UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

DAMIEN HALL,

Petitioner,

v.

VINCENT CULLEN, Acting Warden of San Quentin State Prison,

Respondent.

_____/

No. C 09-5299 PJH

ORDER GRANTING PETITION FOR WRIT OF HABEAS CORPUS

Before the court is the petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, filed by state prisoner, Damien Hall ("Hall"). Having reviewed the parties' papers, and having carefully considered their arguments, the record, and the relevant legal authorities, the court hereby GRANTS the petition.

BACKGROUND

A. Procedural Background

Hall, who is represented by counsel, filed his federal habeas petition on November 6, 2009. At the time he filed his petition, Hall was out of custody on bail. However, he was subsequently remanded into state custody.

Hall was charged with forcible penetration of the genital opening of a person by a foreign object pursuant to California Penal Code § 289(a)(1) and with sexual battery under California Penal Code § 243.4(a). On December 14, 2006, a jury in the San Francisco County Superior Court convicted Hall of the lesser-included offense of assault with intent to

commit forcible sexual penetration in violation of California Penal Code § 220.[1] On September 19, 2007, the trial court sentenced him to two years in prison. Hall appealed, and the California Court of Appeal affirmed on June 16, 2009, and the California Supreme Court denied review on September 30, 2009.

On January 27, 2010, Hall filed a motion for release pending decision on his federal habeas petition, which this court denied on March 8, 2010. Hall's petition was fully briefed on April 29, 2010, and in accordance with the March 8, 2010 order, the court has expedited its review of Hall's petition.

B. Factual Background

The charges against Hall stem from an incident that occurred downtown San Francisco on New Year's Eve, December 31, 2005.

Hall was out that evening in San Francisco's Union Square area with his childhood friend and codefendant Tomelia Dillon. Hall, who lived in Suisun City, California, at the time with his wife and two children, drove into the city with Dillon. They drove to the Tenderloin neighborhood, where they bought and drank some liquor, met another person known to Hall as "Mr. Chill," and began walking up toward the Union Square area. Hall testified at trial that once they arrived at the cable car turnaround near Powell and Market Streets, they headed toward the Embarcadero, during which time they heard chimes signifying that it was midnight. After reaching the Embarcadero, they headed back up Market Street toward Union Square.

Hall testified that Dillon was behaving in a very "abrupt" and "forward" manner with people they encountered along the way, and that Hall felt like he had to apologize for Dillon's behavior. Hall testified that he was "buzzed" at the time, but not drunk.

Meanwhile, the nineteen year-old victim, Antoinette B., who was 5'1 and weighed

[1]Hall was tried jointly with codefendant, Tomelia Dillon, who was charged with robbery in the second degree under California Penal Code § 212.5(c); assault by means of force likely to produce great bodily injury under California Penal Code § 245(a)(1), and with misdemeanor battery under California Penal Code § 242.

ninety pounds, had come into San Francisco with six other friends from San Ramon, California to celebrate New Year's Eve. Antoinette and her friends traveled to San Francisco on BART around 9:30 or 10:00 p.m. on December 31, 2005. They checked into the Galleria hotel and then went out to look around. Antoinette testified that she had only been in San Francisco one other time and was not familiar with the Union Square area.

Antoinette testified that she and her friends walked around for a couple of hours. They walked through a restaurant, but did not eat. Antoinette lost her cell phone while walking around. The group brought in the new year near Macy's department store in Union Square, and then returned to their hotel. Antoinette's friends subsequently went to a restaurant in the Galleria for drinks, but she stayed outside to smoke a cigarette. She borrowed a cell phone from one of her friends, and spoke with another friend of hers, Albert, who was also in San Francisco with a separate group of friends. She and Albert agreed to meet up, but when Antoinette attempted to get directions to her hotel from her friends to give to Albert, there was too much noise. Albert told her he was near a clock tower, and Antoinette began walking in a direction that she thought would lead her to Albert. Meanwhile, it was Antoinette's understanding that Albert and his friends would be walking toward her.

As she was walking toward what she believed was Albert's location, she encountered several police officers near a 7-Eleven store. She asked for directions, but was still unclear afterward where she was going. She arrived at a BART station, but then decided she should return to her hotel when she did not find Albert. She asked people she ran into on the street for directions to the Galleria, but received conflicting instructions so she walked in a direction that she believed would lead to the hotel.

Around that time, Antoinette encountered Hall, Dillon, and Mr. Chill. What transpired during that encounter is in dispute.

Hall testified that he and the two other men first encountered Antoinette standing by herself holding a champagne glass at the corner of Sutter and Market streets. Dillon and

Mr. Chill began talking to her, and Hall joined them in conversation. Hall testified that Antoinette was "bubbly" and "nice." He asserted that they were flirting with each other, and that Antoinette turned around and "backed over" into him. According to Hall, he put his right arm, and then his left arm around her abdomen area. Antoinette then grabbed Hall's hand and began to rub it on her belly. Hall moved his left hand down her pants.

Hall testified that as he began to slide his hand down the front of Antoinette's pants, she told him to stop. He stated that he stopped immediately, took his hand out of her pants, and backed away. He asserted that prior to her telling him to stop, he had gotten his hand underneath her pant line only to his knuckles, and that he had not unbuttoned or unzipped her pants. He stated that when he backed away from her, Antoinette laughed, and Hall responded "okay, whatever." Antoinette then turned away from Hall and crossed the street. Hall admitted that he intended to stick a finger in Antoinette's vagina "if it ever got that far."

Antoinette testified that Hall and his two friends approached her as she was walking back to her hotel and offered her directions. She did not remember asking them for directions first, though. Dillon spoke to her first, and one of the men told her that she was headed in the right direction. She subsequently sensed that the men were following her, and she was nervous and scared of the men. She did not encourage them to talk to her or walk with her, but they did anyway. She crossed the street to get away from the men, but they followed her.

Shortly after she crossed the street, the three men surrounded her. Dillon was on her left side, and Hall, who was initially on her right side, ended up behind her. Antoinette stated that she was carrying her purse on one of her shoulders and was holding her friend's cell phone. She was on the phone with her friend, Albert, asking him to come help her because she was being followed, when Dillon grabbed the phone out of her hand. She never saw the phone again.

According to Antoinette, Hall subsequently reached around her from behind and

pinned her arms to her sides. She tried to get away from Hall but could not. She testified that Hall then, against her will, put one of his hands into her shirt on her left breast under her bra. He then slid his hand down her jeans, unbuttoned them and pulled down the zipper. He stuck his hand down her pants below her underwear. Initially, she testified that she believed that the tip of Hall's finger penetrated the outside of her vagina for a few seconds, but that it never fully entered her. In later testimony, she stated that the tip of his middle finger touched the outside of her vagina but did not penetrate it.

Antoinette did not want Hall to touch her, and she told him to stop. She started crying and screaming for Hall to let her go and for help, but no one came to her aid. After a few seconds, Hall withdrew his hand and let her go. She asked the men why they would do that to her, and did not remember getting any response.

Antoinette testified that she then zipped up and buttoned her pants as she walked back across the street to an area with more people. The men, however, continued to follow her. She was still crying and asking people on the street for help. Dillon apparently caught up with her and told her to stop asking for help, and shoved her when she asked for help again. At a corner near another hotel, the Grand Hyatt, Antoinette asked a woman for directions, and Dillon responded by kicking her on her upper right thigh. Dillon ordered her to stop asking for help and told Antoinette she was going to make him some money.

A couple seconds later, Dillon grabbed Antoinette's purse. At that point, Antoinette testified that she was scared for her life and made a break for the Hyatt's entrance. As she reached the Hyatt's revolving doors, Dillon came up behind her, grabbed her by the hair, and pulled her back so that her legs and feet were dragging on the sidewalk. A Hyatt security guard approached and Dillon ran off.[2]

A Hyatt security guard testified that he was checking identification to confirm that those entering the hotel were guests around 1:00 a.m. on January 1, 2006, and was

[2]By stipulation, the jury was shown a Hyatt security camera videotape taken at 1:11 a.m. on January 1, 2006. The videotape showed Dillon following Antoinette and pulling her hair with one hand, while holding her purse in his other hand.

stationed approximately ten feet from the hotel doors on Stockton street. He heard a loud bang and a female screaming, and noticed people in the lobby looking toward the glass hotel doors. He looked out and saw a female being dragged on the sidewalk by her hair in the direction of Sutter Street by an African-American male who was over six feet tall and appeared to weigh more than 200 pounds. The guard ran out of the hotel toward the female, and the man ran away. The guard then picked up the female and carried her inside the hotel.

Two off-duty police officers, Alameda County Sheriff's deputies, Curtis Nelson and Shawn Christiansen, and their wives also witnessed the altercation between Dillon and Antoinette. The officers were sitting with their wives in the Hyatt's lobby when they heard a loud noise and something hit the window outside the entrance to the hotel, followed by the sounds of a woman screaming. The officers ran outside and observed Antoinette on the ground with a group of people surrounding her, and the Hyatt security officer attempting to comfort her. Nelson asked Antoinette what happened, and she gave him a description of Dillon.

Nelson then ran to the corner and looked up Sutter Street for the suspect. He spotted Dillon, who matched Antoinette's description. Nelson ran up to Dillon, identified himself as an Alameda County law enforcement officer, and advised Dillon that he had reasonable cause to believe that he had been involved in an incident in front of the Hyatt and that Dillon needed to return with him to sort things out. Dillon pulled out Antoinette's purse from underneath his shirt, gave it to Nelson, and stated, "you got me." As Nelson and Dillon returned to the hotel, Dillon pulled out of Nelson's grasp and sprinted up Sutter Street. As Nelson chased Dillon, Hall who was nearby, but whom Nelson failed to observe, lowered his shoulder into Nelson and knocked Nelson into the side of a building. Deputy Christiansen observed this, and then joined Nelson in chasing Dillon. They caught Dillon after he tripped. San Francisco Police Department officers detained Hall nearby.

Antoinette then identified both Hall and Dillon, along with her purse.

Antoinette testified at trial that she was slightly intoxicated and "buzzed," but not to the point that she was unaware of what was going on. However, Dr. Nikolas Lemos, the forensic laboratory director and chief forensic toxicologist for the City and County of San Francisco, testified that based on blood and urine samples taken that night, Antoinette had a blood alcohol content ("BAC") level of 0.17 percent at approximately 1:30 a.m. Lemos opined that Antoinette had to have consumed approximately eight and one-half to nine drinks that evening, and that she was intoxicated at the time she encountered Hall. He further testified that the average person with Antoinette's BAC level would experience depressed inhibitions and would possess an impaired ability to process stimuli, to understand and respond to what is going on around her, and to judge and recall a situation.

Dr. Lemos also testified that Antoinette had cannabis and cocaine in her system at the time of the incident. Dr. Lemos opined, contrary to Antoinette's testimony otherwise, that she must have taken an "undetermined amount of cocaine" in the "time frame of her encounters with Dillon and Hall."

Hall called several witnesses at trial who testified to his reputation for truthfulness and good character. The witnesses included two people who had served as mentors to Hall, one of whom had known Hall for seventeen years and testified that Hall was "incredibly honest" and never appeared aggressive toward women. The other two witnesses' testimony regarding Hall was similar.

The jury returned verdicts finding Hall not guilty of forcible sexual penetration with a foreign object and not guilty of the lesser-included offense of attempted sexual penetration with a foreign object. Clerks Transcripts ("C.T.") 355, 357. It also found him not guilty of sexual battery. C.T. 358. The jury, however, found him guilty of the lesser-included offense of assault with intent to commit penetration of the genital opening of another person by a foreign object. C.T. 356. The jury found Dillon not guilty of second degree robbery, but convicted him of the lesser-included offense of grand theft from the person, and also of

assault by means likely to cause great bodily injury and misdemeanor battery.

Following the jury verdict, Hall moved for a new trial, arguing that the jury instructions were defective. In support of his motion, Hall submitted three declarations from jurors William Sealy, Stephanie Orr, and Duane Pellervo, which suggested that it was a defect and/or omission in the instructions that led the jury to return a guilty verdict. Two of the three jurors who submitted declarations asserted that the jury "verbally discussed and agreed" that "the prosecution did not prove that Hall did *not* reasonably believe that Antoinette B. consented to his touching of her." Those two jurors also attested that the jury "verbally discussed and agreed" that Hall was not guilty of the charged offenses based on the defense of a reasonable belief in consent. All three jurors attested that they "verbally discussed and agreed" that such a defense was not available for the offense for which they convicted Hall, per the court's instruction pursuant to CALCRIM No. 890. Two of the three declarations then provide that the jury "verbally discussed and agreed" that if such a defense was available with respect to the lesser-included offense of assault with intent to commit forcible sexual penetration under California Penal Code § 220, "a finding of not guilty would be the verdict." Additionally, all three of the declarations state that the "jury verbally discussed and agreed that the [CALCRIM 890] instruction only referenced the jury instruction of CALCRIM 1045 as to the defendant's intent, not as to defenses." *Id.*

The trial court denied the motion on the record without explanation. Exh. B-20 at 13. Soon thereafter, Hall filed a renewed motion for a new trial based on an intervening California Court of Appeal decision. The trial court denied that motion without explanation as well. Exh. B-21 at 4.

One day before the trial court sentenced Hall, juror Pellervo, one of the jurors who submitted a declaration, sent a letter to the trial judge. That letter was filed and became part of the record on appeal before the state courts and is included in the record before this court. In his letter, Pellervo, who stated in his declaration that he is a lawyer, asserted that his guilty verdict was based on his "incorrect understanding that a 'reasonable belief'

defense did not exist" for the lesser-included offense of assault with intent to commit forcible sexual penetration. Pellervo implies that the jury acquitted on the charged offenses because it found that Hall reasonably believed that the victim consented to the physical contact. Pellervo notes that the jury specifically looked through the instructions regarding whether such a defense applied to the lesser-included offense, but failed to locate it. Pellervo expresses dismay at the fact that the trial court denied the motion for a new trial in spite of the juror declarations. He asserts that "while the primary purpose of this letter [sic] is to request that [the court] impose the lightest possible sentence on Mr. Hall as well as release him pending the decision on appeal, the real issue this Court should be concerned with is the fatally flawed process that resulted in Mr. Hall's conviction in the first place."

The declarations and the letter were part of the record before the state appellate courts. The California Court of Appeal held that the declarations were "plainly inadmissible" under state law, rejecting Hall's argument that portions of the declaration were in fact admissible because they recounted statements made during deliberations and did not simply describe the jury's reasoning.[3] The court cited the language in the declarations providing that the "jury verbally discussed and agreed," in finding that the declarations were inadmissible because they "purport[ed] to explain how the jurors allegedly understood the relevant instructions and arrived at their verdicts."

ISSUES

In his petition, Hall raises two issues. First, he argues that his due process rights were violated when the trial court failed to instruct the jury that it was required to find that the victim did not consent to the touching. Second, Hall also contends that his due process rights were violated because the trial court failed to instruct the jury that it was required to find that he specifically intended to touch the victim against her will and without her consent.

[3]The state appellate court did not explicitly address Pellervo's letter, but presumably its reasoning as to the declarations applied as well to the letter.

Previously, on appeal before the state appellate courts, Hall raised both of the above issues in addition to other issues, including a claim that the trial court erred in failing to instruct on the "reasonable belief in consent" defense and to give a *Mayberry* instruction.[4] However, Hall concedes that he is not raising that issue as a stand-alone claim in his federal petition, apparently anticipating an argument that it is not cognizable because it arose solely under California law. He does argue, though, that the trial court's failure to instruct on the "reasonable belief in consent" defense and to give a *Mayberry* instruction is relevant to any harmless error analysis with respect to the two other instructional issues that he does raise in his petition.

STANDARD OF REVIEW

This court may entertain a petition for writ of habeas corpus "on behalf of a person in custody pursuant to the judgment of a state court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). Because the petition in this case was filed after the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), the provisions of that act apply here. *See Lindh v. Murphy*, 521 U.S. 320, 327 (1997). Under the AEDPA, a district court may not grant a petition challenging a state conviction or sentence on the basis of a claim that was reviewed on the merits in state court unless the state court's 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." 28 U.S.C. § 2254 (d).

A state court decision is "contrary to" Supreme Court authority, falling within the first clause of § 2254(d)(1), only if "the state court arrives at a conclusion opposite to that

[4]This apparently includes the argument that CALCRIM No. 890 failed to inform the jurors that even if the victim did not consent, Hall could not be convicted if there was reasonable doubt as to whether he reasonably but mistakenly believed she had consented.

reached by [the Supreme] Court on a question of law or if the state court decided a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 412-413 (2000). "Clearly established federal law" under § 2254(d)(1) is the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision." *Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003). This "clearly established" law "refers to the holdings, as opposed to the dicta, of [Supreme] Court decisions as of the time of the relevant state court decision." *Id.*

"Under the 'unreasonable application' clause" of § 2254(d)(1), a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id*. at 74. However, this standard "requires the state court decision to be more than incorrect or erroneous." *Id.* For the federal court to grant habeas relief, the state court's application of the Supreme Court authority must be "objectively unreasonable." *Id.* at 74-75. The "objectively unreasonable" standard is different from the "clear error" standard in that "the gloss of clear error fails to give proper deference to state courts by conflating error (even clear error) with unreasonableness." *Id.* at 75; *see also Clark v. Murphy*, 331 F.3d 1062, 1068 (9th Cir. 2003). Therefore, "[i]t is not enough that a habeas court, in its independent review of the legal question, is left with a firm conviction that the state court was erroneous . . . Rather, the habeas court must conclude that the state court's application of federal law was objectively unreasonable." *Andrade*, 538 U.S. at 75; *see also Clark*, 331 F.3d at 1068.

As for state court findings of fact, under § 2254(d)(2), a federal court may not grant a habeas petition by a state prisoner unless the adjudication of a claim on the merits by a state court 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. 28 U.S.C. § 2254(d)(2). The "clearly erroneous" standard of unreasonableness that applies in determining the "unreasonable application" of federal law under § 2254(d)(1) also applies in

determining the "unreasonable determination of facts in light of the evidence" under § 2254(d)(2). *See Torres v . Prunty*, 223 F.3d 1103, 1107-1108 (9th Cir. 2000). To grant relief under 2254(d)(2), a federal court must be "left with a firm conviction that the determination made by the state court was wrong and that the one [petitioner] urges was correct." *Id.* at 1108.

However, when the state court decision does not articulate the rationale for its determination or does not analyze the claim under *federal* constitutional law, a review of that court's application of clearly established federal law is not possible. *See Delgado v. Lewis*, 223 F.3d 976, 981-82 (9th Cir. 2000); *see also* 2 J. Liebman & R. Hertz, Federal Habeas Corpus Practice and Procedure § 32.2, at 1424-1426 & nn. 7-10 (4th ed. 2001). When confronted with such a decision, a federal court must conduct an independent review of the record and the relevant federal law to determine whether the state court's decision was "contrary to, or involved an unreasonable application of, "clearly established federal law." *Delgado*, 223 F.3d at 982.

> When a state court does not furnish a basis for its reasoning, we have no basis other than the record for knowing whether the state court correctly identified the governing legal principle or was extending the principle into a new context. . . .[A]lthough we cannot undertake our review by analyzing the basis for the state court's decision, we can view it through the 'objectively reasonable' lens ground by *Williams* [, 529 U.S. 362]. . . . Federal habeas review is not de novo when the state court does not supply reasoning for its decision, but an independent review of the record is required to determine whether the state court clearly erred in its application of controlling federal law. . . . Only by that examination may we determine whether the state court's decision was objectively reasonable.

Id.

DISCUSSION

A. Admissibility/Consideration of Jurors' Declarations and Letter

As noted, Hall submitted several declarations and a letter from jurors in conjunction with his motion for a new trial and with his state court appeal suggesting that the jury was misled by the instructions. Hall submitted the declarations and letter with his motion for release previously denied by this court, and the documents are also before this court as part of the record below.

The parties have disputed the admissibility of the declarations and the letter. At the outset, the court declines to resolve this issue – including whether it is required to consider them for some purpose other than the merits – because, for the reasons set forth below, the court need not consider the documents in order to conclude that Hall is entitled to federal habeas relief.[5]

B. Analysis

1. The Jury Instructions

California Penal Code § 220, which governs assault with intent to commit forcible sexual penetration, provides in pertinent part:

> (a) Except as provided in subdivision (b), any person who assaults another with intent to commit mayhem, rape, sodomy, oral copulation, or any violation of Section 264.1, 288, or 289 shall be punished by imprisonment in the state prison for two, four, or six years.

Section 289, which governs forcible acts of sexual penetration, in turn, provides:

> (a)(1) Any person who commits an act of sexual penetration when the act is accomplished against the victim's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person shall be punished by imprisonment in the state prison for three, six, or eight years.

At trial, the jury was instructed with two form instructions, CALCRIM No. 1045, governing forcible sexual penetration, and CALCRIM No. 890, governing assault with intent to commit certain crimes. CALCRIM No. 1045 was given first, and CALCRIM No. 890 followed.

The trial court gave CALCRIM No. 1045 as follows:

> Damien Hall is charged in Count 1 with sexual penetration by force. To prove that the defendant is guilty of this crime, the People must prove that (1) the defendant committed an act of sexual penetration with another person; (2) the penetration was accomplished by using a foreign object; (3) *the other person did not consent to the act;* and (4*) the defendant accomplished the act by force*, violence, duress, menace, or fear of immediate and unlawful bodily

---

[5]In his traverse, Hall argues that even if the declarations are not admissible on the merits, that to the extent the court concludes he has procedurally defaulted any of his claims, the court is required to consider the declarations as they pertain to his claim of actual innocence. *See House v. Bell*, 547 U.S. 518 (2006).

injury to anyone.

Sexual penetration means penetration, however slight, of the genital opening of the other person for the purpose of sexual abuse, arousal, or gratification. A foreign object, substance, instrument, or device includes any part of the body except a sexual organ. Penetration for sexual abuse means penetration for the purpose of causing pain, injury, or discomfort.

In order to consent, a person must act freely and voluntarily and know the nature of the act. Evidence that the other person requested, suggested, communicated that the defendant use a condom or other birth-control device is not enough by itself to constitute consent.

An act is accomplished by force if a person uses enough physical force to overcome the other person's will. Duress means a direct or implied threat of force, violence, danger, hardship, or retribution that is enough to cause a reasonable person of ordinary sensitivity to do or submit to something that he or she would not otherwise do or submit to. When deciding whether the act was accomplished by duress, consider all the circumstances, including the age of the other person and her relationship to the defendant.

Menace means a threat, statement, or act showing an intent to injure someone. An act is accomplished by fear if the other person is actually and reasonably afraid or if she's actually and unreasonably afraid and the defendant knows of her fear and takes advantage of it. The defendant is not guilty of forcible sexual presentation [sic] 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.

People v. Dillon, 174 Cal.App.4th 1367, 1376-77 (Cal. Ct. App. 2009) (emphasis added).

It then instructed the jury as follows according to CALCRIM No. 890:

Damien Hall is charged in Count 1 with sexual penetration by a foreign object through force or violence. A lesser-included offense of sexual penetration by a foreign object is assault with intent to commit the penetration of the genital opening of another by a foreign object.

To prove the defendant is guilty of this crime, the People must prove that (1) the defendant did an act that, by its nature, would directly and probably result in the application of force to a person; (2) the defendant did that act willfully; (3) when the defendant acted, he was aware of facts that would lead a reasonable person to realize that his act, by its nature, would directly and probably result in the application of force to someone; (4) when the defendant acted, he had the present ability to apply force to a person; and (5) when the defendant acted, he intended to commit the penetration of the genital opening of another by a foreign object.

Someone commits an act willfully when he or she does it willingly or on purpose. The terms application of force and apply force mean to touch in a

> harmful or offensive manner. The slightest touching can be enough if it is done in a rude or angry way. Making contact with another person, including through his or her clothing, is enough. The touching does not have to cause pain or injury of any kind. The touching can be done indirectly or by causing an object or someone else to touch the other person.
>
> The People are not required to prove that the defendant actually touched someone. No one needs to actually have been injured by the defendant's act. But if someone was injured, you may consider that fact along with all the other evidence in deciding whether the defendant committed an assault and, if so, what kind of assault it was.
>
> *To decide whether the defendant intended to commit the penetration of the genital opening of another by force, please refer to the instruction which defines that crime, which is the instruction labeled CALCRIM 1045.*

Id. at 458-59 (emphasis added).

In addition, the trial court instructed the jury with CALCRIM 252, which distinguishes between those crimes that require proof of general intent and those that require proof of specific intent. The court instructed the jury about several crimes that require general criminal intent, and then instructed the jury regarding specific intent crimes as follows:

> The following crimes require a specific intent or mental state: Sexual penetration by a foreign object with force or violence in Count 1, Penal Code 289(a)(1); sexual battery in Count 2, Penal Code 243.4; and robbery in Count 3, Penal Code 212.5(c). To be guilty of these offenses, a person must not only intentionally commit the prohibited act, but must do so with a specific intent or mental state. The act or the intent or mental state required are explained in the instruction for each crime.

Exh. B-15 at 74.

All of the above instructions given by the trial court were taken from the form CALCRIM instructions. At the time of Hall's trial, the CALCRIM instructions had been in effect for less than a year, having replaced California Jury Instructions ("CALJIC") on January 1, 2006. As the state court noted, CALCRIM 890 operates in the same manner as its predecessor, CALJIC 9.09. *Id.* at 1379 n. 5. CALCRIM 890, like CALJIC 9.09, is a fairly general instruction, and does not exclusively govern assault with intent to commit *forcible sexual penetration*. Instead, like California Penal Code § 220, CALCRIM 890 governs "assault with intent to commit specified crimes," and then includes blanks by which the court may insert the particular underlying crime at issue in the case. In other words,

CALCRIM 890 operates in conjunction with another jury instruction pertaining to the underlying crime, in this case, CALCRIM 1045.

The Judicial Council bench use notes to CALCRIM 890 provide:

> The court has a sua sponte duty to instruct on the sex offense or offense alleged. In the blanks, specify the sex offense or offenses that the defendant is charged with intending to commit. Included sex offenses are: rape (Pen. Code, § 261); oral copulation (Pen. Code, § 288a [including in-concert offense]); sodomy (Pen. Code, § 286 [including in-concert offense]); sexual penetration (Pen. Code, § 289); rape, spousal rape, or sexual penetration in concert (Pen. Code, § 264.1); and lewd or lascivious acts (Pen. Code, § 288). (See Pen. Code, § 220.) Give the appropriate instructions on the offense or offenses alleged.

Here, the trial court did just that, and instructed the jury pursuant to CALCRIM 1045.

2. Hall's Claims

Hall does not dispute that CALCRIM 890 and 1045 were given in a manner that complied with and tracked the form instructions. Instead, he asserts that in a case such as this one, involving assault with intent to commit forcible sexual penetration, the form instructions, CALCRIM 890 and CALCRIM 1045, operate in a manner that is unconstitutional because they do not provide the jury with the requisite elements of the offense. Hall asserts that unlike other CALJIC jury instructions that were improved with the enactment of the CALCRIM instructions in 2006, the CALCRIM committee "blundered" with CALCRIM 890.[6]

In both claims before this court, Hall challenges CALCRIM 890 generally, and in particular, its reliance on and cross-reference to CALCRIM 1045. Hall contends that CALCRIM 890 should include the elements of the underlying crime - rather than just simply cross-reference CALCRIM 1045. Specifically, he asserts that "the reliance of CALCRIM 890 on a cross-reference to the form instruction on the greater offense of forcible digital

[6]Two amici curiae letter briefs filed in support of Hall's petition for review before the California Supreme Court are part of the record before this court. *See* Exhs. C-13; C-14. One of the briefs is from an attorney who served as a member of the CALCRIM committee, and urges the state supreme court to accept review in order to determine whether CALCRIM 890 "meets the standards of clarity and accuracy expected of CALCRIM instructions in general." Exh. C-13.

penetration (CALCRIM 1045) resulted in the omission from the sexual-assault instructions of any mention of two required elements: the absence of consent on the part of the complaining witness; and the defendant's specific intent to act against her will and without her consent."

a. Lack of Complaining Witness' Consent

i. Procedural Default

In its order denying Hall's motion for release, this court noted that Hall may have procedurally defaulted one or both of his claims. Having reviewed the parties' subsequent filings, including the state's opposition and Hall's traverse, it is clear that only one of Hall's two claims is affected by the potential procedural default - Hall's claim regarding the jury instructions' failure to include the element of lack of consent. The other issue regarding Hall's intent is not impacted.

The California Court of Appeal found that Hall failed to preserve for appeal his contention that CALCRIM No. 890 should have been modified to state that the prosecution had the burden to prove the complainant's lack of consent. The state appellate court noted that at trial, Hall's counsel requested only an instruction that the prosecution was required to prove beyond a reasonable doubt that he did not actually and reasonably believe the complainant consented, and that there was no evidence that Hall requested a lack of consent instruction at an unreported conference. *Id.* at 1380 & n. 7. It further noted that in the event Hall indeed contended that he requested such an instruction before the trial court he "failed to meet his burden of establishing that in the record." *Id.* The state court nevertheless addressed the issue on the merits.

The state argues that Hall's failure to make and/or present on review before the state court of appeal an adequate record in support of this claim rendered the issue non-cognizable in state court, and that this state procedural default constitutes an adequate and independent ground to bar his claim in this court as well. It notes that California's contemporaneous objection requirement is well-established, and that federal courts have

repeatedly held that this state rule constitutes a valid procedural default. The state argues that the fact that the state court alternatively considered the merits of the claim has no bearing on whether the claim was procedurally defaulted, noting that a state court's clear and unequivocal invocation of a state procedural bar will not be disregarded even if the state court alternatively considers the merits of the federal question as well.

In his traverse, Hall contends that the state court's ruling regarding his failure to preserve the issue for appeal was erroneous. He cites to state law and argues that a state court's failure to instruct on a required element is cognizable on appeal even absent a defendant's request that the court instruct on the element or an objection by the defense to the instruction that is given.[7] Hall further argues that even if he procedurally defaulted either of his claims, the court should forgive the default because he is actually innocent.

While it appears to the court that the state's argument that Hall procedurally defaulted this claim is strong, the court need not resolve the default issue because it concludes that on the merits, Hall is not entitled to relief on this claim. It is therefore also unnecessary for the court to reach Hall's argument that he is actually innocent.

ii. Merits

Hall asserts in his opening brief that there is no dispute that the victim's lack of consent is an essential element of the offense. He contends that the trial court's instructions omitted this element, and that rather than "recognize and correct" the deficiencies of the form instructions, the state appellate court simply declared that Hall's jury would have read into the instructions language they did not contain, and also would have ignored specific language that the instructions did contain.

In its decision, the state appellate court did not explicitly state that lack of consent is an element of the crime, but implied as much by holding that "CALCRIM Nos. 890 and

---

[7]Hall argues that under state law, trial courts have a sua sponte duty to instruct on all elements of a charged crime. He contends that under California Penal Code § 1259, an appellate court may review any instruction given even if there was no objection below "if substantial rights of the defendant were affected." He further asserts that the state court case relied on by the appellate court for its default ruling is inapplicable.

1045, taken together, adequately instructed the jurors that they had to find a lack of consent before they could convict Hall for assault with intent to penetrate the genital opening of another by a foreign object."[8] 174 Cal.App.4th at 1380. In so holding, it reasoned that in

> [r]eading CALCRIM No. 1045 to determine the intent required under CALCRIM No. 890, jurors would reasonably conclude that if the prosecution failed to prove the complainant's lack of consent the defendant could not be guilty of assault with intent to commit forcible sexual penetration.

Id. In support, it cited language in CALCRIM No. 1045 providing that "[t]he People have the burden of proving beyond a reasonable doubt that the defendant did not actually and reasonably believe that the other person consented."

Hall challenges the state court's decision, arguing that its conclusion that the jury would have determined the *victim's* state of mind in the course of determining the *defendant's* was objectively unreasonable. He further contends that CALCRIM 890 referred jurors to CALCRIM 1045 for the sole purpose of determining his requisite intent - and *not* for determining other elements - such as the victim's lack of consent. *See* CALCRIM 890 ("[t]o decide whether the defendant *intended* to commit the penetration of the genital opening of another by force, please refer to the instruction which defines that crime, which is the instruction labeled CALCRIM 1045") (emphasis added). He thus argues that a reasonable juror would have no way of knowing that the alleged victim's lack of consent was an independent element of sexual assault.

In opposition, and contrary to its position before the state court, the state argues for the first time that it is actually *not* clear that lack of consent is even an element of the crime. *See* Oppos. at 14-15. However, assuming that lack of consent is an element of the crime, the state asserts that CALCRIM 1045 in fact informed the jurors that one of the elements of the crime was that the victim did not consent to the act of forcible sexual penetration.

In his traverse, Hall argues that the state's suggestion that lack of consent may not

---

[8]Both parties agreed in their briefs on appeal that lack of consent was an element of the offense.

be an element of the offense is simply wrong under both California and federal law. [9]

At the outset, the court notes that both parties - and the state court - appear to equate the statute's requirement that the act be "against the victim's will" with a lack of consent, and have used the phrases interchangeably. *See* Cal. Penal Code § 289(a)(1) (requiring that the act be "accomplished against the victim's will"). Because this is an issue of state law, and neither party nor the state court have suggested that there is any distinction between "against the victim's will" and a lack of consent, and in fact have implied that there is none, the court assumes this is a proper interpretation of California law for purposes of federal habeas review. The court notes that the commentary to CALCRIM 1045 states that "against the will" has been defined by California courts as "without consent." *See also People v. Key*, 153 Cal.App.3d 888, 895 (Cal. Ct. App. 1984); *People v. Young*, 190 Cal.App.3d 248, 257 (Cal. Ct. App. 1987).

The state court's decision was not unreasonable because the jury was in fact instructed on the lack of consent element. CALCRIM 1045 expressly provided that the prosecution was required to prove that "the other person did not consent to the act." Accordingly, because the lack of consent element was not omitted from the instructions, the court reviews the instructions for ambiguity. Even if there is some ambiguity, inconsistency, or deficiency in the instruction, such an error does not necessarily constitute a due process violation. *Waddington v. Sarausad*, 129 S.Ct. 823, 831 (2009) (citing *Estelle v. McGuire*, 502 U.S. 62, 72 (1991)). Rather, the petitioner must show both that the instruction was

---

[9] As noted, before this court, the state appears to challenge the state court's implicit determination that lack of consent is an element of the crime of assault with intent to commit forcible sexual penetration. This court does not review state court determinations of state law, and even if it were to review the issue here, the court concludes that the state court's determination that lack of consent is an element of the offense was not objectively unreasonable. *See Ghent v. Woodford*, 279 F.3d 1121, 1134 n.12 (9th Cir. 2002) (noting that the related crime of assault with intent to commit rape under California Penal Code § 220 "includes every fact necessary for a finding of rape except for the act of penetration"). The state itself admitted as much in its brief before the appellate court. *See* Exh. C-5 at 78 ("One of the elements of the crime of forcible sexual penetration, as told to the jury in CALCRIM No. 1045, is that the victim did not consent to the act of forcible sexual penetration."). The state's latest change in position otherwise is not persuasive.

ambiguous and that there was "a reasonable likelihood" that the jury applied the instruction in a way that relieved the state of its burden of proving every element of the crime beyond a reasonable doubt. *Id.* (citing *Estelle*, 502 U.S. at 72). In making this determination, the jury instruction "may not be judged in artificial isolation, but must be considered in the context of the instructions as a whole and the trial record." *Id.* (quoting *Cupp v. Naughten*, 414 U.S. 141, 147 (1973)). "The pertinent question is 'whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process.'" *Id.* (quoting *Cupp*, 414 U.S. at 147). Therefore, in order to establish a due process violation, Hall is still required to demonstrate a "reasonable likelihood" that the jury applied the instruction in a way that relieved the state of proving every element of the crime beyond a reasonable doubt. *Waddington*, 129 S.Ct. at 831. A "reasonable likelihood" is lower than the "more likely than not" standard but higher than a mere "possibility." *Polk v. Sandoval*, 503 F.3d 903, 910 (9th Cir. 2007).

A determination that there is a reasonable likelihood that the jury has applied the challenged instruction in a way that violates the Constitution establishes only that an error has occurred. *See Calderon v. Coleman*, 525 U.S. 141, 146 (1998). If an error is found, the court also must determine that the error had a substantial and injurious effect or influence in determining the jury's verdict, *see Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993), before granting relief in habeas proceedings. *See Calderon*, 525 U.S. at 146-47.

Considering the instructions as a whole, the court cannot say that there was a reasonable likelihood that the jury applied the challenged instructions in a way that violates the Constitution. Although CALCRIM 890 did refer the jury to CALCRIM 1045 for purposes of determining the defendant's "intent to commit the penetration of the genital opening of another by force," the jury would have reviewed CALCRIM 1045 as a whole, and that instruction, in several places, informs the jury that the prosecution was required to prove the victim's lack of consent. *See Estelle*, 502 U.S. at 72 n.4. For this reason, the state appellate court's determination on this claim was not contrary to, or an unreasonable

application of, clearly established federal law. Because the court concludes that there was no constitutional error regarding the lack of consent element, the court need not address whether such error was harmless.

b. Defendant's Specific Intent

Hall also argues that CALCRIM Nos. 890 and 1045 omitted the specific intent element in violation of his due process rights. He notes that CALCRIM 890 referred the jury to CALCRIM 1045 to ascertain intent, but that CALCRIM 1045 defined the crime of sexual penetration, a *general* intent crime. Hall asserts that, unlike sexual penetration, assault with intent to commit sexual penetration is a *specific* intent crime which required that he intended to commit sexual penetration without the victim's consent.[10] *See People v. Senior*, 3 Cal.App.4th 765, 776 (Cal. Ct. App. 1992). Hall therefore contends that neither CALCRIM 890 nor CALCRIM 1045 - nor the two instructions in combination - accurately stated the intent required.

The state appellate court agreed with Hall that in order to be convicted under California Penal Code § 220 of assault with intent to commit forcible sexual penetration, specific intent to commit the act without the consent of the victim was required – not just intent to commit the underlying sexual act. *Dillon*, 174 Cal.App.4th at 1378 (citing *People v. Davis*, 10 Cal.4th 463, 509 (Cal. 1995)). It further held that because of this, the mental state required for conviction of assault with intent to commit forcible sexual penetration "is not the same" as that required for forcible sexual penetration, a general intent crime. *Id.* at 1380. Nevertheless, without much explanation, the state appellate court implied that the instructions' failure to specify the specific intent required for assault with intent to commit forcible sexual penetration was not error. In support, it noted that the former comparable CALJIC instructions operated in "exactly the same fashion," and did "not mention any specific intent to act against the complainant's will." 174 Cal.App.4th at 1379 n.5.

[10] Again, as was the case with the consent issue, the parties use the phrases "without consent" and "against her will" interchangeably.

The state court also held that the failure of CALCRIM 252 to include assault with intent to commit forcible sexual penetration among the listed specific intent crimes "in no way entitle[d] or induce[d] jurors to assume that no specific intent was required to convict [Hall]." *Id.* at 1379. The court noted that CALCRIM 252 described specific and general intent with respect to only the charged crimes, and "did not purport to discuss or classify the intent required for any of the lesser-included offenses." *Id.* Ultimately, the state appellate court concluded that because CALCRIM 1045 advised jurors that they were required to find a lack of consent, the jurors must also have ascertained that they were required to find that Hall assaulted the victim with the intent to sexually penetrate her without her consent. *Id.* at 1380.

Hall argues that it was objectively unreasonable for the state court to find that a reasonable juror, not properly instructed regarding the specific intent but instead instructed that s/he was required to find general intent, would have somehow figured out the requisite intent. Moreover, Hall reiterates that CALCRIM 252, which listed the specific intent offenses, notably did not include California Penal Code § 220, assault with intent to commit sexual penetration.

In opposition, the state argues that the state court's decision was reasonable because the jury instructions were adequate regarding Hall's intent, and that it wasn't necessary that the jury be told that the intent required was a "specific" intent. The state contends that CALCRIM 890 required the jury to find that Hall "intended to commit" the "crime" defined by CALCRIM 1045. It argues that because CALCRIM 1045 included the elements of sexual penetration, CALCRIM 890 and CALCRIM 1045 in combination therefore required that Hall intend to commit each of the elements, including the element that "the other person did not consent to the act." In other words, according to the state, CALCRIM 890 informed the jurors that in order to find Hall guilty of the crime, it was required to find that he intended to commit the crime defined by CALCRIM 1045, which necessarily included that he intended that the act of forcible sexual penetration be against

the victim's will. It argues that there is thus no "reasonable likelihood" that the jury applied the instructions in the manner that Hall contends it did.

In his traverse, Hall contends that the "reasonable likelihood" standard utilized by the state is the wrong test here since the jury instructions were not simply ambiguous, but in fact omitted an element of the offense. He asserts that because the omission of an element of the offense itself constitutes constitutional error, the issue here is whether that error is harmless or prejudicial.

The court agrees with Hall that this issue is not simply one of an ambiguous jury instruction. Instead, unlike the lack of consent element discussed above, neither CALCRIM 890 nor 1045 included the element of intent required for conviction of the lesser-included offense, assault with the intent to commit forcible sexual penetration without the victim's consent. Therefore, the instructions were erroneous on these facts, and the "reasonable likelihood" standard employed for ambiguous jury instructions is not applicable. *Ho v. Carey*, 332 F.3d 587, 592 (9th Cir. 2003). If a jury instruction omits a necessary element of the crime, constitutional error has occurred. *Id.* at 593 (finding jury instructions "erroneous" rather than ambiguous, where they included an uncorrected erroneous instruction that second-degree murder could be based on a finding of general intent, but also included an accurate description of the elements of second-degree murder, including specific intent); *see also Polk,* 503 F.3d at 910.

However, actual prejudice is still required before relief may be granted. *See Ho*, 332 F.3d at 595 (citing *Brecht*, 507 U.S. at 637); *see also Hedgpeth v. Pulido*, 129 S.Ct. 530, 532 (2008) (confirming that instructional error is subject to a harmless error analysis); *Byrd v. Lewis*, 566 F.3d 855, 866 (9th Cir. 2009). The omission will be found harmless unless it "'had substantial and injurious effect or influence in determining the jury's verdict.'" *California v. Roy*, 519 U.S. 2, 4 (1996) (quoting *Brecht*, 507 U.S. at 637). Where the trial court fails to alert the jurors that they must consider an element of the crime, the omission is harmless if review of the facts found by the jury establishes beyond a reasonable doubt

that the jury necessarily found the omitted element. *See United States v. Lin*, 139 F.3d 1303, 1309 (9th Cir. 1998) (error harmless if no rational jury would have made the findings without also finding missing element of the crime). But if the reviewing federal habeas court is in grave doubt as to whether the error had substantial and injurious effect or influence in determining the jury's verdict, the petitioner is entitled to the writ. *See Evanchyk v. Stewart*, 340 F.3d 933, 940-42 (9th Cir. 2003); *Ho*, 332 F.3d at 595-96.

The California Court of Appeal did not address whether any error was harmless or prejudicial because it found no error.

Hall argues that the constitutional error was not harmless because the evidence against him was not overwhelming and because Hall's understanding regarding Antoinette's consent was a critical factual issue that was contested at trial. Hall emphasizes that since it was undisputed at trial that he put his hands down Antoinette's pants, the pivotal issues at trial concerned his mental state and her consent. Hall also argues that his acquittal on both the forcible digital penetration and the sexual battery charges demonstrates that the jurors would have acquitted him on the assault with intent to commit digital penetration because the jury was explicitly instructed that Antoinette's lack of consent and the absence of Hall's reasonable belief in consent had to be proven for conviction on the former charges.

In opposition, the state argues that any error was harmless because the evidence overwhelmingly demonstrated that Hall put his hand down Antoinette's pants with the intent to penetrate her against her will and without her consent. In support, the state points to Hall's admission that he did not ask Antoinette for permission put his hand in her pants. It also argues that Antoinette's testimony was more credible than Hall's because Hall was a stranger, and Antoinette had no reason to falsely accuse him. Furthermore, the state notes Hall's admission that he intended to penetrate her vagina "if it ever got that far." The state contends that based on the "undisputed" facts alone, any reasonable juror would have concluded beyond a reasonable doubt that Hall intended to touch Antionette without her

consent. The state also argues that Hall's trial counsel's closing argument cured any prejudice because he made the requisite intent clear, as did the prosecution's rebuttal. 9 R.T at 80-91.

In his traverse, Hall counters that counsel's arguments regarding the elements of the crime cannot render the error harmless as the state suggests. *Ho*, 332 F.3d at 595. Nevertheless, he contends that the closing arguments did not include clear directions regarding the requisite elements.

The court need not consider the contested juror declarations to conclude that it is in "grave doubt" as to whether the jury necessarily found that Hall assaulted Antoinette with the intent to sexually penetrate her *against her will*. *Evanchyk*, 340 F.3d at 940-42. Having reviewed the record, including the testimony and the parties' closing arguments, it is clear that Hall's intent at the time he touched Antoinette was hotly disputed. There is nothing in the record that indicates that the jury - in the absence of an instruction otherwise - would have "necessarily" found that Hall specifically intended to touch Antoinette without her consent. *See Lin*, 139 F.3d at 1309. Nor is it possible, as the state implicitly requests, for this court to make a determination based on the record before it that the jury "necessarily" found Antoinette's testimony on the issue more credible than Hall's, particularly in view of his acquittal of attempted sexual penetration.

Accordingly, because this court has serious doubts as to whether the error had a substantial and injurious effect or influence in determining the jury's verdict, it concludes that the state appellate court's decision involved an unreasonable application of, clearly established federal law, and grants habeas relief based on the challenged jury instruction. *See Brecht*, 507 U.S. at 637.

CONCLUSION

For the above reasons, the court GRANTS habeas relief on Hall's claim that his due process rights were violated by the trial court's failure to instruct on the specific intent required for conviction of assault with intent to commit forcible sexual penetration.

Accordingly, Hall's conviction is VACATED. The respondent shall release petitioner

from custody unless the state commences proceedings to retry petitioner within 90 days of the date of entry of judgment on this order.

The clerk shall send an informational copy of this order to the district attorney of San Francisco County, in addition to the usual service on counsel of record.

IT IS SO ORDERED.

Dated: July 29, 2010

PHYLLIS J. HAMILTON
United States District Judge