

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

VERNON LEE BELTON,

Petitioner, No. 2:11-cv-3365 CKD F

VS.

CONNIE GIPSON¹,

Respondent. **ORDER**

16 Petitioner, a state prisoner, is proceeding pro se with a petition for writ of habeas
17 corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges his 2009 conviction for first degree
18 burglary, attempted sodomy, assault with intent to commit sodomy, two counts of forcible rape,
19 and related enhancements, for which he was sentenced to an indeterminate term of 25 years to
20 life plus a consecutive determinate term of 21 years, four months. (Dkt. No. 1 (“Ptn.”) at 1; Dkt.
21 No. 13-1 (state court opinion) at 2-3.) Respondent has filed an answer to the petition, and
22 petitioner has filed a traverse. (Dkt. Nos. 13, 24.) The parties have consented to this court’s
23 jurisdiction. (Dkt. Nos. 7, 9.) Upon careful consideration of the record and the applicable law,
24 the undersigned will deny the petition.

¹ See Dkt. No. 28.

BACKGROUND

In its affirmation of the judgment on appeal, the California Court of Appeal, Third Appellate District, provided the following factual summary of the events resulting in petitioner's conviction:

Late at night in September 2003, J.W. and her boyfriend C.T. were drinking Hennessy, smoking marijuana, and watching cartoons at their apartment in North Sacramento. C.T. "sold drugs and shot dice" as a means of generating income and occasionally sold drugs out of the apartment. After watching cartoons, C.T. and J.W. had unprotected sex in their bedroom. A short time later, C.T. answered a knock at the front door and told J.W. that he was going to the mini-mart to get a Swisher cigar and not to close the front door because the lock was broken. J.W. remained in bed and fell asleep.

She awoke about 30 minutes later to loud rustling noises coming from inside the apartment. By the time she opened her eyes, defendant and two other men were standing over her bed. Defendant was armed with a handgun, wore a black ski mask that covered his nose and mouth, and had dreadlocks. He grabbed J.W., who remained unclothed, and threw her on the ground, demanding: "Where's the money at, bitch?" J.W. responded that she did not have any money, prompting defendant to strike her in the head with the handgun and insist: "I'm not playing with you. Where's the money at?" Bleeding from the head, J.W. curled up in the fetal position and told defendant that she had \$100 in a skirt that was in the closet. One of the other men took the money from the skirt and said: "I got the money. Let's go." Defendant's accomplices then left the bedroom and continued to ransack the apartment.

Defendant remained in the bedroom and sexually assaulted J.W. He first tried to sodomized her. When that was unsuccessful, he flipped J.W. onto her back and raped her, penetrating her vagina with his penis several times over the course of three to four minutes. The assault came to an end when the other men returned to the bedroom and told defendant several times: "[C.T.] is coming. [C.T.] is coming." Defendant then "finished," pulled up his pants, and went to the bathroom before leaving the apartment. J.W. believed that defendant used a condom during the assault, but also heard a "pop" sound, which she believed to be the condom breaking.

While defendant and the other robbers were still inside the apartment, C.T. was outside enlisting the assistance of his neighbor, J.J. He told J.J. that some-thing strange was going on at his apartment and that he needed to find a gun. J.J. then walked to

1 a corner of the apartment complex with a clear view of the
2 apartment and saw a young African-American man leaving the
3 apartment. This man had dreadlocks and was holding a handgun.
4 Deciding to patrol the neighborhood, J.J. went back to his house to
5 get his truck. As he pulled out of the apartment complex gate, he
6 saw the same man, accompanied by several others, in a car pulling
out of another nearby apartment complex. J.J. followed in pursuit,
chasing the car down Howe Avenue at a high rate of speed. When
the pursued vehicle turned onto Auburn Boulevard, it lost control
and crashed into a fence. J.J. then drove back to the apartment
complex to pick up C.T.

7 Meanwhile, J.W. came out of the apartment and told C.T. what
8 happened. She then went to his mother's apartment across the
9 street to call 911. At this point, J.J. drove C.T. to the crash site,
dropped him off, and then found a police officer to flag down. By
the time the police officer arrived at the crashed vehicle, the
occupants had fled the scene.

10 J.W. was taken to UC Davis Medical Center, where a sexual
11 assault examination was performed. Back at her apartment, police
12 collected a used and torn condom that was discovered on the
bathroom floor. Police also collected evidence from the crashed
13 vehicle, which was a rental car that had been rented to Kenneth
14 Hill, defendant's former cell mate. Hill and defendant were
released from jail about two weeks prior to the home invasion
robbery and sexual assault.

15 Defendant was not identified as a suspect until April 2006. Shortly
16 thereafter, J.W. picked defendant out of a photo line-up, stating:
17 "Probably [defendant], but I'm not positive. I'm basing that on his
eyes because I never saw the lower half of his face. His eyes were
18 real small and kind of almond shaped. [Defendant] looks like the
guy who sexually assaulted me." Police then questioned defendant
19 and obtained a sample of his DNA. Defendant admitted to having
sex with J.W., but claimed that he met her at the mini-mart and that
she invited him into the apartment to smoke marijuana. According
20 to defendant, after they smoked the marijuana they had consensual
sex, at which point three men broke into the apartment and started
21 to hit defendant, prompting him to flee from the apartment.

22 Defendant's DNA was a match for that collected from semen
samples taken from J.W.'s anal and vaginal areas. Defendant's
23 DNA was also a match for that collected from the torn condom
found on the bathroom floor. Defendant's DNA also matched that
24 collected from a cigarette, a red hat, and a white t-shirt found in the
crashed vehicle.

25 People v. Belton, 2011 WL 2571312, **1-2 (Cal. App. 3 Dist., June 30, 2011).

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On September 21, 2009, following a trial in the Sacramento County Superior Court, a jury found petitioner guilty on the following counts: first-degree residential burglary (count 1; Cal. Penal Code § 459²), first-degree robbery (count 2; § 211), attempted sodomy count 3; (§§ 664/286(c)(2); assault with intent to commit sodomy (count 4; § 220); and rape (counts 5 and 6; § 261(a)(2)). (Lod Doc. 1 at 450-55, 458-63³.) The jury also found that petitioner personally used a firearm during the commission of the offenses in counts 1 and 2 (count 1; §§ 1203.06(a)(1)/12022.5(a)(1); count 2, §12022.53(b)). The jury also found that petitioner committed the offenses in counts 3, 5, and 6 during the commission of a burglary and personally used a firearm (§ 667.61(e)(2), (e)(4)).

On November 20, 2009, the court sentenced petitioner to an aggregate term of twenty-five years to life, plus twenty-one years and four months, in state prison. (Ptn. at 1; Lod. Doc. 1 at 538-41.)

Petitioner appealed the judgment to the Court of Appeal for the Third Appellate District, which affirmed the judgment in a reasoned opinion on June 30, 2011. (Lod. Docs. 5-7; Dkt. No. 13-1.) Petitioner then filed a petition for review in the California Supreme Court. (Lod. Doc. 8.) On October 12, 2011, the California Supreme Court denied the petition “without prejudice to any relief which . . . [petitioner] might be entitled after this court decides People v. McCullough, S192513.” (Lod. Doc. 8.)⁴

Petitioner commenced the instant action on December 19, 2011. (Ptn.) Respondent filed an answer to the petition (Dkt. No. 13), and petitioner filed a traverse (Dkt. No. 24).

² Unless otherwise designated, all statutory references are to the California Penal Code.

³ Lodged Documents refer to those documents lodged by respondent on March 22, 2012. (Dkt. No. 14.)

⁴ McCullough concerns a defendant's obligation to pay jail booking fees pursuant to state law. (Lod. Doc. No. 9.)

ANALYSIS

I. AEDPA

The statutory limitations of federal courts' power to issue habeas corpus relief for persons in state custody is provided by 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). The text of § 2254(d) states:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-

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

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

As a preliminary matter, the Supreme Court has recently held and reconfirmed

“that § 2254(d) does not require a state court to give reasons before its decision can be deemed to have been ‘adjudicated on the merits.’” Harrington v. Richter, 131 S. Ct. 770, 785 (2011).

Rather, “when a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary.” Id. at 784-785, citing Harris v. Reed, 489 U.S. 255, 265 (1989) (presumption of a merits determination when it is unclear whether a decision appearing to rest on federal grounds was decided on another basis). “The presumption may be overcome when there is reason to think some other explanation for the state court’s decision is more likely.” Id. at 785.

The Supreme Court has set forth the operative standard for federal habeas review of state court decisions under AEDPA as follows: “For purposes of § 2254(d)(1), ‘an *unreasonable* application of federal law is different from an *incorrect* application of federal

1 law.”” Harrington, supra, 131 S. Ct. at 785, citing Williams v. Taylor, 529 U.S. 362, 410 (2000).
2 “A state court’s determination that a claim lacks merit precludes federal habeas relief so long as
3 ‘fairminded jurists could disagree’ on the correctness of the state court’s decision.” Id. at 786,
4 citing Yarborough v. Alvarado, 541 U.S. 652, 664 (2004). Accordingly, “a habeas court must
5 determine what arguments or theories supported or . . could have supported[] the state court’s
6 decision; and then it must ask whether it is possible fairminded jurists could disagree that those
7 arguments or theories are inconsistent with the holding in a prior decision of this Court.” Id.
8 “Evaluating whether a rule application was unreasonable requires considering the rule’s
9 specificity. The more general the rule, the more leeway courts have in reaching outcomes in
10 case-by-case determinations.”” Id. Emphasizing the stringency of this standard, which “stops
11 short of imposing a complete bar of federal court relitigation of claims already rejected in state
12 court proceedings[,]” the Supreme Court has cautioned that “even a strong case for relief does
13 not mean the state court’s contrary conclusion was unreasonable.” Id., citing Lockyer v.
14 Andrade, 538 U.S. 63, 75 (2003).

15 The undersigned also finds that the same deference is paid to the factual
16 determinations of state courts. Under § 2254(d)(2), factual findings of the state courts are
17 presumed to be correct subject only to a review of the record which demonstrates that the factual
18 finding(s) “resulted in a decision that was based on an unreasonable determination of the facts in
19 light of the evidence presented in the state court proceeding.” It makes no sense to interpret
20 “unreasonable” in § 2254(d)(2) in a manner different from that same word as it appears in
21 § 2254(d)(1) – i.e., the factual error must be so apparent that “fairminded jurists” examining the
22 same record could not abide by the state court factual determination. A petitioner must show
23 clearly and convincingly that the factual determination is unreasonable. See Rice v. Collins, 546
24 U.S. 333, 338 (2006).

25 The habeas corpus petitioner bears the burden of demonstrating the objectively
26 unreasonable nature of the state court decision in light of controlling Supreme Court authority.

1 Woodford v. Viscotti, 537 U.S. 19 (2002). Specifically, the petitioner “must show that the state
2 court’s ruling on the claim being presented in federal court was so lacking in justification that
3 there was an error well understood and comprehended in existing law beyond any possibility for
4 fairminded disagreement.” Harrington, supra, 131 S.Ct. at 786-787. Clearly established” law is
5 law that has been “squarely addressed” by the United States Supreme Court. Wright v. Van
6 Patten, 552 U.S. 120, 125 (2008). Thus, extrapolations of settled law to unique situations will
7 not qualify as clearly established. See e.g., Carey v. Musladin, 549 U.S. 70, 76 (2006)
8 (established law not permitting state sponsored practices to inject bias into a criminal proceeding
9 by compelling a defendant to wear prison clothing or by unnecessary showing of uniformed
10 guards does not qualify as clearly established law when spectators’ conduct is the alleged cause
11 of bias injection). The established Supreme Court authority reviewed must be a pronouncement
12 on constitutional principles, or other controlling federal law, as opposed to a pronouncement of
13 statutes or rules binding only on federal courts. Early v. Packer, 537 U.S. 3, 9 (2002).

14 The state courts need not have cited to federal authority, or even have indicated
15 awareness of federal authority in arriving at their decision. Early, supra, 537 U.S. at 8. Where the
16 state courts have not addressed the constitutional issue in dispute in any reasoned opinion, the
17 federal court will independently review the record in adjudication of that issue. “Independent
18 review of the record is not de novo review of the constitutional issue, but rather, the only method
19 by which we can determine whether a silent state court decision is objectively unreasonable.”
20 Himes v. Thompson, 336 F.3d 848, 853 (9th Cir. 2003).

21 “When a state court rejects a federal claim without expressly addressing that
22 claim, a federal habeas court must presume that the federal claim was adjudicated on the merits –
23 but that presumption can in some limited circumstances be rebutted.” Johnson v. Williams, No.
24 11-465, slip op. at 10, 568 U.S. ____ (Feb. 20, 2013). “When the evidence leads very clearly to
25 the conclusion that a federal claim was inadvertently overlooked in state court, § 2254(d) entitles
26 the prisoner to” de novo review of the claim. Id., slip op. at 13.

1 II. Petitioner's Claims⁵

2 A. Dismissal of Jurors

3 1. Claim

4 Petitioner alleges that the trial court “acted without good cause and in violation of
5 his rights to a unanimous and impartial jury” and his constitutional right to a fair trial when the
6 court dismissed two jurors during deliberations. (Ptn. at 24.⁶) Petitioner contends that “the trial
7 court improperly continued questioning and pressuring Jurors [Nos.] 6 and 12 after they had
8 assured the court they were presently willing and able to deliberate.” (Id. at 27.)

9 Addressing petitioner’s claim on appeal in the last reasoned decision on this issue,
10 the Court of Appeal for the Third Appellate District set forth the relevant facts as follows:

11 After two full days of deliberations, the jury sent the trial court a
12 note advising that they were unable to reach a decision. In
13 response, the trial court sent the jury a questionnaire asking with
14 respect to each count: (1) the number of votes taken; (2) when the
last vote was taken; and (3) the numerical breakdown of the jury on
its first and last vote. The jury responded that it had taken a single
vote that morning, and that the numerical breakdown was
six-five-one as to each count.

15 When the foreperson returned the questionnaire, she advised the
16 bailiff of her concern that three of the jurors were "trying to rush
17 through everything" and were not "taking their obligation
18 seriously." The trial court then questioned the foreperson, who
explained that Juror No. 12 "seemed biased" because she stated, "
19 'not guilty' " when she first entered the deliberation room. The
foreperson also explained that this juror, a high school biology
teacher, "seem[ed] to be in a hurry and wanting to get this trial over
20 with," repeatedly commenting that she "stays up until 11:00 at
night [correcting paperwork] and then has to be back at the high
school at 6:30 in the morning to drop off the paperwork." The
foreperson also complained that Juror No. 6 asked the other jurors
21 whether they were being paid for their jury service. When several
22

23 ⁵ In addition to the claims discussed below, petitioner claims that the trial court erred in
24 imposing booking, classification, and crime prevention program fees on petitioner. This claim is
25 not cognizable on federal habeas review. Additionally, as set forth in its May 22, 2012 order, the
court disregards petitioner’s unintentional and unexhausted claims for ineffective assistance of
counsel, construing them as drafting errors such that the petition is not “mixed.” (Dkt. No. 26.)

26 ⁶ Page citations refer to those number assigned by the court’s docketing system.

jurors answered that they were being paid, he responded that it was "not fair," and that he did not seek to be excused for economic hardship because "he wanted to see what it was like" to be on a jury. FN1

FN1. The foreperson also complained that Juror No. 5 appeared to be texting on his cell phone and had also fallen asleep during deliberations. When the trial court questioned this juror, he explained that he had been sick over the weekend, and the medication he took that morning made him "kind of groggy." He denied texting on his cell phone. He also stated that he felt "much better" and promised to fully participate in deliberations from that point forward. The trial court did not remove him from the jury.

The trial court then questioned Juror No. 6. When asked whether he was being paid by his employer for his jury service, the juror responded that he was not. And when asked whether that created a hardship, the juror responded: "Kind of, yes, since it has been going on for so long. If it continues, it will." The trial court then asked how he supported himself without this source of income. The juror answered: "I get help from whoever I can." When asked whether he was thinking about how he was going to pay his bills, the juror responded: "Well, right now I don't have too many bills to pay, but, kind of, yeah."

The following exchange then took place: "[Trial court:] So if you were to—if the jury were to need to deliberate for another week—you kind of put your teeth together. [] [Juror No. 6:] Yeah. [] [Trial court:] I have to mark things on the record. [] [Juror No. 6:] Yeah, it is kind of inconvenient. But if I'm needed, I guess I can do it. [] [Trial court:] Well, could you promise us that you can continue to deliberate without thinking about 'I want to hurry and get this over with?' [] [Juror No. 6:] Umm. A hundred-percent truthfully, no, probably not." The trial court then asked: "Can you promise us not to think about when will this be over, meaning deliberations, if I were to send you back into the jury deliberation room?" The juror answered: "No, I can't."

The trial court also questioned Juror No. 12. The juror confirmed that she had been staying up late correcting papers and getting up early to return them to the high school before returning to the court to continue deliberations. She denied making any statement that she wanted to "get this over with." She also stated that she was committed to participating in deliberations, discussing the evidence with the other jurors, and allowing each juror to participate in deliberations "[r]egardless of how long it takes." The trial court decided not to remove Juror No. 12 from the jury.

The trial court then called Juror No. 6 back into the courtroom and asked two questions in order to "make sure" that continued participation would not result in a hardship. First, the trial court

1 asked: "Can you focus on the evidence regardless of how long jury
2 deliberations take?" He responded: "No." Second, the trial court
3 asked: "Can you put aside your concern regarding the time it is
4 taking and your not getting paid and your bills and focus just on the
5 evidence?" He responded: "No, ma'am." Defense counsel
6 objected to the removal of this juror, but candidly stated: "I think
7 those were clear answers, unfortunately." The trial court then
8 removed Juror No. 6 from the jury, replaced him with an alternate,
9 and instructed the jury that deliberations must begin anew.

10 The jury deliberated for the remainder of the day. That night, Juror
11 No. 12 left a voicemail for the trial judge asking to be removed as a
12 juror. She explained in a "tired" voice: "[H]aving just arrived home
13 now at 8:20, I want to see if it is still possible to be excused. []
14 Going into class, going through the paperwork, notes from my
15 substitute, I am losing my sub next week. He's been a long-term
16 biology sub, but I will no longer have him, and that will be a
17 hardship to my students, really, more than me. I can go the
18 nighttime, but with losing him, it is going to be more difficult for
19 the 156 students I have in my class. [] Anyways, I am not a quitter,
20 but I was thinking if this goes another week or two, then it is going
21 to be really detrimental."

22 The next day of trial, the trial court again questioned Juror No. 12.
23 After explaining to the juror that it had "no idea" how long
24 deliberations would take, the trial court asked whether she knew
25 about the extra work she would be doing for her students when she
26 was initially questioned during voir dire. The juror responded that
she knew she would be required to make lesson plans for her
substitute, but explained that she was fortunate to have had a
substitute with a biology major for the previous three weeks.
However, now she was going to lose this substitute, and would be
required to devise lesson plans "as if the person knows nothing
about biology."

27 The trial court then asked whether, given the current situation, she
28 would be able to concentrate on the evidence and fully participate
29 in the deliberations with the other jurors. The juror provided an
30 equivocal response, stating, "[o]f course I could," but also
31 explaining that it would cause her "a lot of stress and pressure" and
32 "would be very, very difficult." The trial court then explained that
33 the juror needed to be clear: "[I]f you say, 'It's going to be difficult,
34 but I will do it,' then my obligation under the law is to leave you on
35 this jury. If you say, 'I am not a quitter. I know it's going to be
36 difficult, but given the situation, I'm not going to be able to
37 concentrate. I am going to be thinking about when it's going to be
38 over because of the duty I have to my students,' then the law would
39 provide differently." The juror then unequivocally stated that she
40 would not be able to concentrate and deliberate as a juror. She
41 then broke into tears and said: "I'm not a quitter. I don't want to not
42 be here. I'm trying to-I thought I could at one time, but ... I've got

1 three kids of my own and I have no clean laundry. It's just so many
2 things. So I'm trying to-I want to do the best for everything and I'm
not doing well with anything.

3 The trial court removed Juror No. 12 and replaced her with an
4 alternate. The jury was again instructed to begin deliberations
5 anew. The jury reached a verdict after roughly seven hours of
deliberations.

6 2011 WL 2571312, **3-5.

7 2. State Court Decision

8 Addressing the merits of petitioner's claim, the state court of appeal reasoned⁷:

9 Penal Code section 1089 provides the trial court with authority to
10 discharge a juror who, upon good cause shown, is found to be
11 unable to perform his or her duty. FN2 Because a juror possesses
12 a duty to deliberate (see People v. Cleveland (2001) 25 Cal.4th
13 466, 485), a finding of financial or personal hardship that would
14 cause the juror to feel pressure to bring deliberations to a speedy
close renders the juror unable to perform his or her duty and thus
subject to discharge and substitution under section 1089. (People
v. Earp (1999) 20 Cal.4th 826, 892-893 (Earp); People v. Lucas
(1995) 12 Cal.4th 415, 489 (Lucas); see also People v. Fudge
(1994) 7 Cal.4th 1075, 1099-1100 (Fudge)).

15 FN2. Undesignated section references are to the Penal Code.

16 We review the trial court's decision to discharge a juror under the
17 deferential abuse of discretion standard, and will uphold the
18 decision unless it falls outside the bounds of reason. [Citations.]
19 "The substitution of a juror for good cause pursuant to section
20 1089, even after deliberations have commenced, ' "does not offend
21 constitutional proscriptions." ' [Citation.]" [Citations.]

22 However, in order to protect a defendant's constitutional rights to
23 due process and to a fair trial, "a juror's inability to perform as a
juror must be shown as a 'demonstrable reality.' " [Citations.]

24 In Lucas, supra, 12 Cal.4th 415, our Supreme Court upheld the
25 discharge of a juror prior to penalty phase deliberations in a capital
murder trial where it "seemed likely the penalty trial would require
26 the juror to cancel her vacation." (Id. at p. 487.) Even though the

⁷ Where there is no reasoned decision from the state's highest court, the Court "looks through" to the last reasoned state court decision. Y1st v. Nunnemaker, 501 U.S. 797, 801-806 (1991); Van Lynn v. Farmon, 347 F.3d 735 (9th Cir. 2003).

1 juror stated that this would "not impact her deliberation," the trial
2 court relied on her "demeanor and distress" and the fact that she
3 brought up the problem of losing her vacation several times. (Id. at
4 pp. 487-488.) Finding no abuse of discretion, the court explained:
5 "Although the juror stated the cancellation of her vacation would
6 not affect the discharge of her duties as a juror, her behavior and
7 demeanor supplied substantial evidence to the contrary. She had
8 repeatedly brought the problem of the vacation to the court's
attention, exhibiting concern and agitation over it. The court
determined that the juror's demeanor indicated her ability to
deliberate fairly would be substantially impaired if the penalty trial
caused her to cancel her vacation. [Citation.] We also observe that
the juror would have felt some pressure to bring the penalty
deliberations to a speedy close in order to preserve her planned
vacation." (Id. at p. 489.)

9 Similarly, in Fudge, supra, 7 Cal.4th 1075, our Supreme Court
10 upheld the discharge of a juror during guilt phase deliberations of a
11 capital murder trial where the juror anticipated starting a new job
12 and experienced anxiety over certain paperwork she needed to
13 complete to terminate her old position. (Id. at pp. 1099-1100.)
14 Shortly after deliberations began, the juror sent the trial court a
15 note indicating that the impending start date of her new job would
16 make deliberations inconvenient and might impact her decision.
17 But when the trial court questioned her, she stated that her anxiety
18 over the new job would not affect her deliberations. The trial court
19 decided not to discharge her from the jury. (Id. at p. 1098.) Later
20 in the deliberations, after the juror again asked to be removed, the
trial court again questioned her, and she reaffirmed that her anxiety
would not affect her deliberations. (Ibid.) The trial court then
allowed her to call her employer, who informed her that she would
be required to complete certain paperwork in order to terminate her
old position. (Id. at pp. 1098-1099.) After the phone call, she
stated that her anxiety over this paperwork would affect her
deliberations, and the trial court removed her. Our Supreme Court
found no abuse of discretion. (Id. at pp. 1099-1100; see also Earp,
supra, 20 Cal.4th at p. 893 [upholding trial court's decision to
discharge juror where the juror's "employer had stopped paying her
for jury service one month earlier and she had used her own
vacation time during the month to continue to serve on the jury"].)

21 We find no abuse of discretion in this case. As a preliminary
22 matter, the trial court properly called Juror No. 6 and Juror No. 12
23 in for questioning after being informed by the foreperson that these
jurors were attempting to "rush through" the deliberations and were
not "taking their obligation seriously." [Citation.] With respect to
Juror No. 6, the foreperson stated that he complained about not
being paid for his jury service. With respect to Juror No. 12, the
foreperson stated that she "seem[ed] to be in a hurry and wanting to
get this trial over with," and repeated several times that she was
staying up late correcting paperwork for her students. These reports

1 raised the possibility that these jurors had either a financial or
2 personal hardship that might cause them to feel pressure to bring
3 deliberations to a speedy close, which would render them unable to
4 perform their duty as jurors. [Citations.]

5 *Removal of Juror No. 6*

6 The trial court's decision to remove Juror No. 6 was not an abuse
7 of discretion. This juror unequivocally stated that he would not be
8 able to put aside his concern about not being paid and focus on the
9 evidence. This statement, relied upon by the trial court, constitutes
10 substantial evidence that Juror No. 6 was unable to perform his
11 duty as a juror, and thus establishes good cause for removal as a
12 "demonstrable reality." (People v. Wilson (2008) 43 Cal.4th 1, 26
13 ["The demonstrable reality test 'requires a showing that the court as
14 trier of fact did rely on evidence that, in light of the entire record,
15 supports its conclusion that [disqualification] was established' "].)

16 Nevertheless, defendant argues that the trial court inappropriately
17 continued to question Juror No. 6 after he assured the court "that
18 although the situation was 'inconvenient,' he was still able to fulfill
19 his duties as a juror, and would be able to do so even if the
20 deliberations took another week." Not so. As defendant
21 acknowledges, the trial court's inquiry into possible grounds for
22 removal of a juror "should cease once the court is satisfied that the
23 juror at issue is participating in deliberations and has not expressed
24 an intention to disregard the court's instructions or otherwise
25 committed misconduct, and that no other proper ground for
26 discharge exists." (People v. Cleveland, *supra*, 25 Cal.4th at p.
485[.])

27 Here, as in Lucas, although the juror expressed an ability to
28 continue deliberations ("I guess I can do it"), he also clenched his
29 jaw at the prospect of continued deliberations, which the trial court
30 noted for the record. Then, he could not "truthfully" state that he
31 would be able to continue to deliberate without thinking that he
32 wanted to "hurry and get this over with." Based on Juror No. 6's
33 demeanor and inability to promise to deliberate without wanting to
34 bring deliberations to a speedy close, the trial court appropriately
35 continued the inquiry. This, combined with his later unequivocal
36 statement that he would not be able to put aside his concern about
37 not being paid and focus on the evidence, supports the trial court's
38 decision to remove him from the jury.

39 *Removal of Juror No. 12*

40 We also conclude that the trial court did not abuse its discretion by
41 removing Juror No. 12 from the jury. Much like the juror in
42 Fudge, *supra*, 7 Cal.4th 1075, 1099-1100, Juror No. 12 initially
43 stated that she was committed to participating in deliberations
44 despite the fact that she was staying up late correcting papers and

1 getting up early to return them to the high school. Satisfied by this
2 response, the trial court decided not to remove her from the jury.
3 However, the situation changed when she discovered that her
4 current substitute teacher would no longer be available. After
5 leaving a voicemail asking to be removed, the trial court again
6 called her in for questioning. This time, after some initial equivocal
7 responses ("of course [she] could" concentrate on the evidence and
8 participate in deliberations, but it would cause her "a lot of stress
and pressure" and "would be very, very difficult") and further
questioning, she unequivocally stated that she would not be able to
concentrate and deliberate as a juror. She then broke into tears.
We conclude that Juror No. 12's demeanor and unequivocal
statement that she would not be able to concentrate and deliberate
as a juror established good cause for removal as a demonstrable
reality.

9 Nevertheless, defendant complains that the trial court "kind of laid
10 out two paths and after laying out the two paths, she then took the
11 path of being excused," referring to this statement: "[I]f you say,
12 'It's going to be difficult, but I will do it,' then my obligation under
13 the law is to leave you on this jury. If you say, 'I am not a quitter. I
14 know it's going to be difficult, but given the situation, I'm not going
15 to be able to concentrate. I am going to be thinking about when it's
16 going to be over because of the duty I have to my students,' then
17 the law would provide differently." Contrary to defendant's
argument, we do not believe that this statement amounted to the
trial court putting words into the juror's mouth. The juror's
previous answers were subject to two interpretations, and the trial
court simply asked her to clearly state which one she meant. In any
event, even if she had stuck to her initial position that she would be
able to continue to participate in deliberations, the trial court would
have been justified in removing her based on her "demeanor and
distress" displayed when she broke down during questioning. (See
Lucas, supra, 12 Cal.4th at p. 488.)

18 Finally, defendant's reliance on People v. Delamora (1996) 48
19 Cal.App.4th 1850 (Delamora) is misplaced. There, the Court of
Appeal found an abuse of discretion where the trial court removed
20 two jurors after more than three days of deliberation "without any
inquiry" about whether they would be willing to deliberate longer
21 even if their employers would not pay them. (Id. at p. 1855.) The
court noted, "[a]lthough a trial court does not abuse its discretion
when it discharges a juror because of problems related to the juror's
employment, the employment problem must be real and not
22 imagined," and explained, "where, as here, there is no evidence at
all to show good cause (because no inquiry of any kind was made),
the procedure used was by definition inadequate." (Id. at pp.
23 1855-1856.) Unlike Delamora, the trial court in this case
24 extensively questioned both Juror No. 6 and Juror No. 12
concerning the perceived hardship. These jurors were not removed
25 until the trial court was convinced that such a hardship existed.
26

1
2 We conclude with respect to both jurors that the hardship was not
3 imagined, but was instead shown to be a demonstrable reality.

4 2011 WL 2571312, **5-8 (some internal citations omitted).

5 3. Discussion

6 State criminal defendants have a federal constitutional right to a fair and impartial
7 jury. Duncan v. Louisiana, 391 U.S. 145, 149 (1968). A defendant's Sixth Amendment right to a
8 fair trial is violated when the "essential feature" of the jury is not preserved. Williams v. Florida,
9 399 U.S. 78, 100 (1970). California Penal Code section 1089 governs the dismissal and
10 substitution of jurors in California criminal trials. Under section 1089, a juror may be removed
11 from service either before or after final submission of the case if the juror becomes ill, dies, or
12 upon other "good cause." Id. The Ninth Circuit has upheld the constitutionality of section 1089,
13 after determining that it "preserved the 'essential feature' of the jury required by the Sixth and
14 Fourteenth Amendments." Miller v. Stagner, 757 F.2d 988, 995 (9th Cir.), amended, 768 F.2d
15 1090 (9th Cir. 1985). Accordingly, reviewing habeas courts need only decide whether the state
16 court's application under the circumstances violated a petitioner's Sixth Amendment rights (e.g.,
17 whether good cause existed for the dismissal of the juror). Perez v. Marshall, 119 F.3d 1422,
18 1426–28 (9th Cir.1997).

19 Section 1089 provides in pertinent part:

20 If at any time, whether before or after the final submission of the
21 case to the jury, a juror dies or becomes ill, or upon other good
22 cause shown to the court is found to be unable to perform his or
23 her duty, or if a juror requests a discharge and good cause appears
therefor, the court may order the juror to be discharged and draw
the name of an alternate, who shall then take a place in the jury
box, and be subject to the same rules and regulations as though the
alternate juror had been selected as one of the original jurors.

24 Cal. Penal Code § 1089.

25 Under AEDPA, a state court's factual determination that good cause existed for
26 the dismissal of a particular juror is presumed correct, and must be upheld unless the finding was

1 based on an “unreasonable determination of the facts in light of the evidence presented in the
2 State court proceeding.” 28 U.S.C. §§ 2254(d)(2), (e)(1); Perez, 119 F.3d at 1426.⁸

3 Here, the state court of appeal’s finding that good cause existed to remove Juror
4 No. 6 was not an unreasonable determination of the facts. The record reflects that Juror No. 6
5 initially expressed some doubt as to whether he could deliberate on the evidence without thinking
6 about when the trial would be over. Upon further questioning, he unequivocally responded “No”
7 when asked whether he could focus on the evidence, regardless of how long jury deliberations
8 lasted. He also indicated that he could not “put aside” his concerns about the length of the trial
9 and the resulting financial hardship. The trial judge’s extended questioning of Juror No. 6 on the
10 topic of whether he could focus on his duties was not improper under established federal law.

11 The state court of appeal’s finding that good cause existed to remove Juror No. 12
12 was also a reasonable determination of the facts. Like Juror No. 6, this juror clearly indicated
13 that she could not focus on deliberations without being distracted by the fact that her duties as a
14 juror were causing personal hardship. In response to the trial court’s proper questioning on this
15 subject, Juror No. 12 stated that it would be “very, very difficult” to concentrate on the evidence
16 and engage in deliberations with other jurors.

17 Because the state court of appeal’s “good cause” determinations as to both jurors
18 were reasonable determinations of the facts under § 2254(d)(2), petitioner is not entitled to
19 habeas relief on this claim.

20 ////

21 ////

22 ⁸ Per Johnson and for the reasons as discussed therein concerning a similar claim, the
23 undersigned applies the presumption of a merits determination to this claim. See 568 U.S. ___,
24 slip. op. at 15 (“Indeed, it is difficult to imagine any panel of appellate judges reading Cleveland
25 and passing on the propriety of dismissing a holdout juror under § 1089 without realizing that
such situations also bear on the federal constitutional right to a fair trial.”) Thus AEDPA
26 deference to the state court’s decision is proper.

1 B. Jury Coercion

2 1. Claim

3 Petitioner next claims that "the trial court's failure to respond to the jury's
4 announcement that it was deadlocked, combined with the court's statements to Jurors No. 6 and
5 12, implicitly coerced the jury to reach verdicts." (Ptn. at 31.)

6 The state court of appeal addressed petitioner's claim as follows:

7 Defendant also asserts that his constitutional right to due process
8 was violated when the trial court "effectively coerced the jury into
9 reaching verdicts." Specifically, he asserts that the trial court failed
10 to address the jury's indication of deadlock, removed a
11 defense-oriented juror, failed to remind the jurors to stick to their
12 conscientiously-held opinions, and informed the jurors brought in
13 for questioning that they would be required to deliberate regardless
14 of how long it took to render a verdict. Together, argues defendant,
15 these "statements and actions implicitly told the jury that it must
16 reach a verdict."

17 As we have already indicated, following the jury's indication of
18 deadlock, the trial court asked the jury for the number of votes
19 taken, the time of the last vote, and the numerical breakdown. The
20 jury responded that it had taken a single vote that morning, and that
21 the numerical breakdown was six-five-one as to each count. At this
22 point, the trial court was required to investigate the hardships
23 addressed in the previous section of this opinion.

24 After removing and replacing Juror No. 6, the trial court instructed
25 the jury that deliberations must begin anew because the alternate
26 juror "must participate fully in the deliberations that lead to any
27 verdict" and both "[t]he People and the defendant have the right to
28 a verdict reached only after full participation of the jurors whose
29 votes determine that verdict." The trial court further explained:
30 "Therefore, you must set aside and disregard all past deliberations
31 and begin your deliberations all over again. Each of you must
32 disregard the earlier deliberations and decide this case as if those
33 earlier deliberations had not taken place." Defense counsel did not
34 object to this instruction, nor request that the trial court address the
35 jury's prior indication of deadlock. Then, after removing and
36 replacing Juror No. 12, the trial court again instructed the jury to
37 begin deliberations anew. Defense counsel again did not object to
38 this approach. Nor did counsel ask the trial court to address the
39 previous indication of deadlock.

40 Because defendant did not object to the trial court's approach with
41 respect to instructing the jury following the removal of Juror No. 6
42 and Juror No. 12, he has forfeited his claim that it implicitly

1 coerced a verdict. (People v. Lewis and Oliver (2006) 39 Cal.4th
2 970, 1038.) And while he did object to the removal of these jurors,
we have already held that these jurors were properly removed.

3 In any event, no impropriety occurred. Section 1140 provides:
4 "Except as provided by law, the jury cannot be discharged after the
cause is submitted to them until they have agreed upon their
5 verdict and rendered it in open court, unless by consent of both
parties, entered upon the minutes, or unless, at the expiration of
such time as the court may deem proper, it satisfactorily appears
6 that there is no reasonable probability that the jury can agree."
7 "The determination whether there is reasonable probability of
agreement rests in the discretion of the trial court. [Citations.] The
court must exercise its power, however, without coercion of the
8 jury, so as to avoid displacing the jury's independent judgment 'in
favor of considerations of compromise and expediency.'
9 [Citation.]" (People v. Breaux (1991) 1 Cal.4th 281, 319.) "The
question of coercion is necessarily dependent on the facts and
10 circumstances of each case." (People v. Sandoval (1992) 4 Cal.4th
155, 195-196.)

11 Here, when the jury indicated deadlock, the trial court
12 appropriately inquired about the number of votes taken and the
numerical breakdown. (See People v. Carter (1968) 68 Cal.2d 810,
13 815.) Upon discovering that a single vote had been taken after a
relatively short period of deliberation, the trial court was justified
14 in requiring the jury to continue deliberating. (See People v.
Rodriguez (1986) 42 Cal.3d 730, 774-777 [finding no abuse of
15 discretion in requiring the jury to continue deliberating after it
indicated deadlock after 18 days of deliberation].) However, the
16 trial court also discovered that two jurors were suffering hardships
that required their removal from the jury, and properly instructed
17 the jury to start their deliberations from the beginning. (People v.
Collins (1976) 17 Cal.3d 687, 693-694, overruled on other grounds
18 in People v. Boyette (2002) 29 Cal.4th 381, 462, fn. 19.) This
instruction in no way indicated that the trial court would refuse to
19 release the jury until verdicts were reached.

20 Moreover, because the jury was starting its deliberations anew,
21 there was no need to address the prior indication of deadlock. Nor
do we believe that the trial court's questions to Juror No. 6 and
22 Juror No. 12 indicated that the trial court intended to require the
jury to deliberate until it reached a verdict. Instead, the trial court
23 candidly acknowledged that it did not know how long deliberations
would last, and simply sought to find out whether jurors' personal
situations would allow them to focus on the evidence and
24 participate in deliberations regardless of how long they lasted.
Because deliberations can end in a deadlock as well as a verdict,
25 this statement cannot be construed as informing the jurors that they
would be required to deliberate until they rendered a unanimous
26 verdict.

1 2011 WL 2571312, **8-9.

2 2. Discussion

3 As set forth above, before turning to the merits of petitioner's claim, the court of
4 appeal stated: "Because defendant did not object to the trial court's approach with respect to
5 instructing the jury following the removal of Juror No. 6 and Juror No. 12, he has forfeited his
6 claim that it implicitly coerced a verdict." Id. at *9, citing People v. Lewis and Oliver, 39 Cal.4th
7 970, 1038 (2006) (holding that, because defendants did not object to trial court's comments to
8 jury regarding scheduling, "they have forfeited their state law claim that it interfered with the
9 jury's deliberations and coerced a verdict. [Citation.] They have also forfeited their related
10 constitutional claims. [Citation.]").

11 Respondent argues that this claim is procedurally barred. Based on concerns of
12 comity and federalism, federal courts will not review a habeas petitioner's claims if the state
13 court decision denying relief relies on a state law ground that is independent of federal law and
14 adequate to support the judgment. See Coleman v. Thompson, 501 U.S. 722 (1991); Harris v.
15 Reed, 489 U.S. 255, 260–62 (1989). However, a discretionary state rule is not adequate to bar
16 federal habeas corpus review. See Siripongs v. Calderon, 35 F.3d 1308 (9th Cir. 1994).
17 Generally, the only state law grounds meeting these requirements are state procedural rules.
18 Even if there is an independent and adequate state ground for the decision, the federal court may
19 still consider the claim if the petitioner can demonstrate: (1) cause for the default and actual
20 prejudice resulting from the alleged violation of federal law, or (2) a fundamental miscarriage of
21 justice. See Harris, 489 U.S. at 262 (citing Murray v. Carrier, 477 U.S. 478, 485, 495 (1986)).

22 In the instant case, the last reasoned state court decision concluded that petitioner
23 forfeited his jury coercion claim by failing to object at trial. Under California law, "[a]n
24 appellate court will not consider claims of error that could have been — but were not — raised in
25 the trial court." People v. Vera, 15 Cal.4th 269, 275–76 (1997). In Rich v. Calderon, 187 F.3d
26 1064, 1066 (9th Cir. 1999) and Vansickel v. White, 166 F.3d 953 (9th Cir. 1997), the Ninth

1 Circuit held that California's contemporaneous objection rule is an adequate and independent
2 state procedural rule when properly invoked by the state courts. The Ninth Circuit has also
3 concluded that the contemporaneous objection rule has been consistently applied by the
4 California courts. See Fairbanks v. Ayers, 650 F.3d 1243, 1256 (9th Cir. 2011); Melendez v.
5 Pliler, 288 F.3d 1120, 1125 (9th Cir. 2002).

6 Here, while the court of appeal invoked the contemporaneous objection rule in
7 declaring petitioner's claim forfeited, it went on to alternately consider petitioner's claim on the
8 merits. In the Ninth Circuit, it is a "well-settled rule that 'the independent state grounds doctrine
9 bars the federal courts from reconsidering the issue in the context of habeas corpus review as
10 long as the state court explicitly invokes a state procedural bar rule as a separate basis for its
11 decision.'" Fairbank v. Ayers, 650 F.3d 1243, 1256 (9th Cir. 2011), citing Jackson v. Giurbino,
12 364 F.3d 1002, 1006 (9th Cir. 2004). See Harris v. Reed, 489 U.S. 255, 264 n.10 (1989) ("[A]
13 state court need not fear reaching the merits of a federal claim in an *alternative* holding. By its
14 very definition, the adequate and independent state ground doctrine requires the federal court to
15 honor a state holding that is a sufficient basis for the state court's judgment, even when the state
16 court also relies on federal law.") (Italics in original.)

17 Petitioner has not demonstrated cause and prejudice or a fundamental miscarriage
18 of justice such as would allow the court to consider this procedurally defaulted claim.⁹ As a
19 result, the court concludes that this claim is barred.

20 \\\\
21 \\\\
22

23 ⁹ "Any criminal defendant ... being tried by a jury is entitled to the uncoerced verdict of
24 that body." Lowenfield v. Phelps, 484 U.S. 231, 241 (1988). Clearly established Supreme Court
25 law on the subject of jury coercion in the constitutional context is sparse, consisting solely of
26 Lowenfield. See Wong v. Smith, ____ U.S. ____, 131 S.Ct. 10, 11 (2011) (Alito, J., dissenting
from the denial of certiorari). "As a result, the clearly established law in this area provides very
little specific guidance." Id. "About all that can be said is that coercive instructions are
unconstitutional, coerciveness must be judged on the totality of the circumstances, and the facts
of Lowenfield . . . were not unconstitutionally coercive." Id.

1 C. Statement to Police

2 1. Claim

3 Petitioner claims that the trial court violated his Fifth and Fourteenth Amendment
4 rights when it refused to suppress his statements to the police. (Ptn. at 37.) He maintains that
5 "police questioning should have ceased when he stated, 'I'll get a lawyer. I don't know what
6 you're talking about. Honest-to-God I don't know' and 'I'll go to trial, fight it all the way out.'"
7 (Id.)

8 The state court of appeal set forth the relevant facts as follows:

9 *Police Interrogation*

10 Defendant was arrested and interrogated by police in June 2006.
11 At the start of the interrogation, defendant was advised of his right
12 to remain silent, to have an attorney present during questioning,
13 and to have such an attorney appointed if he could not afford to
14 retain counsel. Miranda v. Arizona (1966) 384 U.S. 436 [16
15 L.Ed.2d 694] (Miranda).) Defendant acknowledged that he
16 understood these rights and began answering questions.

17 At first, defendant claimed to "know nothing" about the home
18 invasion robbery that occurred in September 2003. Defendant
19 admitted to knowing C.T., claiming to be "good friends" with him.
20 However, he denied knowing J.W., stating that he saw her only
21 once while he and C.T. were drinking and shooting dice at C.T.'s
22 apartment. When detectives asked whether he had ever had sex
23 with J.W., defendant responded: "Hell, no." One of the detectives
24 then asked defendant if he knew why she would pick him out of a
25 lineup and accuse him of being one of three individuals who broke
26 into her home and robbed her. Defendant responded: "No. I only
seen her one time and-and can't call it. I-anything ya'll need from
me. Ya'll can get it from me. Prove it wasn't me."

The detectives then confronted defendant with the details of the
crimes: "[J.W.] says that three guys, one of them being you, forced
their way into their apartment" and "two of the guys robbed her and
you raped her." Defendant called this a "crazy-assed story." The
detectives continued: "But she picked you right out of the lineup"
and "said she'll never forget your eyes even though you had a mask
on, that covered your nose and mouth." They also explained that
J.W. had stated that defendant was carrying a handgun during the
robbery and "pistol-whipped her with it." Detectives then told
defendant that his DNA matched that collected from semen found
the night of the assault. Defendant repeatedly denied involvement.
As an explanation for his semen being found at the crime scene,

1 defendant stated: "Man, me being a young man, only part of being
2 a player, living the fast life out there, man, you fuck broads every
3 day."

4 One of the detectives then told defendant that he would be charged
5 with rape and home invasion robbery. Defendant responded: "I'll
6 get a lawyer. I don't know what you're talking about.

7 Honest-to-God I don't know." The detective continued: "Now is
8 the time to tell us what happened." Defendant answered: "I don't
9 know what you're talking about so ain't no time to tell nothing,
10 because I don't want-don't know nothing." The detective
11 interrupted with: "You had nothing to do with it?" Defendant
12 responded: "I'll go to trial, fight it all the way out. I'll win-because I
13 had nothing to do with that. I don't know nothing, so I don't know
14 what you guys talking about."

15 Questioning continued. And defendant steadfastly denied
16 involvement in the crimes, stating at one point: "I don't know what
17 you're talking about. That wasn't me. I didn't do it. Shh. So you
18 guys say I'm-you guys say I'm responsible for something I don't
19 know nothing about. Hey, I guess I got to fight it in court. Sorry. If
20 that's what you guys say, that's what you guys say. I'm-I'm denying
21 it, because I didn't do it." At another point, defendant stated: "I
22 didn't do it, period, point blank. We can go to court, or we can go
23 to trial." Detectives then took a saliva sample from defendant,
24 stopped the interrogation, and left the room.

25 A short time later, defendant knocked on the interrogation room
26 door and told another detective that he wanted to talk to his
previous interrogators, stating: "I want to tell them the truth."
Defendant then admitted to having sex with J.W., but claimed that
the sex was consensual. According to defendant, he met J.W. at the
mini-mart and then went back to her apartment to smoke
marijuana. After smoking the marijuana, they had sex in J.W.'s
bedroom, at which point three men broke into the apartment. The
men punched and kicked defendant in the face and one of them
chased defendant out of the apartment. Defendant also claimed
that he did not know J.W. prior to meeting her at the mini-mart,
and never saw her again after being chased out of her apartment.

27 2011 WL 2571312, **10-11.

28 2. State Court Decision

29 Addressing the merits of petitioner's federal claim, the state court of appeal
30 reasoned:

31 Nor did the trial court violate defendant's constitutional rights by
32 admitting his statement to police into evidence. Contrary to
33 defendant's argument on appeal, he did not unambiguously invoke

1 his right to counsel, and thus the police were not required to stop
2 the interrogation.
3
4 . . .
5

6 Defendant argues that the detectives should have stopped the
7 interrogation after he stated: "I'll get a lawyer. I don't know what
8 you're talking about. Honest-to-God I don't know." According to
9 defendant, this was an unambiguous invocation of his right to have
10 an attorney present during questioning. We disagree.
11

12 "To protect the Fifth Amendment privilege against
13 self-incrimination, a person undergoing a custodial interrogation
14 must first be advised of his right to remain silent, to the presence of
15 counsel, and to appointed counsel, if indigent." (People v. Stitely
16 (2005) 35 Cal.4th 514, 535, citing Miranda, *supra*, 384 U.S. at pp.
17 444, 467-473, 478-479 [16 L.Ed.2d at pp. 706-707, 719-723, 726].)
18 "If at any point in the interview the suspect invokes the right to
19 remain silent or the right to counsel, 'the interrogation must cease.'
20 [Citation.] But, as the high court has stated, an officer is not
21 required to stop questioning a suspect when 'a suspect makes a
22 reference to an attorney that is ambiguous or equivocal.' [Citation.]
23 The suspect 'must articulate his desire to have counsel present
24 sufficiently clearly that a reasonable police officer in the
25 circumstances would understand the statement to be a request for
26 an attorney.' " (People v. Bacon (2010) 50 Cal.4th 1082, 1105,
quoting Davis v. United States (1994) 512 U.S. 452, 459 [129
L.Ed.2d 362, 371].)

In People v. Davis (2009) 46 Cal.4th 539 (Davis), defendant was interrogated concerning the kidnapping and murder of 12-year-old Polly Klaas. After about an hour of questioning, the interrogators, Officer Pelton and FBI Agent Taylor, accused defendant of abducting the girl and alluded to certain trace evidence and DNA evidence. Defendant stood up and responded: " 'Well then book me and let's get a lawyer and let's go for it, you know.' " (Id. at pp. 550, 586-587.) Defendant then stated that he resented being accused of the abduction and remarked, " 'let's shit or get off the pot.' " (Id. at p. 587.) Agent Taylor then stated, " 'It's going to happen,' " prompting defendant to respond: " 'Well, let's go for it. That's the end, the end.' " Defendant was then asked whether he still wanted to talk, to which he replied: " 'Get real. You think I should?' " Officer Pelton answered: " 'That's up to you.' " Defendant responded: " 'Fuck.' " He then sat down and continued to answer questions.

Our Supreme Court held that these comments "were not an unambiguous invocation of the right to 'immediate presence of an attorney.' " (Davis, *supra*, 46 Cal.4th at p. 588, quoting People v. Gonzalez (2005) 34 Cal.4th 1111, 1126.) Instead, the court considered defendant's statement (" 'book me and let's get a lawyer

1 and let's go for it' ") to be a challenge to his interrogators, which he
2 employed as an interrogation technique, and not as a means of
3 invoking the right to have an attorney present during questioning.
4 (Ibid.) The court also contrasted this ambiguous statement with a
5 statement made later in the interrogation, in which "defendant
6 blurted out, 'get me a lawyer,' and said he was 'over and done'
7 answering any questions." (Ibid.) Unlike the first statement, this
8 latter statement was a "clear invocation of his constitutional rights
9 to counsel and to remain silent," and the interrogation was properly
10 ended at that point. (Ibid.; compare People v. Jablonski (2006) 37
11 Cal.4th 774, 810-811 ["'I won't say anything until I see my lawyer'
12 " is an unambiguous request for the immediate presence of an
13 attorney] with People v. Gonzalez, supra, 34 Cal.4th at pp. 1119,
14 1126 ["'if for anything you guys are going to charge me I want to
15 talk to a public defender' " is not an unambiguous request for the
16 immediate presence of an attorney].)

17 In this case, after detectives confronted defendant with the details
18 of the crimes, explained that semen containing his DNA was found
19 at the crime scene, and told him that he would be charged with rape
20 and home invasion robbery, defendant stated: "I'll get a lawyer."
21 Like the statement in Davis, this statement was not an
22 unambiguous request for the immediate presence of an attorney
23 before defendant would answer any more questions. It was a
24 challenge. Defendant was telling the detectives that if he were
25 charged with these crimes, he would get a lawyer to defend against
26 them at trial. Indeed, within seconds of making the statement,
defendant stated: "I'll go to trial, fight it all the way out. I'll
win-because I had nothing to do with that." And while he repeated
the challenge twice more ("I guess I got to fight it in court" and
"we can go to trial"), at no point did defendant request the
immediate presence of an attorney.

27 We conclude defendant did not unambiguously invoke his right to
28 have an attorney present during questioning. Therefore, the
29 detectives were not required to stop the interrogation and
30 defendant's entire statement to police was properly admitted into
31 evidence.

32 2011 WL 2571312, **11-12.

33 3. Discussion

34 In Miranda, the United States Supreme Court held that "[t]he prosecution may not
35 use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the
36 defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege
37 against self-incrimination." 384 U.S. at 444. To this end, custodial interrogation must be

1 preceded by advice to the potential defendant that he or she has the right to consult with a lawyer,
2 the right to remain silent and that anything stated can be used in evidence against him or her. Id.
3 at 473–74. These procedural requirements are designed “to protect people against the coercive
4 nature of custodial interrogations.” DeWeaver v. Runnels, 556 F.3d 995, 1000 (9th Cir. 2009).
5 Once Miranda warnings have been given, if a suspect makes a clear and unambiguous statement
6 invoking his constitutional rights, “all questioning must cease.” Smith v. Illinois, 469 U.S. 91,
7 98, (1984).

8 A defendant may waive his Miranda rights, provided the waiver is “voluntary in
9 the sense that it was the product of a free and deliberate choice rather than intimidation, coercion,
10 or deception,” and “made with a full awareness of both the nature of the right being abandoned
11 and the consequences of the decision to abandon it.” Moran v. Burbine, 475 U.S. 412, 421
12 (1986). However, an express waiver of Miranda rights is not necessary. Berghuis v. Thompkins,
13 — U.S. —, —, 130 S.Ct. 2250, 2261 (2010); North Carolina v. Butler, 441 U.S. 369, 37
14 (1979); United States v. Younger, 398 F.3d 1179, 1185 (9th Cir. 2005) (“In soliciting a waiver of
15 Miranda rights, police officers need not use a waiver form nor ask explicitly whether a defendant
16 intends to waive his or her rights.”). A valid waiver of rights may be implied under the
17 circumstances presented in the particular case. Specifically, “a suspect may impliedly waive the
18 rights by answering an officer’s questions after receiving Miranda warnings.” United States v.
19 Rodriguez, 518 F.3d 1072, 1080 (9th Cir. 2008) (quoting United States v. Rodriguez-Preciado,
20 399 F.3d 1118, 1127, amended, 416 F.3d 939 (9th Cir. 2005)). See also Butler, 441 U.S. at
21 369–73 (waiver of Miranda rights can be inferred “from the actions and words of the person
22 interrogated”).

23 Here, the state court’s determination that the trial court did not violate plaintiff’s
24 right to due process by admitting his statements to police is reasonable under clearly established
25 federal law. Taken in context, petitioner’s statement, “I’ll get a lawyer,” was not a “a clear and
26 unambiguous statement invoking his constitutional rights.” See Smith, 496 U.S. at 98. Rather

1 than indicating a desire to have an attorney present during the interview, this statement
2 reasonably could be understood to mean that petitioner would dispute, with the aid of lawyer, any
3 charges the state filed against him. Nor do petitioner's subsequent statements – e.g., "I don't
4 know what you're talking about" – constitute a clear request for an attorney, requiring police to
5 terminate the interview. Thus petitioner is not entitled to federal habeas relief on this claim.

6 **D. Jury Instructions**

7 **1. Claim**

8 Petitioner claims that "the trial court erred by failing to instruct the jury on the
9 specific intent necessary for attempted sodomy . . . and assault with the intent to commit
10 sodomy." (Ptn. at 40.)

11 The state court of appeal set forth the relevant facts as follows:

12 *Trial Court's Jury Instructions*

13 The trial court instructed the jury on the crime of attempted
14 sodomy with CALCRIM No. 460. FN3 This instruction begins:
15 "To prove that the defendant is guilty of attempted sodomy, the
16 People must prove that: [] 1. The defendant took a direct but
17 ineffective step toward committing sodomy; and [] 2. The
18 defendant intended to commit sodomy." Then, after defining
19 "direct step," including the fact that such a step "indicates a definite
20 and unambiguous intent to commit sodomy," the instruction
21 explains: "To decide whether the defendant intended to commit
22 sodomy, please refer to the separate instructions that I will give you
23 on that crime."

24 FN3. CALCRIM No. 460, as delivered to the jury, provides in full:
25 "To prove that the defendant is guilty of attempted sodomy, the
26 People must prove that: [] 1. The defendant took a direct but
ineffective step toward committing sodomy; and [] 2. The
defendant intended to commit sodomy." [] 'A direct step' requires
more than mere planning or preparing to commit sodomy or
obtaining or arranging for something needed to commit sodomy. A
direct step is one that goes beyond planning or preparation and
shows that a person is putting his plan into action. A direct step
indicates a definite and unambiguous intent to commit sodomy. It
is a direct movement towards the commission of the crime after
preparations are made. It is an immediate step that puts the plan in
motion so that the plan would have been completed if some
circumstance outside the plan had not interrupted the attempt. []
A person who attempts to commit sodomy is guilty of attempted

sodomy even if, after taking a direct step toward committing the crime, he abandoned further efforts to complete the crime or if his attempt failed or was interrupted by someone or something beyond his control. On the other hand, if a person freely and voluntarily abandons his plans before taking a direct step toward committing sodomy, then that person is not guilty of attempted sodomy. [] To decide whether the defendant intended to commit sodomy, please refer to the separate instructions that I will give you on that crime."

The trial court instructed the jury on the crime of assault with intent to commit sodomy with CALCRIM No. 890. FN4 This instruction begins: "To prove that the defendant is guilty of [assault with intent to commit sodomy], 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 the 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 sodomy." Then, after defining "willfully," "application of force," and "apply force," the instruction explains: "To decide whether the defendant intended to commit sodomy, please refer to the earlier definition of sodomy."

FN4. CALCRIM No. 890, as delivered to the jury, provides in full: "To prove that the defendant is guilty of [assault with intent to commit sodomy], 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 the 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 sodomy. [] Someone commits an act 'willfully' when he 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 touching can be done indirectly by causing an object to touch the other person. [] The People are not required to prove 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 and, if so, what kind of assault it was. [] To decide whether the defendant intended to commit sodomy, please refer to the earlier definition of sodomy."

1 Between these instructions, the trial court instructed the jury on the
2 crime of sodomy with CALCRIM No. 1030. This instruction
3 begins: "The crime of sodomy by force or fear has the following
4 elements: [] 1. A male person committed an act of sodomy with
5 another person; [] 2. The other person did not consent to the act;
6 and [] 3. The male person accomplished the act by force, violence,
7 duress, menace, or fear of immediate and unlawful bodily injury to
8 someone."

9 The instruction then further defines each element: "Sodomy is any
10 penetration, no matter how slight, of the anus of one person by the
11 penis of another person. Ejaculation is not required. [] In order to
12 consent, a person must act freely and voluntarily and know the
13 nature of the act. [] An act is accomplished by force if a person
14 uses enough physical force to overcome the other person's will. []
15 'Duress' means a direct or implied threat of force, violence, or
16 danger that causes a reasonable person to do or submit to
17 something that she would not otherwise do or submit to. When
18 deciding whether the act was accomplished by duress, consider all
19 the circumstances, including the age of the other person and her
20 relationship to the defendant. [] 'Menace' means a threat, statement
21 or act showing an intent to injure someone. [] An act is
22 accomplished by fear if the other person is actually and reasonably
23 afraid or she is actually but unreasonably afraid and the defendant
24 knows of her fear and takes advantage of it."

25 Finally, the instruction explains: "The male person is not guilty of
26 forcible sodomy or attempted sodomy if he actually and reasonably
believed that the other person consented to the act. [] The People
have the burden of proving beyond a reasonable doubt that the
defendant did not actually and reasonably believe that the other
person consented. If the People have not met this burden, you must
find the defendant not guilty."

27 The trial court further instructed the jury that the crime of sodomy
28 required a "general criminal intent," while the crimes of attempted
sodomy and assault with intent to commit sodomy required a
"specific intent" that was explained in the instructions for those
crimes.

29 2011 WL 2571312, **13-14.

30 2. State Court Decision

31 The state court of appeal addressed petitioner's claim as follows:

32 Defendant argues that the foregoing instructions failed to
33 adequately inform the jury on the specific intent necessary for the
34 crimes of attempted sodomy and assault with intent to commit
35 sodomy because these crimes require not only the specific intent to
36 commit the underlying sex act, but also the specific intent to do so

1 without the victim's consent. While defendant is correct in his
2 description of the specific intent required (see People v. Davis
3 (1995) 10 Cal.4th 463, 509 [an "essential element" of assault
4 with intent to commit sodomy is "the intent to commit the act
5 against the will of the complainant"]), we conclude that the
6 instructions as a whole properly informed the jury of the required
7 specific intent. "[T]he correctness of jury instructions is to be
8 determined from the entire charge of the court, not from a
9 consideration of parts of an instruction or from [one] particular
10 instruction." (People v. Burgener (1986) 41 Cal.3d 505, 538,
11 overruled on other grounds in People v. Reyes (1998) 19 Cal.4th
12 743, 753.)

13 Here, the attempted sodomy instruction (CALCRIM No. 460)
14 explained: "To decide whether the defendant intended to commit
15 sodomy, please refer to the separate instructions that I will give you
16 on that crime." Then, the sodomy instruction (CALCRIM No.
17 1030) defined the "crime" of sodomy as requiring three elements:
18 (1) a male person committed an act of sodomy with another
19 person; (2) the other person did not consent to the act; and (3) the
20 male person accomplished the act by force, violence, duress,
21 menace, or fear of immediate and unlawful bodily injury to
22 someone. Then, the assault with intent to commit sodomy
23 instruction (CALCRIM No. 890) also referred the jury to "the
24 earlier definition of sodomy" in deciding whether defendant
25 intended to commit sodomy. Thus, the jury would reasonably have
26 understood that in order for defendant to have committed the
27 crimes of attempted sodomy and assault with intent to commit
28 sodomy, he would have to intend not only to commit an act of
29 sodomy, but also to intend to do so without the victim's consent.
(See People v. Dillon (2009) 174 Cal.App.4th 1367, 1378-1379.)

30 Defendant cannot be heard to complain about jury instructions that
31 accurately set forth the law with respect to the elements of sodomy,
32 attempted sodomy, and assault with intent to commit sodomy.

33 2011 WL 2571312, *14.

34 3. Discussion

35 "[F]ederal habeas corpus relief does not lie for errors of state law." Estelle v.
36 McGuire, 502 U.S. 62, 67 (1991). "In conducting habeas review, a federal court is limited to
37 deciding whether a conviction violated the Constitution, laws, or treaties of the United States."
38 Id. at 68. To obtain federal habeas relief for instructional error, a petitioner must show that the
39 ailing instruction by itself so infected the entire trial that the resulting conviction violates due
40 process. See id. at 72. The instruction may not be judged in artificial isolation, but must be

1 considered in the context of the instructions as a whole and the trial record. See id. In reviewing
2 a faulty instruction, the court inquires whether there is a “reasonable likelihood” that the jury has
3 applied the challenged instruction in a way that violates the Constitution. Id. at 72, n. 4.

4 The omission of an instruction is less likely to be prejudicial than a misstatement
5 of the law. See Walker v. Endell, 850 F.2d 470, 475–76 (9th Cir. 1987) (citing Henderson v.
6 Kibbe, 431 U.S. 145, 155 (1977)). Thus, a habeas petitioner whose claim involves a failure to
7 give a particular instruction bears an “‘especially heavy burden.’” Villafuerte v. Stewart, 111
8 F.3d 616, 624 (9th Cir. 1997) (quoting Henderson, 431 U.S. at 155).

9 Even if there is an instructional error, a habeas petitioner is not entitled to relief
10 unless the error “had substantial and injurious effect or influence in determining the jury's
11 verdict.” Brecht v. Abrahamson, 507 U.S. 619, 637 (1993). In other words, state prisoners
12 seeking federal habeas relief may obtain plenary review of constitutional claims of trial error, but
13 are not entitled to habeas relief unless the error resulted in “actual prejudice.” Id. (citation
14 omitted). If the court is convinced that the error did not influence the jury, or had but very slight
15 effect, the verdict and the judgment should stand. O'Neal v. McAninch, 513 U.S. 432, 437
16 (1995). Further, a federal court's review of a claim of instructional error is subject to a highly
17 deferential standard of review. Masoner v. Thurman, 996 F.2d 1003, 1006 (9th Cir.1993).

18 Here, the undersigned finds no basis for disturbing the conclusions of the state
19 appellate court. Even assuming the trial court erred in failing to instruct on the specific intent
20 requirement for attempted sodomy and/or assault with intent to commit sodomy, any such an
21 error was harmless in light of the extensive evidence present in the record to warrant petitioner's
22 conviction on these counts. What petitioner characterizes as instructional error did not “so
23 infect[] the entire trial that the resulting conviction violate[d] due process.” See Estelle, 502
24 U.S. at 72. Therefore, petitioner is not entitled to relief on this claim.

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1 Accordingly, IT IS HEREBY ORDERED THAT:

2 1. The petition for writ of habeas corpus (Dkt. No. 1) is denied; and

3 2. This case is closed.

4 Dated: March 25, 2013

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6 CAROLYN K. DELANEY
7 UNITED STATES MAGISTRATE JUDGE

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