No.

IN THE SUPREME COURT OF THE UNITED STATES

MELISSA DEAN-BAUMANN

Petitioner,

v.

JANELLE ESPINOZA, Warden,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case presents questions about the AEDPA:

I. Do the California Courts' Denials Bar Dean-Baumann's Federal Claims? ; Does *Martinez* Apply to Ineffective Assistance of Trial and Appellate Counsel Claims Raised in a State Habeas Petition?

II. Did the Trial Court's Failure to Instruct on the Lesser Included Misdemeanor Offense Deny Dean-Baumann Her Federal and State Constitutional Due Process Rights?

III. Should Dean-Baumann Get an Evidentiary Hearing on Her Claims? ; Did the Courts Unreasonably Refuse to Hold an Evidentiary Hearing?

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No.

IN THE SUPREME COURT OF THE UNITED STATES

MELISSA DEAN-BAUMANN
Petitioner,
v.
JANEL ESPINOZA, Warden,
Respondent.

Petitioner, **MELISSA DEAN-BAUMANN**, petitions for a writ of certiorari to review the United States Court of Appeals for the Ninth Circuit's October 28, 2020 Order denying Dean-Baumann's request for a certificate of appealablity. (Appendix A)

OPINION BELOW

On October 28, 2020, the Ninth Circuit Court of Appeals denied Dean-Baumann's request for a certificate of appealablity. (Appendix A)

JURISDICTION

The jurisdiction of this Court is 28 U.S.C. § 2254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. Amends. V, VI, XIV; 28 U.S.C.§ 2254.

STATEMENT OF THE CASE

On November 20, 2014, a Riverside County Superior Court jury convicted Dean-Baumann of second-degree murder (Cal. Penal Code § 187(a); Ct. 1), vehicular manslaughter with gross negligence while intoxicated (Cal. Penal Code § 191.5 (a); Ct. 2); driving under the influence and causing injury (Cal. Veh. Code § 23153(a); Ct. 3); driving with .08% or higher blood alcohol content and causing injury (Cal. Veh. Code § 23153(b); Ct. 4); and child endangerment intoxicated (Cal. Penal Code § 273a(a)(5).

The jury also found several sentence enhancements to be true.

On January 23, 2015, the trial court sentenced Dean-Baumann to fifteen years to life in state prison.

Dean-Baumann appealed her convictions and sentence. The California Court of Appeal (CCA) struck the great bodily injury enhancement for count 2 and affirmed the judgment as modified.

Dean-Baumann filed a petition for review in the California Supreme Court (CSC). The CSC denied the petition on July 27, 2016.

On October 20, 2017, Dean-Baumann filed a habeas corpus

petition in the CCA. On October 26, 2017, the court of appeal denied the petition without prejudice to Dean-Baumann refiling it in Superior Court.

On November 3, 2017, Dean-Baumann filed a habeas corpus petition in Riverside County Superior Court (RCSC). The RCSC denied the petition in a reasoned decision on March 7, 2018.

On April 3, 2018, Dean-Baumann filed a habeas corpus petition in the CCA. The CCA denied the petition in a reasoned decision on April 11, 2018. On April 13, 2018, Dean-Baumann filed a petition for review in the CSC. The CSC denied the petition on June 13, 2018.

Dean-Baumann filed a habeas petition in the federal district court. The federal district court denied the petition. (No. 5:17-cv-02187-JAK-SS)

On October 28, 2020, the Ninth Circuit denied Dean-Baumann's request for a Certificate of Appealability. (Appendix A)

FACTUAL AND PROCEDURAL BACKGROUND[1]

A

In May 2003 a police officer stopped Dean-Baumann after he observed her vehicle make a right turn and then a U-turn before it turned left, drove over a sidewalk, through a dirt field, and stopped behind a house. When the officer explained why he stopped her, Dean-Baumann stated she was going home and this was the quickest route. The officer smelled alcohol on her breath and noticed she had bloodshot and watery eyes. She also had slurred speech and a dry mouth. Dean-Baumann denied drinking. However, she did not perform well on field sobriety tests. She was cooperative, but giggly during the field sobriety tests. The results of two preliminary alcohol sensor tests (breathalyzer) were 0.14 and 0.13. Dean-Baumann was arrested and cited for driving under the influence. Later, in 2009, Dean-Baumann was required to attend drug and alcohol counseling sessions regarding the impact of driving under the influence.

On September 10, 2012, Dean-Baumann's boyfriend called 911 because he suspected she was trying to pick up their child from school after she had been drinking. Dean-Baumann knocked the phone from his hand as he was calling and she left with the child in the car. Her boyfriend told her not to drink and drive with their children in the vehicle.

B

On December 13, 2012, at approximately 12:30 p.m., Dean-Baumann ran a red light at the intersection of McCall Boulevard and Encanto Drive

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[1] The facts, taken from the California Court of Appeal's written decision on direct review are presumed correct. 28 U.S.C. § 2254(e)(1); *Slovik v. Yates,* 556 F.3d 747, 749 n.1 (9th Cir. 2009).

in Menifee, California. She drove her Chevrolet Tahoe into the intersection at a high rate of speed and struck a Saturn driving the opposite direction, which was turning left onto Encanto Drive. A witness, who was in the left turn lane behind the Saturn, saw the Tahoe come toward the intersection without slowing down. The driver of the Tahoe did not appear to be paying attention to the road. She had one hand on the steering wheel in the 12 o'clock position as she looked toward the right. She appeared to be trying to find something or grab something with her other hand.

Donald F. was taking his 86-year-old wife, Phyllis F., to the hairdresser and turned left on a green turn signal from McCall Boulevard onto Encanto Drive. As he did so, his vehicle was hit on the passenger side by Dean-Baumann's vehicle. Phyllis F. died from blunt impact injuries to the torso as a result of the collision. Donald F. was taken to a trauma center. He sustained cuts, bruises and a concussion.

After the collision, a witness saw Dean-Baumann raise her hands in the air. It looked like she was talking or yelling at someone in the back of the vehicle. Another witness saw the driver of the Tahoe exit her vehicle crying and holding a child. Dean-Baumann's boyfriend, went to the scene to pick up the child.

A community service officer of the Riverside County Sheriffs Department responded to the traffic collision. The officer found an elderly male in the driver's seat and an elderly female in the front passenger seat. Both were injured. The male was bleeding from his head. The female had a large gash wound to the skull. She was unresponsive and her head draped forward. The male was alert, but agitated.

When the responding officer initially contacted Dean-Baumann, she was crying and appeared hysterical. Another officer later contacted Dean-

Baumann at the scene to discuss the accident. Dean-Baumann said she and her daughter had come from Fallbrook that morning to purchase a puppy and they were on their way home when the accident occurred. She denied drinking or taking medication before the accident other than medication for acid reflux.

The officer observed her eyes were bloodshot and watery, her speech was slurred and the odor of alcohol emanated from her breath and person. He advised her the passenger in the vehicle she hit was dead at the scene. During field sobriety tests, as Donald F. was being loaded into an ambulance, Dean-Baumann laughed and talked about how hard the tests were and how they were like games children play.

Dean-Baumann's blood alcohol level was found to be 0.16 percent, which is twice the level at which a person is impaired for driving. Since the sample was drawn more than an hour after the accident, her blood alcohol level at the time of the accident was likely higher than 0.17 percent. She also tested positive for methamphetamine and marijuana. The amount of methamphetamine found in her blood was more than three times the therapeutic level. The levels of cannabinoids found in her blood indicated marijuana use within hours of when the blood was drawn.

During an inspection of the SUV, an open empty bottle of vodka was found inside a closed compartment between the passenger and driver seat of the SUV under some papers. The vehicle also smelled of alcohol.

A deputy sheriff for the Riverside County Sheriffs Department analyzed the crash data retrieval (CDR) box in the Tahoe. The CDR records data when it is senses something is about to happen. Various things can trigger the module such as braking, the start of an impact, deployment of an airbag or a combination of things. The module records

information prior to the event based on an algorithm from the time the device is enabled, i.e., algorithm enabled (AE). In this case, the data showed the vehicle was traveling 59 miles per hour five seconds before AE and decelerated to 53 miles per hour two seconds before AE. One second before AE, the speed was 29 miles per hour. That amount of deceleration could not occur with braking, but instead would occur if the vehicle struck something.

C

Dean-Baumann presented evidence she purchased a puppy at a residence approximately three miles from the intersection where the accident occurred. The person who sold the puppy to Dean-Baumann did not notice she was under the influence of alcohol.

REASONS TO GRANT CERTIORARI

I. THE CALIFORNIA COURTS' DENIALS DID NOT BAR DEAN-BAUMANN'S FEDERAL CLAIMS BECAUSE *MARTINEZ* APPLIES TO INEFFECTIVE ASSISTANCE OF TRIAL AND APPELLATE COUNSEL CLAIMS RAISED IN A STATE HABEAS PETITION;

A. Introduction

In grounds one through six, Dean-Baumann raised six substantive claims.[2] All the claims incorporated ineffective assistance of counsel claims. ("IAC"). The RR found Dean-Baumann's claims 1 - 6 procedurally barred. RR 23. The RR found that, when a prisoner defaults a claim by violating a state procedural rule, that would constitute adequate and independent

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[2] Dean-Baumann raised the following claims in her habeas petition to the CCA:

I. Resentencing is Required Because the Prosecution Failed to Plead and Prove the 1203.09 Enhancement; Trial and Appellate Counsel Rendered IAC; **II**. Trial Counsel Rendered IAC by Failing to Present a Forensic Expert Toxicologist; **III.** The Trial Court Deprived Dean-Baumann of Due Process and a Fair Trial by Admitting Inflammatory Evidence; Appellate Counsel Rendered IAC; **IV.** The Trial Court Deprived Dean-Baumann of Due Process and a Fair Trial by Issuing a Faulty Character Evidence Instruction; Trial and Appellate Counsel Rendered IAC; **V**. The Prosecutor Committed Prejudicial Misconduct During Closing Argument; Trial and Appellate Counsel Rendered IAC; **VI**. The Cumulative Effect of the Errors Deprived Dean-Baumann of Due Process and a Fair Trial.

grounds to bar direct review in the United States Supreme Court, she may not raise the claim in federal habeas corpus absent a showing of cause and prejudice or actual innocence. RR 16.

Dean-Baumann agrees that *Coleman v. Thompson* held that a state prisoner who fails to comply with the State's procedural requirements in presenting his claims is barred by the adequate and independent state ground doctrine from obtaining a writ of habeas corpus in federal court. *Coleman v. Thompson,* 501 U.S. 722 (1991) ("Just as in those cases in which a state prisoner fails to exhaust state remedies, a habeas petitioner who has failed to meet the State's procedural requirements for presenting his federal claims has deprived the state courts of an opportunity to address those claims in the first instance.")

Where such a procedural default constitutes an adequate and independent state ground for denial of habeas corpus, the default may be excused only if "a constitutional violation has probably resulted in the conviction of one who is actually innocent," or if the prisoner demonstrates cause for the default and prejudice resulting from it. *Murray v. Carrier*, 477 U.S. 478, 496 (1986).

B. Based on *Martinez*, Dean-Baumann Has Shown Cause and Prejudice for Any Default as to Claims 1, 2, 4, 5

To obtain federal review of her claims, Dean-Baumann must show cause and prejudice for the default. In Claims 1, 2, 4 and 5, Dean-Baumann raised issues of ineffective assistance of trial and appellate counsel. In *Martinez v. Ryan,* 566 U.S. 1 (2012), the Supreme Court held that cause, excusing procedural default, is found where a petitioner makes a claim of ineffective assistance of trial and/or appellate counsel.

Martinez applies where: (1) the claim was "substantial"; (2) state law requires the claim be brought in an initial-review collateral proceedings; (3) there was no counsel or only ineffective counsel during the state collateral review proceeding; and (4) the state collateral proceeding was the "initial" review proceeding for the claim. *Trevino v. Thaler,* 569 U.S. 413, 423 (2013) (discussing *Martinez*, at 11).

The RR finds *Martinez* does not extend to procedurally defaulted claims of ineffective assistance of trial and/or appellate counsel. RR 18 n. 6. Dean-Baumann disagrees. *Martinez* applies where the state's "procedural framework, by reason of its design

and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise the claim of ineffective assistance of trial counsel on direct appeal." *Id.* at 423.

The *Martinez* exception applies to California petitioners because, under California law, "except in those rare instances where there is no conceivable tactical purpose for counsel's actions, *claims of ineffective assistance of counsel should be raised on habeas corpus, not on direct appeal*." *People v. Lopez,* 42 Cal. 4th 960, 972 (2008). (Italics added.)

The RR believes that *Martinez* applies to ineffective assistance of state habeas counsel, not to claims of trial and appellate counsel. RR 21. Dean-Baumann disagrees. "Where, as here, the initial-review collateral proceeding is the first designated proceeding for a prisoner to raise a claim of ineffective assistance at trial, the collateral proceeding is in many ways the equivalent of a prisoner's direct appeal as to the ineffective-assistance claim. This is because the state habeas court 'looks to the merits of the clai[m]' of ineffective assistance, no other court has addressed the claim, and 'defendants pursuing

first-tier review . . . are generally ill equipped to represent themselves' because they do not have a brief from counsel or an opinion of the court addressing their claim of error. *Halbert v. Michigan,* 545 U.S. 605, 617, 125 S. Ct. 2582, 162 L. Ed. 2d 552 (2005); see *Douglas* [*v. California,* 372 U.S. 353] 357-358 (1963).)" *Martinez v. Ryan,* 566 U.S. at 11.

Citing *Davila v. Davis,* 137 S. Ct. 2058 (2017), the RR finds that *Martinez* did not apply to a claim that post-conviction counsel ineffectively failed to exhaust a claim of ineffective assistance of appellate counsel. RR 18. Not so. *Davila v. Davis* does not apply to Dean-Baumann's case because Dean-Baumann does not challenge her post-conviction habeas counsel's ineffective assistance. Dean-Baumann challenges the ineffective assistance of her trial and appellate counsel. Ineffective claims of both trial and appellate counsel generally cannot be presented until after the termination of direct appeal and should be raised in a petition for writ of habeas corpus. *People v. Lopez,* 42 Cal. 4th at 972.

C. *Martinez* applies to Post-Conviction Ineffective Assistance of Appellate Counsel Claims

Neither *Martinez* nor *Davila* affect Dean-Baumann's right

to challenge not only trial counsel's assistance, but also appellate counsel's assistance on direct appeal. The Sixth Amendment right to effective counsel applies equally to both trial and appellate counsel. Compare *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (trial counsel) ("[A]ny person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."), and *Powell v. Alabama*, 287 U.S. 45, 69 (1932) (trial counsel) ("[The defendant] requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence."), with *Evitts v. Lucey,* 469 U.S. 387, 396 (1985) (appellate counsel) ("A first appeal as of right . . . is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney."), and *Douglas v. California,* 372 U.S. at 357 (appellate counsel) ("[W]here the merits of the one and only appeal an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor.")

Nothing suggests that the Sixth Amendment right to

effective counsel is weaker or less important for appellate counsel than for trial counsel. *Coleman* made clear that the dividing line between cases in which state-court procedural default should, or should not, be forgiven was the line between constitutionally ineffective and merely negligent counsel: "Where a petitioner defaults a claim as a result of the denial of the right to effective assistance of counsel, the State, which is responsible for the denial as a constitutional matter, must bear the cost of any resulting default and the harm to state interests that federal habeas review entails." *Coleman*, 501 U.S. at 754.

The court in *Coleman* did not distinguish between ineffective assistance by trial and appellate counsel. Even *Martinez* emphasized the importance of effective appellate counsel by stating, ". . . . *[A]n attorney's errors during an appeal on direct review may provide cause to excuse a procedural default; for if the attorney appointed by the State to pursue the direct appeal is ineffective, the prisoner has been denied fair process and the opportunity to comply with the State's procedures and obtain an adjudication on the merits of his claims." Martinez*, at 2, 10-11. (Italics added.)

Similarly, *Davila v. Davis*, ___ U.S. ___, 137 S. Ct. at 2068 held that ineffective assistance of appellate counsel claims must be heard in collateral proceedings, where counsel is not constitutionally guaranteed.

D. A COA Should Be Granted

In Claims 1, 2, 4, 5, Dean-Baumann raised substantial claims challenging trial counsel's ineffective assistance. As to Claim 1, Dean-Baumann alleged that trial rendered IAC by concurring in the trial court's erroneous failure to exercise its sentencing discretion. In Claim 2, Dean-Baumann alleged trial counsel rendered IAC by failing to present a forensic expert toxicologist. In Claim 4, Dean-Baumann alleged trial counsel failed to object to the trial court's defective instructions. As to Claim 5, Dean-Baumann alleged that trial counsel rendered IAC by failing to object to the prosecutor's misconduct during closing.

Dean-Baumann brought Claims 1, 2, 4, 5 in the initial-review collateral proceedings. Dean-Baumann did not have counsel during the state collateral review proceeding; and the state collateral proceeding was the "initial" review proceeding for the claim. See, *Trevino v. Thaler,* 569 U.S. at 423.

(discussing *Martinez*, at 11)

E. Dean-Baumann Has Shown, as to Claim 3, a Miscarriage of Justice

As to Claim 3,[3] the RR finds that Dean-Baumann has failed to establish cause under *Martinez*. RR 20. Dean-Baumann disagrees. Dean-Baumann could not have known about the claims presented in her state petition because the unexhausted issues involve the ineffective assistance of trial and appellate counsel.

The RR overlooks that, unlike appeals or federal habeas corpus proceedings which have specific time limits, no prescribed fixed time period exists during which to seek state habeas corpus relief in a noncapital case. *In re Sanders,* 21 Cal.4th 697, 703 (1999); *In re Swain,* 34 Cal.2d 300, 304 (1949).

Neither the Legislature nor the California Supreme Court has established an express time limit within which a petitioner must seek habeas corpus relief. *In re Huddleston,* 71 Cal.2d 1031, 1034 (1969). The general rule requires only that a petition be filed

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[3] In Claim 3, Dean-Baumann claimed that appellant counsel rendered IAC by failing to raise an issue involving the admission of inflammatory evidence.

"as promptly as the circumstances allow." *In re Clark,* 5 Cal.4th 750, 765, fn. 5 (1993).

If, as the RR finds, Dean-Baumann had brought the claims regarding trial counsel sooner, any subsequent petition raising ineffective assistance of appellate counsel could have been construed as an improper successive petition. See, *In re Clark,* 5 Cal.4th 750.

The RR finds that Dean-Baumann does not qualify for relief under the miscarriage-of-justice exception because she has failed to prove her actual or factual innocence. *See Schlup v. Delo,* 513 U.S. 298, 326-27 (1995); *Murray v. Carrier,* 477 U.S. at 496. RR 22. The RR finds that Dean-Baumann challenges only procedural and instructional error and that she does not claim actual or factual innocence. RR 23.

Dean-Baumann disagrees. She claims actual and/or factual innocence of the charges and challenges the admission of prior incidents as the cause of her false conviction. Dean-Baumann's claims fall within an exception to the procedural bar against successive or untimely petitions. Dean-Baumann' claims demonstrate that a "'fundamental miscarriage of justice'" will

have occurred because (1) an error of constitutional magnitude led to a trial that was so fundamentally unfair that absent the error no reasonable judge or jury would have convicted the petitioner; and (2) Dean-Baumann is actually innocent of the crime or crimes of which she was convicted.

II. THE TRIAL COURT'S FAILURE TO INSTRUCT ON THE LESSER INCLUDED MISDEMEANOR OFFENSE DENIED DEAN-BAUMANN HER FEDERAL AND STATE CONSTITUTIONAL DUE PROCESS RIGHTS

The trial court erred in failing to instruct, sua sponte, on the lesser included offense of misdemeanor child abuse/endangerment. The RR finds that, because no clearly established Supreme Court precedent exists on lesser offense instructions in noncapital cases, the CCA's rejection of the claim could have been contrary to, or an unreasonable application of controlling precedent. RR 27.

Dean-Baumann disagrees. In *Windham v. Merkle*, 163 F.3d 1092, 1105-06 (9th Cir. 1998), the Ninth Circuit stated, "Under the law of this circuit, the failure of a state trial court to instruct on lesser included offenses in a noncapital case does not present a federal constitutional question." See *Turner v. Marshall*, 63 F.3d

807, 819 (9th Cir. 1995); see also *Bashor v. Risley*, 730 F.2d 1228 (9th Cir. 1984) (Generally the "[f]ailure of a state court to instruct on a lesser offense fails to present a federal constitutional question and will not be considered in a federal habeas corpus proceeding.") *Bashor,* 730 F.2d at 1240, quoting *James v. Reese*, 546 F.2d 325, 327 (9th Cir. 1976).

The Ninth Circuit later receded from that position in *Solis v. Garcia*, 219 F.3d 922 (9th Cir. 2000), where the Court found "the refusal by a court to instruct a jury on lesser included offenses, when those offenses are consistent with defendant's theory of the case, may constitute a cognizable habeas claim" under clearly established United States Supreme Court precedent. *Solis*, 219 F.3d at 929 (emphasis added); see also *Bradley v. Duncan*, 315 F.3d 1091, 1098-1101 (9th Cir. 2002) (finding federal due process violation in a post-AEDPA habeas case where defendant's request for instruction on the only theory of defense was denied.)

The RR finds that instructional relief warrants federal habeas relief only if the instruction violates due process. RR 24. Dean-Baumann agrees that, generally, a challenge to jury

instructions does not state a federal constitutional claim. *Estelle v. McGuire,* 502 U.S. 62, 67-68 (1991); *Engle v. Isaac*, 456 U.S. 107, 119 (1982); *Gutierrez v. Griggs*, 695 F.2d 1195, 1197 (9th Cir. 1983).

But Dean-Baumann disagrees because due process requires that "'criminal defendants be afforded a meaningful opportunity to present a complete defense.'" *Clark v. Brown*, 450 F.3d 898, 904 (9th Cir. 2006) (quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984). The law required the trial court to issue adequate instructions on the defense theory of the case. *Conde v. Henry,* 198 F.3d 734, 739 (9th Cir. 1999) (error to deny defendant's request for instruction on simple kidnapping where such instruction was supported by the evidence).

The RR finds that no error occurred because defense counsel made a tactical decision to defend the felony endangerment charge by arguing that an element had not been met. RR 29. Dean-Baumann disagrees. The California courts should have held an evidentiary hearing to allow Dean-Baumann to call trial counsel as a witness and prove that trial counsel rendered ineffective assistance. See, e.g., *People v. Pope*, 23

Cal.3d 412, 426 (1979) (An evidentiary hearing allows trial counsel to fully describe "his or her reasons for acting or failing to act in the manner complained of.") (See Argument IV.)

Even if Dean-Baumann drove while impaired with her child in the Tahoe, became distracted, violated traffic laws and a fatal accident resulted, other facts supported the issuance of a lesser included offense. Dean-Baumann drove a hefty, strong Tahoe, she carefully buckled her child into a properly installed car seat in the second row of seats. Baumann qualifies for habeas relief.

A COA should issue

III. THE COURTS' UNREASONABLE REFUSALS TO HOLD A FEDERAL EVIDENTIARY HEARING, ENTITLES DEAN-BAUMANN TO AN EVIDENTIARY HEARING

Dean-Baumann sought an evidentiary hearing at every level of the state habeas proceedings and again in federal court. (Dkt. 22-12 at 82; 22-14 at 3 of 15, 12 of 15; 22-15 at 19, 90 of 364; 22-19 at 45 of 49) The California courts should have held an evidentiary hearing to allow Dean-Baumann to call trial counsel as a witness and prove that trial counsel rendered ineffective

assistance. See, e.g., *People v. Pope*, 23 Cal.3d at 426 (An evidentiary hearing allows trial counsel to fully describe "his or her reasons for acting or failing to act in the manner complained of.")

Dean-Baumann made a prima facie showing for ineffective assistance of counsel supported by the record. Assuming the record and other evidence to be true nothing more was required. See *Cullen v. Pinholster*, 563 U.S. 170, 188 (2001); *Nunes v. Mueller*, 350 F.3d 1045, 1054 (9th Cir. 2003).

Because no AEDPA deference is due under 2254(d)(2) or (e)(1) where the state has made an "unreasonable" determination of the facts, no deference is due in federal court to the state court's disputed findings of fact. *Taylor v. Maddox*, 366 F.3d 992, 1001 (9th Cir. 2004) ("Where a state court makes evidentiary findings without holding a hearing and giving petitioner an opportunity to present evidence, such findings clearly result in an "unreasonable determination" of the facts.").

Because the California courts unreasonably denied Dean-Baumann's claim without holding an evidentiary hearing, this Court should hold an evidentiary hearing. See *Pinholster*, 563

U.S. at 183-184 (evidentiary hearing may be proper where § 2254(d) does not preclude habeas relief); *Harrington v. Richter*, 562 U.S. 86, 86 (2011) (where petitioner satisfies § 2254(d), claim may be relitigated in federal court); *Johnson v. Finn*, 665 F.3d 1063, 1069 n.1 (9th Cir. 2011)(where state court decision not entitled to AEDPA deference, even after *Pinholster* it was still proper for district court to hold evidentiary hearing); *see also Earp v. Ornoski*, 431 F.3d 1158, 1167 (9th Cir. 2005) (evidentiary "hearing is required if: '(1) [the defendant] has alleged facts that, if proven, would entitle him to habeas relief, and (2) he did not receive a full and fair opportunity to develop those facts'") (quoting *Williams v. Woodford*, 384 F.3d 567, 586 (9th Cir. 2004)).

CONCLUSION

A certificate of appealability should issue because "(1) ' . . . jurists of reason would find it debatable whether the district court was correct in its procedural ruling'; and (2) ' . . . jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right.'" *Morris v. Woodford,* 229 F.3d at 780.

A COA should also issue under 28 U.S. C. § 2253 because ". . . reasonable jurists could debate whether (or, . . . agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack v. McDaniel,* 529 U.S. 473 (2000) (quoting *Barefoot v. Estelle,* 463 U.S. 880, 893 and n. 4 (1983).)

Certiorari should be granted.

DATED: December 29, 2020

Respectfully submitted,
FAY ARFA, A LAW CORPORATION

/s Fay Arfa

Fay Arfa, Attorney for Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

OCT 28 2020

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

MELISSA DEAN-BAUMANN, Petitioner-Appellant, v. JANELLE ESPINOZA, Respondent-Appellee.	No. 19-56005 D.C. No. 5:17-cv-02187-JAK-SS Central District of California, Riverside ORDER

Before: W. FLETCHER and R. NELSON, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 3) is denied because appellant has not shown that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012); *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

APPENDIX A

JS-6

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MELISSA DEAN-BAUMANN, Petitioner, v. JANELLE ESPINOZA, Warden, Respondent.	Case No. EDCV 17-2187 JAK (SS) **JUDGMENT**

Pursuant to the Court's Order Accepting Findings, Conclusions and Recommendations of United States Magistrate Judge,

IT IS HEREBY ADJUDGED that the above-captioned action is dismissed with prejudice.

DATED: August 26, 2019

JOHN A. KRONSTADT
UNITED STATES DISTRICT JUDGE

APPENDIX B

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MELISSA DEAN-BAUMANN, Petitioner, v. JANELLE ESPINOZA, Warden, Respondent.	Case No. EDCV 17-2187 JAK (SS) **ORDER ACCEPTING FINDINGS, CONCLUSIONS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE**

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition, all the records and files herein, the Report and Recommendation of the United States Magistrate Judge, and Petitioner's Objections. After having made a de novo determination of the portions of the Report and Recommendation to which Objections were directed, the Court concurs with and accepts the findings and conclusions of the Magistrate Judge.

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APPENDIX B

IT IS ORDERED that the Petition is denied and Judgment shall be entered dismissing this action with prejudice.

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

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: August 26, 2019

JOHN A. KRONSTADT
UNITED STATES DISTRICT JUDGE

APPENDIX B

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MELISSA DEAN-BAUMANN, Petitioner, v. JANELLE ESPINOZA, Warden, Respondent.	Case No. EDCV 17-2187 JAK (SS) **REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE**

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

I.

INTRODUCTION

On October 23, 2017, Melissa Dean-Baumann ("Petitioner"), a California state prisoner represented by counsel, filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 with an accompanying Memorandum of Points and Authorities ("Pet. Mem.").

(Dkt. No. 1). On October 29, 2018, Respondent filed an Answer to the Petition with an accompanying Memorandum of Points and Authorities ("Ans. Mem."). (Dkt. No. 21). Respondent has also lodged relevant portions of the record from Petitioner's state court proceedings, including a two-volume copy of the Clerk's Transcript ("CT") and a four-volume copy of the Reporter's Transcript ("RT"). (Dkt. Nos. 11, 22). On January 24, 2019, Petitioner filed a Reply. (Dkt. No. 26). For the reasons discussed below, it is recommended that the Petition be DENIED and this action be DISMISSED with prejudice.

II.

PRIOR PROCEEDINGS

On November 20, 2014, a Riverside County Superior Court jury convicted Petitioner of one count of second-degree murder in violation of California Penal Code ("P.C.") 187(a) (count 1), one count of vehicular manslaughter with gross negligence while intoxicated in violation of P.C. § 191.5(a) (count 2), one count of driving under the influence and causing injury in violation of California Vehicle Code ("Cal. Veh. C.") § 23153(a) (count 3), one count of driving with .08% or higher blood alcohol content and causing injury in violation of Cal. Veh. C. § 23153(b) (count 4), and one count of child endangerment in violation of P.C. § 273a(a) (count 5), and the jury also found several sentence enhancements to be true. (CT 281-91; RT 767-73). On January 23, 2015, the trial court sentenced Petitioner to fifteen years to life in state prison. (CT 430-32, 457-62; RT 789-92).

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Petitioner appealed her convictions and sentence to the California Court of Appeal (4th App. Dist., Div. 1), which struck the great bodily injury enhancement for count 2 and affirmed the judgment as modified. (Lodgments 1, 11-13). Petitioner next filed a petition for review in the California Supreme Court, which denied the petition on July 27, 2016. (Lodgments 2-3).

On October 20, 2017, Petitioner filed a habeas corpus petition in the California Court of Appeal (4th App. Dist., Div. 1). On October 26, 2017, the court of appeal denied the petition without prejudice to Petitioner refiling it in Superior Court. (Lodgments 4-5).

On November 3, 2017, Petitioner filed a habeas corpus petition in Riverside County Superior Court, which denied the petition in a reasoned decision on March 7, 2018. (Lodgments 6, 14-16; Lodgment 17, Exh. F). On April 3, 2018, Petitioner filed a habeas corpus petition in the California Court of Appeal (4th App. Dist., Div. 1), which denied the petition in a reasoned decision on April 11, 2018. (Lodgments 17-18). On April 13, 2018, Petitioner filed a petition for review in the California Supreme Court, which denied the petition on June 13, 2018. (Lodgments 19-22).

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III.

FACTUAL BACKGROUND

The following facts, taken from the California Court of Appeal's written decision on direct review, have not been rebutted with clear and convincing evidence and must, therefore, be presumed correct. 28 U.S.C. § 2254(e)(1); Slovik v. Yates, 556 F.3d 747, 749 n.1 (9th Cir. 2009).

A

> In May 2003 a police officer stopped [Petitioner] after he observed her vehicle make a right turn and then a U-turn before it turned left, drove over a sidewalk, through a dirt field, and stopped behind a house. When the officer explained why he stopped her, [Petitioner] stated she was going home and this was the quickest route. The officer smelled alcohol on her breath and noticed she had bloodshot and watery eyes. She also had slurred speech and a dry mouth. [Petitioner] denied drinking. However, she did not perform well on field sobriety tests. She was cooperative, but giggly during the field sobriety tests. The results of two preliminary alcohol sensor tests (breathalyzer) were 0.14 and 0.13. [Petitioner] was arrested and cited for driving under the influence. Later, in 2009, [Petitioner] was required to attend drug and alcohol counseling sessions regarding the impact of driving under the influence.

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On September 10, 2012, [Petitioner's] boyfriend called 911 because he suspected she was trying to pick up their child from school after she had been drinking. [Petitioner] knocked the phone from his hand as he was calling and she left with the child in the car. Her boyfriend told her not to drink and drive with their children in the vehicle.

B

On December 13, 2012, at approximately 12:30 p.m., [Petitioner] ran a red light at the intersection of McCall Boulevard and Encanto Drive in Menifee, California. She drove her Chevrolet Tahoe into the intersection at a high rate of speed and struck a Saturn driving the opposite direction, which was turning left onto Encanto Drive. A witness, who was in the left turn lane behind the Saturn, saw the Tahoe come toward the intersection without slowing down. The driver of the Tahoe did not appear to be paying attention to the road. She had one hand on the steering wheel in the 12 o'clock position as she looked toward the right. She appeared to be trying to find something or grab something with her other hand.

Donald F. was taking his 86-year-old wife, Phyllis F., to the hairdresser and turned left on a green turn signal from McCall Boulevard onto Encanto Drive. As he did so, his vehicle was hit on the passenger side by

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[Petitioner's] vehicle. Phyllis F. died from blunt impact injuries to the torso as a result of the collision. Donald F. was taken to a trauma center. He sustained cuts, bruises and a concussion.

After the collision, a witness saw [Petitioner] raise her hands in the air. It looked like she was talking or yelling at someone in the back of the vehicle. Another witness saw the driver of the Tahoe exit her vehicle crying and holding a child. [Petitioner's] boyfriend, went to the scene to pick up the child.

A community service officer of the Riverside County Sheriff's Department responded to the traffic collision. The officer found an elderly male in the driver's seat and an elderly female in the front passenger seat. Both were injured. The male was bleeding from his head. The female had a large gash wound to the skull. She was unresponsive and her head draped forward. The male was alert, but agitated.

When the responding officer initially contacted [Petitioner], she was crying and appeared hysterical. Another officer later contacted [Petitioner] at the scene to discuss the accident. [Petitioner] said she and her daughter had come from Fallbrook that morning to purchase a puppy and they were on their way home when the accident occurred. She denied drinking or taking medication

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before the accident other than medication for acid reflux.

The officer observed her eyes were bloodshot and watery, her speech was slurred and the odor of alcohol emanated from her breath and person. He advised her the passenger in the vehicle she hit was dead at the scene. During field sobriety tests, as Donald F. was being loaded into an ambulance, [Petitioner] laughed and talked about how hard the tests were and how they were like games children play.

[Petitioner's] blood alcohol level was found to be 0.16 percent, which is twice the level at which a person is impaired for driving. Since the sample was drawn more than an hour after the accident, her blood alcohol level at the time of the accident was likely higher than 0.17 percent. She also tested positive for methamphetamine and marijuana. The amount of methamphetamine found in her blood was more than three times the therapeutic level. The levels of cannabinoids found in her blood indicated marijuana use within hours of when the blood was drawn.

During an inspection of the SUV, an open empty bottle of vodka was found inside a closed compartment between the passenger and driver seat of the SUV under some papers. The vehicle also smelled of alcohol.

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A deputy sheriff for the Riverside County Sheriff's Department analyzed the crash data retrieval (CDR) box in the Tahoe. The CDR records data when it is senses something is about to happen. Various things can trigger the module such as braking, the start of an impact, deployment of an airbag or a combination of things. The module records information prior to the event based on an algorithm from the time the device is enabled, i.e., algorithm enabled (AE). In this case, the data showed the vehicle was traveling 59 miles per hour five seconds before AE and decelerated to 53 miles per hour two seconds before AE. One second before AE, the speed was 29 miles per hour. That amount of deceleration could not occur with braking, but instead would occur if the vehicle struck something.

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[Petitioner] presented evidence she purchased a puppy at a residence approximately three miles from the intersection where the accident occurred. The person who sold the puppy to [Petitioner] did not notice she was under the influence of alcohol.

(Lodgment 1 at 3-6).

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IV.

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PETITIONER'S CLAIMS

The Petition raises seven grounds for federal habeas relief. In Ground One, Petitioner contends: (a) she is entitled to resentencing because the prosecution failed to plead and prove a P.C. § 1203.09(c) enhancement; and (b) she received ineffective assistance of counsel when neither trial nor appellate counsel raised this issue. (Petition at 5; Pet. Mem. at 12-21). In Ground Two, Petitioner alleges she received ineffective assistance of counsel when her trial counsel did not present a forensic toxicology expert. (Petition at 5-6; Pet. Mem. at 22-30). In Ground Three, Petitioner asserts: (a) she was denied due process of law and a fair trial when the trial court admitted inflammatory evidence against her; and (b) appellate counsel provided ineffective assistance in not raising this issue. (Petition at 6; Pet. Mem. at 31-45). In Ground Four, Petitioner claims: (a) she was denied due process of law and a fair trial when the trial court gave the jury a faulty character evidence instruction; and (b) she received ineffective assistance of counsel when neither trial nor appellate counsel raised this issue. (Petition at 5; Pet. Mem. at 46-51). In Ground Five, Petitioner alleges: (a) the prosecutor committed prejudicial misconduct during closing argument; and (b) she received ineffective assistance of counsel when neither trial nor appellate counsel raised this issue. (Petition at 6; Pet. Mem. at 52-63). In Ground Six, Petitioner asserts that the cumulative effect of the errors denied her due process of law and a fair trial. (Petition at 6a; Pet. Mem. at 64). In Ground Seven, Petitioner contends she was denied due process of law when the

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trial court failed to instruct the jury on the lesser-included offense of misdemeanor child endangerment.[1] (Petition at 6a; Pet. Mem. at 65-71).

V.

STANDARD OF REVIEW

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") "bars relitigation of any claim 'adjudicated on the merits' in state court, subject only to the exceptions in §§ 2254(d)(1) and (d)(2)." Harrington v. Richter, 562 U.S. 86, 98 (2011). Under AEDPA's deferential standard, a federal court may grant habeas relief only if the state court adjudication was contrary to or an unreasonable application of clearly established federal law, as determined by the Supreme Court, or was based upon an unreasonable determination of the facts. Id. at 100 (citing 28 U.S.C. § 2254(d)). "This is a difficult to meet and highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt[.]" Cullen v. Pinholster, 563 U.S. 170, 181 (2011) (citations and internal quotation marks omitted).

Petitioner raised her claims in her petitions for review to the California Supreme Court, which denied the petitions without

[1] The Petition initially asserted an eighth ground for habeas corpus relief, alleging the trial court erred in staying instead of dismissing the punishment for the lesser-included driving under the influence convictions. (Petition at 6a-6b; Pet. Mem. at 72-76). However, in her Reply, Petitioner withdrew Ground Eight. (Reply at 36).

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comment or citation to authority. (Lodgments 2-3, 19-22). The Court "looks through" the California Supreme Court's silent denial to the last reasoned decision, which is presumed to be the basis for the California Supreme Court's decision. Wilson v. Sellers, 138 S. Ct. 1188, 1192 (2018); Ylst v. Nunnemaker, 501 U.S. 797, 803 (1991). That presumption has not been rebutted here. Therefore, the Court will consider the California Court of Appeal's decision on habeas review in addressing Grounds One through Six, and the California Court of Appeal's decision on direct review in addressing Ground Seven. Berghuis v. Thompkins, 560 U.S. 370, 380 (2010).

VI.

DISCUSSION

A. Grounds One Through Six Are Procedurally Barred

Federal courts "will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." Coleman v. Thompson, 501 U.S. 722, 729 (1991); Walker v. Martin, 562 U.S. 307, 315 (2011). The procedural default doctrine, which is a specific application of the general adequate and independent state grounds doctrine, Fields v. Calderon, 125 F.3d 757, 761-62 (9th Cir. 1997), "bar[s] federal habeas [review] when a state court declined to address a prisoner's federal claims because the prisoner had failed to meet a state procedural requirement." Coleman, 501 U.S. at 729-30; Hanson v.

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Mahoney, 433 F.3d 1107, 1113 (9th Cir. 2006). To constitute a procedural bar, the state's rule had to be independent and adequate at the time Petitioner purportedly failed to comply with it. Fields, 125 F.3d at 760. A state procedural rule is considered an independent bar if it is not interwoven with federal law or dependent upon a federal constitutional ruling. Ake v. Oklahoma, 470 U.S. 68, 75 (1985); Michigan v. Long, 463 U.S. 1032, 1040-41 (1983). A state procedural rule constitutes an adequate bar to federal court review if it was "firmly established and regularly followed" at the time the state court applied it. Ford v. Georgia, 498 U.S. 411, 423-24 (1991); King v. Lamarque, 464 F.3d 963, 965 (9th Cir. 2006).

Procedural default is an affirmative defense, Gray v. Netherland, 518 U.S. 152, 165-66 (1996); Insyxiengmay v. Morgan, 403 F.3d 657, 665 (9th Cir. 2005), "and the state has the burden of showing that the default constitutes an adequate and independent ground." Insyxiengmay, 403 F.3d at 665-66; Bennett v. Mueller, 322 F.3d 573, 585 (9th Cir. 2003). However, "[o]nce the state has adequately pled the existence of an independent and adequate state procedural ground as an affirmative defense, the burden to place that defense in issue shifts to the petitioner." Bennett, 322 F.3d at 586; King, 464 F.3d at 966-67. "The petitioner 'may satisfy this burden by asserting specific factual allegations that demonstrate the inadequacy of the state procedure, including citation to authority demonstrating inconsistent application of the rule.'" King, 464 F.3d at 967 (quoting Bennett, 322 F.3d at 586). "Once a petitioner has demonstrated the inadequacy of a

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rule, the state bears the ultimate burden of proving the rule bars federal review." Collier v. Bayer, 408 F.3d 1279, 1284 (9th Cir. 2005); King, 464 F.3d at 967.

Here, Respondent asserts that Petitioner has procedurally defaulted Grounds One through Six. (Ans. Mem. at 7-10). In addressing whether Petitioner has procedurally defaulted these claims, the Court looks to the decision of the last state court to which Petitioner presented this claim to determine if the state court decision rested on an "independent and adequate state ground." Coleman, 501 U.S. at 730; see also Nitschke v. Belleque, 680 F.3d 1105, 1109 (9th Cir. 2012) (Under "the doctrine of procedural default, . . . a federal court is barred from hearing the claims of a state prisoner in a habeas corpus proceeding when the decision of the last state court to which the prisoner presented his federal claims rested on an 'independent and adequate state ground.'" (citation omitted)). However, as previously noted, "[w]here there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground." Nunnemaker, 501 U.S. at 803. Here, the last state court to address Grounds One through Six was the California Supreme Court, which denied Petitioner's second petition for review without comment or citation to authority. (Lodgments 19-22). Before that, Petitioner raised these claims in her habeas corpus petition to the California Court of Appeal, which denied Grounds One through Six as untimely,[2] denied

[2] Petitioner asserts that she "never delayed filing her habeas petition" (Reply at 9), but the California Court of Appeal

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the "claims of evidentiary error, instructional error, prosecutorial misconduct, and sentencing error" because "they could have been asserted at trial but were not [citing In re Seaton, 34 Cal. 4th 193, 200 (2004),] . . . or could have been asserted on appeal but were not[,] [citing In re Reno, 55 Cal. 4th 428, 490 (2012), and In re Dixon, 41 Cal. 2d 756, 759 (1953),]" and alternately denied these claims on the merits.[3] (Lodgment 18 at 2-6).

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determined otherwise, and the Court cannot second guess the California Court of Appeal's application of state law. See Bradshaw v. Richey, 546 U.S. 74, 76 (2005) (per curiam) ("[A] state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus."); Hicks on behalf of Feiock v. Feiock, 485 U.S. 624, 629-30 & n.3 (1988) ("We are not at liberty to depart from the state appellate court's resolution of these issues of state law. Although petitioner marshals a number of sources in support of the contention that the state appellate court misapplied state law on these two points, the California Supreme Court denied review of this case, and we are not free in this situation to overturn the state court's conclusions of state law."); Martinez v. Ryan, 926 F.3d 1215, 1224 (9th Cir. 2019) (federal court lacks jurisdiction to address the contention that state court misinterpreted its procedural default rules); Poland v. Stewart, 169 F.3d 573, 584 (9th Cir. 1999) ("Federal habeas courts lack jurisdiction . . . to review state court applications of state procedural rules."; Johnson v. Foster, 786 F.3d 501, 508 (7th Cir. 2015) (A "federal habeas court is not the proper body to adjudicate whether a state court correctly interpreted its own procedural rules, even if they are the basis for a procedural default.").

[3] The fact that the California Court of Appeal alternately rejected Grounds One through Six on the merits does not prevent the claims from being procedurally barred in this Court. Harris v. Reed, 489 U.S. 255, 264 n.10 (1989); Comer v. Schriro, 480 F.3d 960, 964 n.6 (9th Cir. 2007). However, "AEDPA deference applies to th[e] alternative holding[s] on the merits." Clabourne v. Ryan, 745 F.3d 362, 383 (9th Cir. 2014), overruled in part on other grounds by, McKinney v. Ryan, 813 F.3d 798 (9th Cir. 2015) (en banc); Stephens v. Branker, 570 F.3d 198, 208 (4th Cir. 2009).

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"California's timeliness rule is an independent and adequate state law ground sufficient to bar federal habeas relief on untimely claims." Ayala v. Chappell, 829 F.3d 1081, 1095 (9th Cir. 2016) (italics in original), cert. denied, 138 S. Ct. 244 (2017); Martin, 562 U.S. at 310-11. Likewise, California's contemporaneous objection rule has long been held to be an independent and adequate procedural ground.[4] Zapien v. Martel, 849 F.3d 787, 793 n.2 (9th Cir. 2016); Tong Xiong v. Felker, 681 F.3d 1067, 1075 (9th Cir. 2012); Fairbank v. Ayers, 650 F.3d 1243, 1256-57 (9th Cir. 2011); see also Vansickel v. White, 166 F.3d 953, 957-58 (9th Cir. 1999) (California's contemporaneous objection rule is independent and adequate for purposes of procedural default analysis). Finally, the Reno/Dixon citation qualifies as an adequate and independent state law ground. Johnson v. Lee, 136 S. Ct. 1802, 1804-06 (2016) (per curiam); Bennett, 322 F.3d at 582-83; Roybal v. Davis, 148 F. Supp. 3d 958, 987 (S.D. Cal. 2015); Protsman v. Pliler, 318 F. Supp. 2d 1004, 1007-08 (S.D. Cal. 2004).[5]

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[4] California's contemporaneous objection rule provides that "[o]rdinarily, a criminal defendant who does not challenge an assertedly erroneous ruling of the trial court in that court has forfeited his or her right to raise the claim on appeal." In re Sheena K., 40 Cal. 4th 875, 880 (2007).

[5] In Lee, the Supreme Court held that California's Dixon rule "qualifies as adequate to bar federal habeas review." Lee, 136 S. Ct. at 1805-06. In Bennett, the Ninth Circuit held that a post-In re Robbins, 18 Cal. 4th 770 (1998), denial of a state petition for untimeliness "is an independent procedural ground." Bennett, 322 F.3d at 582-83. Since Bennett's rationale applies equally to the Dixon bar, it follows that the Dixon citation qualifies as an independent state law ground. Protsman, 318 F. Supp. 2d at 1007-08; see also Roybal, 148 F. Supp. 3d at 987 ("As the Dixon rule was applied in this case nearly fifteen years after Robbins and the California Supreme Court's stated intention to refrain from considering federal law in applying state procedural bars, this Court is in accord with other district courts in concluding that

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Because Respondent has adequately pled the affirmative defense of procedural bar, the burden now shifts to Petitioner to place the affirmative defense in issue. King, 464 F.3d at 966-67; Bennett, 322 F.3d at 586. "In most circumstances, the best method for petitioners to place the defense in issue is to assert 'specific factual allegations that demonstrate the inadequacy of the state procedure' by citing relevant cases." King, 464 F.3d at 967 (quoting Bennett, 322 F.3d at 586). Petitioner has not done this. Thus, Petitioner has not met her burden and she has procedurally defaulted Grounds One through Six. Cunningham v. Wong, 704 F.3d 1143, 1155 (9th Cir. 2013).

When a habeas petitioner "has defaulted [her] federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." Coleman, 501 U.S. at 750; Medley v. Runnels, 506 F.3d 857, 869 (9th Cir. 2007) (en banc). Here, Petitioner argues she can establish cause and prejudice for the procedural default of Grounds One, Two, Four and Five, and the failure to consider Ground Three would constitute a fundamental miscarriage of justice. (Reply at 6-11).

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the procedural rule was independent of federal law at the time of its application to Petitioner's habeas claims.").

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1. Cause and Prejudice

"Cause for a procedural default exists where something external to the petitioner, something that cannot fairly be attributed to [her], . . . impeded [her] efforts to comply with the State's procedural rule." Maples v. Thomas, 565 U.S. 266, 280 (2012) (citation, internal quotation marks and brackets omitted; italics in original); Coleman, 501 U.S. at 753. "A habeas petitioner demonstrates prejudice by establishing that the constitutional errors 'worked to [her] actual and substantial disadvantage, infecting [her] entire trial with error of constitutional dimensions.'" Schneider v. McDaniel, 674 F.3d 1144, 1153 (9th Cir. 2012) (quoting United States v. Frady, 456 U.S. 152, 170 (1982)); Sexton v. Cozner, 679 F.3d 1150, 1158 (9th Cir. 2012). Petitioner has the burden of proving both cause and prejudice. Bousley v. United States, 523 U.S. 614, 622 (1998); Coleman, 501 U.S. at 750.

Petitioner contends that pursuant to Martinez v. Ryan, 566 U.S. 1 (2012), she has shown cause and prejudice for procedurally defaulting Grounds One, Two, Four and Five because she "raised issues of ineffective assistance of trial counsel" in those claims. (Reply at 6-8).

While attorney ignorance or inadvertence cannot establish cause for a procedural default, "[a]ttorney error that constitutes ineffective assistance of counsel is cause[.]" Coleman, 501 U.S. at 753-54; see also Davila v. Davis, 137 S. Ct. 2058, 2065 (2017)

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("It has long been the rule that attorney error is an objective external factor providing cause for excusing a procedural default only if that error amounted to a deprivation of the constitutional right to counsel."). This is because an "error amounting to constitutionally ineffective assistance is 'imputed to the State' and is therefore external to the prisoner[,]" while "[a]ttorney error that does not violate the Constitution . . . is attributed to the prisoner 'under well-settled principles of agency law.'" Davila, 137 S. Ct. at 2065 (citations omitted); Coleman, 501 U.S. at 754. Applying this distinction, the Supreme Court has held that, generally, "attorney error committed in the course of state postconviction proceedings — for which the Constitution does not guarantee the right to counsel — cannot supply cause to excuse a procedural default that occurs in those proceedings." Davila, 137 S. Ct. at 2065; Coleman, 501 U.S. at 757; see also Atwood v. Ryan, 870 F.3d 1033, 1059 (9th Cir. 2017) ("'Because a prisoner does not have a constitutional right to counsel in state postconviction proceedings,' as a general rule 'ineffective assistance in those proceedings does not qualify as cause to excuse a procedural default.'" (citation omitted)).

Martinez provides a "narrow, 'equitable . . . qualification'" to the general rule "where state law requires prisoners to raise claims of ineffective assistance of trial counsel 'in an initial-review collateral proceeding,' rather than on direct appeal."[6]

[6] Martinez does not extend to procedurally defaulted claims of ineffective assistance of appellate counsel. Davila, 137 S. Ct. at 2065-66; Hurles v. Ryan, 914 F.3d 1236, 1237-38 (9th Cir. 2019) (per curiam); see also Martinez, 926 F.3d at 1225 ("[I]neffective

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Davila, 137 S. Ct. at 2065 (quoting Martinez, 566 U.S. at 16-17); see also Jones v. Ryan, 733 F.3d 825, 843 (9th Cir. 2013) ("Martinez 'qualifie[d] Coleman by recognizing a narrow exception' to that case's rule that state post-conviction relief counsel's ineffective assistance cannot serve as cause to excuse the procedural default of an ineffective-assistance-of-trial-counsel claim." (citation omitted)). In "those situations, 'a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if' the default results from the ineffective assistance of the prisoner's counsel in the collateral proceeding." Davila, 137 S. Ct. at 2065 (quoting Martinez, 566 U.S. at 17); see also Martinez, 566 U.S. at 17 ("Where, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective."). This "exception applies both where state law explicitly prohibits prisoners from bringing claims of ineffective assistance of trial counsel on direct appeal and where the State's 'procedural framework, by reason of its design and operation, makes it unlikely in a typical case that a defendant will have a meaningful opportunity to raise' that claim on direct appeal." Davila, 137 S. Ct. at 2065 (quoting Trevino v. Thaler, 569 U.S. 413, 429 (2013)).

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assistance of [post-conviction review] counsel can constitute cause only to overcome procedurally defaulted claims of ineffective assistance of trial counsel.").

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To "establish 'cause' to overcome procedural default under Martinez, a petitioner must show: (1) the underlying ineffective assistance of trial counsel claim is 'substantial'; (2) the petitioner was not represented or had ineffective counsel during the PCR proceeding; (3) the state PCR proceeding was the initial review proceeding; and (4) state law required (or forced as a practical matter) the petitioner to bring the claim in the initial review collateral proceeding." Dickens v. Ryan, 740 F.3d 1302, 1319 (9th Cir. 2014) (en banc); Trevino, 569 U.S. at 423, 429.

Petitioner argues that Martinez applies to California petitioners. She also contends that she has met Martinez's requirements because she brought Grounds One, Two, Four and Five "in the initial-review collateral proceeding[,]" she "did not have counsel during the state collateral review proceeding[,] and the state collateral review proceeding was the 'initial' review proceeding for the claim." (Reply at 7-8). Assuming arguendo that Martinez is applicable to California petitioners, see Martinez v. McGrath, 535 F. App'x 614, 615 (9th Cir. 2013) (citing Trevino and assuming without deciding that Martinez applies to post-conviction proceedings in California); People v. Lopez, 42 Cal. 4th 960, 972 (2008) ("[E]xcept in those rare instances where there is no conceivable tactical purpose for counsel's actions, claims of ineffective assistance of counsel should be raised on habeas corpus, not on direct appeal."), Petitioner has failed to establish cause under Martinez.

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Petitioner's assertion that she did not have counsel during the initial state collateral review proceeding is incorrect and, at best, disingenuous because Petitioner's federal habeas counsel also filed her state habeas corpus petitions in Riverside County Superior Court and the California Court of Appeal as well as the subsequent petition for review in the California Supreme Court. (See Dkt. Nos. 1, 3, 26; Lodgments 4, 14, 16-17, 19, 21). In any event, Martinez is inapposite because Petitioner does not contend her state habeas counsel – that is, her current counsel – provided ineffective assistance during the initial post-conviction review proceeding.[7] (See Reply at 6-9).[8] Accordingly, Martinez does not

[7] As noted, current counsel was also Petitioner's state habeas counsel, so counsel's decision to avoid claiming ineffective assistance during the state habeas process is understandable. Moreover, unlike Martinez and Trevino, Petitioner raised ineffective assistance of trial counsel claims in her initial state habeas petition. (See Lodgments 4, 14); see also Trevino, 569 U.S. at 419-20; Martinez, 566 U.S. at 7.

[8] The only ineffective assistance allegations Petitioner makes are against her trial and appellate counsel. However, Petitioner does not suggest the alleged ineffective assistance of her trial and/or appellate counsel constitute cause for her procedural defaults. (See Reply at 6-8). Even if she had so argued, it would not have benefitted her. The Court cannot consider an ineffective assistance of trial or appellate counsel claim as "cause" for a procedural default when, as here, the ineffective assistance of counsel claim is itself procedurally defaulted. Edwards v. Carpenter, 529 U.S. 446, 453 (2000); see also Moraga v. McDaniel, 415 F. App'x 784, 786 (9th Cir. 2011) ("While it is true that ineffective assistance of counsel may satisfy the cause requirement to overcome a procedural default, it cannot serve as cause if that claim is itself procedurally defaulted."); Hall v. Scribner, 619 F. Supp. 2d 823, 844 (N.D. Cal. 2008) ("A procedurally defaulted ineffective assistance of counsel claim is not cause to excuse the default of another habeas claim unless the petitioner can satisfy the cause and prejudice standard with respect to the ineffective assistance of counsel claim itself.").

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establish cause for Petitioner's procedural default of Grounds One, Two, Four and Five.[9]

2. Fundamental Miscarriage of Justice

Petitioner also argues that she has demonstrated a fundamental miscarriage of justice in Ground Three. (Reply at 6-11). To qualify for the "fundamental miscarriage of justice" exception to the procedural default rule, Petitioner must "show that 'a constitutional violation has probably resulted in the conviction of one who is actually innocent.'" Schlup v. Delo, 513 U.S. 298, 327 (1995) (quoting Murray v. Carrier, 477 U.S. 478, 496 (1986)); Wood v. Ryan, 693 F.3d 1104, 1117 (9th Cir. 2012). "To be credible, such a claim requires [P]etitioner to support [her] allegations of constitutional error with new reliable evidence — whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence — that was not presented at trial[,]" and "show that it is more likely than not that no reasonable juror would have found [P]etitioner guilty beyond a reasonable doubt." Schlup, 513 U.S. at 324, 327; House v. Bell, 547 U.S. 518, 537 (2006).

Here, while Petitioner conclusorily argues she is "actually innocent of the crime or crimes of which she was convicted[,]" she

[9] Because Petitioner has not established cause, the Court need not consider the issue of prejudice. See Engle v. Isaac, 456 U.S. 107, 134 n.43 (1982) ("Since we conclude that these respondents lacked cause for their default, we do not consider whether they also suffered actual prejudice.").

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proffers no new evidence supporting this assertion but instead argues the fundamental miscarriage of justice exception applies because the trial court erroneously admitted inflammatory evidence – a 2003 reckless driving conviction and Petitioner's boyfriend's 911 call – that led to her conviction. (Reply at 10-11; see also Petition at 6; Pet. Mem. at 31-45). However, the alleged erroneous admission of this evidence says nothing about whether Petitioner is actually – that is factually – innocent of the crimes for which she was convicted, see Bousley v. United States, 523 U.S. 614, 623-24 (1998) ("'[A]ctual innocence' means factual innocence, not mere legal insufficiency."); Wildman v. Johnson, 261 F.3d 832, 842-43 (9th Cir. 2001) ("To show manifest injustice resulting from a procedural default, Wildman . . . needs to establish factual innocence."), and Petitioner's conclusory allegations of innocence are manifestly insufficient to demonstrate a fundamental miscarriage of justice. See Cook v. Schriro, 538 F.3d 1000, 1029 (9th Cir. 2008) (petitioner did not qualify for fundamental miscarriage of justice exception when "there [was] no new evidence to support an actual innocence claim"); Casey v. Moore, 386 F.3d 896, 921 n.27 (9th Cir. 2004) ("[T]he fundamental miscarriage of justice exception applies only when a constitutional violation probably has resulted in the conviction of one actually innocent of a crime and petitioner supplements his constitutional claim with a colorable showing of factual innocence, which [petitioner] has not done."); Ratliff v. Hedgepeth, 712 F. Supp. 2d 1038, 1054 (C.D. Cal. 2010) (A "conclusory assertion is clearly insufficient to meet [the Schlup] standard."). Therefore, Petitioner has procedurally defaulted Grounds One through Six.

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B. Petitioner Is Not Entitled To Relief On Her Jury Instruction Claim

Instructional error warrants federal habeas relief only if the "'instruction by itself so infected the entire trial that the resulting conviction violates due process[.]'" Waddington v. Sarausad, 555 U.S. 179, 191 (2009) (citation and internal quotation marks omitted); Middleton v. McNeil, 541 U.S. 433, 437 (2004) (per curiam). The instruction must be more than merely erroneous. Instead, Petitioner must show there was a "reasonable likelihood that the jury has applied the challenged instruction in a way that violates the Constitution." McNeil, 541 U.S. at 437 (citations and internal quotation marks omitted); Sarausad, 555 U.S. at 190-91; see also Cupp v. Naughten, 414 U.S. 141, 146 (1973) ("Before a federal court may overturn a conviction resulting from a state trial in which [an allegedly faulty] instruction was used, it must be established not merely that the instruction is undesirable, erroneous or even 'universally condemned,' but that it violated some right which was guaranteed to the defendant by the Fourteenth Amendment."). Further, "[i]t is well established that the instruction 'may not be judged in artificial isolation,' but must be considered in the context of the instructions as a whole and the trial record." Estelle v. McGuire, 502 U.S. 62, 72 (1991) (citation omitted); Sarausad, 555 U.S. at 191. Where, as here, the alleged error is the failure to give an instruction, the burden on the Petitioner is "'especially heavy.'" Sarausad, 555 U.S. at 191 (quoting Henderson v. Kibbe, 431 U.S. 145, 155 (1977)). Moreover, if a constitutional error occurred, federal habeas relief

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remains unwarranted unless the error caused prejudice, i.e., unless it had a substantial and injurious effect or influence in determining the jury's verdict. Hedgpeth v. Pulido, 555 U.S. 57, 61-62 (2008) (per curiam); Brecht v. Abrahamson, 507 U.S. 619, 623 (1993).

The trial court instructed the jury with, inter alia, CALCRIM 821, discussing felony child endangerment.[10] (RT 662-64; CT 337-

[10] As given to the jury, CALCRIM 821 stated:

> The defendant is charged in Count 5 with child abuse likely to produce great bodily harm or death, in violation of [P.C. § 273a(a)]. [¶] To prove the defendant is guilty of this crime, the People must prove that, first, the defendant, while having care or custody of a child, willfully caused or permitted that child to be placed in a situation where the child's person or health was endangered; secondly, the defendant inflicted pain or suffering on the child or caused or permitted the child to suffer or be injured or to be endangered under circumstances or conditions likely to produce great bodily harm or death; and, third, the defendant was criminally negligent when she caused or permitted the child to suffer or be injured or be endangered. [¶] Someone commits an act willfully when he or she does it willingly or on purpose. [¶] The phrase likely to produce great bodily harm or death means the probability of great bodily harm or death is high. [¶] Great bodily harm means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm. [¶] A child is any person under the age of 18 years. [¶] Unjustifiable physical pain or mental suffering is pain or suffering that is not reasonably necessary or is excessive under the circumstances. [¶] Criminal negligence involves more than ordinary carelessness, inattention, or mistake in judgment. A person acts with criminal negligence when, first, he or she acts in a reckless way that is a gross departure from the way an ordinarily careful person would act in the same situation; second, the person's act amounts to a disregard for human life or indifference to the consequences of his or her acts; and, third, a reasonable

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38). However, in Ground Seven, Petitioner contends she was denied due process of law when the trial court failed to instruct the jury on the lesser-included offense of misdemeanor child endangerment. (Petition at 6a; Pet. Mem. at 65-71).

Misdemeanor child endangerment is a lesser included offense of felony child endangerment.[11] People v. Moussabeck, 157 Cal. App. 4th 975, 980 (2007). Although the Supreme Court has held the failure of a state court to instruct on a lesser included offense in a capital murder case is constitutional error if there was evidence to support the instruction, Beck v. Alabama, 447 U.S. 625, 638 (1980), the Supreme Court reserved judgment on "whether the Due Process Clause would require the giving of such instructions

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> person would have known that acting in that way would naturally and probably result in harm to others. [¶] A child does not need to actually suffer great bodily harm, but if a child does suffer great bodily harm, you may consider that fact along with all of the other evidence in deciding whether the defendant committed the offense.

(RT 662-64; CT 337-38).

[11] "P.C. [§] 273a defines both felony and misdemeanor child abuse." People v. Moussabeck, 157 Cal. App. 4th 975, 980 (2007).

> The criminal acts proscribed by [P.C. §] 273a are: (1) willfully causing or permitting any child to suffer, or (2) inflicting thereon unjustifiable physical pain or mental suffering, or (3) having the care or custody of any child, willfully causing or permitting the person or health of such child to be injured, or (4) willfully causing or permitting such child to be placed in such situation that its person or health is endangered. If the act is done under circumstances or conditions likely to produce great bodily injury or death, it is a felony; if not, the offense is a misdemeanor.

Id. (citations omitted).

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in a noncapital case[,]" Id. at 638 n.14; see also Keeble v. United States, 412 U.S. 205, 213 (1973) (The Supreme Court has "never explicitly held that the Due Process Clause of the Fifth Amendment guarantees the right of a defendant to have the jury instructed on a lesser included offense. . . ."), and the Ninth Circuit has specifically held that "the failure of a state trial court to instruct on lesser included offenses in a non-capital case does not present a federal constitutional question." Windham v Merkle, 163 F.3d 1092, 1106 (9th Cir. 1998); Solis v. Garcia, 219 F.3d 922, 929 (9th Cir. 2000) (per curiam); see also United States v. Rivera-Alonzo, 584 F.3d 829, 834 n.3 (9th Cir. 2009) ("In the context of a habeas corpus review of a state court conviction, we have stated that there is no clearly established federal constitutional right to lesser included instructions in non-capital cases."). Therefore, the state court's rejection of Petitioner's lesser included instruction argument cannot be contrary to, or an unreasonable application of, clearly established federal law. See Wright v. Van Patten, 552 U.S. 120, 126 (2008) ("Because our cases give no clear answer to the question presented, . . . it cannot be said that the state court unreasonabl[y] appli[ed] clearly established Federal law. Under the explicit terms of § 2254(d)(1), therefore, relief is unauthorized." (citation and internal quotation marks omitted; brackets in original)).

Petitioner disagrees, arguing due process entitles her to a meaningful opportunity to present a complete defense, including adequate instructions on the defense theory of the case. (Pet. Mem. at 68-71). In this case, Petitioner asserts she was entitled

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to a jury instruction on misdemeanor child endangerment because "[e]ven though [alcohol and drugs] were involved, one or more reasonable jurors could have believed that [Petitioner's] conduct, albeit abhorrent, did not subject [her daughter] to the possibility of great bodily injury" given that she was driving "a hefty, strong [Chevy] Tahoe, she carefully buckled her child into a properly installed car seat in the second row of seats[,]" there was no evidence either Petitioner or her child were injured, and the damage to the Tahoe was moderate. (Pet. Mem. at 68-69; Reply at 36).

A criminal defendant "is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in [her] favor." Mathews v. United States, 485 U.S. 58, 63 (1988); Bradley v. Duncan, 315 F.3d 1091, 1098 (9th Cir. 2002); see also California v. Trombetta, 467 U.S. 479, 485 (1984) ("Under the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness. We have long interpreted this standard of fairness to require that criminal defendants be afforded a meaningful opportunity to present a complete defense."); Bashor v. Risley, 730 F.2d 1228, 1240 (9th Cir. 1984) ("'Failure of a state court to instruct on a lesser offense fails to present a federal constitutional question and will not be considered in a federal habeas corpus proceeding.' This general statement may not apply to every habeas corpus review, because the criminal defendant is also entitled to adequate instructions on his or her theory of defense." (citations omitted)). However, this rule does not

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benefit Petitioner because her theories of defense as to count five were that she was not guilty because she was not criminally negligent and she did not place her daughter into a situation likely to cause great bodily injury or death, not that she only committed the lesser offense of misdemeanor child endangerment.[12] (See RT 735-36); see also Bashor, 730 F.2d at 1240 ("There was no fundamental unfairness in the trial court's failure to instruct the jury on lesser included offenses" when petitioner did not base his theory of defense on those lesser included offenses); Clark v. Singh, 2009 WL 82279, *5-6 (C.D. Cal. 2009) ("Defense counsel did not request an instruction on misdemeanor child endangerment. . . . It is clear to the Court that defense counsel made a tactical decision to defend the felony endangerment charge by arguing that an element had not been met. Had the jury agreed with defense counsel that the element had not been met, it would have returned a not guilty verdict on that count. In other words, petitioner's defense was not that he was guilty of the lesser included offense of misdemeanor child endangerment but rather that he was not guilty of the charged offense of felony child endangerment. . . . [Accordingly,] petitioner is unable to claim that he was denied instruction on a lesser included offense that was his theory of defense. . . .").[13]

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[12] That is, defense counsel never sought instruction on misdemeanor child endangerment and instead argued the prosecutor had not proven felony child endangerment beyond a reasonable doubt. (See RT 602, 735-36).

[13] Petitioner complains that "since the jury was provided only an 'all or nothing' verdict choice [on] the child endangerment charge, it could not render a conclusion coincident with the possibility it believed the conduct constituted endangerment short of endangerment positing potential great bodily injury[,]" which "had

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Moreover, failure to instruct on a defense theory constitutes reversible error only "'if the theory is legally sound and evidence in the case makes it applicable.'" Clark v. Brown, 450 F.3d 898, 904-05 (9th Cir. 2006) (citations omitted). Here, the California Court of Appeal properly found that "[g]iven the evidence in this case, there was no basis upon which to give the instruction on the lesser included offense" of misdemeanor child endangerment.[14]

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the effect of denying [Petitioner] a reasonable defense to the charge." (Pet. Mem. at 71). This is simply not true. If the jury believed the prosecutor had not proven all the elements of felony child endangerment, it would have returned a not guilty verdict on count 5. Clark, 2009 WL 82279 at *5. Indeed, the jury was specifically instructed to return a not guilty verdict unless the prosecutor proved Petitioner guilty beyond a reasonable doubt (RT 628-29; CT 297), and it is presumed the jury followed its instructions. Blueford v. Arkansas, 566 U.S. 599, 606 (2012); Weeks v. Angelone, 528 U.S. 225, 234 (2000).

[14] The California Court of Appeal explained:

> [W]e conclude there is no substantial evidence from which a reasonable jury could find [Petitioner] committed misdemeanor child endangerment, but not felony child endangerment. The evidence in the case showed [Petitioner] consumed alcohol, methamphetamine and marijuana before or while she drove her three-year-old child from Fallbrook to Menifee to purchase a puppy. She had an open empty bottle of vodka in her vehicle. Immediately before the accident, she was driving 59 miles per hour on a roadway with a speed limit of 35 miles per hour. She admitted she was not looking where she was going as she approached the intersection. She ran a red light at a high rate of speed and struck another vehicle, killing one of the occupants.
>
> Each of the intoxicants, and the combination thereof, impaired [Petitioner's] ability to drive. [Petitioner] drove under the influence with her child in the car knowing the risks involved. She had previously attended courses about the dangers of driving under the influence. In addition, her boyfriend had recently called 911 because he was concerned about her drinking and driving with children in the vehicle. He told her not to drink and drive with their children in the car for their safety.

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(Lodgment 1 at 9-10). Accordingly, because the misdemeanor child endangerment "instruction was not warranted under California law[,]" the trial court's failure to give it "was not error, let alone a violation of due process." Menendez v. Terhune, 422 F.3d 1012, 1030 (9th Cir. 2005); Solis v. Garcia, 219 F.3d 922, 929-30 (9th Cir. 2000); see also Delgado v. Figueroa, 2016 WL 1084725, *7 (C.D. Cal.) (rejecting claim that trial court erred in failing to instruct the jury on misdemeanor child endangerment when no such instruction was requested and "the evidence did not warrant an instruction on misdemeanor child endangerment because a jury could not reasonably have found that Petitioner had committed only the lesser offense of misdemeanor child endangerment"), report and recommendation accepted by, 2016 WL 1084765 (C.D. Cal. 2016); Clark, 2009 WL 82279 at *5-6 (rejecting claim that trial court erred in failing to instruct the jury on misdemeanor child endangerment when defense counsel did not request any such instruction and, "as the Court of Appeal found, the evidence did not warrant an instruction on misdemeanor child endangerment because a 'jury could not reasonably have found that [petitioner]

> The fact neither she nor her child were significantly injured in the accident is fortuitous, but irrelevant. We cannot agree a reasonable jury could conclude [Petitioner's] criminally negligent conduct did not create a probability of serious injury for her child simply because she was driving a large SUV and happened to crash into a smaller vehicle. Even in an SUV, there is a significant risk of great bodily injury and death associated with driving under the influence of alcohol and drugs. [Petitioner's] impaired driving could have just as easily caused her to become involved in a roll-over accident or a collision with a larger vehicle, with a much different outcome for the child.

(Lodgment 1 at 9-10 (citations omitted)).

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had committed only the lesser offense of misdemeanor child endangerment.'").

Finally, Petitioner has not shown that any possible error had a substantial and injurious effect or influence in determining the jury's verdict. Pulido, 555 U.S. at 61-62; Brecht, 507 U.S. at 623. To the contrary, as the California Court of Appeal explained, "[t]he evidence in this case overwhelmingly supported the jury's finding [that Petitioner's] conduct in driving under the influence of a combination of intoxicants at a high rate of speed and not paying attention to the road ahead created a high probability of great bodily harm or death for her child who was riding in the vehicle." (Lodgment 1 at 11).

For all these reasons, the state court's rejection of Ground Seven was not contrary to, or an unreasonable application of, clearly established federal law.

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VII.

CONCLUSION

For the foregoing reasons, IT IS RECOMMENDED that the District Judge issue an Order: (1) accepting this Report and Recommendation, (2) denying the Petition for Writ of Habeas Corpus, and (3) directing that Judgment be entered dismissing this action with prejudice.

DATED: August 2, 2019

/S/
SUZANNE H. SEGAL
UNITED STATES MAGISTRATE JUDGE

NOTICE

Reports and Recommendations are not appealable to the Court of Appeals, but may be subject to the right of any party to file objections as provided in the Local Rules Governing the Duties of Magistrate Judges and review by the District Judge whose initials appear in the docket number. No notice of appeal pursuant to the Federal Rules of Appellate Procedure should be filed until entry of the judgment of the District Court.

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Appellate Courts Case Information

CALIFORNIA COURTS
THE JUDICIAL BRANCH OF CALIFORNIA

Supreme Court

Change court

Court data last updated: 02/07/2017 08:39 AM

Docket (Register of Actions)

PEOPLE v. DEAN-BAUMANN
Case Number S235286

Date	Description	Notes
06/20/2016	Petition for review filed	Defendant and Appellant: Melissa Dean-Baumann Pro Per
06/20/2016	Record requested	
06/23/2016	Received Court of Appeal record	two doghouses (volumes 1 and 2)
07/27/2016	Petition for review denied	
08/30/2016	Returned record	petition, 2 doghouses

Click here to request automatic e-mail notifications about this case.

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Filed 5/13/16 P. v. Dean-Baumann CA4/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. MELISSA DEAN-BAUMANN, Defendant and Appellant.	D069430 (Super. Ct. No. RIF1210970)

APPEAL from a judgment of the Superior Court of Riverside County, Jeffrey J. Prevost, Judge. Affirmed.

Athena Shudde, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Eric A. Swenson, Kristine A. Gutierrez and Lynne G. McGinnis, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

A jury convicted Melissa Dean-Bauman of second degree murder (Pen. Code, § 187, subd. (a); count 1),[1] vehicular manslaughter with gross negligence while intoxicated (§ 191.5, subd. (a); count 2), driving under the influence of alcohol and/or drugs causing injury (Veh. Code, § 23153, subd. (a); count 3), felony drunk driving (Veh. Code, § 23153, subd. (b); count 4), and felony child endangerment (§ 273a, subd. (a); count 5). The jury found true allegations Dean-Bauman inflicted great bodily injury on victims 70 years of age or older in committing counts 2 through 4 (§ 12022.7, subd. (c)).

The court sentenced Dean-Baumann to prison for 15 years to life for count 1. The court sentenced Dean-Baumann to concurrent terms of six years for count 2 and two years each for counts 3 and 4. Pursuant to section 12022.7, subdivision (c), the court added a five-year enhancement to the sentence for count 2 and additional enhancements of one year and eight months (one-third of the five years) to each of the sentences for counts 3 and 4. The court also sentenced Dean-Baumann to one year and four months for count 5, to be served consecutively to count 1. Pursuant to section 654, the court stayed punishment for counts 2 through 5.

On appeal, Dean-Baumann contends: (1) the court erred in failing to instruct on the lesser included offense of misdemeanor child abuse/endangerment (§ 273a, subd. (b)) as to count 5 because the jury could have concluded her child was not at great risk of bodily injury since the vehicle Dean-Baumann drove while under the influence of both

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1 All further statutory references are to the Penal Code unless otherwise indicated.

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alcohol and drugs was a sports utility vehicle (SUV) as opposed to some smaller vehicle; (2) the true finding on the great bodily injury enhancement for count 2 should be stricken as unauthorized under section 12022.7; and (3) the drunk driving convictions in counts 3 and 4 should have been vacated because they are lesser included offenses of the gross vehicular manslaughter conviction in count 2. The People concede the second contention. Therefore, we strike the enhancement for count 2. We disagree with the other contentions and affirm the judgment in all other respects.

FACTUAL AND PROCEDURAL BACKGROUND

A

In May 2003 a police officer stopped Dean-Baumann after he observed her vehicle make a right turn and then a U-turn before it turned left, drove over a sidewalk, through a dirt field, and stopped behind a house. When the officer explained why he stopped her, Dean-Baumann stated she was going home and this was the quickest route. The officer smelled alcohol on her breath and noticed she had bloodshot and watery eyes. She also had slurred speech and a dry mouth. Dean-Baumann denied drinking. However, she did not perform well on field sobriety tests. She was cooperative, but giggly during the field sobriety tests. The results of two preliminary alcohol sensor tests (breathalyzer) were 0.14 and 0.13. Dean-Baumann was arrested and cited for driving under the influence. Later, in 2009, Dean-Baumann was required to attend drug and alcohol counseling sessions regarding the impact of driving under the influence.

On September 10, 2012, Dean-Baumann's boyfriend called 911 because he suspected she was trying to pick up their child from school after she had been drinking.

Dean-Baumann knocked the phone from his hand as he was calling and she left with the child in the car. Her boyfriend told her not to drink and drive with their children in the vehicle.

B

On December 13, 2012, at approximately 12:30 p.m., Dean-Baumann ran a red light at the intersection of McCall Boulevard and Encanto Drive in Menifee, California. She drove her Chevrolet Tahoe into the intersection at a high rate of speed and struck a Saturn driving the opposite direction, which was turning left onto Encanto Drive. A witness, who was in the left turn lane behind the Saturn, saw the Tahoe come toward the intersection without slowing down. The driver of the Tahoe did not appear to be paying attention to the road. She had one hand on the steering wheel in the 12 o'clock position as she looked toward the right. She appeared to be trying to find something or grab something with her other hand.

Donald F. was taking his 86-year-old wife, Phyllis F., to the hairdresser and turned left on a green turn signal from McCall Boulevard onto Encanto Drive. As he did so, his vehicle was hit on the passenger side by Dean-Bauman's vehicle. Phyllis F. died from blunt impact injuries to the torso as a result of the collision. Donald F. was taken to a trauma center. He sustained cuts, bruises and a concussion.

After the collision, a witness saw Dean-Baumann raise her hands in the air. It looked like she was talking or yelling at someone in the back of the vehicle. Another witness saw the driver of the Tahoe exit her vehicle crying and holding a child. Dean-Baumann's boyfriend, went to the scene to pick up the child.

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A community service officer of the Riverside County Sheriff's Department responded to the traffic collision. The officer found an elderly male in the driver's seat and an elderly female in the front passenger seat. Both were injured. The male was bleeding from his head. The female had a large gash wound to the skull. She was unresponsive and her head draped forward. The male was alert, but agitated.

When the responding officer initially contacted Dean-Baumann, she was crying and appeared hysterical. Another officer later contacted Dean-Baumann at the scene to discuss the accident. Dean-Baumann said she and her daughter had come from Fallbrook that morning to purchase a puppy and they were on their way home when the accident occurred. She denied drinking or taking medication before the accident other than medication for acid reflux.

The officer observed her eyes were bloodshot and watery, her speech was slurred and the odor of alcohol emanated from her breath and person. He advised her the passenger in the vehicle she hit was dead at the scene. During field sobriety tests, as Donald F. was being loaded into an ambulance, Dean-Baumann laughed and talked about how hard the tests were and how they were like games children play.

Dean-Baumann's blood alcohol level was found to be 0.16 percent, which is twice the level at which a person is impaired for driving. Since the sample was drawn more than an hour after the accident, her blood alcohol level at the time of the accident was likely higher than 0.17 percent. She also tested positive for methamphetamine and marijuana. The amount of methamphetamine found in her blood was more than three

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times the therapeutic level. The levels of cannabinoids found in her blood indicated marijuana use within hours of when the blood was drawn.

During an inspection of the SUV, an open empty bottle of vodka was found inside a closed compartment between the passenger and driver seat of the SUV under some papers. The vehicle also smelled of alcohol.

A deputy sheriff for the Riverside County Sheriff's Department analyzed the crash data retrieval (CDR) box in the Tahoe. The CDR records data when it is senses something is about to happen. Various things can trigger the module such as braking, the start of an impact, deployment of an airbag or a combination of things. The module records information prior to the event based on an algorithm from the time the device is enabled, i.e., algorithm enabled (AE). In this case, the data showed the vehicle was traveling 59 miles per hour five seconds before AE and decelerated to 53 miles per hour two seconds before AE. One second before AE, the speed was 29 miles per hour. That amount of deceleration could not occur with braking, but instead would occur if the vehicle struck something.

C

Dean-Baumann presented evidence she purchased a puppy at a residence approximately three miles from the intersection where the accident occurred. The person who sold the puppy to Dean-Baumann did not notice she was under the influence of alcohol.

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DISCUSSION

I

Dean-Baumann contends the court erred in failing to instruct the jury on the elements of misdemeanor child abuse or endangerment as a lesser included offense of felony child abuse or endangerment, as charged in count 5. Dean-Baumann contends a jury could conclude, even though she drove while intoxicated through a red light at a high rate of speed and broadsided another vehicle, her child was not endangered under circumstances or conditions likely to produce great bodily injury because the child was riding restrained in a car seat in the back seat of her SUV. Dean-Baumann claims the large, heavy SUV was "somewhat impervious to damage" and the child was "more protected than a child in a standard sedan, or small vehicle." We are not persuaded.

A

"A trial court has a sua sponte duty to 'instruct on a lesser offense necessarily included in the charged offense if there is substantial evidence the defendant is guilty only of the lesser.' [Citation.] Substantial evidence in this context is evidence from which a reasonable jury could conclude that the defendant committed the lesser, but not the greater, offense. [Citation.] 'The rule's purpose is ... to assure, in the interest of justice, the most accurate possible verdict encompassed by the charge and supported by the evidence.' [Citation.] In light of this purpose, the court need instruct the jury on a lesser included offense only '[w]hen there is substantial evidence that an element of the charged offense is missing, but that the accused is guilty of' the lesser offense.' " (*People v. Shockley* (2013) 58 Cal.4th 400, 403-404.)

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"[T]he existence of *'any* evidence, no matter how weak' will not justify instructions on a lesser included offense, but such instructions are required whenever evidence that the defendant is guilty only of the lesser offense is 'substantial enough to merit consideration' by the jury. [Citations.] 'Substantial evidence' in this context is ' "evidence from which a jury composed of reasonable [persons] could ... conclude[]" ' that the lesser offense, but not the greater, was committed." (*People v. Breverman* (1998) 19 Cal.4th 142, 162 (*Breverman*).)

"Section 273a defines both felony and misdemeanor child abuse. The criminal acts proscribed by section 273a are: (1) willfully causing or permitting any child to suffer, or (2) inflicting thereon unjustifiable physical pain or mental suffering, or (3) having the care or custody of any child, willfully causing or permitting the person or health of such child to be injured, or (4) willfully causing or permitting such child to be placed in such situation that his or her person or health is endangered." (*People v. Moussabeck* (2007) 157 Cal.App.4th 975, 980 (*Moussabeck*).) The *Moussabeck* court explained the difference between felony child abuse or endangerment and misdemeanor child abuse or endangerment: "If the act is done under circumstances or conditions likely to produce great bodily injury or death, it is a felony (§ 273a, subd. (a)); if not, the offense is a misdemeanor (§ 273a, subd. (b)). [Citation.] Misdemeanor child abuse (citation), is a lesser included offense of felony child abuse." (*Moussabeck, supra,* at p. 980.)

Courts have defined the phrase "circumstances ... likely to produce great bodily harm or death" in section 273a to mean " 'the probability of serious injury is great.' "

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(*People v. Sargent* (1999) 19 Cal.4th 1206, 1223; *People v. Chaffin* (2009) 173 Cal.App.4th 1348, 1351-1353; contra, *People v. Wilson* (2006) 138 Cal.App.4th 1197, 1204 [holding the term "likely" in section 273a means "a substantial danger, i.e., a serious and well-founded risk, of great bodily harm or death"].) The jury, which convicted Dean-Baumann of felony child endangerment, was instructed "[t]he phrase likely to produce great bodily harm or death means the probability of great bodily harm or death is high." (CALCRIM No. 821.)

We need not decide the contours of the definition of "likely" in section 273a, because, under any standard, we conclude there is no substantial evidence from which a reasonable jury could find Dean-Baumann committed misdemeanor child endangerment, but not felony child endangerment. The evidence in the case showed Dean-Baumann consumed alcohol, methamphetamine and marijuana before or while she drove her three-year-old child from Fallbrook to Menifee to purchase a puppy. She had an open empty bottle of vodka in her vehicle. Immediately before the accident, she was driving 59 miles per hour on a roadway with a speed limit of 35 miles per hour. She admitted she was not looking where she was going as she approached the intersection. She ran a red light at a high rate of speed and struck another vehicle, killing one of the occupants.

Each of the intoxicants, and the combination thereof, impaired Dean-Baumann's ability to drive. Dean-Baumann drove under the influence with her child in the car knowing the risks involved. She had previously attended courses about the dangers of driving under the influence. In addition, her boyfriend had recently called 911 because

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he was concerned about her drinking and driving with children in the vehicle. He told her not to drink and drive with their children in the car for their safety.

The fact neither she nor her child were significantly injured in the accident is fortuitous, but irrelevant. (*People v. Clair* (2011) 197 Cal.App.4th 949, 955-956 [lack of evidence of actual injury or harm is irrelevant for violation of § 273a, subd. (a)].) We cannot agree a reasonable jury could conclude Dean-Baumann's criminally negligent conduct did not create a probability of serious injury for her child simply because she was driving a large SUV and happened to crash into a smaller vehicle. Even in an SUV, there is a significant risk of great bodily injury and death associated with driving under the influence of alcohol and drugs. Dean-Baumann's impaired driving could have just as easily caused her to become involved in a roll-over accident or a collision with a larger vehicle, with a much different outcome for the child. Given the evidence in this case, there was no basis upon which to give the instruction on the lesser included offense.

B

Even assuming, arguendo, it was error not to instruct on the lesser included offense of misdemeanor child abuse, it was not prejudicial. We review the failure to instruct sua sponte on a lesser included offense in a noncapital case under state standards of reversibility. (*Breverman, supra*, 19 Cal.4th at p. 165, citing Cal. Const., art. VI, § 13; *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*).) " 'Appellate review under *Watson* ... takes an entirely different view of the evidence [than that employed when considering whether or not to instruct on a lesser included offense]. Such posttrial review focuses not on what a reasonable jury *could* do, but what such a jury is *likely* to have

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done in the absence of the error under consideration. In making that evaluation, an appellate court may consider, among other things, whether the evidence supporting the existing judgment is so *relatively* strong, and the evidence supporting a different outcome is so *comparatively* weak, that there is no reasonable probability the error of which the defendant complains affected the result. Accordingly, a determination that a duty arose to give instructions on a lesser included offense, and that the omission of such instructions in whole or in part was error, does not resolve the question whether the error was prejudicial. Application of the *Watson* standard of appellate review may disclose that, though error occurred, it was harmless.' " (*People v. Moye* (2009) 47 Cal.4th 537, 556 (*Moye*).)

The evidence in this case overwhelmingly supported the jury's finding Dean-Baumann's conduct in driving under the influence of a combination of intoxicants at a high rate of speed and not paying attention to the road ahead created a high probability of great bodily harm or death for her child who was riding in the vehicle. Speculation the child was not at actually at risk of suffering death or great bodily injury because the child was in an SUV is so comparatively weak we conclude any instructional error was harmless. It is not reasonably probable Dean-Baumann would have obtained a more favorable outcome had a misdemeanor child endangerment instruction been given. (*Moye, supra,* 47 Cal.4th at pp. 557-558.)

II

With respect to count 2, the jury convicted Dean-Bauman of vehicular manslaughter of Phyllis F. (§ 191.5, subd. (a).) The jury found true allegations Dean-

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Baumann inflicted great bodily injury upon Donald F. when she committed count 2 (§ 12022.7, subd. (c)). As a result, the court imposed and stayed the five-year sentence enhancement for count 2.

Dean-Baumann contends, and the People concede, the enhancement for count 2 must be stricken pursuant to *People v. Cook* (2015) 60 Cal.4th 922 (*Cook*). The Supreme Court held in *Cook* great bodily injury enhancements under section 12022.7 do not apply to a murder or manslaughter conviction, even if the victim who suffered great bodily injury is not the deceased victim. (*Cook, supra*, at p. 935.) We, therefore, strike the great bodily injury enhancement for count 2.

III

Dean-Baumann contends the convictions under counts 3 (Veh. Code, § 23153, subd. (a), driving under the influence of alcohol and/or drugs causing injury) and 4 (Veh. Code, § 23153, subd. (b), felony drunk driving) should have been vacated because they are necessarily included offenses of count 2 (§191.5, subd. (a), gross vehicular manslaughter while intoxicated). As a result, Dean-Baumann contends the court erred in sentencing her and staying punishment as to these counts under section 654. The People contend the convictions under counts 3 and 4 are not necessarily included offenses of count 1 because they involve a different victim than charged in count 2. The People are correct.

"In general, a person may be *convicted* of, although not *punished* for, more than one crime arising out of the same act or course of conduct. 'In California, a single act or course of conduct by a defendant can lead to convictions "of *any number* of the offenses

charged." [Citations.]' [Citation.] Section 954 generally permits multiple conviction. Section 654 is its counterpart concerning punishment. It prohibits multiple punishment for the same 'act or omission.' When section 954 permits multiple conviction, but section 654 prohibits multiple punishment, the trial court must stay execution of sentence on the convictions for which multiple punishment is prohibited. [Citations.] ... [¶] A judicially created exception to the general rule permitting multiple conviction 'prohibits multiple convictions based on necessarily included offenses.' [Citation.] '[I]f a crime cannot be committed without also necessarily committing a lesser offense, the latter is a lesser included offense within the former.' " (*People v. Reed* (2006) 38 Cal.4th 1224, 1226-1227.)

The Supreme Court has held a defendant in a single driving incident may be convicted of multiple crimes where he or she commits vehicular manslaughter in violation of the Penal Code as to one victim and drunk driving in violation of the Vehicle Code causing injury to a separate victim. (*People v. McFarland* (1989) 47 Cal.3d 798, 803 (*McFarland*).) Noting the crime of vehicular manslaughter with gross negligence constitutes a crime of violence against a person, the court held where "a defendant commits vehicular manslaughter with gross negligence—an act of violence against the person—he [or she] may properly be punished [for a violation of the Vehicle Code] for injury to a separate individual that results from the same incident." (*Id.* at p. 804.)

Here, Dean-Baumann was convicted under count 2 for gross vehicular manslaughter of Phyllis F. for driving while intoxicated in violation of section 191.5, subdivision (a). She was convicted under counts 3 and 4 for causing injury to Donald F.

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under Vehicle Code section 23153, subdivisions (a) and (b), for drunk driving. Therefore, counts 3 and 4 are not necessarily included offenses of count 2. (*McFarland*, *supra*, 47 Cal.3d at p. 804.)

The cases cited by Dean-Baumann are single victim cases in which courts have held a violation of Vehicle Code section 23153, subdivision (a), for driving under the influence is a necessarily included offense of gross vehicular manslaughter while intoxicated. (*People v. Miranda* (1994) 21 Cal.App.4th 1464, 1468; *People v. Binkerd* (2007) 155 Cal.App.4th 1143, 1149 ["where one victim dies from an alcohol-related accident due to a violation of Vehicle Code [section 23153], the Vehicle Code violation would always be a lesser included offense" of vehicular manslaughter while intoxicated].) Such cases are inapposite when the charges involve separate victims. The court properly sentenced Dean-Baumann as to counts 3 and 4 and stayed the punishment for those counts pursuant to section 654.

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DISPOSITION

The great bodily injury enhancement accompanying count 2 is stricken. The court is directed to prepare an amended abstract of judgment reflecting the modification and to forward the amended abstract to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

McCONNELL, P. J.

WE CONCUR:

HUFFMAN, J.

AARON, J.

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