

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

TERRY D. BUFORD,

Petitioner,

No. CIV S-08-2986 JAM CHS

vs.

JAMES A. YATES, Warden,

Respondent.

FINDINGS AND RECOMMENDATIONS

\_\_\_\_\_ /

I. INTRODUCTION

Petitioner Terry Buford is a state prisoner proceeding pro se with a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner stands convicted of attempted premeditated murder of a fetus, assault with a deadly weapon, second degree robbery, kidnapping to commit robbery, attempted robbery, and conspiracy to murder a human fetus, for which he is currently serving multiple life sentences. In the pending petition, petitioner claims that various errors at trial and sentencing deprived him of his constitutional rights.

II. BACKGROUND

On December 14, 2005, the Sacramento County District Attorney’s Office charged petitioner and three co-defendants (Dwayne Curry, Titenesha Russell, and Tashara Boone) with six crimes:

- 1 (1) Count 1 – attempted premeditated murder of “Baby Doe,” a  
2 seven-month-old fetus (Cal. Penal Code §§ 664, 187(a));
- 3 (2) Count 2 – assault with a deadly weapon upon L.R. (Cal.  
4 Penal Code §245(a)(1));
- 5 (3) Count 3 – second-degree robbery of L.R. (Cal. Penal Code  
6 §211);
- 7 (4) Count 4 – kidnapping to commit robbery (also known as  
8 “aggravated kidnapping,” Cal. Penal Code §209(b)(1));
- 9 (5) Count 5 – attempted robbery of L.R. (Cal. Penal Code §§  
664, 211); and
- 10 (6) Count 6 – conspiracy to murder a human fetus (Cal. Penal  
Code §§ 182(a)(1), 187(a)).

11 (Clerk’s Transcript on Appeal (“CT”) at 207-11.)

12 At the joint trial of petitioner and his co-defendants, evidence was admitted as  
13 follows:

14 The Prosecution’s Case

15 L.R. dated Buford before she became pregnant with his child in  
16 February 2004. As the pregnancy progressed, Buford told L.R. she  
17 should have an abortion. L.R. wanted to have the baby and told  
18 Buford that he could “just pay child support” if he “didn’t want to  
19 be there.” Buford acted indifferently and began to deny that the  
20 child was his. When L.R. was about five months pregnant, L.R.  
21 and Buford broke off their relationship.

22 At some time in the weeks leading up to the assault, L.R. called  
23 Buford’s cell phone. A woman answered and identified herself as  
24 Buford’s sister. The same woman, whose voice L.R. identified as  
25 Russell’s, called L.R. to ask about the baby and the identity of the  
26 father. She continued to make harassing phone calls to L.R.,  
calling her a “bitch” and threatening to kill L.R. and her baby.

Before the assault, L.R. told petitioner that she had \$700 and was  
willing to lend him money to repair his car. She lived with her  
grandmother and kept the money there.

Boone testified pursuant to her agreement to cooperate with the  
district attorney’s office. She and petitioner were “best friends.”  
On September 20, 2004, five days before the assault and  
kidnapping, Buford asked Boone to “beat somebody up.” She  
agreed to help him. In subsequent conversations, Boone learned  
that Buford and L.R. had argued over whether he was the baby’s

1 father.

2 Between September 20 and September 25, Buford and Boone  
3 devised a plan. Buford would invite L.R. to the movies but take  
4 her to a park where Boone would beat her up. The goal was to  
5 force L.R. to have a miscarriage. Boone asked Russell to help beat  
6 up L.R. and she agreed.

7 About 8:00 p.m. on September 25, 2004, Buford picked up L.R. at  
8 her home for the ostensible purpose of taking her to the movies.  
9 He was driving a white Chevrolet Malibu. Curry, whom L.R.  
10 knew through Buford as "Pacman," was sitting in the backseat.  
11 Buford picked up Russell, who joined Curry in the backseat, then  
12 drove to a liquor store. After Buford, Curry and Russell bought  
13 liquor, everyone changed seats. Russell drove with Curry beside  
14 her. Buford and L.R. were in the backseat. Instead of going to the  
15 movies, defendants drove L.R. to a park in Elk Grove.

16 Buford and Russell informed Boone of their whereabouts by cell  
17 phone, while she waited for their arrival at the park. Buford, Curry  
18 and Russell drank behind some bushes and L.R. sat by herself.  
19 Eventually, L.R. told Buford she wanted to go home and he agreed  
20 to drive her back. Buford had his arm around L.R.'s waist, but  
21 turned sideways as they walked.

22 When Buford gave the signal, Boone and Russell ran in front of  
23 him and L.R., turned, and Boone sprayed L.R. in the face with  
24 Mace. Boone also hit L.R. in the face. L.R. tried to fight back but  
25 was blinded by the Mace. Russell joined the fray and punched  
26 L.R. in the face. L.R. fell to the ground. L.R. told her attackers  
that she was pregnant. When L.R. asked Buford for help, he  
responded, "[J]ust fight back."

The attack continued while L.R. was on the ground. Curry kicked  
her in the side. He also threw a garbage can at L.R., hitting her in  
the head. Boone removed L.R.'s tennis shoes and someone took  
her cell phone. At that point, Boone and Russell left in the Malibu  
by themselves. They drove north on Interstate 5 toward  
Meadowview where Russell's grandmother lived.

Back at the park, L.R. asked Buford to call an ambulance and he  
said, "Okay." However, instead of calling the ambulance, Buford  
called Boone and told her to "come back and finish the job."  
Boone asked Buford if he was trying to kill L.R., and Buford said,  
"[N]o, just the baby." He wanted Boone to continue, "as long as  
that baby gets up out of her." While Russell and Boone were  
driving back to the park, Buford called again to tell them to bring a  
baseball bat and flashlight from the car.

Boone and Russell approached L.R. at the park carrying a  
flashlight and baseball bat. Boone struck L.R.'s leg with the bat

1 and Russell hit her in the head with the flashlight. The women told  
2 L.R. that Buford was not the father of her baby and he was not  
3 going to pay child support. L.R. named someone else as the baby's  
4 father because she wanted the beating to stop.

5 Boone testified that while Russell and L.R. continued to fight,  
6 Curry hit L.R. in the head, knocking her to the ground. Boone also  
7 stated that Curry kicked L.R. with both feet as she lay on the  
8 ground saying, "Help me, my baby." L.R. lost consciousness while  
9 she was on the ground.

10 Boone and Curry began searching L.R.'s clothing for money.  
11 Boone took \$20 that they found inside L.R.'s bra. Changing her  
12 earlier testimony that she first learned of L.R.'s \$700 in the car  
13 after they all left the park, Boone stated on redirect examination  
14 that Buford and Curry were looking for the \$700 when Curry  
15 pulled L.R.'s clothes off. Curry removed L.R.'s pants and  
16 someone removed her socks. Defendants carried L.R. to the  
17 Malibu.

18 Once inside the car, Buford showed Boone and Russell a picture of  
19 the \$700 on his cell phone, an image he had received from L.R.  
20 Although L.R. was not fully conscious, Buford suggested that they  
21 get the money from L.R.'s house by having her call her brother and  
22 asking him to bring it to the car.

23 Curry drove to Russell's apartment to get clean pants and  
24 underwear for L.R. Russell's roommate brought the clothes to the  
25 car and Boone and Russell put them on L.R. in the backseat of the  
26 car. Russell put a BB gun on her lap to scare L.R.

Curry continued to drive. Russell, Boone and Curry bought and  
smoked marijuana with the \$20 they had taken from L.R. When  
someone looked in the car, Russell stated, "See what we do? See  
how we beat up bitches?" They let L.R. out of the car to urinate  
near a tree, but Boone and Russell stood next to her.

Once L.R. was awake, defendants turned their attention to the  
money. Boone and Russell told L.R. that she "better find some  
way" to retrieve the \$700. Someone handed L.R. a cell phone and  
ordered her to call home. L.R. telephoned her grandmother and  
told her to send L.R.'s brother outside with her purse.

L.R.'s grandmother stepped outside of the house at 1:00 a.m. and  
saw the Malibu approaching. Curry sped away and L.R. called her  
grandmother again, telling her to send L.R.'s brother to the car  
with the money. Sensing trouble, L.R.'s grandmother asked if she  
was being held against her will. L.R. said that she was.

Curry pulled up again and L.R.'s brother approached the car.  
When he saw that L.R.'s face was bruised and bleeding, he told the

1 occupants of the car to let her out. Instead, Curry drove off with  
2 L.R.'s brother holding onto the car door. L.R.'s grandmother  
called 911 when L.R.'s brother came inside.

3 L.R. asked to be taken to a hospital, but Curry refused. After  
4 discussing alternatives, defendants left L.R. by the side of the road.  
Curry drove to Russell's apartment where he, Russell and Boone  
5 spent the night.

6 L.R. walked to a nearby apartment where a resident found her and  
called 911. L.R. had bruises on her face and stomach and was  
7 fading in and out of consciousness. An ambulance transported her  
to the hospital.

8 Doctors treated L.R. for a fractured eye socket and extensive  
bleeding inside the eye. She was still experiencing double vision at  
9 the time of trial. The doctors drained blood from both of L.R.'s  
swollen ears. They noticed abrasions on L.R.'s face, abdomen and  
10 buttocks, and bruises all over her body.

11 Fetal heart monitors indicated that L.R.'s unborn baby was in  
distress and not receiving enough oxygen. L.R. was nearly 32  
12 weeks pregnant at the time of the assault and had not experienced  
any problems with her pregnancy. Doctors delivered the baby by  
13 emergency Cesarean section. The baby had an initial Apgar score  
of 1 on a scale of 1 to 10. A normal baby has an initial Apgar  
14 score of 7 or 8. Doctors placed the baby on a mechanical ventilator  
for 48 hours and supplied oxygen through its nasal passages for  
15 another five days. The baby remained in the hospital for three  
weeks.

#### 16 Buford's Defense

17 Buford's aunt, Crystal Latimore, testified that she met Boone in  
18 county jail in the fall of 2005. Boone approached her and began  
talking about the case. According to Latimore, Buford picked up  
19 Boone on his way to the movies because she asked for a ride. The  
aunt also testified that Boone said that the fight with L.R. was just  
20 between the two of them.

#### 21 Curry's Defense

22 Curry testified that he called Buford on the day of the assault to ask  
him for a ride to a motel where he was scheduled to babysit. When  
23 Buford arrived, he told Curry that he had to "handle some  
business" before driving him to the motel. Buford picked up L.R.  
24 in Del Paso Heights, picked up Russell in another part of town,  
then drove to Elk Grove.

25 According to Curry's testimony he did not learn about the plan to  
26 beat up L.R. until they met Boone at the park. Curry watched

1 Boone and Russell assault L.R., but did not take part. He also  
2 claimed that he did not know that L.R. was pregnant until she fell  
to the ground and her peacoat came open.

3 Curry also testified about what happened when Boone and Russell  
4 returned to the park. He confirmed earlier testimony that Boone hit  
L.R. with the baseball bat and Russell hit her with the flashlight.  
5 Curry denied that he kicked or hit L.R., or threw a garbage can at  
her. [Boone]'s sister<sup>1</sup> testified later at trial that Buford, rather than  
6 Curry, had kicked L.R. in the stomach while she lay on the ground  
in the park.

7 With respect to L.R.'s \$700, Curry recounted that Russell pointed a  
gun at L.R. in the car and threatened to shoot her if she did not get  
8 the money. Curry said that he did not know what Russell was  
talking about and had not been privy to any discussions regarding  
9 the \$700. He denied seeing the cell phone photo of the money.  
10 However, on cross-examination, Curry stated that while L.R. was  
lying on the ground in the park after the beating, he heard Buford  
11 tell the group to "check her for money."

12 Curry testified that he drove the car to Russell's apartment and  
L.R.'s grandmother's at the direction of Boone and Russell because  
13 he was afraid of them. He thought Russell's gun was real.

14 In response to a question from Russell's trial counsel, Curry  
testified that he was drunk at the park after consuming one and a  
15 half bottles of Mad Dog. On cross-examination, Curry stated that  
he knew what was happening and was able to drive the car. He  
16 acknowledged that he told the district attorney's investigator that  
he was "a little screwed up" from the alcohol, but "not too bad."

### 17 Russell's Defense

18 Russell testified that she spoke to L.R. one time before the assault.  
She was on the speakerphone during a conversation between  
19 Boone and L.R. Boone and L.R. were arguing over Buford and  
L.R. challenged Boone to a fight.

20 On the night of the assault, Russell drove the Malibu with Buford,  
21 Curry and L.R. in the car. She stopped at a liquor store and bought  
three bottles of Mad Dog 20/20. Buford bought a Sprite. Russell  
22 and Boone shared one bottle; Curry drank the second bottle; and all  
three of them shared the third bottle. Russell testified that she took  
23 ecstasy that night. She also felt "out of character" because she

---

24  
25 <sup>1</sup> The state court of appeal's opinion from which this factual summary is taken indicates  
26 that petitioner's sister testified that petitioner, rather than Curry, kicked L.R., but review of the  
record reveals it was Boone's sister who gave that testimony, somewhat equivocally. (RT at 918-  
923 (testimony of Kimberly Harris)).

1 does not drink.

2 Russell testified that she did not know that Boone was going to  
3 fight L.R. until they arrived at the park and Boone said, "I'm gonna  
4 fuck this bitch up." Russell offered to assist if she needed help.  
5 She admitted socking L.R. in the face after L.R. bumped into her in  
6 what she described as a "cat fight." Like Curry, Russell claimed  
7 that she did not realize L.R. was pregnant until L.R. fell to the  
8 ground. She testified that L.R. wore a peacoat that concealed her  
9 stomach.

10 Russell recounted that Buford had called Boone after they left the  
11 park the first time and told them to return to "finish the job."  
12 According to Russell, it was the first time she realized that Buford  
13 wanted to force L.R. to have a miscarriage. Russell testified that at  
14 that point, she still felt the effects of the alcohol and ecstasy, but  
15 "[n]ot... to the point where [she] didn't know what [she] was  
16 doing."

17 Russell testified that she retrieved the baseball bat and flashlight  
18 from the backseat of the Malibu, but denied hitting L.R. with the  
19 flashlight. Russell and Boone put L.R. in the backseat of the  
20 Malibu while she was unconscious.

21 After everyone was in the car, Buford said L.R. had money and  
22 showed them the photo on his cell phone. Russell told L.R. that  
23 she wanted the money and L.R. agreed to get it. Russell assumed  
24 [L.R.] agreed because she did not want to suffer another beating.  
25 Russell acknowledged that there was a BB gun in the car, but  
26 claimed she never threatened L.R. with it. Russell stated that the  
sole purpose of placing L.R. in the car was to take her home and  
that she never intended to force L.R. to stay in the car to rob her.  
According to Russell, no one told Curry where to take L.R. after  
they drove away from L.R.'s house the second time. Later that  
night, Curry bragged that he rendered L.R. unconscious and  
complained that he got her blood on his shoes.

20 *People v. Curry*, 158 Cal.App.4th 766, 772-788 (2007).

21 Following jury trial, petitioner was convicted on all counts. He was sentenced to  
22 life in prison for the aggravated kidnaping, 25 years to life for the conspiracy to murder a fetus,  
23 and the upper term of five years for second degree robbery. The court also imposed an additional  
24 life sentence for the attempted premeditated murder of a fetus, the upper term of four years for  
25 the assault, and eight months for the attempted robbery; these sentences were stayed pursuant to  
26 California Penal Code §654. Restitution fines totaling \$11,430.00 were imposed.





1 Under AEDPA, federal habeas corpus relief is not available for any claim decided on the merits  
2 in state court proceedings unless the state court's adjudication of the claim:

3 (1) resulted in a decision that was contrary to, or involved an  
4 unreasonable application of, clearly established Federal law, as  
determined by the Supreme Court of the United States; or

5 (2) resulted in a decision that was based on an unreasonable  
6 determination of the facts in light of the evidence presented in the  
State court proceeding.

7 28 U.S.C. § 2254(d); *see also Penry v. Johnson*, 532 U.S. 782, 792-93 (2001); *Williams v.*  
8 *Taylor*, 529 U.S. 362, 402-03 (2000); *Lockhart v. Terhune*, 250 F.3d 1223, 1229 (9th Cir. 2001).  
9 This court looks to the last reasoned state court decision in determining whether the law applied  
10 to a particular claim by the state courts was contrary to the law set forth in the cases of the United  
11 States Supreme Court or whether an unreasonable application of such law has occurred. *Avila v.*  
12 *Galaza*, 297 F.3d 911, 918 (9th Cir. 2002), *cert. dismissed*, 538 U.S. 919 (2003).

## 13 V. DISCUSSION

### 14 A. Sufficiency of the Evidence (Aggravated Kidnapping)

15 Petitioner claims that the evidence adduced at trial was insufficient to show the  
16 required elements of kidnapping for robbery, also known as “aggravated kidnapping,” under  
17 California Penal Code §209(b). According to petitioner, the evidence failed to show these  
18 required elements: (1) that he formed the intent to rob L.R. before she was transported from the  
19 park; (2) that L.R. was transported beyond the distance necessary to commit the robbery; and (3)  
20 that the transportation substantially increased the risk of harm to L.R. beyond that necessarily  
21 present in the commission of the robbery.

22 On habeas corpus review, sufficient evidence supports a conviction so long as,  
23 “after viewing the evidence in the light most favorable to the prosecution, any rational trier of  
24 fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v.*  
25 *Virginia*, 443 U.S. 307, 319 (1979); *Sarausad v. Porter*, 479 F.3d 671, 677 (9th Cir. 2007),  
26 reversed on other grounds by *Waddington v. Sarausad*, 129 S. Ct. 823 (2009). As stated by the

1 United States Court of Appeals for the First Circuit, the focus under Jackson is not the  
2 correctness, but rather, the reasonableness of the state judgement. *See Hurtado v. Tucker*, 245  
3 F.3d 7, 19 (1st Cir. 2001). The dispositive question is “whether the record evidence could  
4 reasonably support a finding of guilt beyond a reasonable doubt.” *Chein v. Shumsky*, 373 F.3d  
5 978, 982 (9th Cir. 2004) (quoting *Jackson*, 443 U.S. at 318).

6 Under this standard, “*all of the evidence* is to be considered in the light most  
7 favorable to the prosecution.” *Wright v. West*, 505 U.S. 277, 296 (1992) (quoting *Jackson*, 443  
8 U.S. at 319) (emphasis in original). The prosecution need not affirmatively rule out every  
9 hypothesis except that of guilt. *Wright*, 505 U.S. at 296. A reviewing court such as this one  
10 must presume, even if it does not affirmatively appear in the record, that the trier of fact resolved  
11 any such conflicts in favor of the prosecution, and must defer to that resolution. *Id.*

12 On direct appeal of petitioner’s convictions, the state appellate court applied the  
13 rule of *Jackson* to reject petitioner’s argument that insufficient evidence supported his conviction  
14 for aggravated kidnapping. Petitioner’s claim is therefore evaluated under 28 U.S.C.  
15 §2254(d)(1). *See Sarausad*, 479 F.3d at 677-68 (“Section 2254(d)(1) plainly applies to *Jackson*  
16 cases...[¶] By contrast, §2254(d)(2) is not readily applicable to *Jackson* cases.”), (*overruled on*  
17 *other grounds* in *Waddington v. Sarausad*, 129 S.Ct 823 (2009)). Thus, the issue for review is  
18 not whether “the state court unreasonably determined disputed facts,” but rather, “whether the  
19 state court unreasonably applied the *Jackson* test.” *Id.* at 678.

20 With regard to the evidence of when petitioner formed the intent to rob, the state  
21 appellate court held:

22 Defendants argue that there is insufficient evidence to prove them  
23 guilty of aggravated kidnapping in count four. They maintain there  
24 is no evidence to show that they acted with the specific intent to  
rob L.R. at the time they moved her from the park to the car. The  
record does not support defendants’ argument.

25 When a defendant challenges the sufficiency of the evidence, the  
26 reviewing court “must determine ‘whether, after viewing the  
evidence in the light most favorable to the prosecution, any rational

1 trier of fact could have found the essential elements of the crime  
2 beyond a reasonable doubt.’ (*Jackson v. Virginia* (1979) 443 U.S.  
3 307, 319 [61 L. Ed. 2d 560, 573, 99 S. Ct. 2781], italics in  
4 original.) ‘[T]he court must review the whole record in the light  
5 most favorable to the judgment below to determine whether it  
6 discloses substantial evidence – that is, evidence which is  
7 reasonable, credible, and of solid value – such that a reasonable  
8 trier of fact could find the defendant guilty beyond a reasonable  
9 doubt.’ (*People v. Johnson* (1980) 26 Cal.3d 557, 578 [162 Cal.  
Rptr. 431, 606 P.2d 738].)” (*People v. Davis* (1995) 10 Cal.4th  
463, 509 [41 Cal. Rptr. 2d 826, 896 P.2d 119] (*Davis*).)  
“Substantial evidence includes circumstantial evidence and any  
reasonable inferences drawn from that evidence. [Citation.]” (*In re*  
*Michael D.* (2002) 100 Cal.App.4th 115, 126 [121 Cal. Rptr. 2d  
909].) Indeed, we ““presume in support of the judgment the  
existence of every fact the trier could reasonably deduce from the  
evidence.”[Citation.]” (*Davis, supra*, at p. 509.)

10 A person is guilty of kidnapping under California law if he or she  
11 “forcibly, or by any other means of instilling fear, steals or takes, or  
12 holds, detains, or arrests any person in this state, and carries the  
13 person into another country, state, or county, or into another part of  
14 the same county...” (§ 207, subd. (a).) The Legislature dictates  
15 greater punishment for aggravated kidnapping under section 209,  
16 subdivision (b)(1) where the accused “kidnaps or carries away any  
17 individual to commit robbery...” Section 209 also requires  
18 asportation or “movement of the victim that is not merely  
19 incidental to the commission of the robbery, and which  
20 substantially increases the risk of harm over and above that  
21 necessarily present in the crime of robbery itself. [Citations.]”  
22 (*People v. Rayford* (1994) 9 Cal.4th 1, 12 [36 Cal. Rptr. 2d 317,  
23 884 P.2d 1369] (*Rayford*); see § 209, subd. (b)(2).)

24 The parties agree that for them to be found guilty of aggravated  
25 kidnapping, the evidence must show that they intended to commit  
26 the robbery at the time they held or detained L.R. “A person  
[cannot] kidnap and carry away his victim to commit robbery if the  
intent to rob [is] not formed until after the kidnap[p]ing ha[s]  
occurred.” (*People v. Tribble* (1971) 4 Cal.3d 826, 831 [94 Cal.  
Rptr. 613, 484 P.2d 589].) Thus, the crime of aggravated  
kidnapping ““is similar to burglary where it is necessary to show  
that the entry was with the intent to commit larceny or any felony.  
An illegal entry but without such an intent is not a burglary  
[citation]; similarly..., kidnapping without intent to rob constitutes  
kidnapping but not kidnapping for purpose of robbery; and a  
robbery during a kidnapping where the intent was formed after the  
asportation is a robbery and not a kidnapping for purpose of  
robbery.”[Citations.]” (*Ibid.*) Moreover, the robbery need not be  
completed. “All that is required is that the defendant have the  
specific intent to commit a robbery at the time the kidnapping  
begins.” (*People v. Davis* (2005) 36 Cal.4th 510, 565–566 [31 Cal.

1 Rptr. 3d 96, 115 P.3d 417].)

2 Defendants claim they did not have the specific intent to rob L.R.  
3 at the time they put her in the Malibu. They cite evidence to show  
4 that they decided to rob L.R. only after they drove away with L.R.  
5 and Buford showed them the photo of the \$700 on his cell phone.  
6 All three maintain that there is no evidence they knew about the  
7 money before they placed L.R. in the car. Defendants ignore the  
8 inferences to be drawn from other evidence presented at trial.

9 Boone testified on redirect examination that Buford and Curry  
10 were looking for the \$700 when Curry pulled L.R.'s clothes off at  
11 the park. Both Russell and Curry told the district attorney's  
12 investigator that they heard Buford tell the others to "check for  
13 money" while L.R. lay on the ground after the second assault.  
14 Buford told them that L.R. "had money someplace, she had just  
15 gotten paid or something." Russell also told the district attorney's  
16 investigator that she heard Buford ask L.R. where the money was  
17 several times. According to Russell's statement to the district  
18 attorney's investigator, thereafter, Curry ripped off L.R.'s clothes  
19 and found the \$20. And in the car Buford said to L.R., "I thought  
20 you had \$700." We conclude that the jurors could reasonably infer  
21 from this circumstantial evidence that defendants knew about  
22 L.R.'s \$700 before they put her in the car and formed the required  
23 specific intent to rob her at that time. (In re Michael D., supra, 100  
24 Cal.App.4th at p. 126.)

25 Buford contends that "any inference that [he] intended to rob  
26 [L.R.] of the money at the time of the movement is made  
unreasonable by [L.R.'s] own testimony that it was her intent to  
lend Buford the \$700, that she had informed him of that fact and  
that she had never verbally reneged." She did, in fact, testify on  
that point at trial. However, we reject Buford's contention. The  
evidence was that Buford lured L.R. to the park where he set her up  
so she could be ambushed and brutally assaulted by his friends.  
And, although L.R. testified that she had previously offered to loan  
Buford the \$700 to repair his car, a jury could reasonably infer that,  
under the circumstances, L.R. was no longer willing to loan him  
money.

21 *Curry*, 158 Cal.App.4th at 778-80.

22 Petitioner argues that the state appellate court misconstrued the evidence in order  
23 to find sufficient evidence that he intended to rob L.R. of the \$700 when she was placed in the  
24 Malibu. According to petitioner, the state court misconstrued Boone's testimony by finding that  
25 Boone testified "Buford and Curry were looking for the \$700 when Curry pulled L.R.'s clothes  
26 off at the park." Specifically, petitioner argues in the pending federal petition:

1 The Court's statement is based on an exchange between Boone and  
2 the district attorney[:]

3 Q: And when you got the – I want to ask you a  
4 couple of other things about the statement in  
5 December. At the time that [L.R.]'s clothes were  
6 being taken off, do you recall that – that part of the  
7 – after she had been assaulted the first and second  
8 time and her clothes are being taken off, okay, you  
9 told Investigator Williams that Curry and Buford  
10 were looking for the \$700 as Curry pulled off her  
11 clothes, right?

12 A: Yes.

13 As this exchange makes clear, all Boone says is that she told the  
14 investigator that Curry and Buford were looking for money at the  
15 time. She does not testify to the veracity of the statement she made  
16 to the investigator. Nor does she say when she formulated that  
17 opinion. It is mere speculation to conclude that petitioner was  
18 looking for \$700 at that time, particularly in light of the fact that he  
19 could have asked L.R. to bring the money that night, had robbery  
20 been his intent.

21 (Petition at pp. 7-8, n.3.)

22 Boone's testimony with regard to the \$700 was indeed somewhat equivocal. She  
23 testified that, during the second assault, the assailants were looking for money but had not yet  
24 learned of the \$700, but also acknowledged telling an investigator that Curry and Buford were  
25 looking for the \$700 when Curry pulled off L.R.'s clothes at the park. (*See* Reporter's Transcript  
26 on Appeal ("RT") at 422-423, 526.) Boone further testified she was testifying truthfully and in  
accordance with her statement to the investigator. (RT at 470-473.)

Additional evidence admitted at trial, however, sufficiently showed petitioner's  
intent to rob L.R. of the \$700 when he and the others put her in the car. While the evidence was  
conflicting with respect to when his co-defendants learned of the \$700, it was undisputed that  
petitioner knew of the \$700 before picking up L.R. the night of the assault. Russell testified on  
cross examination that, during the second assault, petitioner told Curry to "check" L.R., as in to  
check her pockets. (RT at 718-19.) Curry similarly testified on cross-examination that petitioner  
said to check L.R. for money during the second assault. (RT at 823-24.) Both Boone's and

1 Curry's statements to the investigator corroborated that petitioner had told the assailants to check  
2 L.R. for money during the second assault. (RT at 940-43.) The investigator also testified during  
3 the prosecution's rebuttal case that Boone had stated that, once in the car, petitioner said to L.R.,  
4 "I thought you had \$700." (RT at 941.) Viewing this evidence in the light most favorable to the  
5 prosecution, the jury could easily have inferred that petitioner directed his cohorts to search L.R.  
6 for the money, and when only \$20 was found, that he decided to force L.R. to obtain the \$700 for  
7 him from her house. The state appellate court's conclusion that the evidence sufficed to show  
8 that petitioner intended to rob L.R. when she was placed in the car is not contrary to, or an  
9 unreasonable application of, the *Jackson* standard.

10 Petitioner's additional argument that the evidence did not show that he intended to  
11 rob L.R. of the \$700 because she had promised to loan it to him is likewise without merit. As the  
12 court of appeal found, there was evidence from which the jury could infer that L.R. no longer  
13 wished to loan the money to petitioner following the assault. (See RT at 285, 290). Moreover,  
14 the evidence discussed above showed that petitioner intended instead to take the money from her  
15 by force or fear.

16 Regarding the elements of asportation, namely, more transportation than necessary  
17 for the robbery and that the transportation increased the risk of harm to victim, the court of  
18 appeal held:

19 Buford also maintains that the prosecution failed to establish the  
20 asportation element of the crime. He argues that the movement of  
21 L.R. from the park to the house was merely incidental to the  
22 robbery and did not substantially increase the risk of harm to her.  
23 Whether the forced movement of the victim was merely incidental  
24 to the target crime, and whether that movement substantially  
25 increased the risk of harm to the victim, "is difficult to capture in a  
26 simple verbal formulation that would apply to all cases." (*People*  
*v. Dominguez* (2006) 39 Cal.4th 1141, 1151 [47 Cal. Rptr. 3d 575,  
140 P.3d 866].) The Supreme Court suggests that the asportation  
element requires "a multifaceted, qualitative evaluation rather than  
a simple quantitative assessment. Moreover, whether the victim's  
forced movement was merely incidental to the [target crime] is  
necessarily connected to whether it substantially increased the risk  
to the victim. 'These two aspects are not mutually exclusive, but

1 interrelated.’ (Rayford, [supra, 9 Cal.4th] at p. 12.)” (Id. at p.  
2 1152.)

3 In support of his argument, Buford contends that the only way for  
4 defendants to get the \$700 was to return to L.R.’s house, thus “the  
5 movement from the park to the house was ‘merely incidental to the  
6 target crime’ and did not substantially increase the risk of harm to  
7 [L.R.]” He suggests that they moved her from a location “where  
8 the likelihood of detection was near zero, to others, where it was  
9 more likely that she be observed and aided.” Buford’s analysis  
10 ignores the evidence and minimizes the interrelationship between  
11 the movement and the increased risk in the circumstances of this  
12 case. We disagree that the movement of L.R. from the park to the  
13 house was incidental to the target crime of robbery. Defendants  
14 drove to several locations before they went to L.R.’s home. Once  
15 inside the Malibu, defendants drove to obtain clean clothing for  
16 L.R., bought and smoked marijuana and Curry sped off not once  
17 but twice from L.R.’s home. And, even if detection was arguably  
18 more likely after defendants left the park with L.R., she was clearly  
19 not any safer. Defendants had placed L.R. in the backseat of the  
20 Malibu between Boone and Russell, with a self-proclaimed  
21 “drunk” driver, Curry, at the wheel. The pregnant L.R. was  
22 bruised, bleeding and unconscious when defendants placed her in  
23 the Malibu. Curry testified that in the car, Russell pointed a gun at  
24 L.R. and threatened to shoot her if she did not get the money.  
25 Further, the inference could be made that any delay in getting L.R.  
26 medical care substantially increased the risk of harm to her and her  
unborn child. On this record, a jury could reasonably find that  
defendants’ forced movement of L.R. was more than incidental to  
the robbery and substantially increased her risk of harm.

17 *Curry*, 158 Cal.App.4th at 780-81.

18 Petitioner contends that the state court failed to explain how the additional  
19 locations to which petitioner and his co-defendants drove L.R. increased the risk of harm to L.R.  
20 and argues that the dangers presented by the BB gun and delayed medical care were already  
21 present at the park. These arguments are without merit. That the assailants did not drive directly  
22 to L.R.’s house showed that they transported her more than was merely incidental to the robbery,  
23 and there was evidence that Russell placed the on her lap in the car following the assaults. In  
24 contrast, there was no evidence that the gun was displayed previously at the park. (RT at 373-74;  
25 428, 826-27). In addition, had the assailants left L.R. at the park, she could have sought out  
26 medical care to the extent her condition allowed. Once placed in the car between Boone and

1 Russell, L.R.'s care was left in the hands of petitioner and his co-defendants, who took no steps  
2 to obtain medical care for her and later dumped her at the side of a field, half-dressed, staggering  
3 and holding herself. (RT at 434, 732, 838). The state appellate court's conclusion that sufficient  
4 evidence supported petitioner's conviction for aggravated kidnapping was not contrary to, or an  
5 unreasonable application of the applicable *Jackson* standard.

6 B. CALCRIM No. 1203 (Aggravated Kidnapping)

7 Petitioner next claims that the instruction provided by the trial court on aggravated  
8 kidnapping, CALCRIM No. 1203, omitted an element of that offense, namely, that the defendant  
9 must have the intent to rob at the time the victim is moved.

10 It is clearly established federal law that a criminal defendant is constitutionally  
11 entitled to a determination of guilt beyond a reasonable doubt on all elements of the offense  
12 charged, and a jury instruction that "fails to give effect to that requirement" violates due process.  
13 *Middleton v. McNeil*, 541 U.S. 433, 437 (2004).

14 Nonetheless, not every ambiguity, inconsistency, or deficiency in a  
15 jury instruction rises to the level of a due process violation. The  
16 question is whether the ailing instruction . . . so infected the entire  
17 trial that the resulting conviction violates due process. A single  
18 instruction to a jury may not be judged in artificial isolation, but  
19 must be viewed in the context of the overall charge. If the charge  
20 as a whole is ambiguous, the question is whether there is a  
21 reasonable likelihood that the jury has applied the challenged  
22 instruction in a way that violates the Constitution.

19 *Id.* (internal citations and quotations omitted). In addition, where a trial court fails to instruct the  
20 jury on an element of the offense, the error is subject to harmless error review. *Neder v.*  
21 *United States*, 527 U.S. 1, 18 (1999).

22 In rejecting this claim on direct appeal, the state appellate court found that the  
23 element of intent at the time of movement was implicitly conveyed to the jury by the instruction,  
24 and that no error occurred:

25 Russell [joined by Buford] contends that Judicial Council of  
26 California Criminal Jury Instructions (2006) CALCRIM No. 1203  
(Kidnap for Robbery) improperly allowed the jury to convict her of



1 aggravated kidnapping without finding that she had the intent to  
2 rob L.R. at the time the kidnapping commenced. We conclude that  
CALCRIM No. 1203 is a correct statement of the law.

3 The court instructed the jury on the elements of aggravated  
4 kidnapping as follows:

5 [T]he defendants are charged in Count Four with kidnapping for  
6 the purpose of robbery. To prove that a defendant is guilty of this  
7 crime, the people must prove that, *one, the defendant intended to*  
8 *commit robbery; two, acting with that intent, the defendant took,*  
9 *held or detained another person by force or instilling a reasonable*  
10 *fear; and, three, using that force or fear, the defendant moved the*  
11 *other person or made the other person move a substantial*  
12 *distance; and, four, the other person was moved or made to move a*  
13 *distance beyond that merely incidental to the commission of the*  
14 *robbery; and, five, the other person did not consent to the*  
15 *movement; and, six, the defendant did not actually and reasonably*  
16 *believe, that the other person consented to the movement.*

17 In order to consent, a person must act freely and voluntarily and  
18 know the nature of the act. As used here, a substantial distance  
19 means more than a slight or trivial distance. The movement must  
20 have substantially increased the risk of harm to the person beyond  
21 that necessarily present in the robbery. In deciding whether the  
22 movement was sufficient, consider all of the circumstances relating  
23 to the movement. (Italics added.)

24 Although CALCRIM No. 1203 does not expressly state that the  
25 intent to rob must exist at the time the movement commences, we  
26 conclude that the first three points of the instruction, set forth in  
italics, adequately express that requirement. The instruction  
describes the sequence of events starting with intent and followed  
by action – first to take, hold or detain the victim by force or fear,  
and then to move the victim a substantial distance. There was no  
error.

27 *Curry*, 158 Cal.App.4th at 781-82.

28 The state court's finding was not contrary to, nor an unreasonable  
29 application of, the principles of federal law outlined above. Rather, the court reasonably  
30 construed the minor ambiguity in CALCRIM 1203 to conclude that the instruction implicitly  
31 conveys that the intent to rob must exist at the time the movement commences. There is no  
32 reasonable likelihood that the jury applied the instruction in an unconstitutional manner. For the  
33 jury to have applied the instruction without finding that intent to rob exist at the time of the

1 movement, it would have had to find that: (1) petitioner intended to rob L.R., (2) with intent to  
2 hold her by force or fear, (3) then lost the intent to rob L.R. while still holding her by force or  
3 fear, and (4) using that force or fear, moved L.R. a substantial distance. Such findings are not  
4 supported in the record and also defy common sense. For the same reasons, even if the  
5 instruction was in error, such error was harmless, because there is no indication it had a  
6 substantial and injurious effect on the verdict. Accordingly, the state court’s conclusion that  
7 CALCRIM No. 1203 did not improperly allow the jury to convict petitioner of aggravated  
8 kidnapping without finding all the elements of that offense beyond a reasonable doubt was a  
9 reasonable of clearly established applicable law.

10 C. Voluntary Intoxication Instructions

11 Petitioner next claims that the trial court failed to instruct the jury on the law of  
12 voluntary intoxication in order to determine whether he had the requisite intent to be convicted of  
13 the following offenses: (1) attempted murder on a non-natural and probable consequences theory;  
14 (2) robbery; (3) attempted robbery; and (4) aggravated kidnapping.

15 Again, a jury instruction may violate due process if it subverts the requirement  
16 that a criminal defendant be convicted only upon proof beyond a reasonable doubt of every  
17 element of the offenses charged violates due process. *Middleton*, 541 U.S. at 437.

18 In rejecting petitioner’s claim about voluntary intoxication instructions, the state  
19 appellate court ruled:

20 First, we conclude that when read together (see *People v. Smithey*  
21 (1999) 20 Cal.4th 936, 963 [86 Cal. Rptr. 2d 243, 978 P.2d 1171]),  
22 the instructions contained in CALCRIM Nos. 404 (Intoxication),  
23 625 (Voluntary Intoxication: Effects on Homicide Crimes) and  
24 3426 (Voluntary Intoxication) provided adequate guidance to the  
25 jury. CALCRIM No. 3426 specifically told the jurors that they  
26 could consider defendant's voluntary intoxication “in deciding  
whether the defendant acted with the specific intent... [¶] [r]equired  
for Counts One, Three, Four, Five and Six...”

Second, Buford was not prejudiced by any error in instructing the  
jury on voluntary intoxication because there is no evidence he was  
intoxicated – or that he even drank alcohol – the night of the

1 incident. Russell testified that she purchased three bottles of Mad  
2 Dog 20/20 at a liquor store in route to the park. Buford bought a  
3 Sprite. According to Russell, she and Boone shared one bottle,  
4 Curry drank a second, and all three of them shared the third bottle.  
5 This lack of evidence explains why Buford's attorney did not  
6 mention voluntary intoxication in his closing argument.

7 *Curry*, 158 Cal.App.4th at 790.

8 Once again, the state appellate court's analysis is not contrary to, or an  
9 unreasonable application of, clearly established federal law, nor an unreasonable determination  
10 of the facts in light of the evidence presented. There was no evidence that petitioner was  
11 intoxicated at any point during his participation in the crimes. L.R. testified that Boone, Curry,  
12 Russell, and petitioner drank alcohol at the park. (RT at 360-61). But there was no evidence that  
13 petitioner drank enough to become intoxicated or that he behaved in a manner indicating  
14 intoxication. Other witnesses were equivocal about whether petitioner, in particular, drank any  
15 alcohol at all, while Russell testified affirmatively that petitioner did not smoke marijuana with  
16 the others. (RT at 405-406, 586, 724.) As petitioner did not present a defense of voluntary  
17 intoxication and there was no evidence that he was intoxicated, the trial court did not err. Even if  
18 the minimal evidence of petitioner's drinking warranted more detailed instructions on voluntary  
19 intoxication, petitioner was not harmed by the failure to so instruct because, as the state court  
20 reasonably concluded, the evidence would not have caused the jury to conclude that he was  
21 intoxicated.

#### 22 D. Unanimity Instruction (Robbery)

23 Petitioner next claims that the trial court erroneously failed to give a unanimity  
24 instruction informing the jury that it must unanimously agree as to which act(s) constituted the  
25 crime with respect to the robbery count. The Court of Appeal rejected this claim, reasoning:  
26

Buford argues that the court prejudicially erred in failing to instruct the jury on the requirement of unanimity with regard to the robbery charge in count three. He notes that there was evidence of three acts of robbery – the forcible taking of L.R.'s shoes, cell phone and \$20 – and argues that jurors could have disagreed about which act

1 or acts Buford committed. The Attorney General argues that there  
2 was evidence of only two acts of robbery, one act being the taking  
3 of L.R.'s shoes and cell phone and the other act being the later  
4 taking of L.R.'s \$ 20. The Attorney General has the better  
5 argument.

6 The record reflects three items were taken from L.R. The taking of  
7 two items, L.R.'s shoes and phone, occurred almost simultaneously  
8 during the first assault at the park and there is no evidence  
9 suggesting otherwise. On these facts, the taking of L.R.'s shoes  
10 and cell phone were so closely connected that they formed a single  
11 incident of robbery and no unanimity instruction was required to  
12 distinguish between those takings. (People v. Thompson (1995) 36  
13 Cal.App.4th 843, 851 [42 Cal. Rptr. 2d 798] ["A unanimity  
14 instruction is not required where the offenses are so closely  
15 connected to form a single transaction or where the offense itself  
16 consists of a continuous course of conduct".])

17 The third item taken from L.R. was her \$20. Prior to the taking of  
18 her \$20, Boone and Russell had ended the first assault and had  
19 driven away from the park. L.R. asked Buford to call an  
20 ambulance; instead however, Buford called Boone and Russell  
21 back to the park to assault L.R. further. While Boone and Russell  
22 were driving back to the park, Buford called again to tell them to  
23 bring a bat and flashlight from the car. Defendants took the \$20  
24 during the second assault, when Boone and Russell returned to the  
25 park to "finish the job." It appears from the record that the first  
26 robbery at the park was separated from the second robbery by a  
period of time, during which the beating of L.R. had abated and  
Buford was able to make two phone calls, the first to summon  
Boone and Russell back to the park to finish the job and the second  
to ask them to bring a bat and a flashlight. Thus, the record  
demonstrates that L.R. was robbed at the park two separate times.

18 "[W]hen the evidence suggests more than one discrete crime, either  
19 the prosecution must elect among the crimes or the court must  
20 require the jury to agree on the same criminal act. [Citations.]"  
21 (People v. Russo (2001) 25 Cal.4th 1124, 1132 [108 Cal. Rptr. 2d  
22 436, 25 P.3d 641].) Where no election is made, the court has a  
23 duty to instruct sua sponte on the unanimity requirement. (People  
24 v. Melhado (1998) 60 Cal.App.4th 1529, 1534 [70 Cal. Rptr. 2d  
25 878].)

26 The failure to provide a unanimity instruction is subject to the  
Chapman harmless error analysis on appeal. (People v. Wolfe  
(2003) 114 Cal.App.4th 177, 186 [7 Cal. Rptr. 3d 483] (Wolfe),  
citing People v. Deletto (1983) 147 Cal. App. 3d 458, 472 [195  
Cal. Rptr. 233].) Under that standard the question is "whether it  
can be determined, beyond a reasonable doubt, that the jury  
actually rested its verdict on evidence establishing the requisite  
[elements of the crime] independently of the force of the ...

1 misinstruction.” (Wolfe, supra, 114 Cal.App.4th at p. 188.)

2 We conclude that the error in failing to instruct the jury on  
3 unanimity was harmless beyond a reasonable doubt. “Where the  
4 record provides no rational basis, by way of argument or evidence,  
5 for the jury to distinguish between the various acts, and the jury  
6 must have believed beyond a reasonable doubt that defendant  
7 committed all acts if he committed any, the failure to give a  
8 unanimity instruction is harmless. (People v. Deletto, supra, 147  
9 Cal. App. 3d at p. 473.) Where the record indicates the jury  
10 resolved the basic credibility dispute against the defendant and  
11 therefore would have convicted him of any of the various offenses  
12 shown by the evidence, the failure to give the unanimity instruction  
13 is harmless. [Citation.]” (People v. Thompson, supra, 36  
14 Cal.App.4th at p. 853.)

15 In this case, the prosecutor argued that Buford was an aider and  
16 abettor in the taking of L.R.’s shoes, cell phone and money at the  
17 park. Buford maintained that there was no evidence that he took  
18 anything from L.R. although he was there. He suggested that the  
19 only evidence that he aided and abetted the crime came from  
20 Curry, whose testimony the jury should not believe. Buford also  
21 argued that he had no motive to rob L.R. because she had agreed to  
22 give him the \$700. Defense counsel argued that his client did  
23 nothing in regard to the money and suggested that, “it was... the  
24 women in the back seat that were interested in that money and  
25 were making the claims and making the requests...” The verdicts  
26 demonstrate that the jury rejected Buford’s defense.

The evidence is overwhelming that Buford masterminded all of the  
crimes against L.R., including the robberies. It also shows that he  
was an aider and abettor in all of the crimes including the two  
separate robberies at the park. Circumstantial evidence suggests  
that Buford encouraged Curry to take the cell phone during the first  
assault to prevent L.R. from calling for help. Evidence that the cell  
phone ended up in the hands of Buford’s cousin supports the  
inference that even if Curry took the cell phone in the first instance,  
Curry gave the cell phone to Buford. Evidence of Buford’s role as  
an aider and abettor is even stronger as to the \$20 taken from L.R.  
in the second assault, where he repeatedly asked L.R. for the  
money and told Curry to “check [L.R.] for money.” Buford,  
however, did not argue or present any evidence from which the  
jury could distinguish between the acts of robbery at the park; he  
offered the same defense to both acts of robbery – that he took  
nothing from L.R. and had no motive to do so – yet the evidence of  
his involvement in the second act of robbery was conclusive.  
Given this record, it is reasonable to conclude that the jury believed  
beyond a reasonable doubt that Buford committed all acts if he  
committed any. Thus, the failure to give the unanimity instruction  
was harmless beyond a reasonable doubt. (See Wolfe, supra, 114  
Cal.App.4th at p. 188; People v. Gary (1987) 189 Cal. App. 3d

1 1212, 1218–1219 [235 Cal. Rptr. 30].)

2 *Curry*, 158 Cal.App.4th at 782-84.

3 Respondent asserts that no clearly established federal law requires the giving of a  
4 unanimity instruction. This issue need not be decided here. Even assuming, for purposes of this  
5 opinion, that a unanimity instruction was constitutionally required in this case, the state court’s  
6 conclusion that the trial court’s omission in this regard was harmless beyond a reasonable doubt  
7 was a reasonable application of the applicable federal law. Even if all three takings were  
8 considered separate events, as petitioner urges, the state appellate court correctly observed that  
9 the jury clearly rejected the only defense offered by petitioner: that it was the two women who  
10 were solely responsible for the robberies. There was substantial evidence that petitioner aided  
11 and abetted at least one, if not all three, of the robberies. Moreover, any error was harmless.  
12 Petitioner would not have escaped conviction on the robbery count had a unanimity instruction  
13 been provided, of this there is no grave doubt. *Cf. O’Neal v. McAninch*, 513 U.S. 432, 445  
14 (1995) (holding that, under Brecht, when a federal habeas court is in grave doubt about an error’s  
15 harmfulness, it should grant relief).

16 E. Aider and Abettor Liability Instructions (Attempted Murder of a Fetus)

17 Petitioner next argues that the trial court erroneously failed to instruct the jury  
18 that, in order to find him guilty of attempted murder of a fetus under the natural and probable  
19 consequences doctrine as an aider and abettor, it must find that he personally premeditated the  
20 murder. According to petitioner, by failing to instruct the jury in that manner, the trial court  
21 deprived him of due process.

22 As an initial matter, petitioner’s argument hinges on whether personal  
23 premeditation by an aider and abettor is an element of attempted premeditated murder under  
24 California Penal Code §664(a). California law on this issue is not clear. *Compare People v.*  
25 *Anderson*, 47 Cal.4th 92 (2009) and *People v. Seel*, 34 Cal.4th 535 (2004) (holding that  
26 premeditation is an element of attempted premeditated murder under §664(a) rather than a

1 penalty provision for purposes of double jeopardy) with *People v. Lee*, 31 Cal.4th 613 (2003)  
2 (holding that personal premeditation is not an element of attempted premeditated murder under  
3 the language of §664(a), which requires only that the murder be premeditated, not that the  
4 particular murderer have joined in the premeditation). In this case, however, the state court  
5 concluded it was unnecessary to address the application of the foregoing authorities, because  
6 “[e]ven if the court erred in not instructing the jury on premeditation in the circumstances of this  
7 case, the error was harmless beyond a reasonable doubt.” *Curry*, 158 Cal.App.4th at 792. The  
8 state court’s finding of no prejudice was reasonable.

9           The state court of appeal noted that, in convicting Russell of conspiracy to commit  
10 murder, the jury necessarily found that she premeditated and deliberated the murder. *Curry*, 158  
11 Cal.App.4th at 792. The same is true for petitioner. In instructing the jury on conspiracy, the  
12 trial court required it to find that petitioner intended to agree and did agree with another to  
13 commit murder and, at the time of the agreement, intended that he or another conspirator would  
14 commit murder. (RT at 1236.) These elements of conspiracy require a state of mind  
15 indistinguishable from premeditation and deliberation. *People v. Cortez*, 18 Cal.4th 1223, 1232  
16 (1998). Moreover, there was ample evidence that petitioner masterminded the assaults against  
17 L.R. with the intent to kill her unborn baby. (*See e.g.*, RT at 39--91 (petitioner devised the plan  
18 to tell L.R. he was taking her to the movies but instead travel to the park where Boone would  
19 assault her); RT at 408 (Boone began attacking L.R. when petitioner gave the signal); RT at 414-  
20 15 (after the first assault, petitioner asked Boone and Russell to return to continue assaulting L.R.  
21 until “that baby gets up out of her” and to bring the bat and flashlight from the car).) There is no  
22 grave doubt that if asked to, the jury would have found that petitioner engaged in the required  
23 premeditation for conviction.

#### 24           F.       Upper Term Selection at Sentencing

25           Petitioner next argues that the trial court violated his Sixth Amendment right to  
26 trial by jury when it imposed the upper term on his robbery conviction based on aggravating

1 factors found by the court and not determined by the jury beyond a reasonable doubt. The state  
2 court of appeal rejected this claim after concluding that, while the trial court did commit Sixth  
3 Amendment error, the error was harmless.

4           It appears that the trial court indeed made an error of constitutional magnitude  
5 when it imposed the upper term based on its findings that petitioner’s victim was particularly  
6 vulnerable and that petitioner betrayed a position of trust. Such findings, when used to impose  
7 an upper term under California law at the time of petitioner’s sentencing, must be determined by  
8 the jury beyond a reasonable doubt. *Cunningham v. California*, 549 U.S. 270 (2007).<sup>2</sup>

9           In concluding that the error was harmless, the Court of Appeal reasoned:

10           Denial of the right to jury trial on aggravating circumstances is  
11 reviewed under the harmless error standard set forth in *Chapman*,  
12 *supra*, 386 U.S. 18 [17 L. Ed. 2d 705]. (*Sandoval*, *supra*, 41 Cal.4th  
13 at pp. 838–839, citing *Washington v. Recuenco* (2006) 548 U.S.  
14 212 [165 L. Ed. 2d 466, 476, 126 S. Ct. 2546], and *Neder v. United*  
15 *States* (1999) 527 U.S. 1, 8–15 [144 L. Ed. 2d 35, 119 S. Ct.  
16 1827].) Under this standard, “we must determine whether, if the  
17 question of the existence of an aggravating circumstance or  
18 circumstances had been submitted to the jury, the jury’s verdict  
19 would have authorized the upper term sentence.” (*Sandoval*, *supra*,  
20 41 Cal.4th at p. 838.) If we conclude, “beyond a reasonable doubt,  
21 that the jury, applying the beyond-a-reasonable-doubt standard,  
22 unquestionably would have found true at least a single aggravating  
23 circumstance had it been submitted to the jury, the Sixth  
24 Amendment error properly may be found harmless.” (*Id.* at p. 839,  
25 italics added.) The record in this case supports such a finding as  
26 to both Buford and Curry.

As set forth in detail in the statement of facts, Buford and L.R. had  
dated for several months and Buford was the father of L.R.’s  
unborn child. L.R. was seven months pregnant at the time Buford  
gathered his friends to rob and beat her with the intent to cause a  
miscarriage. It is difficult to imagine a greater breach of trust  
against a more vulnerable victim. (Cal. Rules of Court, rule  
4.421(a)(3), (4).)

...

---

<sup>2</sup> *Cunningham* rested on the fact that, as California law existed at that time, a sentence to the middle term was presumed absent special findings. 549 U.S. at 277-78. The California legislature amended the law in response to *Cunningham*. Nevertheless, this case concerns the law as it existed in *Cunningham*, not the amended law on the rule announced in that case.



1 Based on this record, we conclude a jury would have found the  
2 cited aggravating circumstances true beyond a reasonable doubt  
3 had they been given the opportunity. Accordingly, any  
4 Appendi/Blakely/Cunningham error was harmless.

5 *Curry*, 158 Cal.App.4th at 794. Both the analysis and conclusion of the state court are consistent  
6 with, and reasonable applications of, Supreme Court precedent. The Sixth Amendment violation  
7 alleged by petitioner is indeed subject to harmless error review. *Washington v. Recuenco*, 548  
8 U.S. 212, 222 (2006). The state court’s application of harmless error review was a reasonable  
9 application of the federal standard in light of the record evidence.

10 Under California law, only one aggravating factor is necessary to set the upper  
11 term as the maximum term. *See* Cal. R. Ct. 4.420; *People v. Cruz*, 38 Cal.App.4th 427, 433 (2nd  
12 Dist. 1995); *People v. Forster*, 29 Cal.App.4th 1746, 1758 (4th Dist. 1994). Any *Blakely* error  
13 therefore will be found harmless if it is not prejudicial as to just one of the aggravating factors at  
14 issue. *Butler v. Curry*, 538 F.3d at 648.

15 As the state court concluded, evidence established that L.R., at seven months  
16 pregnant, that she and her unborn child were particularly vulnerable, and that petitioner abused  
17 the position of trust he enjoyed with L.R. to induce her to accompany him to the park. *See Butler*  
18 *v. Curry*, 528 F.3d 624, 649 (9th Cir. 2008) (noting that California law defines “vulnerable” as  
19 “defenseless, unguarded, unprotected, accessible, assailable, one who is susceptible to the  
20 defendant’s criminal act” (internal quotations and citations omitted)). A victim who is  
21 vulnerable to a “special or unusual degree, to an extent greater than in other cases,” is  
22 “particularly” vulnerable. *Id.* In other words, ‘particularly vulnerable’ victims have inherent  
23 personal characteristics that, sometimes in combination with the manner in which the crime was  
24 committed, render them more vulnerable than other victims.” *Id.* Certainly, it is a reasonable  
25 conclusion that the jury, given the opportunity, would have found either that L.R. was  
26 particularly vulnerable, or that petitioner abused the position of trust he enjoyed with L.R., or  
both of these factors, beyond a reasonable doubt.

1 G. Attempt to “Join” in Co-Defendants’ Claims

2 Petitioner indicates that he wishes to “join” in any claims raised in habeas corpus  
3 petitions filed by his co-defendants. The court is aware only of the petition of Titenesha Russell,  
4 Case No. 2:08cv1538. Russell raises no claims in that case not already addressed herein. In any  
5 event, it is petitioner’s burden, not that of his co-defendants, to show petitioner is in custody in  
6 violation of the Constitution. *Silva v. Woodford*, 279 F.3d 825, 835 (9th Cir. 2002). Allegations  
7 of fact are required. *Brown v. Allen*, 344 U.S. 443, 458, n.6 (1953) (overruled on other grounds  
8 in *Townsend v. Sain*, 372 U.S. 293 (1963)); *see also James v. Borg*, 24 F.3d 20, 26 (9th Cir.  
9 1994) (“Conclusory allegations which are not supported by a statement of specific facts do not  
10 warrant habeas relief.”). Petitioner fails to meet his burden with allegations that he wishes to  
11 “join” in claims presented by his co-defendants in any habeas corpus petitions filed on their own  
12 behalf.

13 H. Ineffective Assistance of Trial Counsel

14 Petitioner next claims that his trial counsel was ineffective for not attempting to  
15 impeach Boone’s testimony at trial by eliciting that she used “psychotic medication” regularly  
16 and that she had previously lost an unborn child after being assaulted by friends. Petitioner  
17 alleges that he provided this information to counsel. This claim was rejected without comment  
18 by the California Supreme Court in denying petitioner’s state habeas petition. This court must  
19 therefore independently review the record to determine whether denial of that claim warrants  
20 relief under 28 U.S.C. § 2254(d).

21 It is clearly established federal law that the Sixth Amendment right to counsel is  
22 violated by counsel’s ineffective assistance where:

23 (1) counsel’s performance was deficient; i.e., it fell below an  
24 objective standard of reasonable competence; and

25 (2) the defendant suffered prejudice from counsel’s deficient  
26 performance; i.e., that “there is a reasonable probability that, but  
for counsel’s unprofessional errors, the result of the proceeding  
would have been different. A reasonable probability is a

1 probability sufficient to undermine confidence in the outcome.”

2 *Strickland v. Washington*, 466 U.S. 668, 687-96 (1984).

3 Upon careful review of the record, it does not appear that counsel’s failure to  
4 impeach Boone in the manner suggested by petitioner either was deficient, or that it prejudiced  
5 petitioner. Petitioner does not explain how Boone’s alleged use of medication or past assault  
6 could have caused the jury to discredit her testimony. To the contrary, the jury could easily have  
7 regarded Boone’s experience being similarly victimized as bolstering the reliability of her  
8 testimony. It should be presumed that counsel’s decision not to elicit this fact in particular fell  
9 within “the wide range of reasonable professional assistance.” *Id.* at 689. Moreover, even if the  
10 jury had discounted Boone’s testimony for the reasons advanced by petitioner, there was other  
11 substantial evidence against him in the form of the testimony of L.R., which was corroborated by  
12 numerous other witnesses (her brother, her grandmother, the DA’s investigator, and those who  
13 assisted L.R. after the attack). There is no reasonable probability that petitioner would have  
14 secured a better outcome if only his lawyer had elicited that Boone regularly used “psychotic  
15 medication” and that she had lost an unborn baby in an assault. It is noted that Russell’s attorney  
16 did elicit that Boone was on anti-depressant medication, nevertheless, this fact apparently did not  
17 cause the jury to discredit her testimony. (RT at 460.) Petitioner is not entitled to relief for trial  
18 counsel’s alleged deficiency in this regard.

19 I. Restitution Order

20 For his final claim, petitioner contends that the trial court violated his due process  
21 rights by imposing a maximum restitution fine of \$10,000 under California Penal Code  
22 §1202.4(b) without considering his ability to pay. The California Supreme Court rejected this  
23 claim without comment in petitioner’s state habeas corpus action.

24 This claim is not cognizable on federal habeas because it does not challenge  
25 petitioner’s custody as required by 28 U.S.C. § 2254(a). Federal habeas corpus relief is expressly  
26 limited to claims based “only on the ground that [the petitioner] is *in custody* in violation of the

1 Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254(a) (emphasis added).  
2 Petitioner’s challenge to the restitution order does not involve the state’s custody of him and is  
3 therefore not reviewable by this court. *Flores v. Hickman*, 533 F. Supp. 2d 1068, 1085 (C.D.  
4 Cal. 2008); *see also United States v. Thiele*, 314 F.3d 399, 401-02 (9th Cir. 2002) (interpreting  
5 custody requirement of 28 U.S.C. §2255 to exclude claims for relief from a restitution order);  
6 *United States v. Kramer*, 195 F.3d 1129, 1130 (9th Cir. 1999) (same).

7  
8 VI. CONCLUSION

9 For all these reasons, IT IS HEREBY RECOMMENDED that petitioner’s  
10 application for a writ of habeas corpus be DENIED.

11 These findings and recommendations are submitted to the United States District  
12 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within  
13 twenty-one days after being served with these findings and recommendations, any party may file  
14 written objections with the court and serve a copy on all parties. Such a document should be  
15 captioned “Objections to Magistrate Judge's Findings and Recommendations.” Any reply to the  
16 objections shall be served and filed within fourteen days after service of the objections. The  
17 parties are advised that failure to file objections within the specified time may waive the right to  
18 appeal the District Court's order. *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

19 DATED: December 1, 2010

20   
21 CHARLENE H. SORRENTINO  
22 UNITED STATES MAGISTRATE JUDGE  
23  
24  
25  
26