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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

RICARDO TORRES,  
Plaintiff,  
v.  
SCOTT FRAUENHEIM,  
Defendant.

Case No. [16-cv-06054-WHO](#)

**ORDER DENYING PETITION FOR  
WRIT OF HABEAS CORPUS**

Re: Dkt. No. 14

**INTRODUCTION**

Petitioner Ricardo Torres seeks federal habeas relief from a state court aggravated assault conviction on the grounds that the trial court’s inclusion of certain jury instructions violated his due process and fair trial rights under the Fifth, Sixth, and Fourteenth Amendments. None of these claims has merit. Accordingly, the petition for habeas relief is DENIED.

**BACKGROUND**

In 2012, Torres and an acquaintance, Manuel Rivera, attacked Aurelio Alvarado outside of a gay bar. The following factual background is taken from the order on direct appeal of the California Court of Appeal:

*The Prosecution’s Case*

Ernesto Sanchez owned Franco’s Norma Jean’s Club, a gay bar located in Castroville. Sanchez was working at the bar on May 20, 2012. At approximately 1:45 a.m., he began to close the bar. He turned on the lights and heard a noise that sounded like fighting towards the back of the dance floor. He saw two suspects, who he later identified as Torres and Rivera, “saying bad words” and yelling, using the term “faggot.” Sanchez immediately called 911 and walked over. He saw a bar patron, Niko, on the floor. Sanchez did not see Torres or Rivera hit Niko. However, both defendants were standing over him, saying obscenities. Sanchez said he heard the defendants say “faggot” several times. Sanchez managed to get Torres and Rivera out of the club. As he was being escorted out, Torres warned Sanchez that he “better not be calling the cops,” otherwise he would “burn down [his] place.”

1 Sanchez returned to the dining room of the bar to call 911 again. At that point, he  
2 saw Torres and Rivera hitting and kicking somebody outside the bar. Sanchez saw  
3 Torres kick the victim, later identified as Aurelio Alvarado, in the head. He also  
4 heard Torres and Rivera repeatedly call Alvarado a “fucking faggot.” Torres and  
5 Rivera ran off after the police arrived. When they were apprehended, Sanchez  
6 identified them from a photo lineup.

7 Cecilia Guevara was employed as a security officer at the bar that night. She saw  
8 Alvarado being beaten outside the bar by the defendants. Guevara said she did not  
9 hear Rivera say anything, but she heard Torres say “faggot” as he was hitting  
10 Alvarado. She described Rivera as being “on his knees having [Alvarado] by the  
11 neck punching him.” She saw Rivera hit Alvarado a minimum of three times. At  
12 that point, Alvarado was on the floor.

13 Guevara returned to the bar to tell Sanchez to call the police. Sanchez told Guevara  
14 he was already on the phone with the police, so she went back outside. At that  
15 point, she saw Torres kick the victim in the head. Guevara asserted that it looked  
16 like Alvarado blacked out after the kick. She heard Torres call Alvarado a  
17 “faggot.” Afterwards, Guevara attempted to help Alvarado sit up. She said  
18 Alvarado seemed disoriented. Torres threatened Guevara and several other  
19 bystanders.

20 Veronica Lara was at the bar that night with her partner, Griselda Martinez. Lara  
21 and Martinez were leaving the bar when they heard a commotion. They witnessed  
22 the assault on Alvarado, and walked toward the attackers to get them to stop. Lara  
23 identified Rivera as the individual who was hitting Alvarado. She also saw Torres  
24 kick Alvarado in the head. After the kick, Alvarado’s eyes went white and he fell  
25 on the floor. Martinez saw Torres kicking Alvarado unconscious. She also heard  
26 Torres call Alvarado a “fucking fag” afterwards.

27 Rene Gonzalez Corona, who was in a relationship with Alvarado, was at the bar  
28 with him the night of the attack. Corona and Alvarado left the bar after the last  
call. They ran into Torres and Rivera outside. Rivera asked Corona and Alvarado,  
“What’s your problem?” Corona thought he looked angry. Rivera asked Corona  
why he “grabbed his butt at the bar.” Corona did not know what Rivera was  
talking about. Corona moved aside, and Rivera responded, “Well, then, it’s not  
your problem.” Rivera then grabbed Alvarado and began beating him. Rivera  
punched Alvarado in the face multiple times, grabbing him in a choking fashion.  
Alvarado eventually fell to the ground. Corona then saw Torres kick him in the  
head once. Corona heard Torres call Alvarado a “faggot.”

Monterey County Sheriff’s Deputy Jose Sheppy responded to the call from the bar  
that night. He made contact with Rivera after witnesses identified him in a group  
walking along the street. Rivera took off his hat and threw it on the ground when  
Sheppy approached. He told Sheppy he had been assaulted in front of the bar.  
Witnesses told Sheppy that there was another suspect walking with another group  
of individuals across the street.

Monterey County Sheriff’s Deputy Chris Brown also testified. He was also  
dispatched to the bar the night of the incident. He made contact with Deputy  
Sheppy, who had already detained Rivera. Sheppy told Brown that there was  
another suspect, later identified to be Torres, across the street. Brown conducted an  
infield show-up of Rivera and Torres with Corona. Corona identified both of them.

Monterey County District Attorney’s Investigator Roy Diaz testified that he  
showed the photo lineup to Sanchez. Sanchez identified Torres, and chose two

1 photos that he identified as Rivera. Guevara identified both Torres and Rivera.

2 Alvarado also testified, explaining that he went to the bar with Corona that night.  
3 As they were leaving, they noticed two individuals outside, who he later identified  
4 as Torres and Rivera. Alvarado said that because of his limited English skills, he  
5 was not completely sure what Torres and Rivera said to him. However, he knew  
6 that they were angry about an incident in the bar where someone had touched them  
7 inappropriately. Alvarado did not remember anyone saying anything about his  
8 sexual orientation. He remembered getting hit by Rivera multiple times. He did  
9 not remember how many punches there were and could not recall being kicked. A  
10 few days after the incident, Alvarado said he could hear echoes and began  
11 experiencing headaches. He went to the hospital due to his worsening symptoms.

12 *The Defense's Case*

13 Vickie Rodriguez, an investigator for the public defender's office, testified on  
14 behalf of the defense. She interviewed Alvarado about the assault. She said  
15 Alvarado told her that he could not identify his assailants, but Corona and Guevara  
16 had told him Torres and Rivera were the attackers. Alvarado said he was told that  
17 if he did not identify the two attackers, they would be released by the police.

18 Rodriguez also interviewed Sanchez. She showed Sanchez photographs of Torres  
19 and Rivera. Rodriguez asserted that Sanchez did not identify Rivera as the "short  
20 attacker" based on a lineup of photographs.

21 Several of Rivera's friends testified that they had been with Rivera that night for a  
22 bachelor party. One friend said he had never seen Rivera act in a homophobic  
23 manner and described him as a calm, peaceful person.

24 The defense recalled Deputy Brown, who interviewed Alvarado that night. Brown  
25 said Alvarado told him he could not remember anything after he walked towards  
26 Corona that night, since he blacked out. He did not give Brown a description of his  
27 attackers.

28 Rivera testified on his own behalf. He expressed disapproval for hate crimes on  
homosexual individuals and said he had family members who were gay. He denied  
attacking Alvarado. He confirmed he went out for a bachelor party the night of the  
assault. Rivera said he went to Mike's Bar, leaving near closing time. He was  
attacked outside as he left. After the attack, he saw crowds of people pointing at  
him. Rivera believed the crowd had assaulted him. He found a bump on his head  
that had scabbed over the morning after the attack. Rivera identified Torres as an  
acquaintance.

The defense called Officer Sheppy, who testified that he came into contact with  
Rivera and Torres after he responded to the call about the attack in front of the bar.  
Rivera told Sheppy that he had been assaulted. Torres did not look like he had  
been in a fight; there was no blood on his clothing or any visible injuries on his  
body.

Respondent's Answer to the Order to Show Cause ("Ans."), Ex. A, Unpublished Opinion of the  
California Court of Appeal ("CCA Op.") at 3-6 [Dkt. No. 10-3].

On August 16, 2013, a California Superior Court, County of Monterey, jury convicted  
Torres of assault by means of force likely to produce great bodily injury (Cal. Pen. Code §

1 245(a)(4)), with special enhancement findings that: (i) Torres personally inflicted great bodily  
2 injury (Cal. Pen. Code § 12022.7(a)); and (ii) the assault was a hate crime (Cal. Pen. Code §  
3 422.75(a)). Petition for Writ of Habeas Corpus (“Pet.”) at 8 [Dkt. No. 1]. In May of 2015, the  
4 California Court of Appeal affirmed the judgment, finding Torres’ jury instruction claims without  
5 merit. *See* CCA Op. In June 2015, Torres filed a petition for review with the California Supreme  
6 Court. Pet. at 9. On July 22, 2015, the California Supreme Court denied review. *Id.* This federal  
7 habeas petition followed.

8 As grounds for federal habeas relief, Torres alleges that the trial court violated his due  
9 process and fair trial rights under the Fifth, Sixth, and Fourteenth Amendments, by instructing the  
10 jury with CALCRIM Nos. 3160, 370, and 1354. Pet. at 9.

11 **LEGAL STANDARD**

12 Under the Anti-Terrorism and Effective Death Penalty Act of 1996 (“AEDPA”), a federal  
13 district court may entertain a petition for writ of habeas corpus “in behalf of a person in custody  
14 pursuant to the judgment of a State court only on the ground that he is in custody in violation of  
15 the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254(a). The petition may  
16 not be granted with respect to any claim that was adjudicated on the merits in state court unless the  
17 state court’s adjudication of the claim: “(1) resulted in a decision that was contrary to, or involved  
18 an unreasonable application of, clearly established Federal law, as determined by the Supreme  
19 Court of the United States; or (2) resulted in a decision that was based on an unreasonable  
20 determination of the facts in light of the evidence presented in the State court proceeding.” 28  
21 U.S.C. § 2254(d).

22 “Under the ‘contrary to’ clause, a federal habeas court may grant the writ if the state court  
23 arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if  
24 the state court decides a case differently than [the] Court has on a set of materially  
25 indistinguishable facts.” *Williams v. Taylor*, 529 U.S. 362, 412–13 (2000).

26 “Under the ‘unreasonable application’ clause, a federal habeas court may grant the writ if  
27 the state court identifies the correct governing legal principle from [the] Court’s decisions but  
28 unreasonably applies that principle to the facts of the prisoner’s case.” *Williams*, 529 U.S. at 413.

1 “[A] federal habeas court may not issue the writ simply because that court concludes in its  
2 independent judgment that the relevant state-court decision applied clearly established federal law  
3 erroneously or incorrectly. Rather, that application must also be unreasonable.” *Id.* at 411. A  
4 federal habeas court making the “unreasonable application” inquiry should ask whether the state  
5 court’s application of clearly established federal law was “objectively unreasonable.” *Id.* at 409.

## 6 DISCUSSION

### 7 I. CALCRIM NO. 3160

8 Torres asserts that the trial court committed prejudicial error when it instructed the jury  
9 with CALCRIM No. 3160, as two prerequisites for the instruction were not met. Pet. at 26;  
10 Traverse to Respondent’s Answer to Petition for Writ of Habeas Corpus (“Rep.”) at 9 [Dkt. No.  
11 11]. To obtain federal collateral relief for errors in the jury charge, a petitioner must show that the  
12 deficient instruction by itself so infected the entire trial that the resulting conviction violates due  
13 process. *Estelle v. McGuire*, 502 U.S. 62, 72 (1991). The instruction may not be judged in  
14 artificial isolation, but must be considered in the context of the instructions as a whole and the trial  
15 record. *Id.* In other words, the court must evaluate jury instructions in the context of the overall  
16 charge to the jury as a component of the entire trial process. *United States v. Frady*, 456 U.S. 152,  
17 169 (1982) (citing *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977)); *Prantil v. California*, 843 F.2d  
18 314, 317 (9th Cir. 1988).

19 CALCRIM No. 3160 outlines the group beating exception to the enhancement for  
20 personally inflicting great bodily injury under California Penal Code section 12022.7(a). The trial  
21 court instructed the jury on CALCRIM No. 3160 as follows:

22 If you find the defendant guilty of the crime charged in Count 1, you must then  
23 decide whether the People have proved the additional allegation that the defendant  
24 personally inflicted great bodily injury on Aurelio Alvarado in the commission of  
that crime.

25 You must decide whether the People have proved this allegation and return a  
separate finding for each defendant.

26 Great bodily injury, again, means significant or substantial physical injury. It is an  
27 injury that is greater than minor or moderate harm.

28 If you conclude that more than one person assaulted Aurelio Alvarado and you  
cannot decide which person caused which injury, you may conclude that the

1 defendant personally inflicted great bodily injury on Aurelio Alvarado if the People  
2 have proved that, one, two or more people acting at the same time assaulted  
Aurelio Alvarado and inflicted great bodily injury on him.

3 Two, the defendant personally used physical force on Aurelio Alvarado during the  
group assault;

4 And 3A, the amount or type of physical force the defendant used on Aurelio  
5 Alvarado was enough that it alone could have caused Aurelio Alvarado to suffer  
great bodily injury.

6 Or, 3B, the physical force that the defendant use [sic] on Aurelio Alvarado was  
7 sufficient in combination with the force used by the others to cause Aurelio  
Alvarado to suffer great bodily injury.

8 The defendant must have applied substantial force to Aurelio Alvarado. If that  
9 force could not have caused or contributed to the great bodily injury, then it was  
not substantial.

10 The People have the burden of proving each allegation beyond a reasonable doubt.  
11 If the People have not met this burden, you must find that the allegation has not  
been proved.

12 Ans., Ex. D, Reporter’s Transcript (“RT”) at 2433–34 [Dkt. No. 10-12]; *cf.* Ans., Ex. C, Clerk’s  
13 Transcript (“CT”) at 411 [Dkt. No. 10-6].

14 Torres asserts that instructing the jury with CALCRIM No. 3160 was an unreasonable  
15 application given the facts of his case. Specifically, Torres argues that in order for a CALCRIM  
16 No. 3160 instruction to be proper, two purported assailants must have assaulted a victim at the  
17 same time, and a determination as to which assailant inflicted which injury must be impossible to  
18 make. Pet. at 26; Rep. at 9. Here, Torres claims that the evidence indicates that the assailants’  
19 attacks on Alvarado were committed sequentially and thus not at the same time, and that both  
20 assailants inflicted injuries on different parts of Alvarado’s body, which makes connecting injury  
21 to perpetrator achievable. Pet. at 28–29; Rep. at 10. In opposition, respondent asserts that,  
22 contrary to Torres’ claims, the evidence shows that Torres and Rivera were acting at the same  
23 time, and that it is unclear as to the specific events that caused Alvarado’s injuries. Respondent’s  
24 Memorandum of Points and Authorities in Support of the Answer (“Memo”) at 14 [Dkt. No. 10-  
25 1]. Respondent further argues that Torres fails to show either how the jury misapplied CALCRIM  
26 No. 3160, or how the challenged instruction lowered the prosecution’s burden of proof. *Id.* at 15.

27 As to Torres’ “same time” argument, the California Court of Appeal provided:

28 Torres seems to argue that the group beating exception is inapplicable because

1 there were two separate assaults: first, the assault by Rivera when he punched  
2 Alvarado in the head, and second, the assault by Torres when he kicked Alvarado.  
3 Although witnesses were able to discern that Rivera first punched Alvarado and  
4 Torres later kicked him, the testimony supports the prosecution’s theory that both  
perpetrators attacked Alvarado as part of the same ongoing attack. . . . Sequentially,  
Rivera punched Alvarado first, but witnesses asserted he was joined in the assault  
by Torres, who kicked Alvarado when he was on the ground.

5 CCA Op. at 11–12.

6 I find that the state appellate court’s rejection of Torres’ CALCRIM No. 3160 instructional  
7 error claim was reasonable and is therefore entitled to deference under AEDPA. In *People v.*  
8 *Modiri*, the California Supreme Court held that the group beating theory is applicable in cases  
9 where a defendant “*joins* [another] in actually beating and harming the victim.” 39 Cal.4th 481,  
10 495 (Cal. 2006) (emphasis added). Though Torres would have me believe that two distinct attacks  
11 occurred, the evidence shows that the attack was a joint and coordinated effort. Just as joining  
12 another in a relay race does not necessarily equate to running at the same time, joining another in a  
13 group beating does not require each perpetrator’s respective blows to land upon a victim  
14 simultaneously. It is sufficient to say that, here, both acquaintances joined one another in one  
15 attack upon the same victim, with their respective blows occurring within an extremely short  
16 period of one another.

17 In regards to Torres’ “identifiable injury” claim, the California Court of Appeal further  
18 found:

19 [E]ven if the jury was able to determine that Torres kicked Alvarado or that Rivera  
20 punched him, this would still be a situation where the jury may be unable to  
21 ascertain which defendant caused Alvarado’s injuries. Alvarado said he suffered  
22 from headaches and began hearing echoes as a result of the injuries to his head.  
Witnesses testified that both Torres’ and Rivera’s attacks—the punches and the  
kick—were directed toward Alvarado’s head. Therefore, it may not have been  
clear to the jury which defendant caused the harm.

23 CCA Op. at 12.

24 I find the state appellate court’s assessment entirely reasonable and consistent with the  
25 evidence of record. At least four eyewitnesses testified at trial that they saw Torres kick Alvarado  
26 in the head, which is where Rivera’s punches landed. As both assailants’ blows landed upon  
27 Alvarado’s face and head, it is objectively reasonable that a jury would be unable to determine  
28 which assailant’s contact resulted in Alvarado’s subsequent headaches and hearing of echoes. In

1 short, Torres’ “identifiable injury” contention is without merit.

2 The California Court of Appeal lastly found that CALCRIM No. 3160 is a correct  
3 statement of law. CCA Op. at 12. This Court is bound by a state court’s determination that the  
4 trial court’s instruction correctly stated the law. *See Bradshaw v. Richey*, 546 U.S. 74, 76 (2005).  
5 Moreover, if the jurors did not find the instruction’s factual requirements true, they would  
6 presumably have ignored the instruction. The instruction itself specified as much, as it contained  
7 two predicate conditions that preceded its acceptance. Specifically, the trial court provided: “*If*  
8 *you conclude that more than one person assaulted Aurelio Alvarado and you cannot decide which*  
9 *person caused which injury, you may conclude that the defendant personally inflicted great bodily*  
10 *injury on Aurelio Alvarado if the People have proved that, one, two or more people acting at the*  
11 *same time assaulted Aurelio Alvarado and inflicted great bodily injury on him.” RT at 2433–34.  
12 There is nothing to suggest that the jury misunderstood these requirements.*

13 In sum, because the state appellate court’s determination was reasonable, and not contrary  
14 to clearly established Supreme Court precedent, it is entitled to deference under AEDPA.  
15 Accordingly, habeas relief is not warranted here and Torres’ CALCRIM No. 3160 claims are  
16 DENIED.

17 **II. CALCRIM NOS. 370 AND 1354**

18 Torres asserts that the trial court committed prejudicial error when it instructed the jury  
19 with CALCRIM Nos. 370 and 1354, because the two instructions, when read in conjunction, are in  
20 conflict with one another. Pet. at 31; Rep. at 13. The Due Process Clause of the Fourteenth  
21 Amendment requires the prosecution to prove every element charged in a criminal offense beyond  
22 a reasonable doubt. U.S. Const. amend. XIV; *see In re Winship*, 397 U.S. 358, 364 (1970). Any  
23 jury instruction that “reduce[s] the level of proof necessary for the Government to carry its burden  
24 . . . is plainly inconsistent with the constitutionally rooted presumption of innocence.” *Cool v.*  
25 *United States*, 409 U.S. 100, 104 (1972).

26 CALCRIM No. 370 provides that motive is not a required element of finding a defendant  
27 guilty of assault with force likely to produce great bodily injury (Count 1). The trial court  
28 instructed the jury on CALCRIM No. 370 as follows:



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The People are not required to prove that the defendant had a motive to commit the crime charged in Count 1, assault with force likely to produce great bodily injury.

In reaching your verdict you may, however, consider whether the defendant had a motive. Having a motive may be a factor tending to show that the defendant is guilty. Not having a motive may be a factor tending to show the defendant is not guilty.

Let me read that again. I'm not sure I read that correctly.

Having a motive may be a factor tending to show that the defendant is guilty. Not having a motive may be a factor tending to show the defendant is not guilty.

RT at 2429; *cf.* CT at 405.

If the jury finds defendant guilty of assault with force likely to produce great bodily injury, CALCRIM No. 1354 provides that, in regards to the special enhancement finding that the assault was a hate crime, a finding of motive is required. The trial court instructed the jury on CALCRIM No. 1354 as follows:

If you find the defendant guilty of the crime charged in Count 1, you must then decide whether the People have proven the additional allegation that the crime committed by the defendant was a hate crime. To prove this allegation the People must prove that the defendant committed that crime in whole or in part because of the alleged victim's actual or perceived sexual orientation, or association with a person or group having this actual or perceived characteristic.

The defendant acted in whole or in part because of the actual or perceived characteristic of the victim if the defendant was biased against the victim based on the victim's actual or perceived sexual orientation or association with a person or group with this actual or perceived characteristic; and two, the bias motivation caused the defendant to commit the illegal acts.

RT at 2432; *cf.* CT at 410.

Torres argues that, in the way CALCRIM No. 370 and CALCRIM No. 1354 were read, it was not clear that CALCRIM No. 370 only applied to the underlying crime (assault), and that CALCRIM No. 1354 applied only to the assault motivated by hate enhancement. Pet. at 31; Rep. at 13. Specifically, Torres claims that CALCRIM No. 1354, "while initially differentiating between a crime and an 'additional allegation,' then includes the sentence[:]" "To prove this *allegation*, the People must prove that the defendant committed *that crime* in whole or in part because of the alleged victim's actual or perceived sexual orientation." *Id.*; *see also* RT at 2432. According to Torres, "[i]t is clear that with the ambiguity of using the word enhancement and crime the jury could have determined that [Torres] committed a hate crime even without proof of a motive to

1 commit the offense.” Pet. at 31; Rep. at 13. In opposition, respondent argues that Torres’  
2 CALCRIM Nos. 370 and 1354 contentions are forfeited, because the state appellate court found as  
3 much. Memo at 18. Respondent further asserts that, even if Torres’ CALCRIM Nos. 370 and  
4 1354 claims are not forfeited, the state court reasonably found that the wording of the respective  
5 instructions was neither confusing nor ambiguous. *Id.* at 19.

6 In rejecting Torres’ CALCRIM Nos. 370 and 1354 claims, the California Court of Appeal  
7 provided:

8 Defendants argue that when these two instructions are given together, it is  
9 reasonably likely the jurors may have misunderstood and misapplied the law,  
10 finding that they committed a hate crime without proof of motive to commit the  
11 offense. The People claim this contention is forfeited, because Rivera’s trial  
12 counsel requested clarification of CALCRIM No. 370, which the court agreed to  
13 modify. After the modification, which specified that CALCRIM No. 370 applied  
14 only as to count 1, assault with force likely to produce great bodily injury, none of  
15 the defendants objected.

16 “The long-standing general rule is that the failure to request clarification of an  
17 instruction that is otherwise a correct statement of law forfeits an appellate claim of  
18 error based upon the instruction given.” (*People v. Rundle* (2008) 43 Cal.4th 76,  
19 151, disapproved of on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390,  
20 421, fn. 22.) Here, Rivera objected to the use of CALCRIM No. 370, received a  
21 modification of the instruction, and did not make any further objections or request  
22 other clarifying instructions. Similarly, Torres did not object to the initial  
23 instruction or to the subsequent modification. Accordingly, we conclude that both  
24 defendants have forfeited this contention on appeal.

25 Furthermore, even if we were to consider the claim on its merits, we would find the  
26 court’s instruction was not erroneous or prejudicial. . . .

27 [T]he other instructions given to the jury clearly distinguish between a crime and an  
28 enhancement allegation. The court instructed the jury, “The defendants are charged  
in Count 1 with assault with force likely to produce great bodily injury in violation  
of Penal Code [s]ection 245[, subdivision] (a)(4). [¶] To prove that a defendant is  
guilty of *this crime* . . . .” (Italics added.) It seems reasonably clear from the  
instructions that the jury was to apply the principles outlined in CALCRIM No. 370  
only as to the crime charged in count 1, assault.

Defendants, however, claim the language of CALCRIM No. 1354 lends itself to  
ambiguity, because it initially differentiates between the underlying “crime” and  
the “additional allegation,” but then includes the sentence that “[t]o prove this  
*allegation* the People must prove that the defendant committed *that crime* in whole  
or in part because of the alleged victim’s actual or perceived sexual orientation . . .  
.” (Italics added.) We fail to see how the wording of the instruction is ambiguous  
or confusing. It plainly instructs the jury that to prove the additional *allegation* that  
the crime committed was a hate crime, the People must prove that the underlying  
crime was committed in whole or in part because of the victim’s perceived or actual  
sexual orientation. The “crime” referenced in the latter sentence refers to the crime  
of assault.

1 CCA Op. at 16–17.

2 Because the state court concluded that Torres forfeited his claim by failing to object to the  
3 ambiguity of the trial instruction before the trial court, the Court cannot reach this claim in federal  
4 habeas unless the instructional error resulted in a fundamental miscarriage of justice. Like the  
5 California Court of Appeal, I do not see how the wording of either CALCRIM No. 370 or 1354 is  
6 ambiguous, confusing, or prejudicial. As stated above, challenged instructions may not be judged  
7 in artificial isolation, but must be considered in the context of the instructions as a whole and the  
8 trial record. *Estelle*, 502 U.S. at 72. Torres has failed to show either how the jury misapplied  
9 CALCRIM Nos. 370 and 1354, or how the challenged instructions lowered the prosecution’s  
10 burden of proof. The state appellate court’s rejection of these claims was reasonable and is  
11 entitled to deference under AEDPA. Accordingly, habeas relief is not warranted here, and Torres’  
12 CALCRIM Nos. 370 and 1354 claims are DENIED.

13 **CONCLUSION**

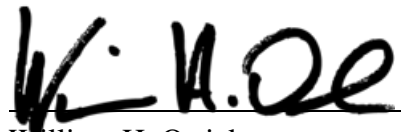
14 The California Court of Appeal’s adjudication of Torres’ claims did not result in decisions  
15 that were contrary to, or involved an unreasonable application of, clearly established federal law.  
16 Accordingly, the petition is DENIED.

17 A certificate of appealability will not issue as reasonable jurists would not “find the district  
18 court’s assessment of the constitutional claims debatable or wrong.” *Slack v. McDaniel*, 529 U.S.  
19 473, 484 (2000). Torres may seek a certificate of appealability from the Ninth Circuit Court of  
20 Appeals.

21 The clerk shall enter judgment in favor of respondent and close the file.

22 **IT IS SO ORDERED.**

23 Dated: March 2, 2018

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25 

26 William H. Orrick  
27 United States District Judge  
28