, *supra*, 174 Cal.App.3d at p. 300) concerning the sufficiency of the evidence necessary to prove assault with the intent to commit rape or oral copulation.[6] Thus, in determining whether a defendant intended to rape or orally copulate a victim of an attack, the ordinary rule, namely, that the jury may infer a defendant's intent from all of the "facts and circumstances surrounding the offense," applies. (*Pre*, *supra*, 117 Cal.App.4th at p. 420; see *Duke*, *supra*, at p. 300 ["Normally, the question whether the circumstances surrounding the act show the required specific intent is for the jury."].) In this case, the facts, as described above, are sufficient for the jury to infer that Terrell committed his assault of the victim with the intent to rape or orally copulate her.

Terrell also "directs this [c]ourt" to *People v. Greene* (1973) 34 Cal.App.3d 622 (*Greene*), in which the Court of Appeal concluded that there was insufficient evidence that a defendant committed an assault with the intent to rape the victim. In *Greene*, the People presented evidence that the defendant approached the 16-year-old victim (Linda) as she was walking home from a babysitting job at approximately 11:00 p.m. (*Id.* at p. 629.) The *Greene* court summarized the evidence concerning the ensuring 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

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6 In any event, unlike in *Duke*, there is no evidence that Terrell *voluntarily* stopped his assault of the victim. (See *Duke*, *supra*, 174 Cal.App.3d at p. 299 ["After touching Erica's groin area, 'he just kind of let go and started running out of the house.' "].)

> 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.)

The People presented evidence that the defendant had committed another charged sexual offense against a second victim (Terese). (*Greene*, *supra*, 34 Cal.App.3d at p. 627.)[7] During this offense, which occurred less than a month prior to the charged offense involving Linda, the defendant approached Terese on the street and asked her to come with him. (*Id.* at p. 628.) When she declined, the defendant grabbed her with one arm and shoved his other hand into her vaginal area. After approximately 30 seconds, Terese was able to free herself and flee. (*Ibid.*)

The People also presented evidence of several additional incidents during which the defendant attempted to have sex with a teenage girl whom he met on the street. Each of the incidents occurred approximately 18 months before defendant's encounter with Linda and involved the same victim, Miss K. (*Greene*, *supra*, 34 Cal.App.3d at p. 631.) During one of the encounters, the defendant approached Miss. K. on the street and told

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7 The *Greene* court concluded that the jury could consider evidence pertaining to the defendant's offense against Terese in considering whether he was guilty of committing the offense against Linda. (*Greene*, *supra*, 34 Cal.App.3d at p. 630.)

her that he wanted to have sexual intercourse. The defendant then grabbed Miss. K. before she was able to flee. (*Ibid.*) On another occasion, the defendant offered Miss K. $100 to have sex with him, and then pushed her into some bushes before she was able to run away. (*Id.* at p. 632.) On still another occasion, the defendant offered Miss K. $50 to have intercourse, blocked her path when she attempted to leave, and grabbed her in the crotch before she was able to flee. (*Ibid.*) Miss K. testified that the defendant exposed himself during each of the incidents. (*Ibid.*)

In concluding that the evidence was insufficient to support the jury's verdict finding the defendant guilty of assault with intent to rape Linda, the *Greene* court stated, "The testimony of Linda when considered alone falls short of furnishing substantial evidence that the defendant assaulted her with intent to commit rape." (*Greene*, *supra*, 34 Cal.App.3d at p. 651.) In support of this conclusion, the court cited the facts of several cases in which the People had presented stronger evidence of the defendant's intent to commit a rape. (*Id.* at pp. 651-652.) The *Greene* court also concluded that the evidence of the defendant's commission of the other offenses "fail[ed] to rise to the dignity of showing intent to overcome his victim's resistance by force or violence." (*Id.* at p. 653.) In support of this conclusion, the *Greene* court again reasoned that the evidence did "not measure up to the facts" of several other cases in which the People had presented stronger evidence of a defendant's intent to rape. (*Ibid.*)

We are not persuaded that *Greene* requires reversal in this case. To begin with, we disagree with the *Greene* court's conclusion that no reasonable jury could find that the defendant committed an assault with the intent to rape Linda. In light of Linda's

testimony concerning the defendant's threat, his statement that he wanted to "play" with her, and the placement of his hand on her waist, together with the evidence that the defendant had committed several other similar offenses that were clearly sexually motivated, a juror could reasonably infer that the defendant assaulted Linda with the intent to rape her.

The *Greene* court's reasoning to the contrary was based primarily on its assessment that the evidence in that case was weaker than that presented in other cases. However, the Supreme Court has cautioned against such an approach to evaluating sufficiency claims. (See *People v. Story* (2009) 45 Cal.4th 1282, 1299 ["The Court of Appeal erred in focusing on evidence that did not exist rather than on the evidence that did exist."].) Accordingly, we decline to follow *Greene*.

In any event, even if we were to follow *Greene*, it is distinguishable. Unlike the brief encounter on the street in *Greene*, the defendant in this case executed an elaborate plan to trick the victim into coming to a motel room in which he had placed several items that a reasonable juror could find would facilitate a rape or oral copulation. In addition, unlike in *Greene*, the defendant's act in binding the victim's wrists, throwing her on the bed, and climbing on top of her, showed a clear "intent to overcome his victim's resistance by force or violence." (*Greene*, *supra*, 34 Cal.App.3d at p. 653.)

Accordingly, we conclude that there is sufficient evidence in the record to support the jury's verdict finding Terrell guilty of assault with the intent to commit rape or oral copulation.

IV.

DISPOSITION

The judgment is affirmed.

AARON, J.

WE CONCUR:

McINTYRE, Acting P. J.

O'ROURKE, J.

I, KEVIN J. LANE, Clerk of the Court of Appeal, Fourth Appellate District, State of California, do hereby certify that this preceding and annexed is a true and correct copy of the original on file in my office.

WITNESS, my hand and the Seal of the Court this November 2, 2015

KEVIN J. LANE, CLERK

By Jonathan Newton Deputy Clerk

APPENDIX E
CIVIL DOCKET

CLOSED,HABEAS,HabeasPSLC,Rule60b

U.S. District Court
Southern District of California (San Diego)
CIVIL DOCKET FOR CASE #: 3:17-cv-00088-BTM-AGS

Terrell v. Armant et al
Assigned to: Judge Barry Ted Moskowitz
Referred to: Magistrate Judge Andrew G. Schopler
Case in other court: USCA, 18-56567
Cause: 28:2254 Petition for Writ of Habeas Corpus (State)

Date Filed: 01/17/2017
Date Terminated: 10/26/2018
Jury Demand: None
Nature of Suit: 530 Habeas Corpus (General)
Jurisdiction: Federal Question

Petitioner

Matthew Terrell

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V.

Respondent

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Date Filed	#	Docket Text
01/17/2017	1	Petition for Writ of Habeas Corpus against C. Armant, Attorney General of the State of California (Filing fee $5 receipt number 0974-9731608)(Filing fee $5, fee paid, IFP not filed), filed by Matthew Terrell. (Attachments: # 1 Memo of Points and Authorities, # 2 Opinion of the CCA, # 3 Denial of the Petition for Review by California Supreme Court, # 4 Civil Cover Sheet) The new case number is 3:17-cv-88-BTM-AGS. Judge Barry Ted Moskowitz and Magistrate Judge Andrew G. Schopler are assigned to the case. (Khoury, Charles)[*Case in Screening per 28 USC 1915A*] (rlu) (sjt). (Entered: 01/17/2017)
04/11/2017	2	ORDER Requiring Response to Petition (28 U.S.C. § 2254). Respondent must file a "Notice of Appearance" no later than 4/28/2017. If Respondent files a motion to dismiss no later than 6/12/2017, Petitioner must file his opposition, if any, to the motion no later than 7/14/2017. If Respondent does not contend that the Petition can be decided without the Court reaching the merits of Petitioner's claims, Respondent must file and serve an answer to the Petition, no later than 6/12/2017. Petitioner may file a traverse to matters raised in the answer no later than 7/14/2017. Signed by Magistrate Judge Andrew G. Schopler on 4/11/2017.(rlu) (Entered: 04/11/2017)
04/11/2017	3	NOTICE REGARDING POSSIBLE FAILURE TO EXHAUST AND ONE-YEAR STATUTE OF LIMITATIONS. Signed by Magistrate Judge Andrew G. Schopler on 4/11/2017.(rlu) (Entered: 04/11/2017)
04/14/2017	4	NOTICE of Appearance by Jennifer Anne Jadovitz on behalf of C. Armant (Jadovitz, Jennifer)Attorney Jennifer Anne Jadovitz added to party C. Armant(pty:res) (nbp) (Entered: 04/14/2017)
06/12/2017	5	RESPONSE to 1 Petition for Writ of Habeas Corpus,, by C. Armant. (Attachments: # 1 Memo of Points and Authorities in Support of Answer to Petition, # 2 Proof of Service [Answer to Petition for Writ of Habeas Corpus; and Memorandum of Points and Authorities in Support of Answer to Petition]) (Jadovitz, Jennifer) (dsn) (Entered: 06/12/2017)
06/12/2017	6	NOTICE of Lodgment of State Court Record by C. Armant re 5 Response to Habeas Petition, (Attachments: # 1 Proof of Service [Notice of Lodgment in 28 U.S.C. 2254 Habeas Corpus Case], # 2 Supplement [L#1 - CT, Part 1 of 2], # 3 Supplement [L#1 - CT, Part 2 of 2], # 4 Supplement [L#2-1 - RT Vol. 1 of 5], # 5 Supplement [L#2-2 - RT Vol. 2 of 5], # 6 Supplement [L#2-3 - RT Vol. 3 of 5], # 7 Supplement [L#2-4 - RT Vol. 4 of 5], # 8 Supplement [L#2-5 - RT Augment Vol 1 of 1], # 9 Supplement [L#3 - AOB], # 10 Supplement [L#4 - RB], # 11 Supplement [L#5 - Reply Brief], # 12 Supplement [L#6 - Opinion], # 13 Supplement [L#7 - Petn for Rehearing], # 14 Supplement [L#8 - Order denying], # 15 Supplement [L#9 - Petn for Review], # 16 Supplement [L#10 - Order denying])(Jadovitz,

		Jennifer) (dsn) (Entered: 06/12/2017)
07/17/2017	7	TRAVERSE by Matthew Terrell, re 5 Response to Habeas Petition, filed by Matthew Terrell. (Khoury, Charles) (dsn). (Entered: 07/17/2017)
09/13/2017	8	Memorandum in Support of Traverse (ECF No. 7), filed by Matthew Terrell. (Khoury, Charles) QC email sent re event used. (dsn) (Entered: 09/13/2017)
03/29/2018	9	TRAVERSE by Matthew Terrell, re 8 Reply - Other filed by Matthew Terrell. (Khoury, Charles) (dsn). (Entered: 03/29/2018)
03/29/2018	10	SUPPLEMENTAL DOCUMENT by Matthew Terrell . (Khoury, Charles) (dsn). (Entered: 03/29/2018)
10/26/2018	11	ORDER: (1) DENYING PETITION FOR WRIT OF HABEAS CORPUS; and (2) DENYING CERTIFICATE OF APPEALABILITY. Signed by Judge Barry Ted Moskowitz on 10/26/2018.(sjm) (sjt). (Entered: 10/26/2018)
10/29/2018	12	CLERK'S JUDGMENT. IT IS SO ORDERED AND ADJUDGED that judgment is in favor of Attorney General of the State of California, C. Armant and against Matthew Terrell and the Petition for Writ of Habeas Corpus and the Certificate of Appealability is denied.(sjm) (Entered: 10/29/2018)
11/10/2018	13	**DOCUMENT WITHDRAWN** MOTION for Reconsideration re 12 Clerk's Judgment, by Matthew Terrell. (Khoury, Charles) (sjm).(jms). (Entered: 11/10/2018)
11/10/2018	14	**DOCUMENT WITHDRAWN** NOTICE of Technical Failure by Matthew Terrell re 13 MOTION for Reconsideration re 12 Clerk's Judgment, (Attachments: # 1 Memo of Points and Authorities)(Khoury, Charles) Q.C. Mailer regarding incorrect event used. Filer instructed to file a Notice of Withdrawal and identify which document to withdraw. (sjm). (jms). (Entered: 11/10/2018)
11/13/2018	15	NOTICE *of Withdrawal of docs 13 & 14* by Matthew Terrell re 14 Notice of Technical Failure, 13 MOTION for Reconsideration re 12 Clerk's Judgment, (Khoury, Charles)(jms). (Entered: 11/13/2018)
11/13/2018	16	MOTION for Reconsideration re 12 Clerk's Judgment, 11 Order by Matthew Terrell. (Khoury, Charles) (jms). (Entered: 11/13/2018)
11/22/2018	17	MOTION for Leave to Proceed in forma pauperis by Matthew Terrell re 18 Notice of Appeal. (Khoury, Charles). (Modified on 11/22/2018: Changed event to "Motion for Leave to Appeal in forma pauperis" and added link to Notice of Appeal.) (akr). (Entered: 11/22/2018)
11/22/2018	18	NOTICE OF APPEAL to the 9th Circuit as to 12 Clerk's Judgment, by Matthew Terrell. IFP Filed. (Notice of Appeal electronically transmitted to US Court of Appeals.) (Khoury, Charles). (Modified on 11/22/2018: In 11 Order, the US District Court denied a Certificate of Appealability.) (akr). (Entered: 11/22/2018)
11/26/2018	19	USCA Case Number 18-56567 for 18 Notice of Appeal to 9th Circuit filed by Matthew Terrell. (akr) (Entered: 11/26/2018)

12/11/2018	20	ORDER GRANTING MOTION TO PROCEED IN FORMA PAUPERIS RE NOTICE OF APPEAL ECF NO 18 . 17 Motion for Leave to Appeal in forma pauperis. Signed by Judge Barry Ted Moskowitz on 12/11/2018. (sjm) (Entered: 12/12/2018)
12/14/2018	21	ORDER DENYING MOTION FOR RECONDIDERATION re: ECF No 16 . Signed by Judge Barry Ted Moskowitz on 12/14/2018. (sjm) (Entered: 12/17/2018)
07/22/2019	22	ORDER of USCA as to 18 Notice of Appeal to the 9th Circuit filed by Matthew Terrell. The request for a certificate of appealability is denied because appellant has not made a "substantial showing of the denial of a constitutional right." Any pending motions are denied as moot. Denied. (akr) (Entered: 07/22/2019)
09/16/2019	23	ORDER of USCA as to 18 Notice of Appeal to the 9th Circuit filed by Matthew Terrell. Appellant's motion for reconsideration is denied. No further filings will be entertained in this closed case. (akr) (Entered: 09/16/2019)

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12/13/2019 19:04:27

PACER Login:	ck2768:3916228:0	**Client Code:**	terrell
Description:	Docket Report	**Search Criteria:**	3:17-cv-00088-BTM-AGS
Billable Pages:	3	**Cost:**	0.30

General Docket
United States Court of Appeals for the Ninth Circuit

Court of Appeals Docket #: 18-56567
Nature of Suit: 3530 Habeas Corpus
Matthew Terrell v. C. Armant, et al
Appeal From: U.S. District Court for Southern California, San Diego
Fee Status: IFP

Docketed: 11/26/2018
Termed: 07/22/2019

Case Type Information:
1) prisoner
2) state
3) 2254 habeas corpus

Originating Court Information:
District: 0974-3 : 3:17-cv-00088-BTM-AGS
Trial Judge: Barry Ted Moskowitz, Senior District Judge
Date Filed: 01/17/2017

Date Order/Judgment:	Date Order/Judgment EOD:	Date NOA Filed:	Date Rec'd COA:
10/26/2018	10/26/2018	11/22/2018	11/22/2018

Prior Cases:
None

Current Cases:
None

MATTHEW TERRELL Petitioner - Appellant,	Charles Roger Khoury, Jr., Esquire, Attorney Direct: 858-764-0644 [COR LD NTC CJA Appointment] P.O. Box 791 Del Mar, CA 92014
v.	
C. ARMANT Respondent - Appellee,	Jennifer Jadovitz [COR NTC Dep State Aty Gen] AGCA - Office of the Attorney General (San Diego) 600 W. Broadway Suite 1800 San Diego, CA 92101
ATTORNEY GENERAL FOR THE STATE OF CALIFORNIA Respondent - Appellee,	Office of Attorney General, Esquire Direct: 619-645-2076 [COR NTC Dep State Aty Gen] AGCA - Office of the Attorney General (San Diego) 600 W. Broadway Suite 1800 San Diego, CA 92101

MATTHEW TERRELL,

Petitioner - Appellant,

v.

C. ARMANT; ATTORNEY GENERAL FOR THE STATE OF CALIFORNIA,

Respondents - Appellees.

11/26/2018	1 1 pg, 213.67 KB	Open 9th Circuit docket: needs certificate of appealability. Date COA denied in DC: 10/26/2018. Record on appeal included: Yes. [11098157] (HC) [Entered: 11/26/2018 09:45 AM]
11/26/2018	2 2 pg, 59.17 KB	Filed (ECF) Appellant Matthew Terrell Correspondence: a motion to reconsider the denial of petition and COA is pending in the District Court. Date of service: 11/26/2018 [11099301] [18-56567] (Khoury, Charles) [Entered: 11/26/2018 03:21 PM]
12/04/2018	3	Criminal Justice Act electronic voucher created. (Counsel: Mr. Charles Roger Khoury, Jr., Esquire for Matthew Terrell) [11108962] (JN) [Entered: 12/04/2018 12:13 PM]
12/12/2018	4 2 pg, 135.39 KB	Received copy of District Court order filed on 12/11/2018 ORDER granting motion to proceed in forma pauperis re notice of appeal (ECF NO. 18) [ECF NO. 17]. [11118096] (RL) [Entered: 12/12/2018 09:44 AM]
01/31/2019	5 19 pg, 137.83 KB	Filed (ECF) Appellant Matthew Terrell Motion for certificate of appealability. Date of service: 01/31/2019. [11173610] [18-56567] (Khoury, Charles) [Entered: 01/31/2019 12:32 AM]
07/22/2019	6 1 pg, 147.92 KB	Filed order (SANDRA S. IKUTA and N. RANDY SMITH) The request for a certificate of appealability (Docket Entry No. [5]) 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. [11372046] (JBS) [Entered: 07/22/2019 02:55 PM]
08/09/2019	7 27 pg, 307.48 KB	Filed (ECF) Appellant Matthew Terrell motion for reconsideration of dispositive Judge Order of 07/22/2019. Date of service: 08/09/2019. [11393259] [18-56567] (Khoury, Charles) [Entered: 08/09/2019 06:16 PM]
09/16/2019	8 1 pg, 112.83 KB	Filed order (MILAN D. SMITH, JR. and ANDREW D. HURWITZ) Appellant's motion for reconsideration (Docket Entry No. [7]) is denied. See 9th Cir. R. 27-10. No further filings will be entertained in this closed case. [11432262] (OC) [Entered: 09/16/2019 10:11 AM]

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Description:	Docket Report (filtered)	**Search Criteria:**	18-56567
Billable Pages:	1	**Cost:**	0.10