

SUPREME COURT OF THE UNITED STATES

SHEYNA DOUPREA,)
Petitioner,) NO. _____
v.) MOTION FOR LEAVE TO PROCEED
JANEL ESPINOZA) IN FORMA PAUPERIS
Respondent.)

The petitioner, Sheyna Douprea, asks leave to file the attached Petition for a Writ of Certiorari to the Ninth Circuit Court of Appeal, No. 18-16139, without prepayment of costs and to proceed in forma pauperis under Rules 12.2 and 39 of the U.S. Supreme Court Rules and 28 U.S.C. § 1915(a).

Petitioner has previously been granted leave to proceed in forma pauperis in the following courts: The United States District Court for the Northern District of California, No. 4:15-cv-06133-JST; The United States Court of Appeals for the Ninth Circuit, No. 18-16139.

On January 21, 2019, petitioner's undersigned counsel was appointed to represent petitioner in those proceedings pursuant to The Criminal Justice Act, 18 U.S.C. 3006A. Accordingly, no affidavit of the petitioner is attached. U.S. Sup. Ct. R. 39.

Dated: September 8, 2020.

Respectfully submitted,

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No.

IN THE SUPREME COURT OF THE UNITED STATES

SHEYNA DOUPREA,

Petitioner

v.

JANEL ESPINOZA, Warden,

Respondent

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Sheyna Douprea was convicted of first degree murder after she stabbed her boyfriend with a pocketknife while he tried to strangle her. At trial, Douprea's counsel argued that Douprea stabbed Mooney in self defense.

Under the clearly established rule in *Strickland v. Washington*, 466 U.S. 668 (1984), the district court found that Douprea's trial counsel was professionally unreasonable when she failed to investigate and present evidence that Douprea was a battered woman, that she had a long history of serious mental illness and that she suffered from post traumatic stress disorder.

The question presented is: was Douprea required to establish a reasonable probability of a total acquittal, as opposed to a conviction of a lesser included offense, in order to show that she was prejudiced by trial counsel's errors?

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT
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PETITION FOR WRIT OF CERTIORARI

Petitioner, Sheyna Douprea, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case

OPINIONS BELOW

The Ninth Circuit Court of Appeals affirmed the district court's denial of habeas corpus relief in an unpublished memorandum decision. App. 1. ¹ The order and judgment of the district court denying petitioner's habeas petition are unreported. App. 6, 8.

¹ "App" refers to the Appendix attached to this petition. "ER" refers to the Appellant's Excerpts of Record filed in the Court of Appeals for the Ninth Circuit. "RT" refers to the reporter's transcript of the state Court of Appeal proceedings and "CT" refers to the Clerk's Transcript. 1

The California Court of Appeal affirmed Douprea's conviction and sentence and in an unpublished decision. App. 55. The California Supreme Court denied review and denied Douprea's petition for a writ of habeas corpus in unpublished orders. App. 53, 54.

JURISDICTION

The final judgment of the Ninth Circuit Court of Appeals was entered on June 16, 2020. App. 1. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part: "No state shall . . . deprive any person of life, liberty or property without due process of law." Additionally, the Sixth Amendment guarantees that, "[i]n all criminal prosecutions, the accused shall enjoy the right...to have the assistance of counsel for his defense."

STATEMENT OF THE CASE

On August 16, 2010, in Sonoma County Superior Court, Douprea was convicted by a jury of one count of first degree murder (Cal. Penal Code § 187) with an enhancement for personal use of a knife (Cal. Penal Code § 12022 (b)(1)). On January 4, 2011, Douprea was sentenced to twenty six years to life in prison. 11 CT 2584.

On November 30, 2012, the California Court of Appeal affirmed the judgment and sentence. ER 52. On March 13, 2013, the California Supreme

Court denied review without comment or citation to authority. I ER 51. On December 16, 2015, the California Supreme Court denied Douprea's petition for a writ of habeas corpus without comment or citation to authority. I ER 50.

Douprea timely filed an amended petition for writ of habeas corpus in the district court on July 24, 2016. CR 12. On May 25, 2018, the district court denied the petition on the merits. 1 ER 3, 5. The Ninth Circuit Court of Appeals issued a certificate of appealability. 1 ER 1. On June 16, 2020, the Court of Appeals affirmed the decision of the district court. App. 1.

Statement of Facts

1. Introduction and Summary

Douprea had been dating and sometimes living with Daniel Mooney for about one year when he died from stab wounds he received during an altercation with her. During the course of their relationship, Mooney had attacked Douprea approximately 15-20 times and had been arrested for battering her at her home. At trial, the defense argued that Douprea killed Mooney in self defense when she stabbed him while he attempted to strangle her. The prosecution argued that Douprea had stabbed Mooney while he was in an alcoholic stupor because she was angry at him for being too drunk to attend a Christmas party.

At trial, the defense presented the testimony of Dr. Linda Barnard, who is a therapist and expert in the area of PTSD and Battered Woman's Syndrome. Although defense counsel sought to present Dr. Barnard's testimony that Douprea was a battered woman, defense counsel inexplicably agreed when the prosecutor argued that Dr. Barnard's opinion on that subject was inadmissible.

Moreover, defense counsel failed to present any testimony from a medical expert who could have described for the jury Douprea's long history of major mental illness and how her very poor mental health affected her perceptions of and reactions to Mooney's conduct and her behavior before, during and after the stabbing.

Prior to trial, defense counsel had obtained Douprea's medical and social history records, which documented her extensive history of trauma due to child abuse and sexual abuse as well as major mental illness. Defense counsel also had copies of reports concerning incidents where Douprea had been arrested for violence against other intimate partners in the past. Defense counsel did not provide all of those records to Dr. Barnard before she testified.

Dr. Barnard 's post trial declaration states that had she reviewed this material prior to trial, her testimony would have been significantly stronger in several respects. Moreover, she would have been able to

anticipate and rebut the prosecution's argument that Douprea and not Mooney was a perpetrator of intimate partner violence.

Post-conviction counsel also provided Douprea's mental health and psychosocial history records to Dr. Linda Kriegler, a psychologist. Dr. Kriegler's post-trial declaration states that Douprea has suffered from serious mental illness since she was a child. Dr. Kriegler could have testified at trial about Douprea's diagnosis of bipolar disorder, depression, and psychosis, which would have undermined the prosecutor's argument that Douprea's past misconduct was evidence of her violent character and that she was a perpetrator and not a victim of intimate partner violence. Such testimony would have supported counsel's self defense theory and raised a reasonable doubt that Douprea formed the mental states (premeditation, deliberation and malice) necessary for a conviction of first or second degree murder.

Douprea's trial counsel's has admitted that she had no tactical reason for failing to investigate Douprea's history of mental illness or for failing to introduce that evidence at her trial.

2. Douprea's Relationship with Daniel Mooney, Who Was a Violent Alcoholic

Douprea, was 23 years old at the time of the charged incident. In 2007 or 2008, Douprea met 46 year old Daniel Mooney, who lived in an apartment in Healdsburg and worked at a lumber yard. 15 RT 1587, 1596,

1599.

Mooney had a long history of severe alcohol abuse. At the time of his death, he was on probation for a 2006 felony DUI offense. 18 RT 2222. In January, 2005, Mooney had also been arrested for driving under the influence, with a blood alcohol level of .40. 18 RT 2181-2282. After his arrest, Mooney was so aggressive with hospital staff that both of his arms had to be handcuffed to a bed rail. 18 RT 2177-2178.

In January, 2002, Mooney had also been arrested for DUI after he was involved in an automobile accident. 18 RT 2222-2223. Despite his .33 blood alcohol level, he was able to get out of his vehicle, walk to the curb and attempt field sobriety tests. 18 RT 2221.

On August 9, 2008, about three months before the charged incident, Mooney was arrested after a domestic violence incident at Douprea's home. 16 RT 1782-1793. A neighbor, 16 year-old Jennifer Cardona, called 911 when she saw Douprea yelling "stop" and "trying to get away" from Mooney who was chasing her outside. 16 RT 1780-1781. Cardona then saw Mooney pulling Douprea by the hair back toward her trailer. 16 RT 1782. Douprea pushed Mooney and was "trying to get away." 16 RT 1783.

Jennifer Cardona's mother, Modesta Cardona, also testified that she saw Mooney hitting Douprea that night. 18 RT 2145. Modesta saw Mooney hit Douprea "strongly" three or four times. 18 RT 2146-2147. ³ She also saw

Mooney holding Douprea with one hand while striking her and pulling her hair. 18 RT 2147-2148.

Douprea cried when police arrived, and told them not to arrest Mooney. 18 RT 2077. She said Mooney had pushed her down during a scuffle on the porch. 18 RT 2073. She also asked the officers for instructions as to how she could bail Mooney out of jail. 18 RT 2077. Mooney said that he had not struck Douprea “at all.” *Id.*

According to Douprea, during the course of her relationship with Mooney there were about 15-20 incidents of domestic violence, where he grabbed or battered her, pulled her hair, tackled her, and struck her with his fist. 3 CT 513-515. She explained to the detective that those incidents were her “fault” because “[Mooney] told me that it was my fault.” 3 CT 514. Mooney was “very strong” because he worked “in a lumber yard all day.” 3 CT 524.

According to Douprea, Mooney was the kind of person who was continually involved in fights. 3 CT 508-509. He would frequently fight in bars and would also get drunk and fight with her. 3 CT 508. Just prior to the charged incident, they had been having many disagreements because Mooney said he did not understand why Douprea would want to be with a “worthless drunk.” 3 CT 512. A few months before the charged incident, Douprea went to Fort Bragg to visit a friend, Michael Cuadra. Douprea had

confided in Cuadra that Mooney had been “drinking more” and that he was “belligerent.” 18 RT 2207. Cuadra testified that when Douprea arrived in Fort Bragg, she was “obviously scared.” 18 RT 2207-2208.

On the day before the charged incident, Douprea went to Mooney’s apartment and found him drunk. During an argument, Mooney cornered her in the kitchen and was “taking swings” at her. He then grabbed her neck and began to choke her. 3 CT 518-519. Mooney held her throat against the refrigerator and told her that he was going to kill her. He said that every time he choked her. 3 CT 538-539.

Douprea, who described the incident as “really scary” then retreated to a bedroom with her daughter. 3 CT 519. Mooney came into the bedroom and twisted Douprea’s arm, which was something he had done before because he had a “thing” about arm twisting. 3 CT 519. She asked him to leave and he did.

3. Mooney Tried to Strangle Douprea And She Stabbed Him With a Pocketknife

On December 14, 2008, Douprea and Mooney had planned to attend a Christmas party. That morning, Douprea wanted to go to church and Mooney “kept trying to pull me and not let me leave.” Douprea left Mooney’s apartment at about 6 a.m. with her daughter, Hailey. When Douprea arrived at about noon, she discovered that Mooney was drunk. 3 CT 503.

Douprea called her Alcoholics Anonymous sponsor, Nicole Rowan, who told Douprea to leave. RT 1883. According to Rowan, Douprea said "OK" and did not seem upset. RT 1881-1884.

Less than an hour later, at 11:54 a.m., Douprea called her mother Gena from the bathroom of Mooney's apartment. RT 1856. Douprea's voice was terrified and frantic and she cried as she said that Mooney had attacked her and threatened to kill her. RT 1842, 1856-1867. Douprea said that Mooney had tried to strangle her. RT 1842-1843, 1857-1858. Gena could hear Mooney pounding on the bathroom door and screaming incoherently at Douprea. RT 1842-1853, 1858, 1868.

Douprea said she did not know what to do and Gena asked if she could get out. Douprea said "no." RT 1843. Gena told her to call 911 and Douprea refused because she did not want Mooney to go to jail. RT 1843, 1858, 1861.

Gena heard Mooney continue to scream and pound on the bathroom door for about six minutes. RT 1864, 1867-1868. When he stopped, Douprea seemed relieved and she asked Gena not to call the police. RT 1844.

A few minutes later, A.J. Fulton, a friend of Mooney's and Douprea's called Douprea on her cell phone. RT 1894. Douprea calmly told Fulton that Mooney was drunk and that they had been fighting. RT 1894, 1897, 1905. When Fulton tried to speak to Mooney on the phone, Mooney was

incoherent. RT 1894-1895. Fulton heard Douprea telling Mooney to “get off” of her. RT 1897. Fulton also heard Mooney laughing “maniacally” with an “evil” sounding and “out of control” laugh. RT 1895- 1898.

When Fulton spoke to Douprea again she told him she was afraid of Mooney and that he was being “physical” with her. RT 1898, 1906. Fulton suggested Douprea “get the hell out of there” and talk to Mooney when he was sober. RT 1898.

According to Douprea’s cell phone records, she called 911 at 12:29 p.m. for about one minute. 3 CT 682. No recording of the call was presented at trial and it is unknown whether she was able to make a connection.

At 12:33 p.m. Douprea again called her mother Gena. RT 1863. Douprea was crying and very upset. She said that Mooney had attacked and tried to strangle her and that she had stabbed him. RT 1864. Douprea said that she had called 911 but had not been able to “get through.” Id.

At 12:37 p.m., Douprea called 911 and falsely told the operator that she had come into the apartment and found Mooney covered in blood. RT 1125, 1128; CT 464; People’s Exhibit 138A. Gena also called 911 and reported that Mooney had attacked Douprea and that she stabbed him and “she says

he's dead." RT 1869. Responding police officers described Douprea as scared, distraught, anxious, and very concerned about Mooney. 12 RT 1044, 1057, 1069- 1070. She was breathing heavily, probably due to anxiety and fear. 12 RT 1069. Her eyes were red and she was crying. There was blood on her upper lip, hands, pants, and in her nose. RT 1045, 1058, 1079.

The officers found Mooney on his back on the floor of his bedroom, bleeding from four neck wounds. There was a towel pressed against his neck. He was unresponsive but still breathing. 12 RT 1076. Mooney was pronounced dead when he arrived at a hospital approximately thirty minutes later. 12 RT 1114-1117. His blood alcohol level was .35 and he also had a "therapeutic" dose of Benadryl in his blood. RT 2278, 2297.

There was blood on the kitchen floor and counter, the dishwasher, refrigerator, kitchen sink and a door mat. There were also some small pieces of glass and glitter on the kitchen floor. RT 1046. There was also blood on the bathroom floor and counter. RT 1047.

4. Douprea's Statements to Detective Shooter

Douprea was interrogated by police detectives for approximately three hours. A video recording of the interrogation was presented to the jury. 14 RT 1379-1381. During the interview, Douprea initially told Detective Michael Shooter that she had returned to Mooney's apartment

and found him bleeding on the floor. 3 CT 504, 521, She said that Mooney's wounds may have been self inflicted. 3 CT 522. She also said she had tried to call 911 but could not get through. 3 CT 504.

Douprea then admitted that she and Mooney had been in an altercation during which he tried to strangle her and she had stabbed him in self defense, accidentally injuring him much more than she had intended. 3 CT 524-525.

Douprea said that when she came back to the apartment, expecting to go to the Christmas party, Mooney had refused to go. 3 CT 526. Douprea said she had thought "uh oh, what did I do?" 3 CT 526. She tried to coax him out of bed and said "come on, you gotta get ready, let's go." 3 CT 548, 575. Mooney then became very angry, got out of bed and began to follow her around the apartment and grab her. 3 CT 524, 548, 575, 595.

They began to fight and punched each other in the nose. CT 549, 575. Then they were both on the kitchen floor, fighting. He twisted her arms and threatened to break them and also banged her head against the kitchen floor. 527, 548, 575-577. They punched each other in the face. 528, 548, 575, 595.

Douprea ran to the bathroom and locked herself inside. She spoke to her mother and AJ Fulton on her cell phone and told them both that she was scared. 3 CT 525-527, 548, 575. She did not call the police because she

loved Mooney and felt like he was not himself when he was drunk. CT 550.

Douprea went back to the bedroom and Mooney began to yell at her. CT 576. He called her a worthless whore. CT 550. She tried to hug him but he pushed her to the floor and tackled her. CT 577. She was afraid to leave because Mooney would become “worse” and “furious” when she tried to get away. CT 579-581, 603-604. In the past, she had tried to deal with conflicts by telling him he was right and apologizing to him. CT 539, 603, 609.

Mooney got on top of her and held her down, while banging her head on the floor. CT 540 541, 577. She punched him in the nose. CT 577. He held her down with his hands around her neck and said he was going to kill her. CT 551, 577. He was “squeezing real hard.” 528. He was drunk and his eyes were “all glazed over.” 528. He began to kick her, twist her arms and rant. That is when Douprea showed him her pocket knife. 3 CT 528, 536-537. Mooney was “unphased” and acted like he thought she could not do anything to him. 3 CT 538.

Mooney said “go ahead” and they continued to wrestle. She thought he was going to kill her. She decided to “poke” him with the knife to scare him and get him to stop. CT 577, 586, 598. She did not intend to seriously hurt him. CT 577, 587, 599, 601, 606. After she stabbed him once, he continued to taunt her and tell her he was going to kill her. CT 555, 577. She thought he would, so she stabbed him again. CT 556, 605, 616. He began to bleed a lot.

3 CT 530. She grabbed a towel and tried to stop the bleeding and also tried to call 911. CT 578, 584. She then called her mother and said she thought Mooney was dying. 3 CT 537.

Douprea explained to the detective that she carried the pocket knife for protection when Mooney was drunk and for “scary situations.” 3 CT 536. When she brought the knife into Mooney’s bedroom, she thought she could use it to protect herself and “scare him.” 3 CT 567-568, 604. She felt like she went “too far” because she had not intended to hurt him that badly. CT 614.

Douprea put the knife in a diaper pail on the balcony, showered for about two minutes and changed her jeans because they were covered with blood. CT 510, 566, 557-558, 565, 578, 585. When she was scared, hurt or depressed she would soothe herself with a shower. CT 578, 581.

5. Testimony About Douprea’s Past Misconduct

a. Robert Melia

Robert Melia testified that he had been in an intimate relationship with Douprea about four or five years earlier. When he met her, he was homeless and addicted to methamphetamine and alcohol. RT 1504, 1550. Within about a month, he had moved into her apartment. RT 1509.

Douprea was going to school and paying the bills. RT 1509-1510. Douprea did not drink, however she sometimes used methamphetamine that was supplied by her mother. RT 1554-1556.

According to Melia, Douprea began to have “weird outbursts.” RT 1509. She would yell and become very angry and then “storm out.” RT 1510-1511. One day, Melia accused Douprea of “cheating and lying” and she threw a box at him and scratched and shoved him. RT 1512.

Melia and Douprea eventually moved to Las Vegas. Id. During this period, Douprea was twice hospitalized in psychiatric wards. She had also been threatening suicide on a regular basis. RT 1564. She had slashed her own arms and threatened to bite down on razor blades. RT 1579. She also got on top of a parking garage at the Sahara Hotel and threatened to jump off. RT 1581-1582.

One day, when Melia had been drinking he woke up to Douprea screaming and “throwing full beer cans” at him. RT 1526. Another day, she saw him smoking and attacked him, ripping his shirt, scratching his face and throwing punches at him. RT 1528. Douprea was arrested. Id.

When she was released from jail, she came home, found him drinking and threw a glass at him. She also broke a lamp. RT 1531, 1542. When Douprea’s mother and boyfriend tried to intervene, Douprea attacked them, scratching and biting. RT 1532-1538. Douprea was again arrested. RT 1532.

After that incident, Melia and Douprea were married in Las Vegas. RT 1543. One night, they were lying in bed and Douprea became angry

because Melia was not showing sexual interest in her. She punched him in the ribs and scratched his face, then grabbed a pocket knife and threatened him with it. RT 1545-1546. They are no longer married. RT 1549.

b. Adam Patterson

Patterson and Douprea dated on and off. RT 1707. At times, Douprea would get extremely upset. Id. Once, he woke to find Douprea hitting him with a closed fist because she wanted to have sex. RT 1710. According to Patterson, the blows only hurt him “slightly.” RT 1710.

After they broke up, Douprea swore and yelled at him when he refused to allow her in his house. She then threw a shoe through his window. RT 1713. He opened the door and she attacked him and his roommate, trying to get into the house by striking and biting them. RT 1713.

c. Michael Schneider

Michael Schneider is Gena Douprea’s live in boyfriend. Douprea, when she was eight months pregnant, had attacked Schneider with a knife when she heard him make an insulting remark to her mother. RT 1753, 1765-1766, 1852. She cut his arm, and the police were called. The wound was about three inches long. RT 1711. After Douprea’s pregnancy, she “calmed down” and did not get as upset over little things. RT 1760.

6. Defense Expert Testimony Concerning Strangulation and The Effects of Alcohol

Defense witness Diane Emerson was a forensic nurse practitioner and expert in the area of domestic violence and assessment of injuries. RT 2306-2309. Emerson testified that most people who survive strangulation attacks have no or only minimal visible injuries to their neck. RT 2342, 2346-2347, 2388.

The redness and swelling in photos of Douprea's neck after the charged incident was consistent with recent strangulation. RT 2333- 2334, 2394. Emerson also reviewed photographs of bruises, scratches and injuries to Douprea's face, back and forearms. Those injuries were consistent with recent participation in a physical fight. RT 2394. Emerson concluded that Douprea had been in a fight and that she had been strangled. RT 2338, 2349.

Forensic toxicologist Kenton Wong testified that people who have developed a long term high tolerance for alcohol, such as Mooney, can metabolize alcohol much more quickly than a normal person. 19 RT 2270-2275, 2284, 2292. At a blood alcohol level of .35, most people would be comatose. 19 RT 2283. However, Wong had "seen" cases where people with high tolerance for alcohol were walking with that level of alcohol in their blood. 19 RT 2283, 2285.

7. Testimony of Defense Expert Dr. Linda Barnard Concerning Intimate Partner Violence Syndrome, Dissociation and Post Traumatic Stress Disorder

Dr. Linda Barnard is a licensed marriage and family therapist with a Ph.D. in counselor education. For 35 years, she has specialized in the area of domestic violence. Intimate Partner Violence used to be called “Battered Woman’s Syndrome.” 3 ER 406. She is also a Board Certified expert in the areas of post traumatic stress and domestic violence. She has been a speaker at numerous law enforcement training programs. 3 ER 303-304. Dr. Barnard has testified on behalf of the prosecution in domestic violence cases. 3 ER 306, 414.

A. Defense Counsel’s Erroneous Stipulation That Dr. Barnard Could Not Testify That Douprea Was a Battered Woman And The Trial Court’s Rulings on the Scope of Dr. Barnard’s Testimony

Prior to trial, Dr. Barnard prepared a report where she opined, among other things, that Douprea was a victim of Intimate Partner Violence and that she had suffered from a long history of trauma and dissociative states since childhood. 3 ER 453. Dr. Barnard also stated that, in this case, Douprea had “significant gaps” in her memory of the charged events, and that “much of what occurred was likely in a dissociative state” where memory tracks were disrupted. 3 ER 467.

Defense counsel argued that Dr. Barnard's testimony that Douprea suffered from post traumatic stress disorder (PTSD) could explain why Douprea had displayed a "flat affect" or emotionless expression during her interview with police. 3 ER 421. The prosecutor agreed that PTSD testimony was admissible. He argued that the testimony concerning IPV should be limited to general background and that it was impermissible for Dr. Barnard to give an opinion that Douprea was a battered woman. 3 ER 422-423.

Defense counsel agreed with the prosecutor that Dr. Barnard could not testify that Douprea was a battered woman but could only describe that syndrome in a general way. 3 ER 423-424, 429.

At a side bar conference during Dr. Barnard's testimony, the trial court held that she could not testify that Douprea was a battered woman because that would be tantamount to an opinion on guilt or innocence. 3 ER 349. The trial court also sustained the prosecutor's objections to Dr. Barnard's opinion that Douprea suffered from dissociation on grounds that it would have been an impermissible opinion on her criminal intent. 3 ER 349.

During re- cross examination by the prosecutor, he elicited from Dr. Barnard her opinion that Douprea suffered from PTSD. 3 ER 360. When Dr.

Barnard later attempted to expand on her opinion, the trial court interrupted and stated that there were “certain opinions” that she could give that were of value to the jury and others that were not. 3 ER 417.

B. Dr. Barnard’s Trial Testimony

Dr. Barnard described for the jury the characteristics of Intimate Partner Violence and Dissociative Disorder. 3 ER 308-315. Intimate Partner Violence generally involves a “pattern” of physical, sexual, verbal or psychological abuse. 3 ER 398.

Dissociation occurs when a person subconsciously splits from their emotions. The individual may appear to be “very flat” when discussing a terrible experience. 3 ER 315-316.

Dr. Barnard also testified that Douprea suffers from bipolar disorder, which is a mood disorder. Douprea told Dr. Barnard that her insurance had “run out” at the time of the charged incident and so she was not taking any medications. 3 ER 386-387.

C. The Prosecutor’s Cross Examination

During cross examination of Dr. Barnard, the prosecutor asked whether the expression “garbage in garbage out” accurately conveyed the importance of the “quality of the information” she was provided to review. *Id.* The prosecutor pressed Dr. Barnard as to whether she had contacted Adam

Patterson or Robert Melia concerning their experiences with Douprea. 3 ER 361-363.

The prosecutor also extracted Dr. Barnard's admission that she had not spoken to Dr. Jill Rothberg or Dr. Kathleen Whisman. 3 ER 368, 370. Dr. Barnard also admitted that her own report states that Douprea "has a significant mental health history." 3 ER 369.

As to Dr. Whisman, the prosecutor asked if Dr. Barnard should have spoken to the doctor who had been prescribing Douprea Lithium (a mood stabilizer) and Topomax (an anti-psychotic drug). 3 ER 370. He also asked Dr. Barnard whether she had talked with the person who had issued Douprea's Prozac prescription. Dr. Barnard admitted she had not. 3 ER 371.

The prosecutor then asked Dr. Barnard if she had reviewed any crime reports related to Douprea's statement that she had been sexually molested as a child. Dr. Barnard testified that if there was such a report, "it could have been" helpful. 3 ER 382.

8. Counsel's Closing Arguments

A. Prosecutor's Argument

During the prosecutor's closing remarks, he relied on evidence of Douprea's mental disorders to argue that she was a perpetrator of domestic violence. For example, the prosecutor argued that Douprea's

history of cutting herself and her suicide attempts were evidence of her “lethality” (2 ER 205, 293-294) and that Douprea’s explosive episodes with Schneider, Melia and Patterson were evidence of her “scary, violent” behavior. 2 ER 227.

The prosecutor also argued that Douprea’s initial dishonesty when she reported the incident to police and her attempt to hide the knife in a diaper pail were evidence of her guilt. 2 ER 238, 240-241, 243.

As to Dr. Barnard, the prosecutor argued:

What is clear is there is a whole host of other stuff going on in this young woman’s mind. She even acknowledged the possibility of various co-occurring disorders. She acknowledged all of the materials that might have been helpful that she was not provided or did not review.

2 ER 244.

The prosecutor then argued that Dr. Barnard’s testimony concerning Intimate Partner Violence “applies to [Douprea] as the batterer, as the initiator of aggression time and time again . . . See Also RT 2504, 2551-2552 (rebuttal argument that Dr. Barnard’s testimony about Intimate Partner Violence “fits Sheyna Douprea”).

B. Defense Argument

Defense counsel argued that Douprea had killed Mooney in self defense when he tried to strangle her. 2 ER 270-276, 279, 282-283.

**9. Dr. Barnard's Post-Conviction Declaration
That Trial Counsel Failed to Provide Her With
Psychiatric and Social History Records That
Would Have Supported Dr. Barnard's Opinions
And Would Have Prepared Her to Respond to
the Prosecutor's Questions on Cross
Examination**

After the guilty verdicts, post-conviction counsel obtained a declaration from Dr. Barnard, which states that Douprea suffered from PTSD and dissociation and that Douprea had been a victim of Intimate Partner Violence in her relationship with Mooney. 2 ER 106; 3 ER 453.

Dr. Barnard's testimony at trial was curtailed because she was not permitted to testify that Douprea was a victim of IPV and was only permitted to describe the syndrome in general terms. If asked, Dr. Barnard would have been able to explain to the jury that Douprea was a victim of IPV in her relationship with Mooney. 2 ER 113.

If asked, Dr. Barnard could have also explained to the jury that Douprea's previous history of assaultive behavior did not mean that she was not a victim of IPV in her relationship with Mooney. Dr. Barnard stated that "it is a myth that battered women are non-violent, docile, weak individuals." 2 ER 113.

Dr. Barnard also stated "critically, I would have explained to the jury how being a battered woman would have affected Ms. Douprea's perceptions

and behaviors at the time she killed Mr. Mooney. Not being able to talk about IPV removed a “critical chunk” of Dr. Barnard’s testimony. 2 ER 114.

Dr. Barnard described how she could have also explained to the jury how each PTSD symptom would have affected Douprea’s thought processes and behavior at the time of the charged incident. 2 ER 114. Even if Mooney had not been a threat to Douprea at the time of the stabbing, her PTSD symptoms and history of IPV could have caused her to genuinely perceive him as a threat and overreact. 2 ER 115. Finally, Dr. Barnard was not asked to testify to her opinion that Douprea had entered into a “dissociative state” at the time of the killing, i.e., that she had become psychologically detached during the episode because it was traumatic and overwhelming and because she had a long history of dissociation as a coping method during traumatic incidents. 2 ER 115. Dr. Barnard’s testimony about dissociation could have explained some of the inconsistencies between Douprea’s account of the incident and the physical evidence. ER 116. She could also have explained how Douprea acted “more instinctively than with reason, judgment or contemplation” when she stabbed Mooney. 2 ER 116.

At the request of post conviction counsel, Dr. Barnard also reviewed additional material that had not been provided to her by trial counsel, including: (1) Psychological evaluations of Douprea when she was a child,

(2) Police reports concerning reports of child and sexual abuse committed against Douprea, (3) Material establishing that, when Douprea was a child, her mother had a live in boyfriend who was a registered sex offender, (4) An incident report concerning a domestic battery against Gena Douprea, (5) A 1997 incident report concerning an assault by Douprea against her mother, (6) A police report concerning Douprea's arrest for shoplifting, (7) A 2006 report of an incident where Douprea was arrested for domestic violence against Adam Patterson, (8) Douprea's domestic violence treatment program records, (9) Douprea's jail mental health records from 2007 to 2009, (10) Several of Douprea's journal entries and (11) Investigative reports for witnesses Adam Patterson, Robert Melia, Matthew Schamens, Michael Schneider and Nicole Rowan. 2 ER 117.

Those records would have provided additional support for Dr. Barnard's conclusions regarding Douprea's dissociation and PTSD. 2 ER 117. If she had received this material prior to trial, she could have testified more definitively in several respects.

First, if Dr. Barnard had reviewed the documents about the incidents Melia, Patterson and Schneider had described at trial, she would have advised defense counsel to address this behavior "head on" so that she could have explained to the jury that this history of misconduct did not negate the

fact that Douprea was a victim of domestic violence in her relationship with Mooney. Dr. Barnard explained that “Battered women are frequently aggressive.” 2 ER 118.

Moreover, if Dr. Barnard had received the various reports concerning Douprea’s chaotic and traumatic childhood, she could have augmented and “buttressed” her testimony about Douprea’s PTSD diagnosis. 2 ER 118. Finally, if Dr. Barnard had received this material prior to trial, she would not have been surprised by the prosecutor’s questions about that material and could have responded effectively on cross examination. 2 ER 118-119.

10. Dr. Kriegler’s Post Conviction Declaration Concerning Douprea’s Long History of Bipolar Disorder, Post Traumatic Stress Disorder and Other Psychiatric Disturbance

Post-conviction counsel obtained a declaration by Dr. Julie A. Kriegler, Ph.D., who is a licensed clinical psychologist. 2 ER 128. Dr. Kriegler found that Douprea had suffered “profound mental illness and trauma” throughout her life, beginning when she was six years old. 2 ER 132. Dr. Kriegler’s sixty nine page declaration reviews all of the evidence in detail and concludes that Douprea’s history of severe chronic mental illness was well documented in reports generated by a “host” of psychologists, psychiatrists and other treatment professionals. 2 ER 132.

Dr. Kriegler's declaration must be read in its entirety to fully appreciate the extent of Douprea's history of severe psychiatric illness. 2 ER 128 to 196. Teachers first noticed Douprea's severe functional difficulties when she was in kindergarten. When Douprea was nine years old, a doctor said she was "lonely, appeared to feel worthless, had strange behavior, and did not get along with her peers." 2 ER 140. At that age, she already suffered numerous symptoms of mental illness and indications that she was not being cared for adequately. Id.

By sixth grade, Douprea was diagnosed with psychosis with "severe disruption on almost all levels of psychological functioning" including reality distortion and delusions. 2 ER 147. Douprea suffered bouts of uncontrollable anger and she was depressed and anxious. 2 ER 142. Her delusional symptoms included accusing people of things they didn't do, behaving "strangely" and becoming obsessed with marriage. 2 ER 142- 143. She was also moody, suspicious, had temper tantrums, threatened people and suffered irrational fears. 2 ER 143. ⁴

When she was fourteen years old, Douprea was referred to Napa State Hospital for a one year adolescent inpatient treatment program, because she was at "great risk of permanent and serious mental health problems." 2 ER 152. Instead, Douprea's mother kept her at home where she was subjected

to additional abuse. 2 ER 153.

Dr. Kriegler's declaration emphasized that, during the charged incident, Douprea had not been taking any of her prescribed mood stabilizing drugs. Instead, she had been taking an anti-depressant that had an "excitatory" effect, which could have added to her agitation and psychotic symptoms. 2 ER 194.

11. Defense Counsel's Post-Conviction Declaration That There Was No Tactical Reason For Her Failure to Investigate and Present Evidence of Douprea's Mental Condition

In connection with Douprea's petition for a writ of habeas corpus, her trial counsel signed a declaration stating that she did not have a tactical reason for failing to investigate or offer evidence of Douprea's mental health history, failing to offer evidence that Douprea was a battered woman and failing to provide Dr. Barnard with records concerning Douprea's mental health and psycho-social history. 2 ER 102- 104.

Trial counsel had obtained an evaluation of Douprea by a psychologist, Dr. Thomas Cushing, before she had collected Douprea's mental health records. As a result, the only assessment instrument he used was one designed to evaluate personality disorders. 2 ER 101, 104.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE NINTH CIRCUIT'S CONCLUSION THAT TRIAL COUNSEL WAS NOT INEFFECTIVE IN FAILING TO CONDUCT A THOROUGH INVESTIGATION INTO DOUPREA'S MENTAL HEALTH CONFLICTS WITH THIS COURT'S PRECEDENTS

A. The Decisions Below Conflict With *Strickland* When They Held That Douprea Was Not Prejudiced By Trial Counsel's Failure to Investigate and Present Mental Health Evidence

This Court should grant certiorari because the decisions below conflict with *Strickland v. Washington*, 466 U.S. 668, 689 (1984) *Rompilla v. Beard*, 545 U.S. 374 (2005) and *Wiggins v. Smith*, 539 U.S. 510 (2003), which hold that trial counsel must conduct a professionally reasonable investigation in a criminal case. The decisions also conflict with this Court's holding that a defendant must show only a reasonable probability of a different result at trial to establish that she was prejudiced by trial counsel's errors. *Strickland*, at 689-690.

The Ninth Circuit Court of Appeal's decision assumes that trial counsel's investigation of Douprea's mental health was professionally unreasonable. App. 2. The Ninth Circuit's decision conflicts with *Strickland* when it holds that Douprea did not establish prejudice because the omitted evidence would have "undermined" Douprea's claim of self defense. Id.

In *Williams* this Court reaffirmed that the prejudice standard for ineffective assistance of counsel claims is the “reasonable probability” test in *Strickland*. The Ninth Circuit departed from this Court’s precedent when it held that the omitted mental state evidence would have undermined Douprea’s self defense claim at trial. App. 2. The Ninth Circuit’s analysis erroneously focused only on whether the omitted evidence could have led to a total acquittal, without considering whether there was a reasonable possibility of a different result, i.e. a conviction of a lesser included offense. For this reason, this Court should intervene to ensure that established Supreme Court precedent on the “prejudice” requirement is applied correctly and consistently.

The Court’s conclusion that Douprea did not establish prejudice is based on its erroneous conclusion that evidence of Douprea’s long history of serious mental illness, her status as a victim of Intimate Partner Violence and her diagnosis of Post Traumatic Stress disorder would have conflicted with her argument that she killed Mooney in self defense. App. 2-3. However, the central question in the prejudice inquiry is not whether the omitted mental state evidence supported Douprea’s credibility when she spoke to the police, it was whether a reasonable probability that at least one juror would have harbored a reasonable doubt as to Douprea’s guilt of the charge of first degree murder. *See Wiggins*, 539 U.S. at 513. As set forth in more detail below, had trial counsel offered evidence of Douprea’s chronic emotional disturbance, reality distortions, dissociation and hypomania, the jury would have,

at the very least, been convinced that she did not act with the necessary premeditation and deliberation for first degree murder.

The Ninth Circuit's prejudice analysis also failed to account for the lesser included offense of manslaughter based on a theory of imperfect self-defense. An expert could have testified that during a violent confrontation with Mooney, Douprea's symptoms caused her to inaccurately process her environment leading her to misperceive Mooney's behavior and misperceive the threat of danger he imposed. Based on that evidence, there is a reasonable likelihood that at least one juror would have concluded that Douprea was guilty of only the lesser included offense of voluntary manslaughter.

Strickland does not require proof that the omitted evidence would have resulted in a total acquittal, it requires only a reasonable probability of a different result. Because the memorandum decision is in conflict with this Court's decisions in *Strickland* and *Williams*, certiorari should be granted.

Argument

A. The Sixth and Fourteenth Amendment Right to Effective Assistance of Counsel

A claim of ineffective assistance of trial counsel requires proof that : (1) counsel's performance was objectively unreasonable and (2) but for counsel's error there is a "reasonable probability that the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 689 (1984). "The relevant question is not

whether counsel's choices were strategic, but whether they were reasonable." *Roe v. Flores-Ortega*, 528 U.S. 470, 481 (2000).

B. The District Court Held Correctly That Trial Counsel's Failure to Investigate Douprea's Mental Condition Was Professionally Unreasonable

When, as in this case, counsel has failed to present exculpatory evidence, the court must "focus on whether the investigation supporting counsel's decision not to introduce [exculpatory evidence] was itself reasonable." *Wiggins v. Smith*, 539 U.S. 510, 523 (2003). The duty to investigate derives from counsel's basic function, which is " 'to make the adversarial testing process work in the particular case.' " *Kimmelman v. Morrison*, 477 U.S. 365, 384 (1986) (quoting *Strickland*, 466 U.S. at 690). An attorney who fails to introduce evidence "that would have raised a reasonable doubt at trial renders deficient performance." *Lord v. Wood*, 184 F.3d 1083, 1092 (9th Cir. 1999).

The California Supreme Court denied this claim without comment or citation to authority. I ER 50. However, after an extensive analysis, the District Court held that trial counsel's failure to fully investigate Douprea's mental condition was professionally unreasonable. The Court held that a "mental state defense theory - arguing that Petitioner suffered from PTSD, IPV, and dissociation at the time of the offense - would have been consistent with, and would have bolstered, Petitioner's theory of self defense. I ER 23.

C. Trial Counsel's Failure to Present Evidence of Douprea's Mental Condition Was Also Professionally Unreasonable

The district court concurred with the state Court of Appeal's conclusion that Douprea was not prejudiced by defense counsel's failure to introduce evidence of her mental condition. 1 ER 30-35. On direct appeal, the California Court of Appeal found that trial counsel had a "reasonable tactical justification for not eliciting Dr. Barnard's opinion that Douprea suffered from IPV." The Court of Appeal reasoned that such testimony would have subjected Dr. Barnard to a "blistering cross examination" that Douprea was "more of an abuser than a victim," which would have diminished Dr. Barnard's credibility. 1 ER 69.

The evidence would have supported the defense that counsel selected and argued to the jury and would have negated the mental state elements for first and second degree murder. *See People v. Aris*, 215 Cal.App.3d 1178, 1199 (1989)(error to exclude evidence of IPV when offered to demonstrate defendant's genuine fear of victim and of imminent harm). Moreover, counsel's statement to the trial court that she agreed with the prosecutor that the IPV evidence was inadmissible was professionally unreasonable. Counsel had no tactical justification for this statement, which was contrary to California law. 2 ER 103.

The Court of Appeal unreasonably applied *Strickland* and unreasonably determined the facts when it held that protecting Dr. Barnard from a damaging cross examination was a reasonable justification for counsel's omissions. It is difficult to imagine how the prosecutor's cross examination could have been any

more vigorous than it was. 3 ER 328-414. The prosecutor grilled Dr. Barnard about Douprea's history of violence against her previous intimate partners and about her failure to review numerous reports and records relevant to Douprea's psycho-social history.

Moreover, there is simply no reasonable justification for counsel's failure to present evidence of Douprea's long term history of major mental illnesses. Testimony from a qualified expert such as Dr. Kriegler was necessary to explain that Douprea's long history of bizarre and sometimes explosive behavior as well as her conduct during and after the charged offense was a product of her major mental illness. For all of these reasons, defense counsel's failure to present mental health evidence at trial was professionally unreasonable.

D. There Is A Reasonable Likelihood That At Least One Juror Would Have Voted to Acquit Absent Counsel's Failure to Investigate, to Present Mental Health Evidence and to Provide Essential Reports to Dr. Barnard

The evidence of Douprea's history of Battered Woman's Syndrome ("IPV"), bipolar disorder, psychosis and PTSD was relevant to the jury's consideration of her reasonable or unreasonable fear of Mooney, her perception that a lethal attack by him was imminent, and whether she formed the mental states of premeditation and deliberation for first degree murder or malice for a second degree murder verdict. Significantly, the first degree murder verdict in this case was a surprise. Even the prosecutor had argued in closing that, in his view, the evidence supported a verdict of murder in the second degree. 2 ER 222.

Ultimately, defense counsel's failure to investigate and introduce evidence of Douprea's long history of mental illness allowed the prosecutors to present the jury with a grossly unfair impression of Douprea's behavior in the past and of her conduct during and after the charged incident. Because the jury was unaware of Douprea's mental health history, the prosecutor was able to portray her as a "scary" controlling person and to portray symptoms of mental illness as evidence of domestic violence "lethality."

2. The Court Should Weigh The Cumulative Effect of All of Trial Counsel's Errors

The petitioner must show "there is a reasonable probability that at least one juror would have struck a different balance." *Wiggins v. Smith*, 539 U.S. 510, 537 (2003). The Court must consider "the cumulative effect of multiple errors and not simply conducting a balkanized, issue-by-issue harmless error review." *Parle v. Runnels*, 505 F.3d 922, 927 and fn 6 (9th Cir. 2007).

3. Review of the Prejudice Issue Should Be De Novo

The California Court of Appeal analyzed only the prejudice arising from trial counsel's failure to present Dr. Barnard's opinion that Douprea was a battered woman. It held there was no prejudice because the jurors had "ample evidence" to consider the issue even without Dr.

Barnard's opinion. 1 ER 70.

No court below has considered the cumulative effect of all of trial counsel's errors. See 1 ER 52 (Court of Appeal Opinion); 1 ER 50, 51 (California Supreme Court decisions separately denying petition for review and petition for a writ of habeas corpus without comment or citation); 1 ER 5 (District Court decision analyzing the prejudice arising from each error individually). Accordingly, the prejudice issue should be reviewed de novo. *Murdaugh v. Ryan*, 724 F.3d 1104, 1121-1122 (9th Cir. 2013); *Rompilla v. Beard*, 545 U.S. 374, 390 (2005) (reviewing prejudice de novo after identifying a § 2254(d)(1) error in the state court's evaluation of the performance requirement).

4. Expert Testimony About Douprea's Mental Health Would Have Been Consistent With And Bolstered the Self Defense Theory That Defense Counsel Selected And Argued to the Jury

Under any standard of review, Douprea's defense was prejudiced. This case is comparable to *Weeden v. Johnson*, 854 F.3d 1063, 1072 (9th Cir. 2017) where expert testimony about the defendant's mental state would have provided an "entirely new dimension" to the jury's assessment of the critical issue of mens rea. Here, had defense counsel had presented expert testimony about Douprea's lengthy history of bipolar disorder, IPV, PTSD, dissociation, psychosis, psychiatric hospitalizations and bouts of severe depression, mania and suicide attempts at least one juror would have received a

different impression of her behavior before, during and after the charged events. *See Jennings v. Woodford*, 290 F.3d 1006, 1018-1019 (9th Cir. 2002)(counsel's failure to investigate mental defenses prejudicial where there was "abundant" evidence of mental illness that would have supported a manslaughter verdict at trial).

The prosecutor argued that Mooney must have been in a drunken stupor and so Douprea could not have reasonably perceived him as a threat. II ER 224. This argument could have been effectively rebutted if defense counsel had provided Dr. Barnard with the reports and records concerning Douprea's history of serious mental illness and trauma and if counsel had presented Dr. Kriegler's testimony about Douprea's mental health. The experts could have explained that because of Douprea's dissociation, bipolar disorder, psychosis and her constellation of illnesses and impairments she was likely to misperceive traumatic events, to suffer from gaps in her memory and to overreact to a perceived threat.

Moreover, the omitted evidence would have rebutted the prosecutor's argument that Douprea's statements about the incident were not credible. This case is comparable to *Seidel v. Merkle*, 146 F.3d 750 (9th Cir. 1998), where the defendant stabbed and killed a neighbor during a fight. After the verdict, an expert found that the defendant suffered from "clear symptoms of PTSD" and brain damage that would have "played a significant role" in the jury's assessment of his fear for the purpose of establishing self defense. Id at p. 757. This Court emphasized that the fact that the defendant had lied during the assessment did not change the prejudice

analysis, as his dishonesty may have been a symptom of his chronic mental disease.

Id.

Had trial counsel offered evidence of Douprea's chronic emotional disturbance, reality distortions, dissociation and hypomania, the jury would have, at the very least, been convinced that she did not act with the necessary premeditation and deliberation for first degree murder.

Dr. Kriegler could have testified that during a violent confrontation with Mooney, Douprea's symptoms caused her to inaccurately process her environment leading her to misperceive Mooney's behavior and over read the threat of danger he imposed. 2 ER 195.

This omitted evidence would have also convinced at least one juror that there was reasonable doubt as to the malice evidence for murder in the second degree, which would have resulted in a verdict of manslaughter or an acquittal. For all of these reasons, Douprea's defense was prejudiced and she should receive a new trial.

CONCLUSION

For the reasons set forth above, this Court should grant certiorari and grant the writ.

Dated: September 8, 2020.

Respectfully submitted,

Stephanie M. Adraktas
CJA Appointed Attorney for Petitioner
Sheyna Douprea

No.

IN THE SUPREME COURT OF THE UNITED STATES

SHEYNA DOUPREA,

Petitioner

v.

JANEL ESPINOZA, Warden,

Respondent

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

PETITIONER'S APPENDIX

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CJA Appointed Counsel for Petitioner

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FILED**NOT FOR PUBLICATION**

JUN 16 2020

UNITED STATES COURT OF APPEALS

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

FOR THE NINTH CIRCUIT

SHEYNA DOUPREA,

Petitioner-Appellant,

v.

JANEL ESPINOZA, Warden, Central
California Women's Facility, Chowchilla,
California,

Respondent-Appellee.

No. 18-16139

D.C. No. 4:15-cv-06133-JST

MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Jon S. Tigar, District Judge, Presiding

Submitted June 11, 2020**
San Francisco, California

Before: SCHROEDER and BUMATAY, Circuit Judges, and MORRIS,*** District Judge.

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

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable Brian M. Morris, United States District Judge for the District of Montana, sitting by designation.

Petitioner Sheyna Douprea, a California prisoner, was convicted by a jury of first-degree murder in the 2008 stabbing death of her intoxicated boyfriend, Daniel Mooney. She received a sentence of 25 years to life in prison. The California Supreme Court denied her petition for habeas corpus without opinion.

The district court issued a comprehensive order considering all her claims. We granted a certificate of appealability on her claim of ineffective assistance of trial counsel in failing to investigate and present evidence of her mental condition at the time of the stabbing. We affirm the district court's denial of the petition.

Petitioner's defense at trial was that she acted in self defense. Her main post-conviction claim is that her trial counsel did not sufficiently investigate her mental condition in order to present expert evidence to the jury that her mental state at the time of the killing negated a finding of first-degree murder. Petitioner's counsel at trial did present an expert witness on PTSD and intimate partner violence. The witness testified Petitioner suffered from PTSD as the result of repeated trauma and generally about intimate partner violence.

Even assuming that counsel's performance was deficient because of a failure to investigate a potential mental state defense, there was no prejudice. *See Strickland v. Washington*, 466 U.S. 668, 694 (1984). Had counsel presented a mental state defense at trial, it would have undermined petitioner's own

explanations to the police that she acted in self defense. *See Greenway v. Ryan*, 856 F.3d 676, 682 (9th Cir. 2017). Moreover, the jury heard considerable evidence concerning Petitioner's mental problems and her abusive relationship, and nevertheless found Petitioner guilty. Even if counsel had pursued a mental state defense, that defense would not have affected the result at trial.

We also reject Petitioner's argument that counsel was constitutionally ineffective at trial for failing to present to the jury evidence of dissociation, or additional evidence about PTSD and Intimate Partner Violence (IPV). Evidence of dissociation would have undercut Petitioner's argument that she acted in self-defense. Presentation of additional PTSD and IPV evidence would not have made a difference in the jury's verdict.

Nor was counsel constitutionally ineffective for failing to turn over additional medical records to the expert witness. Much of that history was unfavorable to petitioner and would have undercut her credibility at trial. *See Murtishaw v. Woodford*, 255 F.3d 926, 945 (9th Cir. 2001).

The district court's denial of the petition is

AFFIRMED.

FILED

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAN 10 2019

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

SHEYNA DOUPREA,

Petitioner-Appellant,

v.

DEBORAH K. JOHNSON, Warden, Central
California Women's Facility, Chowchilla,
California,

Respondent-Appellee.

No. 18-16139

D.C. No. 3:15-cv-06133-JST
Northern District of California,
San Francisco

ORDER

Before: SCHROEDER and CHRISTEN, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 2) is granted with respect to the following issue: whether counsel was ineffective in failing to investigate and present evidence of a mental condition at the time of the offense, including providing psychological records to the expert witness. *See* 28 U.S.C. § 2253(c)(3); *see also* 9th Cir. R. 22-1(e).

The district court granted appellant in forma pauperis status in an order entered on November 15, 2018. The Clerk shall change the docket to reflect appellant's in forma pauperis status.

Counsel is appointed *sua sponte* for purposes of this appeal. *See* 18 U.S.C. § 3006A(a)(2)(B); *Weygandt v. Look*, 718 F.2d 952, 954 (9th Cir. 1983). Counsel will be appointed by separate order.

If appellant does not wish to have appointed counsel, appellant shall file a motion asking to proceed pro se within 14 days of the date of this order.

The Clerk shall electronically serve this order on the appointing authority for the Northern District of California, who will locate appointed counsel. The appointing authority shall send notification of the name, address, and telephone number of appointed counsel to the Clerk of this court at counselappointments@ca9.uscourts.gov within 14 days of locating counsel.

The opening brief is due May 14, 2019; the answering brief is due June 13, 2019; the optional reply brief is due within 21 days after service of the answering brief.

The Clerk shall serve on appellant a copy of the “After Opening a Case - counseled Cases” document.

If Deborah K. Johnson is no longer the appropriate appellee in this case, counsel for appellee shall notify this court by letter of the appropriate substitute party within 21 days of the filing date of this order. *See* Fed. R. App. P. 43(c).

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

SHEYNA DOUPREA,
Petitioner,
v.
DEBORAH K. JOHNSON,
Respondent.

Case No. 3:15-cv-06133-JST (PR)

CLERK'S JUDGMENT

Re: Dkt. No. 32

DEBORAH K. JOHNSON,

Respondent.

Pursuant to the Order Denying Petition for Writ of Habeas Corpus; Denying Certificate of Appealability signed May 25, 2018 the Petition for a Writ of Habeas Corpus is DENIED, and a Certificate of Appealability is hereby DENIED. Judgment is hereby entered in favor of Respondent and against Petitioner.

IT IS SO ORDERED AND ADJUDGED.

Dated: May 25, 2018

Susan Y. Soong
Clerk, United States District Court

By: William Noble
William Noble, Deputy Clerk to the
Honorable JON S. TIGAR

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7 SHEYNA DOUPREA,
8 Petitioner,
9 v.
10 DEBORAH K. JOHNSON,
11 Respondent.

12 Case No.3:15-cv-06133-JST

13 **CERTIFICATE OF SERVICE**

14 I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S.
15 District Court, Northern District of California.

16 That on 5/25/2018, I SERVED a true and correct copy(ies) of the attached, by placing said
17 copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing
18 said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle
19 located in the Clerk's office.

20
21 Sheyna Douprea ID: #:WA9085
22 Central California Women's Facility
23 P.O. Box 1508, Facility#:507-4-4L
24 Chowchilla, CA 93610-1508

25 Dated: 5/25/2018

26 Susan Y. Soong
27 Clerk, United States District Court

28 By: William Noble
29 William Noble, Deputy Clerk to the
30 Honorable JON S. TIGAR

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7 SHEYNA DOUPREA,
8 Petitioner,
9 v.
10 DEBORAH K. JOHNSON,
11 Respondent.

Case No. [15-cv-06133-JST](#)

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28 **ORDER DENYING PETITION FOR
WRIT OF HABEAS CORPUS;
DENYING CERTIFICATE OF
APPEALABILITY**

Before the Court is the above-titled petition for a writ of habeas corpus, filed pursuant to 28 U.S.C. § 2254 by Petitioner Sheyna Douprea, challenging the validity of her state court conviction. ECF No. 12. Respondent has filed an answer to the petition, ECF No. 20, and Petitioner has filed a traverse, ECF No. 31. For the reasons set forth below, the petition is denied.

I. PROCEDURAL HISTORY

On August 16, 2010, a Sonoma County jury found Petitioner guilty of first-degree murder, enhanced for use of a knife. Clerk's Transcript¹ ("CT") 312–13; Reporter's Transcript² ("RT") 2681–83. On January 4, 2011, the trial court sentenced Petitioner to twenty-six years to life in prison. CT 2586; RT 2924–28.

On November 30, 2012, the California Court of Appeal affirmed the judgment in an unpublished decision. People v. Douprea, No. A131031, 2012 WL 5987896, at *1 (Cal. Ct. App. Nov. 30, 2012). On March 13, 2013, the California Supreme Court denied review. ECF No. 24-4 at 2.

On May 15, 2014, Petitioner filed a petition for a writ of habeas corpus in the California

¹ The Clerk's Transcript is docketed at ECF Nos. 21–22.

² The Reporter's Transcript is docketed at ECF No. 23.

1 Supreme Court. ECF Nos. 24-5-24-18. After soliciting an informal opposition from respondent,
2 the California Supreme Court denied the petition on December 16, 2015.

3 On December 28, 2015, Petitioner filed a federal habeas petition that commenced this
4 action. See ECF No. 1. On January 10, 2017, Petitioner filed an amended habeas petition that
5 omitted her unexhausted claims. See ECF No. 12 (“Pet.”).

6 II. FACTUAL BACKGROUND

7 The following factual and procedural background is taken from the California Court of
8 Appeal’s opinion:³

9 Sheyna Douprea, then 23 years old, stabbed her intoxicated 46-year-old boyfriend
10 to death after he refused to go with her to a Christmas party in December 2008.
The essential question at trial was Douprea’s state of mind at the time of the killing.

11 A. *Pretrial and Evidentiary Rulings*

12 An information charged Douprea with the murder of her boyfriend, Daniel
13 Mooney, and alleged that she perpetrated the murder willfully, deliberately, and
14 with premeditation. (Pen. Code, § 187.) The information further alleged that
15 Douprea personally used a deadly and dangerous weapon (a knife), such that the
offense was a serious felony. (Pen. Code, §§ 12022, subd. (b)(1); 1192.7, subd.
(c)(23).) In addition, it was alleged that Douprea personally and intentionally
inflicted great bodily injury. (Pen. Code, §§ 1203.075, 12022.7, subd. (a)).

16 In July 2010, the prosecution filed motions in limine seeking admission of
17 numerous prior acts of violence by Douprea. (Evid. Code, §§ 1101, subd. (b);
1109.) Defense counsel opposed the motions in part. The trial court admitted all
18 but two of the prior incidents, a ruling that Douprea challenges in this appeal, as
discussed *post*.

19 Also in July 2010, defense counsel agreed with the prosecutor’s motion to preclude
20 a defense expert witness from opining that Douprea suffers from Battered
21 Women’s Syndrome (or, as it is also known, “Intimate Partner Violence”). (See
Evid. Code., § 1107.) The court later precluded the expert’s opinion that Douprea
22 entered into a dissociative state on the date of the crime. As addressed *post*,
Douprea challenges these matters as well.

23 B. *Prosecution Case*

24 1. *Relationship Between Douprea and Mooney*

25 Douprea and Mooney started dating in late 2007 or early 2008. At that time,
Mooney lived in an apartment in Healdsburg with Matthew Schamens, whom he

27 ³ The Court has independently reviewed the record as required by AEDPA. Nasby v. Daniel, 853
28 F.3d 1049, 1052-54 (9th Cir. 2017). Based on the Court’s independent review, the Court finds
that it can reasonably conclude that the state court’s summary of facts is supported by the record,
unless otherwise indicated in this order.

1 had met at an alcohol rehabilitation center. Douprea lived with her two-year-old
2 daughter in Windsor, in a mobile home purchased by her mother, Gena. [FN 1]

3 FN 1: Because Gena Douprea has the same last name as appellant, we refer
4 to Gena by her first name for clarity, without disrespect.

5 In August 2008, about four months before the killing, Douprea and Mooney had a
6 physical altercation witnessed by Douprea's neighbor, Jennifer Cardona. Cardona
7 testified that she saw a female quickly leaving Douprea's home around midnight,
8 trying to get away from a male and yelling at him to "leave us alone." The man
9 pulled the woman by the hair toward the house and then toward a car; she pushed
10 him to get away; and then he hit her and she fell to the ground. Cardona called
11 911, and the police soon arrived.

12 Questioned by the police, Mooney denied hitting Douprea or any physical violence,
13 while Douprea claimed they had a fight because she wanted him to spend the night.
14 Photographs admitted at trial showed an injury to Douprea's hip and a small scratch
15 on her face. After Mooney was taken away, however, Douprea asked the police
16 how she could bail him out. She did not want him arrested and did not want a
17 restraining order.

18 At some point, Mooney obtained a restraining order against Douprea. Sometime
19 thereafter, Schamens observed an argument between them at Mooney's apartment:
20 Douprea struck at Mooney's face, removed Mooney's glasses and threw them on
21 the floor, and hit Mooney with a towel rack; Mooney had scratches down his neck
22 and "claw" marks on his chest.

23 In November 2008, Mooney started drinking again. Schamens saw Mooney
24 intoxicated twice, but on neither occasion was he aggressive or violent. Schamens
25 vacated the apartment in late November, and Douprea accepted Mooney's
26 invitation to move in.

27 Around 11:00 p.m. on the night before the December 14 killing, Victoria Steel,
28 who lived in the apartment below Mooney's, heard noises upstairs for 15–20
minutes. The noises sounded like something heavy dropping on the floor. [FN 2]

29 FN 2: As described *post*, Douprea told the police that she had an argument
30 with Mooney the night before he died; initially, she claimed there was no
31 violence; later she asserted that he had swung at her, choked her, threatened
32 to kill her, and twisted her arm behind her back.

33 2. *The Hours Before the Killing*

34 On the morning of December 14, 2008, Douprea attended church and dropped off
35 her daughter at daycare. At 11:00 a.m., she picked up her daughter and said she
36 was going to a Christmas party. She did not appear distraught.

37 Around 11:15 or 11:30 a.m., Douprea was observed driving in the direction of
38 Gena's home in Windsor. Gena confirmed that Douprea dropped off her daughter
39 at her house around 11:30 a.m. and was in a pleasant mood.

40 According to Douprea's cell phone records, Douprea called Nicole Rowan, her
41 sponsor at Alcoholics Anonymous, at 11:31 a.m. and spoke for nine minutes.
42 Rowan testified that Douprea sounded irritated; she had planned to go to a
43 Christmas party with Mooney and he was already drinking at 11:00. The last thing
44 Douprea said was, "I'm going to go and get him cleaned up, see if I can get him

1 cleaned up.”

2 At 11:54 a.m., Douprea called Gena and spoke with her for eight minutes.
 3 According to Gena, Douprea said she was locked in the bathroom and Mooney had
 4 beaten her, threatened to kill her, and tried to strangle her. Gena heard screaming
 5 and pounding on the door, and Douprea sounded terrified and frantic and was “sort
 6 of” crying. Douprea said she did not know what to do; she could not leave the
 7 apartment, and she did not want to call 911 because she was afraid Mooney would
 8 go to jail. After about six minutes, the pounding and screaming subsided, Douprea
 9 seemed calmer, and she said she thought everything was going to be alright.
 10 Douprea convinced Gena not to call 911.

11 According to Douprea’s cell phone records, Douprea spoke next to her friend
 12 Fulton, from 12:04 to 12:09 p.m. Fulton testified that he had invited Douprea and
 13 Mooney to dinner and called Douprea to let her know she did not have to pick up
 14 one of the other guests. Although she seemed calm, Douprea told him that Mooney
 15 had been drinking and they got into an altercation. At Fulton’s request, Douprea
 16 put Mooney on the phone; obviously intoxicated, Mooney’s speech was so slurred
 17 that Fulton could hardly understand him. After Mooney got off the phone, Fulton
 18 spoke to Douprea while Mooney was “laughing maniacally” in the background.
 19 Douprea said, “Get off of me, Daniel” at least once, but still seemed calm.
 20 According to Fulton, Mooney’s laugh sounded evil and out of control; he testified
 21 that he had never heard Mooney laugh that way before. Douprea said she was
 22 scared (or sounded scared) when she talked about Mooney being physical with her,
 23 and she asked Fulton if she should call the police. Fulton suggested that Douprea
 24 leave the apartment and talk to Mooney when he was sober.

25 Janet Lopez and Tamara Nolan, who lived in the apartment next to Mooney’s,
 26 testified that they were returning to their apartment around 12:15 or 12:30 p.m. on
 27 December 14th when they met Douprea going up the stairs. [FN 3] Douprea was
 28 talking on her cell phone, saying “I will get him up or get him out.” She did not
 appear angry.

29 FN 3: Their time estimate may not be correct, since Douprea’s cell phone
 30 records indicate that Douprea was on the phone with Fulton from 12:04 to
 31 12:09 p.m. and made calls to Gena at 12:09 p.m., to 911 (apparently without
 32 a connection) at 12:29 p.m., and to Gena at 12:33 p.m.

33 At some point between 12:09 and 12:32, Douprea killed Mooney.

34 3. *Douprea’s Post-Killing Call to Gena; Gena’s Call to 911*

35 At 12:33 p.m., Gena received a call from Douprea. Crying and very upset,
 36 Douprea said Mooney had been strangling her and tried to kill her, and she stabbed
 37 him. Douprea claimed she had tried to call 911 but could not get through. Gena
 38 said she would call 911 and hung up.

39 Gena testified that she called 911 when she got off the phone with Douprea and
 40 gave the dispatcher Douprea’s contact information. She also told the 911 operator
 41 that there was probably a knife in the house and that Douprea “[said] he’s dead.”
 42 Police dispatcher Linda Haviland testified that Gena called 911 at 12:32 p.m. [FN
 43 4]

44 FN 4: It is unclear why records indicate that Douprea’s call to Gena was at
 45 12:33 p.m., while Gena’s call to 911, supposedly following Douprea’s call
 46 to Gena, was at 12:32 p.m.

1 4. *Police Dispatch and Douprea's False Statement to the Dispatcher*

2 The Healdsburg Police were dispatched to Mooney's apartment at 12:33 p.m., and
3 officers arrived at 12:34. Before they entered, Haviland telephoned Douprea inside
4 the apartment. In a tape of the conversation played for the jury, Douprea told
 Haviland, "I came in from church and my boyfriend's covered in blood." (At trial,
 defense counsel conceded that Douprea's statement to the dispatcher was untrue.)

5 5. *The Crime Scene*

6 At 12:39 p.m., the police entered Mooney's apartment. Mooney was on his back
7 on the floor of his bedroom, unresponsive, attempting to breathe, and bleeding
8 heavily. A towel saturated with blood was against the left side of his neck. A lot
 of blood was on the floor around him, particularly close to his head. Emergency
 medical technicians were unable to revive him; he was transported to the hospital
 and pronounced dead on arrival.

9 Douprea was handcuffed and remained with police inside the apartment for 15 to
10 20 minutes. She had blood on her lip and in her left nostril. She was concerned
11 about Mooney, seemed to be crying, and was breathing heavily or rapidly, but she
 had no difficulty speaking and did not indicate she was in pain.

12 A police officer drove Douprea from Mooney's apartment to the Healdsburg police
13 station. Douprea had no difficulty breathing or speaking, she did not cough or
 gasp, and nothing about her appearance suggested she needed medical attention.

14 6. *Mooney's Condition*

15 Mooney had a .35 percent blood alcohol level and a therapeutic level of Benadryl
16 in his blood, which in combination would intoxicate a person much more than
 either substance would separately. He was 70 inches tall and "relatively slight" and
 "slighter framed," weighing 150 pounds.

17 An autopsy determined that Mooney died from four stab wounds on the left side of
18 his neck. Three of the wounds had the same angle, suggesting they occurred in the
19 same session, while Douprea and Mooney were in the same relative positions. The
 pathologist could not determine, however, the position of Mooney or Douprea at
 the time of the injuries. Two of the wounds were about one and a half inches deep,
 reflected similar paths through the neck and external jugular vein, damaged the
 internal jugular vein and carotid artery, and would have been fatal individually. A
 third wound was about one and a quarter inches deep, just below the left jaw bone.
 The fourth wound was toward the back of the left side of Mooney's neck and about
 a half inch deep. Mooney had superficial wounds around his left nostril, on his left
 forearm, and on his right palm, which could have been caused by a fingernail or a
 knife. He had abrasions on the left side of his face and the right side of his neck,
 along with apparent scrapes from fingernails on his arm and bruises on his nose and
 above his right eyebrow.

25 7. *Physical Evidence*

26 The knife that Douprea used to kill Mooney was a folding pocketknife with a two-
27 inch blade. Police found it in a diaper pail on the patio, under soiled diapers.

28 The room with the most blood was a bedroom in which Mooney's wallet was
 found. Blood was on the bed and saturated the carpet. There was also blood

1 leading to the bathroom and inside the bathroom. Blood in the shower suggested
2 that someone had taken a shower (and Douprea's hair was wet when the police
3 arrived).

4 In the kitchen, blood was on the counter, in the sink, on the refrigerator, and next to
5 the sliding glass door. In the trash can was broken glass wrapped in a wet tissue, a
6 shoe with apparent blood stains, and paper towels soaked in blood.

7 *8. Douprea's Statement to Police*

8 Douprea was interviewed at the police station by Healdsburg Police Detective
9 Shooter for about three hours, starting around 3:00 p.m. The interview was
10 recorded. Other than a headache, Douprea made no complaints of pain. She had a
11 one-inch red mark above her brow and said she had suffered a nose bleed.

12 Douprea offered police several inconsistent explanations for Mooney's death. She
13 began by saying that she just found Mooney on his bed, bleeding, when she came
14 home. She tried to help him to the bathroom so she could put a towel on his neck,
15 but he slumped to the floor. She tried to call 911 but could not get through, so she
16 called Gena and said Mooney might be dying.

17 Douprea next told police that Mooney had been getting drunk lately and was prone
18 to fighting when drunk. Douprea described previous altercations between them,
19 including one the night before. [FN 5] This time, Douprea claimed, Mooney
20 attacked her by pulling her into the closet, beating her, twisting her arm, and asking
21 her if she wanted to die. She fought back, and he "started bleeding more" from
22 what "might have been some kind of a cut."

23 FN 5: Douprea told the police that Mooney had assaulted her physically two
24 or three times before the day she killed him. The first time was the August
25 2008 incident at her home; she claimed that Mooney choked her and said,
26 "I'm gonna kill you." Douprea also stated that she would bite Mooney to
27 get him off of her, and she had a recorded voice message from Mooney
28 saying he would rearrange her face if she ever bit him again. As to the
night before the killing, Douprea first told the police they had a non-violent
argument in which he did not understand why she wanted to be with him
since he was a worthless drunk. Later she claimed that he became angry
when she asked him how much he had to drink, and he swung at her and
choked her. Holding her throat, he pressed her up against the refrigerator,
told her not to get into his business, and said he was going to kill her. Later
that night, he twisted her arm behind her back and said she was worthless
and drove him to drink.

29 Detective Shooter told Douprea that her story was not "lining up." Douprea then
30 claimed that Mooney was choking her, so she used a pocket knife to try to get him
31 off of her and accidentally cut his neck. Eventually, Douprea provided additional
32 details, which we piece together as follows.

33 On the morning of the killing, Douprea went to church with her daughter, dropped
34 her off afterward at Gena's home in Windsor, and returned to Mooney's apartment
35 so she and Mooney could attend a Christmas party. But when she went into
36 Mooney's bedroom, he rolled away from her and said they were not going. She
37 replied that the party was very important to her, but Mooney repeated they were not
38 going. "[V]ery hurt," Douprea pulled back Mooney's blanket and said, "Come on,
39 you gotta get ready, let's go."

1 Mooney became very angry and followed her into the kitchen. They punched each
2 other in the nose, and they each had bloody noses. They gave each other a black
3 eye. He banged her head on the floor, twisted her arms, and threatened to break
4 them.

5 Douprea ran into the bathroom and called Fulton and Gena, telling them she was
6 scared. She did not call the police or ask anyone to do so because Mooney was on
7 parole and would get into trouble. She loved him and knew that “that’s not the
8 sober him.”

9 Douprea next went into her bedroom. After about a minute and a half, Mooney
10 opened the door, yelled at her, and insulted her. When he left, she thought about
11 what to do. She felt unsafe because the door to her room did not lock, but she felt
12 unable to leave the apartment because her experience was that he would become
13 more angry and something worse would happen. [FN 6]

14 FN 6: When Detective Shooter asked Douprea why she stayed in the
15 apartment to confront a belligerent and violent man, she said she could
16 usually calm Mooney down, she loved him, and she did not want to get him
17 in trouble.

18 So Douprea got her knife and put it in her pocket. After about 10 minutes in her
19 bedroom, she went to the bathroom for a few minutes until she said to herself,
20 “Okay, I’m calmed down, I’m gonna go talk to him.”

21 Douprea went to Mooney’s bedroom to calm him down, as she was usually able to
22 do. She brought her knife along to protect herself and to scare him, because she
23 thought there could be a fight.

24 Entering Mooney’s room, Douprea tried to reassure Mooney, saying she did not
25 want to fight, she loved him, and everything would be okay. She went to hug him,
26 but Mooney told Douprea she was a worthless whore, pushed her to the floor, and
27 tackled her. On top of her, he twisted her arms and banged her head in the closet;
28 she punched him in the nose again; and he moved his hands to her throat and said
he was going to kill her.

29 Although the knife “was a threat” and she had not originally intended to stab
30 Mooney, that changed when Mooney choked her. Frightened, she pulled out her
31 knife to scare him. But Mooney just laughed and said she could not do anything.

32 Douprea stabbed Mooney lightly in the side of the neck with a puncturing motion,
33 thinking that “a little poke” would scare him and get him to understand this was
34 serious, without severely hurting him. The knife went into the side of Mooney’s
35 neck and she saw a little blood, but it did not phase him.

36 Mooney taunted Douprea for another 30 seconds and said he was going to kill her.
37 Believing him, and feeling dizzy and unable to breathe, Douprea stabbed Mooney
38 again. She thought that stabbing him the second time would make him get off her,
39 without seriously hurting him. But “there might have been some aspect of it where
40 I was like I don’t ever want this to happen again”; she did not want Mooney to
41 assault her anymore.

42 Mooney got up and fell backwards onto his bed. She tried to pull him to the
43 bathroom to get a towel, but he fell down. She retrieved a towel, hoping to stop the
44 bleeding with pressure, and held him for a few minutes. She called 911 but no one
45 answered, so she called her mother, who called the police. She told her mother she

1 did not intend for this to happen and was scared Mooney was going to die.

2 Douprea put the knife in the diaper pail because she was scared. Then she
3 showered for about two minutes because she was covered in Mooney's blood; she
4 often took a shower to comfort herself when scared, hurt, or depressed. When she
5 got out of the shower, she put on different jeans (but the same shirt), held Mooney
6 again, and called the police about three more times.

7 After asking what the process would be if she were charged with murder, Douprea
8 told police, "I think [a jury] would probably be more understanding due to the fact
9 that I was protecting myself."

10 *9. Douprea's Condition at the Hospital*

11 Douprea was brought to the hospital at 7:59 p.m. Dr. Richard Reisman, an
12 emergency room physician, examined Douprea for perhaps 10 minutes to see if she
13 was able to go to jail. According to Dr. Reisman, Douprea was alert, her blood
14 pressure was normal, and her pulse and breathing were a little fast. She
15 complained of a headache and soreness in the back of her head and neck,
16 explaining that she had been choked and thrown to the ground, hitting the back of
17 her head several times. She also stated that she had been hit in the face with a fist
18 and suffered a nose bleed.

19 Dr. Reisman found the back of Douprea's head tender but not swollen. A small
20 reddened area next to the left nostril did not have much swelling; there was a little
21 blood at the left nostril but no active bleeding. There was dried blood on both sides
22 of the upper and lower lips. A little reddened area on the right side of the forehead
23 had some swelling, but there was no tenderness or deformation in the face.

24 *10. Douprea's Prior Violence Against Other Men*

25 Douprea's former husband, Robert Melia, testified that his relationship with
26 Douprea began in 2005. During the two or three months they initially lived
27 together, Douprea had angry outbursts. In the first incident, Douprea threw a box
28 at him, shoved him, and scratched him when he accused her of lying and cheating.
The police were called, but Melia declined to have her arrested. Later in Calistoga,
Douprea attacked him again, grabbing him and throwing things.

The couple moved to Las Vegas, where Douprea threatened suicide. She was
hospitalized twice in a psychiatric ward, the second time voluntarily after she
threatened to jump off a hotel parking garage. They also continued to have violent
arguments. In September 2005, she ripped Melia's shirt, scratched his face, and
punched him because he smoked a cigarette. When she returned from jail on
October 2, 2005, Douprea threw a glass at Melia because he was drinking and
smoking. Trying to intervene, Schneider pinned Douprea down while Gena called
the police; Douprea bit Gena and bit and scratched Schneider. (Schneider and
Gena described the altercation similarly at trial.)

At Gena's suggestion, Melia nonetheless married Douprea two or three days later.
Subsequently, Douprea attacked Melia for not showing sexual interest in her; she
punched, scratched, and kicked him, nearly ripping off his shirt and leaving
fingernail scrape marks on his face. She threatened him by brandishing a three-
inch knife, from her collection of 20 to 25 knives. Melia walked out and never
returned.

Adam Patterson testified that he met Douprea at an Alcoholics Anonymous

1 meeting in 2005, and they had an off-and-on intimate relationship for about five or
2 six months. Douprea's temper was unpredictable and severe, and they broke up
3 about a month before she went to Las Vegas. When she returned, they lived
4 together for perhaps a few months. On one occasion, he awoke to find her hitting
5 him and trying to force him to have sex. In February 2006, after their relationship
6 ended, Douprea dropped off some of Patterson's belongings at his residence;
Patterson asked her to leave, and Douprea started yelling and threw a boot through
his window. When Patterson opened the door, she punched and bit both Patterson
and his roommate, Lawrence Mahoney. At some point, she was holding a small
knife. Mahoney called the police, who took photographs of the damage Douprea
caused to the apartment and the injuries she inflicted. Douprea later entered a plea
to throwing the boot through the window.

7 Michael Schneider testified that he lived with Gena from 2003 to 2010 and
8 experienced Douprea's violent temper as well. On one occasion, Schneider put
9 Douprea's cat out of Gena's house, and Douprea grabbed a big knife from the
kitchen and said she would kill him if he "messed" with her cat. On another
10 occasion on April 11, 2006, Gena asked Schneider to get her a cup of coffee, and
when Schneider made a rude comment, Douprea grabbed a knife from the kitchen
and rushed at him. Raising his arm to block her, Schneider suffered a cut that
11 required three stitches.

12 C. *Defense Case*

13 1. *Mooney's prior violence*

14 In January 2005 – nearly four years before Mooney's death – Mooney was stopped
15 by the police while apparently intoxicated and about to drive. Unable to keep his
balance and unresponsive to voice commands, he was taken to the hospital.
16 Because he resisted when medics tried to insert an "IV" in his arm, he was
handcuffed to a gurney.

17 The altercation between Douprea and Mooney in August 2008 was confirmed by
18 Modesta Cardona (Jennifer's mother). According to Modesta, Mooney pushed
Douprea out of the house, then hit her three or four times while she tried to defend
herself.

19 In addition, Michael Cuadra, who met Douprea in December 2007 by answering
20 her Craigslist ad for a "cuddle bunny," testified that Douprea said in August 2008
that she feared Mooney because he was drinking, belligerent, and mistreating her.
21 She also claimed that she was nervous about doing anything because she did not
want to get Mooney in trouble. On December 7, 2008, she sent Cuadra a text
22 message that Mooney had said something like "the next time you bite me . . . I will
shatter your face."

23 2. *Expert Witness Linda Barnard*

24 Linda Barnard, an expert in post-traumatic stress disorder (PTSD) and intimate
25 partner violence (IPV), defined PTSD and IPV and the relationship between them.
She testified that Douprea had PTSD from the cumulative effect of multiple
26 traumas or cumulative traumatic stressors in her life. She also testified as to the
effects of PTSD, including that PTSD was not consistent with initiating violence
against another person. In addition, Barnard described IPV and "dissociation"
27 generally, but she did not opine whether Douprea suffered from IPV and was not
permitted to testify that Douprea was in a dissociative state on the day of the
28 killing.

1 3. *Forensic Nurse Diana Emerson*

2 The court recognized Diana Emerson as “a forensic nurse practitioner,” who
3 conducts medical examinations and writes reports describing injuries, their
4 significance, and possible causes. In Emerson’s view, Dr. Reisman’s examination
5 of Douprea was not a forensic examination for manual strangulation, which
6 requires a CT scan of the neck to check for swelling and trauma. In addition,
7 Emerson explained, patients who have experienced only vascular pressure, such as
8 to the jugular and carotid arteries, are likely to revive very quickly afterward; there
9 may be no pain if there is no significant injury, and swelling can take several hours
10 to appear.

11 Emerson pointed to photographs taken after the killing that, in her opinion, showed
12 injuries on Douprea’s neck consistent with strangulation. In addition, the bruising
13 and swelling on Douprea’s forehead, and the blood and swelling in her left nostril,
14 were consistent with direct trauma. Bruises on Douprea’s forearms were consistent
15 with defensive injuries sustained from warding off blunt force trauma. Emerson
16 concluded that Douprea was in a fight and appeared to have been strangled.

17 D. *Closing Arguments*

18 The prosecutor argued that Douprea attacked and killed Mooney because she was
19 enraged at him for being drunk and refusing to attend the Christmas party. Her
20 claim of self-defense was untrue; she “chose to stay in her room for a period of
21 time, arm herself with a knife, [and] go in and kill” Mooney, while he was in a
22 “stupor” from alcohol.

23 Defense counsel argued that Douprea suffered from PTSD, was a victim of IPV,
24 and killed Mooney unintentionally or in self-defense. Mooney had attacked
25 Douprea in a drunken rage, and when he choked her to the point she thought she
26 would die, she used the knife to defend herself.

27 E. *Jury Verdict and Sentence*

28 The jury found Douprea guilty of first degree murder and found true the use
1 enhancement under Penal Code section 12022, subdivision (b)(1). The court
2 sentenced Douprea to 25 years to life for first degree murder plus one year for the
3 use enhancement.

4 Douprea, 2012 WL 5987896, at *1-*8.

III. DISCUSSION

A. Standard of Review

1 A petition for a writ of habeas corpus is governed by the Antiterrorism and Effective Death
2 Penalty Act of 1996 (“AEDPA”). This Court may entertain a petition for a writ of habeas corpus
3 “in behalf of a person in custody pursuant to the judgment of a State court only on the ground that
4 he is in custody in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C.
5 § 2254(a).

1 A district court may not grant a petition challenging a state conviction or sentence on the
2 basis of a claim that was reviewed on the merits in state court unless the state courts' adjudication
3 of the claim: "(1) resulted in a decision that was contrary to, or involved an unreasonable
4 application of, clearly established Federal law, as determined by the Supreme Court of the United
5 States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in
6 light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d); Williams v.
7 Taylor, 529 U.S. 362, 412–13 (2000). Additionally, habeas relief is warranted only if the
8 constitutional error at issue "had substantial and injurious effect or influence in determining the
9 jury's verdict." Penry v. Johnson, 532 U.S. 782, 795 (2001).

10 A state court decision is "contrary to" clearly established Supreme Court precedent if it
11 "applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases," or if it
12 "confronts a set of facts that are materially indistinguishable from a decision of [the Supreme]
13 Court and nevertheless arrives at a result different from [its] precedent." Williams, 529 U.S. at
14 405–06. "Under the 'unreasonable application' clause, a federal habeas court may grant the writ if
15 the state court identifies the correct governing legal principle from [the Supreme] Court's
16 decisions but unreasonably applies that principle to the facts of the prisoner's case." Id. at 413.
17 "[A] federal habeas court may not issue the writ simply because that court concludes in its
18 independent judgment that the relevant state-court decision applied clearly established federal law
19 erroneously or incorrectly. Rather, that application must also be unreasonable." Id. at 411.

20 Section 2254(d)(1) restricts the source of clearly established law to the Supreme Court's
21 jurisprudence. "[C]learly established Federal law, as determined by the Supreme Court of the
22 United States" refers to "the holdings, as opposed to the dicta, of [the Supreme] Court's decisions
23 as of the time of the relevant state-court decision." Williams, 529 U.S. at 412. "A federal court
24 may not overrule a state court for simply holding a view different from its own, when the
25 precedent from [the Supreme Court] is, at best, ambiguous." Mitchell v. Esparza, 540 U.S. 12, 17
26 (2003).

27 The state court decision to which § 2254(d) applies is the "last reasoned decision" of the
28

1 state court. See *Ylst v. Nunnemaker*, 501 U.S. 797, 803–04 (1991);⁴ *Barker v. Fleming*, 423 F.3d
2 1085, 1091–92 (9th Cir. 2005). With respect to Petitioner’s claims for habeas relief, some claims
3 were raised only on direct review and denied in a reasoned decision. Other claims were raised for
4 the first time in her state habeas petition and summarily denied. In reviewing each claim, the
5 Court examines the last reasoned state court decision that addressed the claim.

6 When a federal claim has been presented to a state court and the state court has denied
7 relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of
8 any indication or state-law procedural principles to the contrary. *Harrington v. Richter*, 562 U.S.
9 86, 98 (2011) (one-sentence order denying habeas petition analyzed under § 2254(d)).
10 Accordingly, in reviewing the habeas claims not addressed by the state appellate court, this Court
11 follows the Supreme Court’s direction and “determine[s] what arguments or theories . . . could
12 have supported” the California Supreme Court’s rejection of the federal claim, and then gives
13 deference to those arguments or theories under AEDPA. *Harrington*, 562 U.S. at 102.

14 **B. Petitioner’s Claims**

15 Petitioner has raised five claims: (1) trial counsel was ineffective where she failed to
16 investigate and present evidence of her mental condition at the time of the offense to negate first
17 degree murder and support self-defense and imperfect self-defense; (2) trial counsel was
18 ineffective when she failed to present Dr. Barnard with all of Petitioner’s records; (3) trial counsel
19 was ineffective where she failed to present blood splatter evidence that undercut the prosecution’s
20 case for first degree murder; (4) trial counsel was ineffective when she failed to object to
21 admission of an already barred stabbing incident; and (5) her right to a conviction based on proof
22 less than a reasonable doubt where violated by section 1109 of the California Evidence Code and
23 the use of CALCRIM No. 852. See ECF No. 12.

24

25 ⁴ Although *Ylst* was a procedural default case, the “look through” rule announced there has been
26 extended beyond the context of procedural default. *Barker v. Fleming*, 423 F.3d 1085, 1091 n.3
27 (9th Cir. 2005). The look through rule continues as the Ninth Circuit held that “it is a common
28 practice of the federal courts to examine the last reasoned state decision to determine whether a
state-court decision is ‘contrary to’ or ‘an unreasonable application of’ clearly established federal
law” and “it [is] unlikely that the Supreme Court intended to disrupt this practice without making
its intention clear.” *Cannedy v. Adams*, 706 F.3d 1148, 1158 (9th Cir.), amended, 733 F.3d 794
(9th Cir. 2013).

1 **1. Ineffective Assistance of Counsel**

2 Petitioner argues that trial counsel was ineffective in the following four ways: failing to
3 investigate and present evidence of her mental condition at the time of the offense to negate first
4 degree murder and support self-defense and imperfect self-defense; failing to present Dr. Barnard
5 with all of her records; failing to present blood splatter evidence that undercut the prosecution's
6 case for first degree murder; and failing to object to admission of an already barred stabbing
7 incident.

8 **a. Legal Standard**

9 Claims of ineffective assistance of counsel are examined under Strickland v. Washington,
10 466 U.S. 668 (1984). In order to prevail on a claim of ineffectiveness of counsel, the petitioner
11 must establish two factors. First, he must establish that counsel's performance was deficient, i.e.,
12 that it "amounted to incompetence under 'prevailing professional norms,' not whether it deviated
13 from best practices or most common custom." Harrington, 562 U.S. at 105 (citing Strickland, 466
14 U.S. at 690). "A court considering a claim of ineffective assistance must apply a 'strong
15 presumption' that counsel's representation was within the 'wide range' of reasonable professional
16 assistance." Id. at 104 (quoting Strickland, 466 U.S. at 689). Second, he must establish that he
17 was prejudiced by counsel's deficient performance, i.e., that "there is a reasonable probability that,
18 but for counsel's unprofessional errors, the result of the proceeding would have been different."
19 Strickland, 466 U.S. at 694. A reasonable probability is a probability sufficient to undermine
20 confidence in the outcome. Id. Where the petitioner is challenging his conviction, the appropriate
21 question is "whether there is a reasonable probability that, absent the errors, the factfinder would
22 have had a reasonable doubt respecting guilt." Id. at 695. "The likelihood of a different result
23 must be substantial, not just conceivable." Harrington, 562 U.S. at 112 (citing Strickland, 466
24 U.S. at 693). It is unnecessary for a federal court considering an ineffective assistance of counsel
25 claim on habeas review to address the prejudice prong of the Strickland test if the petitioner cannot
26 establish incompetence under the first prong. Siripongs v. Calderon, 133 F.3d 732, 737 (9th Cir.
27 1998).

1 The standards of both 28 U.S.C. § 2254(d) and Strickland are “highly deferential and when
2 the two apply in tandem, review is doubly so.” Harrington, 562 U.S. at 105 (internal quotation
3 marks and citations omitted). “[T]he question [under § 2254(d)] is not whether counsel’s actions
4 were reasonable. The question is whether there is any reasonable argument that counsel satisfied
5 Strickland’s deferential standard.” Id. The Strickland prejudice analysis is complete in itself and
6 there is no need for an additional harmless error review under Brech. Avila v. Galaza, 297 F.3d
7 911, 918 n.7 (9th Cir. 2002).

8 “[S]trategic choices made after thorough investigation of law and facts relevant to
9 plausible options are virtually unchallengeable; and strategic choices made after less than
10 complete investigation are reasonable precisely to the extent that reasonable professional
11 judgments support the limitations on investigation.” Strickland, 466 U.S. at 690–91. “In any
12 ineffectiveness case, a particular decision not to investigate must be directly assessed for
13 reasonableness in all the circumstances, applying a heavy measure of deference to counsel’s
14 judgments.” Id. at 691.

15 That an attorney might have conducted a more thorough investigation does not establish
16 deficient performance. Burger v. Kemp, 483 U.S. 776, 794 (1987). “[T]he duty to investigate
17 does not force defense lawyers to scour the globe on the off chance something will turn up;
18 reasonably diligent counsel may draw a line when they have good reason to think further
19 investigation would be a waste.” Rompilla v. Beard, 545 U.S. 374, 383 (2005). The question is
20 not what the best lawyer or even what most good lawyers would have done, but whether a
21 reasonable lawyer could have acted as defense counsel did. Coleman v. Calderon, 150 F.3d 1105,
22 1113 (9th Cir. 1998), rev’d on other grounds, 525 U.S. 141 (1998). Thus, the relevant inquiry is
23 not what trial counsel could have done, but whether counsel’s actions were reasonable. Babbitt v.
24 Calderon, 151 F.3d 1170, 1173–74 (9th Cir.1998).

25 **b. Mental Condition at Time of Offense**

26 Petitioner argues that trial counsel was ineffective because she failed to investigate and
27 present evidence of Petitioner’s mental condition at the time of the offense – post-traumatic stress
28 disorder (“PTSD”), dissociation, and intimate partner violence (“IPV”) – to explain Petitioner’s

1 perceptions and behaviors at the time of the killing to negate first degree murder and to support
2 self-defense and imperfect self-defense. The Court first addresses Petitioner's claim that counsel
3 failed to investigate, and then her contention that counsel failed to present evidence of her mental
4 state or condition.

5 **1) Failure to Investigate Mental Condition During the Offense**

6 Petitioner argues that trial counsel was ineffective because she failed to investigate
7 Petitioner's mental condition and functioning at the time of the stabbing. ECF No. 12 at 54–63.
8 Petitioner argues that a review of Petitioner's psychological evaluations and records would have
9 alerted "reasonably competent counsel" that, despite Petitioner's insistence that she acted in self-
10 defense when she stabbed her boyfriend in the midst of a violent fight, Petitioner's history of
11 mental disorders and trauma may have supported other potentially meritorious defenses to the
12 charge of murder, or to negate the intent element of first-degree murder. Petitioner further argues
13 that trial counsel should have investigated these alternative theories of the case by presenting
14 Petitioner's psychological evaluations and records to a mental health professional to determine
15 how Petitioner's mental illness and social history would have affected Petitioner's perceptions and
16 behaviors at the time of the stabbing. Petitioner concludes that, without conducting this type of
17 "reasonably diligent preliminary investigation," counsel lacked the framework within which to
18 make a competent, informed tactical decision regarding the most effective presentation of a
19 defense, and that the Strickland presumption therefore does not apply. Petitioner raised this claim
20 in her petition for a writ of habeas corpus, ECF No. 24-5 at 48–58, which was summarily denied
21 by the California Supreme Court, ECF No. 24-5 at 2. With respect to this claim, trial counsel has
22 submitted a declaration, stating in relevant part:

23 I remember reading the evaluation by Dr. Girbaldi and other evaluations that
24 discuss disruption on almost all levels of Sheyna's psychological functioning, her
25 reality distortion, inaccurate perceptions, and reactivity. I don't know why I did
26 not act on it. There was no tactical reason. I had this information in the file. I did
27 not give the reports to Dr. Cushing. I should have given these reports to a mental
28 health expert for review. The fact that Sheyna exhibits these behaviors could have
been presented to support imperfect self-defense. It could have also negated the
elements of first degree murder.

ECF No. 3-4 at 6.

Respondent does not directly address this claim in the answer. Respondent conclusorily states that trial counsel conducted a thorough investigation by hiring two mental health experts. ECF No. 20-1 at 19. Respondent also states that trial counsel pursued the defense that Petitioner insisted upon – self-defense – which was consistent with Petitioner’s statement to the police and which, if successful, would have resulted in a complete acquittal.

a) Deficient Performance

The United States Supreme Court has never required defense counsel to pursue every nonfrivolous claim or defense, regardless of its merit, viability, or realistic chance of success. Knowles v. Mirzayance, 556 U.S. 111, 125, 127 (2009) (not unreasonable for state court to conclude that trial counsel's performance was not deficient when he counseled defendant to abandon claim that stood almost no chance of success). However, defense counsel's failure to pursue a claim or defense must be reasonable under the circumstances. United States v. Chambers, 918 F.2d 1455, 1461 (9th Cir. 1990). The question, therefore, is whether it was reasonable for defense counsel to fail to investigate Petitioner's mental condition at the time of the charged offense.

Tactical decisions of trial counsel deserve deference when: (1) counsel in fact bases trial conduct on strategic considerations; (2) counsel makes an informed decision based upon investigation; and (3) the decision appears reasonable under the circumstances. See Sanders v. Ratelle, 21 F.3d 1446, 1456 (9th Cir. 1994). Whether counsel's actions were reasonable is a question of law considered under 28 U.S.C. § 2254(d)(1). Edwards v. LaMarque, 475 F.3d 1121, 1126 (9th Cir. 2007) (en banc). Counsel's investigation must determine trial strategy, not the other way around. Weeden v. Johnson, 854 F.3d 1063, 1066, 1073 (9th Cir. 2017) (granting habeas petition where mental condition was a factor in deciding whether defendant had required mental state to commit charged crime and counsel failed to obtain psychological evaluation; counsel could not have known that psychological evaluation would conflict with trial strategy without first knowing what examination would reveal). Here, a mental state defense theory – arguing that Petitioner suffered from PTSD, IPV, and dissociation at the time of the offense – would have been consistent with, and would have bolstered, Petitioner's theory of self-defense'.

1 A mental state defense would have highlighted that Petitioner has a reactive, rather than
2 responsive, nervous system that causes her to misperceive her environment, to chemically
3 overreact to environmental stimuli, and to suffer from extreme mood instability and relational
4 dysfunction. ECF No. 3-1 at 5. An emphasis on Petitioner's mental state would be consistent
5 with Petitioner reacting to the victim's strangulation attempt and threats by stabbing him with a
6 pocket knife. A mental state defense would have countered the prosecution's theory that the
7 victim could not have reasonably been perceived as a threat because the victim was in his own
8 bedroom and incapacitated due to his alcohol consumption. Moreover, trial counsel has stated that
9 she had no tactical reason for failing to provide Petitioner's records to a mental health expert for
10 review.

11 The instant action is similar to Weeden v. Johnson, 854 F.3d 1063 (9th Cir. 2017), and
12 Seidel v. Merkle, 146 F.3d 750, 757 (9th Cir. 1998), where habeas relief was granted because
13 counsel failed to make a reasonable investigation.

14 In Weeden, the Ninth Circuit summarized the trial proceedings as follows:

15 Sarah Weeden was convicted in California state court of felony murder and
16 sentenced to twenty-nine years to life in prison for her role in a bungled robbery
17 that occurred when she was fourteen. She was not present at the scene of the
18 crime; the prosecution's case rested on evidence of her role in planning and
19 facilitating the robbery.

20 Weeden's defense at trial consisted entirely of four character witnesses [who
21 testified that Weeden was not the type of person who would plan a robbery]. Trial
22 counsel did not seek an evaluation by a psychologist or present expert testimony
23 about the effect of Weeden's youth on her mental state. In post-trial proceedings,
24 counsel claimed that he did not obtain an evaluation because the result might not
25 support his defense strategy.

26 Weeden, 854 F.3d at 1066. The Ninth Circuit held that counsel's failure to investigate
27 psychological testimony constituted ineffective assistance of counsel because counsel has a duty to
28 investigate evidence *before* forming, and in order to reasonably form, a trial strategy. Id. at 1070
("Under Strickland, counsel's investigation must determine trial strategy, not the other way
around."). "The correct inquiry is not whether psychological evidence would have supported a
preconceived trial strategy, but whether Weeden's counsel had a duty to investigate such evidence
in order to form a trial strategy, considering 'all the circumstances.'" Id. The Ninth Circuit

1 further found that Weeden was prejudiced by counsel's failure to investigate because, had counsel
2 presented testimony from a qualified expert regarding Weeden's mental state, there was a
3 probability of a different result "sufficient to undermine confidence in the outcome." The only
4 evidence presented by the prosecution regarding Weeden's intent was testimony by others about
5 what she said and text messages sent months after the events at issue. Testimony from a qualified
6 expert would have "added an entirely new dimension to the jury's assessment of the critical issue
7 of Weeden's mens rea" by allowing the jury to consider the effect of Weeden's youth on her
8 mental state. Id. at 1071–72. The Ninth Circuit concluded that the state appellate court's finding
9 that counsel rendered adequate performance because he made a tactical decision not to investigate
10 was contrary to, or involved an unreasonable application of, clearly established Supreme Court
11 law; reversed the district court's denial of the writ of habeas corpus; and remanded the case with
12 instructions to grant the writ of habeas corpus. Id. at 1071.

13 In Seidel, the petitioner was convicted of second-degree murder. His defense at trial was
14 self-defense, but in his state collateral proceedings, he alleged that trial counsel was ineffective
15 because he had deprived him of the meritorious defense of PTSD. Seidel, 146 F.3d at 752. The
16 district court concluded that trial counsel's decision to rely exclusively on a theory of self-defense
17 could not have been the product of reasonable professional judgment because, despite being put on
18 notice,⁵ trial counsel had conducted no investigation into the defendant's mental state and PTSD:
19 "The fact remains that counsel had ample notice of Seidel's condition from objective sources, yet
20 failed to conduct even a minimal investigation in order to make an informed decision regarding
21 the possibility of a defense based on Seidel's mental illness." Id. at 756. The Ninth Circuit also
22 found that Seidel had been prejudiced by this failure to investigate because a defense of mental
23 illness could have negated the element of malice necessary to convict a defendant of second-
24

25 _____
26 ⁵ In Seidel, trial counsel had both actual and constructive notice prior to trial that Seidel had an
27 extensive history of mental problems. The pre-trial record indicated that Seidel had been treated
28 with medication by a prison psychiatrist while awaiting trial; and Seidel had been treated at a V.A. hospital for a mental disorder. Seidel testified at the federal evidentiary hearing that he had informed counsel about the symptoms related to his mental condition. Counsel's notes reflected her awareness that Seidel was on medication prescribed from the V.A. hospital and receiving medication from the jail. Seidel, 146 F.3d at 755–56.

1 degree murder. Id. at 757. The Ninth Circuit affirmed the lower court's grant of the writ of
2 habeas corpus.

3 Here, similar to Weeden and Seidel, there were two potential non-conflicting available
4 defense theories – self-defense and mental state – and trial counsel failed to fully investigate the
5 mental state defense. The fact that the defense theory pursued by trial counsel was the defense
6 theory put forth by Petitioner does not, by itself, render trial counsel's decision reasonable for the
7 purposes of a Strickland analysis. “[A]n attorney who fulfills his or her duty to investigate the
8 facts of a case may discover and need to act upon information contrary to that which the client has
9 furnished.” Johnson v. Baldwin, 114 F.3d 835, 840 (9th Cir. 1997) (counsel's failure to
10 investigate and discredit defendant's unconvincing denial that he was present at scene of alleged
11 crime fell outside range of competent assistance because it deprived defendant of other defenses).
12 Trial counsel's failure to have a mental health expert review Petitioner's psychological reports and
13 assess Petitioner's mental state at the time of the offense was not the product of reasonable
14 professional judgment.

15 **b) Prejudice**

16 In order to establish prejudice, Petitioner “must show that there is a reasonable probability
17 that, but for counsel's unprofessional errors, the result of the proceeding would have been
18 different.” Strickland, 466 U.S. at 694. “A reasonable probability is a probability sufficient to
19 undermine confidence in the outcome.” Id.

20 Petitioner argues that there is a reasonable probability that if counsel had investigated her
21 mental state at the time of the offense, counsel would have presented evidence of mental illness,
22 trauma, and IPV that would have negated the elements of first degree murder; supported imperfect
23 self-defense and self-defense; and resulted in a verdict of either second degree murder or
24 manslaughter. Respondent argues that there was no reasonable likelihood that evidence of mental
25 illness, trauma, and IPV would have compelled a different result because the evidence presented at
26 trial against Petitioner was overwhelming, and because the additional records undercut Petitioner's
27 credibility and detailed Petitioner's long history of violence against others. ECF No. 20-1 at 24–
28 25, 50–56.

Having carefully reviewed the record, the Court finds that Petitioner has failed to establish prejudice. To determine prejudice in a case where counsel failed to make a reasonable investigation to support a tactical decision, the Supreme Court considers whether a reasonable attorney would have made a different tactical decision if she had conducted a reasonable investigation, and whether there was a reasonable probability that the jury would have reached a different verdict had the attorney pursued the alternative strategy. Wiggins v. Smith, 539 U.S. 510, 536–38 (2003) (death penalty case discussing counsel’s failure to discover and present certain mitigating evidence). In making the latter determination, a reviewing court must evaluate the totality of the evidence, both the evidence adduced at trial and the evidence adduced in the habeas proceedings, and it need not make the state-law evidentiary findings that would have been at issue at trial. Id.

It is unclear that counsel would have made a different tactical decision if she had conducted a reasonable investigation into a mental state defense. In fact, the record shows that trial counsel was aware of a potential mental state defense⁶ but chose not to pursue such a defense. In addition, the trial court put limits on the extent to which a mental state defense could be presented, RT 866–74 (court warning that Dr. Barnard should not testify that Petitioner suffered from mental conditions that prevented her from forming the necessary specific intent for the charged crimes), 2000–02 (court stated that he did not think it was permissible for Dr. Barnard to testify that Petitioner was suffering from IPV); and trial counsel believed that there were significant limits as to whether she could present a mental state defense, RT 867 (agreeing that Dr. Barnard cannot say Petitioner is a battered woman). The record also shows that Dr. Barnard specifically repudiated her ability to confirm whether Petitioner had PTSD at the time of the offense:

⁶ In her July 1, 2010 Domestic Violence Assessment of Petitioner, Dr. Barnard alerted counsel as to the possibility of a mental state defense. In her assessment, Dr. Barnard made six findings, one of which was: “The impact of intimate partner battering played a critical role in the perception, beliefs, and behaviors of Ms. Douprea at the time of the incident on December 14, 2008 that resulted in the death of Daniel Mooney.” ECF No. 3-3 at 3. In addition, the prosecution expressed concern that, based on Dr. Barnard’s report, counsel would attempt to argue PTSD as a mental defense. CT 865–68.

1 Barnard: You can't diagnose somebody when you weren't there. So I may
2 believe [Petitioner] has posttraumatic stress disorder by history, but
3 I can't say for sure. I can only say for sure at a time when I evaluate
4 someone whether they have posttraumatic stress disorder.

5 Prosecution: So with regards to Ms. Douprea, your opinion is actually that on
6 July 1st, 2010, she suffered from posttraumatic stress disorder or
7 some other date?

8 Barnard: From the time that I first evaluated her, my assessment was that she
9 did. And my opinion that she had PTSD by history, but I can't attest
10 to that. I can only attest to when I evaluate someone.

11 RT 2035-36.

12 While there were clear limitations on the presentation of a mental state defense, there was
13 significant evidence that supported a self-defense theory. The following evidence was introduced
14 that supported the defense theory that Petitioner reasonably considered herself to be in imminent
15 danger from Mooney. Four months prior to the offense, Mooney pushed Petitioner out of the
16 apartment and hit her, leaving her with an injury to her hip and some scratches to her hand.
17 Around that time, Petitioner told Cuadra that she feared Mooney because he was belligerent and
18 had been mistreating her. RT 2207, 2216. She described Mooney as unpredictable. RT 2216.
19 Two months prior to the offense, Mooney began drinking again. The week before the offense,
20 Petitioner confided in Cuadra that Mooney was still threatening her and had told her something to
21 the effect of "the next time you bite me . . . I will shatter your face." RT 2208. The night before
22 the offense, Mooney came home drunk and got into a fight with Petitioner when she expressed
23 disapproval that he had been drinking. Mooney swung at Petitioner and choked her. CT 518-19.
24 Petitioner consistently reported that she stabbed Mooney in self-defense, even though she was
25 inconsistent as to other details of that day. Given the significant evidence supporting a self-
26 defense theory, the limitations on presenting a mental state defense, and the potential conflict
27 between those theories, a reasonable attorney that had conducted a reasonable investigation into a
28 mental state defense might still have reasonably chosen to argue self-defense.

29 Nor has Petitioner established that there was a reasonable probability that the jury would
30 have reached a different verdict had counsel argued both self-defense and a mental state defense.
31 First, it is unclear that the trial court would have allowed Petitioner even to present a robust mental
32 health defense. As discussed above, the trial court significantly limited the extent to which the

1 mental state defense could be presented. When the prosecution asked Dr. Barnard if Petitioner
2 was suffering from PTSD on the night of the offense, Dr. Barnard answered in the affirmative and
3 then began to state that she believed that Petitioner was also suffering from other mental states at
4 the time. The trial court *sua sponte* cut off Dr. Barnard and stated: "I'm going to cut it off there.
5 There are certain opinions you're allowed to give that are valuable to the jury and others that are
6 not." RT 2069.

7 Second, the jury knew of Petitioner's potential mental health issues, yet still found
8 Petitioner guilty of first-degree murder. The jury heard Dr. Barnard's professional opinion that
9 Petitioner likely has had PTSD since her childhood and that she suffered from IPV in her
10 relationship with Mooney, as well as in her prior relationships. RT 2012, 2050–66. The jury also
11 heard about how PTSD and IPV affect an individual's behavior and perceptions, and how a person
12 suffering from PTSD and IPV would react to certain situations. RT 1961–80. Dr. Barnard also
13 testified briefly about dissociation. RT 1967. Although the defense did not emphasize that
14 Petitioner suffered from PTSD, IPV, and dissociation at the time of the offense, Dr. Barnard's
15 testimony introduced the possibility that Petitioner's mental state at the time of the offense was
16 affected by her mental health issues. Despite being in possession of information regarding
17 Petitioner's mental state, the jury found Petitioner guilty in less than nine hours. CT 311–12.
18 Petitioner argues that the jury's request for clarification regarding the difference between first-
19 degree and second-degree murder indicated that the prosecution's case for murder was weak, and
20 that the jury questioned the sufficiency of the evidence of premeditation and deliberation. ECF
21 No. 31 at 19. However, given the jury's promptness in rendering its verdict, and the fact that the
22 jury rendered its verdict with only an additional hour of deliberation after the trial court addressed
23 its request for clarification,⁷ the request for clarification appears to be merely a request for
24 clarification and not an indication that the prosecution's case for first-degree murder was weak.

25 Third, while evidence that Petitioner had disassociated during the offense arguably negated
26

27 ⁷ The jury submitted this request for clarification at the end of their first day of deliberation, after
28 five hours of deliberation. The trial court responded the following day after the jury had
deliberated another two hours, and the jury rendered its decision after approximately another hour
of deliberation. CT 311–12.

1 the intent for first-degree murder, evidence of dissociation did not support the self-defense theory
2 and was inconsistent with Petitioner's statements during the police interview. The jury was
3 instructed that self-defense was defined as according to the reasonable belief that one is in
4 imminent danger of being killed or suffering great bodily injury. RT 2461. In contrast, Dr.
5 Barnard described dissociation as a person "splitting off from their emotions" and not feeling what
6 the person is experiencing. RT 1967. In addition, Petitioner's description of her mental state at
7 the time of the offense was inconsistent with dissociation. Petitioner described thinking
8 deliberately, if in a panicked fashion, about the situation. She considered how to use the knife to
9 scare the victim and get the victim to back off. CT 528–30 577, 586.

10 Finally, in introducing evidence of Petitioner's mental condition, Petitioner would open the
11 door to evidence that undermined her credibility and countered her version of events.

12 Evidence regarding Petitioner's PTSD diagnosis could undermine Petitioner's credibility.
13 The traumatic events that triggered Petitioner's PTSD were witnessing abuse of her mother, being
14 molested as a child, and experiencing IPV in prior relationships. ECF No. 3-3 at 3. With respect
15 to the accusation that she had been molested by Shawn Wilson, her mother's boyfriend, a close
16 examination of Petitioner's records indicate that (1) Petitioner had recanted those accusations,
17 stating that she made up the accusation so that she could live with her boyfriend (ECF No. 4-24 at
18 25–26); (2) a police investigation found the accusations to be unsubstantiated (ECF No. 4-22 at 4);
19 (3) a police officer deemed her a not credible witness with respect to these accusations (ECF No.
20 44-21 at 9); and (4) a therapist doubted the accusations because while Petitioner had been in
21 therapy for many years, she had never mentioned the molestation (ECF No. 4-24 at 21, 23).
22 Accordingly, introducing and emphasizing Petitioner's PTSD diagnosis might have instead
23 significantly undermined Petitioner's credibility because it introduced evidence that she was
24 willing to make a false accusation to benefit herself; and that law enforcement and her therapist
25 doubted her credibility. Whether Petitioner committed first-degree murder or acted in self-defense
26 turned on her credibility. Should the jury believe Petitioner's version of events – that she stabbed
27 Mooney in the closet because she feared for her life – or should the jury believe the prosecution's
28 version of events that, at the time of the offense, Mooney was in his room and not a threat due to

1 intoxication and other factors? Although the presentation of further PTSD evidence could negate
2 the elements of first-degree murder, it could also undercut the defense theory of the case.

3 Because Petitioner had acted violently in her prior relationships, evidence regarding
4 Petitioner's IPV diagnosis could undermine the self-defense theory by suggesting that Mooney,
5 and not Petitioner, was the victim of IPV. In fact, the prosecution argued exactly that. The
6 prosecution repeatedly questioned Dr. Barnard as to whether Mooney suffered from IPV from
7 Petitioner. RT 2050–66. In his closing argument, the prosecutor argued the intimate partner
8 violence to be considered was Petitioner's acts of, and tendency towards, violence towards her
9 intimate partners. RT 2476–79.

10 Finally, the instant case differs from the cases cited above where prejudice was found. In
11 Weeden, the Ninth Circuit found prejudice in the following specific circumstances:

12 We hold only that: (a) in a murder case involving a defendant who was fourteen
13 years old at the time of the crime; (b) in which mens rea was critical given the
14 defendant's absence from the crime scene and the prosecution's felony murder
15 theory; (c) where the defendant's trial counsel declined to investigate psychological
16 testimony because he feared what he might learn; (d) where the only expert
17 psychological report in the post-conviction record concluded that the defendant was
18 "extremely unlikely" to have formed the requisite mens rea; and (e) where the state
19 court nonetheless concluded that the defendant received effective assistance
20 because a psychological examination "might" have undermined counsel's
21 preselected strategy, habeas relief should issue.

22 Weeden, 854 F.3d at 1072–73 (internal footnotes omitted). In Weeden, there was no
23 contemporaneous direct evidence of Weeden's *mens rea*; the prosecution relied on witness
24 testimony as to Weeden's statements at the time, and on text messages that Weeden sent months
25 after the incident. No psychological testimony was presented. The psychological testimony
26 regarding the effect of Weeden's age on her mental state was therefore critical to providing a
27 different perspective on Weeden's actions at the time. Here, however, counsel did present
28 evidence regarding Petitioner's general mental health, yet the jury still returned a guilty verdict.
In addition, there was contemporaneous direct evidence of Petitioner's *mens rea* at the time in the
form of the police interview. As a result, evidence of Petitioner's mental condition at the time
would not have had the same persuasive effect as the psychological testimony contemplated in
Weeden. It would be evaluated against Petitioner's statements in her police interview.

1 In Seidel, Seidel was convicted of second-degree murder for stabbing the victim during a
2 fight. The defense relied on a theory of self-defense, but did not conduct a psychological
3 evaluation. A psychological evaluation conducted pursuant to state collateral proceedings
4 revealed that the defendant had PTSD, some residual brain damage, and long-term memory
5 impairment. The Ninth Circuit agreed with the district court's finding that Seidel was prejudiced
6 by counsel's failure to investigate a mental state defense:

7 As the district court below found, "A defense of imperfect self-defense based on
8 the facts of the case, coupled with petitioner's mental state at the time of the fight,
9 the PTSD symptoms, and the organic brain damage would have eliminated the
10 element of malice." We agree with the district court that if counsel had introduced
11 Dr. Koller's evaluation at trial, which documented both "clear symptoms of PTSD"
12 and "chronic brain damage," along with other evidence in the record of Seidel's
13 mental illness, the jury in all likelihood would have returned a verdict of
14 manslaughter instead of murder.

15 Seidel, 146 F.3d at 757. Again, as discussed above, counsel did present evidence regarding
16 Petitioner's general mental health, yet the jury still returned a guilty verdict. Moreover, as
17 discussed *supra*, based on the facts of this case – where there was evidence that Petitioner had
18 recently engaged in physical altercations with the victim, where there was no direct evidence
19 supporting Petitioner's version of events, where the victim had a high blood alcohol content level,
20 and where Petitioner's credibility was undermined by her inconsistent statements at the police
21 interview – there is not a reasonable probability, sufficient to undermine confidence in the
22 outcome of Petitioner's trial, that introducing evidence of Petitioner's mental condition at the time
23 would have resulted in a different verdict

24 In Wiggins, the Ninth Circuit found that Wiggins was prejudiced by trial counsel's failure
25 to investigate and present at sentencing mitigating evidence of a troubled history that courts have
26 previously declared relevant to assessing a defendant's moral culpability. Specifically, the
27 mitigation evidence not presented indicated that Wiggins experienced severe privation and abuse
28 in the first six years of his life; suffered physical torment, sexual molestation, and repeated rape in
subsequent years in foster care; had diminished mental capacities; and spent significant time
homeless. The only mitigating evidence presented was that Wiggins had no prior convictions.
The defense theory focused on Wiggins' lack of direct responsibility for the murder. The Ninth

1 Circuit found that had the jury been confronted with this considerable mitigating evidence that
2 showed severe and extensive abuse, there was a reasonable probability that it would have returned
3 with a different sentence. Wiggins, 539 U.S. at 535–36. As discussed *supra*, presenting evidence
4 of Petitioner’s mental condition risked undermining Petitioner’s credibility and the self-defense
5 theory. Moreover, in this case, the jury was presented with evidence that Petitioner suffered from
6 PTSD, dissociation, and IPV and still returned a guilty verdict on the count of first-degree murder.

7 Although Petitioner has established deficient performance due to counsel’s failure to
8 investigate her mental condition at the time of the offense, she has not established prejudice from
9 that deficient performance. Petitioner is therefore not entitled to habeas relief on this claim.

10 **2) Failure to Present PTSD, Dissociation, and IPV**

11 Petitioner argues that trial counsel was ineffective because she failed to present evidence of
12 Petitioner’s mental condition at the time of the offense to explain Petitioner’s perceptions and
13 behaviors, and that such evidence would have negated first degree murder and supported self-
14 defense and imperfect self-defense. ECF No. 12 at 52–60. Petitioner raised the failure to present
15 these claims in her petition for a writ of habeas corpus, ECF No. 24-5 at 51–63, 65–69, 76–81,
16 which was summarily denied by the California Supreme Court, ECF No. 24-5 at 2. On direct
17 appeal, Petitioner presented two claims that are related to the failure to present evidence of
18 dissociation and IPV: the trial court in precluding the expert witness from testifying the Petitioner
19 suffered from IPV and was in a dissociative state on the day of the killing. The state court denied
20 these claims as follows:

21 *A. Exclusion of Expert Witness Testimony*

22 Douprea contends the trial court erred by precluding Dr. Barnard from testifying
23 that Douprea was a battered woman (i.e., suffered from IPV) and was in a
24 dissociative state on the day of the killing. She further argues that, to the extent her
trial attorney agreed that Barnard could not testify that Douprea suffered from IPV,
she received ineffective assistance of counsel.

25 *1. Background*

26 In July 2010, at defense counsel’s request, Dr. Barnard authored a domestic
27 violence assessment report of Douprea. In her report, Barnard concluded that
28 Douprea was a “battered woman” and described her abusive history with Mooney
in the context of IPV. Barnard also described Douprea’s history of “dissociation”
since childhood, including instances of “cutting,” periods when she “lost

1 memories,” and “blank periods during the series of events resulting in and
2 subsequent to [Mooney’s] death.” Barnard suggested that Douprea likely
3 experienced a dissociative state on the day she killed Mooney, concluding that
4 “[m]uch of what occurred was likely in a dissociative state and memory tracks were
5 disrupted.”

6 The prosecutor filed an in limine motion to exclude, *inter alia*, Dr. Barnard’s
7 opinion that Douprea is a battered woman. The prosecutor contended that IPV
8 testimony must be limited to general information about a class of victims, not the
9 ultimate issue of Douprea’s mental state at the time of the offense.

10 An ensuing hearing addressed the extent to which Dr. Barnard could testify
11 regarding IPV, as well as PTSD. As to IPV, the prosecutor acknowledged that Dr.
12 Barnard could testify about IPV “in a general way,” but Barnard could not “make
13 the factual finding she’s a battered woman.” Defense counsel *agreed*, stating:
14 “[Barnard] *cannot say Ms. Douprea is a battered woman*,” but she can opine that
15 Douprea was suffering from PTSD and describe how IPV can affect perception.
16 (*Italics added.*) Defense counsel added that she would ask Barnard hypotheticals,
17 but that she would “admonish [Barnard] not to blurt out that Sheyna Douprea in her
18 opinion was a battered woman.”

19 As to PTSD, defense counsel asserted that she retained Dr. Barnard to explain that
20 PTSD explained Douprea’s “flat affect” in her interview with police, to rebut any
21 prosecution argument that she was being “remorseless or uncaring.” The
22 prosecutor agreed with defense counsel that Barnard could testify that “she’s got
23 PTSD.” In addition, defense counsel said that PTSD explained Douprea’s
24 dissociative state during the interview, and the prosecutor agreed that PTSD was
25 “fair game.” Thus, by the time of Barnard’s direct examination, the parties had
26 agreed she could opine that Douprea had PTSD, but not that she was a victim of
27 IPV.

28 On direct examination, Dr. Barnard testified within these confines. She opined that
29 Douprea suffered from PTSD, but testified only generally about IPV, including the
30 “cycle of violence,” “traumatic bonding,” common myths about abused persons,
31 and the fact that victims commonly remain in abusive relationships even when they
32 could leave.

33 Dr. Barnard also testified generally about “dissociation.” When defense counsel
34 attempted to elicit Barnard’s opinion that Douprea had entered into a dissociative
35 state, however, the court sustained the prosecution’s objection. Defense counsel
36 then asked Barnard: “Hypothetically, if a person is sitting in an interview and they
37 are . . . questioned about the death of their partner and they have a very flat affect,
38 what would you attribute that to?” Barnard answered: “It could be attributed to
39 shock or . . . dissociation.” Barnard subsequently testified that taking a shower
40 after a traumatic event could be done in a dissociative state as a way to decrease
41 anxiety.

42 The court later explained, outside the presence of the jury, that it had barred Dr.
43 Barnard from opining that Douprea “was suffering from dissociation *[sic]*”
44 because it “was going to get into PC 29 issues, getting to ultimate facts whether she
45 had intent or didn’t have intent.” [FN 7]

46 FN 7: Penal Code section 29 states in part that an expert testifying about a
47 defendant’s mental illness, disorder, or defect may not testify “as to whether
48 the defendant had or did not have the required mental states.”

2. Absence of Opinion That Douprea Was a Battered Woman (IPV Victim)

Evidence Code section 1107 permits testimony concerning the physical, emotional, or mental effects of IPV upon the beliefs, perceptions, or behavior of domestic violence victims. An expert witness may also offer an opinion as to whether a defendant actually suffers from IPV. (*People v. Aris* (1989) 215 Cal.App.3d 1178, 1185 (*Aris*), disapproved on another ground in *People v. Humphrey* (1996) 13 Cal.4th 1073, 1089 (*Humphrey*)).

Here, however, defense counsel expressly agreed that she could not, and would not, elicit Dr. Barnard's opinion that Douprea suffers from IPV. Douprea cannot now claim that the trial court erred because it did not admit evidence that Douprea's attorney declared was inadmissible and elected not to introduce.

In her reply brief, Douprea argues that defense counsel had proffered Dr. Barnard's entire report – which included the IPV opinion – and the court engaged in an analysis and explicitly ruled that the opinion was inadmissible. [FN 8] But the court's comments came long *after* defense counsel represented that Barnard could not opine that Douprea was a "battered woman," appearing to be in full agreement with the prosecutor on this point. The court's later remark that such evidence was inadmissible does not establish that an offer of proof and argument for its admissibility would have been futile. (Evid. Code, § 354, subd. (a); see *People v. McKinnon* (2011) 52 Cal.4th 610, 659.) Douprea fails to establish judicial error.

FN 8: At one point, the court indicated there had been a sidebar discussion as to whether Dr. Barnard would testify that Douprea had IPV, and the court believed such testimony was impermissible because it pertained to an “ultimate decision” and “an opinion on guilt or innocence;” defense counsel stated, however, that she had been arguing for admission of an opinion regarding PTSD, *not* IPV. Later, the court stated that it had excluded the opinion that Douprea was suffering from IPV because the evidence would have been misleading and the record would have been “convoluted,” citing Evidence Code section 352.

3. *Counsel's Failure to Seek Admission of the Battered Woman/IVP Opinion*

Doupree next argues that her attorney provided ineffective assistance in failing to insist that Dr. Barnard's IPV opinion be admitted. To prevail on a claim of ineffective assistance, a defendant must show that (1) counsel performed incompetently and (2) in the absence of counsel's error, there is a reasonable probability the defendant would have obtained a more favorable result. (*Strickland v. Washington* (1984) 466 U.S. 668, 690, 694; *People v. Hart* (1999) 20 Cal.4th 546, 623–624.)

Douprea contends her attorney should have sought admission of Dr. Barnard's opinion that Douprea suffers from IPV and rebutted the prosecutor's argument for excluding it. After all, she argues, the prosecutor had analogized to cases pertaining to other types of expert testimony (child sexual abuse accommodation syndrome and rape trauma syndrome) – an analogy *Aris* rejected (215 Cal.App.3d at p. 1199). Furthermore, Douprea claims, the IPV evidence was relevant to the subjective aspect of imperfect self-defense, the objective aspect of self-defense, Douprea's credibility, whether Douprea had the mental states for the charged crime, and heat of passion.

Respondent counters that the law at the time of trial was not as clear for defense

1 counsel as Douprea asserts. Moreover, respondent urges, defense counsel had a
2 reasonable tactical purpose for not eliciting an opinion that Douprea suffered from
3 IPV.
4

5 We agree there was a reasonable tactical justification for not eliciting Dr. Barnard's
6 opinion that Douprea suffered from IPV. By introducing IPV evidence about how
7 IPV affects perceptions and explains an IPV victim's decision to stay with her
8 partner, but *not* attempting to have Barnard opine expressly that Douprea suffered
9 from IPV, defense counsel was able to suggest to the jury that Douprea was an IPV
10 victim and that Barnard thought so, while avoiding a blistering cross-examination
11 of Barnard that would have likely demonstrated Douprea was not an IPV victim
12 and Barnard was wrong to conclude she was. Or, to put it a bit differently, there
13 was so much evidence contrary to the conclusion that Douprea was an IPV victim
14 that it would have made it appear that Barnard was overreaching and thus diminish
15 her credibility.
16

17 For example, in reaching her conclusion that Douprea suffered from IPV in her
18 report, Dr. Barnard apparently spoke only to Douprea and did not consider the
19 evidence that Douprea was more of an abuser than a victim. Barnard did not speak
20 to Patterson and Melia, who testified that Douprea repeatedly assaulted them.
21 Barnard accepted Douprea's depiction of certain encounters, and did not review the
22 police report from a February 2006 incident when Douprea allegedly attacked
23 Patterson and his roommate Mahoney. Nor did Barnard acknowledge that Douprea
24 entered a plea to vandalizing Patterson's apartment, or consider Melia's contention
25 that Douprea attacked him (as documented by the reports Barnard allegedly
reviewed) including a time when Douprea brandished a knife. Nor did Barnard's
report note an altercation between Schneider and Douprea, in which Douprea
allegedly became enraged at Schneider for putting out her cat, brandished a knife at
him, and threatened to kill him. Nor did the report mention Schamen's account of
Douprea violating a restraining order and hitting Mooney over the head with a
towel rack. And in applying indicators of IPV to suggest that Mooney was
subjecting Douprea to IPV, Barnard accepted Douprea's uncorroborated assertions,
including that Mooney controlled the use of their money.
26

27 A closer question is whether this tactical reason was, in fact, what prompted
28 Douprea's counsel not to press for admission of Dr. Barnard's opinion, or whether
counsel simply misunderstood the law. Douprea argues that, because defense
counsel told the court she "didn't highlight the admissible parts [of Barnard's
report] because I'm going to try to get *as much as I can*," counsel's agreement that
Barnard could not testify that Douprea is a battered woman must have been due to
her belief that she could not elicit that opinion under the law. Nonetheless, while
defense counsel displayed more of an "I can't get it in" attitude as opposed to an "I
don't want to get it in" attitude, the record does not preclude the possibility that
defense counsel went along with the prosecutor's position because it furthered the
defense strategy. And although Douprea contends that defense counsel did not shy
away from eliciting the opinion just to avoid cross-examination of Barnard because
Barnard faced vigorous cross-examination anyway, the fact of that vigorous cross-
examination only underscores the reasonableness of a defense tactic to avoid yet
more fodder for the prosecutor's questioning. In short, the record does not
affirmatively show that defense counsel's position was not a matter of tactics.
29

30 At any rate, Douprea's ineffective assistance claim fails on the prejudice prong.
31 Even without Dr. Barnard's opinion that Douprea was a battered woman suffering
32 from IPV, the jury had ample evidence with which to determine whether she was a
33 victim of IPV and how it might have affected her behavior. In this light, Barnard's
34 opinion, resulting in a severe cross-examination, would not have helped Douprea
35

1 much. And because there was so much evidence contrary to Barnard's conclusion
2 that Douprea suffered from IPV, and so many matters Barnard had apparently not
3 considered in reaching that conclusion, there is no reasonable likelihood that jurors,
4 unconvincing that Douprea suffered from IPV based on the IPV evidence that was
5 admitted, would have become convinced that she did suffer from IPV merely upon
6 Barnard saying so. Accordingly, it is not reasonably probable that Douprea would
7 have obtained a more favorable outcome if Barnard had testified that Douprea was
8 an IPV victim. Douprea fails to demonstrate ineffective assistance of her trial
9 counsel.

10 *4. Dissociative State*

11 Douprea contends the court erred in excluding Dr. Barnard's testimony that she
12 entered into a dissociative state. We review the court's ruling for an abuse of
13 discretion. (*People v. Cortes* (2011) 192 Cal.App.4th 873, 908 (*Cortes*)).

14 To the extent the court precluded such testimony based on Penal Code section 29,
15 the court was mistaken. Penal Code Section 29 provides that an expert witness
16 shall not testify as to whether the defendant had the required mental *states* for the
17 crimes charged. But it does not prohibit an expert witness from opining that the
18 defendant suffers from a mental *disorder or condition*. (*Cortes, supra*, 192
19 Cal.App.4th at p. 908–911.) The statute therefore did not preclude Dr. Barnard
20 from opining that Douprea was in a dissociative condition on the day of the killing.
21 (*Ibid.*)

22 The next question, however, is whether the evidence was inadmissible for some
23 other reason or, if not, whether the error was harmless. To decide this question, we
24 must look more closely at the evidence Douprea attempted to elicit. At trial,
25 defense counsel asked Dr. Barnard whether Douprea was in a dissociative state
26 when Detective Shooter interviewed her, and she elicited Barnard's testimony that
27 a person who takes a shower after a killing might be in a dissociative state.
28 Douprea now claims that Barnard should have also been permitted to testify that
Douprea dissociated when stabbing Mooney and hiding the murder weapon,
although counsel did not attempt to elicit such testimony at trial. We will consider
the latter point first.

29 *a. dissociation when stabbing Mooney and hiding the knife*

30 Because defense counsel did not ask Dr. Barnard whether Douprea dissociated
31 when she stabbed Mooney or when she hid the knife, or make any offer of proof to
32 that effect, Douprea cannot now contend that the court erred by excluding such
33 testimony. Nor can it be argued successfully that defense counsel's failure to elicit
34 this testimony was due to the court's refusal to permit other evidence of
35 dissociation, since the record does not indicate that Barnard *would* have testified
36 that Douprea was in a dissociative state when she stabbed Mooney or hid the knife,
37 even if she had been asked to do so.

38 Dr. Barnard's report did not opine that Douprea dissociated when she stabbed
39 Mooney or hid the knife. In her "Summary of Findings," Barnard mentions that
40 Douprea "has a history of dissociative experiences beginning in childhood," but she
41 concludes that it was the "impact of intimate partner battering" – not dissociation –
42 that played a critical role in Douprea's perceptions at the time of the incident that
43 resulted in Mooney's death. Elsewhere in her report, Barnard reasserts that
44 Douprea has a history of dissociation beginning in childhood, but there is no
45 mention of any dissociation during or after the stabbing except, vaguely, that "[s]he
46 also has blank periods during the series of events resulting in and subsequent to

1 Daniel's death." Barnard does not identify those blank periods, but we know it
 2 cannot be Douprea's stabbing Mooney or hiding the knife (or taking a shower, see
 3 *post*) because Barnard reports Douprea's distinct recollection of these matters. [FN
 4 9]

5 FN 9: Dr. Barnard's report adds: "In this case, [Douprea] has significant
 6 gaps in memory. She has a recollection of the basics of what occurred prior
 7 to [Mooney] being stabbed, but many details are lost or out of order. She
 8 has even more significant gaps in memory for behavior subsequent to
 9 [Mooney] being stabbed. She knows she was frantically moving about but
 10 cannot effectively recount her actions or the sequence of her actions. Much
 11 of what occurred was likely in a dissociative state and memory tracks were
 12 disrupted." But the stabbing and hiding the knife were not forgotten.
 13

14 Moreover, Dr. Barnard's description of dissociation indicates that Douprea did *not*
 15 dissociate when she stabbed Mooney or hid the knife. In her report, Barnard
 16 defined dissociation as a "response to severe trauma" in which "the psyche 'splits
 17 off.'" "[T]he person experiences a sense of detachment from self . . . [during
 18 which] there is a persistent or recurrent experience of feeling detached from one's
 19 mental processes or body, as if one is outside their own body observing." Barnard
 20 said dissociation "can even take the form of traumatic amnesia, where the person
 21 has no memory at all for certain events or actions." By contrast, Douprea made
 22 clear to the police and to Barnard that she was aware of what was happening when
 23 she stabbed Mooney and the reasons she did it. That is quite the opposite of the
 24 "detachment" indicative of dissociation.
 25

26 Finally, an opinion that Douprea dissociated at the time of the killing would have
 27 been inconsistent with Douprea's primary defense – that she stabbed Mooney
 28 because she *perceived* an imminent deadly threat, not in a detached state of
 29 dissociation. [FN 10]

30 FN 10: Douprea argues that the dissociation evidence was consistent with
 31 her claim of self-defense, because she was aware that she was in a life-
 32 threatening situation and intended to use the knife to defend herself but
 33 dissociated in response to the trauma. For this proposition, she cites *Cortes*,
 34 *supra*, 192 Cal.App.4th 873, which held it was error to exclude an expert's
 35 opinion that the defendant had entered into a dissociative state, where the
 36 expert seemingly opined that the defendant stabbed the victim one time out
 37 of self-defense and then additional times in a dissociated state. (*Id.* at pp.
 38 893–894.) *Cortes* is readily distinguishable. There, the expert's report
 39 recounted that the defendant said the "noise around him disappeared," he
 40 saw his hand "stabbing down through silence," and he lacked memory of
 41 his continued stabbing of the victim. (*Id.* at p. 893.) From this the expert
 42 drew his opinion of dissociation. (*Id.* at pp. 893–894.) In the matter before
 43 us, Dr. Barnard's report did not specify any particular indication of
 44 dissociation during the stabbing. Moreover, unlike the defendant in *Cortes*,
 45 Douprea never told the expert or the police that the first stab was for self-
 46 defense and the rest were in the context of an out-of-body experience or
 47 other circumstance from which dissociation might be inferred.
 48

49 For all of these reasons, we find that the absence of any opinion that Douprea
 50 dissociated in stabbing Mooney and hiding the knife was not the result of judicial
 51 error, and even if it were error, there is no reasonable probability that the opinion, if
 52 admitted, would have led to a more favorable outcome for Douprea.
 53

54 Douprea, 2012 WL 5987896, at *8–*9, *11–*13.

1 With respect to these claims, trial counsel has submitted a declaration stating in relevant
2 part:

3 I had no tactical reason for failing to elicit from Dr. Barnard testimony as to how
4 PTSD and dissociation would have affected Sheyna's behaviors, perceptions, and
5 mental functioning at the time of the killing to support imperfect self-defense or to
6 negate the elements required for first degree murder. If I should have had Dr.
7 Barnard testify to those things and I did not, that was my mistake.

8 I did not have a tactical reason for failing to present more evidence to support
9 imperfect self-defense and argue to the jury the alternative theory that Sheyna
10 killed Mr. Mooney in a real but unreasonable belief in the need to self defend, as it
11 would not have been inconsistent with the self-defense evidence presented.

12 Any speculation that I had a strategic reason for not wanting to elicit Dr. Barnard's
13 opinion that Sheyna is a battered woman is incorrect. I wanted Dr. Barnard to
14 testify that Sheyna suffered from IPV. Dr. Barnard was firm in her opinion that
15 Sheyna was an IPV victim. That was the defense, so of course I wanted the jury to
16 hear Dr. Barnard's opinion. Dr. Barnard's opinion was necessary to the defense. It
17 was absolutely not a tactical decision. I certainly do not remember conceding that
18 Dr. Barnard could not offer her opinion. The reason that I did not ask Dr. Barnard
19 the question was because Judge Medvigy warned me that if I did, he would not
20 allow it and would embarrass my witness in front of the jury. If I did not put
21 enough on the record as to why I did not push further to have Dr. Barnard testify
22 that in her opinion Sheyna was an IPV victim, that was my error.

23 ECF No. 3-4 at 5-6.

24 The Court finds that the state court's denial of this claim was neither contrary to, nor
25 involved an unreasonable application of, clearly established Federal law, as determined by the
26 Supreme Court of the United States. Nor was the state court's denial based on an unreasonable
27 determination of the facts in light of the evidence presented in the State court proceeding. As
28 discussed in detail *supra*, Petitioner was not prejudiced by counsel's failure to present evidence of
her mental condition at the time of the offense. There is not a reasonable probability that the jury
would have reached a different verdict had counsel presented evidence regarding Petitioner's
mental state at the time of the offense. Petitioner is therefore not entitled to habeas relief on this
claim.

24 **c. Failure to Provide Expert with Records**

25 Petitioner argues that trial counsel was ineffective because she failed to adequately prepare
26 Dr. Barnard in that she failed to provide Dr. Barnard with the extensive records documenting
27 Petitioner's history of mental illness, traumatic upbringing, and complete history of assaultive
28 behavior. This failure rendered Dr. Barnard unable to effectively respond to the prosecutor's

1 cross-examination. Petitioner raised this claim in her petition for a writ of habeas corpus, ECF
2 No. 24-5 at 70–75, which was summarily denied by the California Supreme Court, ECF No. 24-5
3 at 2. With respect to this claim, trial counsel has submitted a declaration, stating in relevant part:

4 I did not provide Dr. Barnard with the mental health evaluations I had gathered. I
5 did not have a tactical reason for failing to do so. I did not provide Dr. Barnard
6 with the police reports regarding the childhood allegations of molestations made by
Sheyna because Sheyna recanted some allegations and I did not want evidence of
Sheyna lying coming in at trial.

7 ECF No. 3-4 at 6.

8 The Court finds that the state court’s denial of this claim was neither contrary to, nor
9 involved an unreasonable application of, clearly established Federal law, as determined by the
10 Supreme Court of the United States. Petitioner has not cited any clearly established federal law,
11 and the Court is aware of none, that requires counsel to provide an expert with all the information
12 in her possession, or even all the information that might be relevant to responding to cross-
13 examination. Counsel has a duty to provide experts with information relevant to the conclusions
14 of the expert. See Caro v. Calderon, 165 F.3d 1223, 1226 (9th Cir. 1999). But, absent a request
15 for information from an expert, counsel does not have a duty “to acquire sufficient background
16 material on which an expert can base reliable psychiatric conclusions.” Bloom v. Calderon, 132
17 F.3d 1267, 1277 (9th Cir. 1997); see, e.g., Turner v. Calderon, 281 F.3d 851, 876–77 (9th Cir.
18 2002) (“Failure to provide a psychologist with facts about a defendant’s family history ordinarily
19 cannot support a claim of constitutionally ineffective assistance.”); Murtishaw v. Woodford, 255
20 F.3d 926, 945 & n.9 (9th Cir. 2001) (finding no IAC where, in the absence of a specific request,
21 counsel failed to inform experts of capital defendant’s family history of mental illness;
22 distinguishing Bean where Ninth Circuit found IAC during penalty phase of capital case because
23 *inter alia* counsel ignored expert’s requests for information). There is no record of Dr. Barnard
24 requesting additional materials.

25 Nor was the state court’s denial based on an unreasonable determination of the facts in
26 light of the evidence presented in the state court proceeding. Petitioner and Dr. Barnard argue that
27 Dr. Barnard was inadequately prepared for cross-examination without the additional records
28 because she was unable to effectively corroborate and support her diagnosis on cross-examination.

1 However, this argument is contradicted by Dr. Barnard's testimony. On cross-examination, Dr.
2 Barnard testified that she felt the materials provided were sufficient for her to make an accurate
3 diagnosis. After a series of questions by the prosecutor as to whether she had considered other
4 types of records (jail records, other psychiatric records, domestic violence program records,
5 psychological evaluations) or interviewed witnesses in reaching her diagnosis, Dr. Barnard
6 testified,

7 [Whether it is helpful to know as much as possible about the person that you're
8 interviewing by reviewing all records] sort of depends. Sometimes more is not
9 better. Sometimes more is just more. So when I look at a case, what I look and see
is whether it seems like there's enough information for me to make a
determination. If I think I need more information, then I'll request that, and if I
don't, I don't.
10

11 CT 2018–19. Dr. Barnard also testified that she seldom received the complete psychiatric history
12 of an individual before she interviewed them “unless that's a huge issue.” CT 2067. Petitioner
13 argues that Petitioner's mental health history was a “huge issue” here, thereby requiring an
14 effective counsel to provide Dr. Barnard with her records prior to her evaluation of Petitioner.
15 ECF No. 12 at 65. However, Petitioner's interpretation of Dr. Barnard's statement is inconsistent
16 with Dr. Barnard's earlier statement that she did not need further materials to reach her diagnosis.
17 In addition, Petitioner's interpretation of Dr. Barnard's statement is unreasonable given the
18 context. Generally speaking, an individual's mental health is a central issue if Dr. Barnard is
19 retained to conduct an evaluation. Dr. Barnard's response is more reasonably understood as
20 saying that unless the entire psychiatric history is a huge issue, she commonly only receives the
21 types of materials that trial counsel provided her.⁸ Finally, the crux of the prosecution's cross-
22 examination of Dr. Barnard was that Petitioner might be feigning her IPV symptoms and that Dr.
23 Barnard choose not to consider sources that would contradict her diagnosis. Because Petitioner's
24 records simply offered additional support for Dr. Barnard's opinions of dissociation and PTSD

25 _____
26 ⁸ Counsel provided Dr. Barnard with records related to the offense; the post-arrest interview;
27 police reports related to the August 2008 domestic violence incident related to the victim; police
28 reports related to the September 2005 domestic violence incident related to her then-boyfriend
Melia; police reports related to the October 2005 domestic violence incident related to Schneider,
her mother's boyfriend at that time; police reports related to the April 2005 altercation with
Schneider; and police reports related to the December 2007 altercation with Vasquez-Lee. ECF
No. 3-2 at 3–4.

1 and did not change her IPV diagnosis, ECF No. 3-2 at 13–15, the records would not have refuted
2 the prosecution’s theories that Petitioner was malingering and that Dr. Barnard was a biased
3 witness because she deliberately declined to consider material that would challenge her
4 conclusions.

5 Petitioner has not established that, if counsel had provided Dr. Barnard with all her
6 records, the result of the proceeding would have been different. Strickland, 466 U.S. at 689, 694.
7 Petitioner is not entitled to relief on this habeas claim.

8 **d. Blood Splatter Evidence**

9 Petitioner argues that trial counsel was ineffective because she failed to present blood
10 splatter evidence that would have undercut the prosecution’s case for first degree murder.
11 Petitioner raised this claim in her petition for a writ of habeas corpus, ECF No. 24-5 at 75–76,
12 which was summarily denied by the California Supreme Court, ECF No. 24-5 at 2. With respect
13 to this claim, trial counsel has submitted a declaration stating in relevant part:

14 I retained a blood splatter expert, Dr. Robert D. Lawrence. I provided Dr.
15 Lawrence with photographs from the crime scene, Mr. Mooney’s autopsy report,
16 police reports, and the transcribed interview of Sheyna. Dr. Lawrence informed me
17 that the blood splatter evidence did not support Sheyna’s representation that the
18 stabbing occurred as she was lying in the closet floor. Dr. Lawrence opined that
19 Mr. Mooney was initially stabbed while standing in the hallway near the bathroom.
20 I did not call Dr. Lawrence because the prosecution was not calling a blood splatter
21 expert and his findings did not support Sheyna’s account of the stabbing.

22 ECF No. 3-4 at 6. Respondent argues that the decision to call an expert witness is a matter of trial
23 tactics and a petitioner’s disagreement with trial tactics cannot form the basis for a claim of
24 ineffective assistance of counsel. Respondent further argues that the testimony would have
25 impeached Petitioner’s credibility because it conflicted with her version of where the stabbing
26 took place, and because the question of where the attack commenced was not a critical aspect of
27 the case against Petitioner. ECF No. 20-1 at 58–59. Petitioner argues that her credibility had
28 already been undermined by photographic evidence presented at trial which suggested that the
stabbing occurred on the bed, and not in the closet, as Petitioner claimed. ECF No. 31 at 40.

29 The Court agrees that the state court’s denial of this claim was neither contrary to, nor
30 involved an unreasonable application of, clearly established Federal law, as determined by the

1 Supreme Court of the United States. Nor did the denial result in a decision that was based on an
2 unreasonable determination of the facts in light of the evidence presented in the State court
3 proceeding. Where the evidence does not warrant it, as is the case with the blood splatter
4 evidence, the failure to call an expert does not amount to ineffective assistance of counsel. See
5 Wilson v. Henry, 185 F.3d 986, 990 (9th Cir. 1999) (a decision not to pursue testimony by a
6 psychiatric expert is not unreasonable when the evidence does not raise the possibility of a strong
7 mental state defense). Counsel's decision to not call Dr. Lawrence deserves deference because (1)
8 she based the decision on the strategic consideration that it would be more harmful than helpful
9 because Dr. Lawrence's testimony could damage Petitioner's credibility because his version of
10 events conflicted with Petitioner's version and because in providing a third theory as to when the
11 victim was stabbed, the testimony did not strongly undercut the prosecution's version of events;
12 (2) counsel's decision was informed and based upon investigation; and (3) the decision was
13 reasonable under the circumstances, given that the prosecution challenged Petitioner's credibility,
14 RT 1992–98, 2004–07 (cross-examining mental health expert as to whether Petitioner might be
15 deliberately faking symptoms of IPV to bolster a self-defense theory) and 2484 (in closing
16 argument, telling jury to believe the self-defense theory, you must believe the defendant who "has
17 made all manners of inconsistent statements" regarding whether she reasonably believed she was
18 in danger). See Sanders, 21 F.3d at 1456 (setting forth three elements to consider when deciding
19 whether trial decision deserves deference). Moreover, presenting Dr. Lawrence would require
20 presenting a conflicting defense theory. While Dr. Lawrence's potential testimony undercut the
21 prosecutor's contention as to where the victim was stabbed, it also conflicted with the heart of
22 Petitioner's self-defense theory – that she stabbed the victim in the closet because he had pinned
23 her down and was choking her. Trial counsel has the discretion to abandon a conflicting defense.
24 See Williams v. Woodford, 384 F.3d 567, 610–12 (9th Cir. 2004) (where counsel reasonably
25 selected an alibi defense as the primary defense theory, counsel no longer had a duty to investigate
26 a "conflicting" mental-state defense); Correll v. Stewart, 137 F.3d 1404, 1411 (9th Cir. 1998)
27 ("it was within the broad range of professionally competent assistance for Correll's attorney to
28 choose not to present psychiatric evidence which would have contradicted the primary defense

theory’’); Bean v. Calderon, 163 F.3d 1073, 1082 (9th Cir. 1998) (attorney’s duty to further investigate diminished capacity defense ended when he chose to present an alibi theory rather than a diminished capacity defense based largely on defendant’s representations that he was not present during the crime, defendant’s refusal to blame his alleged co-burglar, and defendant’s refusal to adopt the diminished capacity defense). Petitioner has not establish that counsel’s performance ‘amounted to incompetence under ‘prevailing professional norms’’’ Harrington, 562 U.S. at 105 (citing Strickland, 466 U.S. at 690). Petitioner is not entitled to habeas relief on this claim.

e. **Failure to Object**

Petitioner argues that trial counsel was ineffective when she failed to object to admission of an already barred stabbing incident. Petitioner raised this claim on direct review, and the state appellate court rejected Petitioner’s claim as follows:

Douprea next contends that her trial counsel provided ineffective assistance of counsel by failing to object when the prosecutor introduced evidence of an incident in which Douprea stabbed Schneider, which the court had ruled inadmissible before trial.

1. *Background*

Before trial, the prosecution had sought admission under section 1101, subdivision (b), of the April 11, 2006 incident involving Douprea and Schneider. In the proffer, it was alleged that Schneider made a derogatory remark to Gena, and Douprea responded by grabbing a knife and attempting to stab Schneider in the chest. To defend himself, Schneider raised his arm, which Douprea stabbed. Defense counsel opposed the admission of the evidence, and the court excluded it as inflammatory and unduly time-consuming.

At trial, however, the prosecutor on direct examination of Schneider elicited evidence of this very incident, without objection from defense counsel: Schneider testified that Gena asked him to get her a cup of coffee and he made a derogatory comment; Douprea ran towards him, holding a knife at shoulder height in a fist; Schneider used his arm to block the knife from entering his chest, and the knife cut his arm, causing a wound that Schneider showed the jury. [FN 17] On cross-examination, Schneider acknowledged that he kicked Douprea, then pregnant, in the stomach as she approached: "I put my leg up and she ran into my foot."

FN 17: The prosecutor also elicited testimony from Patterson that he observed a wound about three inches long on Schneider's arm.

Defense counsel also asked Gena about the incident. Gena testified that Schneider made the derogatory comment after she asked him to get her a cup of coffee, she heard his argument with Douprea, but she did not see what happened. Gena recalled that Douprea, who was eight months pregnant at the time, cried out in pain and later appeared with red marks on her stomach.

2. *Competence*

Douprea contends her trial counsel should have objected to the prosecutor's elicitation of this evidence – especially since the court had already ruled it inadmissible – and there can be no tactical reason for counsel's failure because, after all, counsel had originally sought to exclude it.

Respondent counters that Douprea has failed to demonstrate “there simply could be no satisfactory explanation” for her trial counsel’s inaction. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266.) Respondent posits that the lack of objection by the defense does not appear to be an oversight, since the subject matter was raised in examinations and argument several times, counsel made other objections, and yet there was no mention by anyone of the court’s prior ruling or any contention in Douprea’s new trial motion that the elicitation of the evidence was erroneous. Further, respondent argues, the record does not preclude the possibility that the court changed its ruling prior to the elicitation of the evidence, either as relevant to intent under section 1101, subdivision (b), or to rebut evidence of Mooney’s violent character under section 1103.

As Douprea points out, however, it would be unusual for such a ruling not to have been reported on the record, since the court on numerous occasions memorialized side bar discussions. Nor can we imagine any good reason defense counsel would ever agree to admission of the evidence without such an order (unless, perhaps, she decided to allow the evidence in order to show that Douprea acted in self-defense, as she suggested in closing argument). Thus, while this type of uncertainty in the record often leads courts to disfavor ineffective assistance claims on direct appeal, we proceed to the next issue of prejudice.

3. *Prejudice*

Douprea argues that the April 11, 2006 incident was uniquely harmful because it was the only prior instance in which Douprea used a knife to injure someone, for little or no reason, holding it the same way she held the knife in stabbing Mooney. Furthermore, Douprea argues, the April 2006 stabbing was inflammatory and the prosecutor used the incident in closing argument to assert that Douprea had a propensity to commit domestic violence: "If she did it before, she did it here."

We conclude it is not reasonably probable that Douprea would have obtained a more favorable outcome if the defense had objected to the evidence of her cutting Schneider. The fact is, there was already evidence that she had threatened Schneider with a knife, holding it the same way as she held it when stabbing Mooney. And there was also plenty of evidence that she had caused physical harm to several other people on several occasions while enraged for little or no reason. Those other incidents might not have resulted in a scar, but there was on some occasions photographic proof of the injuries she had caused. Accordingly, this additional testimony simply did not add much to the mountain of evidence indicating Douprea's past violence, and in closing argument defense counsel was even able to suggest that Douprea's use of the knife against Schneider might have been out of self-defense (like her use of the knife against Mooney was supposedly out of self-defense). And although the prosecutor in closing argument did lump this incident in with the prior acts of domestic violence that could be used to show propensity under section 1109, the reference was so fleeting that the record discloses no reasonable possibility that the jury latched on to this point to convict Douprea in any way contrary to the court's instructions. Viewing the record as a whole, including all of the properly admitted evidence against her, Douprea fails to establish a ground for reversal.

1 Douprea, 2012 WL 5987896, at *22-*23.

2 Petitioner argues that the failure to object was below the standard of a reasonably
3 competent attorney because the prior act evidence was overtly prejudicial; the objection would
4 have been sustained; and there was no rational tactical reason for the failure to object. ECF No. 12
5 at 94–95. Petitioner further argues that the April 11, 2016 evidence was uniquely harmful because
6 this prior incident mirrored the charged crime, in that Petitioner carried out the same act (stabbing)
7 with the same weapon (knife), and because this evidence was emphasized in the prosecution’s
8 impermissible closing remarks urging the jury to use the incident as propensity evidence. Pet. at
9 96. Respondent contends that Petitioner cannot show that counsel erred on this record for the
10 following reasons. The record shows that either the trial court had reconsidered its ruling
11 excluding this evidence or trial counsel deliberately allowed the admission of the prior act
12 evidence for tactical reasons; and the state court reasonably applied Strickland. ECF No. 20-1 at
13 62–63. Petitioner rejects these arguments as unsupported by the record and undervaluing the
14 weight of the evidence. ECF No. 31 at 41–42.

15 Following the state court’s lead, this Court focuses on the prejudice prong of Strickland.
16 After carefully reviewing the record, the Court finds that the state court’s denial of this claim was
17 neither contrary to, nor involved an unreasonable application of, clearly established Federal law,
18 as determined by the Supreme Court of the United States. Nor did the denial result in a decision
19 that was based on an unreasonable determination of the facts in light of the evidence presented in
20 the State court proceeding. Petitioner has failed to establish that there is a substantial probability
21 that, absent the admission of the April 11, 2006 incident, the jury would have had a reasonable
22 doubt as to whether Petitioner was guilty of first-degree murder. Strickland, 466 U.S. at 694.
23 “[T]he question [under § 2254(d)] is not whether counsel’s actions were reasonable. The question
24 is whether there is any reasonable argument that counsel satisfied Strickland’s deferential
25 standard.” Harrington, 562 U.S. at 105. As the state court noted, there was a “mountain” of
26 properly admitted evidence indicating that, on several occasions when she was enraged for little or
27 no reason, Petitioner had acted violently towards others and caused them physical harm. Douprea,
28 2012 WL 5987896, at *23; see also RT 1511–14 (Petitioner threw box at Melia, scratched Melia,

1 caused property damage); 1526 (Petitioner threw beer cans at Melia unprovoked); 1528 (Petitioner
2 ripped Melia's shirt and scratched him, resulting in police visit and jail time); 1531 (Petitioner
3 threw glass tumbler at Melia); 1532–40 (Petitioner attacked her mom and Schneider); 1609–11
4 (Petitioner struck and scratched Mooney and took his glasses off); 1710 (Petitioner hit Patterson
5 with a closed fist while he was asleep because he refused to have sex with her); 1712–21
6 (Petitioner attacked Patterson and his roommate when they refused to allow her entry into their
7 apartment). There was also properly admitted evidence that she had previously threatened others
8 with a knife. CT 1544 (threatened Melia with a knife); 1720–21 (rushed at Patterson and his
9 roommate with an open pocket knife in her hand). Based on the record before it, the state court
10 reasonably concluded there was "no reasonable possibility" that admission of the April 11, 2016
11 incident was so prejudicial and inflammatory that the jury improperly relied upon this incident to
12 convict Douprea in any way contrary to the court's instructions. The state court's denial of this
13 claim was neither an unreasonable determination of the facts in light of the evidence presented at
14 the state court proceedings; nor was it contrary to, or an unreasonable application of, clearly
15 established Federal law, as determined by the Supreme Court of the United States. See, e.g.,
16 Featherstone v. Estelle, 948 F.2d 1497, 1507 (9th Cir. 1991) (finding no prejudice from trial
17 counsel's failure to object to an improper closing argument because *inter alia* "[a] substantial
18 amount of other independent evidence pointed squarely at [defendant's] guilt"). Petitioner is not
19 entitled to habeas relief on this claim.

20 **2. Due Process Claim**

21 Petitioner argues that her right to a conviction based on proof less than a reasonable doubt
22 was violated by section 1109 of the California Evidence Code and the use of CALCRIM No. 852.
23 Petitioner raised this claim on direct review and the state appellate court rejected the claim as
24 follows:

25 Douprea contends that section 1109 is unconstitutional, because the admission of
26 prior acts of domestic violence to prove a defendant's propensity to commit
27 charged acts of domestic violence leads to a conviction based on proof less than
beyond a reasonable doubt. She recognizes that our California Supreme Court
"faced a similar issue when it upheld section 1108 against a Due Process
challenge" in *Falsetta, supra*, 21 Cal.4th at p. 903, and that "numerous courts of
28 appeal have found the Court's reasoning in *Falsetta* applicable to section 1109."

1 (See, e.g., *People v. Johnson* (2010) 185 Cal.App.4th 520, 529.) She nonetheless
2 argues that *Falseetta* is incorrect in its reliance on section 352 as a constitutional
3 safeguard, and that its holding should not be extended to section 1109. We are not
4 persuaded that we should part ways with the cited precedent.

5 Doupree also contends that CALCRIM No. 852 is unconstitutional, arguing that it
6 undercuts the presumption of innocence and the right to proof beyond a reasonable
7 doubt, for reasons our Supreme Court rejected (as to section 1108) in *People v. Loy*
8 (2011) 52 Cal.4th 46, 71–77, and *People v. Reliford* (2003) 29 Cal.4th 1007, 1013–
9 1015 (*Reliford*). Doupree notes that California appellate courts have applied the
10 reasoning in *Reliford* to section 1109 (see, e.g., *People v. Reyes* (2008) 160
11 Cal.App.4th 246, 251), but contends these cases were wrongly decided. She fails to
12 convince us that these precedents are in error, or that error occurred in this case.

13 Doupree, 2012 WL 5987896, at *24.

14 **a. California Evidence Code 1109**

15 Petitioner argues that Section 1109 offends a deeply ingrained Anglo-American
16 jurisprudence that has categorically excluded other crimes evidence when offered to prove
17 disposition; that the erroneous admission rendered her trial fundamentally unfair in violation of
18 her due process rights.⁹ ECF No. 12 at 100–02.

19 After carefully reviewing the record, the Court finds that Petitioner is not entitled to habeas
20 relief on this claim. In determining whether to grant federal habeas relief pursuant to § 2254(d),
21 historical Anglo-American jurisprudence is neither dispositive nor persuasive. Rather, the
22 question is whether the state court decision involved either contrary to, or an unreasonable
23 application of, clearly established Federal law, as determined by the Supreme Court of the United
24 States.

25 The United States Supreme Court has never held that the introduction of propensity or
26 other allegedly prejudicial evidence violates due process. Rather, the Supreme Court has
27 specifically left this question open. See Estelle v. McGuire, 502 U.S. 62, 68–70, 75 n.5 (1991)
28 (“we express no opinion on whether a state law would violate the Due Process Clause if it
permitted the use of ‘prior crimes’ evidence to show propensity to commit a charged crime”); see also Holley v. Yarborough, 568 F.3d 1091, 1101 (9th Cir. 2009) (Supreme Court “has not yet

9 Petitioner also argues that the state court’s reliance on *Falseetta* in denying her due process claim
was misplaced. This argument fails to state a claim for federal habeas relief because it concerns a
state court’s application of state law. Federal habeas relief does not for errors of state law.
Estelle, 502 U.S. at 67.

1 made a clear ruling that admission of irrelevant or overtly prejudicial evidence constitutes a due
2 process violation sufficient to warrant issuance of the writ"). Where the U.S. Supreme Court
3 "cases give no clear answer to the question presented, let alone one in [the petitioner's] favor, 'it
4 cannot be said that the state court unreasonabl[y] appli[ed] clearly established Federal law.' . . .
5 Under the explicit terms of § 2254(d)(1), therefore, relief is unauthorized." Wright v. Van Patten,
6 552 U.S. 120, 126 (2008) (alterations in original) (quoting Carey v. Musladin, 549 U.S. 70, 77
7 (2006), and 28 U.S.C. § 2254(d)(1)); see also Holley, 568 F.3d at 1101 (denying habeas relief
8 upon finding that trial court's admission of irrelevant pornographic materials was "fundamentally
9 unfair" under Ninth Circuit precedent but not contrary to, or an unreasonable application of,
10 clearly established Federal law under § 2254(d)); Alberni v. McDaniel, 458 F.3d 860, 865 (9th
11 Cir. 2006) (denying habeas relief on claim that due process was violated by admission of evidence
12 of defendant's past violent actions and explosive temper to show propensity due to Estelle's
13 reservation of the question whether propensity evidence violates due process).

14 Petitioner is not entitled to federal habeas relief on this claim.

b. CALCRIM No. 852

16 After carefully reviewing the record, the Court also finds that the state court's denial of
17 Petitioner's challenge to the constitutionality of CALCRIM 852 was not contrary to, nor did it
18 involve an unreasonable application of, clearly established Federal law, as determined by the
19 Supreme Court of the United States.

20 The Due Process Clause of the Fourteenth Amendment requires the prosecution to prove
21 every element charged in a criminal offense beyond a reasonable doubt. In re Winship, 397 U.S.
22 358, 364 (1970). Consequently, any jury instruction that lowers the level of proof necessary for
23 the prosecution to carry its burden “is plainly inconsistent with the constitutionally rooted
24 presumption of innocence.” Cool v. United States, 409 U.S. 100, 104 (1972).

25 Plaintiff's claim that CALCRIM 852 impermissibly lowers the prosecution's burden of
26 proof is without merit. CALCRIM 852 instructs the jury how to consider evidence that the
27 defendant committed domestic violence that was not charged in this case. In relevant part,
28 CALCRIM 852 instructs:

1 You may consider this evidence [of domestic violence that was not charged in this
2 case] only if the People have proved by a preponderance of the evidence that the
3 defendant in fact committed the uncharged domestic violence. Proof by a
4 preponderance of the evidence is a different burden of proof from proof beyond a
reasonable doubt. A fact is proved by a preponderance of the evidence if you
conclude that it is more likely than not that the fact is true.

5 If the People have not met this burden of proof, you must disregard this evidence entirely.
6 If you decide that the defendant committed the uncharged domestic violence, you
7 may, but are not required to, conclude from that evidence that the defendant was
disposed or inclined to commit domestic violence and, based on that decision, also
conclude that the defendant was likely to commit domestic violence and did
commit murder as charged in Count I. If you conclude that the defendant
committed the uncharged domestic violence, that conclusion is only one factor to
consider along with all the other evidence. It is not sufficient by itself to prove that
the defendant is guilty of murder as charged in Count I. The People must still
prove the charge beyond a reasonable doubt.

10 CT 331–32. CALCRIM 852 does not require the jury to consider the prior domestic violence
11 evidence, much less make a finding of guilt based upon such evidence. Instead, the jury was free
12 to accept or reject such evidence. Even if the jury accepted prior domestic violence evidence as
13 true, the jury was free to give this evidence any weight it chose. Second, the instruction does not
14 lower the prosecution’s burden of proof. The instruction explicitly stated that the prior acts
15 evidence “is not sufficient by itself to prove that the defendant is guilty of” the charged offenses.
16 The jury was also separately instructed that it had to be convinced of Petitioner’s guilt beyond a
17 reasonable doubt. RT 2429–30 (“Proof beyond a reasonable doubt is proof that leaves you with an
abiding conviction that the charge is true. . . . Unless the evidence proves the defendant guilty
beyond a reasonable doubt, she is entitled to an acquittal and you must find her not guilty.”). The
Court must presume jurors followed the instructions and applied the proper legal standard. See
Weeks v. Angelone, 528 U.S. 225, 234 (2000). There is no “reasonable likelihood” that the jury
applied the challenged instruction in a way that lowered the prosecution’s burden of proof. See
Estelle, 502 U.S. at 72; accord Beltran v. Warden, No. 14-CV-03027-JST (PR), 2015 WL
7874326, at *25 (N.D. Cal. Dec. 4, 2015) (citing cases holding that CALCRIM 852 did not
impermissibly lower the prosecution’s burden of proof). Petitioner is therefore not entitled to
habeas relief on this claim.

1 **C. Certificate of Appealability**

2 The federal rules governing habeas cases brought by state prisoners require a district court
3 that issues an order denying a habeas petition to either grant or deny therein a certificate of
4 appealability. See Rules Governing § 2254 Case, Rule 11(a).

5 A judge shall grant a certificate of appealability “only if the applicant has made a
6 substantial showing of the denial of a constitutional right,” 28 U.S.C. § 2253(c)(2), and the
7 certificate must indicate which issues satisfy this standard. Id. § 2253(c)(3). “Where a district
8 court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c)
9 is straightforward: [t]he petitioner must demonstrate that reasonable jurists would find the district
10 court’s assessment of the constitutional claims debatable or wrong.” Slack v. McDaniel, 529 U.S.
11 473, 484 (2000).

12 Here, Petitioner has not made such a showing, and, accordingly, a certificate of
13 appealability will be denied.

14 **III. CONCLUSION**

15 For the reasons stated above, the petition for a writ of habeas corpus is DENIED, and a
16 certificate of appealability is DENIED.

17 The Clerk shall enter judgment in favor of Respondent and close the file.

18 **IT IS SO ORDERED.**

19 Dated: May 25, 2018



20 _____
21 JON S. TIGAR
22 United States District Judge

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2
3
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6
7 SHEYNA DOUPREA,
8 Petitioner,
9 v.
10 DEBORAH K. JOHNSON,
11 Respondent.

12 Case No.3:15-cv-06133-JST

13 **CERTIFICATE OF SERVICE**

14 I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S.
15 District Court, Northern District of California.

16 That on 5/25/2018, I SERVED a true and correct copy(ies) of the attached, by placing said
17 copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing
18 said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle
19 located in the Clerk's office.

20
21 Sheyna Douprea ID: #:WA9085
22 Central California Women's Facility
23 P.O. Box 1508, Facility#:507-4-4L
24 Chowchilla, CA 93610-1508

25 Dated: 5/25/2018

26 Susan Y. Soong
27 Clerk, United States District Court

28 By: William Noble
29 William Noble, Deputy Clerk to the
30 Honorable JON S. TIGAR

S218574

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re SHEYNA DOUPREA on Habeas Corpus.

The petition for writ of habeas corpus is denied.

SUPREME COURT
FILED

DEC 16 2015

Frank A. McGuire Clerk

Deputy

CANTIL-SAKAUYE

Chief Justice

Court of Appeal, First Appellate District, Division Five - No. A131031

S207910

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

SHEYNA DOUPREA, Defendant and Appellant.

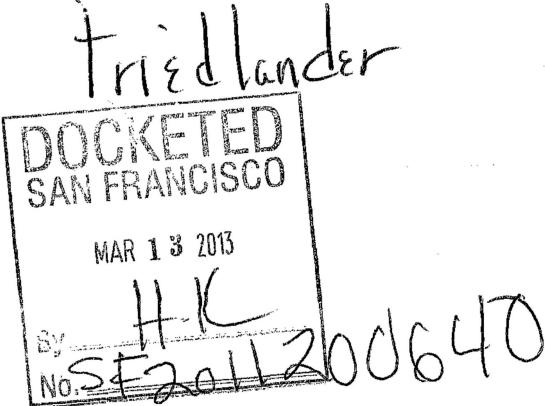
The petition for review is denied.

SUPREME COURT
FILED

MAR 13 2013

Frank A. McGuire Clerk

Deputy



CANTIL-SAKUYE

Chief Justice

COPY

Filed 11/30/12

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

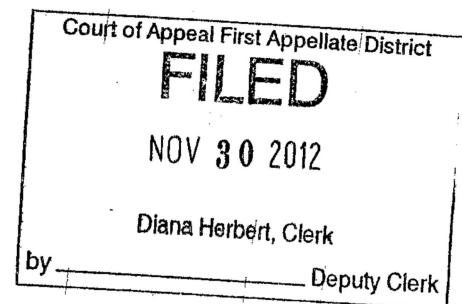
DIVISION FIVE

THE PEOPLE,**Plaintiff and Respondent,**

v.

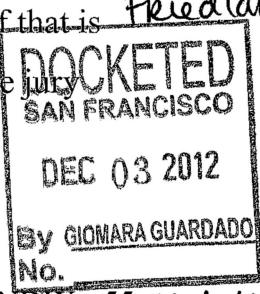
SHEYNA DOUPREA,**Defendant and Appellant.**

A131031



**(Sonoma County
Super. Ct. No. SCR 551716)**

Sheyna Douprea appeals from a judgment of conviction entered after a jury found her guilty of the first degree murder of her boyfriend. She contends: (1) the trial court erred by excluding expert testimony that she is a battered woman and lapsed into a dissociative state on the day of the murder; (2) the court erred by instructing the jury in a manner that restricted its use of intimate partner violence evidence; (3) the prosecutor committed misconduct by using evidence of intimate partner violence for an improper purpose; (4) the court should not have admitted evidence of her prior acts of violence; (5) her trial attorney did not provide effective assistance of counsel because she failed to object to evidence that had been excluded before trial; (6) Evidence Code section 1109 and CALCRIM No. 852 unconstitutionally permit the jury to convict upon proof that is less than beyond a reasonable doubt; and (7) the court erred in not instructing the jury



adequately on the provocation needed to reduce murder from first to second degree under an unreasonable heat of passion theory. We will affirm the judgment.

I. FACTS AND PROCEDURAL HISTORY

Sheyna Douprea, then 23 years old, stabbed her intoxicated 46-year-old boyfriend to death after he refused to go with her to a Christmas party in December 2008. The essential question at trial was Douprea's state of mind at the time of the killing.

A. *Pretrial and Evidentiary Rulings*

An information charged Douprea with the murder of her boyfriend, Daniel Mooney, and alleged that she perpetrated the murder willfully, deliberately, and with premeditation. (Pen. Code, § 187.) The information further alleged that Douprea personally used a deadly and dangerous weapon (a knife), such that the offense was a serious felony. (Pen. Code, §§ 12022, subd. (b)(1); 1192.7, subd. (c)(23).) In addition, it was alleged that Douprea personally and intentionally inflicted great bodily injury. (Pen. Code, §§ 1203.075, 12022.7, subd. (a)).

In July 2010, the prosecution filed motions in limine seeking admission of numerous prior acts of violence by Douprea. (Evid. Code, §§ 1101, subd. (b); 1109.) Defense counsel opposed the motions in part. The trial court admitted all but two of the prior incidents, a ruling that Douprea challenges in this appeal, as discussed *post*.

Also in July 2010, defense counsel agreed with the prosecutor's motion to preclude a defense expert witness from opining that Douprea suffers from Battered Women's Syndrome (or, as it is also known, "Intimate Partner Violence"). (See Evid. Code., § 1107.) The court later precluded the expert's opinion that Douprea entered into a dissociative state on the date of the crime. As addressed *post*, Douprea challenges these matters as well.

B. *Prosecution Case*

1. *Relationship Between Douprea and Mooney*

Douprea and Mooney started dating in late 2007 or early 2008. At that time, Mooney lived in an apartment in Healdsburg with Matthew Schamens, whom he had met

at an alcohol rehabilitation center. Douprea lived with her two-year-old daughter in Windsor, in a mobile home purchased by her mother, Gena.¹

In August 2008, about four months before the killing, Douprea and Mooney had a physical altercation witnessed by Douprea's neighbor, Jennifer Cardona. Cardona testified that she saw a female quickly leaving Douprea's home around midnight, trying to get away from a male and yelling at him to "leave us alone." The man pulled the woman by the hair toward the house and then toward a car; she pushed him to get away; and then he hit her and she fell to the ground. Cardona called 911, and the police soon arrived.

Questioned by the police, Mooney denied hitting Douprea or any physical violence, while Douprea claimed they had a fight because she wanted him to spend the night. Photographs admitted at trial showed an injury to Douprea's hip and a small scratch on her face. After Mooney was taken away, however, Douprea asked the police how she could bail him out. She did not want him arrested and did not want a restraining order.

At some point, Mooney obtained a restraining order against Douprea. Sometime thereafter, Schamens observed an argument between them at Mooney's apartment: Douprea struck at Mooney's face, removed Mooney's glasses and threw them on the floor, and hit Mooney with a towel rack; Mooney had scratches down his neck and "claw" marks on his chest.

In November 2008, Mooney started drinking again. Schamens saw Mooney intoxicated twice, but on neither occasion was he aggressive or violent. Schamens vacated the apartment in late November, and Douprea accepted Mooney's invitation to move in.

¹ Because Gena Douprea has the same last name as appellant, we refer to Gena by her first name for clarity, without disrespect.

Around 11:00 p.m. on the night before the December 14 killing, Victoria Steel, who lived in the apartment below Mooney's, heard noises upstairs for 15-20 minutes. The noises sounded like something heavy dropping on the floor.²

2. *The Hours Before the Killing*

On the morning of December 14, 2008, Douprea attended church and dropped off her daughter at daycare. At 11:00 a.m., she picked up her daughter and said she was going to a Christmas party. She did not appear distraught.

Around 11:15 or 11:30 a.m., Douprea was observed driving in the direction of Gena's home in Windsor. Gena confirmed that Douprea dropped off her daughter at her house around 11:30 a.m. and was in a pleasant mood.

According to Douprea's cell phone records, Douprea called Nicole Rowan, her sponsor at Alcoholics Anonymous, at 11:31 a.m. and spoke for nine minutes. Rowan testified that Douprea sounded irritated; she had planned to go to a Christmas party with Mooney and he was already drinking at 11:00. The last thing Douprea said was, "I'm going to go and get him cleaned up, see if I can get him cleaned up."

At 11:54 a.m., Douprea called Gena and spoke with her for eight minutes. According to Gena, Douprea said she was locked in the bathroom and Mooney had beaten her, threatened to kill her, and tried to strangle her. Gena heard screaming and pounding on the door, and Douprea sounded terrified and frantic and was "sort of" crying. Douprea said she did not know what to do; she could not leave the apartment, and she did not want to call 911 because she was afraid Mooney would go to jail. After about six minutes, the pounding and screaming subsided, Douprea seemed calmer, and she said she thought everything was going to be alright. Douprea convinced Gena not to call 911.

² As described *post*, Douprea told the police that she had an argument with Mooney the night before he died; initially, she claimed there was no violence; later she asserted that he had swung at her, choked her, threatened to kill her, and twisted her arm behind her back.

According to Douprea's cell phone records, Douprea spoke next to her friend Fulton, from 12:04 to 12:09 p.m. Fulton testified that he had invited Douprea and Mooney to dinner and called Douprea to let her know she did not have to pick up one of the other guests. Although she seemed calm, Douprea told him that Mooney had been drinking and they got into an altercation. At Fulton's request, Douprea put Mooney on the phone; obviously intoxicated, Mooney's speech was so slurred that Fulton could hardly understand him. After Mooney got off the phone, Fulton spoke to Douprea while Mooney was "laughing maniacally" in the background. Douprea said, "Get off of me, Daniel" at least once, but still seemed calm. According to Fulton, Mooney's laugh sounded evil and out of control; he testified that he had never heard Mooney laugh that way before. Douprea said she was scared (or sounded scared) when she talked about Mooney being physical with her, and she asked Fulton if she should call the police. Fulton suggested that Douprea leave the apartment and talk to Mooney when he was sober.

Janet Lopez and Tamara Nolan, who lived in the apartment next to Mooney's, testified that they were returning to their apartment around 12:15 or 12:30 p.m. on December 14th when they met Douprea going up the stairs.³ Douprea was talking on her cell phone, saying "I will get him up or get him out." She did not appear angry.

At some point between 12:09 and 12:32, Douprea killed Mooney.

3. Douprea's Post-Killing Call to Gena; Gena's Call to 911

At 12:33 p.m., Gena received a call from Douprea. Crying and very upset, Douprea said Mooney had been strangling her and tried to kill her, and she stabbed him. Douprea claimed she had tried to call 911 but could not get through. Gena said she would call 911 and hung up.

³ Their time estimate may not be correct, since Douprea's cell phone records indicate that Douprea was on the phone with Fulton from 12:04 to 12:09 p.m. and made calls to Gena at 12:09 p.m., to 911 (apparently without a connection) at 12:29 p.m., and to Gena at 12:33 p.m.

Gena testified that she called 911 when she got off the phone with Douprea and gave the dispatcher Douprea's contact information. She also told the 911 operator that there was probably a knife in the house and that Douprea "[said] he's dead." Police dispatcher Linda Haviland testified that Gena called 911 at 12:32 p.m.⁴

4. Police Dispatch and Douprea's False Statement to the Dispatcher

The Healdsburg Police were dispatched to Mooney's apartment at 12:33 p.m., and officers arrived at 12:34. Before they entered, Haviland telephoned Douprea inside the apartment. In a tape of the conversation played for the jury, Douprea told Haviland, "I came in from church and my boyfriend's covered in blood." (At trial, defense counsel conceded that Douprea's statement to the dispatcher was untrue.)

5. The Crime Scene

At 12:39 p.m., the police entered Mooney's apartment. Mooney was on his back on the floor of his bedroom, unresponsive, attempting to breathe, and bleeding heavily. A towel saturated with blood was against the left side of his neck. A lot of blood was on the floor around him, particularly close to his head. Emergency medical technicians were unable to revive him; he was transported to the hospital and pronounced dead on arrival.

Douprea was handcuffed and remained with police inside the apartment for 15 to 20 minutes. She had blood on her lip and in her left nostril. She was concerned about Mooney, seemed to be crying, and was breathing heavily or rapidly, but she had no difficulty speaking and did not indicate she was in pain.

A police officer drove Douprea from Mooney's apartment to the Healdsburg police station. Douprea had no difficulty breathing or speaking, she did not cough or gasp, and nothing about her appearance suggested she needed medical attention.

6. Mooney's Condition

Mooney had a .35 percent blood alcohol level and a therapeutic level of Benadryl in his blood, which in combination would intoxicate a person much more than either

⁴ It is unclear why records indicate that Douprea's call to Gena was at 12:33 p.m., while Gena's call to 911, supposedly following Douprea's call to Gena, was at 12:32 p.m.

substance would separately. He was 70 inches tall and “relatively slight” and “slighter framed,” weighing 150 pounds.

An autopsy determined that Mooney died from four stab wounds on the left side of his neck. Three of the wounds had the same angle, suggesting they occurred in the same session, while Douprea and Mooney were in the same relative positions. The pathologist could not determine, however, the position of Mooney or Douprea at the time of the injuries. Two of the wounds were about one and a half inches deep, reflected similar paths through the neck and external jugular vein, damaged the internal jugular vein and carotid artery, and would have been fatal individually. A third wound was about one and a quarter inches deep, just below the left jaw bone. The fourth wound was toward the back of the left side of Mooney’s neck and about a half inch deep. Mooney had superficial wounds around his left nostril, on his left forearm, and on his right palm, which could have been caused by a fingernail or a knife. He had abrasions on the left side of his face and the right side of his neck, along with apparent scrapes from fingernails on his arm and bruises on his nose and above his right eyebrow.

7. Physical Evidence

The knife that Douprea used to kill Mooney was a folding pocketknife with a two-inch blade. Police found it in a diaper pail on the patio, under soiled diapers.

The room with the most blood was a bedroom in which Mooney’s wallet was found. Blood was on the bed and saturated the carpet. There was also blood leading to the bathroom and inside the bathroom. Blood in the shower suggested that someone had taken a shower (and Douprea’s hair was wet when the police arrived).

In the kitchen, blood was on the counter, in the sink, on the refrigerator, and next to the sliding glass door. In the trash can was broken glass wrapped in a wet tissue, a shoe with apparent blood stains, and paper towels soaked in blood.

8. Douprea’s Statement to Police

Douprea was interviewed at the police station by Healdsburg Police Detective Shooter for about three hours, starting around 3:00 p.m. The interview was recorded.

Other than a headache, Douprea made no complaints of pain. She had a one-inch red mark above her brow and said she had suffered a nose bleed.

Douprea offered police several inconsistent explanations for Mooney's death. She began by saying that she just found Mooney on his bed, bleeding, when she came home. She tried to help him to the bathroom so she could put a towel on his neck, but he slumped to the floor. She tried to call 911 but could not get through, so she called Gena and said Mooney might be dying.

Douprea next told police that Mooney had been getting drunk lately and was prone to fighting when drunk. Douprea described previous altercations between them, including one the night before.⁵ This time, Douprea claimed, Mooney attacked her by pulling her into the closet, beating her, twisting her arm, and asking her if she wanted to die. She fought back, and he "started bleeding more" from what "might have been some kind of a cut."

Detective Shooter told Douprea that her story was not "lining up." Douprea then claimed that Mooney was choking her, so she used a pocket knife to try to get him off of her and accidentally cut his neck. Eventually, Douprea provided additional details, which we piece together as follows.

On the morning of the killing, Douprea went to church with her daughter, dropped her off afterward at Gena's home in Windsor, and returned to Mooney's apartment so she and Mooney could attend a Christmas party. But when she went into Mooney's

⁵ Douprea told the police that Mooney had assaulted her physically two or three times before the day she killed him. The first time was the August 2008 incident at her home; she claimed that Mooney choked her and said, "I'm gonna kill you." Douprea also stated that she would bite Mooney to get him off of her, and she had a recorded voice message from Mooney saying he would rearrange her face if she ever bit him again. As to the night before the killing, Douprea first told the police they had a non-violent argument in which he did not understand why she wanted to be with him since he was a worthless drunk. Later she claimed that he became angry when she asked him how much he had to drink, and he swung at her and choked her. Holding her throat, he pressed her up against the refrigerator, told her not to get into his business, and said he was going to kill her. Later that night, he twisted her arm behind her back and said she was worthless and drove him to drink.

bedroom, he rolled away from her and said they were not going. She replied that the party was very important to her, but Mooney repeated they were not going. “[V]ery hurt,” Douprea pulled back Mooney’s blanket and said, “Come on, you gotta get ready, let’s go.”

Mooney became very angry and followed her into the kitchen. They punched each other in the nose, and they each had bloody noses. They gave each other a black eye. He banged her head on the floor, twisted her arms, and threatened to break them.

Douprea ran into the bathroom and called Fulton and Gena, telling them she was scared. She did not call the police or ask anyone to do so because Mooney was on parole and would get into trouble. She loved him and knew that “that’s not the sober him.”

Douprea next went into her bedroom. After about a minute and a half, Mooney opened the door, yelled at her, and insulted her. When he left, she thought about what to do. She felt unsafe because the door to her room did not lock, but she felt unable to leave the apartment because her experience was that he would become more angry and something worse would happen.⁶

So Douprea got her knife and put it in her pocket. After about 10 minutes in her bedroom, she went to the bathroom for a few minutes until she said to herself, “Okay, I’m calmed down, I’m gonna go talk to him.”

Douprea went to Mooney’s bedroom to calm him down, as she was usually able to do. She brought her knife along to protect herself and to scare him, because she thought there could be a fight.

Entering Mooney’s room, Douprea tried to reassure Mooney, saying she did not want to fight, she loved him, and everything would be okay. She went to hug him, but Mooney told Douprea she was a worthless whore, pushed her to the floor, and tackled her. On top of her, he twisted her arms and banged her head in the closet; she punched

⁶ When Detective Shooter asked Douprea why she stayed in the apartment to confront a belligerent and violent man, she said she could usually calm Mooney down, she loved him, and she did not want to get him in trouble.

him in the nose again; and he moved his hands to her throat and said he was going to kill her.

Although the knife “was a threat” and she had not originally intended to stab Mooney, that changed when Mooney choked her. Frightened, she pulled out her knife to scare him. But Mooney just laughed and said she could not do anything.

Douprea stabbed Mooney lightly in the side of the neck with a puncturing motion, thinking that “a little poke” would scare him and get him to understand this was serious, without severely hurting him. The knife went into the side of Mooney’s neck and she saw a little blood, but it did not phase him.

Mooney taunted Douprea for another 30 seconds and said he was going to kill her. Believing him, and feeling dizzy and unable to breathe, Douprea stabbed Mooney again. She thought that stabbing him the second time would make him get off her, without seriously hurting him. But “there might have been some aspect of it where I was like I don’t ever want this to happen again”; she did not want Mooney to assault her anymore.

Mooney got up and fell backwards onto his bed. She tried to pull him to the bathroom to get a towel, but he fell down. She retrieved a towel, hoping to stop the bleeding with pressure, and held him for a few minutes. She called 911 but no one answered, so she called her mother, who called the police. She told her mother she did not intend for this to happen and was scared Mooney was going to die.

Douprea put the knife in the diaper pail because she was scared. Then she showered for about two minutes because she was covered in Mooney’s blood; she often took a shower to comfort herself when scared, hurt, or depressed. When she got out of the shower, she put on different jeans (but the same shirt), held Mooney again, and called the police about three more times.

After asking what the process would be if she were charged with murder, Douprea told police, “I think [a jury] would probably be more understanding due to the fact that I was protecting myself.”

9. Douprea's Condition at the Hospital

Douprea was brought to the hospital at 7:59 p.m. Dr. Richard Reisman, an emergency room physician, examined Douprea for perhaps 10 minutes to see if she was able to go to jail. According to Dr. Reisman, Douprea was alert, her blood pressure was normal, and her pulse and breathing were a little fast. She complained of a headache and soreness in the back of her head and neck, explaining that she had been choked and thrown to the ground, hitting the back of her head several times. She also stated that she had been hit in the face with a fist and suffered a nose bleed.

Dr. Reisman found the back of Douprea's head tender but not swollen. A small reddened area next to the left nostril did not have much swelling; there was a little blood at the left nostril but no active bleeding. There was dried blood on both sides of the upper and lower lips. A little reddened area on the right side of the forehead had some swelling, but there was no tenderness or deformation in the face.

10. Douprea's Prior Violence Against Other Men

Douprea's former husband, Robert Melia, testified that his relationship with Douprea began in 2005. During the two or three months they initially lived together, Douprea had angry outbursts. In the first incident, Douprea threw a box at him, shoved him, and scratched him when he accused her of lying and cheating. The police were called, but Melia declined to have her arrested. Later in Calistoga, Douprea attacked him again, grabbing him and throwing things.

The couple moved to Las Vegas, where Douprea threatened suicide. She was hospitalized twice in a psychiatric ward, the second time voluntarily after she threatened to jump off a hotel parking garage. They also continued to have violent arguments. In September 2005, she ripped Melia's shirt, scratched his face, and punched him because he smoked a cigarette. When she returned from jail on October 2, 2005, Douprea threw a glass at Melia because he was drinking and smoking. Trying to intervene, Schneider pinned Douprea down while Gena called the police; Douprea bit Gena and bit and scratched Schneider. (Schneider and Gena described the altercation similarly at trial.)

At Gena's suggestion, Melia nonetheless married Douprea two or three days later. Subsequently, Douprea attacked Melia for not showing sexual interest in her; she punched, scratched, and kicked him, nearly ripping off his shirt and leaving fingernail scrape marks on his face. She threatened him by brandishing a three-inch knife, from her collection of 20 to 25 knives. Melia walked out and never returned.

Adam Patterson testified that he met Douprea at an Alcoholics Anonymous meeting in 2005, and they had an off-and-on intimate relationship for about five or six months. Douprea's temper was unpredictable and severe, and they broke up about a month before she went to Las Vegas. When she returned, they lived together for perhaps a few months. On one occasion, he awoke to find her hitting him and trying to force him to have sex. In February 2006, after their relationship ended, Douprea dropped off some of Patterson's belongings at his residence; Patterson asked her to leave, and Douprea started yelling and threw a boot through his window. When Patterson opened the door, she punched and bit both Patterson and his roommate, Lawrence Mahoney. At some point, she was holding a small knife. Mahoney called the police, who took photographs of the damage Douprea caused to the apartment and the injuries she inflicted. Douprea later entered a plea to throwing the boot through the window.

Michael Schneider testified that he lived with Gena from 2003 to 2010 and experienced Douprea's violent temper as well. On one occasion, Schneider put Douprea's cat out of Gena's house, and Douprea grabbed a big knife from the kitchen and said she would kill him if he "messed" with her cat. On another occasion on April 11, 2006, Gena asked Schneider to get her a cup of coffee, and when Schneider made a rude comment, Douprea grabbed a knife from the kitchen and rushed at him. Raising his arm to block her, Schneider suffered a cut that required three stitches.

C. Defense Case

1. Mooney's prior violence

In January 2005 – nearly four years before Mooney's death – Mooney was stopped by the police while apparently intoxicated and about to drive. Unable to keep his

balance and unresponsive to voice commands, he was taken to the hospital. Because he resisted when medics tried to insert an “IV” in his arm, he was handcuffed to a gurney.

The altercation between Douprea and Mooney in August 2008 was confirmed by Modesta Cardona (Jennifer’s mother). According to Modesta, Mooney pushed Douprea out of the house, then hit her three or four times while she tried to defend herself.

In addition, Michael Cuadra, who met Douprea in December 2007 by answering her Craigslist ad for a “cuddle bunny,” testified that Douprea said in August 2008 that she feared Mooney because he was drinking, belligerent, and mistreating her. She also claimed that she was nervous about doing anything because she did not want to get Mooney in trouble. On December 7, 2008, she sent Cuadra a text message that Mooney had said something like “the next time you bite me . . . I will shatter your face.”

2. Expert Witness Linda Barnard

Linda Barnard, an expert in post-traumatic stress disorder (PTSD) and intimate partner violence (IPV), defined PTSD and IPV and the relationship between them. She testified that Douprea had PTSD from the cumulative effect of multiple traumas or cumulative traumatic stressors in her life. She also testified as to the effects of PTSD, including that PTSD was not consistent with initiating violence against another person. In addition, Barnard described IPV and “dissociation” generally, but she did not opine whether Douprea suffered from IPV and was not permitted to testify that Douprea was in a dissociative state on the day of the killing.

3. Forensic Nurse Diana Emerson

The court recognized Diana Emerson as “a forensic nurse practitioner,” who conducts medical examinations and writes reports describing injuries, their significance, and possible causes. In Emerson’s view, Dr. Reisman’s examination of Douprea was not a forensic examination for manual strangulation, which requires a CT scan of the neck to check for swelling and trauma. In addition, Emerson explained, patients who have experienced only vascular pressure, such as to the jugular and carotid arteries, are likely to revive very quickly afterward; there may be no pain if there is no significant injury, and swelling can take several hours to appear.

Emerson pointed to photographs taken after the killing that, in her opinion, showed injuries on Douprea's neck consistent with strangulation. In addition, the bruising and swelling on Douprea's forehead, and the blood and swelling in her left nostril, were consistent with direct trauma. Bruises on Douprea's forearms were consistent with defensive injuries sustained from warding off blunt force trauma. Emerson concluded that Douprea was in a fight and appeared to have been strangled.

D. Closing Arguments

The prosecutor argued that Douprea attacked and killed Mooney because she was enraged at him for being drunk and refusing to attend the Christmas party. Her claim of self-defense was untrue; she "chose to stay in her room for a period of time, arm herself with a knife, [and] go in and kill" Mooney, while he was in a "stupor" from alcohol.

Defense counsel argued that Douprea suffered from PTSD, was a victim of IPV, and killed Mooney unintentionally or in self-defense. Mooney had attacked Douprea in a drunken rage, and when he choked her to the point she thought she would die, she used the knife to defend herself.

E. Jury Verdict and Sentence

The jury found Douprea guilty of first degree murder and found true the use enhancement under Penal Code section 12022, subdivision (b)(1). The court sentenced Douprea to 25 years to life for first degree murder plus one year for the use enhancement.

This appeal followed.

II. DISCUSSION

We address each of Douprea's contentions in turn.

A. Exclusion of Expert Witness Testimony

Douprea contends the trial court erred by precluding Dr. Barnard from testifying that Douprea was a battered woman (i.e., suffered from IPV) and was in a dissociative state on the day of the killing. She further argues that, to the extent her trial attorney agreed that Barnard could not testify that Douprea suffered from IPV, she received ineffective assistance of counsel.

1. *Background*

In July 2010, at defense counsel's request, Dr. Barnard authored a domestic violence assessment report of Douprea. In her report, Barnard concluded that Douprea was a "battered woman" and described her abusive history with Mooney in the context of IPV. Barnard also described Douprea's history of "dissociation" since childhood, including instances of "cutting," periods when she "lost memories," and "blank periods during the series of events resulting in and subsequent to [Mooney's] death." Barnard suggested that Douprea likely experienced a dissociative state on the day she killed Mooney, concluding that "[m]uch of what occurred was likely in a dissociative state and memory tracks were disrupted."

The prosecutor filed an in limine motion to exclude, *inter alia*, Dr. Barnard's opinion that Douprea is a battered woman. The prosecutor contended that IPV testimony must be limited to general information about a class of victims, not the ultimate issue of Douprea's mental state at the time of the offense.

An ensuing hearing addressed the extent to which Dr. Barnard could testify regarding IPV, as well as PTSD. As to IPV, the prosecutor acknowledged that Dr. Barnard could testify about IPV "in a general way," but Barnard could not "make the factual finding she's a battered woman." Defense counsel *agreed*, stating: "[Barnard] *cannot say Ms. Douprea is a battered woman*," but she can opine that Douprea was suffering from PTSD and describe how IPV can affect perception. (Italics added.) Defense counsel added that she would ask Barnard hypotheticals, but that she would "admonish [Barnard] not to blurt out that Sheyna Douprea in her opinion was a battered woman."

As to PTSD, defense counsel asserted that she retained Dr. Barnard to explain that PTSD explained Douprea's "flat affect" in her interview with police, to rebut any prosecution argument that she was being "remorseless or uncaring." The prosecutor agreed with defense counsel that Barnard could testify that "she's got PTSD." In addition, defense counsel said that PTSD explained Douprea's dissociative state during the interview, and the prosecutor agreed that PTSD was "fair game." Thus, by the time

of Barnard's direct examination, the parties had agreed she could opine that Douprea had PTSD, but not that she was a victim of IPV.

On direct examination, Dr. Barnard testified within these confines. She opined that Douprea suffered from PTSD, but testified only generally about IPV, including the "cycle of violence," "traumatic bonding," common myths about abused persons, and the fact that victims commonly remain in abusive relationships even when they could leave.

Dr. Barnard also testified generally about "dissociation." When defense counsel attempted to elicit Barnard's opinion that Douprea had entered into a dissociative state, however, the court sustained the prosecution's objection. Defense counsel then asked Barnard: "Hypothetically, if a person is sitting in an interview and they are . . . questioned about the death of their partner and they have a very flat affect, what would you attribute that to?" Barnard answered: "It could be attributed to shock or . . . dissociation." Barnard subsequently testified that taking a shower after a traumatic event could be done in a dissociative state as a way to decrease anxiety.

The court later explained, outside the presence of the jury, that it had barred Dr. Barnard from opining that Douprea "was suffering from disassociation [sic]" because it "was going to get into PC 29 issues, getting to ultimate facts whether she had intent or didn't have intent."⁷

2. *Absence of Opinion That Douprea Was a Battered Woman (IPV Victim)*

Evidence Code section 1107 permits testimony concerning the physical, emotional, or mental effects of IPV upon the beliefs, perceptions, or behavior of domestic violence victims. An expert witness may also offer an opinion as to whether a defendant actually suffers from IPV. (*People v. Aris* (1989) 215 Cal.App.3d 1178, 1185 (*Aris*), disapproved on another ground in *People v. Humphrey* (1996) 13 Cal.4th 1073, 1089 (*Humphrey*)).

⁷ Penal Code section 29 states in part that an expert testifying about a defendant's mental illness, disorder, or defect may not testify "as to whether the defendant had or did not have the required mental states."

Here, however, defense counsel expressly agreed that she could not, and would not, elicit Dr. Barnard's opinion that Douprea suffers from IPV. Douprea cannot now claim that the trial court erred because it did not admit evidence that Douprea's attorney declared was inadmissible and elected not to introduce.

In her reply brief, Douprea argues that defense counsel had proffered Dr. Barnard's entire report – which included the IPV opinion – and the court engaged in an analysis and explicitly ruled that the opinion was inadmissible.⁸ But the court's comments came long *after* defense counsel represented that Barnard could not opine that Douprea was a “battered woman,” appearing to be in full agreement with the prosecutor on this point. The court's later remark that such evidence was inadmissible does not establish that an offer of proof and argument for its admissibility would have been futile. (Evid. Code, § 354, subd. (a); see *People v. McKinnon* (2011) 52 Cal.4th 610, 659.) Douprea fails to establish judicial error.

3. *Counsel's Failure to Seek Admission of the Battered Woman/IPV Opinion*

Douprea next argues that her attorney provided ineffective assistance in failing to insist that Dr. Barnard's IPV opinion be admitted. To prevail on a claim of ineffective assistance, a defendant must show that (1) counsel performed incompetently and (2) in the absence of counsel's error, there is a reasonable probability the defendant would have obtained a more favorable result. (*Strickland v. Washington* (1984) 466 U.S. 668, 690, 694; *People v. Hart* (1999) 20 Cal.4th 546, 623-624.)

Douprea contends her attorney should have sought admission of Dr. Barnard's opinion that Douprea suffers from IPV and rebutted the prosecutor's argument for

⁸ At one point, the court indicated there had been a sidebar discussion as to whether Dr. Barnard would testify that Douprea had IPV, and the court believed such testimony was impermissible because it pertained to an “ultimate decision” and “an opinion on guilt or innocence;” defense counsel stated, however, that she had been arguing for admission of an opinion regarding PTSD, *not* IPV. Later, the court stated that it had excluded the opinion that Douprea was suffering from IPV because the evidence would have been misleading and the record would have been “convoluted,” citing Evidence Code section 352.

excluding it. After all, she argues, the prosecutor had analogized to cases pertaining to other types of expert testimony (child sexual abuse accommodation syndrome and rape trauma syndrome) – an analogy *Aris* rejected (215 Cal.App.3d at p. 1199). Furthermore, Douprea claims, the IPV evidence was relevant to the subjective aspect of imperfect self-defense, the objective aspect of self-defense, Douprea’s credibility, whether Douprea had the mental states for the charged crime, and heat of passion.

Respondent counters that the law at the time of trial was not as clear for defense counsel as Douprea asserts. Moreover, respondent urges, defense counsel had a reasonable tactical purpose for not eliciting an opinion that Douprea suffered from IPV.

We agree there was a reasonable tactical justification for not eliciting Dr. Barnard’s opinion that Douprea suffered from IPV. By introducing IPV evidence about how IPV affects perceptions and explains an IPV victim’s decision to stay with her partner, but *not* attempting to have Barnard opine expressly that Douprea suffered from IPV, defense counsel was able to suggest to the jury that Douprea was an IPV victim and that Barnard thought so, while avoiding a blistering cross-examination of Barnard that would have likely demonstrated Douprea was not an IPV victim and Barnard was wrong to conclude she was. Or, to put it a bit differently, there was so much evidence contrary to the conclusion that Douprea was an IPV victim that it would have made it appear that Barnard was overreaching and thus diminish her credibility.

For example, in reaching her conclusion that Douprea suffered from IPV in her report, Dr. Barnard apparently spoke only to Douprea and did not consider the evidence that Douprea was more of an abuser than a victim. Barnard did not speak to Patterson and Melia, who testified that Douprea repeatedly assaulted them. Barnard accepted Douprea’s depiction of certain encounters, and did not review the police report from a February 2006 incident when Douprea allegedly attacked Patterson and his roommate Mahoney. Nor did Barnard acknowledge that Douprea entered a plea to vandalizing Patterson’s apartment, or consider Melia’s contention that Douprea attacked him (as documented by the reports Barnard allegedly reviewed) including a time when Douprea brandished a knife. Nor did Barnard’s report note an altercation between Schneider and

Douprea, in which Douprea allegedly became enraged at Schneider for putting out her cat, brandished a knife at him, and threatened to kill him. Nor did the report mention Schamen's account of Douprea violating a restraining order and hitting Mooney over the head with a towel rack. And in applying indicators of IPV to suggest that Mooney was subjecting Douprea to IPV, Barnard accepted Douprea's uncorroborated assertions, including that Mooney controlled the use of their money.

A closer question is whether this tactical reason was, in fact, what prompted Douprea's counsel not to press for admission of Dr. Barnard's opinion, or whether counsel simply misunderstood the law. Douprea argues that, because defense counsel told the court she "didn't highlight the admissible parts [of Barnard's report] because I'm going to try to get *as much as I can*," counsel's agreement that Barnard could not testify that Douprea is a battered woman must have been due to her belief that she could not elicit that opinion under the law. Nonetheless, while defense counsel displayed more of an "I can't get it in" attitude as opposed to an "I don't want to get it in" attitude, the record does not preclude the possibility that defense counsel went along with the prosecutor's position because it furthered the defense strategy. And although Douprea contends that defense counsel did not shy away from eliciting the opinion just to avoid cross-examination of Barnard because Barnard faced vigorous cross-examination anyway, the fact of that vigorous cross-examination only underscores the reasonableness of a defense tactic to avoid yet more fodder for the prosecutor's questioning. In short, the record does not affirmatively show that defense counsel's position was not a matter of tactics.

At any rate, Douprea's ineffective assistance claim fails on the prejudice prong. Even without Dr. Barnard's opinion that Douprea was a battered woman suffering from IPV, the jury had ample evidence with which to determine whether she was a victim of IPV and how it might have affected her behavior. In this light, Barnard's opinion, resulting in a severe cross-examination, would not have helped Douprea much. And because there was so much evidence contrary to Barnard's conclusion that Douprea suffered from IPV, and so many matters Barnard had apparently not considered in

reaching that conclusion, there is no reasonable likelihood that jurors, unconvinced that Douprea suffered from IPV based on the IPV evidence that was admitted, would have become convinced that she did suffer from IPV merely upon Barnard saying so. Accordingly, it is not reasonably probable that Douprea would have obtained a more favorable outcome if Barnard had testified that Douprea was an IPV victim. Douprea fails to demonstrate ineffective assistance of her trial counsel.

4. *Dissociative State*

Douprea contends the court erred in excluding Dr. Barnard's testimony that she entered into a dissociative state. We review the court's ruling for an abuse of discretion. (*People v. Cortes* (2011) 192 Cal.App.4th 873, 908 (*Cortes*)).

To the extent the court precluded such testimony based on Penal Code section 29, the court was mistaken. Penal Code Section 29 provides that an expert witness shall not testify as to whether the defendant had the required mental *states* for the crimes charged. But it does not prohibit an expert witness from opining that the defendant suffers from a mental *disorder or condition*. (*Cortes, supra*, 192 Cal.App.4th at p. 908-911.) The statute therefore did not preclude Dr. Barnard from opining that Douprea was in a dissociative condition on the day of the killing. (*Ibid.*)

The next question, however, is whether the evidence was inadmissible for some other reason or, if not, whether the error was harmless. To decide this question, we must look more closely at the evidence Douprea attempted to elicit. At trial, defense counsel asked Dr. Barnard whether Douprea was in a dissociative state when Detective Shooter interviewed her, and she elicited Barnard's testimony that a person who takes a shower after a killing might be in a dissociative state. Douprea now claims that Barnard should have also been permitted to testify that Douprea dissociated when stabbing Mooney and hiding the murder weapon, although counsel did not attempt to elicit such testimony at trial. We will consider the latter point first.

a. *dissociation when stabbing Mooney and hiding the knife*

Because defense counsel did not ask Dr. Barnard whether Douprea dissociated when she stabbed Mooney or when she hid the knife, or make any offer of proof to that

effect, Douprea cannot now contend that the court erred by excluding such testimony. Nor can it be argued successfully that defense counsel's failure to elicit this testimony was due to the court's refusal to permit other evidence of dissociation, since the record does not indicate that Barnard *would* have testified that Douprea was in a dissociative state when she stabbed Mooney or hid the knife, even if she had been asked to do so.

Dr. Barnard's report did not opine that Douprea dissociated when she stabbed Mooney or hid the knife. In her "Summary of Findings," Barnard mentions that Douprea "has a history of dissociative experiences beginning in childhood," but she concludes that it was the "impact of intimate partner battering" – not dissociation – that played a critical role in Douprea's perceptions at the time of the incident that resulted in Mooney's death. Elsewhere in her report, Barnard reasserts that Douprea has a history of dissociation beginning in childhood, but there is no mention of any dissociation during or after the stabbing except, vaguely, that "[s]he also has blank periods during the series of events resulting in and subsequent to Daniel's death." Barnard does not identify those blank periods, but we know it cannot be Douprea's stabbing Mooney or hiding the knife (or taking a shower, see *post*) because Barnard reports Douprea's distinct recollection of these matters.⁹

Moreover, Dr. Barnard's description of dissociation indicates that Douprea did *not* dissociate when she stabbed Mooney or hid the knife. In her report, Barnard defined dissociation as a "response to severe trauma" in which "the psyche 'splits off.'" "[T]he person experiences a sense of detachment from self . . . [during which] there is a persistent or recurrent experience of feeling detached from one's mental processes or body, as if one is outside their own body observing." Barnard said dissociation "can even

⁹ Dr. Barnard's report adds: "In this case, [Douprea] has significant gaps in memory. She has a recollection of the basics of what occurred prior to [Mooney] being stabbed, but many details are lost or out of order. She has even more significant gaps in memory for behavior subsequent to [Mooney] being stabbed. She knows she was frantically moving about but cannot effectively recount her actions or the sequence of her actions. Much of what occurred was likely in a dissociative state and memory tracks were disrupted." But the stabbing and hiding the knife were not forgotten.

take the form of traumatic amnesia, where the person has no memory at all for certain events or actions.” By contrast, Douprea made clear to the police and to Barnard that she was aware of what was happening when she stabbed Mooney and the reasons she did it. That is quite the opposite of the “detachment” indicative of dissociation.

Finally, an opinion that Douprea dissociated at the time of the killing would have been inconsistent with Douprea’s primary defense – that she stabbed Mooney because she *perceived* an imminent deadly threat, not in a detached state of dissociation.¹⁰

For all of these reasons, we find that the absence of any opinion that Douprea dissociated in stabbing Mooney and hiding the knife was not the result of judicial error, and even if it were error, there is no reasonable probability that the opinion, if admitted, would have led to a more favorable outcome for Douprea.

b. *dissociation during interview*

The only time defense counsel specifically asked Dr. Barnard at trial if Douprea was in a dissociative state (during the interview with police), the court sustained the prosecutor’s objection and the defense promptly elicited Barnard’s testimony that a flat affect exhibited by a person being interviewed about the death of her partner “could be attributed to shock . . . or dissociation.” From this evidence, as well as Barnard’s testimony that “dissociation means that the person pretty much has flat affect or they’re

¹⁰ Douprea argues that the dissociation evidence was consistent with her claim of self-defense, because she was aware that she was in a life-threatening situation and intended to use the knife to defend herself but dissociated in response to the trauma. For this proposition, she cites *Cortes, supra*, 192 Cal.App.4th 873, which held it was error to exclude an expert’s opinion that the defendant had entered into a dissociative state, where the expert seemingly opined that the defendant stabbed the victim one time out of self-defense and then additional times in a dissociated state. (*Id.* at pp. 893-894.) *Cortes* is readily distinguishable. There, the expert’s report recounted that the defendant said the “noise around him disappeared,” he saw his hand “stabbing down through silence,” and he lacked memory of his continued stabbing of the victim. (*Id.* at p. 893.) From this the expert drew his opinion of dissociation. (*Id.* at pp. 893-894.) In the matter before us, Dr. Barnard’s report did not specify any particular indication of dissociation during the stabbing. Moreover, unlike the defendant in *Cortes*, Douprea never told the expert or the police that the first stab was for self-defense and the rest were in the context of an out-of-body experience or other circumstance from which dissociation might be inferred.

not feeling what they're talking about or experiencing" due to having experienced something "horrific," the jury could have inferred that Douprea's flat affect during the interview with Detective Shooter was attributable to a dissociative state induced by the trauma of the stabbing incident. The evidence that the defense was able to elicit concerning Douprea's affect during the interview was thus the functional equivalent of the opinion it was not permitted to elicit.

Douprea argues that Dr. Barnard's hypothetical testimony regarding a flat affect and dissociation lacked relevance without her opinion that Douprea dissociated, citing *Cortes, supra*, 192 Cal.App.4th at p. 912 [exclusion of opinion that defendant dissociated, removed the relevance of the expert's testimony about general characteristics of dissociation].) In *Cortes*, however, there were apparently no hypotheticals like the ones asked by Douprea's defense counsel, which elicited expert testimony that persons with certain types of behavior or demeanor – which Douprea displayed – were symptomatic of a dissociated state. (*Id.* at pp. 901, 912.)

Moreover, Douprea was permitted to introduce other evidence to explain why she had displayed a flat affect during the interview. Her main approach to the subject – as defense counsel had told the court before trial—was that her flat affect was *attributable to PTSD*, a topic Dr. Barnard and defense counsel discussed at length. Precluding Barnard's opinion that Douprea was in a dissociative state does not constitute reversible error.

c. *dissociated when taking a shower*

Similarly, Douprea fails to establish reversible error to the extent she now argues that Dr. Barnard should have been allowed to opine that Douprea was in a dissociated state when taking a shower after the killing.

Dr. Barnard was allowed to testify that a person who takes a shower after a killing might be in a dissociated state. From this evidence, the jury could have found that Douprea, who took a shower after killing Mooney, had entered into a dissociative state. Barnard's opinion would not have added much.

Indeed, there is no indication that Dr. Barnard *would* have opined that Douprea was in a dissociative state when she showered after killing Mooney. In her report, Barnard wrote: “[Douprea] *knew* she was getting frantic so she took a shower, *thinking that would help to calm her down.*” (Italics added.) That reflects a conscious decision, not a dissociative state. And even if Barnard had opined that Douprea was in a dissociative state when she showered, a cross-examination based on her own report would have made it quite unlikely that the jury would have accepted her opinion. Thus, even if Barnard had been permitted to opine that Douprea was in a dissociated state when she showered, there is no reasonable probability that it would have resulted in a more favorable outcome to Douprea.

B. CALCRIM No. 851: Use of IPV Evidence

Douprea contends that the court’s instruction on IPV under CALCRIM No. 851 impermissibly limited the jury’s consideration of the IPV evidence to her claim of self-defense and imperfect self-defense, and that the jury should have been explicitly instructed that the evidence could also be considered to assess Douprea’s credibility, to determine whether she harbored the mental state required for murder, and to determine whether the evidence supported a heat of passion finding.

1. Background

The prosecution requested that the court use CALCRIM No. 851 to instruct on IPV, without defense objection.¹¹ Tracking the language of CALCRIM No. 851, the court instructed the jury as follows: “You have heard testimony from Linda Barnard regarding the effect of intimate partner battering. [¶] Linda Barnard’s testimony about intimate partner battery is not evidence that the defendant committed any of the crimes charged against her. [¶] *You may consider this evidence only in deciding whether the*

¹¹ Douprea’s trial attorney did not object to the use of CALCRIM No. 851 or request the modification Douprea now espouses. Douprea argues that the court had a *sua sponte* duty to modify the instruction because the jury needed to know how to use the IPV evidence that was presented. Respondent does not contend that Douprea waived or forfeited her right to challenge the court’s use of the instruction, so we need not and do not decide the issue.

defendant actually believed she needed to defend herself against [an] immediate threat of great bodily injury or death, and whether that belief was reasonable or unreasonable.

[¶] When deciding whether the defendant's belief was reasonable or unreasonable, consider all of the circumstances as they were known by or appeared to the defendant. Also consider what conduct would appear to be necessary to a reasonable person in a similar situation with similar knowledge." (Italics added.)

2. Law

There is no dispute that, just as CALCRIM No. 851 states, evidence of IPV may be relevant to the subjective prong of imperfect self-defense (*Aris, supra*, 215 Cal.App.3d at p. 1198) and the objective prong of self-defense (*Humphrey, supra*, 13 Cal.4th at pp. 1085-1086). Nor is there any dispute that the jury was permitted to consider the IPV evidence in this case for those purposes.

But in addition, Douprea claims, the IPV evidence was relevant to three other matters: (1) Douprea's *credibility*, in the sense that it dispels common misconceptions about battered women (*People v. Brown* (2004) 33 Cal.4th 892, 903); (2) whether Douprea harbored the *intent* for the charged crime (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 98-99)); and (3) a *heat of passion* theory. Douprea argues that the jury would have understood from the instruction that it could consider the IPV evidence "only" for the purpose of evaluating her self-defense claim, and not for purposes of credibility, mental state, and heat of passion.¹²

¹² Douprea points out that the use notes of CALCRIM No. 851 advise that the instruction might need modification if the defense offers IPV testimony on an issue other than whether the defendant actually and reasonably believed in the need for self-defense. Former pattern instruction, CALJIC No. 9.35.1, expressly provided for a modification to state that such evidence could be considered for "proof relevant to the believability of the defendant's testimony." In addition, CALCRIM No. 850, the instruction given when a witness (as opposed to a defendant) testifies that IPV evidence is presented, informs the jury IPV evidence is relevant to assess credibility: "You may consider this evidence only in deciding whether or not _____'s conduct was not inconsistent with the conduct of someone who has been abused, and in evaluating the believability of (his/her) testimony." Douprea claims the jury in her case should have been instructed similarly.

3. Use of IPV Evidence as to Douprea's Credibility

Douprea argues that her credibility was at issue, particularly because the prosecution relied heavily upon her interview with the police. During the interview, Detective Shooter told Douprea that her decision to confront Mooney instead of escaping created an inconsistency that ruined her credibility. She replied that she loved Mooney even though he abused her, the abuse was her fault, and she could usually calm him down. Douprea contends that her credibility was buttressed by Dr. Barnard's testimony that it is a common misconception that an IPV victim would leave her abuser if she wanted to. But, Douprea complains, the jury was not told that it could consider this testimony to evaluate her credibility.

We find no error. Although the court's instruction pursuant to CALCRIM No. 851 did not tell the jury that it could use the IPV evidence to assess Douprea's credibility, the jury necessarily did so in following the instruction and considering the IPV evidence as to Douprea's self-defense claims. Specifically, in deciding her self-defense claims, the jury had to decide whether Douprea stabbed Mooney out of an actual and reasonable fear of imminent great bodily injury or death; relevant to this question was why she decided to confront Mooney rather than leave the apartment; and in using IPV evidence pursuant to CALCRIM No. 851 to evaluate her decision to confront Mooney, the jury necessarily used IPV evidence to assess the credibility of her explanation for her decision. Thus, in complying with CALCRIM No. 851, the jury effectively used IPV evidence to assess Douprea's credibility.

4. Use of IPV Evidence as to Mental State

Douprea argues that, if the jury had been instructed that it could use IPV evidence to assess her mental state when entering Mooney's bedroom, the jury might have found that IPV caused her to enter the bedroom with the intent to calm him down, rather than with the intent to kill him with premeditation and deliberation. Again, we must disagree.

Douprea stated that she entered Mooney's room because her past *experience* was that she could calm him down. Although Douprea now asserts generally that the evidence showed IPV's affect on perceptions and behavior, and that she loved Mooney

and did not want him to get into trouble, she points to no specific evidence that *IPV* accounted for her perception that she had calmed Mooney in the past or could calm him down this time *and*, further, caused her to enter Mooney's room with an open knife in her pocket and then stab him repeatedly with some mental state other than malice with premeditation and deliberation.

Indeed, the fact that the jury rejected Douprea's self-defense and imperfect self-defense theories shows that it concluded, despite the *IPV* evidence, that Douprea did not have an actual fear of imminent great bodily injury or death when she stabbed Mooney. (And this was the only reason she had given the police for stabbing him.) Douprea does not explain how, given this finding, the jury could have decided that the *IPV* evidence meant she did not intend to kill Mooney when she plunged the knife four times into his neck, even if it had been instructed that it could consider *IPV* evidence for that purpose.

5. Use of IPV Evidence to Decide Heat of Passion

Lastly, Douprea contends that the *IPV* evidence was relevant to provocation for purposes of a heat of passion theory. Specifically, she argues that *IPV* evidence might have shown that Douprea was provoked to a state of passion and whether a reasonable person would have been so provoked.

Douprea's argument is unpersuasive. Even if the jury had been instructed that it could use *IPV* evidence to decide heat of passion issues, there was no relevant *IPV* evidence for the jury to consider: Dr. Barnard never testified that an *IPV* victim is more likely than anyone else to be provoked into a heat of passion, and there was no other evidence linking heat of passion to *IPV*. Furthermore, Douprea's defense theory was not that Douprea stabbed Mooney in a heat of passion, but that she stabbed him in reasonable or unreasonable self-defense.

Douprea fails to establish error in regard to the court's use of CALCRIM No. 851.

C. Failure to Object to Prosecutor's Use of IPV Evidence

Evidence Code section 1107, subdivision (a), makes expert testimony about *IPV* evidence admissible "except when offered against a criminal defendant to prove the occurrence of the act or acts of abuse which form the basis of the criminal charge."

Douprea argues that the prosecution violated this statute and committed misconduct when it suggested in its cross-examination of Dr. Barnard and in its closing argument that Douprea was more of an IPV perpetrator than an IPV victim. Specifically, Douprea contends the prosecutor (1) elicited evidence from Barnard about female-initiated IPV leading to lethality, (2) argued to the jury that the IPV evidence proved Douprea committed murder, and (3) misled the jury into thinking that Barnard never diagnosed Douprea as a battered woman. Because defense counsel did not object to any of these matters at trial, Douprea couches her arguments as an ineffective assistance claim.

Douprea contends her attorney should have objected to the prosecutor's cross-examination and closing argument, noting that a prosecutor's behavior violates the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process. (*Darden v. Wainwright* (1986) 477 U.S. 168, 178-179; *People v. Hill* (1998) 17 Cal.4th 800, 819.) A prosecutor's behavior is misconduct under California law when it involves the use of “‘‘‘‘‘deceptive or reprehensible methods to attempt to persuade either the court or the jury.’”’ (*Hill, supra*, 17 Cal.4th at p. 819.) When a misconduct claim focuses on the prosecution's comments made before the jury, “the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.” (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.)

1. *Failure to Object to Prosecutor's Cross-Examination*

During cross-examination of Dr. Barnard, the prosecutor elicited evidence about female-initiated IPV. For example, the prosecutor asked Dr. Barnard whether: the IPV dynamics she described on direct examination applied when there was a female aggressor; men are victims of IPV; male victims fail to report abuse; the cycle of violence leads to an increased chance of lethality if uninterrupted; threats of suicide create a potential for lethality; possessing and using weapons is a lethality factor; the phrase “Battered Women's Syndrome” was changed to “Intimate Partner Violence” to account for male victims; the concept of “ownership of the battered partner” might include a feeling of entitlement to control “what parties they might attend”; females use a weapon

as an “equalizer”; women engage in controlling behavior; and controlling behavior is present in female-initiated IPV.

It was not incompetent or unreasonable for defense counsel to refrain from objecting to the prosecutor’s cross-examination. In the first place, defense counsel could have reasonably believed that the evidence was admissible under Evidence Code section 1107 because it was not being offered to prove that Douprea murdered Mooney, or “to prove the occurrence of the act or acts of abuse which form the basis of the criminal charge” (Evid. Code, § 1107, subd. (a)), but merely to rebut the defense argument that Douprea was an IPV victim. The implication of the prosecutor’s questions was that females can be IPV perpetrators and, given the dynamics of the relationships Douprea had with Mooney and other men, she was more of a perpetrator than a victim of IPV. This line of questioning was obviously germane to whether Douprea was an IPV victim.

Second, defense counsel could have reasonably perceived that the prosecutor’s cross-examination was not appearing to do a whole lot of damage. When the prosecutor asked whether the dynamics Barnard had described on direct examination applied when the aggression was initiated by a female, she responded that “not all the things are the same.” When the prosecutor asked whether an uninterrupted cycle of violence leads to lethality, Barnard replied that the violence might actually stay at the same level and *not* escalate. When asked whether females use a weapon, Barnard stated that “[i]t can be” but there was very little research. When asked whether controlling behavior is present in female-initiated IPV, Barnard responded that females display controlling behavior “but we don’t see the level of coercive control that we see with male perpetrators.” She added that, in regard to IPV, women are more likely to be assaulted than men. And, Barnard testified: “[S]o far we don’t have anything to show that female perpetrators or violence against male partners includes these same kinds of power and control issues, that most male victims of domestic violence don’t fear for their lives, that the same kind of isolation, power and control socially doesn’t exist and within the relationship doesn’t seem to exist in the same way.”

Since defense counsel's objection would have likely been overruled, it was not incompetent for counsel to refrain from drawing attention to the testimony, and implicitly highlighting its importance, with an objection. And, because the objection likely would have been overruled, Douprea fails to show that the failure to object was prejudicial.

2. *Failure to Object to Closing Argument That Douprea Was IPV Perpetrator*

In closing and rebuttal argument, Douprea contends, the prosecutor argued that IPV evidence proved Douprea was guilty of murder because she was the perpetrator in the IPV cycle of violence, which escalated to lethality. When the prosecutor's statements are examined in context, however, no reasonable juror would draw the inference Douprea suggests; it was therefore not incompetent for defense counsel to refrain from objecting.

Before closing argument, the court instructed the jury: "You have heard testimony from Linda Barnard regarding the effect of intimate partner battery. Linda Barnard's testimony about intimate partner battery is *not evidence that the defendant committed any of the crimes charged against her*. You may consider this evidence only in deciding whether the defendant actually believed she needed to defend herself against immediate threat of great bodily injury or death, and whether that belief was reasonable or unreasonable." (Italics added.) The court also instructed the jury on the elements of murder and the prosecution's burden to prove each and every element beyond a reasonable doubt. Therefore, before the prosecutor even started his argument, the jury knew it could not use IPV evidence to convict Douprea.

In his closing argument, the prosecutor reminded the jury of the elements that must be proved to convict Douprea of murder according to the court's instructions, telling the jury explicitly that it "[had] to follow" those instructions. The prosecutor explained at great length why the evidence in the case – including the crime scene, Douprea's actions, Mooney's intoxication, her stabbing him four times in the neck and then trying to hide the knife, and her lies to police – established each of those elements. As to premeditation, deliberation and willfulness, the prosecutor reminded the jury that Douprea went to a separate room, armed herself with a knife, remained in the room

several minutes while angry, and then went to Mooney's room and stabbed him repeatedly. The prosecutor next explained why the verdict should not be voluntary manslaughter due to heat of passion and imperfect self-defense and why Douprea's self-defense claim was meritless. Next the prosecutor went through a timeline of what led up to the offense and the day of the murder, discussed at length Douprea's false statements to police, and criticized Dr. Barnard's finding of PTSD.

After all of this – some 30 pages of transcript spent on explaining that Douprea should be convicted of first degree murder based only on the elements of the crime and the lack of any defense – the prosecutor turned to the defense contention that Douprea's actions could be explained by IPV. He stated: “The other important thing that was presented in this case is testimony from Dr. Barnard about intimate partner violence. . . . She explained many of the dynamics of intimate partner violence. In part Counsel wants to rely upon that to portray Ms. Douprea as being a battered woman, that she has been a long suffering victim of intimate partner violence. And she will behave in ways that a person might just on the face of things say that's counterintuitive, like failing to call the cops, or minimizing violence and things of that nature.”

Then the prosecutor made the first statement that Douprea now calls misconduct: “But when you listen to everything that Dr. Barnard was saying about intimate partner violence, and you apply it to Ms. Douprea, a lot of it applies to her as the batterer, as the initiator of aggression time and time again in relationships that she's found herself in.” With that, the prosecutor went on to a different topic.

When considered in context, the prosecutor's statement that Douprea was “the initiator of aggression” was obviously aimed at negating Douprea's claim that she was a victim of IPV, not at proving she committed murder as an IPV perpetrator.

The second statement of which Douprea now complains occurred during the prosecutor's rebuttal argument. Again, we look to its context. The prosecutor argued that it was “not reasonable to believe that Daniel Mooney was the perpetrator of significant violence against Sheyna Douprea” and explained how Mooney was not violent, even when intoxicated.

The prosecutor next contended that it was “not reasonable to believe that Sheyna Douprea is a battered woman for purposes of the intimate partner violence *defense*,” and segued into the IPV factors and how Douprea met those factors as an IPV perpetrator, not an IPV victim. (Italics added.) In *this* context, the prosecutor stated: “Let’s talk about the cycle of violence and how it applies to Sheyna Douprea as the perpetrator. Sheyna Douprea was not economically abused. . . . If economic abuse was being perpetrated, it was being perpetrated by Sheyna Douprea who chose men who had to depend on her completely. [¶] Sexual abuse. We know twice she hit her boyfriends until they had sex with her. One of them while he was dead asleep. Threats. She attacks them, says I’ll kill you. She tells Mr. Schneider I’ll kill you if you touch my cat again. Threats are a way of executing control of the apartment. Ownership of the batterer. [¶] Mr. Waner [the other prosecutor] asked Dr. Barnard, does that mean the perpetrator decides where you go, when you’ll go, what you do? Yes. They were going to that Christmas party, ladies and gentlemen. Sheyna Douprea had had her life worked out. She had a plan. She had an image in her mind of what her life was going to be like. And come hell or high water, she was going to control everything and everyone in it to make that happen. And she chose men that were easier to control because they were not in a position in their lives to stand up for themselves. Men fail to report domestic violence just as often as women. Why are these accounts of the beer cans, of the beating until having sex, of the attacks with the fingernails that weren’t observed by other people unreported? Does that mean they didn’t happen? No. No. It means they were victims of domestic violence and they fell right into that pattern. They fell right into that cycle of violence with Sheyna Douprea as the perpetrator. Dr. Barnard also talked about lethality. Fantasies or threats of suicide. Sheyna Douprea. Fantasies or threats of homicide. Sheyna Douprea. Use of weapons. Fingernails, knives. Sheyna Douprea, if uninterrupted, can lead to lethality.”¹³

¹³ The prosecutor then proceeded to a different topic: “It is not reasonable to believe that Sheyna Douprea stabbed Daniel Mooney out of fear for her life on the afternoon of December 14th, 2008.”

The obvious point of the prosecutor's comments was that Douprea's history showed she was an IPV perpetrator rather than an IPV victim, and thus her conduct in stabbing Mooney to death could not be *defended* on the ground that she was an IPV victim. In *context*, the statements that there was a "cycle of violence with Sheyna Douprea as the perpetrator" and "Sheyna Douprea, if uninterrupted, can lead to lethality," did not say that Douprea killed Mooney because she was a perpetrator of IPV, or suggest that the jury should disregard the court's instructions and convict Douprea of murder on that basis. At the very least, it was reasonable for defense counsel to conclude that it would be inappropriate or unnecessary to object to the prosecutor's argument, and that doing so would be tactically unwise because of the attention it might draw to this portion of the argument. Accordingly, Douprea fails to establish ineffective assistance.

3. Failure to Object To Prosecutor's Suggestion of No IPV Diagnosis

Douprea also argues that the prosecutor misled the jury into believing that Dr. Barnard never diagnosed her as a battered woman, when in fact Barnard had made such a diagnosis in her report. To make this argument, she cobbles together two phrases by the prosecutor – that "[p]ost traumatic stress disorder is what [Dr. Barnard] was looking for" and "she was limited in her assignment" – which are separated by nearly 50 pages of reporters' transcript. Douprea adds that the prosecutor's conduct was particularly "egregious" because it was the prosecution's motion that caused Dr. Barnard to be prohibited from offering her diagnosis that Douprea is a battered woman.

Douprea's argument is untenable. In the first place, the reason that Dr. Barnard did not opine that Douprea had IPV was because *defense counsel* did not elicit it. Moreover, no reasonable juror would understand the prosecutor's comments, independently or collectively, in the way Douprea now asserts.

The prosecutor never said that Dr. Barnard had not diagnosed Douprea as a battered woman. In closing argument, he argued that "[p]ost traumatic stress disorder is what she was looking for," but the context shows he was suggesting that Barnard found PTSD because she was supposed to find it, while disregarding a lot of information that led to a contrary conclusion. The prosecutor stated: "[A]mong the things [Dr. Barnard]

talked about was post traumatic stress disorder. And I am not here to impugn the professional integrity or the professional competence of Dr. Barnard. The only impression I was left with that I will share with you is that the focus of her investigation and inquiry into Ms. Douprea's situation was extremely limited. And that she had willfully placed blinders on her. I think that would be a fair characterization of it. Post traumatic stress disorder is what she was looking for. Post traumatic stress disorder is what she found and what she reported to you. What is clear is there is a whole host of other stuff going on in this young woman's mind. She even acknowledged the possibility of various co-occurring disorders. She acknowledged all of the materials that might have been helpful that she was not provided or did not review.”¹⁴ In short, the prosecutor was challenging Barnard's methodology in reaching the PTSD diagnosis, not suggesting that Barnard had never made any IPV diagnosis, or that Barnard had found PTSD to the exclusion of IPV.

In rebuttal argument – some 48 pages of transcript later – the prosecutor stated: “It is not reasonable to believe that Sheyna Douprea is a battered woman for purposes of the intimate partner violence defense. Dr. Barnard knows what she's talking about. *She was limited in her assignment.* She was limited in the information she was given. But she gave us very good information. And information she gave us fits Sheyna Douprea.” (Italics added.)

It is extremely unlikely that any lay juror would think “limited in her assignment” referred to the scope of inquiry that defense counsel had granted to Dr. Barnard in the case, rather than what Barnard was to testify at trial. The prosecutor did not indicate that

¹⁴ Douprea also refers us to another page in the transcript, about 40 pages earlier than the prosecutor's first statement, without quoting any particular statement by the prosecutor. On this page, the prosecutor discussed Douprea's threats against her boyfriends, use of weapons, and threats of suicide, and said: “There was a lot of scary things at work with regards to Ms. Douprea. And while their doctor tended to focus on post traumatic stress disorder, I would argue the exclusion of anything else. What's clear from the state of the evidence, there is a lot of stuff going on in this young woman's head.” There is not the remotest suggestion that Dr. Barnard did not diagnose Douprea with IPV in her report.

Barnard had *never* been asked to consider how IPV applied to Douprea, and no reasonable juror would have thought the prosecutor was saying that Barnard had made such an inquiry and determined that Douprea was not an IPV victim. And to the extent the prosecutor's comment could be construed to mean that Barnard was not assigned to testify that Douprea was a victim of IPV, defense counsel herself told the jury the very same thing in opening statement: “[Dr. Barnard] won’t render an opinion as to whether or not she thinks Sheyna Douprea has been the victim of intimate partner violence, but she’ll tell you about [IPV] and she will dispel some common myths that people hold who don’t understand the dynamics.”

In sum, it was not unreasonable for defense counsel to refrain from objecting to the prosecutor's statements. Douprea thus fails to establish ineffective assistance.

D. Admission of Evidence of Douprea's Prior Violent Acts

Douprea next contends the court erred in admitting several instances of her prior violence under Evidence Code section 1101, subdivision (b) and Evidence Code section 1109. (Hereafter, all statutory citations are to the Evidence Code unless otherwise indicated.)

1. Section 1101 Evidence

Section 1101, subdivision (b) allows admission of evidence that a person committed a crime or other act when relevant to prove a material fact other than disposition or bad character. (*People v. Abilez* (2007) 41 Cal.4th 472, 500 (*Abilez*)). Even if admissible under section 1101, subdivision (b), the evidence may be excluded under section 352 if its probative value is outweighed by a risk of undue prejudice. (*Abilez*, at p. 500.) We review for an abuse of discretion. (*Ibid.*)

The court admitted evidence of two prior violent incidents under section 1101, subdivision (b): the altercation in June/July 2005, when Douprea grabbed a knife and threatened to kill Schneider if he ever “messed with” her cat again (incident “c”); and part of the October 2005 altercation, in which Douprea bit Schneider when he and Gena

tried to restrain her from attacking Melia (incident “f”). Both incidents were admitted for the purpose of proving that Douprea “acted with intent to kill in this case.”¹⁵

To be admissible for purposes of intent under section 1101, subdivision (b), the prior act must be sufficiently similar to the charged offense so that the evidence of the prior act tends to support the conclusion that the defendant probably harbored the same intent in each instance. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402.) The idea is that, if a person acts similarly in similar situations, he probably harbors the same intent in each instance, such that the prior incident is circumstantial evidence of the intent (including self-defense) in the commission of the charged offense. (*People v. Thomas* (2011) 52 Cal.4th 336, 355; *People v. Robbins* (1988) 45 Cal.3d 867, 879.) Where as here the uncharged act is offered to prove intent, the required degree of similarity between uncharged act and charged offense is less than when an uncharged act is offered to show common plan or identity. (*Ewoldt, supra*, 7 Cal.4th at p. 402.)

Here, both incidents are probative of Douprea’s intent in stabbing Mooney four times with a knife. The June/July 2005 incident indicated that Douprea used a knife to threaten out of anger; that is relevant to whether Douprea displayed and then used a knife to stab Mooney out of anger with an intent to kill or, as the defense insisted, out of fear for her life. The October 2005 incident indicated that Douprea attacked Schneider when he tried to intervene in her attack on Melia; again suggesting a violent reaction that would arguably tend to disprove her position at trial that she stabbed Mooney only because she feared that she would otherwise die.

Douprea argues that the prior incidents were not sufficiently similar for admission under section 1101, subdivision (b). She contends that her act of brandishing a knife and making a threat to Schneider, with whom she did not have an intimate relationship, does not prove that she decided to stab her boyfriend. Further, she contends, biting Schneider

¹⁵ The October 2005 incident was ruled admissible as to Schneider under section 1101, but as to her mother Gena and ex-husband Melia as domestic violence under section 1109. As to the latter ruling, Douprea concedes that trial counsel either did not object to the evidence or ultimately waived the objection.

did not involve a knife and was distinguishable because Schneider placed himself in the midst of an altercation. Nonetheless, although the prior incidents were not identical to the charged offense, they were sufficiently similar and illustrative of intent for us to conclude that the court did not abuse its discretion in finding the prior incidents probative. (See *People v. Spector* (2011) 194 Cal.App.4th 1335, 1380-1381; *Cortes, supra*, 192 Cal.App.4th at pp. 884-885, 916.)

Furthermore, the court did not abuse its discretion in deciding the evidence was not unduly prejudicial under section 352. Neither prior act was particularly inflammatory when compared to the charged crime – Douprea’s repeated stabbing of her boyfriend Mooney in the neck with her knife. There is no basis for concluding that the jury decided to convict Douprea of murdering Mooney out of a need to punish her for threatening Schneider with a knife or biting him.

2. Section 1109 Evidence

Under section 1109, evidence of a prior act of domestic violence is admissible to prove that the defendant had a propensity to commit domestic violence, when the defendant is charged with an offense involving domestic violence. Evidence admissible under section 1109 is subject to exclusion under section 352. (*People v. Jennings* (2000) 81 Cal.App.4th 1301, 1313-1314.)

The trial court admitted the following under section 1109:

- (1) In June 2005 in Santa Rosa, Douprea became angry and scratched Melia’s face because Melia was smoking (incident “b”). At trial, Melia’s actual testimony was that Douprea attacked him, threw a box at him, and shoved and scratched him.
- (2) On numerous occasions, Douprea battered Melia by scratching, biting, throwing beer cans at him, and brandishing a knife four to five times (incident “d”). At trial, Melia testified that Douprea attacked him when she found him drinking with a friend, threw beer cans at him, punched him in the ribs, scratched his face, and threatened him with a knife.
- (3) In November 2005 in Las Vegas, Douprea ripped Melia’s shirt and raked her nails down the side of his face during an argument, causing visible injury (incident “g”).

At trial, Melia testified that Douprea gashed his face with her nails and ripped his shirt after he declined to have sex with her.

(4) In Santa Rosa in February 2006, Douprea attacked Patterson and Mahoney at Patterson's apartment, and threw a boot through his window, resulting in a criminal conviction (incident "h"). At trial, Patterson testified that when Douprea returned his belongings to his apartment and Patterson would not let her in, she punched and bit Patterson and Mahoney and threw a boot through Patterson's window.

(5) Douprea physically attacked Patterson six to seven times, including punching, biting, brandishing a knife and threatening to kill him (incident "i"). At trial, Patterson testified about one incident in which, after he fell asleep when Douprea wanted to have sex, he awoke to Douprea striking him.

All of these prior incidents constituted domestic violence for purposes of section 1109. The evidence of these incidents had probative value, in that they tended to refute Douprea's claim of self-defense, by showing that Douprea often initiated an incident or reacted disproportionately with anger and violence, to the point of inflicting injury, when her boyfriends did not do what she wanted. Brandishing the knife at Melia when she did not get her way arguably suggests that she brandished her knife at Mooney because he would not go to the Christmas party, rather than out of a reasonable response to any violence on his part. (See *People v. Rucker* (2005) 126 Cal.App.4th 1107, 1119-1120.) The probative value was buttressed by the fact that the sources of the evidence were independent of one another and of the victim in this case, and were corroborated in part by police reports and photographs. (See *People v. Balcom* (1994) 7 Cal.4th 414, 427.)

Furthermore, none of the events, individually or collectively, posed a risk of undue prejudice. They were not as serious as the charged offense, did not invite the jury to prejudge Douprea based on extraneous facts, were not so inflammatory as to invoke an emotional bias against her, and would not have been confused with the charged offense. (See *Rucker, supra*, 126 Cal.App.4th at p. 1120.) The trial court did not abuse its discretion in ruling this evidence admissible.

Douprea's arguments to the contrary are unpersuasive. First, she argues that not all of the prior acts involved a weapon; but the point is that, weapon or not, she repeatedly acted towards her boyfriends with violence disproportionate to their conduct. Second, she argues that the incidents were cumulative of six other incidents the court ruled admissible; but the evidence was not truly cumulative (as where multiple witnesses testify to a single event without adding to each other's testimony), since witnesses testified to *several* events to illustrate a pattern and propensity for violent reactions inconsistent with Douprea's claimed state of mind when she stabbed Mooney to death. (See *People v. Brown*, (2011) 192 Cal.App.4th 1222, 1224-1225, 1231, 1234, 1237.) Third, Douprea complains that so much of the trial was devoted to her past violent acts that the evidence "poisoned" and "overwhelmed" the trial, diverting the jury's attention so that it was "lured into convicting [Douprea] of first degree murder based on a visceral reaction to her past," and saddled her with "the impossible burden of defending against a host of uncharged crimes." In light of the issues put in play by the defenses Douprea asserted at trial, however, our review of the record discloses no abuse of discretion.

Douprea fails to establish error in the admission of the evidence.¹⁶

E. Ineffective Assistance Claim: No Objection to Prior Cutting Incident

Douprea next contends that her trial counsel provided ineffective assistance of counsel by failing to object when the prosecutor introduced evidence of an incident in which Douprea stabbed Schneider, which the court had ruled inadmissible before trial.

1. Background

Before trial, the prosecution had sought admission under section 1101, subdivision (b), of the April 11, 2006 incident involving Douprea and Schneider. In the

¹⁶ Douprea argues that Melia and Patterson testified about incidents that were not first ruled upon by the court and not mentioned in the prosecution's proffer, so the court could not have engaged in the section 352 analysis required as a constitutional safeguard by *People v. Falsetta* (1999) 21 Cal.4th 903. Douprea does not point us to any contemporaneous objection on this ground, however, and our analysis of the record indicates that any error in this regard was harmless beyond a reasonable doubt. Douprea also argues that the prosecutor misused the evidence in closing argument, but again fails to cite any contemporaneous objection on this ground.

proffer, it was alleged that Schneider made a derogatory remark to Gena, and Douprea responded by grabbing a knife and attempting to stab Schneider in the chest. To defend himself, Schneider raised his arm, which Douprea stabbed. Defense counsel opposed the admission of the evidence, and the court excluded it as inflammatory and unduly time-consuming.

At trial, however, the prosecutor on direct examination of Schneider elicited evidence of this very incident, without objection from defense counsel: Schneider testified that Gena asked him to get her a cup of coffee and he made a derogatory comment; Douprea ran towards him, holding a knife at shoulder height in a fist; Schneider used his arm to block the knife from entering his chest, and the knife cut his arm, causing a wound that Schneider showed the jury.¹⁷ On cross-examination, Schneider acknowledged that he kicked Douprea, then pregnant, in the stomach as she approached: “I put my leg up and she ran into my foot.”

Defense counsel also asked Gena about the incident. Gena testified that Schneider made the derogatory comment after she asked him to get her a cup of coffee, she heard his argument with Douprea, but she did not see what happened. Gena recalled that Douprea, who was eight months pregnant at the time, cried out in pain and later appeared with red marks on her stomach.

2. *Competence*

Douprea contends her trial counsel should have objected to the prosecutor’s elicitation of this evidence – especially since the court had already ruled it inadmissible – and there can be no tactical reason for counsel’s failure because, after all, counsel had originally sought to exclude it.

Respondent counters that Douprea has failed to demonstrate “ ‘ ‘ ‘there simply could be no satisfactory explanation’ ’ ’ for her trial counsel’s inaction. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266.) Respondent posits that the lack of objection by the defense does not appear to be an oversight, since the subject matter was raised in

¹⁷ The prosecutor also elicited testimony from Patterson that he observed a wound about three inches long on Schneider’s arm.

examinations and argument several times, counsel made other objections, and yet there was no mention by anyone of the court's prior ruling or any contention in Douprea's new trial motion that the elicitation of the evidence was erroneous. Further, respondent argues, the record does not preclude the possibility that the court changed its ruling prior to the elicitation of the evidence, either as relevant to intent under section 1101, subdivision (b), or to rebut evidence of Mooney's violent character under section 1103.

As Douprea points out, however, it would be unusual for such a ruling not to have been reported on the record, since the court on numerous occasions memorialized side bar discussions. Nor can we imagine any good reason defense counsel would ever agree to admission of the evidence without such an order (unless, perhaps, she decided to allow the evidence in order to show that Douprea acted in self-defense, as she suggested in closing argument). Thus, while this type of uncertainty in the record often leads courts to disfavor ineffective assistance claims on direct appeal, we proceed to the next issue of prejudice.

3. Prejudice

Douprea argues that the April 11, 2006 incident was uniquely harmful because it was the only prior instance in which Douprea used a knife to injure someone, for little or no reason, holding it the same way she held the knife in stabbing Mooney. Furthermore, Douprea argues, the April 2006 stabbing was inflammatory and the prosecutor used the incident in closing argument to assert that Douprea had a propensity to commit domestic violence: "If she did it before, she did it here."

We conclude it is not reasonably probable that Douprea would have obtained a more favorable outcome if the defense had objected to the evidence of her cutting Schneider. The fact is, there was already evidence that she had threatened Schneider with a knife, holding it the same way as she held it when stabbing Mooney. And there was also plenty of evidence that she had caused physical harm to several other people on several occasions while enraged for little or no reason. Those other incidents might not have resulted in a scar, but there was on some occasions photographic proof of the injuries she had caused. Accordingly, this additional testimony simply did not add much

to the mountain of evidence indicating Douprea's past violence, and in closing argument defense counsel was even able to suggest that Douprea's use of the knife against Schneider might have been out of self-defense (like her use of the knife against Mooney was supposedly out of self-defense). And although the prosecutor in closing argument did lump this incident in with the prior acts of domestic violence that could be used to show propensity under section 1109, the reference was so fleeting that the record discloses no reasonable possibility that the jury latched on to this point to convict Douprea in any way contrary to the court's instructions. Viewing the record as a whole, including all of the properly admitted evidence against her, Douprea fails to establish a ground for reversal.

F. Evidence Code Section 1109 and CALCRIM No. 852

Douprea contends that section 1109 is unconstitutional, because the admission of prior acts of domestic violence to prove a defendant's propensity to commit charged acts of domestic violence leads to a conviction based on proof less than beyond a reasonable doubt. She recognizes that our California Supreme Court "faced a similar issue when it upheld section 1108 against a Due Process challenge" in *Falsetta, supra*, 21 Cal.4th at p. 903, and that "numerous courts of appeal have found the Court's reasoning in *Falsetta* applicable to section 1109." (See, e.g., *People v. Johnson* (2010) 185 Cal.App.4th 520, 529.) She nonetheless argues that *Falsetta* is incorrect in its reliance on section 352 as a constitutional safeguard, and that its holding should not be extended to section 1109. We are not persuaded that we should part ways with the cited precedent.

Douprea also contends that CALCRIM No. 852 is unconstitutional, arguing that it undercuts the presumption of innocence and the right to proof beyond a reasonable doubt, for reasons our Supreme Court rejected (as to section 1108) in *People v. Loy* (2011) 52 Cal.4th 46, 71-77, and *People v. Reliford* (2003) 29 Cal.4th 1007, 1013-1015 (*Reliford*). Douprea notes that California appellate courts have applied the reasoning in *Reliford* to section 1109 (see, e.g., *People v. Reyes* (2008) 160 Cal.App.4th 246, 251), but contends these cases were wrongly decided. She fails to convince us that these precedents are in error, or that error occurred in this case.

G. Heat of Passion Instruction

The malice required for murder is negated completely, and the crime is reduced to manslaughter, where it is shown that the defendant killed when subjectively provoked to the heat of passion and a reasonable person would have been so provoked. (*People v. Steele* (2002) 27 Cal.4th 1230, 1252.) Where only the subjective prong of heat of passion is satisfied (i.e. the defendant killed in heat of passion, but it was not reasonable for her to be in the heat of passion), the crime is still murder, but only in the second degree, since the subjective mental state of heat of passion is inconsistent with, or prevents the formation of, premeditation and deliberation. (*People v. Wickersham* (1982) 32 Cal.3d 307, 329, overruled on another ground in *People v. Barton* (1995) 12 Cal.4th 186, 200-201 (*Wickersham*)). Douprea contends the court's instructions misled the jury as to the provocation necessary to reduce murder from first degree to second degree.

1. The Court's Instructions

The court provided a general instruction on first and second degree murder, based on CALCRIM No. 521. At defense counsel's request, the court also instructed the jury using CALCRIM No. 522 and CALCRIM No. 570.

CALCRIM No. 522 provides that “[p]rovocation may reduce a murder from first degree to second degree and may reduce a murder to manslaughter,” so if the jury concludes the defendant committed murder but was provoked, it must consider the provocation in deciding whether the murder was in the first or second degree and in deciding whether the crime was murder or manslaughter.

CALCRIM No. 570 discusses the provocation needed to reduce murder to manslaughter. Essentially, it instructs that if the defendant was provoked to a heat of passion, and a person of average disposition in the circumstances would have been provoked and reacted from passion, the killing is reduced from murder to voluntary manslaughter. CALCRIM No. 521, 522, and 570 do not specify that the provocation needed to reduce murder from first to second degree need not be objectively reasonable.

2. Analysis

Douprea does not contend that CALCRIM No. 570, which pertains to reducing murder to manslaughter, is incorrect. Instead, she urges that CALCRIM No. 522 is incomplete, and CALCRIM Nos. 522 and 570 when read together are misleading, since they make it seem that the provocation needed to reduce murder from first to second degree must be the “reasonable” provocation to passion that is required to reduce murder to manslaughter. Her argument is unavailing for several reasons.

First, the doctrine of invited error bars Douprea’s arguments to the extent she claims CALCRIM No. 522 (or 570), individually or collectively, are erroneous. “ ‘ ‘ ‘The doctrine of invited error bars a defendant from challenging an instruction given by the trial court when the defendant has made a ‘conscious and deliberate tactical choice’ to ‘request’ the instruction.” ’ ” (*People v. Harris* (2008) 43 Cal.4th 1269, 1293; see *People v. Wickersham, supra*, 32 Cal.3d at p. 330.) Once it is shown that counsel made a conscious, deliberate tactical choice between having the instruction and not having it, the invited error doctrine applies even if counsel did not correctly understand all the legal implications. (*People v. Cooper* (1991) 53 Cal.3d 771, 831.)

Here, Douprea’s defense attorney requested the instruction. Since CALCRIM No. 522 is an instruction that need not be given absent a request (*People v. Rogers* (2006) 39 Cal.4th 826, 877-878), defense counsel’s request for it showed a conscious and deliberate tactical choice.

Second, Douprea forfeited her right to argue that an *additional* instruction or modification to CALCRIM No. 522 was necessary. The court had no *sua sponte* duty to instruct the jury on provocation with respect to first and second degree murder, because provocation in this context negates the element of deliberation, as opposed to serving as a defense to the crime of murder. (*People v. Middleton* (1997) 52 Cal.App.4th 19, 28-33, disapproved on other grounds in *People v. Gonzalez* (2003) 31 Cal.4th 745, 752, fn. 3.) Defense counsel’s failure to request an instruction as to the provocation necessary to reduce first degree murder to second degree murder forfeited or waived Douprea’s right to assert error based on the absence of such an instruction. (But see *People v. Hernandez*

(2010) 183 Cal.App.4th 1327, 1331, fn. 2 [failure to object to CALCRIM No. 522 did not forfeit appellate review because a misleading instruction would affect defendant's substantial rights] (*Hernandez*); Pen. Code, § 1259.)

Third, in any event Douprea fails to establish error. CALCRIM No. 522, standing alone or read in concert with CALCRIM No. 570, was neither inaccurate nor reasonably likely to mislead the jury into thinking that a defendant who is subjectively provoked must be convicted of first degree murder unless the provocation was reasonable. CALCRIM No. 522 distinguished between provocation to reduce murder to manslaughter, and provocation to reduce murder from first degree to second degree. CALCRIM No. 570 dealt exclusively with provocation to reduce murder to manslaughter. CALCRIM No. 521 told the jury that first degree murder differs from second degree murder in that the former requires a killing that is intentional, deliberate, and premeditated. Read together, CALCRIM No. 521 and CALCRIM No. 522 showed that provocation can reduce first degree murder to second degree murder by negating this intent, deliberation and premeditation, *without* the proviso of CALCRIM No. 570 (expressly made applicable only to the reduction of murder to manslaughter) that the provocation must be reasonable. (See *Hernandez, supra*, 183 Cal.App.4th at pp. 1333-1335 [CALCRIM No. 522 not incomplete or misleading in failing to specify that provocation can negate premeditation and deliberation, even if insufficient to reduce murder to manslaughter].) Considering the totality of the instructions and the closing arguments of counsel, we find no probability that the jury was misled into legal error.¹⁸

H. Cumulative Error

Douprea contends that the cumulative effect of trial court errors and prosecutorial conduct requires reversal. We disagree. To the extent there was error, the cumulative prejudicial effect, in light of the entire record, is insufficient for reversal.

¹⁸

As Douprea asserts: "The record shows that this was a careful jury that paid attention to the instructions and struggled to resolve the critical distinction between first and second degree murder."

III. DISPOSITION

The judgment is affirmed.

NEEDHAM, J.

We concur.

JONES, P. J.

BRUINIERS, J.

People v. Douprea (A131031)

SUPREME COURT OF THE UNITED STATES

SHEYNA DOUPREA)
Petitioner,) NO. _____
v.) CERTIFICATE OF SERVICE
JANEL ESPINOZA,)
Warden)
Respondent.)
_____)

I hereby certify that I was appointed to represent the petitioner under the Criminal Justice Act, 18 U.S.C. 3006A and that I have on this date served copies of the petitioner's Petition for Writ of Certiorari by depositing them in the U.S. Mail, first class postage prepaid, at Berkeley, California and addressed to:

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Dated: _____, 2020.

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