

No. 21 - _____

IN THE SUPREME COURT OF THE UNITED STATES

CHARLES DAVID GORDON,

Petitioner,

v.

JOE LIZARRAGA,
Warden, Mule Creek State Prison,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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Appendix A

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JUN 28 2021

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

CHARLES DAVID GORDON,

No. 20-15105

Petitioner-Appellant,

D.C. No. 4:12-cv-00769-PJH

v.

JOE A. LIZARRAGA, Warden, Mule Creek
State Prison,

MEMORANDUM*

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of California
Phyllis J. Hamilton, District Judge, Presiding

Argued and Submitted June 18, 2021
San Francisco, California

Before: M. SMITH and VANDYKE, Circuit Judges, and GORDON, ** District Judge.

Concurrence by Judge VANDYKE

Defendant Gordon was charged with, and convicted of, five counts in connection with her physical and sexual violence against two victims, identified as

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Andrew P. Gordon, United States District Judge for the District of Nevada, sitting by designation.

JD1 and JD2. Ms. Gordon litigated numerous post-conviction claims in California state court before filing her federal habeas petition containing twenty claims. The district court denied the petition but granted a certificate of appealability on fifteen of them. We have jurisdiction under 28 U.S.C. § 1291, and we affirm. Because the parties are familiar with the facts, we do not repeat them here except where necessary to add context to our ruling.

1. Gordon's first claim is that her pretrial statements were introduced in violation of her right to counsel under *Massiah v. United States*, 377 U.S. 201 (1964). In this case, adversarial proceedings began on April 1, 2009 when the State filed charges against Gordon. Before that date, the Sixth Amendment right to counsel had not attached, so *Massiah* does not apply to Gordon's statements elicited prior to that date. As for the statements elicited during the interrogation on April 1, 2009, Ms. Gordon waived her right to counsel when she spoke to Det. Elia after being read her *Miranda* rights. See *Montejo v. Louisiana*, 556 U.S. 778, 786 (2009).

2. Gordon next claims that the statements in her April 1, 2009 interrogation were introduced at trial in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966). However, Ms. Gordon validly waived her *Miranda* rights in spite of her alleged intoxication at the time of the interrogation. The Napa County Superior Court, in state habeas proceedings after an evidentiary hearing, found that Ms. Gordon was not intoxicated to the extent that her will was overborne. Ms. Gordon has not shown

by clear and convincing evidence that these factual findings are incorrect. *See Medeiros v. Shimoda*, 889 F.2d 819, 823 (9th Cir. 1989).

3. Third, Gordon contends that her pretrial statements were inadmissible due to outrageous government conduct. The outrageous government conduct defense justifies dismissal “only where the government’s conduct is ‘so grossly shocking and so outrageous as to violate the universal sense of justice.’” *United States v. Pedrin*, 797 F.3d 792, 795–96 (9th Cir. 2015) (quoting *United States v. Stinson*, 647 F.3d 1196, 1209 (9th Cir. 2011)). The facts surrounding Ms. Gordon’s interrogation do not satisfy this “extremely high” standard. *See id.* at 795 (quoting *United States v. Smith*, 924 F.3d 889, 897 (9th Cir. 1992)).

4. Next, Gordon argues that her letters written from jail were introduced at trial in violation of the Fifth Amendment. This claim fails because government coercion is a gateway requirement for a Fifth Amendment violation. *United States v. Kelley*, 953 F.3d 562, 565 (9th Cir. 1992). Ms. Gordon has not rebutted—by clear and convincing evidence—the correctness of the state court’s factual determinations that there was no government coercion and that the letters were written with full competence and awareness. The introduction of these letters therefore did not violate the Fifth Amendment.

5. Gordon also argues that the state habeas court contravened or unreasonably applied clearly established federal law when it held that it was constitutional to admit

evidence of Gordon's uncharged prior acts of sexual and domestic violence. But “[o]ur precedent squarely forecloses” the argument that admission of propensity evidence violates a defendant's clearly established due process rights. *Mejia v. Garcia*, 534 F.3d 1036, 1046 (9th Cir. 2008). The state court did not contravene or unreasonably apply clearly established federal law in rejecting Ms. Gordon's claim.

6. Gordon challenges the state habeas court's rejection of her ineffective assistance of trial counsel claims based on trial counsel's (1) failure to object to introduction of her pretrial statements; (2) failing to object to exclusion of impeachment evidence for testifying victims; (3) failing to conduct an adequate investigation to prepare for trial; (4) failing to litigate certain pretrial motions; and (5) failing to present the reasonable-but-mistaken consent defense. The stated objections and pretrial motions would have been futile, so counsel's performance in that regard does not satisfy the prejudice requirement for an ineffective assistance of counsel claim pursuant to *Strickland v. Washington*, 466 U.S. 668, 687 (1984). There is no clearly established federal right to introduce extrinsic evidence for impeachment purposes. *Nevada v. Jackson*, 569 U.S. 505, 511 (2013). And the numerous facts Ms. Gordon alleges trial counsel failed to unearth in investigation are not sufficient to support an ineffective assistance claim because none demonstrates Ms. Gordon's factual innocence or undermines confidence in the verdicts. *Reynoso v. Giurbino*, 462 F.3d 1099, 1112 (9th Cir. 2006). Furthermore,

Ms. Gordon's trial counsel thoroughly presented her defense of reasonable-but-mistaken belief that JD1 and JD2 consented to the sexual contact. The state court's determination was not unreasonable.

7. Gordon argues that her sentence constituted cruel and unusual punishment pursuant to the Eighth Amendment. This claim fails because Gordon supports it only with mitigation evidence, which would not have impacted the trial court's stated reasoning for the sentence it imposed. Gordon's ineffective assistance of counsel claims based on the alleged violation of the Eighth Amendment also fail accordingly.

8. Next, Gordon asserts that the state habeas court contravened or unreasonably applied clearly established federal law when it held that appellate counsel was not constitutionally ineffective for failing to challenge admitted hearsay on appeal. This claim fails because the state court held that the testimony was properly admitted under state law. “[F]ederal habeas corpus relief does not lie for errors of state law.” *Estelle v. McGuire*, 502 U.S. 62, 67 (1991) (internal quotation marks and citation omitted).

9. Gordon argues that the state court contravened or unreasonably applied clearly established federal law when it held that the State did not violate *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to disclose exculpatory evidence. The prosecution failed in its affirmative obligation to turn over a police interview of JD1.

However, we decline to vacate Ms. Gordon's conviction on *Brady* grounds because the state court's determination that the undisclosed evidence was cumulative of other evidence introduced at trial that impugned JD1's credibility and did not undermine confidence in the outcome was not contrary to or an unreasonable application of clearly established federal law. *See Shelton v. Marshall*, 796 F.3d 1075, 1089 (9th Cir. 2015), *amended on reh'g*, 806 F.3d 1011 (9th Cir. 2015).

10. Finally, Gordon claims that her trial was unconstitutional due to cumulative error. "Under traditional due process principles, cumulative error warrants habeas relief only where the errors have so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Parle v. Runnels*, 505 F.3d 922, 927 (9th Cir. 2007) (internal quotation marks omitted). Ms. Gordon's claims do not present errors that rise to this level.

The judgment of the district court is **AFFIRMED**.

FILED

Charles David Gordon v. Joe A. Lizarraga, No. 20-15105
VANDYKE, Circuit Judge, concurring:

JUN 28 2021

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

I generally agree with the majority's memorandum disposition. I write separately only to express my view that the video evidence that Gordon characterizes under the *Brady* claim as exculpatory is not. As I see it, no reasonable jury would deem the video of the interview with JD1, considered in its entirety, as exculpatory or as impeaching JD1's testimony. *See United States v. Zuno-Arce*, 44 F.3d 1420, 1426 (9th Cir. 1995), *as amended* (Feb. 13, 1995) ("This inference is too weak in this case to amount to exculpatory evidence.").

Appendix B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CHARLES DAVID GORDON,
Petitioner,
v.
JOE A. LIZARRAGA,
Respondent.

Case No. 12-cv-00769-PJH

**ORDER DENYING SECOND
AMENDED PETITION FOR WRIT OF
HABEAS CORPUS; GRANTING IN
PART AND DENYING IN PART
CERTIFICATE OF APPEALABILITY**

Before the court is the second amended petition for writ of habeas corpus ("Pet.") pursuant to 28 U.S.C. § 2254 filed by represented state prisoner Charles David Gordon. The briefs are fully submitted and the court determines that the matter is suitable for decision without oral argument. Having reviewed the parties' papers and the record, and having carefully considered the relevant legal authorities, the court DENIES the petition.

BACKGROUND

I. Factual Summary

The following summary of facts is taken from the decision by the California Court of Appeal on Gordon's direct appeal, based on evidence presented at Gordon's bench trial, which was held September 29, 2009, through October 2, 2009.

Counts 3, 4 and 5 Against Erica Doe

Victim Erica Doe (Erica [or Doe No. 2]) met and began dating appellant in October 2002, when she was 16 years old. Their relationship ended in February 2008. They lived together for most of the five years they were together. In June 2003, after living with Erica's parents in Oregon, they moved to American Canyon where they lived with appellant's parents. Appellant had "control of everything" in the

1 relationship, even insisting that Erica dress him every day. There were
2 instances of violence in the beginning of their relationship, and the
3 violence worsened over time. Erica was afraid of appellant. On numerous
4 occasions, he pushed, slapped and punched her, and threatened to “take
5 [her] out in the woods and make [her] disappear.” He also threatened her
6 with a .22-caliber rifle. As a result of the threats, she felt her life was in
7 danger. He would yell at her and call her “bitch,” “whore,” “cunt,” “stupid,”
8 and “worthless piece of crap.” He gave her a black eye, inflicted bruises,
9 bit her leg, and burned her with a cigarette. Appellant would also be
10 sexually violent toward Erica, forcing sex on her after they fought.

11 In January 2008, they had a “really bad fight.” At about 10:00 p.m.,
12 Erica was home with her friend Marlene [Maple] when appellant arrived
13 and started drinking whiskey. He appeared to be angry. Erica wanted to
14 leave with Marlene but thought this would make the situation worse.
15 When Marlene left, appellant said he was angry because Erica had been
16 “unfaithful” to him that day. He began punching her in the ribs and legs,
17 slapped her, pulled her hair, ripped out some of her hair extension braids,
18 called her a whore and told her to go into the bedroom. Despite her telling
19 him to stop, he pulled her clothes off and raped her. After he ejaculated,
20 they both lit up cigarettes. He then told her he was going to burn her with
21 his cigarette. After his first attempt, she moved away. On his second
22 attempt, he burned her thigh, causing a scarring injury.

23 Five minutes later, appellant told Erica he was going to have anal
24 sex with her to teach her a lesson. Although she begged him not to, he
25 said he was going to do it “whether [she] wanted it or not.” He then
26 penetrated her anus with his penis and she loudly screamed for him to
27 stop, hoping someone would come to her aid. He held on to her so she
28 could not pull away, stopping only after he ejaculated. He then told her to
“get [her] disgusting ass in the shower.” She felt “completely disconnected
and scared and just sick.” The next day appellant apologized to her. She
thought that calling the police would only make the situation worse.

29 After this incident, Erica confided in Marlene, and appellant’s
30 mother, Connie Gordon, found out about the incident. When Connie
31 Gordon asked Erica if it was true, Erica revealed the scar on her leg.
32 Connie Gordon told Erica to pack her belongings and drove her to meet
33 Erica’s mother, who took Erica to Oregon.

34 On December 17, 2008, Erica participated in a pretext phone call to
35 appellant that was recorded by the Medford, Oregon Police Department.
36 Erica told appellant she was feeling anxious after having been “beaten
37 and raped and burned.” Appellant told her not to “go there this time,” said
38 he had apologized and tried to make amends and would not call her any
39 more. He also said: “I know what I fucking did to you. . . . You think it
40 makes me happy? . . . I was fucking crazy. I was fucking out of my mind,

1 in a place in my life where I was absolutely fucking out of my mind, . . .
2 there's nothing I can fucking do about it now. . . . It's like yes, you were
3 victimized and . . . you were beaten and you were fucking put through hell
4 . . . yes, you were. I agree with you a hundred percent. It was wrong and
it was fucking horrible, okay?" Appellant asked Erica to call Jamie (his
current girlfriend) and "just tell her I didn't fucking rape you." Erica
responded, "But you did."

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Counts 1 and 2 Against Kelsey Doe

7 Victim Kelsey Doe [Doe No. 1], born in 1992, is appellant's niece.
8 When Kelsey was four or five years old, she visited her grandparents in
9 Oregon and she and appellant were together in a sauna. Appellant locked
her in the sauna for about 30 minutes and said he would not let her out
10 until she "gave him a blow job." She was frightened but complied, putting
her mouth on his penis. Subsequently, her grandparents came and
appellant ran out of the sauna. Kelsey first told her grandmother about the
11 incident when she was about 15 years old. The sauna incident did not
really affect Kelsey and appellant's relationship; she still considered him
one of her best friends and trusted him. As a teenager, Kelsey liked
12 spending time with appellant because he allowed her to drink alcohol and
smoke marijuana.

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On November 15, 2008, Kelsey was living with her grandparents in Fairfield and appellant was visiting from Oregon. Kelsey contacted appellant saying she wanted to see him. He asked her to "hang out" with him later that night and asked if she had any friends that he could "hook [] up with," which Kelsey understood to mean to have sex with. Appellant said he would get alcohol so they could drink when they arrived at the Napa apartment complex where he was staying. The apartment complex was managed by appellant's grandfather.

Prior to going to visit appellant, Kelsey was with two of her friends and drank a bottle of malt liquor. She got a ride to appellant's apartment complex and met him outside. She was "pretty drunk," and had trouble walking straight. He took her to a small room off the manager's office. He offered her whiskey and she drank several shots. She then felt drunk; she was dizzy, could not think straight, had trouble walking and vomited. Kelsey gave appellant her cell phone so he could call her boyfriend, Dylan, to pick her up. Appellant appeared to make the call and then told Kelsey Dylan could not pick her up. Appellant said he would get her home.

Kelsey kissed appellant on the cheek because he was one of her best friends. He then began "French kissing" her and said he had had a "crush" on her for some time. Kelsey felt "dirty and disgusting." Appellant

1 then sat down, told her to come next to him, pulled out his penis, and put it
2 next to her face, indicating he wanted a “blow job.” Kelsey complied and
3 put his penis in her mouth. Although she did not want to engage in oral
4 sex, she felt like she had no “other option,” and she was not thinking
clearly because she was drunk. Throughout the evening she would black
out and regain consciousness.

5 Appellant then kissed Kelsey again and pushed her onto the bed.
6 He said he wanted to have sex and directed her to remove her pants. She
7 said she did not want to and she was a virgin. Appellant said, “No, you’re
8 not,” and removed her shorts despite her telling him not to. He then got
9 on top of her and put his penis inside her vagina. It hurt, and when she
10 yelled for him to stop, he said he was “almost done.” Although she
11 screamed for help, he continued to penetrate her. The rape lasted
12 approximately five minutes. During it, appellant seemed very angry and
13 irritable, and Kelsey was afraid he might hurt her.

14 When appellant got off of Kelsey she felt “traumatized,” “in shock,”
15 and “betrayed.” She accused him of raping her. He grabbed a cell phone,
16 called her grandparents and told them to pick her up. While he was
17 talking to them, Kelsey was screaming into the phone that appellant had
18 raped her. He then told her to stop crying, get dressed and not tell anyone
19 about what had happened. He said if she told her grandparents (his
20 parents) or the police, he would get in trouble. When she tried to leave,
21 appellant stood in front of the door and pushed her, causing her to fall.

22 When Kelsey’s grandparents arrived, she told them appellant had
23 raped her. They did not believe her. They offered to take her to the
24 hospital, but she asked them to take her to her boyfriend’s house.
25 Although she wanted to go to the hospital, she did not trust her
26 grandparents or believe they would take her there. At some point she saw
27 a police car and opened the car door in an attempt to get the officer’s
28 attention. Her grandmother tried to restrain her and covered her mouth
when the officer approached their car. Kelsey told the officer what had
happened and he took her to the hospital.

29 At about 2:40 a.m. on November 16, 2008, Napa Police Officer
30 Russell Davis saw Kelsey’s grandparents’ SUV drive erratically and pull
31 over. When Davis approached the SUV, Kelsey’s grandfather told Davis
32 Kelsey was intoxicated and out of control, but did not mention her having
33 been possibly raped. Kelsey was crying, “hysterical,” yelling that no one
34 believed her, and her grandmother was trying to keep her from talking.
35 Kelsey told Davis she had been raped by her uncle and was in a lot of
36 pain. She appeared to be intoxicated. Davis administered a PAS test at
37 about 2:00 a.m., which revealed Kelsey’s blood alcohol level to be .143.
38 He transported her to the hospital. At the hospital Kelsey described the
39 sexual assault to Davis.

1 At the hospital, sexual assault nurse examiner Vickie Whitson
2 performed a sexual assault examination on Kelsey. Kelsey said she had
3 vaginal pain and that appellant had grabbed her arm, pulled her onto the
4 bed and used his body weight to hold her down. She said he put both
5 hands around her neck so tightly she could not speak. Kelsey said she
6 was forced to orally copulate appellant and he penetrated her vagina with
7 his penis. The examination revealed two abrasions of Kelsey's hymen,
8 consistent with blunt force trauma. Whitson opined that sexual abuse was
9 highly suspected. Vaginal swabs from Kelsey tested positive for DNA
10 matching appellant's DNA type.

11 *Prior Incidents of Domestic Violence and Sexual Abuse*

12 Jaimie M. met and began dating appellant in June 2008. On
13 September 22, 2008, she went to visit him where he was living in Oregon.
14 She ended up staying, and lived with appellant and his three roommates
15 for about two months. On November 2, they argued because appellant
16 took her paychecks and would not give them back. They also argued
17 because he had flirted with a woman whose boyfriend was supposedly
18 moving in with them. Jaimie told appellant she wanted to move back to
19 Napa and he responded by covering her mouth and saying, "What makes
20 you think you're going to get the chance to?" She perceived this as a
21 threat and was afraid. She started screaming, but his hand covered her
22 mouth and no one heard her. They were on the bed and he had his legs
23 over her so she could not move. After about three or four minutes he let
24 her go and said, "Don't tell anybody." She went into the dining room and
25 was talking to roommate Tim Grabner, when appellant called her names
26 and angrily said, "Nobody will know if you're gone." Jaimie feared for her
27 life. She grabbed a knife but Grabner told her, "Don't do that." Appellant
28 then picked her up by the throat, threw her to the ground, choked her with
his arm and said, "You're not worth it." Grabner told appellant to stop and
pulled him off Jaimie. Jaimie ran outside and another roommate called
the police.

29 Grabner testified he befriended appellant when they were in middle
30 school. In September 2008, they resumed their friendship and began
31 living together when appellant moved to Oregon. Grabner said appellant
32 controlled appellant's relationship with Jaimie. On one occasion, Grabner
33 heard Jaimie's muffled scream from inside appellant and Jaimie's
34 bedroom; there was no response when Grabner and his fiancée knocked
35 on the door. Grabner next saw appellant and Jaimie arguing in the
36 kitchen and appellant would not let her move away from the refrigerator.
37 Jaimie picked up a knife and appellant grabbed it. Appellant then
38 slammed Jaimie against the wall, held her by her throat, threw her over his
39 shoulder and they both fell to the floor. Appellant then began choking her

1 while saying, "The bitch is not worth it, and I'm just going to fucking kill
2 her." Grabner pulled appellant off Jaimie and she ran outside. Appellant
3 later told Grabner he was "not necessarily too concerned about what he
4 had done" to Jaimie. About a month later, appellant joked about the
5 incident with Jaimie after learning that Jaimie's then-boyfriend was in jail,
6 saying, "I don't understand why she dumped me . . . for a fat rapist when
7 she could have at least had a good looking one."

8 Appellant also told Grabner that Erica was a "slut and whore" and
9 he had "bent [Erica] over, raped and sodomized her," and burned her with
10 a cigarette. He was confident that Erica would never testify against him.
11 Appellant told Grabner that if his brother found out about the sexual
12 incident with Kelsey when appellant and Kelsey were much younger,
13 appellant's brother would kill him.

14 Krystal W. dated appellant for about six weeks beginning in mid-
15 February 2009. A couple of weeks later she moved in with appellant and
16 his parents. She broke up with him at the end of March because there
17 had been an increasing amount of physical intimidation. Sometimes when
18 playing with her, despite her telling him to let go, appellant would grab and
19 hold her in a way that she "would have difficulty breathing" and she "would
20 be crying." On one occasion while Krystal showed appellant her bedroom
21 at her parents' house, appellant removed his clothes, pushed her onto the
22 bed and began removing her clothes. Although she said she did not want
23 to have sex, he put on a condom, restrained her wrists and vigorously and
24 forcefully started having sexual intercourse with her against her will. He
25 then tried to convince her he had not sexually assaulted her. Thereafter,
Krystal was afraid of appellant and "too afraid to leave him."

26 Krystal described appellant's level of anger as "unhinged"; he would
27 escalate a small issue into something much larger. On one occasion,
28 appellant told Krystal's sister's boyfriend that if Krystal's sister did not want
to engage in certain sexual acts, "you should just rape her."

29 On March 22, 2009, Krystal and appellant argued while in bed. He
30 told her it would be very dangerous for her to stay in the bedroom since he
31 had "been pushed to this wild and violent edge before." At some point, he
32 left the bedroom. When he returned he said he had done some
33 reprehensible actions for which he could not forgive himself. Krystal was
34 afraid of appellant because he was yelling and throwing things. On March
35 24, she left appellant and ended the relationship. She left Napa County
36 because she was afraid appellant would attempt to find her.

37 *The Defense*

38 Charles Gilman Gordon ([Gil] Gordon), appellant's father and
39 Kelsey's grandfather and guardian, testified that on November 16, 2008,

1 when he picked up Kelsey at the apartment complex, she appeared a
2 "little agitated," said she had been assaulted, and repeatedly asked to be
3 taken to her boyfriend's home. She appeared to have been drinking. [Gil]
4 Gordon did not recall whether she said she was raped.
5

6 [Gil] Gordon received letters written by appellant from jail. One
7 letter said that "people need[ed] to lie on the stand." Another letter said,
8 "The only way I'm going to beat Erica in court is if everyone knows about
9 Erica and my S and M in one way or another. Not everyone can have the
10 same story, but everyone needs to be in the same ballpark." [Gil] Gordon
11 said he made no effort to fabricate evidence.
12

13 Connie Gordon testified that when she and [Gil] Gordon went to
14 pick Kelsey up at the apartment complex Kelsey was intoxicated. After
15 Connie Gordon told Kelsey she would not take her to her boyfriend's
16 house, Kelsey said she was sexually assaulted and raped. Connie
17 Gordon denied holding her hand over Kelsey's mouth. She also said
18 Kelsey had a very bad reputation in the family for truthfulness in the six
19 months leading to November 15, 2008. Connie Gordon testified that a
20 psychologist had said that Kelsey lies to get attention. She also said she
21 did not believe appellant raped and burned Erica.
22

23 Appellant testified he and Erica engaged in anal and vaginal
24 penetration. They both used methamphetamine and alcohol. They
25 engaged in "rough sex" and sadomasochistic sex.
26

27 Appellant described the events regarding the January 2008
28 charged incident involving Erica. That morning, before he went to work,
2 he and Erica had "passionate" sex without "the roughness and fantasies
3 and the dirty talk." When he returned home that night, the apartment
4 smelled like methamphetamine and it appeared that Erica had had sex
5 with someone else that day. Appellant felt "disillusioned" because Erica
6 was apparently not sexually satisfied by him. After Marlene left, he and
7 Erica entered the bedroom and had sex. Appellant denied slapping or
8 hitting Erica before entering the bedroom. They had rough sex but when
9 he attempted to perform anal sex, Erica "wasn't ready for it," and began
10 angrily yelling at him. Appellant got angry, lit a cigarette and as they
11 argued, put the cigarette out on her thigh. He denied ever calling her a
12 whore. Erica began to cry and appellant immediately tried to put ice on
13 her cigarette burn. Their sexual relationship ended, but they continued
14 living together until February 14 when Erica moved away.
15

16 Appellant denied choking Jaimie when they lived together in
17 Oregon. He said they argued and she attacked him with a piece of metal
18 and then a knife. In self-defense, he grabbed her hand and she dropped
19 the knife. Appellant denied telling Grabner that he raped or sodomized
20 Erica. He did tell Grabner he had burned Erica with a cigarette and
21 exposed his penis to a four-year-old when he was 11 years old. Appellant
22

1 said he had consensual sex with Krystal and never raped her, threatened
2 her, or forced her to have sex.

3 Appellant testified that on November 15, 2008, he and Kelsey made
4 plans to get together that evening. She showed up at the apartment
5 complex, sat on his lap and persistently asked him to give her alcohol. He
6 refused because she had been drinking malt liquor and he did not want
7 her to vomit after mixing malt liquor and other alcohol. They then began
8 kissing and she offered to perform oral sex if he gave her alcohol. He
9 agreed. They then resumed kissing and had consensual sex. She then
10 asked him for the alcohol and he complied and went for a walk. When he
11 returned to the apartment they both drank. Eventually, he took the bottle
12 away from her and she went to the bathroom and vomited and asked him
13 to call her boyfriend Dylan. Appellant called him, but Dylan did not have a
14 car. Appellant protested that it was too late when Kelsey said she would
15 walk to Dylan's house. When he prevented her from leaving and
16 threatened to call his parents (her grandparents), Kelsey said she would
17 tell them he raped her. Appellant then called her grandparents, who came
18 and got Kelsey.

19 Appellant admitted repeatedly lying to Detective Elia for "tactical
20 reasons." He also admitted asking family and friends to assist him in
21 fabricating a defense.

22 Dkt. 21 ("Answer"), Ex. C at 2–10 ([People v. Gordon](#), No. A126961, 2010 WL 3771284
23 (Cal. Ct. App. Sep. 29, 2010)). This factual summary by the state court of appeal of the
24 evidence presented at trial is presumed correct, and Gordon does not raise a dispute
25 over the presumptive correctness of this summary. See 28 U.S.C. § 2254(e)(1). The
26 traverse discloses that Gordon is a transgender woman and is currently undergoing a
27 male-to-female medical transition. Dkt. 33. The court herein refers to Gordon by her
28 preferred pronouns but notes for clarity that the state court record contains references to
Gordon as male.

23 **II. Procedural History**

24 **A. State Court Trial and Direct Appeal**

25 On October 2, 2009, following a bench trial in the Napa County Superior Court,
26 Gordon was convicted of two counts of rape under California Penal Code § 261(a)(2)
27 (Counts 1 and 3); oral copulation with a minor under § 288a(b)(1) (Count 2); sodomy by
28 force under § 286(c) (Count 4); and infliction of corporal injury on a cohabitant under

1 § 273.5(a)(5) (Count 5).

2 Additionally, the court found true a multiple victim allegation under California Penal
3 Code § 667.61(b) as to the rape counts. On November 4, 2009, the trial court sentenced
4 Gordon to an indeterminate term of forty-nine years and eight months to life in prison with
5 the possibility of parole.

6 On November 30, 2009, Gordon appealed to the court of appeal, which affirmed
7 her conviction on September 29, 2010. Answer, Ex. C. The California Supreme Court
8 denied review on December 15, 2010. Answer, Ex. E (People v. Gordon, No. S187212
9 (Cal. Dec. 15, 2010)).

10 **B. State Court Habeas Proceedings**

11 On November 22, 2011, Gordon filed a habeas petition with the Napa County
12 Superior Court, which dismissed the petition as untimely on December 5, 2011. On
13 January 3, 2012, Gordon filed a habeas petition with the California Court of Appeal. On
14 January 17, 2012, the California Court of Appeal denied the petition without prejudice.
15 The state appellate court noted that Gordon raised new arguments regarding the
16 timeliness of her habeas petition that were not previously presented to the Napa County
17 Superior Court, and as a result, ruled that Gordon had not exhausted her habeas remedy
18 with the Superior Court. In accordance with that order, on January 20, 2012, Gordon
19 filed an amended habeas petition with the Napa County Superior Court. On February 7,
20 2012, the superior court requested informal briefing from the parties. On April 24, 2012,
21 after considering the informal response to the amended state habeas petition and
22 Gordon's reply thereto, the superior court ordered respondent to show cause why the
23 petition should not be granted, requesting a full analysis of the merits of the claims.

24 On June 5, 2013, the Napa County Superior Court issued a tentative ruling on the
25 35 claims in Gordon's state habeas petition. See Pet. (dkt. 16), Ex. 60 (*In re Gordon*, No.
26 HC 1605 (Napa Super. Ct., June 6, 2013)). Gordon filed objections to the state court's
27 tentative findings on the habeas petition. Pet., Ex. 61. After considering the parties'
28 submissions regarding the tentative findings, the superior court ordered an evidentiary

1 hearing on four factual issues related to Gordon's April 1, 2009, interview, and adopted
2 its tentative findings in all other respects as final. Pet., Ex. 62. With respect to claim 1
3 (violation of Massiah v. United States, 377 U.S. 201 (1964)), the state court found that
4 Gordon's Massiah rights did not attach at the time of her April 1, 2009 interrogation
5 because adversarial judicial proceedings had not commenced. Pet., Ex. 60 at 3–6. With
6 respect to Gordon's Miranda claim (claim 2), the state court found that an evidentiary
7 hearing was necessary to determine whether Gordon's Miranda waiver was valid, as she
8 claimed to have been intoxicated at the time and/or coerced by the interrogator, Detective
9 Elia. Id. at 7. The state court found that "no reasonable likelihood exists that [Gordon]
10 was entitled to relief" on any of the other 33 claims, except to the extent that a few claims
11 (such as ineffective assistance of counsel for failure to raise the Miranda issue) were
12 derivative of claim 2. Id. at 8–32.

13 The superior court held a discovery hearing in the state habeas proceedings on
14 December 17, 2013. Pet., Ex. 63. On January 6 and 7, 2014, the superior court held an
15 evidentiary hearing to address: (1) whether Gordon was intoxicated during the April 1,
16 2009, interview; (2) whether Gordon asserted her Miranda rights on the drive to the police
17 department on April 1, 2009; (3) whether counsel was ineffective for failing to assert a
18 Miranda violation; and (4) whether Gordon was "coerced" by Detective Elia during the
19 April 1, 2009, interview. Pet., Ex. 64 at 7. The superior court held another hearing on
20 April 18, 2014, for argument and ruling on evidentiary issues and the remaining habeas
21 claims. Pet., Ex. 75. On July 15, 2014, the superior court issued written findings that
22 Gordon "was not intoxicated during his April 1, 2009 interview," and that Det. Elia did not
23 "coerce" Gordon into waiving her Miranda rights. Pet., Ex. 76 at 1 (In re Gordon, No. HC
24 1605 (Napa Super. Ct. July 15, 2014)). The superior court also rejected Gordon's 36th
25 claim—added by amendment on January 6, 2014, and corresponding to claim 17 in the
26 instant petition—for violations of Brady v. Maryland, 373 U.S. 83 (1963). Id. In all other
27 respects, the superior court affirmed its tentative ruling and denied the habeas petition in
28 its entirety. Id. at 2.

1 Gordon filed a petition for writ of habeas corpus in the court of appeal, which
2 denied the petition on June 24, 2015. Pet., Ex. 77 (In re Gordon, No. A142558 (Cal. Ct.
3 App. June 24, 2015)). Gordon filed an untimely petition for review and an application for
4 relief from default to file an untimely petition for review, which the California Supreme
5 Court denied on July 24, 2015. Answer, Suppl. Ex. K-87 (Letter/Order re: Appl. for Relief
6 from Default, Cal. Supreme Court Case No. S228004).

7 On July 28, 2015, Gordon filed a new petition for writ of habeas corpus in the
8 California Supreme Court, which denied the petition on the merits with respect to the
9 claims of ineffective assistance of trial counsel and appellate counsel. Pet., Ex. 79;
10 Answer, Ex. I (In re Gordon, No. S228110 (Cal. Nov. 10, 2015)).

11 **C. Federal Habeas Proceedings**

12 On February 16, 2012, while Gordon's habeas petition was pending in state court,
13 she filed a federal habeas petition raising thirty-eight claims for relief. Dkt. 1. On March
14 28, 2012, this court stayed the matter to allow Gordon to exhaust her claims in state
15 court. Dkt. 6.

16 The court lifted its stay of the instant case on December 10, 2015. Dkt. 10.
17 Gordon filed her first amended habeas petition the next day. Dkt. 11. In light of errors in
18 the first amended petition, the court granted leave to file a second amended petition on
19 May 2, 2016. Gordon filed the second amended petition on May 14, 2016. Dkt. 16. By
20 order entered November 21, 2016, the court dismissed claims 5, 6, 8, 10, and 18, and
21 dismissed claim 14 in part with respect to the alleged sentencing error under state law,
22 for failing to state a cognizable ground for federal habeas relief. The court ordered
23 respondent to show cause with respect to the remaining claims:

24 **Claim 1:** Gordon's pretrial statements—her April 1, 2009, interrogation,
25 the December 17, 2008, pretext phone call with Doe No. 2, and her
26 communications on MySpace elicited by Detective Elia—were elicited and
27 introduced in violation of her right to counsel under Massiah v. United
28 States, 377 U.S. 201 (1964).

1 **Claim 2:** The statements from Gordon's April 1, 2009, interrogation were
2 elicited and introduced in violation of Miranda v. Arizona, 384 U.S. 436
3 (1966), because Gordon did not waive her Miranda rights, the waiver was
4 coerced, and/or because Gordon was intoxicated at the time of the
5 interrogation.

6 **Claim 3:** Gordon's pretrial statements were inadmissible as the product of
7 "outrageous government conduct" amounting to a due process violation.

8 **Claim 4:** Trial counsel was ineffective in not objecting to the introduction of
9 Gordon's pretrial statements into evidence on the grounds identified in
10 claims 1–3.

11 **Claim 7:** Trial counsel was ineffective for not objecting to the trial court's
12 exclusion of evidence impeaching Doe No. 1 and Doe No. 2, as described
13 in claims 5–6, on "all available grounds," including Gordon's right to
14 confrontation.

15 **Claim 9:** Gordon's "jailhouse letters" were improperly admitted into
16 evidence at trial because they were written "involuntarily" in light of her
17 incarceration in a segregation unit, her suicidal state of mind, and the
18 antidepressant medications she was taking at the time, in violation of the
19 Fifth Amendment.

20 **Claim 11:** Trial counsel was ineffective in failing to conduct an adequate
21 factual and legal investigation to prepare Gordon's case for trial.

22 **Claim 12:** Trial counsel was ineffective in failing to litigate material issues
23 during the pretrial and in limine proceedings.

24 **Claim 13:** Trial counsel was ineffective in failing to adequately present
25 Gordon's defense of reasonable but mistaken consent on Counts I, III, and
26 IV.

27 **Claim 14 (in part):** The 49-years-to-life sentence constitutes cruel and
28 unusual punishment in violation of the Eighth Amendment.

1 **Claim 15:** Trial counsel was ineffective for not objecting to the sentence
2 on the grounds identified in claim 14.

3 **Claim 16:** Appellate counsel was ineffective in failing to raise the issues
4 identified in claims 8 and 14 on appeal.

5 **Claim 17:** Five pieces of exculpatory evidence discovered in post-
6 conviction proceedings should have been disclosed to trial counsel under
7 Brady v. Maryland, 373 U.S. 83 (1963).

8 **Claim 19:** The admission into evidence of Gordon's uncharged prior acts
9 of sexual assault and domestic violence under Cal. Evid. Code §§ 1108,
10 1109, and 1101(b) violated due process and Gordon's right to a fair trial.

11 **Claim 20:** "Cumulative error" as a result of the errors described in claims
12 1–19 amounts to a denial of due process.

13 See dkt. 18 at 6–7.

14 Respondent filed an answer to the second amended petition on March 21, 2017.
15 Dkt. 21 ("Answer"). Gordon timely filed the traverse on January 12, 2018. Dkt. 33
16 ("Traverse"). Respondent filed objections to new exhibits filed with the traverse and
17 responded to new arguments raised in the traverse. Dkt. 40. On January 30, 2018,
18 Gordon filed a request for an evidentiary hearing to which respondent filed an opposition,
19 followed by Gordon's reply. Dkts. 38, 41, 47.

20 On August 17, 2018, the court held that Exhibits 80 to 83, which were newly
21 submitted with the traverse, were offered to provide evidence of Gordon's gender
22 dysphoria in support of Claims 2, 9, 12, and 14, and that this evidentiary basis in support
23 of those claims was not fully and fairly presented to the state court. Dkt. 55. The court
24 directed Gordon to address any applicable grounds to request a stay and abeyance of
25 the mixed habeas petition to exhaust those claims. After filing a second habeas petition
26 in the California Supreme Court to present the unexhausted claims and exhibits, Gordon
27 filed a motion to stay and hold the federal habeas petition in abeyance, which the court
28 granted on October 16, 2018. Dkt. 61.

1 After briefing was submitted, the California Supreme Court denied Gordon's
2 second habeas petition with a citation to In re Miller, 17 Cal. 2d 734, 735 (1941). In re
3 Gordon, No. S251581 (Cal. Mar. 27, 2019). After Gordon filed a notice of the state
4 court's ruling on the exhaustion petition, the court reopened the federal habeas
5 proceedings and ordered additional briefing limited to the issues raised in the traverse by
6 the evidence of Gordon's gender dysphoria diagnosis and treatment in support of claims
7 2, 9, 12 and 14. Dkt. 65. Respondent filed a supplemental answer on May 24, 2019.
8 Dkt. 66 ("Suppl. Answer"). Gordon filed a supplemental traverse on September 20, 2019,
9 and respondent filed a reply to the opposition to procedural default on September 26,
10 2019. Dkts. 72 ("Suppl. Traverse"), 73 ("Suppl. Reply to Procedural Default Opp.").
11 Gordon filed a supplemental request for an evidentiary hearing, which was followed by an
12 opposition and reply. Dkts. 74, 75, 78.

13 Gordon's habeas petition and requests for evidentiary hearing are now fully
14 briefed, and the court determines that the matter is suitable for decision without oral
15 argument.

STANDARD OF REVIEW

17 Under The Antiterrorist and Effective Death Penalty Act of 1996 (“AEDPA”),
18 applicable to any federal habeas petition filed after April 1, 1996, a district court may not
19 grant a petition challenging a state conviction or sentence on the basis of a claim that
20 was reviewed on the merits in state court unless the state court’s adjudication of the
21 claim: “(1) resulted in a decision that was contrary to, or involved an unreasonable
22 application of, clearly established Federal law, as determined by the Supreme Court of
23 the United States; or (2) resulted in a decision that was based on an unreasonable
24 determination of the facts in light of the evidence presented in the State court
25 proceeding.” 28 U.S.C. § 2254(d). The first prong applies both to questions of law and to
26 mixed questions of law and fact, Williams (Terry) v. Taylor, 529 U.S. 362, 407–09,
27 (2000), while the second prong applies to decisions based on factual determinations,
28 Miller-El v. Cockrell, 537 U.S. 322, 340 (2003).

1 A state court decision is “contrary to” Supreme Court authority, that is, falls under
2 the first clause of § 2254(d)(1), only if “the state court arrives at a conclusion opposite to
3 that reached by [the Supreme] Court on a question of law or if the state court decides a
4 case differently than [the Supreme] Court has on a set of materially indistinguishable
5 facts.” Williams (Terry), 529 U.S. at 412–13. A state court decision is an “unreasonable
6 application of” Supreme Court authority, falling under the second clause of § 2254(d)(1),
7 if it correctly identifies the governing legal principle from the Supreme Court’s decisions
8 but “unreasonably applies that principle to the facts of the prisoner’s case.” Id. at 413.
9 The federal court on habeas review may not issue the writ “simply because that court
10 concludes in its independent judgment that the relevant state-court decision applied
11 clearly established federal law erroneously or incorrectly.” Id. at 411. Rather, the
12 application must be “objectively unreasonable” to support granting the writ. Id. at 409.

13 A state court’s determination that a claim lacks merit precludes federal habeas
14 relief so long as “fairminded jurists could disagree” on the correctness of the state court’s
15 decision. Harrington v. Richter, 562 U.S. 86, 101 (2011) (citing Yarborough v. Alvarado,
16 541 U.S. 652, 664 (2004)). “Evaluating whether a rule application is unreasonable
17 requires considering the rule’s specificity. The more general the rule, the more leeway
18 courts have in reaching outcomes in case-by-case determinations.” Id. “As a condition
19 for obtaining habeas corpus [relief] from a federal court, a state prisoner must show that
20 the state court’s ruling on the claim being presented in federal court was so lacking in
21 justification that there was an error well understood and comprehended in existing law
22 beyond any possibility for fairminded disagreement.” Id. at 103.

23 Under 28 U.S.C. § 2254(d)(2), a state court decision “based on a factual
24 determination will not be overturned on factual grounds unless objectively unreasonable
25 in light of the evidence presented in the state-court proceeding.” Miller-El, 537 U.S. at
26 340. Review under § 2254(d)(1) is limited to the record that was before the state court
27 that adjudicated the claim on the merits. Cullen v. Pinholster, 563 U.S. 170, 181 (2011).

1

DISCUSSION

I. Procedural Default

As an initial matter, respondent argues that Claims 1 (Massiah violation), 2 (Miranda violation), 3 (outrageous government conduct) and 9 (jailhouse letters) were denied by the court of appeal and state supreme court on procedural grounds and are procedurally defaulted. Answer at 9; Suppl. Answer at 2–4. A federal court will not review questions of federal law decided by a state court if the decision also rests on a state law ground that is independent of the federal question and adequate to support the judgment. Coleman v. Thompson, 501 U.S. 722, 729–30 (1991).

Respondent points out that the court of appeal denied the state habeas claims corresponding to Claims 1, 2, 3 and 9 of the operative federal habeas petition for failure to demonstrate that the claims were timely, failure to raise the claims on direct appeal, and failure to preserve the claims at trial under the contemporaneous objection rule. Pet., Ex. 77 (citing, *inter alia*, In re Clark, 5 Cal. 4th 750 (1993) and In re Robbins, 18 Cal. 4th 770 (1998)). The California Supreme Court silently adopted those procedural bars with respect to those claims. Pet., Ex. 79.

With respect to Claims 2 and 9, which were supplemented by new evidence and argument reflecting Gordon’s gender dysphoria, those supplemented claims were presented in Gordon’s second habeas petition to the California Supreme Court, which issued a postcard denial citing In re Miller, 17 Cal. 2d 734, 735 (1941) (per curiam). Suppl. Answer, Ex. Q. As the Ninth Circuit has recognized, the state court’s citation of In re Miller in denying a second habeas petition “signals that the Court is denying the petition for the same reasons that it denied the previous one.” Kim v. Villalobos, 799 F.2d 1317, 1319 n.1 (9th Cir. 1986). Applying Ylst v. Nunnemaker, 501 U.S. 797, 804 n.3 (1991), the court looks through the California Supreme Court’s denial of the second habeas petition to the last reasoned state court opinion, namely, the court of appeal’s June 24, 2015, decision, as the state court’s basis for denying the claims presented in the exhaustion petition. That is, the state court denied Claims 2 and 9, as supplemented

25

1 the second state habeas petition, on the grounds of untimeliness, failure to raise the
2 claims on direct appeal under In re Dixon, 41 Cal. 2d 756, 759 (1953), and the
3 contemporaneous objection rule.

4 As Gordon concedes, California's timeliness rule against substantial delay in filing
5 habeas claims, as reflected in Clark and Robbins, is both independent and adequate.
6 Traverse at 17 (citing Walker v. Martin, 562 U.S. 307 (2011)). However, Gordon asserts
7 that application of the timeliness bar was specifically inadequate in her case, reasoning
8 that the court of appeal's June 24, 2015, denial of the initial state habeas petition as
9 untimely pre-dated the new evidence submitted in the second-filed exhaustion petition
10 filed on September 26, 2018, such that California Supreme Court would have needed to
11 impose a new finding of untimeliness as to the new evidence related to her gender
12 dysphoria diagnosis. Suppl. Traverse at 3–4. In the order denying the second-filed
13 habeas petition, Suppl. Answer, Ex. Q, the California Supreme Court's citation to In re
14 Miller for the principle that "courts will not entertain habeas corpus claims that are
15 repetitive," indicates that the state court denied the supplemented claims of the second
16 habeas petition because it presented the same grounds set forth in a prior petition,
17 without disclosing "a change in the facts or the law substantially affecting the rights of the
18 petitioner." Karis v. Vasquez, 828 F. Supp. 1449, 1457 (E.D. Cal. 1993) (quoting In re
19 Miller, 17 Cal. 2d at 735). Under Ylst, this court presumes that the state supreme court
20 denied the supplemented claims presented in Gordon's second habeas petition under the
21 same procedural bars that were applied in the last reasoned decision to deny state
22 habeas relief on those claims, including the timeliness bar. 501 U.S. at 804 n.3. Gordon
23 fails to show that the state court's denial of supplemented Claims 2 and 9 as untimely
24 imposed "novel and unforeseeable requirements without fair or substantial support in
25 prior state law." Martin, 562 U.S. at 320–21 (finding "no basis for concluding that
26 California's timeliness rule operates to the particular disadvantage of petitioners asserting
27 federal rights") (citation and internal marks omitted).

1 Because the court finds that Claims 1, 2, 3, and 9 were procedurally defaulted on
2 the separate and independent ground of untimeliness, the court need not reach Gordon's
3 arguments challenging the separate procedural bars under the Dixon rule or the
4 contemporaneous objection rule. Traverse at 8–14, 14–17; Suppl. Traverse at 2–4.

5 In the alternative, Gordon argues that the procedural default is excused by cause
6 for the default and actual prejudice as a result of the alleged violation of federal law. See
7 Coleman, 501 U.S at 750. Because Gordon alleges that the failure to timely preserve
8 Claims 1, 2, 3 and 9 was caused by ineffective assistance of trial counsel, a
9 determination of whether attorney error qualifies as “cause” to excuse procedural default
10 would require determination whether there was ineffective assistance of counsel. See
11 Davila v. Davis, 137 S. Ct. 2058, 2062 (2017) (“An attorney error does not qualify as
12 ‘cause’ to excuse a procedural default unless the error amounted to constitutionally
13 ineffective assistance of counsel.”); Murray v. Carrier, 477 U.S. 478, 488 (1986). In the
14 interest of judicial efficiency, the court considers the merits of those claims to determine
15 whether the alleged ineffective assistance of counsel in failing to preserve those claims
16 resulted in actual prejudice, without setting forth a separate cause and prejudice analysis
17 on the procedural default question. See Strickler v. Greene, 527 U.S. 263, 296 (1999)
18 (requiring a reasonable probability that the conviction or sentence would have been
19 different to establish prejudice to overcome procedural default). Having considered the
20 merits of Claims 1, 2, 3, and 9 on de novo review, infra, the court finds no “reasonable
21 probability” that the outcome of the trial would have been different had those claims been
22 preserved, and determines that the alleged ineffective assistance of counsel did not
23 result in prejudice to excuse the procedural default of those claims. See Visciotti v.
24 Martel, 862 F.3d 749, 769 (9th Cir. 2016) (applying de novo standard of review to
25 ineffective assistance of counsel claims in the cause-and-prejudice context), cert. denied,
26 138 S. Ct. 1546 (2018). Accordingly, Claims 1, 2, 3, and 9 are DISMISSED as
27 procedurally defaulted. As discussed below, the court further denies Claims 1, 2, 3, and
28 9 on the merits, as a separate ground from procedural default for denying habeas relief.
27

1 **II. Claims Based on Statements Made During Investigation**

2 **A. Claim 1: Massiah Claim**

3 In Claim 1, Gordon asserts that the police officers investigating the November 15,
4 2008, rape of Doe No. 1 deliberately elicited incriminating statements without the
5 presence of counsel in violation of Massiah v. United States, 377 U.S. 201 (1964).
6 Gordon challenges the elicitation of statements that she made during a pretext phone call
7 with Doe No. 2 on December 17, 2008; statements made on MySpace to the accounts of
8 Doe No. 1 and Jaimie M. between December 2008 and March 2009; and statements
9 made during an interview at the Napa Police Department with Detective Elia on April 1,
10 2009. Pet. at 13–19.

11 The record reflects that the Napa County Superior Court considered and denied
12 Claim 1 on the merits after conducting an evidentiary hearing on factual issues related to
13 the April 1, 2009, interview. Pet., Ex. 60, 62, 76. However, the court of appeal denied
14 Claim 1 on procedural grounds and did not rule on the merits of this claim as a separate
15 and alternative ground for denial. Pet., Ex. 77. Respondent concedes that the California
16 Supreme Court silently adopted the procedural bars with respect to Claim 1 and all
17 claims presented in the state habeas petition that were denied on procedural grounds by
18 the court of appeal, other than the ineffective assistance of counsel claims which the
19 state supreme court denied on the merits. Dkt. 40 at 5. Because the state court denied
20 Claim 1 on procedural grounds, the state court's denial of this claim is not subject to
21 AEDPA's deferential standard on federal habeas review; instead, the claim is reviewed
22 de novo. Cone v. Bell ("Cone II"), 556 U.S. 449, 472 (2009); James v. Ryan, 733 F.3d
23 911, 914 (9th Cir. 2013). "Nonetheless, under AEDPA, factual determinations by the
24 state court are presumed correct and can be rebutted only by clear and convincing
25 evidence." Pirtle v. Morgan, 313 F.3d 1160, 1168 (9th Cir. 2002) (citing 28 U.S.C.
26 § 2254(e); Appel v. Horn, 250 F.3d 203, 210 (3d Cir. 2001)).

27 In support of Claim 1, Gordon alleges that she was represented by attorney Mervin
28 Lernhart in prior probation revocation proceedings in August 11, 2008. Gordon indicates 28

1 that after Detective Elia contacted her by telephone on November 17, 2008, she retained
2 Lernhart as counsel regarding the allegations that she raped Doe No. 1. Pet. at 13 and
3 Exs. 27, 37, 38, 44, 45. On November 18, 2008, Gordon met with attorney Lernhart and
4 self-surrendered before the Napa County Superior Court to “return/surrender on warrant”
5 issued August 11, 2008, for a probation violation. Pet. at 13 and Ex. 13 (Aug. 7, 2008
6 Petition to Revoke Probation, Aug. 11, 2008 Bench Warrant, and Minute Orders dated
7 Nov. 18, 2008 to Apr. 6, 2009). The superior court ordered Gordon remanded into
8 custody on November 18, 2008, and continued the probation violation matter to
9 November 25, 2008. Gordon alleges that Detective Elia arrested her at the Napa
10 Detention Center, pursuant to the “Arrest/Detention/Complaint” form signed by Detective
11 Elia on November 18, 2008, which described “PROBABLE CAUSE FOR
12 ARREST\DETENTION” based on the alleged rape of Doe No. 1. Pet. at 14 and Exs. 8
13 (Incident/Investigation Report and Supplemental Reports) and 14 (Arrest/Detention/
14 Complaint) (also submitted as Clerk’s Transcript (“CT”) at 1). On November 19, 2008, a
15 superior court judge determined there was probable cause to detain Gordon and set bail
16 at \$250,000. Traverse at 25 and Ex. 14. Gordon argues that at this point, she had been
17 formally accused of committing a felony, thereby triggering her right to counsel under
18 Massiah. Traverse at 25.

19 In Massiah, the Supreme Court held that once a criminal defendant has been
20 indicted and the right to counsel attaches, the government may not deliberately elicit
21 statements from the accused in the absence of counsel. 377 U.S. at 205–07. Under
22 well-settled Supreme Court authority, “the clear rule of Massiah is that once adversary
23 proceedings have commenced against an individual, he has a right to legal
24 representation when the government interrogates him.” Brewer v. Williams, 430 U.S.
25 387, 401 (1977). The Sixth Amendment right of the accused to assistance of counsel
26 “does not attach until a prosecution is commenced,” which, for purposes of the right to
27 counsel, is at “the initiation of adversary judicial criminal proceedings—whether by way of
28 formal charge, preliminary hearing, indictment, information, or arraignment.” Rothger 20

1 Gillespie Cty., Tex., 554 U.S. 191, 198 (2008) (citations and internal marks omitted). See
2 United States v. Percy, 250 F.3d 720, 725 (9th Cir. 2001) (“This Circuit adheres to the
3 bright-line rule that the Sixth Amendment’s right to counsel attaches upon the initiation of
4 formal charges.”) (citing United States v. Hayes, 231 F.3d 663, 675 (9th Cir. 2000) (en
5 banc)).

6 In its findings on Gordon’s Massiah claim, the superior court found that the
7 November 19, 2008, judicial determination of probable cause to detain Gordon after her
8 arrest was a non-adversarial, preliminary determination based on a police declaration,
9 similar to a pre-arrest probable cause determination for an arrest warrant. Pet., Ex. 60 at
10 6 (citing County of Riverside v. McLaughlin, 500 U.S. 44 (1991) (requiring judicial
11 determination of probable cause within 48 hours of arrest); Jones v. City of Santa
12 Monica, 382 F.3d 1052 (9th Cir. 2004) (post-arrest probable cause determination may be
13 informal and non-adversarial)). The superior court found that charges against Gordon
14 “were not filed until April 1, 2009, and Petitioner was not arraigned until the following
15 day.” Id. These factual determinations are presumed correct and Gordon does not rebut
16 the presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). Accordingly,
17 the court determines as a matter of law that Gordon’s arrest on November 18, 2008, and
18 the state court’s probable cause determination on November 19, 2008, did not initiate
19 actual criminal charges or formal adversarial proceedings to trigger the right to counsel
20 under Massiah.

21 As the record reflects, Gordon admitted to the probation violation, was sentenced
22 to 21 days in jail with credit for time served, and released from custody on December 9,
23 2008, but was not charged with the sex offenses at issue until April 1, 2009. Pet., Ex. 13.
24 Gordon argues that she was aware of the rape charges when she self-surrendered, and
25 that her right to counsel attached at the time of her arrest on November 18, 2008, and the
26 subsequent probable cause finding on November 19, 2008, because the proceedings
27 had transitioned from merely investigative to adversarial. Traverse at 26. Gordon does
28 not assert that she was arraigned or formally charged with Doe No. 1’s rape before A30

1 1, 2009, and she offers no authority for the proposition that being aware of a criminal
2 investigation at the time of arrest triggers the right to counsel under Massiah. It is well-
3 settled under Supreme Court authority that “the right to counsel does not attach until the
4 initiation of adversary judicial proceedings” and “we have never held that the right to
5 counsel attaches at the time of arrest.” United States v. Gouveia, 467 U.S. 180, 188, 190
6 (1984). Accordingly, Claim 1 is DENIED.

7 **B. Claim 2: Miranda Claim**

8 In Claim 2, Gordon asserts that her statements to Detective Elia during a recorded
9 interrogation at the Napa Police Department on April 1, 2009, were admitted at trial in
10 violation of Miranda because her waiver of Miranda rights was neither voluntary nor
11 knowing and intelligent. Gordon asserts that she was intoxicated at the time of the
12 interrogation, such that her waiver was not knowingly and intelligently made.

13 Gordon further argues that Detective Elia coerced her into talking by arresting her
14 at a probation meeting, denying her requests to make a telephone call, seeking her
15 waiver in exchange for removing her handcuffs after she complained of pain due to
16 poison oak on her wrists, telling her to speak or she was going to jail, suggesting that the
17 interrogation would be the only chance for her to tell her side of the story, promising that
18 she would be given a cigarette after the interview, calling her prior invocation of her right
19 to counsel a “moot point,” and suggesting that her lawyer would not let her testify. Pet. at
20 19–29. Gordon also argues that her untreated gender dysphoria contributed to her
21 alcohol and drug dependence. Traverse at 32–33 and Ex. 80.¹

22 Because the state court denied this claim on procedural grounds, Pet., Ex. 77, the
23 court conducts de novo review of questions of law and mixed questions of law and fact.
24 See James, 733 F.3d at 914. The factual determinations of the state court are presumed
25 correct under § 2254(e)(1).

26
27 ¹ Because Gordon has exhausted the exhibits and arguments related to her gender
28 dysphoria in state court, respondent’s objections to Exhibits 80-83 as unexhausted are
DENIED as moot. Dkt. 40 at 3. 31

1. Legal Standard

2 Miranda requires that a person subjected to custodial interrogation be advised that
3 “he has the right to remain silent, that any statement he does make may be used as
4 evidence against him, and that he has a right to the presence of an attorney.” Miranda v.
5 Arizona, 384 U.S. 436, 444 (1966). The warnings must precede any custodial
6 interrogation, which occurs whenever law enforcement officers question a person after
7 taking that person into custody or otherwise significantly deprive a person of freedom of
8 action. Id. Once properly advised of his rights, an accused may waive them voluntarily,
9 knowingly and intelligently. See Miranda, 384 U.S. at 475. The distinction between a
10 claim that a Miranda waiver was not voluntary, and a claim that such waiver was not
11 knowing and intelligent is important. Cox v. Del Papa, 542 F.3d 669, 675 (9th Cir. 2008).
12 The voluntariness component turns on the absence of police overreaching, i.e., external
13 factors, whereas the cognitive component depends upon the defendant’s mental
14 capacity. Id. Although courts often merge the two-pronged analysis, the components
15 should not be conflated. Id.

2. Knowing and Intelligent Waiver

17 In the state court habeas proceedings, the superior court held an evidentiary
18 hearing on January 6 and 7, 2014, on the factual issues whether Gordon was intoxicated
19 during the April 1, 2009, interview and whether she was coerced by Detective Elia during
20 the interview, with Gordon having withdrawn the issue whether she asserted her Miranda
21 rights on the drive to the police station. Pet., Ex. 64 at 8–9. Gordon contends that her
22 Miranda waiver, as recorded in the videotaped interview with Detective Elia, was not
23 knowing and intelligent because, due to her intoxication, she was not fully aware of “the
24 nature of the right being abandoned and the consequences of the decision to abandon it.”
25 Traverse at 37 (citing Moran v. Burbine, 475 U.S. 412, 421 (1986)). See Pet., Ex. 72 at 4
26 (transcript of recorded interview). At the evidentiary hearing, the superior court heard live
27 testimony addressing Gordon’s condition by the arresting officers, Mike Walund and
28 Brian Campagna, and the investigating detective Darlene Elia who conducted the 32

1 interview, and watched the video recording of the April 1, 2009, interview. Pet., Ex. 65 at
2 70–77 (Walund); 88, 94–100 (Campagna); 237 (playing DVD of interview); 287–94 (Elia).

3 At a hearing on April 18, 2014, the superior court announced its findings that
4 Gordon was not under the influence of alcohol during the April 1, 2009, interview “to the
5 extent that he was not aware of his surroundings, didn’t know what he was saying, and
6 didn’t understand what was being said.” Pet., Ex. 65 at 31. This factual determination by
7 the state court is presumed to be correct and Gordon fails to rebut the presumption by
8 clear and convincing evidence. 28 U.S.C. § 2254(e)(1). While Gordon asserts that her
9 gender identity issues, combined with other factors in her upbringing, contributed to
10 alcohol and drugs as a form of self-medication, Traverse, Ex. 80, the evidence linking
11 Gordon’s gender dysphoria in adolescence and adulthood with her history of substance
12 abuse is not relevant to the factual question whether she was under the influence at the
13 time of waiving her Miranda rights. Presuming the correctness of the state court’s finding
14 that Gordon was not intoxicated, and having independently reviewed the video recording
15 of the April 1, 2009, interview, the court determines that Gordon was not incapacitated
16 when she waived her Miranda rights, and that her waiver was knowing and intelligent.
17 See Medeiros v. Shimoda, 889 F.2d 819, 823 (9th Cir. 1989).

18 Gordon’s argument that the state court violated her right to due process at the
19 evidentiary hearing by denying her request to take judicial notice of a DMV handbook and
20 other hearsay evidence to establish her level of intoxication, fails to show prejudice and
21 lacks merit in light of the record showing that the state court considered evidence of
22 Gordon’s alcohol consumption and heard witness testimony addressing whether she was
23 under the influence at the time of the interview.

24 3. Voluntary Waiver

25 Gordon also argues that under the totality of the circumstances, her Miranda
26 waiver was involuntary due to Detective Elia’s coercive techniques such as misleading
27 Gordon about telling her side of the story, forcing her to suffer through tobacco
28 withdrawal, and asking Gordon to waive her Miranda rights after she asked for smok**33**a

1 cigarette and removing the handcuffs. Pet., Ex. 72 at 3–4 (“I’d be more comfortable to
2 talk to you if I had a cigarette and if I had … the cuffs off, but I’m willing to settle with the
3 cuffs off.”). Gordon further supports this claim by arguing that suffering from gender
4 dysphoria further exacerbated the psychological problems she experienced, including
5 alcohol and drug dependence. Traverse at 32–33.

6 Under clearly established Supreme Court authority, “[t]he sole concern of the Fifth
7 Amendment, on which Miranda was based, is governmental coercion.” Colorado v.
8 Connelly, 479 U.S. 157, 170 (1986) (citing United States v. Washington, 431 U.S. 181,
9 187 (1977)). Though a defendant’s mental condition may be “relevant to an individual’s
10 susceptibility to police coercion,” id. at 165, “this fact does not justify a conclusion that a
11 defendant’s mental condition, by itself and apart from its relation to official coercion,
12 should ever dispose of the inquiry into constitutional ‘voluntariness.’” Id. at 164 (citing
13 Spano v. New York, 360 U.S. 315 (1959)). Without coercive police activity, such as
14 lengthy questioning, deprivation of food or sleep, or physical threats of harm, a suspect’s
15 mental condition does not render a coherent, alert and responsive detainee’s statements
16 involuntary. United States v. Kelley, 953 F.2d 562, 565 (9th Cir. 1992) (citing Connelly,
17 479 U.S. at 164 n.1), disapproved on other grounds by United States v. Kim, 105 F.3d
18 1579, 1581 (9th Cir. 1997). In Kelley, the court held that post-arrest statements made by
19 defendant were voluntary, despite physical signs of heroin withdrawal, where he
20 remained coherent, responsive, and aware. There, the defendant was handcuffed during
21 the interrogation but was never threatened with physical harm if he failed to make a
22 statement; the interrogation lasted one hour and 20 minutes which the court determined
23 was not unduly protracted; and although the interrogation continued for approximately 30
24 minutes after the defendant began to exhibit physical signs of heroin withdrawal, he
25 remained coherent and oriented throughout this time. Kelley, 953 F.2d at 565. The court
26 considered that even the fact that the defendant was told that his cooperation would be
27 communicated to the prosecutor and judge did not rise to the level of psychological
28 coercion. Id. Under those circumstances, the court in Kelley determined that continuo³⁴

1 the interrogation was not unduly coercive. Id.

2 Similarly, Gordon's arguments that Detective Elia coerced her statement by
3 delaying removal of her handcuffs and suggesting that she would go to jail if she did not
4 give a statement do not amount to coercion. See United States v. Bautista-Avila, 6 F.3d
5 1360, 1364 (9th Cir. 1993) ("an interrogating agent's promise to inform the government
6 prosecutor about a suspect's cooperation does not render a subsequent statement
7 involuntary, even when it is accompanied by a promise to recommend leniency or by
8 speculation that cooperation will have a positive effect") (quoting United States v. Leon
9 Guerrero, 847 F.2d 1363, 1366 (9th Cir. 1988)). In light of these authorities, the court
10 determines that Detective Elia's interrogation techniques do not rise to a level of coercion
11 so offensive that it would render Gordon's Miranda waiver involuntary. "[C]oercive police
12 activity is a necessary predicate to the finding that a confession is not 'voluntary' within
13 the meaning of the Due Process Clause of the Fourteenth Amendment." Connelly, 479
14 U.S. at 167.

15 Accordingly, Claim 2 is DENIED.

16 **C. Claim 3: Outrageous Conduct**

17 In Claim 3 Gordon argues that her statements made in the pretext telephone call
18 with Doe No 2, on MySpace, and during the April 1, 2009, interview were obtained by
19 government conduct "so outrageous that due process principles would absolutely bar the
20 government from invoking judicial processes to obtain a conviction." Pet. at 31 (citing
21 United States v. Russell, 411 U.S. 423, 432 (1973) (reserving the outrageous conduct
22 question)). She contends that Detective Elia engaged in outrageous investigatory
23 conduct by obtaining her pretrial statements in violation of her Massiah and Miranda
24 rights and by leveraging Gordon's desire to speak to Doe No. 2 and the mother of her
25 aborted child. Pet. at 29–31.

26 This claim is subject to de novo review. As discussed above with respect to
27 Claims 1 and 2, Gordon's pretrial statements were not obtained in violation of Massiah or
28 Miranda. Furthermore, Gordon fails to show that any of the police conduct amounted to
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1 an “extreme case where the government’s activity is ‘outrageous’ or ‘grossly shocking.’”
2 See United States v. Smith, 538 F.2d 1359, 1361 (9th Cir. 1976) (government’s
3 involvement in having an informer participate in manufacturing illegal drugs did not
4 constitute a due process violation). Claim 3 is therefore DENIED.

5 **III. Trial Court Errors**

6 **A. Claim 9: Jailhouse Letters**

7 In Claim 9, Gordon alleges that the trial court erroneously admitted Gordon’s
8 jailhouse letters, which were written involuntarily due to her medical and mental state, in
9 violation of her rights under the Fifth and Fourteenth Amendments. Pet. at 43–45.
10 Gordon asserts that when she wrote the letters asking friends and family members to lie
11 on her behalf at trial, she was taking an antidepressant, which resulted in suicidal
12 ideations, insomnia and anxiety. She also alleges that she was suffering from
13 psychological disorders while awaiting trial and held in segregation, including alcohol
14 abuse, situational anxiety disorder, and situational depression disorder, as well as
15 delusional thoughts. Pet. at 44 and Exs. 18, 37, 39. Gordon argues that she was also
16 dealing with repressed gender identity, which contributed to her altered mental state and
17 the involuntariness and unreliability of the admissions in her jailhouse letters. Traverse at
18 56 and Exs. 80 and 83; Suppl. Traverse at 6–8. Citing Robinson v. United States, 144
19 F.2d 392, 406 (6th Cir. 1944), aff’d, 324 U.S. 282 (1945), Gordon argues that her
20 jailhouse letters amounted to “involuntary confessions of guilt” and were therefore
21 inadmissible and unreliable. Traverse at 57.

22 The admission of evidence is not subject to federal habeas review unless a
23 specific constitutional guarantee is violated or the error is of such magnitude that the
24 result is a denial of the fundamentally fair trial guaranteed by due process. See Henry v.
25 Kernan, 197 F.3d 1021, 1029–30 (9th Cir. 1999); Colley v. Sumner, 784 F.2d 984, 990
26 (9th Cir. 1986). The Supreme Court “has not yet made a clear ruling that admission of
27 irrelevant or overtly prejudicial evidence constitutes a due process violation sufficient to
28 warrant issuance of the writ.” Holley v. Yarborough, 568 F.3d 1091, 1101 (9th Cir. 2008)

1 (finding that trial court's admission of irrelevant pornographic materials was
2 "fundamentally unfair" under Ninth Circuit precedent but not contrary to, or an
3 unreasonable application of, clearly established Supreme Court precedent under
4 § 2254(d)). The due process inquiry in federal habeas review is whether the admission
5 of evidence was arbitrary or so prejudicial that it rendered the trial fundamentally unfair.
6 Walters v. Maass, 45 F.3d 1355, 1357 (9th Cir. 1995); Colley, 784 F.2d at 990.

7 The court of appeal denied Claim 9 on procedural grounds and did not reach the
8 merits of this claim. Accordingly, this claim is reviewed de novo, and the factual
9 determinations of the state court are presumed correct under § 2254(e)(1). The state
10 court found that Gordon's letters were not produced as a result of any law enforcement
11 effort, and that "there is ample, indeed incontrovertible, evidence that the letters were
12 purposefully written with full competence and awareness of their contents, as shown by
13 the letters themselves and Petitioner's testimony regarding the letters." Pet., Ex. 60 at 19
14 (citing RT 1641–57). The trial transcript demonstrates that Gordon testified about why
15 she asked people to lie for her in court. See RT 1642 ("Because at the time of these
16 letters, I was in fear for my life, sir. And I felt that times were desperate, and that
17 desperate measures were called for."). The record demonstrates, as the Sixth Circuit
18 found in Robinson, that "[t]he letters were written without the slightest duress or
19 constraint [and] were wholly voluntary." 144 F.2d at 406. Gordon cites no controlling
20 circuit authority or clearly established Supreme Court authority finding prejudicial error in
21 the admission of a petitioner's spontaneous, unelicited statements that she later asserts
22 to have been written under duress or involuntarily, even in view of Gordon's allegations of
23 a compromised mental state. Traverse at 56–58. See Oregon v. Elstad, 470 U.S. 298,
24 312 (1985) ("This Court has never held that the psychological impact of voluntary
25 disclosure of a guilty secret qualifies as state compulsion or compromises the
26 voluntariness of a subsequent informed waiver."). Accordingly, Claim 9 is DENIED.

27 **B. Claim 19: Uncharged Prior Acts**

28 In Claim 19, Gordon alleges that the admission of evidence of prior, uncharge
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1 sex offenses involving Doe No. 1 and Krystal W., and domestic violence incidents
2 involving Jaimie M. and Krystal W., violated her rights to due process and a fair trial
3 under the Fifth and Fourteenth Amendments. Pet. at 78–85. She argues that the state
4 evidentiary rules permitting the admission of prior bad acts to show propensity violates
5 her clearly established right to due process. Traverse at 98 (citing Patterson v. New
6 York, 432 U.S. 197, 201–02 (1977) (state law governing criminal procedures “is not

7 subject to proscription under the Due Process Clause unless ‘it offends some principle of

8 justice so rooted in the traditions and conscience of our people as to be ranked as

9 fundamental”)).

10 The last reasoned state court decision to address the merits of this due process
11 claim is the opinion of the court of appeal, rejecting Gordon’s argument on direct appeal
12 that admission of this evidence pursuant to California Evidence Code §§ 1108, 1109 and
13 1101 violated due process.² Answer, Ex. C, slip op. at 12–14 (Cal. Ct. App. Sept. 29,
14 2010) (citing People v. Lewis, 46 Cal. 4th 1255, 1288–89 (2009) and People v. Falsetta,
15 21 Cal. 4th 903 (1999)) and Ex. E (Cal. Dec. 15, 2010) (denying petition for review). The
16 state court denial of this claim was not contrary to, or an unreasonable application of,

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18 ² Gordon did not assert this due process claim in the state habeas proceedings, but
19 the court notes that the superior court addressed a related habeas claim asserting trial
20 error in admitting testimony from Gil Gordon about Gordon’s prior molestation of Doe No.
21 1 when she was 5 years old, presented as Claim 10 in the state habeas petition before
22 the superior court. This claim did not challenge the testimony as propensity evidence in
23 her state court habeas petition, but rather asserted trial error in admitting Gil Gordon’s
24 testimony for presuming facts that were not in evidence without requiring the prosecutor
25 to establish the supporting facts. Pet., Ex. 61 at 28; Answer, Suppl. Ex. K-49 (amended
26 habeas petition filed in superior court). The superior court denied the claim of trial error
27 and held that the trial court “carefully limited the purpose of this testimony, ruling that it
28 was not received for its truth, but to show Jane Doe #1’s father’s state of mind, and to
explain why Mr. Gordon had asked Jane Doe #1 about the molest” Pet., Ex. 60 at
11-12 (citing RT 1467, 1483). Because the superior court’s order denying the state court
habeas petition did not adjudicate the merits of the due process challenge presented in
Claim 19, the court looks to the decision of the court of appeal as the last reasoned state
court decision to adjudicate the merits of this due process claim. See Greene v. Lambert,
288 F.3d 1081, 1086-87 (9th Cir. 2002).

1 clearly established federal law.

2 As respondent correctly points out, the Ninth Circuit has recognized that the
3 Supreme Court expressly reserved the question in Estelle v. McGuire, 502 U.S. 62, 75
4 n.5 (1991), “whether a state law would violate the Due Process Clause if it permitted the
5 use of ‘prior crimes’ evidence to show propensity to commit a charged crime.” Mejia v.
6 Garcia, 534 F.3d 1036, 1046 (9th Cir. 2008) (citing Alberni v. McDaniel, 458 F.3d 860,
7 866 (9th Cir. 2006)). In Mejia, the Ninth Circuit upheld the denial of a claim for habeas
8 relief asserting that admission of evidence of the petitioner’s prior uncharged sexual
9 offenses against his daughter at his jury trial for sexual offenses and other crimes
10 violated due process. The court in Mejia found “no Supreme Court precedent
11 establishing that admission of propensity evidence, as here, to lend credibility to a sex
12 victim’s allegations, and thus indisputably relevant to the crimes charged, is
13 unconstitutional,” and further held that the state court’s decision that the propensity
14 evidence introduced against the petitioner did not violate his due process was not an
15 unreasonable application of general due process principles. Mejia, 534 F.3d at 1046–47.
16 See also Larson v. Palmateer, 515 F.3d 1057, 1066 (9th Cir. 2008) (no clearly
17 established due process right against admission of prior crimes to show propensity). In
18 light of this circuit authority holding that admission of propensity evidence is not contrary
19 to, or an unreasonable application of, clearly established law, controlling precedent
20 “squarely forecloses” Gordon’s claim that admission of prior uncharged offenses as
21 propensity evidence violated her right to due process. Mejia, 534 F.3d at 1046.
22 Accordingly, Claim 19 is DENIED.

23 **IV. Ineffective Assistance of Trial Counsel Claims**

24 Gordon asserts several ineffective assistance of trial counsel claims: Claim 4,
25 which is related to the errors asserted in Claims 1–3, and Claims 7, 11, 12 and 13.
26 Claims 15 and 16 asserting ineffective assistance of trial counsel and appellate counsel,
27 respectively, concerning constitutional challenges to her sentence, as alleged in Claim
28 14, are discussed in Section V, below. Gordon suggests that, in reviewing her ineffectiveness
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1 assistance claims, this court must disregard the factual findings of the superior court in
2 denying the state habeas petition, and instead must assume the factual allegations of her
3 habeas petition to be true because the California Supreme Court assumed the truth of
4 these assertions in summarily denying the claims of ineffective assistance of counsel.
5 Traverse at 51, 63 (citing Pinholster, 563 U.S. at 182).

6 AEDPA requires a district court to presume correct any determination of a factual
7 issue made by a state court unless the petitioner rebuts the presumption of correctness
8 by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); Miller-El, 537 U.S. at 340.
9 Federal habeas law employs a presumption to “look through” a silent state higher court
10 opinion to the reasoned opinion of a lower court in order to determine the reasons for the
11 higher court’s decision. Wilson v. Sellers, 138 S. Ct. 1188, 1193, 1197 (2018). Gordon
12 offers no authority recognizing that the factual allegations in a habeas petition are entitled
13 to deference over the factual findings made by the state court. The court looks through
14 the California Supreme Court’s denial of the ineffective assistance claims to the order of
15 the Napa County Superior Court as the last-reasoned state court decision to address the
16 merits of the ineffective assistance claims. Pet., Exs. 60, 76, 79.

17 Because the California Supreme Court denied Gordon’s claims of ineffective
18 assistance of trial counsel and ineffective assistance of appellate counsel on the merits,
19 including Claim 12 as supplemented by the newly exhausted evidence of gender
20 dysphoria, the court applies AEDPA’s deferential standard on federal habeas review of
21 the state court’s denial of the ineffective assistance of counsel claims. Richter, 562 U.S.
22 at 103 (“if the state court denies the claim on the merits, the claim is barred in federal
23 court unless one of the exceptions to § 2254(d) set out in §§ 2254(d)(1) and (2) applies”).
24 See Pet., Ex. 79 (Cal. Supreme Court order denying state habeas petition on the merits
25 with respect to ineffective assistance of counsel claims); Suppl., Answer Ex. Q (Cal.
26 Supreme Court order denying second habeas petition under In re Miller). Clearly
27 established Supreme Court authority disposes of Gordon’s contention that her ineffective
28 assistance of counsel and other habeas claims that were summarily denied on the m
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1 by the state court are subject to de novo review. Traverse at 20–24. See Richter, 562
2 U.S. at 96, 100 (where the California Supreme Court issued “a one-sentence summary
3 order” denying Strickland claims, “this Court now holds and reconfirms that § 2254(d)
4 does not require a state court to give reasons before its decision can be deemed to have
5 been ‘adjudicated on the merits’”).

6 **A. Claim 4: Ineffective Assistance of Counsel**

7 In Claim 4, Gordon claims that trial counsel was ineffective in failing to object to
8 the admission of Gordon’s pretrial statements. As the state supreme court issued a
9 postcard denial on the merits of the claims of ineffective assistance of counsel, including
10 Claim 4, and the court of appeal denied Claims 1 through 4 on procedural grounds, the
11 court looks to the findings and conclusions of the Napa County Superior Court as the last
12 reasoned decision for review of the state court’s denial of Claim 4. See Ylst, 501 U.S. at
13 801–06; Shackleford v. Hubbard, 234 F.3d 1072, 1079 n.2 (9th Cir. 2000). Gordon fails
14 to demonstrate that the state court’s denial of Claim 4 was contrary to, or involved an
15 unreasonable application of, clearly established federal law. 28 U.S.C. § 2254(d)(1).

16 A claim of ineffective assistance of counsel is cognizable as a claim of denial of
17 the Sixth Amendment right to counsel, which guarantees not only assistance, but
18 effective assistance, of counsel. Strickland v. Washington, 466 U.S. 668, 686 (1984).
19 The benchmark for judging any claim of ineffectiveness must be whether counsel’s
20 conduct so undermined the proper functioning of the adversarial process that the trial
21 cannot be relied upon as having produced a just result. Id.

22 In order to prevail on a Sixth Amendment ineffectiveness of trial counsel claim, a
23 petitioner must establish two things. First, he must establish that trial counsel’s
24 performance was deficient, i.e., that it fell below an “objective standard of
25 reasonableness” under prevailing professional norms. Strickland, 466 U.S. at 687–88.
26 Second, he must establish that he was prejudiced by trial counsel’s deficient
27 performance, i.e., that “there is a reasonable probability that, but for counsel’s
28 unprofessional errors, the result of the proceeding would have been different.” Id. at 691.

1 A reasonable probability is a probability sufficient to undermine confidence in the
2 outcome. *Id.*

3 Gordon contends that trial counsel was ineffective in failing to object to the
4 introduction of Gordon's pretrial statements under Massiah, and in failing to object to the
5 introduction of the interrogation statement under Miranda, as well as on the grounds of
6 outrageous government conduct. Pet. at 31–34. As the underlying Claims 1, 2 and 3
7 lack merit, Gordon fails to show either that trial counsel's performance fell below an
8 objective standard of reasonableness, or that counsel's errors caused prejudice.
9 Accordingly, the decision of the state court was not contrary to, or an unreasonable
10 application of, clearly established federal law. Claim 4 is DENIED.

11 **B. Claim 7: Ineffective Assistance of Counsel for Failing to Object to
12 Exclusion of Impeachment Evidence**

13 In Claim 7, Gordon contends that she was denied effective assistance of trial
14 counsel due to trial counsel's failure to object to the exclusion of exculpatory evidence on
15 the grounds that the exclusion violated Gordon's right to confront witnesses against her
16 and to have compulsory process for obtaining witnesses in her favor. Pet. at 41–42
17 (incorporating allegations and arguments raised in Claims 5 and 6).

18 In Claim 7, Gordon contends that trial counsel should have objected to exclusion
19 of evidence that should have been admitted to impeach Doe No. 1 and Doe No. 2, as
20 summarized below. This ineffective assistance claim incorporates the allegations that
21 impeachment evidence was improperly excluded as set forth in Claims 5 and 6, which
22 sought habeas relief based on trial court error in violation of state law and were
23 dismissed in the order to show cause. Dkt. 18.

24 (a) Connie Gordon's testimony, about specific instances in her personal
25 experience with Doe No. 1's truthfulness or lack of truthfulness, was excluded
26 pursuant to California Evidence Code § 1103 as reputation evidence against a
27 victim of sexual assault, RT 1507–08. Gordon contends that Mrs. Gordon, her
28 mother, would have testified about (i) Doe No. 1's diversion and probation stat42

1 which would show that Doe No. 1 was motivated to fabricate that she was raped to
2 avoid punishment for violating her diversion contract and probation by being
3 intoxicated, alone in Gordon's presence, and out past her curfew; (ii) Mrs.
4 Gordon's conversation with Doe No. 1 about her prior sexual activity, which would
5 impeach Doe No. 1's testimony, RT 882 and 885, and statements during the
6 investigation that she was a virgin at the time of the rape; (iii) specific incidents of
7 Doe No. 1's dishonesty which would have revealed that she consistently lied to the
8 Gordons, police officers and school counselors, which was probative of Doe No.
9 1's truthfulness. Pet. at 34–38.

10 (b) Gordon's testimony, that Doe No. 1 was "partying a lot" around the
11 time of the rape, was excluded for lack of personal knowledge, RT 1585. Gordon
12 contends that she knew that Doe No. 1 used drugs based on her observations and
13 Doe No. 1's statements to her about getting drunk and using drugs, which would
14 show that Doe No. 1 had a motive to lie to avoid punishment for violating the terms
15 of her diversion contract and probation. Pet. at 36 and Exs. 4, 38. Gordon also
16 argues that evidence that Doe No. 1 was using drugs and alcohol would
17 undermine her testimony because she was intoxicated at the time of the alleged
18 rape. Pet. at 38.

19 (c) Doe No. 2 was not cross-examined about using methamphetamine
20 while she and Gordon made a pornographic video a year before the alleged rape
21 because the trial court precluded additional questioning about the video recording
22 pursuant to California Evidence Code § 782, which governs evidence of sexual
23 conduct offered to attack the credibility of the complaining witness. RT 617, 809–
24 12. Gordon argues that trial counsel should have objected to the exclusion of this
25 evidence which would have impeached Doe No. 2's testimony denying that she
26 had a drug or alcohol problem at the time of the rape, that she smoked
27 methamphetamine on the night of the rape, or that taking methamphetamine ever
28 made her "loopy" from staying awake for "several days in a row, which I never
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1 because I didn't do it all the time." Pet. at 38–42; RT 620, 624–28, 834.

2 (d) Connie Gordon was not permitted to testify that Doe No. 2 was
3 addicted to methamphetamine, marijuana, and alcohol for years prior to and after
4 the alleged rape; when Mrs. Gordon testified that she did not ask Doe No. 2
5 whether Gordon raped her because Doe No. 2 used drugs, the trial court asked
6 Mrs. Gordon to clarify whether she meant that it wouldn't have mattered what Doe
7 No. 2 said because she wouldn't have believed Doe No. 2 anyway, and Mrs.
8 Gordon testified, "I felt she was in an altered state, yes, that I probably would not
9 have taken everything she said as fact." RT 1515–18. Contrary to Gordon's
10 argument, the record does not reflect that the trial court prohibited Mrs. Gordon
11 from testifying about Doe No. 2's drug use. RT 1516 ("I'll let you finish the answer,
12 but don't forget to tell him in the end of this, tie it altogether and say why you didn't
13 ask if it was true that day."). Gordon argues that trial counsel should have argued
14 that exclusion of the impeachment evidence against Doe No. 2 violated her rights
15 to confront witnesses against her and to compulsory process of witnesses in her
16 favor, and that Gordon was prejudiced by the exclusion of evidence that would
17 have challenged Doe No. 2's credibility, given the trial court's finding that Doe No.
18 2 "was one of the most believable witnesses I've ever seen, period." RT 1699.

19 The state court denied this ineffective assistance claim, presented as Claim 19 in
20 the state habeas petition before the superior court, after determining that there was no
21 error or prejudice due to the trial court's exclusion of the impeachment evidence. Pet.,
22 Ex. 60 at 12–16. Gordon argues that trial counsel was ineffective by failing to argue that
23 the excluded evidence was material because it challenged the victims' credibility,
24 established their motives to lie, and proved that Gordon reasonably believed that both
25 victims consented to having sex. The Supreme Court "has never held that the
26 Confrontation Clause entitles a criminal defendant to introduce extrinsic evidence for
27 impeachment purposes." Nevada v. Jackson, 569 U.S. 505, 512 (2013). Gordon fails to
28 show that trial counsel's performance fell below an objective standard of reasonable
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1 where trial counsel attempted to introduce evidence and the trial court ruled that the
2 evidence was inadmissible. “[A] failure to introduce evidence that is clearly inadmissible
3 cannot be prejudicial, because there is no chance that the jury ever would have heard
4 that evidence.” Cannedy v. Adams, 706 F.3d 1148, 1163 (9th Cir.), amended on denial
5 of reh’q, 733 F.3d 794 (9th Cir. 2013).

6 Further, Gordon fails to show that the failure to object to the exclusion of this
7 evidence was prejudicial, where other evidence at trial established the victims’ drug and
8 alcohol use to impeach their testimony denying drug or alcohol use. See Plascencia v.
9 Alameda, 467 F.3d 1190, 1201–02 (9th Cir. 2006) (exclusion of cross-examination that
10 would have provided cumulative or repetitive evidence did not violate Confrontation
11 Clause or was harmless error). In particular, Doe No. 2 admitted to using
12 methamphetamine “once in a blue moon,” and her friend Marlene Maple testified that she
13 and Doe No. 2 used methamphetamine on the day of the rape. RT 620, 1416. As found
14 by the superior court, Doe No. 1 testified at trial that she had been drinking the night she
15 was raped and the trial court had evidence that she was in fact intoxicated based on her
16 blood alcohol level. Pet., Ex. 60 at 16 (citing RT 898, 1318). With respect to Gordon’s
17 argument that Doe No. 1 had a motive to lie about being raped in order to avoid
18 consequences for violating her diversion contract and probation, the state court held that
19 “cutting school and lying about it is not connected logically to lying about being raped, nor
20 is a false report of rape shown to be Jane Doe #1’s habit on account of trying to cover up
21 her truancy and her other adolescent misbehaviors.” Pet., Ex. 60 at 14. In light of the
22 record, the state court reasonably determined that Gordon was not denied effective
23 assistance of trial counsel for failure to object to the exclusion of evidence to impeach
24 Doe No. 1 and Doe No. 2. Claim 7 is therefore DENIED.

25 **C. Claim 11: Failure to Investigate**

26 In Claim 11, Gordon asserts that trial counsel was ineffective in not conducting an
27 adequate factual and legal investigation of exculpatory and mitigating issues, particularly
28 in support of her defense that she had a mistaken but reasonable belief that Doe No. 45

1 and Doe No. 2 consented. Gordon also argues that trial counsel should have met with
2 her pretrial and developed a meaningful attorney-client relationship. Pet. at 46–52. The
3 state supreme court issued a postcard denial of this habeas claim on the merits. Answer,
4 Ex. I. In the last reasoned state court decision to address the merits of this ineffective
5 assistance claim, the superior court determined that there was no basis to find that trial
6 counsel failed to investigate the case on any of the grounds asserted by Gordon, as
7 discussed below. Pet., Ex. 60 at 20–23.

8 A defense attorney has a general duty to make reasonable investigations or to
9 make a reasonable decision that makes particular investigations unnecessary.
10 Strickland, 466 U.S. at 691. See Hinton v. Alabama, 571 U.S. 263, 274 (2014) (per
11 curiam). Strickland directs that “a particular decision not to investigate must be directly
12 assessed for reasonableness in all the circumstances, applying a heavy measure of
13 deference to counsel’s judgments.” Silva v. Woodford, 279 F.3d 825, 836 (9th Cir. 2002)
14 (quoting Strickland, 466 U.S. at 691). Counsel need not pursue an investigation that
15 would be fruitless or might be harmful to the defense. Richter, 562 U.S. at 108. In light
16 of the evidence before the state court, the state court denial of habeas relief for
17 ineffective assistance of counsel for failure to investigate was not unreasonable.

18 (1) Gordon contends that trial counsel failed to develop a meaningful attorney-
19 client relationship, having met with her twice, at most, before trial, failing to keep her
20 apprised of the legal proceedings, attempting to get Gordon to plead guilty, and failing to
21 communicate significant details about her case. Traverse at 59–60. The state court’s
22 denial of habeas relief on this ground was reasonable, Pet., Ex. 60 at 20, as the Sixth
23 Amendment does not guarantee a “meaningful relationship” between an accused and her
24 counsel. Morris v. Slappy, 461 U.S. 1, 13–14 (1983); see Plumlee v. Masto, 512 F.3d
25 1204, 1210–11 (9th Cir. 2008) (en banc).

26 (2) Gordon contends that trial counsel failed to develop and present evidence
27 that Gordon had a reasonable but mistaken belief that Doe No. 1 and Doe No. 2
28 consented to having sex as a defense to the rape and sodomy by force charges in **46**

1 Counts 1, 3 and 4. Traverse at 60–61. The state court denied this claim after finding that
2 trial counsel indeed argued that Gordon believed that she had consent, and that trial
3 counsel asked Gordon questions during direct examination to support the defense theory
4 that she believed the victims consented to having sex with her. Pet., Ex. 60 at 21 (citing
5 RT 1560, 1685, 1691).

6 The state court record reflects that trial counsel argued in closing that, with respect
7 to the charge of forcible rape of Doe No. 1, the evidence did not prove “beyond a
8 reasonable doubt that the defendant didn’t believe he had consent,” in light of evidence
9 that there was an act of unsolicited oral copulation before intercourse, that there were no
10 external injuries or torn clothing, and that Doe No. 1’s credibility was impeached based
11 on her “reputation for untruthfulness,” her inconsistent statements including prior
12 testimony under oath, and her “motive for accusing the defendant of rape.” RT 1681–
13 1686, 1691–92. With respect to the sex offenses against Doe No. 2, trial counsel argued
14 in closing that “the defendant had no reason to believe that the sex that he had with Doe
15 No. 2 was non-consensual, until he attempted to have anal intercourse with her;” that
16 Doe No. 2 was not credible given the evidence refuting her testimony that she did not use
17 methamphetamine on the day of the incident and showing that she had a motive to lie;
18 and that she and Gordon had a history of rough sex between the two of them. RT 1690–
19 91. Based on this record, the state court reasonably determined that trial counsel did not
20 fail to adequately investigate and present the defense that Gordon reasonably but
21 mistakenly believed she had consent.

22 (3) Gordon argues that trial counsel failed to investigate certain aspects of the
23 prosecution’s case regarding Doe No. 2.

24 (a) Gordon contends that trial counsel failed to investigate the extent of
25 Marlene Maple’s methamphetamine use and dealing, though Gordon
26 acknowledges that Maple testified on direct examination that she used
27 methamphetamine with Doe No. 2 on the day of the crime, and that trial counsel
28 elicited on cross-examination that Maple provided Doe No. 2 with

1 methamphetamine. Gordon argues that trial counsel should have investigated
2 Maple's drug dealing to impeach her testimony denying that she ever charged Doe
3 No. 2 for the drugs or that she used methamphetamine with anyone else around
4 the time of the rape. Traverse at 61–62 (citing RT 1422–23). Gordon argues that
5 Maple testified that Doe No. 2 discussed the alleged crime days after it occurred,
6 and that evidence of Maple's involvement in drug sales would have undermined
7 her credibility and "put doubts in the jury's mind about her candor during her
8 testimony," although this case was tried before a judge. Traverse at 62. The state
9 court found "no apparent connection between lying that a victim reported that she
10 had been raped, and supplying the victim with drugs," and noted that Maple's drug
11 use was disclosed during her testimony. Pet., Ex. 60 at 21. In light of the record
12 before the state court, the state court reasonably determined that there was no
13 basis to find that trial counsel did not investigate and present evidence of Maple's
14 "use and supply of methamphetamine to undermine her credibility, nor that the trial
15 court was uninformed of this." Id.

16 (b) Gordon argues that trial counsel failed to investigate and present
17 testimony by Zach McClusky that Doe No. 2 used methamphetamine on the day of
18 the alleged rape to impeach Doe No. 2, who the trial court found to be "one of the
19 most believable witnesses I've ever seen, period." Traverse at 62–63 (citing RT
20 1699). Gordon contends that trial counsel never learned what McClusky would
21 have said, and that this failure to locate and approach the witness was deficient
22 and prejudicial. The state court held that there was no failure to investigate and
23 use the information about Doe No. 2's drug use, after determining that there was
24 "no dispute that McCluskey and Jane Doe #2 had sex the day of the rape. This
25 information would have added more force to the Petitioner's motive to rape Jane
26 Doe #2. Also, Maples [sic] testified that Jane Doe #2 had used methamphetamine
27 on the day of the rape." Pet., Ex. 60 at 22. The duty to investigate and prepare a
28 defense does not require that every conceivable witness be interviewed. 48

Hendricks v. Calderon, 70 F.3d 1032, 1040 (9th Cir. 1995). In light of the record indicating that Maple's testimony established that Doe No. 2 used drugs on the day of the rape, the state court denial of habeas relief for failure to investigate and call McClusky to testify about Doe No. 2's drug use was not unreasonable.

(c) Gordon contends that trial counsel rendered ineffective assistance by failing to investigate and present evidence of Doe No. 2's sexual practices with Gordon and other men. Pet. at 47–48 and Ex. 38. In the last reasoned state court decision to address the merits of this claim, the superior court found, “In fact, at trial there was significant testimony as to rough sex with Jane Doe #2. [RT 1545–48.] It is clear that Petitioner’s attorney did investigate and utilize this aspect of Petitioner’s defense. There was no limitation on Petitioner’s opportunity to discuss this with his lawyer, and the transcript makes it clear that Petitioner did understand the possible defense of this type of sex on the charges against him.” Pet., Ex. 60 at 22. In light of the evidence before the state court, the state court reasonably denied habeas relief on this ground.

(d) Gordon argues that trial counsel failed to investigate Doe No. 2's inconsistent statements about the sequence of the alleged rape and sodomy, to determine if the acts occurred on separate occasions within the meaning of Cal. Penal Code § 667.6, and failed to investigate evidence to show Doe No. 2's knowledge that Gordon was represented by counsel, the extent of information provided about the case by Detective Elia, statements Doe No. 2 made to Detective Elia about the alleged crimes, and Doe No. 2's statements to Gordon that she was sorry for talking to police and would remit her statements. Pet. at 47–48. Gordon fails to show how trial counsel was deficient in any of these areas of investigation and how any deficient performance in lacking this investigation was prejudicial in light of the evidence presented in the state court proceedings, particularly Gordon's own admissions about the sexual activity between herself and Doe No. 2 on the day in question. RT 1558–61. The last reasoned state 49

court decision on the merits of Gordon's claim that trial counsel failed to investigate Doe No. 2's initial reluctance to press charges, presented as Claim 25(6)(d) in the habeas petition before the superior court, found no evidence to support Gordon's speculative argument that there was "misconduct by the prosecutor that somehow induced Jane Doe [No. 2] to confabulate her testimony." Pet., Ex. 60 at 22. The state court denial of this claim was not unreasonable.

(4) Gordon contends that trial counsel failed to investigate impeachment evidence against Doe No. 1 and other aspects of the prosecution's case involving Doe No. 1:

(a) Gordon argues that trial counsel failed to contact Victor Rodriguez and Kayla Chromer to investigate Doe No. 1's prior sexual activity, her whereabouts prior to the crime, and her intoxication before arriving at the Bristol apartments where Gordon was staying on the night of the crimes. Pet. at 48. Gordon contends that this evidence would have demonstrated Doe No. 1's lack of credibility, but as the state court found, the trial court had ample evidence of Doe No. 1's intoxication on the night of the rape. Pet., Ex. 60 at 22–23 (citing RT 872, 917). The duty to investigate and prepare a defense does not require that every conceivable witness be interviewed. Hendricks, 70 F.3d at 1040. This claim fails to establish that counsel's performance was deficient or prejudicial.

(b) Gordon argues that trial counsel failed to investigate Dylan Palmer, Doe No. 1's boyfriend, whom Gordon called on the night of the alleged rape. Gordon contends that trial counsel should have investigated Palmer's statements to Detective Elia that on the night of the rape, Gordon asked Palmer to pick up Doe No. 1, that Palmer told Gordon he could not pick her up and did not want her to walk to his house because she was drunk and on probation, and that he did not hear Doe No. 1 yelling in the background. Gordon contends that these facts would have impeached Doe No. 1 by demonstrating that she was on probation, violated her probation on the night of the alleged rape, and gave a statement to police. 50

1 did not match Palmer's recollection or her testimony at trial. Pet. at 48–49 and
2 Exs. 8, 10; Traverse at 65–66; RT 874–75. As further discussed in part (c) below,
3 the state court reasonably found that Doe No. 1's diversion contract could not
4 have influenced the trial court's evaluation of Doe No. 1's credibility, particularly in
5 light of the trial court's acknowledgement that Doe No. 1 had credibility problems.
6 RT at 1697–98. Gordon withdraws the argument that Doe No. 1 claimed to be
7 yelling in the background when Gordon called Palmer. Traverse at 66.

8 (c) Gordon contends that trial counsel should have investigated Doe No.
9 1's truancies from school in violation of the terms of her diversion contract and
10 probation, and the court order to terminate Mr. and Mrs. Gordon's guardianship of
11 Doe No. 1, noting their allegations that Doe No. 1 violated her diversion contract
12 with law enforcement. Pet. at 48–49 and Exs. 3, 24. Gordon also alleges that trial
13 counsel was ineffective for not investigating Doe No. 1's MySpace
14 communications where she told Doe No. 2 that she was using drugs, which
15 violated her probation, and where Doe No. 2 admitted that after she left Gordon,
16 she was partying, smoking weed and drinking. Pet. at 50.

17 The state court rejected this claim after finding that “[t]here was no question
18 during the trial that Jane Doe #1 was under the influence,” and that the trial court
19 “could have had no doubt as to this,” given that she admitted being drunk on both
20 direct and cross-examination. Pet., Ex. 60 at 22–23 (citing RT 872, 917). In his
21 June 12, 2012, declaration, trial counsel explained that he “did not see any point in
22 stressing Jane Doe #1's intoxication, if any, because in my view it would have
23 aggravated defendant's conduct, and opened the door to evidence of a violation of
24 Penal Code Section 261(a)(3).” Answer, Ex. J (“Lernhart Decl.”) ¶ 22. The state
25 court also found that Doe No. 1's “diversion contract could have not had any
26 influence on the court's evaluation of Jane Doe #1's credibility, as counsel
27 determined,” noting that trial counsel did have this contract. Pet., Ex. 60 at 22–23.
28 See Lernhart Decl. ¶ 13.

1 To the extent that Gordon argues that the victims' MySpace
2 communications would have demonstrated Doe No. 2's drug use, such evidence,
3 even if relevant, would have been cumulative in light of the state court's finding
4 that the evidence showed that Doe No. 2 used drugs on the day of the rape. Pet.,
5 Ex. 60 at 22. See Lernhart Decl. ¶ 25. In light of the evidence presented in the
6 state court proceeding, Gordon fails to show that trial counsel's performance was
7 either deficient or prejudicial, and the state court's denial of this claim was not
8 unreasonable. Siripongs v. Calderon, 133 F.3d 732, 734 (9th Cir. 1998) ("Where
9 the attorney has consciously decided not to conduct further investigation because
10 of reasonable tactical evaluations, the attorney's performance is not
11 constitutionally deficient.").

12 (d) Gordon argues that trial counsel failed to investigate Doe No. 1's
13 blood alcohol content and establish her motive to lie about being raped to avoid
14 punishment for violating the conditions of diversion contract and probation. Pet. at
15 49–50 and Exs. 5, 46; Traverse at 67. Though Gordon concedes that evidence of
16 Doe No. 1's intoxication was admitted at trial, she argues that the digital test
17 results showing Doe No. 1's blood alcohol content to be 0.14 percent on
18 November 16, 2008, Pet., Ex. 9, would have corroborated evidence that Doe No. 1
19 was intoxicated and demonstrated it graphically. Traverse at 67. As discussed in
20 part (c) immediately above, the state court determined that evidence of Doe No.
21 1's intoxication was before the trial court, and that violation of the diversion
22 contract would not have influenced the trial court's credibility determination. Pet.,
23 Ex. 60 at 22–23. The record reflects that the evidence of Doe No. 1's intoxication
24 was presented at trial, including her own admissions, the testimony of the officer
25 who took her to the hospital, and testimony about her blood alcohol level from PAS
26 test results, RT 868, 872–75, 879–81, 1317–18, 1407–09, and that trial counsel's
27 closing argument challenged Doe No. 1's credibility, including her motive to
28 accuse Gordon of rape so as to avoid living with her grandparents whose rule⁵²

she did not want to follow, RT 1691–92. In light of the state court record, Gordon fails to show that trial counsel’s performance fell below an objective standard of reasonableness or was prejudicial, and the state court’s denial of this claim was not unreasonable.

(e) Gordon contends that trial counsel failed to investigate and present evidence of Doe No. 1's prior inconsistent statements to Detective Elia and Sexual Assault Victim Advocate Judy Durham after the rape. Pet. at 50. Specifically, Gordon argues that Doe No. 1 stated during the police interview that she did not object to having sex with Gordon for over five minutes, which contradicted her trial testimony that she immediately told Gordon that she did not want to have sex, and that Gordon told Palmer that Doe No. 1 would not go to his house that night, which contradicted Doe No. 1's testimony that Gordon called Palmer to see if she could get a ride to Palmer's house. Traverse at 67–68 (citing RT 874, 882 and Pet., Ex. 8, 11). The state court record reflects that many inconsistencies in Doe No. 1's prior statements were presented at trial; in particular, trial counsel questioned Doe No. 1 on cross-examination about other prior inconsistent factual statements, such as whether she walked or got a ride to the Bristol apartments, and about her conduct with Gordon on the night of the rape. RT 902–05, 908–923. The trial court even found that Doe No. 1 "is capable of lying and has lied in the past." RT 1697. The state court's denial of this claim was not unreasonable in light of the state court record, which shows that Doe No. 1's additional inconsistent statements, which Gordon argues should have been raised by trial counsel on cross-examination, would have been cumulative impeachment evidence.

24 (f) Gordon argues that trial counsel failed to investigate Doe No. 1's
25 inconsistent statements about the assault to the Sexual Assault Response Team
26 ("SART") nurse, Vickie Whitson, during her SART exam and to Detective Elia.
27 Pet. at 49 and Exs. 7, 8, 11. Gordon contends that trial counsel should have
28 investigated and introduced these inconsistent statements to impeach Doe No. 53

1 but as discussed in part (e) above, trial counsel focused on Doe No. 1's other
2 inconsistent statements to impeach her. The record reflects that Detective Elia
3 herself noted Doe No. 1's inconsistencies in her report of Doe No. 1's interview,
4 which pointed out that “[a]fter speaking with her for several minutes, the victim
5 changed her story about what had happened.” Pet., Ex. 8 at 0048.

6 Gordon also claims that trial counsel failed to retain his own sexual assault
7 expert to investigate the SART examination of Doe No. 1, the forensic report and
8 the SART photos. Pet. at 49. Trial counsel stated that he “did not think there was
9 an issue as to whether or not defendant had sexual intercourse with Jane Doe #1
10 because he had admitted that he had such intercourse on several occasions, and
11 so testified during the course of the trial;” and that he was not concerned with DNA
12 evidence or “evidence of forcible rape because Jane Doe #1 had previously
13 testified under oath that she did not object to the intercourse until after intercourse
14 was occurring and she told him to stop.” Lernhart Decl. ¶ 15. Gordon has not
15 demonstrated how another expert would have assisted the defense or reached a
16 different conclusion than the SART nurse, RT 1362–68. See Bible v. Ryan, 571
17 F.3d 860, 871 (9th Cir. 2009) (speculation about what further investigation and
18 testing may have shown is not sufficient to establish prejudice). Upon review of
19 the state court record, the court determines that Gordon has not demonstrated
20 either that trial counsel’s performance was objectively unreasonable or that any
21 deficient performance caused prejudice.

22 (g) Gordon contends that trial counsel failed to investigate and present
23 evidence that Mrs. Gordon was not subject to criminal liability for a crime against
24 public justice, which Gordon argues would have rehabilitated her credibility after
25 Officer Davis testified that Mrs. Gordon held her hand over Doe No. 1’s mouth
26 when she told him that she had been raped. Pet. at 49–50 and Ex. 28. Gordon
27 contends that trial counsel should have investigated the district attorney’s decision
28 that Mrs. Gordon was not criminally liable to support her credibility and impeach. 54

Officer Davis after the prosecution discredited Mrs. Gordon when she did not recall covering Doe No. 1's mouth. Traverse at 69 (citing RT 1313–15, 1522–23). Gordon points to no evidence in the record that the prosecutor suggested Mrs. Gordon would be criminally liable for covering Doe No. 1's mouth, where the trial transcript reflects that he argued that she was untruthful in testifying that she was merely trying to hold Doe No. 1 in the car. RT 1692. Gordon does not demonstrate the relevance or probative value of the district attorney's subsequent determination, that Mrs. Gordon was not criminally liable, to the trial court's credibility determination between Officer Davis and Mrs. Gordon's accounts. Upon review of the state record, the court determines that the state court's denial of this claim was not unreasonable where Gordon has not shown either deficient performance or prejudice.

13 (h) Gordon argues that trial counsel failed to investigate Timothy
14 Grabner's prior misdemeanor convictions to impeach his credibility, though
15 Gordon acknowledges that Grabner's felony burglary conviction was introduced at
16 trial. Traverse at 70–71 and Ex. 36. The state court addressed this argument in
17 the context of Claim 17 alleging a Brady violation and the related ineffective
18 assistance argument in Claim 12 asserting discovery failures, finding that
19 Grabner's misdemeanor convictions did not involve moral turpitude and would not
20 have affected the trial court's credibility determination or the outcome of the case.
21 Pet., Ex. 75 at 20–24. In light of the evidence in the record, the state court
22 reasonably denied this ineffective assistance claim.

23 (5) Gordon contends that trial counsel was ineffective for failing to investigate
24 evidence to support her Massiah and Miranda claims.

25 (a) Gordon contends that trial counsel failed to investigate audio
26 recordings of her jailhouse calls, to establish that she retained counsel and
27 invoked her right to counsel in November 2008, in support of her Massiah claim
28 that her statements made after her arrest were inadmissible. Pet. at 50–51 and 55

1 Exs. 16, 21. As more fully set forth in the discussion of Claim 1, above, Gordon's
2 right to counsel under Massiah attached when formal proceedings were initiated
3 on April 1, 2009. Trial counsel's performance was not deficient for failure to
4 investigate Gordon's jailhouse calls more than four months earlier.

5 (b) Gordon argues that trial counsel failed to investigate and discover
6 evidence of audio recordings of her arrest by Napa police officers indicating that
7 she smelled like alcohol and that she admitted to drinking alcohol prior to her
8 interrogation, which she contends would establish that her interrogation
9 statements were involuntary. As discussed more fully with respect to the Brady
10 violations alleged in Claim 17, below, the state court reasonably found that the
11 evidence relating to Gordon's arrest was not material under Brady on the question
12 whether she was intoxicated during her interrogation because the trial court had a
13 video recording of the actual interview with Detective Elia. Pet., Ex. 75 at 25–29.
14 Even if counsel unreasonably failed to investigate this evidence, any such attorney
15 error was not prejudicial. See United States v. Olsen, 704 F.3d 1172, 1187–1188
16 (9th Cir. 2013) (if withheld evidence is not material under Brady, its absence
17 likewise will not support an ineffective assistance of counsel claim).
18 The state court denial of this claim for ineffective assistance of trial counsel was neither
19 contrary to, nor an unreasonable application of, clearly established federal law.
20 Accordingly, Claim 11 is DENIED.

21 **D. Claim 12: Litigation of Pretrial Issues**

22 In Claim 12, Gordon claims that trial counsel was ineffective for failing to litigate
23 material issues prior to trial. Pet. at 52–57. To determine whether the state court
24 decision denying this claim involved an unreasonable application of clearly established
25 federal law, the court looks to the order of the superior court as the last reasoned state
26 court decision to address the merits of this claim. Pet., Ex. 60 at 23–26 and Ex. 76
27 (adopting the factual findings).

28 (1) Gordon alleges that trial counsel failed to file oppositions to motions in **56**

1 limine filed by the prosecution:

2 (a) to voir dire the jury about sexual assault;
3 (b) to accommodate a child witness;
4 (c) to exclude witnesses from the courtroom except Detective Elia;
5 (d) to refer to the victims as Doe No. 1 and Doe No. 2;
6 (e) to introduce expert testimony concerning child sexual abuse
7 accommodation syndrome;
8 (f) to introduce expert testimony concerning rape trauma syndrome;
9 (g) to introduce other sexual deviant acts by Gordon; and
10 (h) to introduce other incidents of domestic violence by Gordon.

11 Pet. at 52. The state court denied this claim, presented as Claim 26 in the habeas
12 petition before the superior court, after determining that (a) Gordon waived a jury trial,
13 obviating the need to respond to the motions directed to a jury trial; (b) state law permits
14 the presence of a support person and it was “inconceivable that the court was somehow
15 influenced by a support person sitting next to Jane Doe #1;” (c) it is a universal practice in
16 criminal trials for the investigating officer to remain in court and there was no showing of,
17 or basis to find, prejudice; (d)–(f) there was no basis to find that these routine motions
18 had any unfair effect on the trial; (g)–(h) without specifically addressing sexual deviant
19 acts, prior uncharged incidents of sexual offenses and domestic violence may be
20 introduced under California Evidence Code §§ 1108 and 1109, which contain “explicit
21 exceptions to the limitations of Ev. C. 101 regarding introduction of predisposition
22 evidence in sex crimes.” Pet., Ex. 60 at 23–24. The state court noted that trial counsel
23 acted reasonably by requesting that Gordon’s prior, uncharged acts be excluded, and
24 that the evidence was admitted after the trial court weighed the issues under Cal. Evid.
25 Code § 352. Pet., Ex. 60 at 24 (citing RT 526–29). The state court’s denial of Gordon’s
26 claim that trial counsel was ineffective for failing to oppose these pretrial motions was not
27 an unreasonable application of clearly established federal law. See Hebner v. McGrath,
28 543 F.3d 1133, 1137 (9th Cir. 2008) (finding counsel’s failure to object to admission 57

1 defendant's prior sexual misconduct as propensity evidence not ineffective where
2 evidence would have been admitted in any event to show common plan or intent).

3 (2) Gordon alleges that trial counsel failed to object to the victims' contact with
4 advocate Judy Durham during trial on constitutional grounds. Though Gordon concedes
5 that trial counsel objected to Durham's interaction with Doe No. 1 and the trial court
6 admonished them, she argues that trial counsel failed to seek a mistrial based on a
7 mistaken belief that there was no basis for mistrial since this was a court trial not jury trial.
8 Traverse at 73–76. See RT 944–45. The state court found that Durham explained on
9 the record “that her conversation with Jane Doe #1 was simply to define ‘sustained,’” and
10 found “no evidence that Durham coached, advised, investigated or inappropriately
11 communicated with any witness or victim.” Pet., Ex. 60 at 26. In light of the evidence
12 presented in state court, the denial of this claim did not involve an unreasonable
13 application of clearly established federal law.

14 (3) Gordon contends that trial counsel was ineffective in failing to move to
15 sever the charges involving Doe No. 1 and Doe No. 2 based on material differences in
16 the alleged crimes and the inflammatory nature of the charges. Pet. at 53, 55.
17 Acknowledging that “severance would have limited the District Attorney’s opportunity to
18 argue that two victims made the crimes worse and required greater punishment,” the
19 state court noted that this case was tried before a judge, dispelling the concern of undue
20 prejudice, and that there was no “lack of strength of the prosecution’s case” that made
21 the joinder unlawfully prejudicial. Pet., Ex. 60 at 24–25. The denial of this claim by the
22 state court was not objectively unreasonable.

23 (4) Gordon argues that trial counsel failed to object to introduction of Gordon’s
24 jailhouse letters on the ground they were not authenticated and were involuntary because
25 Gordon was in isolation, using Elavil, and had suicidal ideations, as also alleged in
26 support of Claim 9. Pet. at 53, 55. Gordon further relies on newly exhausted evidence of
27 gender dysphoria in further support of the argument that Gordon’s altered mental state
28 rendered the admissions in the jailhouse letters unreliable and involuntary. Traverse 58

1 72–73. The court has considered this argument in support of Claim 9, above, including
2 evidence of Gordon’s struggles with gender identity, and found no due process error in
3 the admission of these letters as involuntary or unreliable, in light of Gordon’s own trial
4 testimony addressing the letters. RT 1641–57.

5 The state court denied this ineffective assistance claim by referring to the denial of
6 Claim 9 asserting trial error in the admission of these letters. Pet., Ex. 60 at 20.
7 Addressing the merits of the argument that the jailhouse letters were involuntary and
8 unreliable due to severe mental affliction caused by medication and alcohol withdrawal,
9 the state court determined, “Since the letters were not produced as a result of any law
10 enforcement effort, there is no basis for exclusion as involuntary statements.” Pet., Ex.
11 60 at 19. Under settled authority that “trial counsel cannot have been ineffective for
12 failing to raise a meritless objection,” see Juan H. v. Allen, 408 F.3d 1262, 1273 (9th Cir.
13 2005), the state court’s denial of the ineffective assistance claim was not objectively
14 unreasonable.

15 (5) Gordon alleges that trial counsel was ineffective in failing to move to
16 suppress Gordon’s post-arrest interrogation statements, MySpace communications,
17 pretext telephone call, and jailhouse letters. Pet. at 56. With respect to Gordon’s pretrial
18 statements, this Strickland claim is duplicative of Claim 4, which was reasonably denied
19 by the state court. With respect to Gordon’s jailhouse letters, Gordon has failed to show
20 that the letters were improperly admitted in violation of due process as alleged in Claim 9,
21 and the state court’s denial of the related ineffective assistance claim was not objectively
22 unreasonable. See Juan H., 408 F.3d at 1273.

23 (6) Gordon alleges that trial counsel failed to move to exclude the uncharged
24 bad acts involving domestic violence and uncharged sexual misconduct. Pet. at 53, 56.
25 Gordon argues that trial counsel should have requested a pretrial hearing to demonstrate
26 that the alleged bad acts did not prove that she committed any criminal offenses.
27 Traverse at 76–77. The state habeas court noted the court of appeal’s decision which
28 determined that trial counsel challenged the admissibility of Gordon’s prior acts of ~~see~~ 59

1 misconduct and domestic violence through in limine motions and at trial. Answer, Ex. C
2 at 16. The court of appeal held that the trial court acted within its discretion in admitting
3 evidence of the prior sex offenses and domestic violence, finding that “at the in limine
4 hearing, the [trial] court did expressly articulate a lengthy Evidence Code section 352
5 analysis” and concluded there was no basis to exclude the evidence of the prior acts.
6 Answer, Ex. C at 16–18. In denying the ineffective assistance claim, the state habeas
7 court held that trial counsel acted reasonably by requesting that Gordon’s prior,
8 uncharged acts be excluded, and that the evidence was admitted after the trial court
9 weighed the issues under Cal. Evid. Code § 352. Pet., Ex. 60 at 24 (citing RT 526–29).
10 To the extent that Gordon claims that trial counsel was ineffective for failing to object on
11 due process grounds, as argued in Claim 19, trial counsel’s performance did not fall
12 below an objective standard of reasonableness as there is no clearly established due
13 process right against the admission of prior crimes to show propensity. In view of the
14 state court record, the state court’s denial of the ineffective assistance claim was not
15 objectively unreasonable.

16 (7) Gordon alleges that trial counsel was ineffective by failing to move to admit
17 evidence demonstrating that Gordon’s character was good and non-violent. Pet. at 54.
18 The state court denied this claim on the ground that “[t]rial counsel would have known of
19 evidence showing Petitioner’s negative character that would be introduced by the District
20 Attorney in response to any introduction of evidence showing Petitioner’s good
21 character.” Pet., Ex. 60 at 25. See Lernhart Decl. ¶ 23. As trial counsel made a
22 reasonable tactical decision not to introduce Gordon’s character evidence, the state court
23 reasonably denied this claim. See Gulbrandson v. Ryan, 738 F.3d 976, 989 (9th Cir.
24 2013) (citing Bell v. Cone (“Cone I”), 535 U.S. 685, 700 (2002) (per curiam)).

25 (8) Gordon argues that trial counsel failed to move to admit evidence
26 impeaching Doe No. 1 and Doe No. 2, such as evidence of the victims’ use of drugs to
27 impeach their credibility and to establish their habits of lying and using drugs. Pet. at 54–
28 56. Gordon argues that evidence of the victims’ sexual history should have been 60

1 admitted to impeach Doe No. 1's statements about being a virgin when Gordon sexually
2 assaulted her and to impeach Doe No. 2 about her sexual practices with other men.
3 Traverse at 77. As discussed above with respect to Claim 11 asserting trial counsel's
4 failure to investigate evidence of the victims' drug and alcohol use and their prior sexual
5 conduct to impeach Doe No. 1 and Doe No. 2, the state court's denial of this claim was
6 not objectively unreasonable. Pet., Ex. 60 at 25–26.

7 (9) Gordon argues that trial counsel failed to discover and introduce material
8 evidence of audio or video recordings of Gordon's arrest, Doe No. 1's interview, and
9 Dylan Palmer's interview; digital results of Doe No. 1's blood alcohol content; and
10 Timothy Grabner's criminal history. Pet. at 53–54, 56 and Exs. 67, 11, 10, 9, 36
11 (respectively). Gordon fails to show that trial counsel was ineffective for the reasons
12 discussed above with respect to the allegations in Claim 11 of trial counsel's failure to
13 investigate this evidence, and for the reasons discussed as to Gordon's failure to
14 establish the materiality of this evidence under Brady in support of Claim 17, below. See
15 Olsen, 704 F.3d at 1187 ("Brady materiality and Strickland prejudice are the same")
16 (citations and internal marks omitted). Accordingly, Gordon fails to demonstrate that
17 counsel's failure to discover and produce this material was prejudicial under Strickland.
18 The state court's denial of this ineffective assistance claim was not objectively
19 unreasonable.

20 Accordingly, Claim 12 is DENIED.

21 **E. Claim 13: Defense of Reasonable but Mistaken Belief of Consent**

22 In Claim 13, Gordon alleges that trial counsel was ineffective on several grounds
23 in his presentation of Gordon's defense of reasonable but mistaken belief of consent as
24 to Counts 1 (forcible rape of Doe No. 1), 3 (forcible rape of Doe No. 2) and 4 (sodomy by
25 use of force). Pet. at 57–62. The last reasoned state court decision to address the
26 merits of this claim is the order of the superior court issuing findings of fact, which were
27 adopted in the order denying Gordon's habeas corpus petition. Pet., Exs. 60, 76.

28 (1) Gordon argues that trial counsel failed to introduce evidence to rebut the 61

1 prosecution's case in chief by impeaching the victims' credibility and demonstrating the
2 investigating detective's bias. Gordon reiterates allegations asserted in support of Claims
3 1 through 4, challenging the admission of Gordon's pretrial statements, and Claims 11
4 and 12, concerning trial counsel's failure to introduce evidence of the following:

- 5 (a) Doe No. 1's use of drugs and alcohol, to impeach her credibility
6 based on violating her probation and rebutting the prosecution's argument that
7 Gordon took advantage of her intoxication;
- 8 (b) prior contact among Detective Elia, Doe No. 1 and Gordon to show
9 that Gordon did not take advantage of Doe No. 1 and that Detective Elia was
10 biased;
- 11 (c) Doe No. 1 was not a virgin, to impeach her credibility about telling
12 Gordon that she was a virgin to object to having sex;
- 13 (d) Gordon's relationship with Doe No. 2 was not abusive to rebut the
14 prosecution's argument that Doe No. 2 did not report the rape because she was
15 under duress from the abusive relationship;
- 16 (e) Gordon's open relationship with Doe No. 2 who routinely slept with
17 other men and was having an affair with Marlene Maple's son, Chris Yoder, to
18 refute the prosecution's argument that Gordon's motive for assaulting Doe No. 2
19 was to punish her infidelity and to show Maple's bias against Gordon;
- 20 (f) Doe No. 2's drug use to impeach her testimony that she did not have
21 a drug problem and was not high at the time of the rape.

22 Pet. at 57–68. In light of the state court record, including trial testimony and cross-
23 examination challenging the credibility of the victims and other witnesses, Gordon fails to
24 demonstrate that the state court denial of habeas relief on these grounds was objectively
25 unreasonable. Pet., Ex. 60 at 26–29. With respect to the particular allegation that trial
26 counsel failed to introduce specific evidence to show Maple's bias against Gordon, any
27 such error was not prejudicial in light of the state court record showing that trial counsel
28 elicited on Maple's cross-examination that she had "animosity or bad feelings" toward

1 Gordon. RT 1423.

2 In addition to these alleged errors by trial counsel, Gordon also argues that trial
3 counsel failed to introduce evidence challenging the prosecution's case in chief that
4 would (i) challenge evidence of Gordon's alleged bad acts; (ii) impeach Maple and
5 Timothy Grabner as well as the victims; (iii) undermine testimony about Doe No. 1's
6 SART exam; (iv) undermine the reliability of Gordon's pretrial statements; (v) establish
7 the outrageousness of Detective Elia's investigation; (vi) establish that Detective Elia's
8 investigation tainted the victims' testimony; (vii) establish Gordon's good and non-violent
9 character; (viii) establish with testimony from neighborhood witnesses that they did not
10 hear screaming on the night of the rapes. Pet. at 60. In light of the evidence in the state
11 court record, the state court's determination that Gordon failed to show deficient
12 performance and prejudice from these alleged errors did not involve an unreasonable
13 application of clearly established federal law. Pet., Ex. 60 at 27–29. In particular, trial
14 counsel's performance was not deficient for failing to call neighbors to testify that they did
15 not hear screaming where defense counsel elicited testimony by Detective Elia that she
16 investigated whether anyone heard unusual sounds coming from the Elm Street address
17 the night of the alleged assault on Doe No. 2, and that she did not locate any disturbance
18 calls that were reported around the relevant time frame. 13 RT 1399. See Bashor v.
19 Risley, 730 F.2d 1228, 1241 (9th Cir. 1984) (tactical decisions are not ineffective
20 assistance even if in hindsight better tactics were available).

21 (2) Gordon argues that trial counsel should have argued and presented
22 credible evidence to support a defense that Gordon was not guilty of Counts 1, 3 and 4
23 because she reasonably but mistakenly believed that Doe No. 1 and Doe No. 2
24 consented to having sex. Pet. at 61. In particular, Gordon argues that trial counsel failed
25 to investigate and present the following evidence to corroborate Gordon's testimony that
26 she believed that Doe No. 1 and Doe No. 2 consented to the sexual encounters, and to
27 show that her belief was reasonable: Doe No. 2's sexual practice with Gordon after
28 having sex with other men and her sex video with Gordon; Doe No. 1's failure to object
63

1 having sex with Gordon initially; Gordon's intoxication on the nights of both rapes. Pet. at
2 58–59. Gordon also argues that trial counsel failed to inform her of the elements of her
3 defense and prepare other defense witnesses for testimony. Pet. at 59.

4 As Gordon concedes, she admitted to Count 2, oral copulation with a minor
5 without force, and Count 5, battery on a cohabitant. Traverse at 82; Answer at 41. See
6 10 RT 595–97; 14 RT 1561; 15 RT 1603–05, 1623. Gordon also admitted the sexual
7 activity with Doe No. 1 and Doe No. 2, but denied rape, testifying that Doe No. 1 was
8 drunk and agreed to have sex if Gordon gave her more alcohol and that Doe No. 2
9 enjoyed aggressive sex and had a sadomasochistic sexual relationship with Gordon.
10 Answer at 41. See 14 RT 1545–47, 1557; 15 RT 1601–07, 1666–67. The state court
11 found not only that trial counsel presented the defense of reasonable but mistaken belief
12 in consent, Pet., Ex. 60 at 21, but also that trial counsel's presentation of the reasonable
13 but mistaken belief of consent was restricted by Gordon's insistence of actual,
14 unmistakable consent, "disregarding trial counsel's advice that it was best that he limit his
15 testimony, but Petitioner was 'adamant on telling the judge why he did what he did' [i.e.
16 that he had gotten actual consent]." Pet., Ex. 60 at 27 (citing Lernhart declaration at p.4).
17 In the face of the victims' testimony regarding the absence of consent, which was subject
18 to impeachment as shown in the record, Gordon's sworn testimony claiming the
19 existence of actual, unmistakable consent was not credible, as the trial court found that
20 "the defendant, of course, is his own worst enemy." RT 1697. In denying this claim, the
21 state court held that "[t]rial counsel was not ineffective for presenting the version of
22 events that his client insisted on, and asking questions and making arguments to show
23 reasonable belief in consent (contrary to Petitioner's insistence otherwise) rather than
24 attempting to direct his client to present another version." Pet., Ex. 60 at 27. The state
25 court's denial of this claim was not unreasonable.

26 (3) With respect to other evidence to support the defense of reasonable but
27 mistaken belief of consent, Gordon makes the following arguments in support of her
28 claim that trial counsel provided ineffective assistance by failing to introduce material

1 evidence that was in his possession. Pet. at 59–60. In the absence of a reasoned state
2 court decision addressing the merits of this claim, the court conducts an independent
3 review of the record to determine whether the state court’s decision was an objectively
4 unreasonable application of clearly established federal law. Plascencia, 467 F.3d at
5 1198.

6 (a) Gordon argues that trial counsel failed to introduce photographs of
7 the Bristol Townhouse Apartments taken by Detective Elia that would have
8 contradicted Doe No. 1’s testimony that she was forced to give petitioner a blowjob
9 in a chair in the apartment, whereas the photographs do not show a chair in the
10 room where Doe No. 1 was raped. Traverse at 80 (citing Exs. 8 and 12; 11 RT
11 877–78). Even assuming that counsel unreasonably failed to introduce these
12 photos to impeach Doe No. 1, Gordon fails to show a reasonable probability that,
13 but for counsel’s unprofessional errors, the result of the proceeding would have
14 been different in light of the state court record, showing that trial counsel
15 impeached Doe No. 1 on cross-examination with her inconsistent accounts of the
16 oral copulation and other events the night she was raped. See RT 919–23, 930–
17 31. The trial court noted Doe No. 1’s credibility problems, but considered all the
18 evidence and found Gordon guilty of forcible rape. RT 1697–98. Gordon has not
19 shown a reasonable probability that, absent the alleged error, the trial court would
20 have had a reasonable doubt respecting guilt.

21 (b) Gordon argues that trial counsel failed to introduce a memorandum
22 from Vincent Ghiringhelli, an investigator, to attorney Mervin Lernhart, reporting
23 that during a phone interview with Gordon’s mother, Connie Gordon, she stated
24 that Doe No. 1 called her on May 30, 2009, berated her over the phone, and said
25 that Gordon “was going to ‘go to prison forever.’” Pet. at 59 and Ex. 31. Gordon
26 argues that this written memorandum should have been introduced and that trial
27 counsel should have examined Doe No. 1 and Mrs. Gordon about the incident to
28 establish that Doe No. 1 was motivated to testify falsely against Gordon. Traverse
65

1 at 80. In light of the evidence in the state court record that Doe No. 1 had
2 problems when she was living with her grandparents, see RT 1498, 1506–08,
3 1525, and that the trial court expressly noted Doe No. 1’s credibility problems, RT
4 1697–98, Gordon has not shown a reasonable probability that, absent the alleged
5 error, the trial court would have had a reasonable doubt respecting guilt.

6 (c) Gordon contends that trial counsel failed to cross-examine Doe No. 2
7 about her use of methamphetamine while making a sex video with Gordon, after
8 Gordon wrote a note to trial counsel stating that “during porn movie we used
9 meth.” Traverse at 80 and Ex. 35. Even assuming that trial counsel’s
10 performance fell below an objective standard of reasonableness by not asking Doe
11 No. 2 about using methamphetamine while making the video to impeach her,
12 Gordon has not shown a reasonable probability that, absent the alleged error, the
13 trial court would have had a reasonable doubt respecting guilt in light of Maple’s
14 testimony that she and Doe No. 2 used methamphetamine together, particularly on
15 the day of the rape. RT 1416, 1422–24.

16 (d) Gordon argues that trial counsel failed to introduce notes written by
17 Gordon’s father, Gil Gordon, after a discussion with investigator Ghiringhelli
18 concerning “his best guess [as to what] they will testify to,” Ex. 33, and failed to
19 ask Gil and Connie Gordon to testify about the following factual issues: Doe No.
20 2’s drug and alcohol problems; Doe No. 1’s lack of credibility, probationary status,
21 drug use and violations of her diversion contract; and Gordon’s good and non-
22 violent character. Traverse at 80–81. The state court addressed the merits of
23 these arguments about trial counsel’s failure to present certain evidence to
24 impeach the victims and to show Gordon’s good character, as raised in support of
25 Claim 12.

26 Trial counsel would have known of evidence showing Petitioner’s
27 negative character that would be introduced by the District Attorney
28 in response to any introduction of evidence showing Petitioner’s
good character. Further, as shown by Respondent, evidence of a

1 rape victim's character or prior sexual conduct is severely limited,
2 and would have allowed introduction of the victims' statements to
3 others for the truth as prior inconsistent statements. Trial counsel
4 is not obliged to make futile or self-defeating arguments. In regard
5 to evidence of drug impairment affecting memory, perception, and
6 communication, the trial court did have evidence of concurrent and
7 past drug and alcohol use by the victims. The drug use did not
8 affect the court's analysis of credibility, because the victim's drug
9 use was not concealed or denied by them or by others. Jane Doe
10 #1 admitted impairment by alcohol, and it is unquestionable that the
11 trial court would have considered this in evaluating both victims'
12 testimony, since trial counsel argued the effect of intoxication,
13 including motive to lie.

14 Pet., Ex. 60 at 25–26 (citing RT 1682–83, 1690–92). The state court's analysis is
15 well-reasoned and relevant to the related claim that trial counsel failed to ask Mr.
16 and Mrs. Gordon about these issues. Upon independent review of the record, the
17 court determines that the state court's decision denying this ineffective assistance
18 claim was not an objectively unreasonable application of clearly established
19 federal law.

20 (e) Gordon contends that trial counsel failed to introduce evidence of
21 Doe No. 1's diversion contract and probation, which she repeatedly violated by
22 consuming alcohol. Pet. at 60 and Exs. 5 and 46. Based on factual statements
23 made in Connie Gordon's Supplemental Declaration dated August 19, 2012, Ex.
24 46, Gordon argues that trial counsel should have impeached Doe No. 1's
25 credibility and established her motive to fabricate allegations to avoid being found
26 in violation of her diversion contract. Traverse at 81. At the evidentiary hearing in
27 superior court on Gordon's state habeas petition, respondent explained that the
28 prosecution "would not have been allowed to disclose a juvenile's probation terms
67
for a misdemeanor at the time of trial." Pet. Ex. 75 at 19 (transcript of Apr. 18,
2014 hrg). As discussed with respect to related ineffective assistance arguments
in Claims 7, 11 and 12, trial counsel presented other impeachment material and
challenged Doe No. 1's credibility during the trial. While noting that Doe No. 1 had

1 problems with credibility, the trial court found Gordon guilty of forcible rape after
2 considering all the evidence. RT 1697–98.

3 Gordon fails to show that trial counsel's performance was deficient or prejudicial on any
4 of these grounds. Having independently reviewed the record, the court determines that
5 the state court's decision, denying the claim that trial counsel was ineffective for failing to
6 introduce material evidence that was in his possession, was not an objectively
7 unreasonable application of clearly established federal law.

8 Accordingly, Claim 13 is DENIED.

9 **V. Claims Based on Challenging Sentence**

10 Gordon asserts several claims based on challenges to the sentence imposed by
11 the trial court.

12 **A. Claim 14: Trial Court Sentencing Error**

13 In Claim 14, Gordon contends that the trial court erred in sentencing her to a
14 prison term of 49 years and 8 months to life with the possibility of parole, rendering the
15 sentencing proceedings fundamentally unfair in violation of the Fifth and Fourteenth
16 Amendments, and resulting in a sentence that was grossly disproportionate to the crime
17 in violation of the Eighth Amendment. The Supreme Court has recognized that
18 sentencing courts must have wide latitude in their decisions as to punishment, subject to
19 the constraints of the due process clause and the Eighth Amendment. Lockyer v.
20 Andrade, 538 U.S. 63, 72 (2003); Brothers v. Dowdle, 817 F.2d 1388, 1390 (9th Cir.
21 1987) (citing Gardner v. Florida, 430 U.S. 349, 358 (1977)). In the order to show cause,
22 the court limited the scope of this claim to assert an Eighth Amendment violation and
23 dismissed the claim in part with respect to challenging the calculation of the sentence
24 under state law. Dkt. 18 at 7. On further consideration, the court will review Gordon's
25 allegations to the extent she challenges the sentence on due process grounds.

26 As the court of appeal denied this claim on procedural grounds, Pet., Ex. 77, and
27 the state supreme court did not reach the merits of this claim, this claim is subject to de
28 novo review. See Amado v. Gonzalez, 758 F.3d 1119, 1131 (9th Cir. 2014).

1 **1. Due Process**

2 Gordon argues that the trial court erred by finding that the rape and sodomy of
3 Doe No. 2, charged in Counts 3 and 4, occurred on separate occasions because there
4 was an “interlude there where the defendant thought about what he was doing” between
5 the crimes, resulting in a finding that Counts 3 and 4 were separate acts pursuant to Cal.
6 Penal Code 667.6(d).³ RT 2075–76. The trial court determined that the crimes “have to
7 be punished consecutively,” and computed the indeterminate terms as 15 years to life as
8 to Counts 1, 3 and 4, each to be served consecutively to the determinate term of four
9 years and eight months, which was calculated from the upper term of four years on the
10 domestic violence offense in Count 5 and a consecutive eight month term for the oral
11 copulation offense in Count 2. RT 2075–76. Gordon argues that the trial court erred by
12 not considering the evidence for purposes of determining whether consecutive sentences
13 were warranted as to Counts 3 and 4. Pet. at 63.

14 The constitutional guarantee of due process is fully applicable at sentencing. See
15 Gardner, 430 U.S. at 358. A federal court may vacate a state sentence imposed in
16 violation of due process; for example, if a state trial judge (1) imposed a sentence in

17
18 ³ Section 667.6(d) provides in relevant part as follows:

19 (d) A full, separate, and consecutive term shall be imposed for each
20 violation of an offense specified in subdivision (e) if the crimes involve
21 separate victims or involve the same victim on separate occasions.

22 In determining whether crimes against a single victim were committed
23 on separate occasions under this subdivision, the court shall consider
24 whether, between the commission of one sex crime and another, the
25 defendant had a reasonable opportunity to reflect upon his or her actions
26 and nevertheless resumed sexually assaultive behavior. Neither the
27 duration of time between crimes, nor whether or not the defendant lost or
28 abandoned his or her opportunity to attack, shall be, in and of itself,
 determinative on the issue of whether the crimes in question occurred on
 separate occasions.

29 The term shall be served consecutively to any other term of
30 imprisonment and shall commence from the time the person otherwise
31 would have been released from imprisonment. . . .

1 excess of state law, see Walker v. Endell, 850 F.2d 470, 476 (9th Cir. 1987), or
2 (2) enhanced a sentence based on materially false or unreliable information or based on
3 a conviction infected by constitutional error, id. at 477. Here, Gordon does not contend
4 that the sentence was unauthorized under state law. Rather, Gordon challenges the
5 unreliability of Doe No. 2's account of the crimes to support the trial court's finding that
6 Gordon "had a reasonable opportunity to reflect upon his or her actions and nevertheless
7 resumed sexually assaultive behavior" under § 667.6, due to Doe No. 2's drug use prior
8 to the rape and her prior statements to Maple and investigating officers which failed to
9 mention that she and Gordon smoked between the sex acts, as she testified at trial. Pet.
10 at 63.

11 The record reflects that trial court found Doe No. 2's testimony to be credible and
12 determined that the two crimes occurred on separate occasions. RT 595–98, 2076. The
13 trial court had evidence that Doe No. 2 used methamphetamine with Maple on the day of
14 the crimes, that Gordon testified and admitted that she "lied to everybody at some point"
15 and had "a problem with lying," RT 1661, and that Doe No. 2 testified that she and
16 Gordon smoked cigarettes after she ejaculated and that Gordon burned her with a lit
17 cigarette before she anally penetrated her, RT 594–601. In light of the evidence in the
18 record, Gordon fails to demonstrate that the trial court's determination that the crimes
19 occurred on two separate occasions was unreasonable, or that the sentencing
20 determination violated due process. See Watts v. Bonneville, 879 F.2d 685, 688 (9th Cir.
21 1989) (imposition of two sentences for rape in concert of same victim did not violate due
22 process because California punished the defendant for two separate criminal acts, not
23 twice for a single act).

24 **2. Cruel and Unusual Punishment**

25 Gordon contends that her sentence is grossly disproportionate to the crimes in
26 violation of the Eighth Amendment, noting that the ordinary punishment for rape in
27 violation of Cal. Penal Code § 261, or for sodomy by force in violation of § 286, is three,
28 six or eight years. Traverse at 84–85 (citing Cal. Penal Code §§ 264, 286(c)(2)). This 70

1 argument disregards the provisions under Cal. Penal Code § 667.61 requiring a prison
2 term of 15 years to life for felony sex offenses under certain aggravated circumstances
3 which were charged in the special allegations.

4 Gordon argues that scientific research on brain development suggests that young
5 adults are less culpable than adults whose brains are fully developed, though she
6 concedes that she was 23 and 24 years old at the time of the crimes. Traverse at 83–84;
7 Suppl. Traverse at 10. She further argues that the sentence fails to account for the
8 numerous mitigating factors in her case, namely that she was molested and raped as a
9 young child, was given alcohol and marijuana by her older brother, and suffered from
10 repressed gender identity. Traverse at 85–86 (citing Ex. 38). Even considering the
11 entirety of Gordon’s arguments and supporting evidence in support of her Eighth
12 Amendment challenge to the sentence, Gordon does not show under clearly established
13 federal law that these mitigating circumstances would have been material at sentencing
14 an adult for a non-capital conviction, particularly where the trial judge was mandated to
15 impose three consecutive indeterminate sentences by state law. RT 2075. See Miller v.
16 Alabama, 567 U.S. 460 (2012) (holding that the Eighth Amendment forbids mandatory life
17 without parole for juvenile homicide offenders under the age of 18); Graham v. Florida,
18 560 U.S. 48 (2010) (categorically banning life without parole for a juvenile convicted of a
19 nonhomicide offense).

20 Gordon further argues that her 49-year sentence is statistically equivalent to a life
21 term without possibility of parole, Traverse at 84, but fails to show that her sentence is a
22 rare or extreme case of a grossly disproportionate sentence. See Andrade, 538 U.S. at
23 71 (upholding sentence of two consecutive terms of 25 years to life for recidivist
24 convicted most recently of two counts of petty theft with a prior conviction); Cacoperdo v.
25 Demosthenes, 37 F.3d 504, 508 (9th Cir. 1994) (sentence making the defendant
26 ineligible for parole for 40 years not grossly disproportionate when compared with gravity
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28

1 of sexual molestation offenses). In light of the evidence and testimony presented at trial,⁴
2 the trial court reasonably found that Gordon committed these crimes “to dominate, to
3 humiliate, to control, to manipulate and in certain cases to actually hurt the people you
4 were with,” and even acknowledged that Gordon was surrounded by a “complicated
5 family dynamic.” RT 2073. The trial court also determined that “prison is mandatory
6 under these circumstances,” and noted that Gordon “demonstrated he can’t follow the
7 terms of probation and I consider him to be an extreme risk to people around him.” RT
8 2074. Though Gordon considers a 49-year sentence to be unconstitutionally
9 disproportionate to her sex offenses against two victims, she fails to show that hers is
10 “the rare case in which a threshold comparison of the crime committed and the sentence
11 imposed leads to an inference of gross disproportionality.” Ewing v. California, 538 U.S.
12 11, 20 (2003) (quoting Harmelin v. Michigan, 501 U.S. 957, 1005 (1991) (KENNEDY, J.,
13 concurring in part and concurring in judgment)).

14 Gordon also raises a facial challenge to the constitutionality of the mandatory
15 consecutive sentencing provisions of § 667.61, on the ground that the statute does not
16 recognize gradations of culpability and fails to account for mitigating factors, but she fails
17 to cite clearly established federal law in support of this claim. Traverse at 66–67.

18 For the reasons set forth above, Gordon has failed to show that the state court’s
19 rejection of her due process and Eighth Amendment challenges to the sentence was
20 contrary to, or an unreasonable application of, clearly established federal law. Claim 14
21 is therefore DENIED.

22 **B. Claim 15: Ineffective Assistance of Trial Counsel in Failure to Object
23 to Sentence**

24 In Claim 15, Gordon argues that trial counsel was ineffective for failing to object to

25
26 ⁴ Respondent cites confidential portions of the clerk’s transcript in response to Claim
27 14, Answer at 44-45, but did not lodge these sealed probation reports with the court.
28 Gordon did not address these sealed portions of the record in the traverse. Accordingly,
the court does not rely on these statements in the sealed records cited by respondent in
reviewing Gordon’s claim for habeas relief.

1 the trial court's sentencing errors and for failing to introduce evidence supporting a lesser
2 sentence. Pet. at 68–70. The court looks to the findings of the superior court as the last
3 reasoned state court decision to address the merits of these claims. Pet., Exs. 60, 76,
4 79.

5 Gordon contends that trial counsel's failure to investigate the mitigating
6 circumstances of Gordon's sexual abuse by her brother, the origins of her substance
7 abuse, and her productive role as a line chef was deficient and prejudicial. Traverse at
8 87. Gordon contends that trial counsel failed to submit a sentencing memorandum and
9 failed to introduce evidence to show that the sex offenses against Doe No. 2 were a
10 single course of events and did not occur on separate occasions that would warrant
11 consecutive sentences. Pet. at 69–70. Gordon also argues that trial counsel failed to
12 object to her sentence as grossly disproportionate in violation of the Eighth Amendment,
13 which had the prejudicial effect of forfeiting the argument on appeal. Traverse at 87–88.

14 The state court denied this ineffective assistance claim upon finding that the trial
15 court reasonably concluded that Gordon had the time and opportunity to form separate
16 intents and acts from Doe No. 2's testimony. Pet., Ex. 60 at 29–30. The state court also
17 made the following findings:

18 First, trial counsel did specifically oppose the assertions of the
19 District Attorney's sentencing statement orally, so there is no
20 reason to believe that failure to produce a written statement was
21 necessary, or harmed Petitioner. Further, Petitioner may have
22 been abused as a child, and he may suffer from drug and alcohol
23 abuse, but the trial court's reasoning for imposing such a lengthy
24 sentence was its conclusion that Petitioner was not capable of
25 changing, due to his lengthy history of cruelty toward others, and
that society needed protection. This would be true regardless of
the origin of Petitioner's propensities, so no harm occurred, and the
trial court was entitled to use its evaluation of Petitioner's character
in imposing the sentence.

26 Pet., Ex. 60 at 30. In light of the evidence presented in the state court proceedings, the
27 decision of the state court denying this claim was neither contrary to, nor an
28 unreasonable application of, clearly established federal law. Claim 15 is therefore

1 DENIED.

2 **C. Claim 16: Ineffective Assistance of Appellate Counsel**

3 In Claim 16, Gordon alleges that appellate counsel was ineffective for failing to
4 raise on appeal the arguments raised in Claim 8 alleging improper admission of hearsay
5 evidence⁵ and Claim 14 challenging the sentence on due process and Eighth
6 Amendment grounds. Pet. at 70–71. The court looks to the superior court’s findings as
7 the last reasoned state court decision to address the merits of these claims. Pet., Exs.
8 60, 76, 79.

9 The Due Process Clause of the Fourteenth Amendment guarantees a criminal
10 defendant the effective assistance of counsel on his first appeal as of right. Evitts v.
11 Lucey, 469 U.S. 387, 391–405 (1985). Claims of ineffective assistance of appellate
12 counsel are reviewed according to the standard set out in Strickland. Smith v. Robbins,
13 528 U.S. 259, 285 (2000). First, the petitioner must show that appellate counsel’s
14 performance was objectively unreasonable, which in the appellate context requires the
15 petitioner to demonstrate that appellate counsel acted unreasonably in failing to discover
16 and brief a merit-worthy issue. Smith, 528 U.S. at 285. Second, the petitioner must
17 show prejudice, which in this context means that the petitioner must demonstrate a
18 reasonable probability that, but for appellate counsel’s failure to raise the issues, the
19 petitioner would have prevailed in his appeal. Id. at 285–86. Appellate counsel does not
20 have a constitutional duty to raise every nonfrivolous issue requested by the defendant.
21 See Jones v. Barnes, 463 U.S. 745, 751–54 (1983). The weeding out of weaker issues
22 is widely recognized as one of the hallmarks of effective appellate advocacy. Miller v.
23 Keeney, 882 F.2d 1428, 1434 (9th Cir. 1989).

24 Gordon contends that appellate counsel failed to appeal on potentially meritorious
25 arguments that (1) the trial court committed error by admitting hearsay testimony by
26 Maple that Doe No. 2 feared Gordon, RT 1417, and (2) the trial court committed error at
27

28 ⁵ Claim 8 was dismissed for failure to state a cognizable ground for federal habeas
relief. Dkt. 18 at 6-7. 74

1 sentencing by imposing consecutive sentences on Counts 3 and 4 upon finding they
2 were committed on separate occasions and by imposing a sentence that was grossly
3 disproportionate to the crimes. Pet. at 42–43, 62–68.

4 The superior court addressed the merits of Gordon’s claim that the trial court erred
5 by allowing Maple’s testimony about Doe No. 2’s statements that she was worried about
6 Gordon. Pet., Ex. 60 at 18–19. The state court found no error in allowing Maple’s
7 testimony for non-hearsay purposes under the fresh complaint exception to the hearsay
8 rule to establish that a complaint of the rape had been made near the time of the rape,
9 and to show Maple’s state of mind on hearing it. *Id.* The superior court concluded that
10 “the trial court was certainly able to distinguish the purpose of the testimony and to
11 consider it only for the stated non-hearsay purposes. Furthermore, Jane Doe #2 was still
12 available for examination, so no violation of the right to confrontation occurred.” *Id.* at 19.
13 In light of the state court record, the state court reasonably denied the claim that
14 appellate counsel was ineffective by not raising this non-meritorious hearsay argument
15 on appeal.

16 With respect to the claim that appellate counsel was ineffective for failing to raise
17 the due process and grossly disproportionate challenges to the sentence on appeal,
18 appellate counsel’s failure to raise these non-meritorious arguments on appeal did not
19 amount to deficient performance or cause prejudice, for the reasons discussed with
20 respect Claim 14, above. *Barnes*, 463 U.S. at 751–54.

21 Accordingly, Claim 16 is DENIED.

22 **VI. Brady Claim**

23 In Claim 17, Gordon alleges that the prosecution committed misconduct by failing
24 to disclose material and exculpatory evidence prior to trial in violation of her due process
25 rights as set forth in *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny. As the
26 court of appeal denied this claim on the merits without a reasoned decision, the court
27 looks through to the reasoning of the superior court denying this claim. *Wilson*, 138 S.
28 Ct. at 1193–96.

1 In Brady, the Supreme Court held that “suppression by the prosecution of
2 evidence favorable to an accused upon request violates due process where the evidence
3 is material either to guilt or to punishment, irrespective of the good faith or bad faith of the
4 prosecution.” 373 U.S. at 87. The Supreme Court has since made clear that the duty to
5 disclose such evidence applies even when there has been no request by the accused,
6 United States v. Agurs, 427 U.S. 97, 107 (1976), and that the duty encompasses
7 impeachment evidence as well as exculpatory evidence, United States v. Bagley, 473
8 U.S. 667, 676 (1985). Evidence is material if “there is a reasonable probability that, had
9 the evidence been disclosed to the defense, the result of the proceeding would have
10 been different.” Cone II, 556 U.S. at 469–70. “A reasonable probability does not mean
11 that the defendant ‘would more likely than not have received a different verdict with the
12 evidence,’ only that the likelihood of a different result is great enough to ‘undermine
13 confidence in the outcome of the trial.’” Smith v. Cain, 565 U.S. 73, 75–76 (2012)
14 (quoting Kyles v. Whitley, 514 U.S. 419, 434 (1995)). For a Brady claim to succeed,
15 (1) the evidence at issue must be favorable to the accused, either because it is
16 exculpatory or impeaching; (2) that evidence must have been suppressed by the
17 prosecution, either willfully or inadvertently; and (3) prejudice must have ensued. Banks
18 v. Dretke, 540 U.S. 668, 691 (2004); Strickler v. Greene, 527 U.S. 263, 281–82 (1999).

19 During the state habeas proceedings, Gordon moved for post-conviction discovery
20 after the superior court issued an order to show cause on her amended state habeas
21 petition, which she filed January 20, 2012. See Pet., Ex. 51. After the parties conferred
22 on the discovery requests, respondent disclosed several items that were not disclosed
23 before trial:

24 (1) Audio recording of Gordon’s arrest. Pet. at 71 and Ex. 67. Gordon
25 contends that this recording is material because it contains statements by
26 one of the arresting officers that Gordon smelled like alcohol, which
27 supports the suppression of her interrogation statements under Miranda.
28 See Pet., Ex. 75 at 25.

- (2) Video recording of police interview of Doe No. 1. Pet. at 71 and Ex. 11. Gordon contends that this video is material because it contains prior inconsistent statements by Doe No. 1 that discredit her testimony.
- (3) Digital results of Doe No. 1's blood alcohol content on November 16, 2008. Pet. at 72 and Ex. 9. Gordon contends this evidence that Doe No. 1's BAC was .14 percent establishes a motive for her to fabricate the allegation that she was raped to avoid punishment for violating the terms of her diversion contract and probation.
- (4) Audio recording of Detective Elia's interview with Dylan Palmer. Pet. at 72 and Ex. 10. As argued by Gordon, Palmer stated that when he talked to Gordon by phone on the night of the rape, Doe No. 1 was not yelling and nothing appeared wrong, which would have established that Gordon was not holding Doe No. 1 against her will and that Doe No. 1 was motivated to falsely testify that Gordon raped her to avoid the repercussions of violating the terms of her probation.
- (5) Timothy Grabner's criminal history. Pet. at 72 and Ex. 36. Gordon contends that Grabner's prior convictions and arrest could have been admitted to impeach his credibility.

Gordon contends that there is a reasonable probability that, if this evidence had been disclosed to the defense, the result of the trial would have been different, and that the prosecution's failure to turn over the evidence before trial violated due process under Brady. Traverse at 93–96.

The state court heard argument from habeas counsel about the materiality of the previously undisclosed evidence and denied the Brady claim, which was presented as claim 36 in the superior court habeas proceedings and briefed by the parties. See Pet., Ex. 75 at 7. The state court found that the evidence was not material under Brady and denied the habeas claim for the following reasons:

(1) The state court found that the audio recording by Officer Walund of

1 Gordon's April 1, 2009, arrest and transport by police car containing
2 statements by the officer that Gordon smelled like alcohol, and Gordon's
3 admission to drinking alcohol, was not material to the Miranda challenge to
4 Gordon's interrogation statements because "evidence of intoxication is
5 contained in the tape of the interview, which is the crucial aspect . . . to
6 show that Mr. Gordon didn't knowingly or understandingly waive his
7 Miranda rights." Pet., Ex. 75 at 25–29. The state court reasoned that the
8 comments during the arrest and transport did not have "any real effect,
9 because should the intoxication be shown, it would have been shown by the
10 interview, itself." Pet., Ex. 75 at 29.

11 (2) With respect to the video recording of Doe No. 1's police interview,
12 reflecting her prior statements admitting (a) that she was drinking and was
13 on probation and (b) that she initiated kissing Gordon and did not object to
14 having sex with Gordon for over five minutes, Pet., Ex. 75 at 9–19, the state
15 court found that this was not material because (a) "enduring a preliminary
16 hearing, trial, police interviews, medical evaluation, and [] all the other
17 things that Jane Doe 1 endured to be a part of this prosecution does not
18 persuade me that this could possibly have caused her to conceal from
19 probation she had been drinking;" and (b) "consent or mistaken consent
20 was thoroughly explored by defense, and raised as a defense [and the trial
21 court] had awareness and ability to evaluate that issue." Id. at 19.

22 (3) With respect to the digital results of Doe No. 1's BAC, the state court
23 reiterated that the evidence was not material to explain bias or motive
24 because a motive to conceal alcohol use from probation could not possibly
25 cause Doe No. 1 to endure the prosecution of this case. Pet., Ex. 75 at 20.

26 (4) With respect to the audio recording of Detective Elia's phone interview of
27 Palmer, the state court did not make a specific finding on the lack of
28 materiality. See Pet., Ex. 75 at 20. However, Gordon concedes that the 78

was no evidence that Doe No. 1 claimed to be yelling at the time Gordon called Palmer, and withdraws the argument that Doe No. 1's statement was inconsistent with Palmer's statements to Detective Elia on that issue.

Traverse at 66.

(5) With respect to Grabner's criminal history, Pet., Ex. 75 at 20–24, the state court determined that Grabner's prior misdemeanor convictions were not material, upon finding that Grabner was a minor witness and the trial judge made clear "that he based his finding of guilt on what the victims said, and their credibility." Id. at 24.

10 In light of the state court record, the state court's decision denying the Brady claim was
11 not contrary to, and did not involve an unreasonable application of, clearly established
12 federal law. Claim 17 is therefore DENIED.

VII. Cumulative Effect

In Claim 20, Gordon argues that the cumulative effect of the errors in her trial, appellate and post-conviction proceedings violated her right to due process. Pet. at 85–86; Suppl. Traverse at 99–100. “[P]rejudice may result from the cumulative impact of multiple deficiencies.” Harris v. Wood, 64 F.3d 1432, 1438 (9th Cir. 1995) (quoting Cooper v. Fitzharris, 586 F.2d 1325, 1333 (9th Cir. 1978) (en banc)). The court has reviewed the various deficiencies alleged by Gordon and determines there is no reasonable probability that, absent the deficiencies, the outcome of the trial, direct appeal, or state habeas proceedings would have been different so as to undermine confidence in the outcome. As the state court recognized on post-conviction review, this case came down to the testimony of Doe No. 1 and Doe No. 2, whose credibility was challenged and notably considered by the trial court. All the additional credibility issues that Gordon has identified in her habeas petition to further impeach the victims are not only cumulative, but they are also overshadowed by Gordon’s own lack of credibility, as found by the trial judge and reflected in the transcript of her testimony.

Having reviewed the state court record, particularly the transcripts of the trial and

1 the state court's post-conviction evidentiary hearing, the court determines that the
2 combination of the harmless errors identified by Gordon did not have a synergistic and
3 cumulative effect so as to render her trial unfair. See Ybarra v. McDaniel, 656 F.3d 984,
4 1001 (9th Cir. 2011). Accordingly, Claim 20 is DENIED.

5 **VIII. Requests for Evidentiary Hearing**

6 Gordon seeks an evidentiary hearing on factual issues raised by Claims 1, 2, 3, 4,
7 7, 9, 11, 12, 13, 14, 15, 16 and 20. Dkts. 38, 74. Respondent opposes the requests for
8 an evidentiary hearing. Dkts. 41 and 75.

9 Section 2254(e)(2), governing evidentiary hearings, provides:

10 If the applicant has failed to develop the factual basis of a
11 claim in state court proceedings, the court shall not hold an
evidentiary hearing unless the applicant shows that:

12 (A) the claim relies on—

13 (i) a new rule of constitutional law, made retroactive to
cases on collateral review by the Supreme Court, that
was previously unavailable; or
14 (ii) a factual predicate that could not have been
previously discovered through the exercise of due
diligence; and

15 (B) the facts underlying the claim would be sufficient to
16 establish by clear and convincing evidence that but for
17 constitutional error, no reasonable factfinder would have
18 found the applicant guilty of the underlying offense.

19 The Supreme Court has interpreted this section to provide that where a petitioner has
20 indeed exercised diligence to "develop the factual bases" of his claims in state court, the
21 requirements of section 2254(e)(2)(A) & (B) do not apply to his request for an evidentiary
22 hearing. Williams (Michael Wayne) v. Taylor, 529 U.S. 420, 435 (2000); Holland v.
23 Jackson, 542 U.S. 649, 652–53 (2004).

24 Gordon contends that there was no lack of diligence triggering the stringent
25 standards of § 2254(e)(2) because she previously sought an evidentiary hearing in state
26 court and was denied the opportunity to develop the factual bases for her claims
27 asserting improper admission of evidence at trial, ineffective assistance of trial and
28 appellate counsel, Brady violations, and grossly disproportionate sentence. Though 80

1 respondent disputes whether Gordon was denied an opportunity to develop these factual
2 allegations in state court, Gordon has sufficiently demonstrated diligence in requesting an
3 evidentiary hearing in state court on the factual issues presented here.

4 Having avoided the restrictions of § 2254(e)(2), Gordon would qualify for an
5 evidentiary hearing under the “pre-AEDPA” standard if she alleges facts, that if proven,
6 would entitle her to relief and the state court trier of fact has not, after a full and fair
7 hearing, reliably found the relevant facts. See Jones v. Wood, 114 F.3d 1002, 1010 (9th
8 Cir. 1997). “In other words, petitioner must allege a colorable constitutional claim.”
9 Turner v. Calderon, 281 F.3d 851, 890 (9th Cir. 2002). There is no “per se rule requiring
10 an evidentiary hearing whenever a petitioner has made out a colorable claim, though.”
11 Id. “Rather, a petitioner must establish that his allegation . . . , if proven, would establish a
12 constitutional deprivation.” Id. “Entitlement to an evidentiary hearing based on alleged
13 ineffective assistance, for example, requires a showing that if [petitioner’s] allegations
14 were proven at the evidentiary hearing, deficient performance and prejudice would be
15 established.” Id.

16 Applying this “pre-AEDPA” standard for an evidentiary hearing on the factual
17 issues, the court determines that Gordon fails to allege facts, that if proven at an
18 evidentiary hearing, would entitle her to relief. Dkt. 38 at 7–14. Further, as a
19 discretionary matter, the court considers that an evidentiary hearing is not warranted in
20 light of the state court record which reflects that Gordon had an opportunity to develop
21 substantial factual issues in the course of the habeas proceedings and that the state
22 court thoroughly considered Gordon’s habeas claims and conducted several hearings,
23 including an evidentiary hearing with testimony by several Napa police detectives, an
24 officer and a medical department manager for the Napa Department of Corrections,
25 Gordon’s parents and friend, and Gordon herself. It is not clear to the court “what more
26 an evidentiary hearing might reveal of material import.” See Gandarela v. Johnson, 286
27 F.3d 1080, 1087 (9th Cir. 2002) (denying petitioner’s request for evidentiary hearing
28 regarding his assertion of actual innocence). Because the claims may be resolved b81

1 reference to the state court record and the documentary evidence submitted by Gordon,
2 the court denies her requests for an evidentiary hearing. See Campbell v. Wood, 18 F.3d
3 662, 679 (9th Cir. 1994).

4 Particularly with respect to the newly exhausted evidence of gender dysphoria
5 presented in support of Claims 2 (Miranda violation), 9 (involuntary and unreliable
6 jailhouse letters), 12 (ineffective assistance in failing to object to introduction of jailhouse
7 letters as involuntary and unreliable) and 14 (sentencing error), the court determines that,
8 because the claims may be resolved by reference to the record and the exhibits
9 themselves, an evidentiary hearing is not warranted by this new evidence on the
10 questions of the voluntariness of Gordon's Miranda waiver, the voluntariness or reliability
11 of the admissions in her jailhouse letters, or the fundamental fairness or gross
12 disproportionality of her sentence which was mandated, for the most part, by state
13 statute.

14 Accordingly, Gordon's requests for an evidentiary hearing are DENIED.

15 **CONCLUSION**

16 For the reasons set forth above, Gordon's second amended petition for a writ of
17 habeas corpus is DENIED. This order fully adjudicates the petition and terminates all
18 pending motions. The clerk shall close the file.

19 **CERTIFICATE OF APPEALABILITY**

20 To obtain a certificate of appealability, a petitioner must make "a substantial
21 showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "Where a district
22 court has rejected the constitutional claims on the merits, the showing required to satisfy
23 § 2253(c) is straightforward. "The petitioner must demonstrate that reasonable jurists
24 would find the district court's assessment of the constitutional claims debatable or
25 wrong." Slack v. McDaniel, 529 U.S. 473, 484 (2000). Section 2253(c)(3) requires a
26 court granting a COA to indicate which issues satisfy the COA standard. Here, the court
27 finds that Claims 1, 2, 3, 4, 7, 9, 11, 12, 13, 14, 15, 16, 17, 19 and 20 presented by

1 Gordon in the second amended petition meet that standard and GRANTS the COA as to
2 those claims. With respect to the remaining claims of the second amended habeas
3 petition, the court DENIES a COA. See generally Miller-El, 537 U.S. at 335-38.

4 **IT IS SO ORDERED.**

5 Dated: January 2, 2020

6 */s/ Phyllis J. Hamilton*
7 PHYLLIS J. HAMILTON
United States District Judge

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United States District Court
Northern District of California

Appendix C

SUPREME COURT
FILED

NOV 10 2015

S228110

Frank A. McGuire Clerk

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re CHARLES DAVID GORDON on Habeas Corpus.

The petition for writ of habeas corpus is denied on the merits with respect to petitioner's claims of ineffective assistance of trial counsel and ineffective assistance of appellate counsel. (See *Harrington v. Richter* (2011) 562 U.S. 86 [131 S.Ct. 770, 785], citing *Ylst v. Nunnemaker* (1991) 501 U.S. 797, 803.)

CANTIL-SAKAUYE

Chief Justice

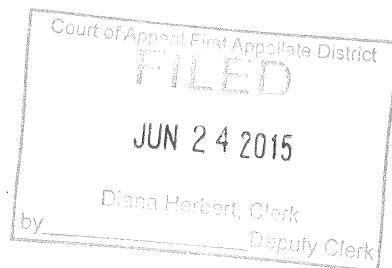
Appendix D

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

In re CHARLES DAVID GORDON on Habeas Corpus.



A142558
Napa County No. 145383

BY THE COURT:*

The petition for writ of habeas corpus is denied.

The petition lacks sufficient allegations to meet petitioner's burden of demonstrating the timeliness of the majority of his claims (e.g., Claims 1, 2 [as to introduction of statements at trial], 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15 and 18 [as to claims barred as untimely]). (*In re Clark* (1993) 5 Cal.4th 750, 765, 775, 782-799 & fns. 5, 6; *In re Robbins* (1998) 18 Cal.4th 770, 780; *In re Swain* (1949) 34 Cal.2d 300, 303-304; *In re Reno* (2012) 55 Cal.4th 428, 458-459, 461, 462-463 & fn. 15.)

Additionally, habeas corpus is unavailable to address claims that could have been raised on appeal. (*In re Dixon* (1953) 41 Cal.2d 756, 759.) Many of petitioner's claims appear subject to this bar (e.g., Claims 1, 2 [as to introduction of statements at trial], 3, 5, 6, 8, 9, 10, 14 and 18 [as to claims barred under *In re Dixon, supra*, 41 Cal.2d at p. 759]), and the petition lacks adequate allegations to demonstrate otherwise. (*In re Swain, supra*, 34 Cal.2d at pp. 303-304; *In re Reno, supra*, 55 Cal.4th at pp. 458-459, 493-494 & fns. 15, 29.)

* Before Jones, P.J., Simons, J. and Needham, J.

A number of claims and specific contentions are not reviewable on habeas corpus, as petitioner has not demonstrated they were preserved at trial (e.g., Claims 1, 2 [as to introduction of statements at trial], 3, 5, 6, 9, 10 and 14). (*In re Seaton* (2004) 34 Cal.4th 193, 199-200.)

Habeas corpus is not appropriate to review the trial court's rulings on the admissibility of evidence (e.g., Claims 5, 6, and 8). (*In re Lindley* (1947) 29 Cal.2d 709, 723.)

The court observes that it appears portions of Claim 11 were not initially exhausted in the superior court. (*In re Steele* (2004) 32 Cal.4th 682, 692; *In re Hillery* (1962) 202 Cal.App.2d 293, 294.)

The petition is denied on the merits as to claims not identified above. (*In re Swain, supra*, 34 Cal.2d 300, 303-304; *People v. Duvall* (1995) 9 Cal.4th 464, 474-475.)

JUN 24 2015

Date _____

Jones, P.J.

P.J.

Appendix E

FILED

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

CHARLES DAVID GORDON,

Petitioner-Appellant,

v.

JOE A. LIZARRAGA, Warden, Mule Creek
State Prison,

Respondent-Appellee.

No. 20-15105

D.C. No. 4:12-cv-00769-PJH
Northern District of California,
Oakland

ORDER

Before: M. SMITH and VANDYKE, Circuit Judges, and GORDON,* District Judge.

The panel unanimously votes to deny the petition for panel rehearing. Judge M. Smith and Judge VanDyke vote to deny the petition for rehearing en banc, and Judge Gordon so recommends. The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on it. Fed. R. App. P. 35. Accordingly, the petition for panel rehearing and the petition for rehearing en banc are DENIED.

* The Honorable Andrew P. Gordon, United States District Judge for the District of Nevada, sitting by designation.

Appendix F

IN THE SUPREME COURT OF CALIFORNIA

) Case No. _____
)
)
California Supreme Court Case No.
S228004
)
In Re CHARLES DAVID) First District Court of Appeal
GORDON) Habeas Case No. A142558
)
)
First District Court of Appeal
Habeas Case No. A134162
)
On Habeas Corpus.) First District Court of Appeal
)
Direct Appeal Case No. A126961
)
)
Napa County Criminal
Case No. 145383
(The Honorable Stephen Kroyer)
)
)
Napa County Habeas Case
No. HC 1605 (The Honorable
Michael Williams)

**TO THE HONORABLE CHIEF JUSTICE AND TO THE HONORABLE
ASSOCIATE JUSTICES OF THIS COURT; TO THE ATTORNEY
GENERAL FOR THE STATE OF CALIFORNIA:**

Petitioner, CHARLES DAVID GORDON, petitions this Court for a
writ of habeas corpus. Petitioner sets forth the following allegations in
support of his claims demonstrating a *prima facie* case in support of the
issuance of the writ:

Maples. RT 1480. Jane Doe #2 did not promptly make the statement or spontaneously tell Maples that she was raped. RT 1418. The lack of spontaneity and reliability demonstrates that the statement was inadmissible. *Brown*, 8 Cal.4th at 750.

Respondent cannot demonstrate that the trial court's error was harmless beyond a reasonable doubt. *Chapman*, 386 U.S. at 20 and *Watson*, 46 Cal.2d at 821. The trial court's error violated Article I and the Fifth, Sixth, and Fourteenth Amendments.

X. PETITIONER'S JAILHOUSE LETTERS WERE IMPROPERLY ADMITTED AT TRIAL (CLAIM 9).

Letters written by petitioner while in custody were introduced at trial. RT 1590, 1523-24, and 1668. The letters were the result of petitioner's use of Elavil; and his suicidal ideations, delusions, and adjustment to segregation within the Napa Detention Center. The letters were inadmissible because they were written involuntarily. *Robinson v. United States*, 144 F.3d 392, 406 (6th Cir. 1994).

Petitioner was prejudiced by the introduction of the letters because the prosecutor repeatedly questioned Mr. Gordon, Mrs. Gordon, and petitioner about the letters. RT 1490-1493, 1523-24, and 1653-57. The introduction of petitioner's involuntarily written letters materially undermined the reliability of the proceedings.

Respondent cannot demonstrate that the trial court's error was harmless beyond a reasonable doubt. *Chapman*, 386 U.S. at 20 and *Watson*, 46 Cal.2d at 821. The introduction of the letters violated Article I and the Fifth, Sixth, and Fourteenth Amendments.

XI. PETITIONER'S CONSTITUTIONAL RIGHTS WERE VIOLATED BY VICTIM ADVOCATE JUDY DURHAM SPEAKING WITH VICTIM WITNESSES DURING THEIR TESTIMONY(CLAIM 10).

Ms. Durham participated in the investigation of petitioner's case. (Exhibit 8). She assisted Jane Doe #1 and Jane Doe #2 during their testimony. Ms. Durham spoke with the victim witnesses and made contact with the witnesses at trial. (Exhibit 41). Advocate Durham's contact with the witnesses impermissibly interjected prejudicial elements into the trial (*Sheppard v. Maxwell*, 384 U.S. 333 (1966) and *Estelle v. Williams*, 425 U.S. 501, 503 (1976)) and proved that petitioner was guilty by "other circumstances not adduced as proof at trial." *Taylor v. Kentucky*, 436 U.S. 478, 485 (1976) and *Turner v. Louisiana*, 379 U.S. 466, 468-69 (1965).

Ms. Durham's investigation of the case and communication with testifying witnesses was improper. Respondent cannot demonstrate that the error was harmless beyond a reasonable doubt. *Chapman*, 386 U.S. at 20 and *Watson*, 46 Cal.2d at 821. Ms. Durham's actions violated petitioner's rights under Article I, and the Fifth, Sixth, and Fourteenth Amendments.

“prepared for trial by only reading the statements that prospective witnesses had given to the police.” *Stanley v. Bartley*, 465 F.3d 810, 815 (7th Cir. 2006) *see also United States v. Tucker*, 716 F.2d 576, 583 (9th Cir. 1983).

Trial counsel did not “interview witnesses that the prosecution intend[ed] to call during trial[, which was] ineffective assistance of counsel.” *Baumann v. United States*, 692 F.2d 565, 580 (9th Cir. 1982). Trial counsel was ineffective in not presenting all evidence and witnesses who established “flaws in the state’s case” that “would have been quite useful, even if not conclusi[ive]” as to petitioner’s innocence. *See Matthews v. Abramajtys*, 319 F.3d 780, 790-91 (6th Cir. 2003).

Trial counsel was ineffective in not conducting an adequate investigation and presentation of the case. There is a reasonable probability that but for trial counsel’s ineffectiveness the trial would have resulted in a more favorable outcome. Trial counsel’s ineffective assistance violated Article I and the Sixth and Fourteenth Amendments. *Hollinquest*, 190 Cal.App.4th at 1555 and *Strickland*, 466 U.S. at 693.

XIII. TRIAL COUNSEL WAS INEFFECTIVE IN NOT LITIGATING MATERIAL ISSUES DURING THE PRETRIAL AND IN LIMINE PROCEEDINGS (CLAIM 12).

Trial counsel should have moved to sever the charges based on the circumstances of petitioner’s case. *Williams*, 36 Cal.3d at 448. Severance was warranted because “the crimes charged were highly inflammatory,” and

the prosecution joined "a 'weak' case with a 'strong' case." *People v. Balderas*, 41 Cal.3d 144, 173 (1985). Trial counsel should have moved to sever the charges because they involved different characteristics or attributes. § 954; *People v. Kemp*, 55 Cal.2d 458, 476 (1961); and *People v. Marshall*, 15 Cal.4th 1, 27 (1997).

Trial counsel objected to the introduction of petitioner's letters because they were not "authenticated." RT 1395. Trial counsel should have moved to exclude the letters as involuntary and unreliable under Article I and the Fifth, Sixth, and Fourteenth Amendments. *Robinson*, 144 F.3d at 406. Trial counsel should have submitted evidence documenting that petitioner involuntarily wrote the letters while in isolation, in reaction to the use of Elavil, and in response to his suicidal ideations.

Trial counsel objected to Ms. Durham's contact with Jane Doe #1 during her testimony. RT 944. Trial counsel should have presented testimony from courtroom observers regarding Ms. Durham's contact with testifying witnesses. (Exhibit 41). Trial counsel should have asserted that Ms. Durham's contact with the victim witnesses violated Article I and the Fifth, Sixth, and Fourteenth Amendments.

Trial counsel should have moved to suppress petitioner's post-arrest interrogation statements; MySpace communications; pretext telephone call; and jailhouse letters. Trial counsel should have argued that the evidence

was inadmissible under Article I and the Fifth, Sixth, and Fourteenth Amendments.

Trial counsel should have filed a motion to exclude the uncharged bad acts under Evidence Code sections 1108 and 1109. Trial counsel should have objected to the introduction of the bad acts involving domestic violence. Trial counsel should have requested a pretrial hearing to demonstrate that the alleged bad acts they did not prove that petitioner committed any criminal offenses.

Trial counsel should have moved to admit evidence impeaching Jane Doe #1 and Jane Doe #2. Evidence Code section 780. Trial counsel should have moved to introduce evidence of the victims' use of drugs to impeach their credibility and establish their habits of lying and using drugs. Evidence Code section 1105.

Trial counsel should have moved to introduce evidence of Jane Doe #1's lack of chastity and Jane Doe #2's sexual practices. Evidence Code § 782 and 1103. Trial counsel should have introduced evidence that Jane Doe #1 was not chaste to impeach her credibility and to rebut the state's case that she was a virgin. RT 872, 885, and 1694. Trial counsel should have introduced evidence concerning Jane Doe #2's and petitioner's sexual practices after she had sex with other men. Evidence Code § 1103(c)(4).

Trial counsel should have moved to discover the audio recording of

petitioner's arrest (Exhibit 71); the video recording of interview of Jane Doe #1 (Exhibit 11); the digital results of Jane Doe #1's blood alcohol content (Exhibit 9); the audio recording of interview with Dylan Palmer (Exhibit 10); and Timothy Grabner's criminal history (Exhibit 36). The evidence was material because it undermined the "reliability of [the] given witness[es] and was] determinative of [petitioner's] guilt or innocence." *Giglio v. United States*, 405 U.S. 150, 154 (1972).

Trial counsel was ineffective in not adequately litigating all material issues. There is a reasonable probability that but for trial counsel's ineffectiveness the trial would have resulted in a more favorable outcome. Trial counsel's ineffective assistance violated Article I and the Sixth and Fourteenth Amendments. *Hollinquest*, 190 Cal.App.4th at 1555 and *Strickland*, 466 U.S. at 693.

XIV. TRIAL COUNSEL WAS INEFFECTIVE IN PRESENTING PETITIONER'S DEFENSE OF REASONABLE BUT MISTAKEN BELIEF OF CONSENT AS TO COUNTS I, III, AND IV (CLAIM 13).

"A lawyer who fails adequately to investigate, and to introduce into evidence, records that demonstrate his client's factual innocence, or that raise sufficient doubt as to that question to undermine confidence in the verdict, renders deficient performance." *Hart v. Gomez*, 174 F.3d 1067, 1070 (9th Cir. 1999). Trial counsel did not present evidence impeaching prosecution witnesses, undermining the reliability of petitioner's out of

XVII. APPELLATE COUNSEL WAS INEFFECTIVE IN NOT RAISING POTENTIALLY MERITORIOUS ARGUMENTS AND MISINFORMING PETITIONER OF FACTS IN HIS CASE (CLAIM 16).

Appellate counsel did not raise Claims 8 and 14 on appeal. The claims are potentially meritorious and should have been included in the opening brief on direct appeal. *Harris*, 5 Cal.4th at 835 n. 8. Appellate counsel waived two arguments because they were not included in the opening brief. Opinion, *People v. Gordon*, Case No. A126961 (California Court of Appeals First Appellate District 2009).

Appellate counsel was ineffective in representing petitioner. There is a reasonable probability that but for appellate counsel's ineffectiveness the appeal would have resulted in a more favorable outcome. Appellate counsel's ineffective assistance violated Article I and the Sixth and Fourteenth Amendments. *Hollinquest*, 190 Cal.App.4th at 1555 and *Strickland*, 466 U.S. at 693.

XVIII. THE PROSECUTION COMMITTED MISCONDUCT BY NOT DISCLOSING MATERIAL AND EXCULPATORY EVIDENCE BEFORE TRIAL (CLAIM 17).

Section 1054.1 requires the prosecution to disclose material and exculpatory evidence thirty (30) days before trial. *Izazaga v. Superior Court*, 54 Cal.3d 356, 378 (1991). Section 1054 creates liberty interests protected by the California and United States Constitutions. *Vitek v. Jones*, 445 U.S. 480, 488 (1980). "The failure of a state to abide by its own

statutory commands [] implicate[s] a liberty interest protected by the Fourteenth Amendment against arbitrary deprivation by a state.” *Fetterly v. Paskett*, 997 F.2d 1295, 1300 (9th Cir. 1993) and *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1981).

Here, the prosecution did not disclose material evidence prior to trial. Under *Brady*, the prosecutor has the duty to disclose evidence that may be exculpatory or favorable to the accused’s case under the Fifth and Fourteenth Amendments. *Strickler v. Greene*, 527 U.S. 263, 281 (1999). The evidence supported the suppression of petitioner’s statements and undermined the credibility and reliability of prosecution witnesses. Section 1054 and *Brady* required the prosecution to disclose the evidence since it was favorable to petitioner. *See United States v. Bagley*, 473 U.S. 667 (1985); *Izazaga v. Superior Court*, 54 Cal.3d 356 378 (1991); and *In re Brown*, 17 Cal.4th 873, 879 (1998) (quoting *Kyles v. Whitney*, 514 U.S. 419, 437 (1995)).

The prosecution’s misconduct violated petitioner’s liberty interests and constitutional rights under Article I and the Fifth, Sixth, Eighth and Fourteenth Amendments. A new trial is warranted because the non-disclosure of the evidence prevented petitioner from receiving “a trial resulting in a verdict worthy of confidence.” *Strickler*, 527 U.S. at 434.

Appendix G

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Attorneys for Petitioner
CHARLES DAVID GORDON

IN THE COURT OF APPEAL FOR THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

In Re	)	No. _____
)	
	)	Napa County Criminal
	)	Case No. 145383 (The Honorable
	)	Stephen Kroyer)
)	
CHARLES DAVID	)	First District Court of Appeal
GORDON,	)	Direct Appeal Case No. A126961
)	
	)	First District Court of Appeal
	)	Habeas Case No. A134162
On Habeas Corpus.)	
	)	Napa County Habeas Case
	)	No. HC 1605 (The Honorable
	)	Michael Williams)
)	

PETITION FOR WRIT OF HABEAS CORPUS

5. Maples' state of mind was irrelevant. Jane Doe #2's alleged complaint to Maples was not made near the time of the alleged rape or under circumstances proving its reliability. Maples testimony was unreliable because she made contradictory statements prior to trial. Napa Police Reports (Exhibit 8).

6. The trial court's erred by not excluding Maples irrelevant and unreliable testimony, in violation of Article I and the Sixth and Fourteenth Amendments. A result more favorable to petitioner would have occurred at trial if the court excluded the inadmissible evidence.

CLAIM 9 PETITIONER'S INVOLUNTARY AND UNRELIABLE JAILHOUSE LETTERS WERE IMPROPERLY ADMITTED AT TRIAL.

1. Petitioner incorporates the factual assertions and legal arguments raised in Claim 12 and in the supporting memorandum.

2. The prosecution introduced letters written by petitioner during his pretrial incarceration. RT 1394-95.

3. Petitioner was taking "Elavil" (also known as Amitriptyline) when writing the letters. Napa Detention Center Medication Record (Exhibit 18). Elavil is an antidepressant. Medical Economics Company, Inc., Physicians's Desk Reference, at 1943 (58th Ed. 2004). The medication may cause "[b]lurred vision; change in sexual desire or ability;

constipation; diarrhea; dizziness; drowsiness; dry mouth; headache; loss of appetite; nausea; tiredness; trouble sleeping; and weakness.” *Id.*

4. Petitioner suffered suicidal ideations as a result of taking the medication. Letter to from Charles Gordon to Charles Gilman Gordon (Exhibit 29). The medication induced insomnia and anxiety in petitioner. Declaration of Charles Gordon (Exhibit 38) and Napa Detention Center Medical Reports (Exhibit 18).

5. Petitioner also was suffering from several psychological disorders while awaiting trial, including: (a) ETOH Abuse; (b) Situational Anxiety Disorder; and (c) Situational Depression Disorder. Napa Detention Center Medical Reports (Exhibit 18). He was experiencing “delusional thoughts” and was hearing Jane Doe #2’s voice. *Id.* At the time, petitioner declared that “pressure was building inside [his] head.” *Id.* Petitioner’s altered mental state was observed by his parents. Declaration of Connie Gordon (Exhibit 39) and Declaration of Charles Gilman Gordon (Exhibit 37).

6. Petitioner wrote the letters involuntarily. Declaration of Charles Gordon (Exhibit 438). The letters were written while petitioner was in segregation. RT 1668 and Segregated Population Observation (Exhibit 20). Petitioner testified that at the time he wrote the letters he was

“in fear for his life.” RT 1643. He testified that “in [his] delusional state at the time, [he] believed [that writing the letters] was the only way to save [his] life.” RT 1643. He felt that his friends and family were “tampered with prior to coming [to testify].” RT 1646. Petitioner explained that, in writing the letters, he “was venting and voicing [his] frustration with [his] confinement and inability to do anything about the case, and waiting in a cell.” RT 1657.

7. Petitioner’s jailhouse letters were written involuntarily and improperly introduced at trial in violation of Article I, and the Fifth and Fourteenth Amendments. A result more favorable to petitioner would have occurred at trial had the Court excluded the inadmissible evidence.

CLAIM 10 PETITIONER’S CONSTITUTIONAL RIGHTS WERE VIOLATED BY VICTIM ADVOCATE JUDY DURHAM SPEAKING WITH VICTIM WITNESSES DURING THEIR TESTIMONY.

1. Petitioner incorporates the factual assertions and legal arguments raised in Claim 12 to this petition and the supporting memorandum.

2. Judy Durham is an advocate for sexually abused victims. RT 945. Ms. Durham and Detective Elia interviewed Jane Doe #1. Napa Police Reports (Exhibit 8). Detective Elia and Ms. Durham interviewed Krystal Williams about the uncharged allegations that she was raped by

investigated the case and developed all exculpatory and mitigating evidence.

CLAIM 12. TRIAL COUNSEL WAS INEFFECTIVE IN NOT LITIGATING MATERIAL ISSUES DURING THE PRETRIAL AND *IN LIMINE* PROCEEDINGS.

1. Petitioner incorporates the factual assertions and legal arguments raised in all Claims to this petition, and supporting memorandum.
2. The prosecution's trial brief contained motions seeking: (a) permission to voir dire the jury about sexual assault; (b) accommodate a child witness; (c) to exclude witnesses from the courtroom except Detective Elia; (d) to make the parties and witnesses refer to the alleged victims as Jane Doe #1 and Jane Doe #2; (e) introduce expert testimony concerning child sexual abuse accommodation syndrome; (f) introduce expert testimony concerning rape trauma syndrome; (g) introduce other sexual deviant acts by petitioner; and (h) introduce other incidents of domestic violence by petitioner. CT 82-121. Trial counsel did not file an opposition to any of the motions. Trial counsel should have filed oppositions to the prosecutor's motions.
3. Trial counsel did not object to Ms. Durham's contact with victim witnesses at trial under Article I and the Fifth and Fourteenth Amendments. Trial counsel did not introduce evidence demonstrating Ms.

Durham's improper contact with the victim witnesses. Napa Police Reports (Exhibit 8) and Declaration of Scott Lester (Exhibit 41).

4. In its trial brief, the prosecution sought to introduce testimony regarding: (a) the alleged childhood molestation of Jane Doe #1 by petitioner; (b) other alleged incidents of rape involving Jane Doe #2; (c) the alleged and uncharged rape of Jane Doe #3; (d) other incidents of domestic violence involving Jane Doe #2; and (e) an alleged domestic assault on Ms. MacArthur. The prosecution filed a memorandum arguing that the evidence was admissible under Evidence Code sections 352, 1101, 1108, and 1109.

5. Trial counsel moved to exclude evidence concerning the other bad acts in a motion that was three pages in length. CT 74-77. Trial counsel did not address whether Evidence Code sections 1108 and 1109 permitted the introduction of the uncharged bad acts, or argue that the evidence was inadmissible under Article I or the Fifth, Sixth, and Fourteenth Amendments. *Id.* Trial counsel should have moved to exclude the evidence on these bases, and requested a hearing concerning the alleged bad acts prior to the waiver of petitioner's right to a jury trial.

6. Trial counsel did not move to sever the charges involving Jane Doe #1 and Jane Doe #2 based on material differences in the alleged crimes, and the "sensational" nature of the crimes. The prosecution

exploited the joinder of the charges by arguing that petitioner engaged in a pattern of sexual assault. RT 1674. The trial court also relied on the number of victims in finding petitioner guilty. RT 1698. Trial counsel should have preempted the prosecution's argument and the court's finding by moving to sever the charges.

7. Petitioner's trial counsel did not move to exclude the introduction of petitioner's jailhouse letters on grounds other than lack of authentication. RT 1395. Trial counsel did not submit evidence documenting that petitioner wrote the letters while in isolation, adversely reacting to prescription drugs, and suicidal. Segregated Population Records (Exhibit 20); Medication Administration Records (Exhibit 18); and Letter from Charles Gordon to Charles Gilman Gordon (Exhibit 29). Trial counsel should have moved to exclude the letters as unreliable and involuntarily written under Article I and the Fifth, Sixth, and Fourteenth Amendments.

8. Trial counsel did not file specific requests for discovery of the evidence in the case. CT 60-62 and 78. Instead, as the prosecution noted, trial counsel filed "boilerplate" requests and motions. RT 518. Trial counsel did not obtain each of the items of evidence listed above. Supplemental Declaration of Brian McComas (Exhibit 43). Trial counsel should have moved to obtain *Brady* evidence discovered by petitioner in post-conviction proceedings. Audio Recording of Petitioner's Arrest

(Exhibit 81); Video Recording of Interview of Jane Doe #1 (Exhibit 11); Digital Results of Jane Doe #1's Blood Alcohol Content (Exhibit 9); Audio Recording of Interview with Dylan Palmer (Exhibit 10); and Timothy Grabner's Criminal History (Exhibit 36).

9. Trial counsel did not move to admit evidence demonstrating that petitioner's character was good and non-violent. Trial counsel should have moved to introduce evidence proving that petitioner did not commit domestic violence or sexual assault during prior relationships. *See generally* Declaration of Charles Gilman Gordon (Exhibit 37), Declaration of Charles Gordon (Exhibit 38), Declaration of Connie Gordon (Exhibit 39), and Declaration of Scott Lester (Exhibit 41). Trial counsel should have moved to introduce evidence that petitioner did not take advantage of Jane Doe #1 on a prior occasion when she was intoxicated and contacted by Detective Elia at petitioner's house. Declaration of Charles Gordon (Exhibit 38).

10. Trial counsel did not move to admit evidence of other sexual acts by Jane Doe #1 and Jane Doe #2. California Evidence Code § 782. Trial counsel should have introduced evidence concerning Jane Doe #2's practice of having sex with other men, and then having rough and anal sex with petitioner. Declaration of Charles Gordon (Exhibit 38). Trial counsel should have introduced evidence that Jane Doe #1 was not chaste. *Id.* and

Declaration of Connie Gordon (Exhibit 39). Trial counsel should have introduced this evidence to: (a) challenge Jane Doe #1's credibility in testifying that she objected to having sex by stating that she was a virgin; (b) challenge Jane Doe #2's credibility in denying that her and petitioner's sexual practices included rough and anal sex; (c) support the reasonableness of petitioner's belief in the consensual nature of the sex with Jane Doe #1; and (d) support the reasonableness of petitioner's belief in the consensual nature of the sex with Jane Doe #2.

11. Trial counsel should have introduced evidence establishing the extent of Jane Doe #1's and Jane Doe #2's use of drugs. Cal. Evidence Code sections 780(b)(c)(d)(f)(h)(j). The evidence properly challenged the credibility of Jane Doe #1 and Jane Doe #2 and was not impermissible character evidence. Cal. Evidence Code section 1101. Trial counsel should have introduced evidence that:

(a) Jane Doe #1 regularly used ecstasy, alcohol, and marijuana. Declaration of Charles Gordon (Exhibit 38); Declaration of Connie Gordon (Exhibit 39); and Jane Doe #1 MySpace Communications (Exhibit 4). Jane Doe #1 was placed on diversion and probation. Diversion Contract (Exhibit 5). Jane Doe #1 continued to use drugs and alcohol, including on the night of the alleged rape. Declaration of Charles Gordon (Exhibit 38) and Declaration of Connie Gordon (Exhibit 39). Trial counsel

should have introduced the evidence to impeach Jane Doe #1's credibility and rebut the prosecution's theory that petitioner got her intoxicated so as to take advantage of her.

(b) Jane Doe #2 was dependent upon methamphetamine. Declaration of Charles Gordon (Exhibit 38); Declaration of Connie Gordon (Exhibit 39); and Declaration of Scott Lester (Exhibit 41). At the time of the alleged rape, Jane Doe #2 procured methamphetamine from Marlene Maples. Declaration of Charles Gordon (Exhibit 38). Trial counsel should have challenged Jane Doe #2's credibility in stating that she did not regularly use methamphetamine and did not use methamphetamine on the night of the alleged crimes. RT 642 and 627.

12. Trial counsel was ineffective in not litigating material issues during the pretrial, *in limine*, and sentencing proceedings in petitioner's case in violation of Article I and the Sixth and Fourteenth Amendments. A result more favorable to petitioner would have occurred had trial counsel effectively litigated material issues pretrial.

CLAIM 13.

TRIAL COUNSEL WAS INEFFECTIVE IN PRESENTING PETITIONER'S DEFENSE OF REASONABLE BUT MISTAKEN BELIEF OF CONSENT AS TO COUNTS I, III, AND IV.

1. Petitioner incorporates the factual assertions and legal arguments raised in Claims 1, 2, 3, 4, 5, 6, 9, 10, 12, and 14 to this petition.

Appellate counsel should have raised the argument because it was based on facts in the record establishing violations of petitioner's constitutional rights and are potentially meritorious.

3. Appellate counsel raised three arguments alleging that:

(a) the evidence presented by the state was insufficient for conviction as to Counts 2 and 5 in violation of petitioner's rights under Article I and the Fifth and Fourteenth Amendments; (b) the prosecution's uncharged bad acts evidence was improperly introduced in violation of California statutory and decisional law, Article I and the Fifth and Fourteenth Amendments; and (c) petitioner's sentence is cruel and unusual in violation of Article I and the Eighth and Fourteenth Amendments. Opinion, *People v. Gordon*, Case No. A126961 (California Court of Appeals First Appellate District 2009).

4. Appellate counsel provided ineffective assistance during petitioner's appeal in violation of Article I and the Fifth, Sixth, Eighth, and Fourteenth Amendments. A result more favorable to petitioner would have occurred on appeal had counsel raised all potentially meritorious claims.

**CLAIM 17 THE PROSECUTION COMMITTED MISCONDUCT
BY NOT DISCLOSING MATERIAL AND
EXONERATOR EVIDENCE BEFORE TRIAL.**

1. Petitioner incorporates the factual assertions and legal arguments raised in Claims 1, 2, 3, 11, 12, and 13 to this petition and the supporting memorandum.

2. Petitioner informally requested discovery of all material and exculpatory evidence in anticipation of trial. CT 60-62. Petitioner moved *in limine* for "disclosure of all potentially favorable evidence to the defense." CT 78. The trial court granted the motion. RT 518. The prosecution provided a single police report concerning an incident involving Jane Doe #1 that allegedly occurred in 1997. RT 519.

3. In January 2012, petitioner filed an amended petition for writ of habeas corpus with the Napa Superior Court. Exhibit 47. Petitioner moved for post-conviction discovery after the Court issued an order to show cause. Napa Superior Court Case No. HC 1605. Respondent disclosed several items that were not in trial counsel's possession. Declaration of Brian McComas (Exhibit 43).

4. The materials disclosed by respondent in post-conviction proceedings should have been disclosed before trial under section 1054 and *Brady*.

(a) Audio Recording of Petitioner's Arrest (Exhibit 71). The audio recording is material because it supports the suppression of petitioner's interrogation statements.

(b) Video Recording of Interview of Jane Doe #1 (Exhibit 11). The video recording is material because it contains prior inconsistent statements made by Jane Doe #1 that discredit her testimony.

(c) Digital Results of Jane Doe #1's Blood Alcohol

Content (Exhibit 9). Jane Doe #1's blood alcohol content on November 16, 2008 at 1:57 a.m. was .14 percent. The digital results of Jane Doe #1's blood alcohol content establish a motive for Jane Doe #1 to fabricate the allegation that she was raped by petitioner to avoid punishment for violating the terms of her diversion contract and probation.

(d) Audio Recording of Interview with Dylan Palmer

(Exhibit 10). On November 16, 2008, Detective Elia called Jane Doe #1's boyfriend, Dylan Palmer. Palmer stated that Jane Doe #1 was not yelling in the background and nothing appeared wrong. Mr. Palmer's statements establish that petitioner did not hold Jane Doe #1 against her will and that Jane Doe #1 was motived to falsely testify that petitioner raped her to avoid the repercussions resulting from violating the terms of her probation.

(e) Timothy Grabner's Criminal History (Exhibit 36). Mr. Grabner's prior convictions and arrest are material because they could have been admitted to impeach his credibility.

5. Petitioner was denied discovery of material and exculpatory evidence by the Napa Superior Court during post-conviction proceedings. Petitioner was denied access to notes concerning the District Attorney's decision to press charges against him in November 2008; Jane Doe #1's juvenile case file; and Ms. Durham's notes from conversations with Jane

Doe #1. Transcript of Hearing (Exhibit 58). The prosecution violated section 1054 and *Brady* by not disclosing the evidence prior to trial to the extent that it includes material and exculpatory evidence.

6. The prosecution's non-disclosure of material evidence before trial was misconduct. The prosecution's misconduct violated petitioner's liberty interests and constitutional rights under Article I and the Fifth, Sixth, Eighth and Fourteenth Amendments. It is reasonably probable that a more favorable result would have occurred at trial but for the non-disclosure of material evidence.

CLAIM 18 CUMULATIVE ERROR UNDERMINED THE RELIABILITY OF THE PROCEEDINGS.

1. Petitioner incorporates the factual assertions and legal arguments raised in all Claims to this petition and supporting the memorandum.

2. Throughout the trial, the court, the prosecutor, and trial counsel committed errors, misconduct, and rendered ineffective assistance. Petitioner's appellate counsel was ineffective in not raising all errors on appeal. Petitioner's post-conviction counsel rendered ineffective assistance in not calling a toxicologist to testify at the evidentiary hearing if the Court was correct in denying petitioner's request to take judicial notice of petitioner's level of intoxication and the effects of his intoxication.