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8 **UNITED STATES DISTRICT COURT**  
9 **SOUTHERN DISTRICT OF CALIFORNIA**  
10

11 MATTHEW TERRELL,

12 Petitioner,

13 v.

14 C. ARMANT,

15 Respondent.

Case No.: 17cv0088 BTM (AGS)

**ORDER: (1) DENYING  
PETITION FOR WRIT OF  
HABEAS CORPUS; and (2)  
DENYING CERTIFICATE OF  
APPEALABILITY**

16  
17 **I. INTRODUCTION**

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

23 The Court has read and considered the Petition, the Memorandum of Points and  
24 Authorities in Support of the Petition (“Petition” or “Pet.”), the Answer and  
25 Memorandum of Points and Authorities in Support of the Answer (“Answer”) [ECF No.  
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28 <sup>1</sup> Page numbers for docketed materials cited in this Order refer to those imprinted by the Court’s  
electronic case filing system, except for lodgments.

1 5], the Traverse and Memorandum of Points and Authorities in Support of the Traverse  
2 [ECF Nos. 7-8], the lodgments, and the legal arguments presented by both parties. For  
3 the reasons discussed below, the Court **DENIES** the Petition and **DENIES** a certificate of  
4 appealability.

## 5 **II. FACTUAL BACKGROUND**

6 This Court gives deference to state court findings of fact and presumes them to be  
7 correct; Petitioner may rebut the presumption of correctness, but only by clear and  
8 convincing evidence. *See* 28 U.S.C. § 2254(e)(1) (West 2006); *see also Parle v. Fraley*,  
9 506 U.S. 20, 35-36 (1992) (holding findings of historical fact, including inferences  
10 properly drawn from these facts, are entitled to statutory presumption of correctness).

11 The state appellate court recounted the facts as follows:

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

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

Shortly after placing the zip ties around her wrists, Terrell grabbed  
Emily's shoulders, dragged her toward the bed, and shoved her down on the  
the bed. Emily was "flailing and struggling," while lying on her back with  
her wrists zip tied underneath her body. Terrell climbed on top of Emily,  
holding her shoulders down and pinning her to the bed. A brief struggle

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

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

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

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

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

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

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

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

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

4 (Lodgment No. 6 at 2-4.)

5 **III. PROCEDURAL BACKGROUND**

6 On July 12, 2013, the San Diego District Attorney's Office filed a complaint  
7 charging Matthew Nathan Terrell with one count of assault with intent to commit rape or  
8 oral copulation, a violation of California Penal Code § 220(a)(1), and false imprisonment,  
9 a violation of California Penal Code §§ 236 and 237(a). (Lodgment No. 1 at 0001-03.)

10 Following a jury trial, Terrell was convicted of both counts in the complaint. (*Id.* at  
11 0093-94.) Terrell was sentenced to six years in prison. (*Id.* at 0226-27.)

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

18 On January 17, 2017, Terrell filed a Petition for Writ of Habeas Corpus pursuant to  
19 28 U.S.C. § 2254 and a Memorandum of Points and Authorities in Support of the  
20 Petition. (ECF No. 1.) Respondent filed an Answer, a Memorandum of Points and  
21 Authorities in Support of the Answer, and a Notice of Lodgment on June 12, 2017 (ECF  
22 Nos. 5-6); Terrell filed a Traverse on July 17, 2017, and a Memorandum of Points and  
23 Authorities in Support of the Traverse on September 13, 2017. (ECF Nos. 7-8.)

24 **IV. DISCUSSION**

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

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

3 A. *Standard of Review*

4 This Petition is governed by the provisions of the Antiterrorism and Effective  
5 Death Penalty Act of 1996 (“AEDPA”). *See Lindh v. Murphy*, 521 U.S. 320 (1997).  
6 Under AEDPA, a habeas petition will not be granted with respect to any claim  
7 adjudicated on the merits by the state court unless that adjudication: (1) resulted in a  
8 decision that was contrary to, or involved an unreasonable application of clearly  
9 established federal law; or (2) resulted in a decision that was based on an unreasonable  
10 determination of the facts in light of the evidence presented at the state court proceeding.  
11 28 U.S.C. § 2254(d); *Early v. Packer*, 537 U.S. 3, 8 (2002). In deciding a state prisoner’s  
12 habeas petition, a federal court is not called upon to decide whether it agrees with the  
13 state court’s determination; rather, the court applies an extraordinarily deferential review,  
14 inquiring only whether the state court’s decision was objectively unreasonable. *See*  
15 *Yarborough v. Gentry*, 540 U.S. 1, 4 (2003); *Medina v. Hornung*, 386 F.3d 872, 877 (9th  
16 Cir. 2004).

17 A federal habeas court may grant relief under the “contrary to” clause if the state  
18 court applied a rule different from the governing law set forth in Supreme Court cases, or  
19 if it decided a case differently than the Supreme Court on a set of materially  
20 indistinguishable facts. *See Bell v. Cone*, 535 U.S. 685, 694 (2002). The court may grant  
21 relief under the “unreasonable application” clause if the state court correctly identified  
22 the governing legal principle from Supreme Court decisions but unreasonably applied  
23 those decisions to the facts of a particular case. *Id.* Additionally, the “unreasonable  
24 application” clause requires that the state court decision be more than incorrect or  
25 erroneous; to warrant habeas relief, the state court’s application of clearly established  
26 federal law must be “objectively unreasonable.” *See Lockyer v. Andrade*, 538 U.S. 63, 75  
27 (2003). The court may also grant relief if the state court’s decision was based on an  
28 unreasonable determination of the facts. 28 U.S.C. § 2254(d)(2).

1           Where there is no reasoned decision from the state’s highest court, the court “looks  
2 through” to the last reasoned state court decision and presumes it provides the basis for  
3 the higher court’s denial of a claim or claims. *See Ylst v. Nunnemaker*, 501 U.S. 797,  
4 805-06 (1991). If the dispositive state court order does not “furnish a basis for its  
5 reasoning,” federal habeas courts must conduct an independent review of the record to  
6 determine whether the state court’s decision is contrary to, or an unreasonable application  
7 of, clearly established Supreme Court law. *See Delgado v. Lewis*, 223 F.3d 976, 982 (9th  
8 Cir. 2000) (*overruled on other grounds by Lockyer v. Andrade*, 538 U.S. 63, 75-76  
9 (2003)); *accord Himes v. Thompson*, 336 F.3d 848, 853 (9th Cir. 2003). However, a state  
10 court need not cite Supreme Court precedent when resolving a habeas corpus claim. *See*  
11 *Early*, 537 U.S. at 8. “[S]o long as neither the reasoning nor the result of the state-court  
12 decision contradicts [Supreme Court precedent,]” *id.*, the state court decision will not be  
13 “contrary to” clearly established federal law. *Id.* Clearly established federal law, for  
14 purposes of § 2254(d),  
15 means “the governing principle or principles set forth by the Supreme Court at the time  
16 the state court renders its decision.” *Andrade*, 538 U.S. at 72.

17           B. *Analysis – Sufficiency of Evidence*

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

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

1 photographs of her. Then, using another ruse, Terrell bound the victim's  
2 wrists in zip ties, before forcibly throwing her on the bed and climbing on  
3 top of her. Terrell pinned the victim to the bed by holding her shoulders  
4 down. He relented only when the victim bit him on the neck and engaged in  
5 a physical struggle during which she was able to slide out from under him.  
6 While the victim was screaming, Terrell placed his hand over her mouth in  
7 an attempt to silence her. Prior to luring the victim to the motel room,  
8 Terrell hid items in the room that could be used to facilitate sexual conduct,  
9 including a ball gag and clothes pins. [FN 4] In addition, the People

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

14 presented evidence that Terrell had cut the panty liners out of several of the  
15 shorts that he brought to the room for the victim to model. A jury could  
16 reasonably infer that Terrell cut the panty liners from the shorts in order to  
17 facilitate his access to the victim's genitals. In light of all of the evidence  
18 mentioned above, a reasonable jury could find that, at the time Terrell  
19 assaulted the victim, he harbored intent to rape or orally copulate her.

20 Terrell's arguments to the contrary are not persuasive. Terrell notes  
21 that "[h]e did not tell [the victim] he wanted to have sexual intercourse."  
22 While there is no evidence that Terrell stated his intentions, "intent is rarely  
23 susceptible of direct proof . . ." (*Pre, supra*, 117 Cal.App.4th at p. 420.)  
24 Terrell also argues that he did not "touch [the victim] sexually." Even  
25 assuming that this is true, [FN5] the jury could reasonably infer from the

26 [FN 5: The People contend that the jury could reasonably find  
27 that Terrell touched the victim in a sexual way, when he threw  
28 her down on the bed and climbed on top of her]

evidence discussed above that Terrell intended to sexually assault the victim,  
and that he was prevented from doing so only by her fierce resistance.

(Lodgment No. 6 at 5-7.)

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

1 evidence in the light most favorable to the prosecution, any rational trier of fact could  
2 have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v.*  
3 *Virginia*, 443 U.S. 307, 319 (1979); *see also Juan H. v. Allen*, 408 F.3d 1262, 1275 (9th  
4 Cir. 2005). In determining whether sufficient evidence has been presented, the Court  
5 must accept the elements of the crime as defined by state law. *See Jackson*, 443 U.S. at  
6 324, n. 16.

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

16 To prove that the defendant is guilty of [assault with intent to commit rape]  
17 the People must prove that:

18 1. The defendant did an act that by its nature would directly and  
19 probably result in the application of force to a person;

20 2. The defendant did that act willfully;

21 3. When the defendant acted, he was aware of facts that would lead a  
22 reasonable person to realize that his act by its nature would directly and  
23 probably result in the application of force to someone;

24 4. When the defendant acted, he had the present ability to apply force  
25 to a person;

26 AND

27 5. When the defendant acted, he intended to commit a rape and/or  
28 oral copulation by force.



1  
2 Someone commits an act *willfully* when he or she does it willingly or on purpose.

3 The terms *application of force* and *apply force* mean to touch in a harmful or  
4 offensive manner. The slightest touching can be enough if it is done in a  
5 rude or angry way. Making contact with another person, including through  
6 his or her clothing, is enough. The touching does not have to cause pain or injury of any kind.

7 The People are not required to prove that the defendant actually touched  
8 someone.

9 No one needs to actually have been injured by the defendant's act. But if  
10 someone was injured, you may consider that fact, along with all the other  
11 evidence, in deciding whether the defendant committed an assault.

12 To decide whether the defendant intended to commit rape or forcible oral  
13 copulation, please refer to the instructions which define those crimes.

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

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

24 To prove the defendant is guilty of [rape by force, fear, or threats], the  
25 People must prove that:

- 26 1. The defendant had sexual intercourse with a woman;  
27  
28 2. He and the woman were not married to each other at the time of the  
intercourse;

1  
2 3. The woman did not consent to the intercourse;

3 AND

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

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

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

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

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

18 . . . .

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

- 21 1. The defendant committed an act of oral copulation with someone else;  
22 2. The other person did not consent to the act;

23 AND

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

26  
27 *Oral copulation* is any contact, no matter how slight, between the mouth of  
28 one person and the sexual organ or anus of another person. Penetration is

1 not required.

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

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

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

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

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

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

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

13         Once police arrived, they searched the motel room and Terrell’s backpack. (*Id.* at  
14 114-16.) Police Officer Alonso Devalasco and Community Service Officer Sheldon Berg  
15 discovered the following items: the zip tie used on Emily, a bag of zip ties, a duct tape-  
16 covered zip tie, several pairs of women’s running shorts which either lacked an interior  
17 panty liner or with the liner cut out, several clothes pins, a belt with a belt buckle, a piece  
18 of an electrical cord, and a roll of duct tape. (*Id.* at 116-34.) Devalasco testified the duct  
19 tape-covered zip tie appeared to be a “ball gag” which, in his experience, was used by  
20 people while engaging in sexual fantasies. (*Id.* at 121-22.) As the state appellate court  
21 noted, the jury could reasonably conclude Terrell removed the panty liners from the  
22 shorts in order to make it easier to access Emily’s genitalia. And, given that Terrell had  
23 zip ties that he used to restrain Emily, the jury could reasonably conclude Terrell  
24 intended to use the belt, electrical cord, and duct tape to further restrain her.<sup>2</sup>

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25  
26 <sup>2</sup> The prosecutor argued during closing argument that Terrell intended to use the clothes pins as “nipple  
27 clamps” or “genital clamps.” (Lodgment No. 2, vol. 3 at 273.) No evidence was presented to support  
28 this contention, and it is not clear to the Court that it would be within a jury’s common knowledge that  
clothes pins could be used in this manner absent expert testimony. Accordingly, the Court does not  
consider this as evidence supporting Terrell’s conviction.

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

17 Second, Terrell contends the court of appeal unreasonably found that the duct tape-  
18 covered zip tie was a ball gag which indicated Terrell’s intent to sexually assault Emily.  
19 (Pet., ECF No. 1-1 at 20.) Devalasco testified that as part of his experience in police  
20 work, he was familiar with the type of work the performed by the Vice Squad.  
21 (Lodgment No. 2, vol. 2, ECF No. 6-5 at 121.) That work included police “sting”  
22 operations involving prostitution in which clients of prostitutes engage in sexual  
23 fantasies, sometimes involving various devices. (*Id.* at 121-22.) One of those devices is  
24 a “ball gag,” which is “a device placed over your mouth so you are not able to scream or  
25 – you know, yell.” (*Id.* at 122.) Devalasco testified that, with regard to the duct tape-  
26 covered zip tie, “[t]he way it’s fashioned here, it looks like it’s kind of bigger at one end,  
27 which would probably be strapped deep into the mouth so the person cannot create any  
28 type of noise or emit any type of screams or something like that.” (*Id.*) Devalasco

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

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

16 [THE PROSECUTOR]: The entire time he’s – he – essentially the  
17 grabbing is he moves you from one area in the room and throws you on the  
18 bed; correct?

19 [EMILY]: Yes, I think he was preoccupied with that.

20 Q. And then *he gets on top of you* and he’s within six inches of your  
21 face; right?

22 A: *Yes.*

23 (*Id.* at 106.)

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

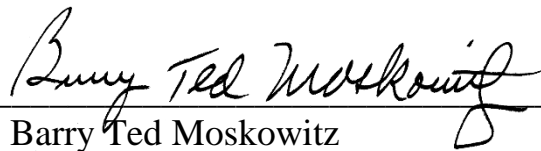
1 Given the above, there clearly was sufficient evidence to support the jury's  
2 conclusion that Terrell had the intent to rape or orally copulate Emily when he assaulted  
3 her, and therefore the state court's denial of Terrell's sufficiency of the evidence claim  
4 was neither contrary to, nor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

8 **IV. CONCLUSION**

9 For the foregoing reasons, the Court **DENIES** the petition. Rule 11 of the Rules  
10 Following 28 U.S.C. § 2254 requires the District Court to "issue or deny a certificate of  
11 appealability when it enters a final order adverse to the applicant." Rule 11, 28 U.S.C.  
12 foll. § 2254 (West Supp. 2013). A certificate of appealability will issue when the  
13 petitioner makes a "substantial showing of the denial of a constitutional right." 28 U.S.C.  
14 § 2253; *Pham v. Terhune*, 400 F.3d 740, 742 (9th Cir. 2005). A "substantial showing"  
15 requires a demonstration that "reasonable jurists would find the district court's  
16 assessment of the constitutional claims debatable or wrong." *Beatty v. Stewart*, 303 F.3d  
17 975, 984 (9th Cir. 2002), quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Here, the  
18 Court concludes Terrell has not made the required showing, and therefore a certificate of  
19 appealability is hereby **DENIED**.

20 **IT IS SO ORDERED.**

21 DATED: 10/26/18



Barry Ted Moskowitz  
Chief Judge, United States District Court