UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ANDREW STUART LUSTER, Petitioner-Appellant, v. JOE A. LIZARRAGA, Warden, Respondent-Appellee.	No. 17-55521 D.C. No. 2:16-cv-02444-VAP-E Central District of California, Los Angeles ORDER (Filed Nov. 8, 2017)

Before: SILVERMAN and IKUTA, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 2) is denied because appellant has not made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ANDREW LUSTER, Petitioner, v. JOE A. LIZARRAGA, Warden, Respondent.	NO. CV 16-2444-VAP(E) ORDER DENYING CERTIFICATE OF APPEALABILITY (Filed Mar. 29, 2017)

The Court has reviewed the Report and Recommendation of United States Magistrate Judge and the other papers on record in these proceedings. For the reasons set forth in the Magistrate Judge's Report and Recommendation, filed January 27, 2017, the Court finds that Petitioner has not made a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253; Fed. R. App. P. 22(b); *see also Miller-El v. Cockrell*, 537 U.S. 322 (2003); *Slack v. McDaniel*, 529 U.S. 473 (2000); *Lozada v. Deeds*, 498 U.S. 430 (1991); *Gardner v. Pogue*, 558 F.2d 548 (9th Cir. 1977).

IT IS ORDERED that the Certificate of Appealability is denied.

IT IS FURTHER ORDERED that the Clerk shall serve copies of this Order on counsel for Petitioner and on counsel for Respondent.

DATED: March 29, 2017.

/s/ Virginia A. Phillips
VIRGINIA A. PHILLIPS
CHIEF UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ANDREW STUART LUSTER, Petitioner, v. JOE A. LIZARRAGA, Warden, Respondent.	NO. CV 16-2444-VAP(E) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE (Filed Jan. 27, 2017)

This Report and Recommendation is submitted to the Honorable Virginia A. Phillips, Chief United States District Judge, pursuant to 28 U.S.C. section 636 and General Order 05-07 of the United States District Court for the Central District of California.

PROCEEDINGS

On April 9, 2016, Petitioner, represented by counsel, filed a "Verified Petition for Federal Writ of Habeas Corpus" ("Petition"), accompanied by a memorandum ("Pet. Mem."). The Petition alleges five claims, some of which contain subclaims. Respondent filed an Answer on June 6, 2016, contending *inter alia* that Claims One through Four of the Petition are procedurally defaulted. Petitioner filed a Reply on July 1, 2016.

On July 7, 2016, the Magistrate Judge ordered Respondent to file a Supplemental Answer addressing the merits of Claims One through Four of the Petition. Respondent filed a Supplemental Answer on September

2, 2016. Petitioner filed a Reply to the Supplemental Answer on October 17, 2016.

BACKGROUND

In 2003, after Petitioner fled the country during his trial, a jury found Petitioner guilty *in absentia* of multiple counts of rape, sodomy, drug possession, weapon possession and poisoning (Augmented Reporter's Transcript ["AUG RT"] 2327-45; Augmented Clerk's Transcript ["AUG CT"] 4711-4879). The sex counts involved three female victims, Carey Doe, Shawna Doe and Tonja Doe (*id.*). The prosecution presented evidence at trial that Petitioner gave the victims a "date rape" drug (gammahydroxybutrate aka "GHB") in order to render the victims unable to resist Petitioner's sexual assaults. The evidence showed Petitioner sexually assaulted Tonja in October of 1996, sexually assaulted Shawna in November or December of 1997 and sexually assaulted Carey in 2000 (*see* AUG RT 925-33, 966-67, 975-90, 1001-04, 1161-64, 1205-19, 1225-29, 1521-87). The evidence included videotapes Petitioner had made of his sexual assaults on Tonja and Shawna while these victims were unconscious (*id.*).

Among other findings, the jury found Petitioner guilty of multiple counts of rape by intoxication of all three female victims in violation of California Penal Code section 261(a)(3) (AUG RT 2333-44; AUG CT 4711-4867). The jury also found Petitioner guilty of multiple counts of rape of an unconscious person

(Shawna and Tonja) in violation of California Penal Code section 261(a)(4) (*id.*). Petitioner received a sentence of 124 years (AUG RT 2402-05).

Petitioner's post-conviction proceedings have traveled a long and winding road. The California Court of Appeal dismissed Petitioner's first direct appeal on June 10, 2003, because of Petitioner's fugitive status. *See People v. Luster*, 2003 WL 21509182 (Cal. App. July 2, 2003). Following Petitioner's capture in Mexico later that year, the Court of Appeal denied Petitioner's petition for rehearing. *See id.* The California Supreme Court denied review on September 10, 2003.[1] The United States Supreme Court denied certiorari on January 26, 2004. *See Luster v. California*, 540 U.S. 1162 (2004).

Petitioner filed a habeas corpus petition in this Court on January 20, 2005, in *Luster v. Knowles*, CV 05-466-VAP(JCR) (*see* Respondent's Lodgment 6). On January 17, 2008, Magistrate Judge Rayburn issued a Final Report and Recommendation recommending denial of the petition on the merits with prejudice (Respondent's Lodgments 5, 6). On January 17, 2008, the District Court issued an Order Adopting the Final Report and Recommendation (Respondent's Lodgment 6). Judgment was entered on January 18, 2008 (*id.*). The United States Court of Appeals for the Ninth Circuit

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[1] The Court takes judicial notice of the docket and proceedings in Petitioner's California Supreme Court proceedings described herein, available on the California courts' website at www.courts.ca.gov. *See Porter v. Ollison*, 620 F.3d 952, 954-55 n.1 (9th Cir. 2010) (taking judicial notice of court dockets).

denied Petitioner's request for a certificate of appealability on September 30, 2009 (*id.*).

In the meantime, on October 26, 2005, Petitioner filed a habeas corpus petition in the California Supreme Court, which that court denied on December 13, 2005. On March 20, 2009, Petitioner filed another habeas corpus petition in the California Supreme Court, which Petitioner withdrew on March 2, 2010.

Petitioner then filed a habeas corpus petition in the Ventura County Superior Court,[2] which that court denied summarily on June 30, 2010 (AUG CT 5969-95; Petition, ¶¶ XIV, XV). Petitioner filed a habeas corpus petition in the California Court of Appeal on August 16, 2010.[3] On April 19, 2012, the Court of Appeal issued an Order to Show Cause, ordering the Ventura County Superior Court to hold an evidentiary hearing on the issues raised in the August 2010 petition (Respondent's Lodgment 7; Clerk's Transcript ["CT"] 91-92). Following an evidentiary hearing, which occurred from February 19, 2013 through March 1, 2013, the Ventura County Superior Court ("state habeas court") issued a twenty-eight page "Order Granting in Part and Denying in Part Petitioner's Requests for Relief on Habeas Corpus; Opinion of the Court" on March 11, 2013 (Respondent's Lodgment 8; CT 1050-79). The state habeas court rejected all of Petitioner's claims except his claim

[2] The record contains only a partial copy of this petition.

[3] The Court takes judicial notice of the Court of Appeal's docket and proceedings, available on the California courts' website at www.courts.ca.gov. *See Porter v. Ollison*, 620 F.3d at 954-55 n.1.

of alleged sentencing error. In response to that claim, the state habeas court ordered a new sentencing hearing.

At the new sentencing hearing on April 16, 2013, the same judge who had conducted the evidentiary hearing (who was the same judge who had ordered the resentencing to occur) sentenced Petitioner to a term of fifty years to life (Respondent's Lodgment 9; CT 1334-53).

The California Court of Appeal affirmed this judgment and denied Petitioner's companion habeas corpus petition on June 8, 2015 (Respondent's Lodgments 13, 17; *People v. Luster*, 2015 WL 3559146 (Cal. App. June 8, 2015). The California Supreme Court denied review on September 9, 2015 (Respondent's Lodgments 19, 23, 24).

Petitioner then filed a habeas corpus petition in the California Supreme Court on October 30, 2015, which that court denied with citations on February 17, 2016 (Respondent's Lodgment 21).

SUMMARY OF PETITIONER'S CONTENTIONS

Petitioner contends:

1. The trial court's instruction regarding the defense of reasonable belief in a victim's capacity to consent allegedly violated due process;

2. The trial court's instruction that GHB was a "controlled substance" in 1996 allegedly violated due process;

3. Petitioner's counsel Roger Diamond allegedly rendered ineffective assistance by failing to object to these assertedly infirm instructions;

4. Petitioner's counsel Joel Isaacson[4] allegedly rendered ineffective assistance by assertedly giving incompetent advice which supposedly caused Petitioner to reject a purported plea offer;

5. Petitioner's counsel Richard Sherman allegedly rendered ineffective assistance while assertedly under an actual conflict of interest, by allegedly: (a) abandoning Petitioner on the eve of trial to facilitate Petitioner's flight for the purpose of financial gain to Sherman; (b) advising Petitioner to flee and planning Petitioner's flight; (c) failing to pursue plea negotiations; (d) failing to file a motion for change of venue; and (e) failing to reveal to the sentencing court Sherman's role in Petitioner's flight; and

6. Petitioner allegedly received an unconstitutional sentence because there assertedly was no jury determination that Petitioner acted on "separate occasions" so as to justify consecutive sentences.

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[4] Petitioner has been represented by many different attorneys at various times.

STANDARD OF REVIEW

Under the "Antiterrorism and Effective Death Penalty Act of 1996" ("AEDPA"), a federal court may not grant an application for writ of habeas corpus on behalf of a person in state custody with respect to any claim that was adjudicated on the merits in state court proceedings unless the adjudication of the claim: (1) "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States"; or (2) "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d); *Woodford v. Visciotti*, 537 U.S. 19, 24-26 (2002); *Early v. Packer*, 537 U.S. 3, 8 (2002); *Williams v. Taylor*, 529 U.S. 362, 405-09 (2000).

"Clearly established Federal law" refers to the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision on the merits. *Greene v. Fisher*, 132 S. Ct. 38, 44 (2011); *Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003).

A state court's decision is "contrary to" clearly established Federal law if: (1) it applies a rule that contradicts governing Supreme Court law; or (2) it "confronts a set of facts . . . materially indistinguishable" from a decision of the Supreme Court but reaches a different result. *See Early v. Packer*, 537 U.S. at 8 (citation omitted); *Williams v. Taylor*, 529 U.S. at 405-06.

Under the "unreasonable application prong" of section 2254(d)(1), a federal court may grant habeas relief "based on the application of a governing legal principle to a set of facts different from those of the case in which the principle was announced." *Lockyer v. Andrade*, 538 U.S. at 76 (citation omitted); *see also Woodford v. Visciotti*, 537 U.S. at 24-26 (state court decision "involves an unreasonable application" of clearly established federal law if it identifies the correct governing Supreme Court law but unreasonably applies the law to the facts).

"In order for a federal court to find a state court's application of [Supreme Court] precedent 'unreasonable,' the state court's decision must have been more than incorrect or erroneous." *Wiggins v. Smith*, 539 U.S. 510, 520 (2003) (citation omitted). "The state court's application must have been 'objectively unreasonable.'" *Id.* at 520-21 (citation omitted); *see also Waddington v. Sarausad*, 555 U.S. 179, 190 (2009); *Davis v. Woodford*, 384 F.3d 628, 637-38 (9th Cir. 2004), *cert. dism'd*, 545 U.S. 1165 (2005). "Under § 2254(d), a habeas court must determine what arguments or theories supported, . . . or could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." *Harrington v. Richter*, 562 U.S. 86, 101 (2011). This is "the only question that matters under § 2254(d)(1)." *Id.* at 102 (citation and internal quotations omitted). Habeas relief may not issue unless "there is no possibility fairminded jurists could disagree that the state court's decision conflicts with [the United States Supreme Court's] precedents." *Id.* "As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id.* at 103.

In applying these standards, the Court looks to the last reasoned state court decision. *See Delgadillo v. Woodford*, 527 F.3d 919, 925 (9th Cir. 2008). Where no reasoned decision exists, as where the state court summarily denies a claim, "[a] habeas court must determine what arguments or theories . . . could have supported the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." *Cullen v. Pinholster*, 563 U.S. 170, 188 (2011) (citation, quotations and brackets omitted).

Additionally, federal habeas corpus relief may be granted "only on the ground that [Petitioner] is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). In conducting habeas review, a court may determine the issue of whether the petition satisfies section 2254(a) prior to, or in lieu of, applying the standard of review set forth in section 2254(d). *Frantz v. Hazey*, 533 F.3d 724, 736-37 (9th Cir. 2008) (en banc).

DISCUSSION[5]

I. Petitioner's Claims of Alleged Instructional Error Do Not Merit Federal Habeas Relief.

A. Standards Governing Claims of Alleged Instructional Error

"[I]nstructions that contain errors of state law may not form the basis for federal habeas relief." *Gilmore v. Taylor*, 508 U.S. 333, 342 (1993); *see also Estelle v. McGuire*, 502 U.S. 62, 71-72 (1991) ("the fact that the instruction was allegedly incorrect under state law is not a basis for habeas relief"); *Dunckhurst v. Deeds*, 859 F.2d 110, 114 (9th Cir. 1988) (instructional error "does not alone raise a ground cognizable in a federal habeas corpus proceeding"). When a federal habeas petitioner challenges the validity of a state jury instruction, the issue is "whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." *Estelle v. McGuire*, 502 U.S. at 72; *Clark v. Brown*, 450 F.3d 898, 904 (9th Cir.), *cert. denied*, 549 U.S. 1027 (2006). The court must evaluate the alleged instructional error in light of the overall charge to the jury. *Middleton v. McNeil*, 541 U.S. 433, 437 (2004); *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977); *Villafuerte v. Stewart*, 111 F.3d 616, 624 (9th

[5] The Court has read, considered and rejected on the merits all of Petitioner's arguments. The Court discusses Petitioner's principal arguments herein. The Court has assumed *arguendo* Petitioner has not procedurally defaulted any of his claims. *See Lambrix v. Singletary*, 520 U.S. 518, 523-25 (1997); *Ayala v. Chappell*, 829 F.3d 1081, 1095-96 (9th Cir. 2016); *Franklin v. Johnson*, 290 F.3d 1223, 1229, 1232-33 (9th Cir. 2002).

Cir. 1997), *cert. denied*, 522 U.S. 1079 (1998). The court must decide whether "there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Rhoades v. Henry*, 638 F.3d 1027, 1042 (9th Cir. 2010), *cert. denied*, 132 S. Ct. 401 (2011) (citation and internal quotations omitted). The question is not whether the jury *could have* done so, but whether there is a reasonable likelihood it *did*. *Id.* (citation omitted; original emphasis). The court should not engage in a "technical parsing" of the challenged instruction, but rather should consider the instruction as the jury would, "with a commonsense understanding of the instructions in the light of all that has taken place at trial." *Id.* at 1042-43 (citation and internal quotations omitted).

B. Instruction Regarding Defense of Reasonable Belief in Victim's Capacity to Consent

The State charged Petitioner with multiple counts of rape of an intoxicated person in violation of California Penal Code section 261(a)(3) (*see* CT 1-16). Section 261(a)(3) defines rape as sexual intercourse with a non-spouse "[w]here a person is prevented from resisting by any intoxicating or anesthetic substance, or any controlled substance, and this condition was known, or reasonably should have been known by the accused." Petitioner's trial court so instructed the jury (AUG RT 2264-65; AUG CT 4675).

The prosecution alleged three counts of violation of section 261(a)(3) with respect to victim Carey Doe (Counts 1, 2 and 3) (CT 3). The prosecution's evidence showed: (1) Carey met Petitioner at a bar where she and a friend had been drinking; (2) at the bar, Carey drank half a glass of water Petitioner had given her; (3) Carey's perception then became blurry and skewed, and she experienced memory gaps; (4) on the drive to Petitioner's beach house, Carey and her friend had sex in the back seat of the car, although Carey did not recall this event; (5) at Petitioner's house, Carey felt like a "robot" and was not thinking logically; (6) after her arrival at the house, Carey jumped off a pier into the ocean, something she had never done before; (7) after returning to the house, and while Carey was taking a shower, Petitioner entered the shower and had sex with her, although Carey did not want him to do so; and (8) Petitioner then gave Carey more drinks, after which Petitioner had sex with Carey twice more in the bedroom, telling her he had put "Liquid Ecstasy" in her drink (AUG RT 1327-28, 1534-86). A prosecution expert testified that liquid GHB, also called "Liquid Ecstasy" or "Liquid X," is a clear liquid with no color or odor (AUG RT 584, 590-91). The expert testified that GHB is a fast-onset anesthetic which initially depresses inhibitions and causes euphoria, while larger doses cause nausea, vomiting, difficulty talking and altered perceptions, eventually leading to unconsciousness and coma (AUG RT 581, 591-99). According to the expert, a person ingesting GHB can experience a form of amnesia in which the person recalls taking the drug but suffers memory gaps because GHB can prevent memories from being formed and stored (AUG RT 605-06). The expert said ingesting alcohol with GHB increases the risk of amnesia (AUG RT 606-14). The expert also said GHB can cause a form of sleep paralysis in which the person ingesting the substance is asleep but appears conscious and is still able to talk and walk (AUG RT 615-16).[6]

In addition to instructing the jury on the elements of rape of an intoxicated person, the court instructed the jury as follows:

> As to the crimes charged in counts 1, 2 and 3 only, there is no criminal intent if the defendant had a reasonable and good faith belief that Carey voluntarily consented to engage in sexual intercourse. Therefore, a reasonable and good faith belief that there was voluntary consent is a defense to such a charge.
>
> *However, a belief that is based upon ambiguous conduct by an alleged victim that is the product of the defendant's knowing and unlawful administration of an intoxicating, anesthetic or controlled substance which prevents her from resisting [ ] is not a reasonable good faith belief.*

(AUG RT 2276-77; AUG CT 4688) (emphasis added).

Petitioner contends the underlined portion of the instruction was improper because, under California law, "[a]n honest and reasonable but mistaken belief

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[6] The defense did not present any expert on GHB.

that a sexual partner is not too intoxicated to give legal consent to sexual intercourse is a defense to rape by intoxication" (Pet. Mem., ECF Dkt. No. 1, p. 65).[7] Petitioner contends the instruction erroneously told the jury that Petitioner never could have had a reasonable belief in consent if Petitioner gave Carey GHB before having intercourse with her (Pet. Mem., ECF Dkt. No. 1, pp. 66-67). The state habeas court rejected this claim without a reasoned explanation (Respondent's Lodgment 8, pp. 28-29).

Under California law, actual consent is not a defense to rape of an intoxicated person who lacks the capacity to consent. *See People v. Giardino*, 82 Cal. App. 4th 454, 461-62, 98 Cal. Rptr. 2d 315 (2000). The challenged instruction was a modification of California's "*Mayberry*" instruction, which informs the jury that a defendant's reasonable and good faith belief in a victim's consent to sexual intercourse can be a defense to forcible rape. *See People v. Mayberry*, 15 Cal. 3d 143, 125 Cal. Rptr. 745, 542 P.2d 1337 (1975).

> The *Mayberry* defense has two components, one subjective, and one objective. The subjective component asks whether the defendant honestly and in good faith, albeit mistakenly, believed that the victim consented to sexual intercourse. In order to satisfy this component, a defendant must adduce evidence of the victim's equivocal conduct on the

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[7] The Memorandum accompanying the Petition does not bear page numbers. The Court uses the ECF pagination.

> basis of which he erroneously believed there was consent.
>
> In addition, the defendant must satisfy the objective component, which asks whether the defendant's mistake regarding consent was reasonable under the circumstances. Thus, regardless of how strongly a defendant may subjectively believe a person has consented to sexual intercourse, that belief must be formed under circumstances society will tolerate as reasonable in order for the defendant to have adduced substantial evidence giving rise to a *Mayberry* instruction.

People v. Williams, 4 Cal. 4th 354, 360-61, 14 Cal. Rptr. 2d 441, 841 P.2d 961 (1992) (footnote omitted).

In a forcible rape case, where there is evidence of "equivocal conduct" by the victim, the court will instruct that the jury may not uphold the defense of reasonable mistake of fact if the jury finds that the victim's "equivocal conduct" was the product of the "force, violence, duress, menace or fear of immediate and unlawful bodily injury." *People v. Williams*, 4 Cal. 4th at 364 ("No doubt it would offend modern sensibilities to allow a defendant to assert a claim of reasonable and good faith but mistaken belief in consent based on the victim's behavior after the defendant had exercised or threatened 'force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another.'") (citations omitted). The challenged instruction evidently represented the trial court's attempt to apply this concept to "non-forcible" rape by intoxication.

Petitioner has not shown a reasonable likelihood that the jury applied the challenged instruction in a way that prevented the consideration of constitutionally relevant evidence, or that the challenged instruction so infected the trial as to violate due process. The court instructed the jury: (1) rape by intoxication occurs "[w]here a person is *prevented from resisting* by any intoxicating or anesthetic substance, or any controlled substance, *and this condition was known, or reasonably should have been known by the accused*"; (2) "prevented from resisting" means "that as a result of intoxication, the alleged victim lacked the legal capacity to give 'consent' "; and (3) "legal capacity" is "the ability to exercise reasonable judgment, that is, to understand and weigh not only the physical nature of the act, but also the moral and probable consequences" (AUG RT 2264-65, 2278-79; AUG CT 4675, 4692) (emphasis added). Given these instructions, it is not reasonably likely that jurors would have believed they could find Petitioner guilty of the rape by intoxication of Carey without finding Petitioner knew or should have known Carey was "prevented from resisting." A finding Petitioner knew or should have known Carey was "prevented from resisting" necessarily meant that any alleged subjective belief by Petitioner that Carey voluntarily gave consent was unreasonable.

In any event, the alleged error was harmless under the harmless error standard applicable to federal habeas cases set forth in *Brecht v. Abrahamson*, 507

U.S. 619 (1993) ("*Brecht*"). *Brecht* forbids a grant of habeas relief for a trial-type error unless the error had a "substantial and injurious effect or influence in determining the jury's verdict." *Id.* at 637-38.[8] Petitioner's trial defense theorized that Carey had voluntarily and knowingly consented to the sex with Petitioner and thereafter lied about the events. Petitioner's trial defense did not theorize that Petitioner mistakenly but reasonably believed Carey had consented. For example, Petitioner's counsel argued in closing that Carey falsely claimed Petitioner had raped her, said "there was no rape of Carey," and asserted Carey lied about having sex with Petitioner while intoxicated because she supposedly wanted to cover up the backseat sexual encounter with her friend and/or because she had after-sex regret or shame about what she had done (AUG RT 2176-79, 2217-18). Similarly, counsel argued "Carey lied" and Carey was "not under the influence of GHB" (AUG RT 2168, 2217). Counsel also referenced Petitioner's police interview, in which Petitioner stated that "a lot of girls" experienced remorse after having sex (some while drunk), and that those girls "want[ed] to point the finger that it wasn't them because of the guilt . . . trip thing" (AUG RT 2172-79; *see* AUG CT

[8] Petitioner appears to argue the Court should apply the "beyond a reasonable doubt" harmless error standard applicable to cases on direct review under *Chapman v. California*, 386 U.S. 18 (1967) (*see* Pet. Mem., ECF Dkt. No. 1, pp. 74-76, 79). Any such argument must be rejected. The proper standard of review for federal habeas claims of instructional error is the standard set forth in *Brecht*. *See California v. Roy*, 519 U.S. 2, 4-5 (1996); *Cavitt v. Cullen*, 728 F.3d 1000, 1010 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 1522 (2014).

3302, 3364). Petitioner's counsel did *not* argue that Carey's conduct was ambiguous or equivocal and Petitioner reasonably but mistakenly believed Carey had the capacity to consent. Perhaps counsel eschewed such argument because the trial evidence demonstrated that, if Carey had testified truthfully, it was extremely improbable Petitioner could have had a reasonable belief Carey voluntarily consented to have sex with him. Furthermore, quite apart from Carey's testimony, the trial evidence showed *inter alia*: (1) Petitioner admitted to police that he gave Carey GHB and alcohol knowing she was drunk; (2) Petitioner admitted to Carey in a police-monitored pretext telephone call that he gave Carey "Liquid X" (GHB);[9] (3) Petitioner also admitted during this call that Carey and Petitioner had been "pretty wasted," and that "you do not want to mix it [GHB] with too much alcohol or else you get, like fuckin' mess you up" (AUG CT 790-91, 795-96, 3286-90, 3345-46, 3367-74, 3379). Petitioner conceded he had sex with Carey after giving her GHB (CT 790-92, 3679). Finally, the evidence showed Petitioner doubtlessly knew the effects of GHB and knew how to use the drug to inflict sexual assaults on women, for he had used GHB to effectuate videotaped sexual assaults on Tonja and Shawna *before* the events involving Carey. In these circumstances, including Petitioner's chosen theory of defense at trial, the alleged instructional error did not have any "substantial and

[9] *See* AUG RT 584, 590-91.

injurious effect or influence in determining the jury's verdict."

Moreover, and finally, the state court's rejection of this claim was not contrary to, or an objectively unreasonable application of, any clearly established Federal law as determined by the United States Supreme Court. *See* 28 U.S.C. § 2254(d); *Harrington v. Richter*, 562 U.S. 86, 100-03 (2011). Accordingly, Petitioner is not entitled to federal habeas relief on this claim.

C. Instruction That GHB Is a Controlled Substance

GHB became a controlled substance in California on September 28, 1997. Therefore, GHB was not a controlled substance at the time of the October, 1996 assaults on Tonja Doe. Nevertheless, without qualification and without objection, the trial court instructed the jury that "GHB is a controlled substance" (AUG RT 2265; *see* AUG CT 4675).

Petitioner contends this instruction violated due process with respect to the rape by intoxication counts concerning Tonja Doe because the instruction assertedly omitted an element of the crimes (Pet. Mem., ECF Dkt. No. 1, pp. 80-86). In rejecting this contention, the state habeas court reasoned that the uncontradicted evidence that GHB was an *anesthetic* substance made it "obvious" that the prosecution had established the element of the offense that the victim "be prevented from resisting by an intoxicating or *anesthetic* substance, or any controlled substance" within the meaning of section 261(a)(3) (Respondent's Lodgment 8, pp. 26-27) (emphasis added). The state habeas court also concluded that any error was not prejudicial because "[a] correct instruction would not have changed the outcome of the trial" (*id.*, p. 27).

Any error in the challenged instruction was harmless. Where a court instructs a jury on alternate theories of guilt, one of which is erroneous, the *Brecht* standard applies. *See Hedgpeth v. Pulido*, 555 U.S. 57, 61-62 (2008). Applying this standard, a federal habeas court must determine "whether it is reasonably probable that the jury still would have convicted the petitioner on the proper instructions." *Babb v. Lozowsky*, 719 F.3d 1019, 1034 (9th Cir.) (citation omitted), *cert. denied*, 134 S. Ct. 526 (2013), *abrogated on other grounds, White v. Woodall*, 134 S. Ct. 1697 (2014), *as stated in Moore v. Helling*, 763 F.3d 1011 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 2361 (2015). As indicated above, the trial court instructed the jury that rape by intoxication occurs "[w]here a person is prevented from resisting by any intoxicating or anesthetic substance, or any controlled substance, and this condition was known, or reasonably should have been known by the accused." The prosecution's expert testified, without contradiction, that GHB is an anesthetic the ingestion of which can cause loss of consciousness.[10] Even if the jury had been instructed that GHB became a controlled substance only after the sexual assaults on

[10] The expert also testified that GHB became a controlled substance in October of 1997 (well after the assaults on Tonya) (AUG RT 725-27).

Tonja, it is not reasonably likely that the jury would have failed to find that, at the time of those assaults, GHB was an anesthetic or intoxicating substance. The challenged instruction had no substantial and injurious effect or influence on the jury's verdict, within the meaning of *Brecht*.

Furthermore, the state court's determination that the alleged error was harmless was not contrary to, or an objectively unreasonable application of, any clearly established Federal law as determined by the United States Supreme Court. *See* 28 U.S.C. § 2254(d); *Harrington v. Richter*, 562 U.S. at 100-03; *Jones v. Harrington*, 829 F.3d 1128, 1141 (9th Cir. 2016) ("Under AEDPA, we accord deference to a state court's harmlessness determination."); *see also United States v. Donovan*, 539 Fed. App'x 648, 653 (6th Cir. 2013), *cert. denied*, 134 S. Ct. 1011 (2014) (in drug conspiracy case, appellate court deemed harmless an instruction erroneously directing the jury that Viagra is a controlled substance); *People v. Flood*, 18 Cal. 4th 470, 502-03, 76 Cal. Rptr. 2d 180, 957 P.2d 869 (1998) ("an instructional error that improperly . . . directs a finding or a partial verdict on a particular element generally is not a structural error in the trial mechanism that defies harmless error review and automatically requires reversal under the federal Constitution."); *State v. May*, 2014 WL 1419568, at *1, *10-12 (Ohio App. April 11, 2014) (in prosecution for driving under the influence of alcohol or, alternatively, under the influence of a "drug of abuse," appellate court deemed harmless an instruction erroneously directing the jury that Cymbalta is a "drug of abuse"). Accordingly, Petitioner is not entitled to federal habeas relief on this claim.

II. **Petitioner's Claim Regarding His Counsel's Alleged Actual Conflict of Interest Does Not Merit Federal Habeas Relief.**

A habeas petitioner alleging ineffective assistance of counsel ordinarily must prove prejudice by showing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Mickens v. Taylor*, 535 U.S. 162, 166 (2002) ("*Mickens*") (quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984) ("*Strickland*")). However, prejudice may be presumed where a petitioner shows counsel "actively represented conflicting interests." *Mickens*, 535 U.S. at 166; *Cuyler v. Sullivan,* 446 U.S. 335, 347 (1980); *see also Earp v. Ornoski*, 431 F.3d 1158, 1182-83 (9th Cir. 2005), *cert. denied*, 547 U.S. 1159 (2006).

Petitioner contends that one of his attorneys, Richard Sherman, operated under an actual conflict of interest because Sherman assertedly "masterminded [Petitioner's] escape" for Sherman's own financial gain (Pet. Mem., ECF Dkt. No. 1, p. 99). According to Petitioner, Sherman deliberately fostered an acrimonious relationship between the prosecution and the defense, pursued an untenable strategy premised on alleged law enforcement misconduct, and engineered Petitioner's flight, all in order to obtain money from Petitioner (*id.*, pp. 99-100). Petitioner asserts that, in light of this alleged conflict of interest, prejudice is presumed under *Mickens* and its progeny (*id.*, pp. 101-03). The state habeas court rejected this claim, ruling that Sherman was no longer acting as Petitioner's attorney at the time he advised Petitioner to flee (Respondent's Lodgment 8, p. 21). The state habeas court also stated that it did not believe, and did not believe Petitioner believed, that Sherman advised Petitioner to flee "as part of his [Sherman's] official role as an attorney" (*id.*). The court further ruled that, in any event, Petitioner had not shown any prejudice (*id.*, p. 22).

In *Mickens*, the Supreme Court declined to approve the application of a presumed prejudice rule to conflicts other than those caused by counsel's joint representation of two or more defendants. *See Mickens*, 535 U.S. at 174-75; *see also Earp v. Ornoski*, 431 F.3d at 1184 (*Mickens* Court "cautioned that its own conflict jurisprudence had not reached beyond joint representation"; citation omitted). The *Mickens* Court noted that the lower courts had applied the presumed prejudice rule of *Cuyler v. Sullivan* "unblinkingly to all kinds of attorney ethical conflicts," including alleged conflicts involving counsel's "personal or financial interests." *Mickens*, 535 U.S. at 174 (citations and internal quotations omitted). The *Mickens* Court indicated that *Cuyler v. Sullivan* did *not* support such an expansive application, and admonished the lower courts that the purpose of the presumed prejudice rule was "not to enforce the Canons of Legal Ethics. . . ." *Id.* at 175-76. "The *Mickens* Court specifically and explicitly concluded that [the presumed prejudice rule] was limited to joint representation, and that any extension of [the rule] outside of the joint representation context remained, as far as the jurisprudence of [the Supreme Court was] concerned, an open question." *Earp v. Ornoski*, 431 F.3d at 1184 (brackets added; internal quotations omitted); *see also Bemore v. Chappell*, 788 F.3d 1151, 1161-62 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 1173 (2016) *and* 136 S. Ct. 1831 (2016) (attorney's misuse of defense funds did not create actual conflict of interest).

Petitioner does not allege a conflict of interest caused by joint representation, but only a conflict supposedly caused by Sherman's asserted financial self-interest. In *Earp v. Ornoski*, *supra*, the petitioner argued that lower courts had applied a presumed prejudice rule to a variety of conflicts, including a conflict stemming from an attorney's personal interests. *Earp v. Ornoski*, 431 F.3d at 1184 n.23. The Ninth Circuit deemed the petitioner's argument "futile" in light of *Mickens* because, under the standard of review set forth in 28 U.S.C. section 2254(d), "only Supreme Court holdings are binding on state courts." *Id.* (citations and internal quotations omitted); *see also Barnes v. Almager*, 526 Fed. App'x 775, 778-79 (9th Cir. 2013) (habeas relief unavailable because presumed prejudice rule does not "clearly apply outside the multiple representation context"). Petitioner's allegation of a conflict stemming from Sherman's asserted financial self-interest is similarly futile.

Petitioner also alleges that Sherman operated under a conflict of interest because Sherman allegedly orchestrated an unlawful act, *i.e.*, Petitioner's flight (Pet.

Mem., ECF Dkt. No. 1, p. 104). Petitioner relies on pre-AEDPA federal criminal cases from the Second Circuit holding that an actual conflict of interest exists when an attorney engages in unlawful conduct related to the charges for which the client is on trial (*id.*, citing *United States v. Fulton*, 5 F.3d 605 (2d Cir. 1993), *United States v. Cancilla*, 725 F.2d 867 (2d Cir. 1987), *and Solina v. United States*, 709 F.2d 160 (2d Cir. 1983)). As the Second Circuit itself has recognized, however, because the United States Supreme Court has not extended its presumed prejudice rule beyond conflicts involving multiple representation, federal habeas relief is unavailable for state prisoners' claims of other potential conflicts, including claims of attorney involvement in criminal activity. *See Cardoza v. Rock*, 731 F.3d 169, 183 n.8 (2d Cir. 2013); *see also Bethea v. Walsh*, 2016 WL 258639, at *27 (E.D.N.Y. Jan. 19, 2016) ("In contrast to the Second Circuit, the [United States] Supreme Court has recognized a *per se* conflict of interest in only one circumstance: 'where defense counsel is forced to represent codefendants over his timely objection.' [citation]. Therefore, insofar as Petitioner argues that the state court's decision denying this claim was contrary to, or involved an unreasonable application of, clearly established Federal law, *as determined by the Supreme Court of the United States*, [citation], his argument fails.") (internal quotations omitted; original emphasis); *Stevens v. Griffin*, 2014 WL 11515874, at *15 (S.D.N.Y. Mar. 4, 2014), *adopted*, 2016 WL 3670825 (S.D.N.Y. July 5, 2016) (applying AEDPA standard of review to deny claim that counsel's illegal and unethical activities constituted actual conflict of interest sufficient to trigger a presumed prejudice rule; "[t]he [United States] Supreme Court has never adopted the [Second Circuit's] *per se* conflict of interest framework").

Accordingly, the state court's rejection of Petitioner's conflict of interest claim was not "contrary to, or an unreasonable application of, any clearly established Federal law as determined by the United States Supreme Court." See 28 U.S.C. § 2254(d). The "presumed prejudice" rule is unavailable in the federal habeas review of Petitioner's claim of an actual conflict of interest.[11]

III. Petitioner's Claims of Ineffective Assistance of Counsel Do Not Merit Federal Habeas Relief.

A. Standards Governing Claims of Ineffective Assistance of Counsel

To establish ineffective assistance of counsel, Petitioner must prove: (1) counsel's representation fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 688, 694, 697. A reasonable probability of a different result "is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. The court may reject the claim upon

[11] The Court discusses in section III D, *infra*, Petitioner's claims that Sherman's alleged ineffectiveness purportedly prejudiced Petitioner within the meaning of *Strickland*.

finding either that counsel's performance was reasonable or the claimed error was not prejudicial. *Id.* at 697; *Rios v. Rocha*, 299 F.3d 796, 805 (9th Cir. 2002) ("Failure to satisfy either prong of the *Strickland* test obviates the need to consider the other.") (citation omitted).

Review of counsel's performance is "highly deferential" and there is a "strong presumption" that counsel rendered adequate assistance and exercised reasonable professional judgment. *Williams v. Woodford*, 384 F.3d 567, 610 (9th Cir. 2004), *cert. denied*, 546 U.S. 934 (2005) (quoting *Strickland*, 466 U.S. at 689). The court must judge the reasonableness of counsel's conduct "on the facts of the particular case, viewed as of the time of counsel's conduct." *Strickland*, 466 U.S. at 690. The court may "neither second-guess counsel's decisions, nor apply the fabled twenty-twenty vision of hindsight. . . ." *Matylinsky v. Budge*, 577 F.3d 1083, 1091 (9th Cir. 2009), *cert. denied*, 558 U.S. 1154 (2010) (citation and quotations omitted); *see Yarborough v. Gentry*, 540 U.S. 1, 8 (2003) ("The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight.") (citations omitted). Petitioner bears the burden to show that "counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment." *Harrington v. Richter*, 562 U.S. 86, 104 (2011) (citation and internal quotations omitted); *see Strickland*, 466 U.S. at 689 (petitioner bears burden to "overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy") (citation and quotations omitted).

A state court's decision rejecting a *Strickland* claim is entitled to "a deference and latitude that are not in operation when the case involves review under the *Strickland* standard itself." *Harrington v. Richter*, 562 U.S. at 101. "When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied Strickland's deferential standard." *Id.* at 105.

"In assessing prejudice under *Strickland*, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently." *Id.* at 111 (citations omitted). Rather, the issue is whether, in the absence of counsel's alleged error, it is "'reasonably likely'" that the result would have been different. *Id.* (quoting *Strickland*, 466 U.S. at 696). "The likelihood of a different result must be substantial, not just conceivable." *Id.* at 112.

B. Alleged Ineffectiveness in Failing to Object to Assertedly Infirm Jury Instructions

Petitioner contends his trial counsel, Roger Diamond, rendered ineffective assistance by failing to object to the modified *Mayberry* instruction and the GHB instruction discussed in section I, *supra*. For the same reasons discussed therein, there is no reasonable probability that, had counsel objected to these instructions, the result of the trial would have been different. Again, the theory of Petitioner's trial defense was that Carey had knowingly and voluntarily consented to have sex with Petitioner and then lied about the events; the theory of Petitioner's trial defense was not that Petitioner mistakenly but reasonably believed Carey had consented. Again, the trial evidence persuasively refuted any potential argument that Petitioner mistakenly but reasonably believed Carey had consented. With respect to the challenged GHB instruction, as discussed above, the undisputed evidence showed that GHB was an "anesthetic," regardless of whether GHB was a "controlled substance." The challenged jury instructions were harmless. Petitioner has not shown a reasonable probability of a different outcome had counsel objected to the challenged instructions. Accordingly, the failure to object to these instructions did not prejudice Petitioner within the meaning of *Strickland.* It follows that Petitioner is not entitled to federal habeas relief. *See* 28 U.S.C. §§ 2254(a) and (d).

C. Alleged Ineffectiveness in Advising Petitioner to Reject a Purported Plea Offer

Petitioner contends attorney Joel Isaacson rendered ineffective assistance by advising Petitioner to reject an alleged proposed plea offer which assertedly would have limited the sentence to eight to twelve years. To show ineffective assistance of counsel in advising Petitioner to reject a plea offer, Petitioner must show a reasonable probability that but for counsel's alleged ineffectiveness Petitioner would have accepted a plea offer and the court also would have accepted the plea offer. *See Lafler v. Cooper*, 132 S. Ct. 1376, 1385 (2012).

The state habeas court rejected Petitioner's claim, ruling *inter alia* that: (1) Petitioner had not met his burden to show that there was a definitive plea offer; (2) although Isaacson's advice was deficient, the contrary advice Petitioner received from other counsel and advisors was "good advice," such that Petitioner received the effective assistance of counsel "overall"; and (3) there was no reasonable probability that Petitioner would have accepted a plea offer even if Isaacson had given different advice (Respondent's Lodgment 8, pp. 4-15). For the several reasons discussed below, Petitioner has not shown an entitlement to federal habeas relief on this claim.

1. <u>Existence of Purported Offer</u>

a. <u>Factual Background</u>

The state habeas court summarized the relevant evidence as follows:

> Just prior to the start of the preliminary hearing in this case, there were discussions among the attorneys regarding a possible plea agreement. The magistrate postponed the preliminary hearing for one day to give the attorneys time to see if they could work out a settlement. There was conflicting evidence

as to whether the initial suggestion for a possible plea agreement came from the District Attorney's office or from the defense team. However, it is clear that there were discussions between the assigned DDA and the defense team about a possible plea agreement.

James Blatt ("Blatt"), one of Luster's two lead attorneys at that time, testified at the Writ Hearing that after an initial discussion between the attorneys regarding the possibility of a plea, the assigned Deputy District Attorney ("DDA"), John Blair, came back to them with the suggestion of a potential offer in the 8 to 12 year range. (Reporter's Transcript of the Writ Hearing ("WH") 7, 10-11.)[12] Blatt testified that he told Luster that there was a potential offer "on the table" in the 8 to 12 year range. (WH 7.) Luster wanted time to think it over and speak to other individuals.

In his testimony, Blatt described this as a "tentative offer," a "potential offer," and an "informal offer." (WH 11, 29.) When asked if he had received any information regarding whether the preliminary hearing magistrate would have accepted the plea offer, Blatt responded that he did not know. He explained further that "we hadn't refined or defined what the plea agreement was, and then, of course, the sentence judge would have to

[12] Page 7: "Would you consider an eight to 12 year sentence[?]"; Page 10: "Would your client consider something in the eight to twelve year range[?]"

make that decision as to whether it was appropriate or not . . . " (WH 18-19.)

Blatt was also asked if DDA John Blair had told him whether or not Blair had discussed the case with his supervisors. Blatt responded that he did not know but that he assumed that the DDA had because there were "numbers on the table." (WH 19.)

Because the defense had no direct evidence that the informal plea offer had been approved by Blair's supervisors in the office, as would have been required, they instead presented circumstantial evidence. A key piece of evidence in this regard was a memo which DDA John Blair wrote which was addressed to the head of the office, District Attorney Michael Bradbury. (Exhibit ("Ex") 13.) It is dated June 5, 2001, the first day scheduled for the preliminary hearing. The three page memo is entitled "RECOMMENDATION TO ACCEPT DEFENSE PLEA OFFER IN THE CASE OF *PEOPLE V. ANDREW LUSTER* CR 49259." The memo indicates that the defense made an offer of a plea to two counts representing two of the three victims which would entail a sentencing range of 6 to 16 years.[13] The memo strongly recommends that this "defense offer" be accepted because of weaknesses in the case which the attorney sets forth in detail.

[13] Although the defense contends that the numbers under consideration were 8 to 12 years.

Former DDA John Blair testified that the offer came from the defense and that he did not engage in any plea negotiations with the defense team because such negotiations would have been against office policy. Such negotiations would have to first receive office approval. Rather, he testified[ ] that the defense came to him with an offer to plead to two counts as is set forth in the memo. (WH 130.) However, retired Judge Arturo Gutierrez testified that it was common practice for prosecutors to engage in plea negotiations, and even initiate them, even though it was against office policy. Even DDA Blair's supervisor in the office, Jacqueline Tilkens ("Tilkens"), agreed that it was a common practice for DDAs to discuss plea offers informally. Then, if there was a meeting of the minds, it would be brought up the chain of command for approval. (WH 787.)

DDA Blair testified that the standard practice when a defense offer was received would be to notify the chain of command. He was then asked to put the defense offer in writing along with his recommendation, which he did. Blair testified that he doesn't remember what happened to this memo after he wrote it. (WH 132, 149.) He testified that he doesn't specifically remember whether he consulted with his superiors before he wrote the memo. However, it would have been the practice to notify the supervisors of the defense offer, especially to explain why there was a one day delay of the preliminary hearing while witnesses were waiting. (WH 133, 138.)

Blair testified that he doesn't recall talking to Blatt about the case; he only recalls talking to the other lead attorney, Joel Isaacson ("Isaacson"). (WH 136.) He also did not initially recall whether there was an office policy in the sex crimes unit that there had to be a plea to at least one count for each victim. (WH 142.) Blair's testimony did not shed much light on the issue of an alleged plea offer.

DDA Blair's immediate supervisor, Jacqueline Tilkens, testified that she may have had discussions with Blair at the time of the preliminary hearing about plea negotiations in this case, but she has no specific recollection as to what those discussions were. She also has no specific recollection as to whether or not she saw the memo, Exhibit 13. (WH 778-79.) However, she testified that she was absolutely certain that such a plea disposition would not have been approved. (WH 786.)

Tilkens' immediate supervisor, Lela Henke-Dobroth ("Dobroth") was the head of the Sexual Assault Unit. Dobroth testified that she did not recall any discussions of a plea offer in this case and has no recollection of ever seeing the memo. She testified that any plea discussions and any such memos would have gone through her. (WH 801-02.) In response to the question of whether she would have approved such an offer, she said, "Absolutely not." (WH 803.)

A stipulation to the testimony of the head District Attorney, Michael Bradbury,

> was presented to the court. It stated that he, Bradbury, would have been the person to approve any negotiated plea offer in this case. Bradbury does not recall having seen the memo (Ex.13.), although he cannot say for sure whether he saw it or not. He testified that his practice would have been to initial a memo after he read it.[14]
>
> Bradbury testified that, if he had seen the memo, he would not have accepted the offer of 6 to 16 years set forth in the memo. However, Mr. Bradbury indicated that he might have considered a sentence in the 20 year range.
>
> After Luster decided not to agree to the plea offer and not to permit further plea negotiations prior to the preliminary hearing, the preliminary hearing went forward. He was held to answer on the charges. Shortly thereafter, DDA Tilkens wrote a notation in the file: "no offer yet. GT [Greg Totten, second in command] on vacation all week. Go ahead and file now. Will get back to you with offer next week. Thanks, JWT 6/18." (Ex. A-1.) No formal offer was ever forthcoming.

(Respondent's Lodgment 8, pp. 4-8) (original footnotes renumbered).

[14] His initials were not on the memo, but there was some indication that he might have been out of the office at that time but available by telephone.

b. <u>State Court's Findings</u>

The state habeas court made the following findings:

> This Court finds that the Petitioner has failed to meet his burden of proof to show that there was, in fact, a definitive settlement offer. Although there were tentative, preliminary discussions between the assigned DDA and the defense attorneys about a possible settlement of the case, both sides understood that upper management in the District Attorney's Office would have to approve any settlement offer, regardless of whether the initial suggestion for a particular deal came from the defense attorneys or from the assigned DDA. That did not happen.

(Respondent's Lodgment 8, p. 7).

c. <u>Standard of Review</u>

To show an entitlement to federal habeas relief, Petitioner must show that the state court's factual determination that no offer was made was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings." 28 U.S.C. § 2254(d)(2). "This is a daunting standard – one that will be satisfied in relatively few cases." *Taylor v. Maddox*, 366 F.3d 992, 1000 (9th Cir.), *cert. denied*, 543 U.S. 1038 (2004). "[A] state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance." *Wood v. Allen*, 558 U.S. 290, 301 (2010) (citation omitted). "[E]ven if reasonable minds reviewing the record might disagree about the finding in question, on habeas review that does not suffice to supersede the trial court's . . . determination." *Id.* (citation and internal quotations omitted; original ellipses). AEDPA "demands that state-court decisions be given the benefit of the doubt." *Renico v. Lett*, 559 U.S. 766, 773 (2010) (citation, footnote and internal quotations omitted).

Petitioner relies on the state court record, as he must.[15] This Court therefore performs an "intrinsic" review, pursuant to which the Court "may only hold that a state court's decision was based on an unreasonable determination of the facts if the Court is convinced that an appellate panel, applying the normal standards of appellate review, could not reasonably conclude that the finding is supported by the record." *Murray v. Schriro*, 745 F.3d 984, 999 (9th Cir. 2014) (quoting *Taylor v. Maddox*, 366 F.3d at 1000; internal quotations omitted).[16] "Such a challenge may be based on the claim that the finding is unsupported by sufficient

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[15] See *Cullen v. Pinholster*, *supra*.

[16] In *Taylor v. Maddox*, the Ninth Circuit held that section 2254(e)(1) applied to an "extrinsic" challenge to a state court's factual determination based on facts outside the state court record. *See Taylor v. Maddox*, 366 F.3d at 1000. However, more recently, the Ninth Circuit has acknowledged that the United States Supreme Court's subsequent decision in *Cullen v. Pinholster*, *supra*, "eliminated the relevance of 'extrinsic' challenges" when reviewing state court decisions under AEDPA. *See Murray v. Schriro*, 745 F.3d at 999-1000. The Ninth Circuit continues to apply the "intrinsic" review test of *Taylor v. Maddox*, however. *See Murray v. Schriro*, 745 F.3d at 999-1000.

evidence, [citations], that the process employed by the state court is defective, [citations], or that no finding was made by the state court at all [citations]." *Taylor v. Maddox*, 366 F.3d at 999. In conducting an intrinsic review, a federal habeas court "must be particularly deferential to our state-court colleagues." *Id.* at 1000. "For example, in concluding that a state-court finding is unsupported by substantial evidence in the state-court record, it is not enough that we would reverse in similar circumstances if this were an appeal from a district court decision." *Id.* "Rather, we must be convinced that an appellate panel, applying the normal standards of appellate review, could not reasonably conclude that the finding is supported by the record." *Id.* (citation omitted).

d. Analysis

Under *Lafler v. Cooper*, to prevail on Petitioner's claim of ineffective assistance regarding advice to decline a purported plea offer, Petitioner first must show the existence of a plea offer. *See Lafler v. Cooper*, 132 S. Ct. 1376, 1387 (2012) ("[i]f no plea offer is made, . . . the issue raised here simply does not arise"); *see also Zoica v. Curtin*, 2016 WL 761915, at *2 (6th Cir. Feb. 26, 2016), *pet. for cert. filed* (No. 16-6419) Sept. 26, 2016 ("counsel could not be ineffective for giving bad advice about . . . a nonexistent offer"). Petitioner contends the issue is not whether there ever was a plea offer but rather whether Isaacson's alleged ineffectiveness caused the prosecution not to make an offer (Pet. Mem., ECF Dkt. No. 1, p. 97). However, the record does not contain any facts (or even any plausible factual allegations) suggesting that Isaacson discouraged the *prosecution* from *making* an offer. Petitioner's claim was and is that Isaacson discouraged *Petitioner* from *accepting* a supposed offer,[17] a claim which must fail in the absence of an offer. *See Lafler v. Cooper*, 132 S. Ct. at 1387.

The state habeas court heard and considered evidence tending both to support and to refute the existence of a purported plea offer, and the state habeas court thereafter concluded that there had been no plea offer. This conclusion was not "an unreasonable determination of the facts in light of the evidence presented in the State court proceedings." *See* 28 U.S.C. § 2254(d)(2). For this reason alone, Petitioner is not entitled to federal habeas relief on this claim. *See Lafler v. Cooper*, 132 S. Ct. at 1387.

2. Allegedly Ineffective Advice Regarding Purported Plea Offer

a. Factual Background

The state habeas court summarized the relevant facts as follows:

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[17] For example, the Petition alleges that "[t]he record shows Petitioner had been offered a plea bargain at the commencement of state [sic] preliminary examination . . . but was led away from considering a plea deal on the advice of Isaacson. . . ." (Pet Mem., ECF Dkt. No. 1, p. 95). Petitioner also alleges Isaacson failed to inform Petitioner accurately "of the prosecution's plea offer" (*id.*, p. 92). In the Reply, Petitioner seeks the remedy requiring the prosecution to "reoffer[ ] the plea bargain" (Reply, p. 19).

At the time of his preliminary hearing, Petitioner had two lead attorneys: James Blatt and Joel Isaacson, who were both experienced criminal law attorneys. He also had two other attorneys, Russell Nordstrom and Lucia Nordstrom, ("Nordstroms") who played a relatively minor role as their experience was centered primarily around civil law. The Nordstroms had been recommended to Luster by his close personal friend and financial advisor, Albert Gersh.

The Nordstroms had brought Blatt into the case. Luster's relative, Max Factor III, also an attorney, had recommended the other lead attorney, Isaacson.

Defense attorney Blatt testified that he advised Luster that the evidence against him was very strong, that consent was not a defense in these circumstances, that he could not win a jury trial, and that he would be facing life in prison. (WH 8.) Blatt testified that he explained to Luster in detail why he did not believe that he had a valid defense of consent, both from an evidentiary standpoint and from a legal standpoint. Blatt testified that the other attorneys were silent and did not respond when he was explaining to Luster why he should accept the plea offer or at least engage in plea negotiations to try to settle the case.

There was ample corroboration from other witnesses that Blatt strongly urged Luster to accept a plea deal. Luster himself told others at the time that Blatt was quite insistent and pushed hard. Luster told numerous people that one attorney was telling him to take the deal and one attorney was telling him not to take the deal. Luster testified that he was confused.

The other lead attorney prior to preliminary hearing, Joel Isaacson, was also an experienced criminal defense attorney. He testified at the Writ Hearing that he too told Luster that he should definitely consider the plea offer. (WH 91, 96.) He also denied that he told Luster that consent was a defense, denied that he said that could win some or all of the case at preliminary hearing, and denied that he said that he could do better [meaning a better plea offer] after the preliminary hearing. This Court finds that this testimony was simply not credible. Isaacson was contradicted by numerous witnesses.

Lucia Hatfield, formerly Lucia Nordstrom, testified at the Writ Hearing. She and her then husband, Russell Nordstrom, were on the defense team prior to and through the preliminary hearing. However, they played a more minor role because they were primarily civil attorneys. In spite of that, they did sit at counsel table during the preliminary hearing, and Russell Nordstrom was present during the chambers conferences. The former Mrs. Nordstrom testified that Blatt strongly recommended that Luster take the deal (which she recalled as being in the general range of 8 to 12 or 15 years.) (WH 40.) She testified that

Isaacson strongly urged Luster to pass on the offer. She testified that Isaacson said that he could "put it to bed" at the preliminary hearing. If not, Isaacson said that he could do better on the offer after the preliminary hearing. (WH 42.)

She also testified that her husband, Russell Nordstrom told Luster that he should accept the offer, while she did not express any opinion on the matter. (WH 41, 46.) However, Luster testified that he remembered that both Nordstroms recommended he take the deal.

Darryl Genis ("Genis"), a criminal defense attorney specializing in DUI cases, but who did not represent Luster in this case, also testified at the Writ Hearing. Genis was simply a friend and surfing buddy. Luster asked Genis to come to the jail and be present for an interview with an attorney that Luster was either thinking about hiring or had just hired. (WH 179.) That attorney was Joel Isaacson.

During the jail interview, Genis said that attorney Joel Isaacson was "painting a picture that was pure fantasy." (WH 182.) He testified that Isaacson was telling Luster that he had a good chance to get a motion to suppress evidence granted or get a favorable plea deal. Genis testified that he advised Luster that while that might be okay in Los Angeles, it definitely wasn't going to happen in Ventura! (WH 182-183.) In the presence of Isaacson, Genis interrupted and told Luster "in no

> uncertain terms" that he was going to get the maximum sentence in Ventura. He told Luster that he could get in excess of 100 years in prison. (WH 193.) Genis said that after they left Luster and they were alone, Isaacson blew up at him and yelled at him "for speaking frankly in front of Drew [Andrew Luster] about the fact that what he was selling was a pipe dream." (WH 184.) Genis testified that Isaacson said it wasn't necessary "to scare Drew with such harsh realities." (WH 185.)
>
> Ultimately, Luster chose to take Isaacson's advice and rejected any plea offer prior to preliminary hearing. After the preliminary hearing, defense attorney Blatt was terminated from the case.

(Respondent's Lodgment 8, pp. 8-10).

b. <u>State Court Ruling</u>

The state habeas court found that Petitioner received the effective assistance of counsel "overall":

> . . . This may be an issue of first impression. Most defendants have only one attorney who is either competent or not competent. In this case, two (or three, depending on the testimony) of his four attorneys gave him good advice and one did not. If it were simply an issue where one attorney told him to take the deal and one told him not to take the deal, without further explanation, his confusion would be understandable. However, in this case, defense attorney Blatt gave Luster an

> explanation of why he should accept a plea bargain, explaining in detail the law, the evidence, and the potential maximum and mandatory sentences. This Court finds that in advising Luster, Isaacson appeared to be simply bragging that he could win the case or do a better job.
>
> Luster consulted with Genis, his friend and a DUI attorney, about whether or not to take the deal. This Court finds that Genis gave Petitioner good advice. Genis told Luster that he couldn't tell him whether or not to take the deal. Genis testified that he told Luster to go back to his attorneys and ask them to explain it to him in more detail so that he could understand why they were making differing recommendations. (WH 188-191.)
>
> In this case, this Court believes that, overall, Luster received effective assistance of counsel. He got good legal advice explained in detail from more than one source. However, that advice wasn't what Luster wanted to hear. Luster fired attorneys who gave him negative information and sought out attorneys who told him what he wanted to hear.

(Respondent's Lodgment 8, pp. 11-12).

c. <u>Analysis</u>

The state habeas court's determination was not unreasonable. No United States Supreme Court case clearly has addressed the issue (which the state habeas court said may be one of "first impression") of whether a criminal defendant is deprived of the right to the effective assistance of counsel when the defendant has multiple attorneys who give conflicting advice, some competent and some incompetent. No United States Supreme Court case clearly establishes that a defendant is deprived of the right to the effective assistance of counsel when the defendant chooses to reject the reasoned, competent advice of several attorneys in favor of the largely unexplained, contrary and incompetent advice of another attorney. In these circumstances, the state habeas court's conclusion that Petitioner received the effective assistance of counsel was not contrary to, or an unreasonable application of, any clearly established United States Supreme Court law. *See Raley v. Webb*, 540 F.3d 393, 416 (6th Cir. 2008), *cert. denied*, 557 U.S. 943 (2009) (state court did not apply *Strickland* unreasonably in rejecting claim that attorneys gave petitioner conflicting advice regarding whether to take a plea, where the state court concluded that counsel had "educated [Raley] on the range of options available to all defendants, including entering a plea or going to trial"); *Harrison v. Motley*, 478 F.3d 750, 757 (6th Cir.), *cert. denied*, 552 U.S. 977 (2007) (no *Strickland* violation where petitioner received conflicting advice from two attorneys regarding whether to testify and whether to call any other witnesses, and petitioner then made an ill-fated decision not to testify and not to call any other witnesses); *Lopez-Nieves v. United States*, 917 F.2d 645, 647-48 (1st Cir. 1990) (where defendant contended one of two attorneys gave incompetent advice, presence of a second attorney "seriously undermine[d]" defendant's claim of ineffective assistance); *cf. State v. McBride*, 213 N.J. Super. 255, 267, 517 A.2d 152 (1986) (defendant not denied right to counsel where defendant was represented by two attorneys and received conflicting advice; "Defendant conferred with each of his attorneys and determined the advice he would follow."). In the absence of controlling Supreme Court law, Petitioner cannot obtain federal habeas relief. *See Carey v. Musladin*, 549 U.S. 70, 77 (2006) ("Given the lack of holdings from this Court [on issue presented], it cannot be said that the state court "unreasonabl[y] applied clearly established Federal law.") (internal brackets and citation omitted).

3. <u>Petitioner's Alleged Willingness to Accept the Purported Offer</u>

a. <u>State Court Findings</u>

The state habeas court stated that it was "firmly convinced that Petitioner would never have accepted any plea offer that involved any substantial period of time in prison" (Respondent's Lodgment 8, p. 12). The state habeas court explained:

> The defense attempted to show that Luster was amenable to a plea offer because he called several people to ask about whether or not he should take the deal. Valerie Balderama, the mother of Luster's two children testified that she told Luster to take the deal. However, she testified that Luster told her that he was innocent and that he wanted to show that he was innocent. Luster said to her that he didn't deserve to go to prison, and he

didn't deserve ten years in prison. He also told her that he didn't want to be away from his children for that period of time. (WH 421-25.)

In *Lafler v. Cooper*, *supra*, 566 U.S. ___, 132 S. Ct. 1376, the defendant had admitted his guilt and initially indicated that he would accept the offer. Whether a defendant had accepted responsibility for his actions is a factor which the court may consider in determining whether there was a reasonable probability that he would have accepted the plea offer. (*Id*, 132 S. Ct. at 1381-82.)

In this case, Luster had a somewhat pugnacious attitude right from the outset. In his *Miranda* interview shortly after his arrest, Luster said of the initial complaining witness [Carey Doe]: "If the D.A. files charges it's gonna go to a jury and she's gonna look like a fool. She's gonna look like a fool. 'Cause I'm gonna get a top notch lawyer and, uh, she'll be cross-examined and ripped to pieces, guaranteed, you know." (citation). Witnesses testified Luster asserted his innocence repeatedly throughout the time period leading up to trial. He told people that he felt very strongly that he had done nothing wrong and wanted to vindicate himself.

The defense argued that if Luster had been given unanimous legal advice by his attorneys, he would have realized that his claims of innocence did not have a valid basis, and he would have accepted the plea offer. This Court finds that highly unlikely. Luster

> was very active in his case, even to the point of telling his attorneys what to say and do during the trial. Luster heard what he wanted to hear. He fired attorneys who gave him advice he didn't like.
>
> The defense argued that Luster would have accepted such a plea offer if he had been given competent legal advice because no rational person would ever choose life in prison over 8 to 12 years or a maximum sentence of 16 years in prison. However, when a person is out of custody, there is always a third choice – flight. So even if the possibility of the defense winning at trial were completely foreclosed, a defendant may still believe that given two very unattractive choices, he could flee rather than take the least unattractive choice. Luster was very adamant that he did not want to go to prison and expressed this view during the plea bargaining stage. It has been the experience of this Court that it is extremely rare for any out of custody defendant to accept a plea offer for more than three or four years in prison.

(Respondent's Lodgment 8, pp. 12-14).

b. <u>Analysis</u>

Petitioner contends the state court's finding that Petitioner "would never have accepted any plea offer that involved any substantial period of time in prison" is an unreasonable determination of the facts unworthy of AEDPA deference under 28 U.S.C. section

2254(d)(2) (Pet. Mem., ECF Dkt. No. 1, pp. 94-95). Petitioner invites this Court to "draw conclusions from the record different that [sic] those unreasonable ones proposed by the state superior court; i.e., that Luster would have never accepted a plea offer" (Pet. Mem., ECF Dkt. No. 1, p. 97). Citing *Taylor v. Maddox*, *supra*, Petitioner asserts that the state habeas court "had before it, yet apparently ignored, the evidence that supported petitioner's claim" (*id.*, p. 94). Petitioner argues that the state habeas court "failed to distinguish between protestations of factual innocence ('I didn't do it') and legal innocence ('What I did isn't unlawful'), and more importantly, failed to recognize the purported source of Luster's so-called " 'pugnacious attitude' " (*id.*). Referencing his own testimony at the evidentiary hearing, Petitioner contends that his supposed willingness to accept an offer is "the only reasonable conclusion from the evidence adduced at the state habeas hearing" (*id.*, pp., 94-95).[18]

In addition to the evidence described above, evidence adduced at the evidentiary hearing also showed the following:

[18] Petitioner also contends that the state habeas court misapplied the law by allegedly requiring Petitioner to show an absolute certainty that Petitioner would have accepted the purported offer absent Isaacson's asserted ineffectiveness (Pet. Mem., ECF Dkt. No. 1, p. 96). The state habeas court correctly described the "reasonable probability" standard set forth in *Lafler v. Cooper.* The fact that the state court ultimately may have evinced more certainty Petitioner would have rejected the purported offer than the *Lafler v. Cooper* standard required does not show the state court applied an incorrect standard.

[Petitioner's counsel] Blatt testified that, upon receipt of the alleged plea offer, Blatt explained to Petitioner the problems with the case, the likelihood of conviction and the advantages of a plea (Reporter's Transcript of 2013 Evidentiary Hearing ["HRT"][19] 129, 133-34). Petitioner said he wanted to think about it and talk to other people (HRT 129, 133-34). The next day, Blatt learned Petitioner had declined the offer (HRT 134-35). Within a week, Blatt's services were terminated (HRT 136).

Petitioner's mother testified that Petitioner told her he had received conflicting advice regarding a plea and said that he would consider a deal but also that "[h]e wanted to go to trial and exonerate himself" (HRT 676).

Petitioner testified that he talked to Balderama about the alleged plea deal and said he was "extremely concerned about being separated from my children" (HRT 801). Despite receiving advice from Blatt, the Nordstroms and Balderama that Petitioner should take the plea, Petitioner said he followed Isaacson's advice not to plead guilty (HRT 796, 799, 803-04, 859, 864). Petitioner said he chose to follow Isaacson's advice "[b]ecause he was offering me my freedom and to be able to go back to my life and my children and life as I knew it," whereas Blatt was talking about prison (HRT 804). Petitioner claimed he would have taken the plea if Isaacson had

[19] Respondent's Lodgment 3.

> recommended that he do so (HRT 804-05, 839, 859).
>
> Notwithstanding the trial evidence showing Petitioner admitted giving Carey GHB, at the evidentiary hearing Petitioner denied giving Carey GHB and denied having sex with her while she was under the influence of GHB (HRT 850). Petitioner said that Carey consented to all of the sexual acts charged as crimes in the case (HRT. 858). Asked whether he gave Tonja and Shawna GHB, Petitioner said he "did GHB together" with each of those women (HRT 851-52). Petitioner admitted having sex with Tonja and Shawn while they were unconscious (HRT 851-53). Petitioner said that he now understood that under the law Tonja did not consent to the sex, but testified that while his criminal case was pending he believed that Tonja and Shawna had consented to have sex with Petitioner on videotape while unconscious (HRT 854-55). Petitioner testified that if his attorneys had agreed that consent was not a defense and that Petitioner could "spend the rest of his life in prison" Petitioner "would have definitely strongly considered" taking the purported plea offer (HRT 859).

Thus, Petitioner gave somewhat equivocal testimony concerning his supposed willingness to accept the purported plea offer. He stated both that he "would have accepted the [purported] offer" and that he only "would have definitely strongly considered" the purported offer. " 'Considering' is not the same as 'accepting,' and 'accepting' is what is required." *Buenrostro v. Spearman*, 2015 WL 2251063, at *12 (N.D. Cal. May 13, 2015) (citing *Lafler v. Cooper*, 132 S. Ct. at 1385). Petitioner's denial that he gave Carey GHB and his denial that he had sex with Carey while she was under the influence of GHB significantly undermined Petitioner's credibility, particularly in light of Petitioner's admissions to the contrary in his police interview and in the pretext call. Petitioner's professed belief that he had thought the victims consented to his sexual assaults also suggests Petitioner would have been loathe to plead guilty. Petitioner's manifested willingness to abscond during trial and to go into hiding in a foreign country also undercut his credibility.

Petitioner contends the state habeas court failed to consider purported evidence that Isaacson's ineffective assistance was the alleged cause of Petitioner's "pugnacious attitude" (see Pet. Mem., ECF Dkt. No. 1, p. 94). However, Petitioner displayed a "somewhat pugnacious attitude right from the outset" – in a police interview which occurred before Isaacson's allegedly ineffective advice (Respondent's Lodgment 8, p. 13). In any event, the state habeas court's opinion carefully considered the relevant evidence (*see* Respondent's Lodgment 8, pp. 8-12). The record does not show the state habeas court overlooked or ignored any evidence that was "highly probative and central to [Petitioner's] claim." *See Taylor v. Maddox*, 366 F.3d 992, 1001 (9th Cir.), *cert. denied*, 543 U.S. 1038 (2004). ("state courts are not required to address every jot and tittle of proof suggested to them, nor need they 'make detailed findings addressing all the evidence before [them].'") (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 347 (2003)); *Dang v. Spearman*, ___ Fed. App'x ___, 2016 WL 7030699, at *3 (9th Cir. Dec. 2, 2016) (rejecting argument that state court's explanation was insufficient because state court did not mention certain specific facts).

Petitioner essentially seeks a reweighing of the evidence. The state habeas court evaluated Petitioner's testimony, and the other evidence, and reasonably chose to disbelieve Petitioner's testimony to the extent Petitioner testified that he would have taken the purported plea offer had Isaccson not counseled against doing so. This Court should defer to the state court's credibility determination. *See Marshall v. Lonberger*, 459 U.S. 422, 434 (1983) ("28 U.S.C. § 2254(d) gives federal habeas courts no license to redetermine credibility of witnesses whose demeanor has been observed by the state trial court, but not by them."); *Rice v. Collins*, 546 U.S. 333, 341 (2006) ("Reasonable minds viewing the record might disagree about . . . credibility, but on habeas review that does not suffice to supersede the trial court's credibility determination.").

In sum, the state habeas court reasonably determined that Petitioner would not have accepted the purported plea offer. Petitioner is not entitled to federal habeas relief on this claim.

4. Conclusion

Petitioner has not shown that the state habeas court acted unreasonably in finding that there was no plea offer or in finding that Petitioner would not have accepted the purported plea offer but for the allegedly ineffective assistance of counsel. Furthermore, no clearly established Supreme Court law supports Petitioner's theory that the conflicting advice of multiple attorneys deprives a defendant of the effective assistance of counsel. For all of these reasons, Petitioner cannot obtain federal habeas relief on his claim that Isaacson's alleged ineffectiveness assertedly caused Petitioner to forgo a purported plea offer.

D. Alleged Errors By Attorney Sherman

Petitioner contends attorney Sherman failed to pursue plea negotiations after the preliminary hearing, failed to file a change of venue motion, abandoned Petitioner on the eve of trial and failed to inform the sentencing court of Sherman's role in Petitioner's flight (Pet. Mem., ECF Dkt. No. 1, pp. 104-08). For the following reasons, these claims do not warrant federal habeas relief under the *Strickland* standard.

Petitioner contends Sherman failed to pursue further plea negotiations after the preliminary hearing. Petitioner had multiple other attorneys after the preliminary hearing, any one of whom could have pursued further plea negotiations, regardless of what Sherman did or failed to do. There is no evidence of any effort to reopen plea negotiations and little or no evidence that the prosecution would have been particularly amenable to any reopening. In any event, as the state court found, Petitioner would not have accepted a plea because he was adamant about going to trial. Petitioner disregarded the advice of several attorneys who counseled him to accept a plea and instead sought his "exoneration," listening only to those people who told him what he preferred to hear. Under the circumstances, Petitioner has not demonstrated Sherman's alleged unreasonableness in failing to attempt to reopen plea negotiations, and has not demonstrated any reasonable probability that any such attempt by Sherman would have produced a different outcome.

Neither did Sherman's alleged failure to file a motion for change of venue constitute ineffective assistance. The decision not to seek a change of venue may have been a strategic choice. Petitioner's lead trial counsel Roger Diamond told the court that the defense had opposed the prosecution's motion for a gag order "because we think the media helps defendants in criminal cases because they in effect go and interview witnesses and help, too" (AUG RT 218). In any event, Petitioner has not shown that any pretrial publicity in the case was so prejudicial that it was objectively unreasonable for Sherman to fail to move for a change of venue. *See Skilling v. United States*, 561 U.S. 358, 378, 381-84 (2010). Accordingly, Petitioner has not shown Sherman's unreasonableness in this regard or any prejudice resulting therefrom.

Nothing in the record indicates that Sherman's "abandonment" of Petitioner prejudiced Petitioner's trial defense in any way. Petitioner's lead trial counsel was Roger Diamond, not Sherman. Diamond associated in as Petitioner's counsel in June of 2001 (AUG CT 325). Sherman associated in as counsel in November of 2001, and worked largely on discovery issues (*see* AUG CT 874, 1368-69). Although Sherman never formally withdrew from the case, the record suggests that his last court appearance occurred on November 13, 2002 (*see* AUG CT 3766). The last filing bearing his name occurred on November 19, 2002 (AUG CT 3820). Sherman's name is not listed on the defense "Supplemental Response to People's Trial Brief" filed on December 6, 2002, or on any of the subsequent defense filings (AUG CT 4186). Prior to jury selection, another of Petitioner's attorneys advised the court that "[w]e have lost Mr. Sherman. . . ." (AUG RT 27). Voir dire began on December 9, 2002 (AUG RT 324). Petitioner has not shown Sherman's alleged abandonment of Petitioner had any prejudicial effect on the trial of the case.

Sherman's failure to inform the sentencing court of his role in Petitioner's flight also does not merit federal habeas relief. On state court habeas review, evidence was received regarding Sherman's role in Petitioner's flight. In its order denying in part and granting in part Petitioner's state court habeas petition and ordering resentencing, the state habeas court agreed that it was "undisputed that Richard Sherman (along with defense investigator/consultant William Pavelic) told Luster that he would be killed in jail and/or prison, that Sherman urged the defendant to flee and that

Sherman helped him flee" (Respondent's Lodgment 8, p. 17). The same judge who issued this ruling later resentenced Petitioner. Sherman's failure to inform the court of his role in Petitioner's flight at the original sentencing proceeding plainly had no effect on Petitioner's conviction or ultimate sentence, a sentence imposed with full knowledge of Sherman's role in Petitioner's flight.

For the foregoing reasons, Petitioner's claims that Sherman allegedly rendered prejudicial ineffective assistance lack merit. It follows that Petitioner is not entitled to federal habeas relief. *See* 28 U.S.C. §§ 2254(a) and (d).

IV. <u>Petitioner's Claim of Alleged Sentencing Error Does Not Merit Federal Habeas Relief.</u>

California Penal Code section 667.6(d) mandates the imposition of a "full, separate, and consecutive term" for specified sex offenses including rape where a person is prevented from resisting by an intoxicating or anesthetic substance or any controlled substance, if the crimes involve separate victims or involve the same victim on separate occasions. Section 667.6(c) confers on the sentencing court the discretion to impose consecutive sentences "if the crimes involve the same victim on the same occasion."

At Petitioner's resentencing in 2013, the court imposed consecutive terms on eleven counts of rape by an intoxicating, anesthetic or controlled substance pursuant to section 667.6(d) (RT 1216-27). The court also stated that, if consecutive terms had not been mandatory, the court still would have exercised its discretion to impose consecutive terms pursuant to section 667.6(c) (RT 1232-35).

Petitioner contends his consecutive terms violate the principles espoused in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) ("*Apprendi*") (holding that any fact other than the fact of a prior conviction that increases the penalty for a crime beyond the prescribed statutory maximum must be proved beyond a reasonable doubt). Petitioner argues that *Apprendi* requires that a jury, not a judge, determine the "facts" necessary to support the imposition of consecutive terms under section 667.6(d) (Pet., ECF Dkt. No. 1, pp. 108-17). The California Court of Appeal rejected this claim, relying *inter alia* on *Oregon v. Ice,* 555 U.S. 160 (2009) (Respondent's Lodgment 13, pp. 2-5; *see People v. Luster*, 2015 WL 3559146, at *2-3 (Cal. App. June 8, 2015)).

As indicated by the California Court of Appeal, *Oregon v. Ice* refutes Petitioner's claim. In *Oregon v. Ice*, the Supreme Court held that the imposition of consecutive terms based on facts found by a judge does not violate *Apprendi*. *Oregon v. Ice*, 555 U.S. at 164. Notwithstanding Petitioner's argument to the contrary, nothing in *Oregon v. Ice* restricts the reach of that decision to sentencing schemes that are discretionary rather than mandatory. *See, e.g.*, *Burrus v. Soto*, 2015 WL 366459, at *24-25 (S.D. Cal. Jan 23, 2015) (*Oregon v. Ice* foreclosed *Apprendi* challenge to section 667.6(d)); *Foy v. Lopez*, 2012 WL 439620, at *11-12 (E.D. Cal. Feb.

9, 2012), *aff'd*, 609 Fed. App'x 903 (9th Cir. 2015) (same).

Petitioner's argument that an application of *Oregon v. Ice* would contravene the holding of *Alleyne v. United States*, 133 S. Ct. 2151 (2013) ("*Alleyne*") is similarly unavailing. *Alleyne* held only that imposition of a term in excess of a mandatory minimum based on a factual finding by a judge violates *Apprendi. Alleyne*, 133 S. Ct. at 2155. *Alleyne* fails to undermine the holding of *Oregon v. Ice* that the imposition of consecutive terms based on a factual finding by a judge does not violate *Apprendi. See Burris v. Soto*, 2015 WL 366459 at *25 (*Oregon v. Ice*, not *Alleyne*, governs the issue of whether section 667.6(d) violates *Apprendi*). This Court is bound by *Oregon v. Ice. See United States v. McCalla*, 545 F.3d 750, 753 (9th Cir. 2008), *cert. denied*, 555 U.S. 1174 (2009) (lower federal court may not set aside or disregard United States Supreme Court precedent). Under *Oregon v. Ice*, Petitioner's consecutive terms are not unconstitutional.

For the foregoing reasons, the state court's rejection of this claim was not contrary to, or an objectively unreasonable application of, any clearly established Federal Law as determined by the United States Supreme Court. *See* 28 U.S.C. § 2254(d); *Harrington v. Richter*, 562 U.S. 86, 100-03 (2011). Petitioner is not entitled to federal habeas relief on this claim.

RECOMMENDATION

For the reasons discussed above, IT IS RECOMMENDED that the Court issue an order: (1) accepting and adopting this Report and Recommendation; and (2) denying and dismissing the Petition with prejudice.

DATED: January 27, 2017.

/s/
CHARLES F. EICK
UNITED STATES
MAGISTRATE JUDGE

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF VENTURA

In re Andrew S. Luster, Petitioner, On Habeas Corpus,	Case No. CR 49259 (Related Case 2d Civil No. B226574) **ORDER GRANTING IN PART AND DENYING IN PART PETITIONER'S REQUESTS FOR RELIEF ON HABEAS CORPUS; OPINION OF THE COURT** (Filed Mar. 11, 2013)

Pursuant to an order of the Court of Appeal, this Court held an evidentiary hearing on the issues set forth in defendant Andrew Luster's Petition for a Writ of Habeas Corpus. The requests contained in the Petition are granted in part and denied in part.

The Court hereby grants the Petitioner's request for a new sentencing hearing for the reasons stated in the attached Opinion. The sentence previously imposed in this case is hereby vacated, and a new sentencing hearing is scheduled for April 4, 2013 at 9:00 am in Courtroom 23 of the main courthouse of the Ventura Superior Court, unless the parties stipulate to a later date not to exceed an additional thirty days. If there is such a stipulation, it should be accompanied by a written waiver by Petitioner of his right to have his sentencing within twenty court days of this Order. (Penal Code Section 1191)

The Court denies the Petitioner's remaining requests. Specifically, the Court denies the request to require the District Attorney's Office to re-offer the "plea offer" or to enforce the "plea bargain." This Court also denies Petitioner's request to vacate his conviction and/or to grant him a new trial on some or all of the charges for the reasons stated in the attached Opinion.

Date:	/s/ Judge Kathryne Ann Stoltz
March 11, 2013	Judge Kathryne Ann Stoltz

OPINION OF THE COURT

I. The Court's Order

Pursuant to an order of the Court of Appeal, this Court held an evidentiary hearing from February 19, 2013 to March 1, 2013 on the issues set forth in Andrew Luster's Petition for a Writ of Habeas Corpus filed in the Court of Appeal. The requests contained in the Petition are granted in part and denied in part.

The Petitioner is granted a new sentencing hearing because the Court failed to state specific reasons for imposing full consecutive sentences as is required by *People v. Irvin* (1996) 43 Cal.App. 1063. The previously imposed sentence is vacated and a new sentencing hearing will be held.

The Court denies the Petitioner's remaining requests for the reasons set forth in the attached Opinion. Specifically, the Court denies the request to require the District Attorney's Office to re-offer the "plea offer" or to enforce the "plea bargain." This Court also denies his request to vacate his conviction and/or to grant him a new trial on some or all of the charges.

II. The Plea Offer Issue

A. Petitioner's Arguments

The Petitioner, Andrew Luster, (sometimes referred to herein as "Petitioner" or "Luster") contends that the Ventura County District Attorney's Office made him a plea offer of a plea to two counts of a violation of Penal Code Section 261(a)(3), Rape by Intoxication, with a sentence of 8 to 12 years in prison. (There was conflicting testimony as to whether the alleged plea offer was in the range of 8 to 12 years or 6 to 16 years.) Luster testified that one of his attorneys told him to take the plea offer and another one of his attorneys told him not to take the plea offer. Petitioner argues that the advice not to take the proposed case settlement offer constituted ineffective assistance of counsel in violation of his Sixth Amendment right to counsel in the U.S. Constitution. Luster testified that he was confused by the conflicting advice of his attorneys and because of that confusion, he rejected the proposal. Luster asserts that had he been given appropriate legal advice, he would have accepted the plea bargain, and he would have been sentenced to a maximum of 16 years instead of the 124 years which he received after trial.

The Ventura County District Attorney's Office denies that they ever made an official, firm offer to Luster for a plea to a particular number of counts or to a particular number or range of years in prison to settle this case. The District Attorney's Office contends that a plea in the range of years suggested by the defense was not and would have not been approved by the District Attorney, as required by office policy.

B. The Law

The leading case on ineffective assistance of counsel is *Strickland v. Washington* (1984) 466 U.S. 668, 104 S.Ct. 2052. In that case, the U.S. Supreme Court set forth a two prong test for ineffective assistance of counsel. A defendant must show that his attorney's performance was deficient, i.e. that it fell below an objective standard of reasonableness based on prevailing professional legal norms and that the defendant suffered prejudice, that is, that the outcome would likely have been different if he had received competent counsel.

The case of *Lafler v. Cooper* (2012) 566 U.S. ___, 132 S.Ct. 1376, 2012 U.S. Lexis 2322, explains the prejudice part of the *Strickland* test in the plea bargaining area. In that case, the defendant was made a plea offer. Counsel stipulated that the advice of counsel not to accept the plea offer constituted ineffective assistance of counsel. After rejecting the offer based on the attorney's advice, the defendant was sentenced to a much longer term after trial. The U.S. Supreme Court held that the defendant could still raise the issue of ineffective assistance of counsel at the plea bargaining stage, even though he subsequently received a fair trial. The Court set forth three requirements that the defendant must show to be eligible for relief for ineffective assistance of counsel in the plea bargaining context:

1) That there was a reasonable probability that the plea offer would have been presented to the court, that is that there was a plea offer made to the defendant and that, but for the ineffective advice of counsel, there is a reasonable probability that the defendant would have accepted the plea offer; and,

2) That the court would have accepted the terms of the plea offer; and,

3) That the terms of the plea offer would have been less severe than the judgment and sentence which was imposed. (*Lafler v. Cooper*, *supra*, 566 U.S. ___, 132 S.Ct. at 1385)

Even if a defendant is able to establish all three of the above factors, the remedy is not necessarily to require performance of the plea bargain. The judge can exercise discretion to determine whether the defendant should receive the term offered in the plea, the sentence received after trial, or something in between. The remedy can include requiring the prosecutor to re-offer the plea bargain. The Court can then accept it, modify it, or reject it. The Supreme Court left open the question of whether, in exercising this discretion, the trial court can use information which came to light during or after the trial. However, since the Supreme Court made it clear that the judge has wide discretion to impose a sentence which the court feels is in the interests of justice, it is likely that the trial court can consider subsequent information. The defendant has no absolute right to specific performance of the plea bargain, even if he did have ineffective assistance of counsel.

C. Was there a plea offer or plea agreement?

Just prior to the start of the preliminary hearing in this case, there were discussions among the attorneys regarding a possible plea agreement. The magistrate postponed the preliminary hearing for one day to give the attorneys time to see if they could work out a settlement. There was conflicting evidence as to whether the initial suggestion for a possible plea agreement came from the District Attorney's office or from the defense team. However, it is clear that there were discussions between the assigned DDA and the defense team about a possible plea agreement.

James Blatt ("Blatt"), one of Luster's two lead attorneys at that time, testified at the Writ Hearing that after an initial discussion between the attorneys regarding the possibility of a plea, the assigned Deputy District Attorney ("DDA"), John Blair, came back to them with the suggestion of a potential offer in the 8 to 12 year range. (Reporter's Transcript of the Writ

Hearing ("WH") 7, 10-11.)[1] Blatt testified that he told Luster that there was a potential offer "on the table" in the 8 to 12 year range. (WH 7.) Luster wanted time to think it over and speak to other individuals.

In his testimony, Blatt described this as a "tentative offer," a "potential offer," and an "informal offer." (WH 11, 29.) When asked if he had received any information regarding whether the preliminary hearing magistrate would have accepted the plea offer, Blatt responded that he did not know. He explained further that "we hadn't refined or defined what the plea agreement was, and then, of course, the sentence judge would have to make that decision as to whether it was appropriate or not . . . " (WH 18-19.)

Blatt was also asked if DDA John Blair had told him whether or not Blair had discussed the case with his supervisors. Blatt responded that he did not know but that he assumed that the DDA had because there were "numbers on the table." (WH 19.)

Because the defense had no direct evidence that the informal plea offer had been approved by Blair's supervisors in the office, as would have been required, they instead presented circumstantial evidence. A key piece of evidence in this regard was a memo which DDA John Blair wrote which was addressed to the head of the office, District Attorney Michael Bradbury. (Exhibit ("Ex") 13.) It is dated June 5, 2001, the first

[1] Page 7: "Would you consider an eight to 12 year sentence [?]"; Page 10: "Would your client consider something in the eight to twelve year range[?]"

day scheduled for the preliminary hearing. The three page memo is entitled "RECOMMENDATION TO ACCEPT DEFENSE PLEA OFFER IN THE CASE OF *PEOPLE V. ANDREW LUSTER* CR 49259." The memo indicates that the defense made an offer of a plea to two counts representing two of the three victims which would entail a sentencing range of 6 to 16 years.[2] The memo strongly recommends that this "defense offer" be accepted because of weaknesses in the case which the attorney sets forth in detail.

Former DDA John Blair testified that the offer came from the defense and that he did not engage in any plea negotiations with the defense team because such negotiations would have been against office policy. Such negotiations would have to first receive office approval. Rather, he testified, that the defense came to him with an offer to plead to two counts as is set forth in the memo. (WH 130.) However, retired Judge Arturo Gutierrez testified that it was common practice for prosecutors to engage in plea negotiations, and even initiate them, even though it was against office policy. Even DDA Blair's supervisor in the office, Jacqueline Tilkens ("Tilkens"), agreed that it was a common practice for DDAs to discuss plea offers informally. Then, if there was a meeting of the minds, it would be brought up the chain of command for approval. (WH 787.)

DDA Blair testified that the standard practice when a defense offer was received would be to notify

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[2] Although the defense contends that the numbers under consideration were 8 to 12 years.

the chain of command. He was then asked to put the defense offer in writing along with his recommendation, which he did. Blair testified that he doesn't remember what happened to this memo after he wrote it. (WH 132, 149.) He testified that he doesn't specifically remember whether he consulted with his superiors before he wrote the memo. However, it would have been the practice to notify the supervisors of the defense offer, especially to explain why there was a one day delay of the preliminary hearing while witnesses were waiting. (WH 133, 138.) Blair testified that he doesn't recall talking to Blatt about the case; he only recalls talking to the other lead attorney, Joel Isaacson ("Isaacson"). (WH 136.) He also did not initially recall whether there was an office policy in the sex crimes unit that there had to be a plea to at least one count for each victim. (WH 142.) Blair's testimony did not shed much light on the issue of an alleged plea offer.

DDA Blair's immediate supervisor, Jacqueline Tilkens, testified that she may have had discussions with Blair at the time of the preliminary hearing about plea negotiations in this case, but she has no specific recollection as to what those discussions were. She also has no specific recollection as to whether or not she saw the memo, Exhibit 13. (WH 778-79.) However, she testified that she was absolutely certain that such a plea disposition would not have been approved. (WH 786.)

Tilkens' immediate supervisor, Lela Henke-Dobroth ("Dobroth") was the head of the Sexual Assault Unit. Dobroth testified that she did not recall any discussions of a plea offer in this case and has no recollection of ever seeing the memo. She testified that any plea discussions and any such memos would have gone through her. (WH 801-02.) In response to the question of whether she would have approved such an offer, she said, “Absolutely not.” (WH 803.)

A stipulation to the testimony of the head District Attorney, Michael Bradbury, was presented to the court. It stated that he, Bradbury, would have been the person to approve any negotiated plea offer in this case. Bradbury does not recall having seen the memo (Ex. 13.), although he cannot say for sure whether he saw it or not. He testified that his practice would have been to initial a memo after he read it.[3]

Bradbury testified that, if he had seen the memo, he would not have accepted the offer of 6 to 16 years set forth in the memo. However, Mr. Bradbury indicated that he might have considered a sentence in the 20 year range.

After Luster decided not to agree to the plea offer and not to permit further plea negotiations prior to the preliminary hearing, the preliminary hearing went forward. He was held to answer on the charges. Shortly thereafter, DDA Tilkens wrote a notation in the file: “no offer yet. GT [Greg Totten, second in command] on vacation all week. Go ahead and file now. Will get back

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[3] His initials were not on the memo, but there was some indication that he might have been out of the office at that time but available by telephone.

to you with offer next week. Thanks, JWT 6/18." (Ex. A-1.) No formal offer was ever forthcoming.

This Court finds that the Petitioner has failed to meet his burden of proof to show that there was, in fact, a definitive settlement offer. Although there were tentative, preliminary discussions between the assigned DDA and the defense attorneys about a possible settlement of the case, both sides understood that upper management in the District Attorney's Office would have to approve any settlement offer, regardless of whether the initial suggestion for a particular deal came from the defense attorneys or from the assigned DDA. That did not happen.

D. Was Petitioner given ineffective assistance of counsel regarding a possible plea agreement?

Even if there had been a definite plea offer or settlement offer, it is difficult to determine whether Petitioner suffered from ineffective assistance of counsel, both because there was conflicting evidence about what his attorneys recommended to him, but also because he had multiple attorneys. One thing is clear – one of his two lead attorneys gave him excellent advice.

At the time of his preliminary hearing, Petitioner had two lead attorneys: James Blatt and Joel Isaacson, who were both experienced criminal law attorneys. He also had two other attorneys, Russell Nordstrom and Lucia Nordstrom, ("Nordstroms") who played a relatively minor role as their experience was centered primarily around civil law. The Nordstroms had been recommended to Luster by his close personal friend and financial advisor, Albert Gersh.

The Nordstroms had brought Blatt into the case. Luster's relative, Max Factor III, also an attorney, had recommended the other lead attorney, Isaacson.

Defense attorney Blatt testified that he advised Luster that the evidence against him was very strong, that consent was not a defense in these circumstances, that he could not win a jury trial, and that he would be facing life in prison. (WH 8.) Blatt testified that he explained to Luster in detail why he did not believe that he had a valid defense of consent, both from an evidentiary standpoint and from a legal standpoint. Blatt testified that the other attorneys were silent and did not respond when he was explaining to Luster why he should accept the plea offer or at least engage in plea negotiations to try to settle the case.

There was ample corroboration from other witnesses that Blatt strongly urged Luster to accept a plea deal. Luster himself told others at the time that Blatt was quite insistent and pushed hard. Luster told numerous people that one attorney was telling him to take the deal and one attorney was telling him not to take the deal. Luster testified that he was confused.

The other lead attorney prior to preliminary hearing, Joel Isaacson, was also an experienced criminal defense attorney. He testified at the Writ Hearing that he too told Luster that he should definitely consider the plea offer. (WH 91, 96.) He also denied that he told

Luster that consent was a defense, denied that he said that could win some or all of the case at preliminary hearing, and denied that he said that he could do better [meaning a better plea offer] after the preliminary hearing. This Court finds that this testimony was simply not credible. Isaacson was contradicted by numerous witnesses.

Lucia Hatfield, formerly Lucia Nordstrom, testified at the Writ Hearing. She and her then husband, Russell Nordstrom, were on the defense team prior to and through the preliminary hearing. However, they played a more minor role because they were primarily civil attorneys. In spite of that, they did sit at counsel table during the preliminary hearing, and Russell Nordstrom was present during the chambers conferences. The former Mrs. Nordstrom testified that Blatt strongly recommended that Luster take the deal (which she recalled as being in the general range of 8 to 12 or 15 years.) (WH 40.) She testified that Isaacson strongly urged Luster to pass on the offer. She testified that Isaacson said that he could "put it to bed" at the preliminary hearing. If not, Isaacson said that he could do better on the offer after the preliminary hearing. (WH 42.)

She also testified that her husband, Russell Nordstrom, told Luster that he should accept the offer, while she did not express any opinion on the matter. (WH 41, 46.) However, Luster testified that he remembered that both Nordstroms recommended he take the deal.

Darryl Genis ("Genis"), a criminal defense attorney specializing in DUI cases, but who did not represent Luster in this case, also testified at the Writ Hearing. Genis was simply a friend and surfing buddy. Luster asked Genis to come to the jail and be present for an interview with an attorney that Luster was either thinking about hiring or had just hired. (WH 179.) That attorney was Joel Isaacson.

During the jail interview, Genis said that attorney Joel Isaacson was "painting a picture that was pure fantasy." (WH 182.) He testified that Isaacson was telling Luster that he had a good chance to get a motion to suppress evidence granted or get a favorable plea deal. Genis testified that he advised Luster that while that might be okay in Los Angeles, it definitely wasn't going to happen in Ventura! (WH 182-183.) In the presence of Isaacson, Genis interrupted and told Luster "in no uncertain terms" that he was going to get the maximum sentence in Ventura. He told Luster that he could get in excess of 100 years in prison. (WH 193.) Genis said that after they left Luster and they were alone, Isaacson blew up at him and yelled at him "for speaking frankly in front of Drew [Andrew Luster] about the fact that what he was selling was a pipe dream." (WH 184.) Genis testified that Isaacson said it wasn't necessary "to scare Drew with such harsh realities." (WH 185.)

Ultimately, Luster chose to take Isaacson's advice and rejected any plea offer prior to preliminary hearing. After the preliminary hearing, defense attorney Blatt was terminated from the case.

Did Isaacson's advice not to accept the plea offer constitute ineffective assistance of counsel? That is, did it fall below an objective standard of reasonableness under prevailing professional norms? Courts should be very reluctant to second guess attorneys' advice to their clients about whether or not to accept a plea deal. Many times this advice is very subjective. In hindsight, things are very clear which may not have been at all clear at the prior time. Competent and experienced attorneys may have differing views as to whether a trial is defensible or not.[4] In this case, even the assigned DDA was worried about the defense of consent, not from a legal point of view, but from a practical point of view. The concern was that the jury might think that the victims were party girls and not be sympathetic to them.

However, where advice on whether to accept or seek a plea deal is based on an attorney's ignorance or misunderstanding of a key principal of law in the case, then the advice is clearly deficient. In this case, Isaacson told Petitioner that he had a defense of consent under the law. (WH 190-191.) It appears that at that time, he was unaware of the case of *People v. Giardino* (2000) 82 Cal.App.4th 454 which held that one cannot consent in advance to have sex while unconscious or while so

[4] The Supreme Court in *Strickland* specifically addresses this concern: "Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." (*Supra*, 466 U.S. at 689.)

intoxicated that one is not capable of giving legal consent. The opinion in this case had been issued approximately one year prior to the preliminary hearing in Luster's case.

It also appears that Isaacson did not fully understand that in some sex cases full consecutive sentences for each separate victim and each separate occasion for the same victim are mandatory, nor did he forcefully convey this to his client, as did the other attorneys. There is no sentencing discretion in these types of cases.

Even if Luster had had a somewhat defensible case, the potential draconian sentence should have given any competent attorney the motivation to seriously consider and encourage settlement. Because of Isaacson's lack of legal research, his performance was deficient.

Does this mean that Luster was given ineffective assistance of counsel overall? This may be an issue of first impression. Most defendants have only one attorney who is either competent or not competent. In this case, two (or three, depending on the testimony) of his four attorneys gave him good advice and one did not. If it were simply an issue where one attorney told him to take the deal and one told him not to take the deal, without further explanation, his confusion would be understandable. However, in this case, defense attorney Blatt gave Luster an explanation of why he should accept a plea bargain, explaining in detail the law, the evidence, and the potential maximum and mandatory sentences. This Court finds that in advising Luster, Isaacson appeared to be simply bragging that he could win the case or do a better job.

Luster consulted with Genis, his friend and a DUI attorney, about whether or not to take the deal. This Court finds that Genis gave Petitioner good advice. Genis told Luster that he couldn't tell him whether or not to take the deal. Genis testified that he told Luster to go back to his attorneys and ask them to explain it to him in more detail so that he could understand why they were making differing recommendations. (WH 188-191.)

In this case, this Court believes that, overall, Luster received effective assistance of counsel. He got good legal advice explained in detail from more than one source. However, that advice wasn't what Luster wanted to hear. Luster fired attorneys who gave him negative information and sought out attorneys who told him what he wanted to hear.

E. Was there a reasonable probability that Petitioner would have accepted a plea offer?

This Court is firmly convinced that Petitioner would have never accepted any plea offer that involved any substantial period of time in prison.

The defense attempted to show that Luster was amenable to a plea offer because he called several people to ask about whether or not he should take the deal.

Valerie Balderama, the mother of Luster's two children testified that she told Luster to take the deal. However, she testified that Luster told her that he was innocent and that he wanted to show that he was innocent. Luster said to her that he didn't deserve to go to prison, and he didn't deserve ten years in prison. He also told her that he didn't want to be away from his children for that period of time. (WH 421-25.)

In *Lafler v. Cooper*, *supra*, 566 U.S. ___, 132 S.Ct. 1376, the defendant had admitted his guilt and initially indicated that he would accept the offer. Whether a defendant had accepted responsibility for his actions is a factor which the court may consider in determining whether there was a reasonable probability that he would have accepted the plea offer. (*Id*, 132 S.Ct. at 1381-82.)

In this case, Luster had a somewhat pugnacious attitude right from the outset. In his Miranda interview shortly after his arrest, Luster said of the initial complaining witness: "If the D.A. files charges it's gonna go to a jury and she's gonna look like a fool. She's gonna look like a fool. 'Cause I'm gonna get a top notch lawyer and, uh, she'll be cross-examined and ripped to pieces, guaranteed, you know." (Ex. K-1, p.30.) Witnesses testified Luster asserted his innocence repeatedly throughout the time period leading up to trial. He told people that he felt very strongly that he had done nothing wrong and wanted to vindicate himself.

The defense argued that if Luster had been given unanimous legal advice by his attorneys, he would have realized that his claims of innocence did not have a valid basis, and he would have accepted the plea offer. This Court finds that highly unlikely. Luster was very active in his case, even to the point of telling his attorneys what to say and do during the trial. Luster heard what he wanted to hear. He fired attorneys who gave him advice he didn't like.

The defense argued that Luster would have accepted such a plea offer if he had been given competent legal advice because no rational person would ever choose life in prison over 8 to 12 years or a maximum sentence of 16 years in prison. However, when a person is out of custody, there is always a third choice – flight. So even if the possibility of the defense winning at trial were completely foreclosed, a defendant may still believe that given two very unattractive choices, he could flee rather than take the least unattractive choice. Luster was very adamant that he did not want to go to prison and expressed this view during the plea bargaining stage. It has been the experience of this Court that it is **extremely** rare for any out of custody defendant to accept a plea offer for more than three or four years in prison.

F. Would the trial court have accepted such a plea offer?

This Court finds that, had a plea agreement been reached by the parties prior to trial, it is highly likely that the magistrate assigned to the preliminary hearing would have accepted the offer. Although retired

Judge Gutierrez was not the judge who handled the preliminary hearing, he testified that the range of years under discussion, 8 to 12 years, was well within the range of commonly accepted sentences for such sex offenders for a plea at an early stage of the proceedings.[5] That has also been the experience of this Court.

Also, it is highly unlikely that a busy preliminary hearing judge would have taken the time to actually watch the videotapes which Petitioner made of the sex acts and which formed the basis for some of the charges.[6] The magistrate would have relied upon the Office of the District Attorney to protect the interests of the victims in the case. The Ventura District Attorney's Office did (and does) have a reputation of being tough on plea bargaining. Under these circumstances, most trial judges would not expect to be required to closely scrutinize the D.A. offers to make sure that they were being tough enough on crime.

G. Were the terms of the alleged settlement offer less than the sentence imposed?

This requirement was clearly established in that Petitioner was sentenced to 124 years in prison after trial. It was alleged that the settlement offer was either in the range of 10 to 12 years in prison or 6 to 16 years in prison for two counts.

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[5] Twelve years would have involved imposing the midterm of six years for each of the two counts.

[6] These were referred to as the "crime tapes" in the Writ proceedings.

H. If such a plea offer were re-offered now, would a sentencing judge now accept it?

The problem with plea offers, especially in sex cases, is that they are frequently made for reasons other than an evaluation as what is the most appropriate resolution of the case. That is, they are frequently made because the victim does not want to testify or the prosecutor does not want to make the victim go through the trauma of testifying. There may also be concerns about whether the prosecutor can obtain a conviction. After trial and a conviction, these concerns are no longer relevant. At that point, the purpose behind a discounted sentence may be moot.

In the instant case, even if there had been a formal plea offer, even if Petitioner had ineffective assistance of counsel, and even if Petitioner could show that he would have accepted the plea deal if his attorneys had unanimously recommended it, it is doubtful that any trial judge would now accept a sentence in the range which was under discussion prior to trial.

At this stage of the proceedings, any sentencing judge would take the time to view the crime tapes. They are disturbing. The victims appear so lifeless that it looks like a person having sex with dead bodies. Luster is forced to struggle to move their arms and legs, which are dead weight, into position to commit the sex acts. He leers, grins, and gloats for the camera.

Also, when Luster was apprehended in Mexico, he was found with a notebook in his handwriting which contained a list entitled "Payback List." (Ex. M.) On this list were the names of people connected with Luster's case, including Ventura County Deputy Sheriffs, prosecutors and his lead trial attorney, as well as the names of the victims. Whether this was just the musings of a disgruntled person or was actually a "hit list," as characterized by the District Attorney's Office, is unknown. However the attitude it embodies is troubling.

At this point in time, the numbers under discussion regarding a possible resolution of the case prior to preliminary hearing may no longer do the case justice.

IV. Flight Issues

Luster left the jurisdiction and went to Mexico during the two week holiday break in his jury trial. Jury selection began on December 3, 2002. Trial began on December 16, 2002 with opening statements. On December 20, 2002, the trial was recessed for two weeks. On January 3, 2003, Luster left the confines of his electronic monitoring and fled the jurisdiction. When trial resumed on January 6, 2003, his whereabouts were unknown. When it was determined that Luster had been gone from his house for the past three days and that most of his clothing was gone, the trial court made a finding of voluntary absence and resumed the trial in his absence. After being found guilty on all but one count, he was sentenced in absentia as well. He was arrested in Mexico approximately six months later.

Penal Code Section 1043 allows a trial which was begun in the presence of the defendant to be continued in his absence if the defendant is "voluntarily absent." Petitioner claims that his flight was not voluntary because one of his attorneys, Richard Sherman[7], repeatedly told him that he would be killed in jail or in prison, that he was going to lose the trial, and that he should flee. Moreover, he contends that Sherman not only recommended that he flee but also set up the arrangements for him to flee in exchange for a large sum of money.[8] Luster argues that his attorney did this, not out of concern for Luster, but was motivated to instigate the flight in order to get money to pay off the attorney's large pressing debts.[9]

Therefore, Petitioner argues that his flight was not voluntary but was coerced. He contends that his remaining trial and sentencing should not have occurred in his absence. Petitioner also contends that not only was his flight involuntary, but also that his attorney's conduct constituted ineffective assistance of counsel, that his attorney had an actual conflict of interest, and that the attorney's conduct deprived him of his Sixth Amendment right to counsel.

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[7] Richard Sherman is now deceased. He died in April of 2011.

[8] Luster paid $280,000 to a third party introduced to him by Richard Sherman, for the arrangements for his flight. Luster said that $80,000 of that was supposed to be returned to him in Mexico for his living expenses, but he said that never happened. Out of this $280,000, it appears that Richard Sherman was paid at least $50,000. (WH 703-710, 752; Exhibit 214.)

[9] Petitioner's attorneys called this "The Sherman Plan."

It is undisputed that Richard Sherman (along with defense investigator/consultant William Pavelic) told Luster that he would be killed in jail and/or prison, that Sherman urged the defendant to flee and that Sherman helped him flee. Moreover, this Court also finds (although the People did not concede this point) that Sherman was paid a large sum of money for his efforts in this regard, and that financial gain was the motive for his behavior. However, this does not necessarily mean that the flight was not voluntary nor does it necessarily entitle Petitioner to a new trial.

Luster knew, long before defense attorney Sherman came into this case, that sex offenders and people with money are in danger of physical harm in custody. One of Luster's first attorneys, James Blatt, testified that this was an issue which was discussed among the defense team and which everyone on the defense team was concerned about. Blatt testified that it was a matter of common knowledge. (WH 28-29.) Gersh also testified that Luster was fearful for his safety in prison very early on in the case. (WH 232-234.)

All defendants who are facing sex charges, whether it be rape or child molestation, have tremendous fears of being hurt in state prison. That is an unfortunate fact of life. However, the law does not allow them to flee the jurisdiction because of these fears, and then, at some later point in time, when memories may have faded or witnesses are unavailable, get a new trial due to these fears. To do so would be against public policy. General fears of being harmed in prison do not render a defendant's flight involuntary.[10]

In this case, Luster contended that he also had specific fears of being harmed in custody by the Ventura County Sheriff's Department. Luster testified that as Detective Evans was taking him down a stairwell shortly after the arrest, Evans told Luster that if he wasn't forthcoming and didn't tell them what they wanted to know, the detective could bring him back to the stairs, handcuff him, and push down the stairs and that would be that. (WH 672.) Luster testified to this both at his Miranda hearing and at the Writ Hearing in this Court. This Court does not find Luster's testimony in this regard to be credible. The Court believes that Luster fabricated this threat in order to try to

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[10] An analogy can be made to the defense of duress or necessity in prison escape cases where an inmate claims that he escaped because of threats in prison or because he was in imminent fear for his life. Although the courts have recognized such a defense, stringent requirements must be met for it to be successful. Among other things, the inmate must show that he first tried to resolve the problem through official channels or the proper authorities or that there was not time to do so. Also, he must show that he immediately reported to proper authorities when he obtained a position of safety from the immediate threat. *People v. Velasquez* (1984) 158 Cal.App.3d 418, 421, citing *People v. Lovercamp* (1974) 43 Cal.App.3d 823, 831-832. In this case, Luster did not bring his concerns to the FBI or to the courts. Nor did he report to the American Embassy or the FBI after he reach a "place of safety" in Mexico. It would be against public policy to allow a person to stay gone for an indefinite period of time, even if the initial failure to appear really was involuntary, and then allow that person a new trial when he or she finally got caught years later.

suppress the [sic] his statements and to mitigate his embarrassment over having waived his rights and having made incriminating and conflicting statements which were later used against him at trial.

This Court has watched the video tape and read a transcript of Luster's Miranda statement. (Exs. K and K-1.) Luster was filmed without his knowledge during his questioning by the police. A female detective, Melissa Smith, took the Miranda waiver and did most of the questioning of Luster. Detective Evans came into the room occasionally to report on items of evidence which were found at Luster's house and to add information. If Detective Smith and Detective Evans had played a "good cop/bad cop" routine with Luster, his argument might be more persuasive. However, this Court finds that both detectives were extremely pleasant to him through most of the interview. Detective Evans chatted with Luster and asked him about good places to surf. The atmosphere was relaxed and casual with occasional joking. This Court doubts that this would be the atmosphere if Detective Evans had just threatened Luster, especially when Luster was not even aware he was being filmed and was alone with Detective Evans for part of the interview.

Luster also testified at the Writ Hearing that, while he was in custody, a male deputy took him aside and told him that the deputy had heard that Luster had dated the deputy's sister. According to Luster, the deputy said that Luster better stop seeing the sister or he would suffer great bodily harm. (WH 672.) This Court finds that this testimony may very well be credible. However, Luster did not seem to be terrified by this threat because he testified that he continued to see the sister for more than a year after he was released. When asked why, Luster simply said, "She wanted to see me and I wanted to see her, so we did." (WH 757.) This Court believes that either Luster wasn't frightened or he was already planning to flee if he wasn't acquitted and didn't see any need to heed the warning.

The fact that Sherman told Luster that he would be killed in prison certainly heightened Luster's anxiety about this issue. But it was also established that Luster already had a strong fear of prison long before Sherman ever came on the case. Luster told several people in connection with the case settlement discussions that he was not willing to accept any plea offer which involved prison time.

Luster had a very powerful incentive to flee the jurisdiction from the moment he was released on bail. He had been told by at least one attorney that the case against him was very strong. (WH 8-10.) Several attorneys told him that he was facing 100 plus years in prison, if convicted. This Court is firmly convinced that Luster would have fled even if Sherman had not exacerbated his pre-existing fears. Luster certainly had the money and the sophistication to arrange his own flight even without Sherman's help.

At the Writ Hearing, Petitioner attempted to bolster his argument that his flight was not voluntary by arguing that he was "childlike," unsophisticated, easily influenced and easily manipulated, thereby making him especially vulnerable to a sharpster attorney like Richard Sherman and his forceful sidekick, investigator/litigation consultant William Pavelic. Although several witnesses did describe Luster as "childlike," it appears that this was primarily because he did not have to work at a regular job due to the fact that he had a trust fund, and he lived the life of a carefree "beach bum." Luster described himself as being involved in real estate, stock trading, entrepreneurial activities, and managing his assets. There is no credible evidence that Luster has a low IQ. He graduated from high school and attended community college for two and a half years. Several witnesses who were asked their opinions of Luster's level of sophistication about the criminal justice system, gave the answer "moderate." One of his first attorneys described him as "strong, both mentally and physically." As described above, he was certainly assertive about his case and how it was being conducted. It would be against public policy to allow a defendant to claim that he was justified in jumping bail and staying gone for an indefinite period of time because he was fearful of going to prison, even if those fears were justified.

Petitioner also argues that he should be granted a new trial because his attorney, Richard Sherman, had an actual conflict of interest because his advice to flee was for his own financial gain and was not in Petitioner's best interest. However, Richard Sherman was no longer Luster's attorney at the time that he gave this advice. He had dropped out of the case during this time period shortly before the trial started.[11] He did not conduct any of the trial. He did not even come into court during the trial. Luster was represented at trial by lead attorney, Roger Diamond, and second chair, Kiana Sloan-Hillier. Although it appears that while Sherman was never officially relieved as an attorney of record, there seemed to be a general acknowledgment that he was no longer on the case.[12]

Also, this Court does not believe, nor does this Court believe that Luster believed, that Sherman was giving him this advice to flee as part of his official role as an attorney. Luster testified that Sherman told Luster that if he were Sherman's son, he would tell Luster to "get out of Dodge immediately." (WH 702.) In addition, Luster knew perfectly well that Richard Sherman was advising him to commit a crime. He could not possibly have thought that this was "legal advice."

Luster also received contrary advice. His close friend and financial advisor, Albert Gersh, testified at the Writ Hearing that he took a walk on the beach with Luster shortly before he fled. Luster confided his plans

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[11] Richard Sherman came into the case in November, 2001, about five months after the preliminary hearing, and dropped out about one year later in November, 2002.

[12] The defense argues that because Richard Sherman visited Luster in jail right after his arrest on the fugitive warrant, that shows that he was still his attorney all along. However, Austin's testimony before the federal grand jury makes it clear that the only reason that Sherman visited Luster in jail was to bring him papers to get Luster to sign over his house. Sherman was the only one who could get into [sic] visit because he had a bar card, not because he was still acting as Luster's attorney.

to his friend/advisor. The friend/advisor testified that he told Luster that the idea to flee was the "stupidest thing I have ever heard" and that he wasn't going to get away with it. He testified that he advised Luster that "running away is never generally the best solution to a problem." (WH 223, 229.) Luster himself testified at the Writ Hearing that this friend was a "sharp cookie" and that Luster trusted his advice. (WH 669.) Luster's own mother testified that she was present after this walk on the beach and she told him that fleeing was "ridiculous." She testified that she informed Luster that "It would be a horrible repercussion if he even attempted to do such a thing." (WH 560.)

Just as in the settlement discussions, this Court believes that Luster heard what he wanted to hear. He accepted the advice that accorded with his already formed intentions and rejected the advice which contradicted his viewpoint. Just as in the settlement discussions, he chose the path of whoever was promising him his freedom.

Even if Sherman had been Luster's attorney at the time of his flight, and even if his advice to flee had given the attorney a conflict of interest and/or assuming that Petitioner's flight was considered involuntary, Petitioner must still show prejudice.[13] That is,

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[13] Defense counsel argues that where there is an actual conflict of interest, prejudice is presumed, citing the case of *People v. Doolin* (2009) 45 Cal.App.4th 390, 417,421, 428-31. However, that case explains that the presumption of prejudice only applies to cases of multiple representation (that is, where the attorney represents more than one defendant in a case) where there is an

Petitioner must show that had he stayed for his trial, it is likely that the outcome would have been different.

Since Petitioner is already being granted a new sentencing hearing, the contention that his sentencing should not have occurred in his absence is moot. Regarding the continuation of the trial in his absence, there is no showing that the outcome of the trial would likely have been different if only he had stayed for the remainder of the trial. It has never been suggested that there was any likelihood that Luster would have been acquitted of some or all charges if only he had stayed. The defense argument throughout this writ has been that the case against Luster was overwhelming,[14] and he should have tried to work out a plea. The only hope for an acquittal had been jury nullification which a defendant is not entitled to. Therefore, it would make no sense to grant him a new trial on this basis only to have the inevitable result of having him convicted again. Petitioner has failed to prove by a preponderance of the evidence that his flight was not

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actual conflict of interest. In that type of case, the likelihood of prejudice is high, although it may be hard to prove definitively. So prejudice is presumed.

[14] Because of the cases of *People v. Giardino, (supra)* 82 Cal.App.4th 454 and *People v. Dancy* (2002) 102 Cal.App.4th 21, Luster had no defense at all to the counts involving the two girls who were unconscious in the videotapes, Tonja and Shawna. With respect to the third girl, Carey, Luster made incriminating statements on the taped "cold call" which Carey made to Luster the next day at the request of law enforcement. (Ex. L-1.) Because of that evidence, the case against him was strong.

voluntary under the law or that he was deprived of his Sixth Amendment right to counsel.

V. Issues of "Ordinary" Ineffective Assistance of Counsel

A. Alleged Error in Jury Instructions

Petitioner has raised several issues in his Writ alleging "ordinary" ineffective assistance of counsel.[15] Petitioner has failed to show that any of these issues would have likely had an effect on the outcome of the trial, as required by the second prong of the *Strickland* test.

Counsel for Petitioner argue that it was error for the judge to instruct the jury that GHB was a controlled substance within the meaning of Penal Code Section 261(a)(3).[16] Petitioner argues that GHB was not made a controlled substance until after the offenses pertaining to Tonja; it was a controlled substance during the offenses pertaining to Shawna (but perhaps not all of its analogs); and it was clearly a

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[15] Defense counsel have referred to these issues as "ordinary" issues of ineffective assistance of counsel, perhaps to distinguish them from the issues pertaining to Richard Sherman which are truly extraordinary.

[16] Penal Code Section 261(a)(3) provides, "Rape is an act of sexual intercourse accomplished with a person not the spouse of the perpetrator under any of the following circumstances: . . . (3) Where a person is prevented from resisting by any intoxicating or anesthetic substance, or any controlled substance, and this condition was known, or reasonably should have been known by the accused."

controlled substance (along with all of its analogs) during the time of the offenses pertaining to Carey.

It is an element of the offense that the person be "prevented from resisting by any intoxicating or anesthetic substance, or any controlled substance." The testimony of the People's expert at the trial was that GHB is an anesthetic substance and it has never been suggested otherwise, it is obvious that this element was established beyond a reasonable doubt (Ex. 137, p.578, trial testimony of Jo Ellen Dyer). Any error was not prejudicial. A correct instruction would not have changed the outcome of the trial.

It should be noted that at the Writ Hearing, the trial attorney for Luster, Roger Diamond, testified that sometimes it is a strategic decision to allow error in a trial, so that a defendant has issues to argue on appeal, especially where the error could easily have been corrected by the prosecutor or the error is unlikely to make a difference. (WH 465-66.)

Similarly, Petitioner criticizes the wording in CALJIC 10.65 (the "Mayberry instruction") which explained to the jury the consent defense with respect to the charges involving Carey, the victim who was not alleged to be unconscious but was only alleged to be intoxicated, and who was not on videotape. This instruction explains that a reasonable and good faith belief that the person voluntarily consented is a defense to the charge. It is the second paragraph of the instruction with which the defense takes issue:

> "However, a belief that is based upon ambiguous conduct by an alleged victim that is the product of the defendant's knowing or unlawful administration of an intoxicating anesthetic or controlled substance which prevents her from resisting is not a reasonable belief"

The defense argues that what it means to prevent someone from resisting should have been explained more under the "unique" facts of this case. Also, the defense argues that the jury should have been instructed that they could consider that an "honest and reasonable, but mistaken belief" in consent as a proper defense because Luster himself was intoxicated and because of his intoxication he may have had a reasonable but mistaken belief that the victim consented. This contention is incorrect. The reasonable man standard is an objective standard, not a subjective standard. It does not encompass what a "reasonable" intoxicated man would think.

Normally jury instructions are outside the purview of a Petition for a Writ of Habeas Corpus which usually addresses issues of constitutional dimension. However this Court has discussed these issues briefly because of the fact that Petitioner was precluded from raising them on a direct appeal due to his flight. This Court is not finding that he has a right to have these issues adjudicated at this time, but is only including them out of an abundance of caution.

B. Failure to consult with and present at trial a medical expert on the properties of GHB

Petitioner alleges that it was ineffective assistance of counsel for the defense attorney to fail to consult with and present at trial, a medical expert to rebut the testimony of the GHB expert presented by the People regarding the physical symptoms of being under the influence of GHB. Petitioner alleges that such a medical expert was available.

At the Writ Hearing, the declaration of Dr. Michael Laufer was admitted into evidence by stipulation. Dr. Laufer stated in the declaration that he watched the videotapes and that his observations were that the girls were in such a deep state of sedation, it is unlikely that it was caused by GHB. Also, one girl starts to wake up, but then becomes unconscious again. The doctor states that this is inconsistent with GHB intoxication. This statement conflicted with the testimony of the People's expert at trial.

It is difficult to understand how this would have been helpful to the defense at trial. Dr. Laufer's declaration raises more questions than it answers. Most importantly, if the girls were in such an extremely deep state of sedation that they were unlikely to have been under the influence of GHB, then what would be likely to cause such a deep state of sedation? Surely it must be an "intoxicating substance or an anesthetic" of some type, which is all that is required by the statute. No one has suggested, nor would a fact finder be likely to believe, that the victims fell down, suffered serious head injuries resulting in unconsciousness, and Luster, rather than calling 911, instead took out his video camera and taped himself having sex with them.

Moreover, one of the videotapes was labeled "Shawna GHBing" at the time that it was found at Luster's residence. Luster admitted at the Writ Hearing that he and these girls "did GHB together" before the acts in question. (WH 729-730.) As such, this Court finds Dr. Laufer's testimony would not have been helpful to the defense.

C. Alleged ineffective assistance of counsel at trial

Petitioner alleges ineffective assistance of counsel because lead trial counsel Roger Diamond argued to the jury the "ludicrous" defense that the girls on the videotapes were not really unconscious but were only pretending to be unconscious. While it is true that that argument was pretty weak, Petitioner has not suggested that defense attorney Diamond had any good arguments explaining the videotapes which he neglected to present. This Court finds that Diamond did the best he could in light of the evidence.

Petitioner also argues that he suffered from ineffective assistance of counsel because Diamond was unprepared for the trial. Petitioner contended that Richard Sherman was supposed to be the lead trial attorney, but that Sherman effectively dropped out of the case about two weeks prior to the start of trial.

Diamond had been affiliated with the case for some time, but his involvement had been limited to writing motions. Shortly before trial, Diamond stepped up and became the lead trial attorney. But again, Petitioner fails to identify any valid defense which he had which was not presented or any actions which Diamond could have taken which would have made a difference in the outcome of the case. Therefore, these arguments fail.

VI. Right to Privacy

Petitioner argues that his prosecution for Rape of an Unconscious Person and Rape by Intoxication violates his right to privacy under the Constitution. He argues, in essence, that the right to privacy includes the right to sexual perversions such as having sex with an unconscious person or sex with a person who is unable to resist because of an intoxicating or an anesthetic substance, as long as all parties consent in advance to the acts.

However, the right to privacy does not allow a person to do reckless acts which endanger or injure another, even if all parties consent and even if the acts are in the privacy of one's own home. For example: consent is not a defense to mayhem; snuff films are illegal; assisting a suicide is illegal.

This Court finds that by giving the victims GHB, either with or without their consent, Luster seriously endangered their lives. The People's expert at trial testified that one can easily die from an overdose of GHB. (Ex. 137, pp. 615, 621-23, 628-29, 632-33.)

Also, a sexual partner is allowed to withdraw his or her consent at any time during a sex act for a good reason. If the person is awake and can feel pain and can resist, he or she can stop an injurious act as it is happening. Also, if one person is unconscious during the act, that person does not know whether the acts remained within the parameters of what was consented to. Those are some of the public policy reasons behind these statutes and why there is no constitutional right to privacy which encompasses this behavior.