Appendix C

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

FIVEA SHARIPOFF,

Petitioner,

v.

ROB PERSSON, Superintendent, Coffee Creek Correctional Institution,

Respondent.

Case No. 3:16-cv-01711-AC
FINDINGS AND RECOMMENDATION

ACOSTA, Magistrate Judge:

Petitioner, an inmate in the custody of the Oregon Department of Corrections, brings this habeas corpus action pursuant to 28 U.S.C. § 2254. As explained below, Petitioner's Petition for Habeas Corpus (ECF No. 2) should be DENIED.

Background

On March 1, 2007, a Linn County grand jury indicted Petitioner on two counts of Manslaughter in the First Degree, one count of Assault in the Second Degree, and one count of Driving under the Influence of Intoxicants ("DUII"). Resp. Exh. 102, pp. 1-2. The victim in

Count One was identified as Angela Svendsen, and the victim in Count Two as Kjersten Oquist. Counts One and Two alleged as to each victim that Petitioner "did unlawfully and recklessly, under circumstances manifesting extreme indifference to the value of human life, cause the death of another human being." Resp. Exh. 102, p. 1. Count Three alleged that Petitioner "did unlawfully and recklessly under circumstances manifesting extreme indifference to the value of human life cause serious physical injury to Kelli Gronli by means of a dangerous weapon, to-wit: a vehicle." Resp. Exh. 102, p. 2. Count Four alleged that Petitioner "did unlawfully drive a motor vehicle upon a public highway or premises open to the public while under the influence of intoxicants, to-wit intoxicating liquor and/or a controlled substance." *Id.* The indictment stemmed from a two-car collision on February 11, 2007, in which Petitioner drove the wrong way onto Interstate 5 ("I-5") in Albany, Oregon, and collided into the car carrying Svendsen, Oquist, and Gronli.

I. Evidence at Trial

On February 11, 2007, around 5:00 p.m., Petitioner met her friend, Justin Smith, at a pizza restaurant in Albany. Tr. 910, 1140. The two shared beer and some breadsticks. Tr. 911. In total that evening, Smith ordered two small (thirty-two ounce) and two large (sixty ounce) pitchers of beer. Tr. 734–35, 760, 911. Smith consumed one small pitcher before Petitioner arrived. Tr. 910, 1140. Petitioner shared the remaining pitchers with Smith about equally, although the pair left some beer in their glasses and in the final pitcher. Tr. 740, 911–12, 925, 1142. Petitioner estimated that she consumed three-and-a-half to four mugs of beer in total. Tr. 1141. Staff at the restaurant considered cutting off the pair because they had ordered more beer than restaurant policy allowed, but they decided not to do so. Tr. 739, 753–54, 761–62. Neither Petitioner nor Smith appeared obviously impaired to the staff. Tr. 736, 753, 761. Petitioner and Smith left the

restaurant around 8:30 p.m. Tr. 737, 759, 912, 1141.

Petitioner drove Smith in her car to Smith's mother's house a few miles away, following Smith's directions. Tr. 912–13, 1142–44. Petitioner felt fine driving. Tr. 1144. Petitioner visited with Smith's family, then Petitioner drove with Smith to a grocery store where they purchased beer and wine as a gift for Smith's mother, who had been babysitting his children. Tr. 913–14, 935–36, 948–50, 1144. Petitioner and Smith returned to Smith's mother's house and continued their visit; neither Petitioner nor Smith consumed the purchased alcohol or any other alcohol at the house. Tr. 914, 935–36, 1145. Petitioner did not appear impaired either to Smith or to his family. Tr. 915–16, 937, 95051. Petitioner drove Smith back to the pizza restaurant some time past 10:00 p.m. so that he could retrieve his own car. Tr. 914–15, 1147–48.

Petitioner began driving, intending to go north on I-5 to her home in Salem. Tr. 1149. She saw a sign to turn left to I-5 going north and made the turn. Tr. 1149. Although she did not notice any wrong-way signs, in fact she had turned too sharply, driving onto the off-ramp for cars exiting I-5 north. Tr. 1149. Petitioner soon saw headlights coming at her and realized while she was on the ramp or soon after she entered the freeway that she was going the wrong direction. Tr. 1149–50, 1155, 1169–70, 1175. Petitioner sped up to merge onto the freeway, then began traveling south in the northbound lanes of I-5. Tr. 638–40, 647–48, 1155.

Once on the freeway, Petitioner moved over and began traveling south in the lane next to the median — for northbound traffic, the left passing lane. Tr. 596, 639, 647–48, 1150. From Petitioner's perspective, she moved to her right. Tr. 1150. A driver traveling north in the right lane watched Petitioner pass by going the wrong direction and called 9-1-1. Tr. 638–40, 647–48. Soon after, Petitioner's car crashed into a car traveling north in the left lane. Tr. 595–97, 651–53.

Accident reconstruction revealed no evidence that Petitioner took evasive action. Tr. 1001. The crash occurred 956 feet from the exit at which Petitioner entered the highway. Tr. 810. First responders were called to the scene at 10:47 p.m. Tr. 607, 623.

The car Petitioner hit was driven by Oquist, with Svendsen sitting in the front passenger seat and Gronli in the back. Tr. 592–94. The three, all musicians in the Eugene Symphony, were returning home to Portland from a rehearsal in Eugene. Tr. 591–92. Oquist pulled the car to the right as Petitioner approached, then the car shimmied and returned to the left lane before Petitioner's car hit it. Tr. 596–97, 653. Oquist and Svendsen died at the scene. Tr. 611–12. Gronli was taken to the hospital with several injuries and suffered lasting nerve damage in her hand. Tr. 599–603.

At the scene, a firefighter, a paramedic, and a driver from another vehicle who interacted with Petitioner all noticed a strong smell of alcohol coming from her and believed her to be intoxicated. Tr. 617–18, 626, 629, 656. Petitioner was crying and distraught. Tr. 615, 624, 655. Petitioner told the paramedic she had been drinking. Tr. 626.

Petitioner arrived at the hospital at 11:22 p.m. Tr. 665. Two nurses treating her perceived her to be intoxicated, with bloodshot eyes, slurred speech, and a strong smell of alcohol, among other signs. Tr. 666, 696–97. An Oregon State Police trooper who observed Petitioner at the hospital also smelled a strong odor of alcohol from her and formed the opinion that she was very impaired by alcohol. Tr. 767–68, 772–73. Upon discharge, Plaintiff's diagnoses included "alcohol intoxication" and "possible concussion." Tr. 682, 687.

In a medical blood draw at 11:30 p.m., Petitioner's blood alcohol content was 0.246 in a serum test performed in the hospital lab, equivalent to approximately 0.20 in a forensic test. Tr.

700, 723, 844. In a blood draw performed pursuant to a warrant at 2:08 a.m., Petitioner's blood alcohol content was 0.15 in a forensic test. Tr. 839–40. A forensic scientist from the Oregon State Police Crime Lab testified that these two measurements were consistent with each other given dissipation of blood alcohol over time, and the measurements indicated that Petitioner had a blood alcohol content between 0.18 and 0.21 at the time of the collision.[1] Tr. 848–50.

An Oregon State Police trooper questioned Petitioner after she was discharged from the hospital at 2:30 a.m. on February 12. Tr. 794. Petitioner told the trooper that she had had three to four beers, starting at 5:30 p.m., and "her last drink just before the crash." Tr. 796. Petitioner said she had taken Cipro (an antibiotic prescribed to her) and Zoloft at noon. Tr. 799–800. Petitioner told the trooper she thought she was fine until she sat behind the wheel. Tr. 798. She said that she had tried to drive home going north on I-5, then realized she was going the wrong way. Tr. 797–98. She said she remembered trying to slow and pull to the right and that she had been very confused. Tr. 798. The trooper questioning her perceived her to be impaired at the time of the conversation based her conduct and a moderate odor of alcohol. Tr. 801–02. The trooper arrested Petitioner. Tr. 801.

Another trooper questioned Petitioner in jail on the afternoon of February 12. Tr. 816–17. Petitioner again reported that she had consumed three or four beers. Tr. 817. She told him that she was "messed up." Tr. 820, 1174. She explained that she had never taken that particular

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[1] (1) A person commits the offense of driving while under the influence of intoxicants if the person drives a vehicle while the person:

(a) Has 0.08 percent or more by weight of alcohol in the blood of the person as shown by chemical analysis of the breath or blood of the person . . . ; [or]

(b) Is under the influence of intoxicating liquor[.]

OR. REV. STAT. § 813.010 (2019).

exit before. Tr. 823. The trooper testified that she told him, "I took a wrong way. I realized it right away. I just wanted to get off the lanes, but I guess it was too late." Tr. 820. Petitioner also told the trooper that she had previously taken an eight-hour course on the dangers of drinking and driving. Tr. 819–20.

At trial, the prosecution presented evidence about Petitioner's participation in a course on the dangers of drinking and driving after she was arrested for DUI in Clark County, Washington in 2003. Tr. 868, 872. The course included videos, photos, and a victim impact panel. Tr. 819–20, 867–72. Petitioner completed a test at the end of the course demonstrating her understanding of the dangers of drinking and driving. Tr. 879–80. Petitioner testified at trial that the course taught her to plan ahead to use a hotel, taxi, or designated driver when drinking, and that she had done those things on other occasions when she drank. Tr. 1146–47. She testified, "I took the classes. I know the risks." Tr. 1176.

At trial, Petitioner sought to demonstrate that the intersection was confusing and difficult to navigate. To do so, she sought to introduce expert evidence about the design of the intersection as well as firsthand testimony from drivers who had navigated the intersection incorrectly. Tr. 477–78. Petitioner sought to use evidence about the confusing intersection to undermine the inference that Petitioner was acting recklessly under circumstances manifesting extreme indifference to the value of human life, an element of the charges of Manslaughter in the First Degree and Assault in the Second Degree. Tr. 954, 959. Her trial attorney noted that Petitioner's having driven the wrong way was a circumstance that could manifest extreme indifference to the value of human life, but the evidence that the off-ramp intersection was one where even unimpaired people could enter the wrong-way demonstrated that Petitioner's conduct did not show extreme

indifference. Tr. 954–56, 1020–21.

The prosecutor objected to the admission of evidence regarding other drivers' incorrect navigation of the intersection as not relevant under Oregon Evidence Code ("OEC") Rule 401. OR. REV. STAT. § 40.150 (2019). Tr. 477–78. He argued that the experiences of other drivers were not relevant to whether Petitioner herself was reckless under circumstances manifesting extreme indifference to the value of human life when she navigated the intersection on the night of February 11. Tr. 477–78. The trial judge agreed with the prosecutor that the experiences of other drivers navigating the intersection, whether correctly or incorrectly, was not relevant to Petitioner's case. Tr. 1023–26. The trial judge ruled that "neither side can be allowed to put on individual instances of other people's conduct to show that this conduct was or was not of a heightened degree of blame worthiness." Tr. 1024.

Accordingly, Petitioner could not present evidence that other drivers had navigated the intersection incorrectly. Tr. 1127–31. In an offer of proof, a former Oregon State Police officer testified that he had made the same error at the intersection while on duty on at least one occasion. Tr. 1128–29. He quickly pulled over and corrected his wrong-way driving. Tr. 1128. Petitioner's attorney told the court that another police officer and four other drivers would have testified similarly. Tr. 1130–31.

Petitioner was allowed to present expert evidence about the design of the intersection and the elements that made it confusing. Tr. 1022–23. At trial, Petitioner introduced into evidence a scale model of the intersection made by an accident reconstructionist. Tr. 956–66.[2] The

[2] The initial model lacked certain signs, lights, and other elements of the intersection; the reconstructionist added these elements and was recalled to explain the changes. Tr. 1051–54.

accident reconstructionist explained how a driver could take the left turn too sharply, miss a "wrong way" sign, and enter the off-ramp going the wrong direction. Tr. 968. Petitioner called a highway and road safety engineer who testified that several elements of the intersection were confusing and that numerous changes should be made to it. Tr. 1069, 1072, 1075–77, 1080–82. The engineer noted that the placement of the stop line far back increased the risk a driver would turn into the oncoming lanes of the off-ramp, that there should have been two "wrong way" signs rather than one, that a "keep right" sign at the intersection was unclear, that several signs were angled incorrectly, and that additional lines on the pavement would have provided more clarity. Tr. 1069, 1072, 1075–77, 1080–81. The engineer noted that drivers making the turn at night without other cars present would lack visual cues telling them not to enter the off-ramp. Tr. 1071. Petitioner also called an investigator who testified that the day after the crash, a streetlight at the intersection was not functioning, leaving the intersection without illumination. Tr. 1031–32.

In his opening and closing arguments, Petitioner's trial counsel urged the jury to find Petitioner did not act recklessly or act recklessly under circumstances manifesting extreme indifference to the value of human life, but instead was criminally negligent and should be guilty of only the lesser included offense of criminally negligent homicide (as well as DUII).[3] Tr. 587,

[3] "[I]ntoxication combined with negligent driving can constitute criminal negligence, recklessness or recklessness under circumstances manifesting extreme indifference to the value of human life, depending on the nature of the accused's erratic driving, the extent of his intoxication and the attitude he displays toward the consequences of his acts." *State v. Hill*, 298 Or. 270, 280 (1984). A person who is criminally negligent with respect to a result "fails to be aware of a substantial and unjustifiable risk that the result will occur." OR. REV. STAT. §161.085(10). A person who is reckless or reckless under circumstances manifesting extreme indifference to the value of human life with respect to a result "is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur." OR. REV. STAT. §161.085(9).

1269–71, 1278–79. Petitioner's trial counsel argued that Petitioner was not aware of the risk of driving impaired in that moment because she was not aware how drunk she was, and thus was not reckless.[4] Tr. 1270, 1276, 1278–79.

The prosecution argued that Petitioner was reckless under circumstances manifesting extreme indifference to the value of human life, focusing on her decision to drive after drinking a substantial amount of beer despite her previous education on the dangers of drinking and driving. Tr. 1279–85. The prosecution argued that whether she drove the right way or wrong way on the freeway, she was reckless under circumstances manifesting extreme indifference to the value of human life when she chose to drive on the freeway after drinking. Tr. 1285–89.

The jury found Petitioner guilty of the charged counts. Tr. 1323–24; Resp. Exh. 101. Petitioner was sentenced to 200 months in prison. Resp. Exh. 101.

II. The Direct Appeal

Petitioner filed a direct appeal asserting that "[t]he trial court erred in excluding evidence that other drivers made the same wrong turn onto the I-5 northbound off-ramp that defendant made." Resp. Exh. 103, p. 14. Petitioner argued primarily that the trial court erred in its application of OEC 401. Resp. Exh. 103, pp. 15–21. Petitioner additionally argued very briefly that the exclusion of this evidence violated her right to present a complete defense under the Oregon Constitution as well as the Compulsory Process Clause of the Sixth Amendment to the United States Constitution and the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Resp. Exh. 103, pp. 21–22. The Oregon Court of Appeals affirmed without

[4] "The difference between criminal negligence on the one hand and the two levels of recklessness on the other is *defendant's subjective awareness of the risks to which he exposes others*." *State v. Johnstone*, 172 Or. App. 559, 566 (2001) (emphasis in original) (quoting *Hill*, 298 Or. at 280).

opinion. *State v. Sharipoff*, 240 Or. App. 465 (2011). The Oregon Supreme Court denied review. *State v. Sharipoff*, 350 Or. 297 (2011).

III. The State Post-Conviction Proceeding

Petitioner then sought state post-conviction relief ("PCR"). She asserted ten claims of ineffective assistance of trial counsel. Resp. Exh. 108, pp. 3–6. The PCR court denied relief. Resp. Exh. 126. Petitioner appealed the PCR judgment, arguing only that the judgment did not meet state law requirements. Resp. Exh. 127, p. 14. The Oregon Court of Appeals affirmed the PCR judgment without opinion, *Sharipoff v. Steward*, 274 Or. App. 260 (2015), and the Oregon Supreme Court denied review, *Sharipoff v. Steward*, 358 Or. 833 (2016).

IV. Petitioner's Petition for Writ of Habeas Corpus

On August 25, 2016, Petitioner filed a *pro se* Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 with this court, alleging two claims for relief. In Ground One, Petitioner alleges that the trial court's exclusion of evidence that other drivers made the same error at the intersection where Petitioner entered the freeway going the wrong direction violated her constitutional rights under the Sixth and Fourteenth Amendments. In Ground Two, Petitioner alleges that trial counsel provided her with ineffective assistance of counsel in violation of her Sixth Amendment rights. In nine sub-parts, Plaintiff points to specific alleged trial counsel errors, eight of which she also alleged in her PCR claim.

Respondent acknowledges that Petitioner fully exhausted Ground One in state court, but argues Petitioner is not entitled to habeas corpus relief because the state court's decision on that claim was not contrary to or an unreasonable application of clearly established federal law, and even if it were, any error was harmless. Respondent argues Petitioner is not entitled to habeas

relief on the claim alleged in Ground Two because it is procedurally defaulted, unargued, and lacking merit.

Discussion

I. Deference to State Court Decisions – Ground One

A. Legal Standards

An application for a writ of habeas corpus shall not be granted unless adjudication of the claim in state court resulted in a decision that was: (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States;" or (2) "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). A state court's findings of fact are presumed correct, and Petitioner bears the burden of rebutting the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

A state court decision is "contrary to . . . clearly established precedent if the state court applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases" or "if the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from [that] precedent." *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000). Under the "unreasonable application" clause, a federal habeas court may grant relief "if the state court identifies the correct governing legal principle from [the Supreme Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413. The "unreasonable application" clause requires the state court decision to be more than incorrect or erroneous. *Id.* at 410. Section 2254(d) "preserves authority to issue the writ in cases where there is no possibility fairminded jurists could disagree that the

state court's decision conflicts with [the Supreme] Court's precedents. It goes no farther." *Harrington v. Richter*, 562 U.S. 86, 102 (2011).

B. Analysis – Exclusion of Evidence

In Ground One, Petitioner argues the trial court's exclusion of evidence of other drivers' errors at the intersection where Petitioner entered the freeway going the wrong direction violated her constitutional rights under the Sixth and Fourteenth Amendments. The trial judge excluded testimony from other drivers on the basis of relevance under OEC 401. "Incorrect state court evidentiary rulings cannot serve as a basis for habeas relief unless federal constitutional rights are affected." *Lincoln v. Sunn*, 807 F.2d 805, 816 (9th Cir. 1987) (citing *Givens v. Housewright*, 786 F.2d 1378, 1381 (9th Cir. 1986)). Accordingly, this court must look to the federal constitutional rights involved.[5]

The Sixth Amendment to the United States Constitution guarantees the right of a criminal defendant to have a public trial, to confront witnesses against her, and to obtain witnesses in her favor. *Lunbery v. Hornbeak*, 605 F.3d 754, 760 (9th Cir.), *cert. denied*, 562 U.S. 1102 (2010). These guarantees are incorporated by the Due Process Clause of the Fourteenth Amendment, binding the states. *Id.* The process due under the Fourteenth Amendment includes a right to "'a meaningful opportunity to present a complete defense.'" *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984)). That right, however, is not unlimited, and "a defendant's right to present relevant evidence . . . is subject to reasonable restrictions." *United States v. Scheffer*, 523 U.S. 303, 308 (1998). State evidentiary rules that

[5] Petitioner's brief devotes significant space to the merits of the state evidentiary ruling on state law grounds; however, it "is not the province of a federal habeas court to reexamine state-court determinations on state-law questions." *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991).

exclude evidence from criminal trials "do not abridge an accused's right to present a defense so long as they are not arbitrary or disproportionate to the purposes they are designed to serve." *Id.* (internal quotations and citations omitted). The Supreme Court has "only rarely . . . held that the right to present a complete defense was violated by the exclusion of defense evidence under a state rule of evidence." *Nevada v. Jackson*, 569 U.S. 505, 509 (2013). In rare circumstances in which "constitutional rights directly affecting the ascertainment of guilt are implicated, [evidentiary rules] may not be applied mechanistically to defeat the ends of justice." *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). The Supreme Court has "found the exclusion of evidence to be unconstitutionally arbitrary or disproportionate only where it has infringed upon a weighty interest of the accused." *Scheffer*, 523 U.S. at 308.

Petitioner argues that the trial court's exclusion of testimony from other drivers who had incorrectly navigated the intersection violated her constitutional right to present a complete defense. Petitioner cites several Supreme Court decisions in support of her argument. These cases address two interrelated evidentiary issues: application of arbitrary or disproportionate rules to exclude evidence; and exclusion of critical exculpatory evidence. However, these cases are distinguishable even if they were applied on direct review; moreover, they do not entitle petitioner to habeas relief.

This court must assess whether the exclusion of this evidence was contrary to or involved an unreasonable application of clearly established federal law, as required in a petition for habeas relief.[6] The trial court's exclusion as irrelevant evidence of other drivers' navigation of the

[6] Petitioner makes no specific argument that the state court's decision was contrary to or involved an unreasonable application of clearly established federal law.

intersection is not contrary to clearly established federal law. The state court did not apply a rule that contradicts governing law set forth by the Supreme Court's cases. The state court also did not confront a set of facts that are materially indistinguishable from any Supreme Court decision that a party or this court has identified. Accordingly, this court's analysis must address whether the state court's decision involved an unreasonable application of clearly established federal law.

The state court in Petitioner's case did not unreasonably apply the holdings of the cases Petitioner cites addressing arbitrary evidentiary rules. Several Supreme Court cases provide "illustrations of 'arbitrary' rules, *i.e.*, rules that excluded important defense evidence but that did not serve any legitimate interests;" in such cases, application of those rules violated a defendant's constitutional rights. *Holmes v. South Carolina*, 547 U.S. 319, 325 (2006). In *Washington v. Texas*, 388 U.S. 14, 22–23 (1967), the state court's rule that precluded the defense from calling certain witnesses, which purportedly addressed perjury concerns, could not be rationally defended on that basis. In *Chambers*, the defendant was denied permission to examine a key witness as adverse based on the voucher rule; on appeal, the state did not even attempt to defend or explain the rationale of the voucher rule. 410 U.S. at 297. In *Crane*, the defendant was not allowed to present evidence suggesting his confession was unreliable based on an evidentiary rule for which neither the Kentucky Supreme Court nor the prosecution "advanced any rational justification." 476 U.S. at 691. In *Rock v. Arkansas*, 483 U.S. 44, 61 (1987), the defendant was barred from testifying about certain memories under a *per se* rule prohibiting hypnotically enhanced testimony that the Supreme Court found to be an arbitrary restriction lacking justification. In *Holmes*, the rule applied to exclude the defendant's evidence of third-party guilt was arbitrary because it did not rationally serve any discernible purpose. 547 U.S. at 331. However, the constitutional

infirmities associated with arbitrary and disproportionate rules do not extend to all evidentiary rules or decisions:

> While the Constitution thus prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote, well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury.

Holmes, 547 U.S. at 326.

This case does not present an instance in which the state court excluded evidence based on an arbitrary rule. Here, the trial judge excluded evidence based on OEC 401, a basic rule of evidence requiring that evidence be relevant. "The function of the doctrine of relevancy is to require that there be some rational relationship between the item of evidence offered by a litigant and the substantive issues properly provable in the case." *State v. Guzek*, 322 Or. 245, 251, 906 P.2d 272, 276 (1995) (citing 22 Wright & Graham, *Federal Practice & Procedure: Evidence* § 5164, at 37 (1978)). Thus, far from being arbitrary, the relevancy requirement is a fundamental and rational rule serving a legitimate interest. Furthermore, "[r]elevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case." *Id.* (internal quotation marks omitted). Accordingly, determining whether evidence is relevant does not involve the mechanistic application of an evidentiary rule, but rather requires a careful consideration of the specific evidence and the matters to be proven in the case. In this case, the trial judge carefully considered the relevancy of the disputed evidence before deciding the issue. Tr. 574–76, 1022–26. Because this case involved the case-specific application of a well-established rule of evidence that serves legitimate interests and is not arbitrary, the state court's exclusion of the evidence "did not run afoul of the *Chambers*–

Washington–Rock prohibition against arbitrary and mechanistic exclusion of exculpatory evidence." *See LaGrand v. Stewart*, 133 F.3d 1253, 1267 (9th Cir. 1998). Instead, the rule "is more analogous to those evidentiary rules described with approval in *Holmes*." *See Moses v. Payne*, 555 F.3d 742, 758 (9th Cir. 2009) (citing *Holmes*, 547 U.S. at 326) (reasoning that Supreme Court precedent supported the constitutionality of Washington's evidentiary Rule 702 allowing discretion in the admission of expert testimony). Accordingly, Petitioner could not successfully argue that OEC 401 itself infringes on her right to present a complete defense. *See id.* Therefore, the state court did not unreasonably apply Supreme Court precedent on this point.

Petitioner argues that the trial court's application of OEC 401 to exclude evidence regarding other drivers' conduct at the intersection violated her constitutional rights because that evidence was critical to her defense. On this point, *Chambers* provides "clearly established Federal law." *See* 28 U.S.C. § 2254(d)(1). In *Chambers*, the Supreme Court held a state court may not mechanistically apply evidentiary rules to exclude directly exculpatory evidence that is reliable and critical to the defense's case. 410 U.S. at 300–01. In *Chambers*, the defendant sought to introduce the testimony of three different third-parties who would testify that another man had confessed to committing the murder of which the defendant had been accused. *Id.* at 298. The Mississippi Supreme Court upheld the trial court's exclusion of the evidence because it was hearsay and not subject to exception under state evidentiary rules at that time. *Id.* The Supreme Court determined that "under the facts and circumstances" of that case, exclusion of this reliable testimony that was crucial to Chambers' defense violated Chambers' constitutional rights. *Id.* at 302–03. The Court concluded that "[i]n these circumstances, where constitutional rights

directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." *Id.*

The Ninth Circuit has relied on *Chambers* as a basis for habeas relief in several cases in which the state court excluded critical, reliable, directly exculpatory hearsay evidence. *See, e.g.*, *Cudjo v. Ayers*, 698 F.3d 752 (9th Cir. 2012), *cert. denied*, 569 U.S. 1013 (2013) (excluded evidence showed that a different person committed the murder of which defendant was accused); *Lunbery*, 605 F.3d 754 (same). However, *Chambers* presents a rare set of facts that is not often replicated. *See Scheffer*, 523 U.S. at 316 (observing that "*Chambers* specifically confined its holding to the 'facts and circumstances' presented in that case"); *Montana v. Egelhoff*, 518 U.S. 37, 52 (1996) (plurality opinion) (noting that "*Chambers* was an exercise in highly case-specific error correction").

Chambers does not establish that *any* reliable exculpatory evidence must be admitted. The Ninth Circuit has observed that "[e]vidence falls within *Chambers*'s admissibility rule only when its exclusion 'significantly undermine[s] fundamental elements of the defendant's defense.'" *Ayala v. Chappell*, 829 F.3d 1081, 1114 (9th Cir. 2016) (quoting *Scheffer*, 523 U.S. at 315). In *Chambers*, and in *Cudjo* and *Lunbery*, the excluded evidence was directly exculpatory. In each case, the evidence at trial pointed to a single person committing murder, the issue of the case was the identity of the murderer, and the excluded evidence pointed to a murderer other than the defendant. *Cudjo*, 698 F.3d at 765 (citing *Chambers*, 410 U.S. at 297; *Lunbery*, 605 F.3d at 760). Additionally, in *Chambers*, as in *Cudjo* and *Lunbery*, the excluded evidence was critical to the defense; without it, the defendant was severely hamstrung in presenting an alternative theory of the case. *Chambers*, 410 U.S. at 302; *Cudjo*, 698 F.3d at 766; *Lunbery*, 605 F.3d at 761.

Petitioner's case is distinguishable from *Chambers*. As a preliminary matter, *Chambers* deals with admission of hearsay; in this case, plaintiff proposed to offer firsthand testimony that was excluded based on relevance.

> [W]hen a Supreme Court decision does not squarely address the issue in the case or establish a legal principle that clearly extends to a new context . . . , it cannot be said, under [Section 2254(d)], there is clearly established Supreme Court precedent addressing the issue before [the habeas court], and so [the habeas court] must defer to the state court's decision.

Moses, 555 F.3d at 754 (quoting *Wright v. Van Patten*, 552 U.S. 120, 745–46 (2008) (internal quotations omitted)). Because *Chambers* addresses admissibility of reliable hearsay, *Chambers* does not squarely address the issue in this case, and the legal principle it establishes does not clearly extend to this case.[7] No other Supreme Court case that the parties have cited or this court can identify addresses the specific issue in or establishes a principle extending to this case. Accordingly, this court must defer to the state court's decision.

Furthermore, even if *Chambers* provides clearly established federal law in this case, the state did not unreasonably apply it. First, unlike the evidence in *Chambers*, the evidence Petitioner sought to present was not directly exculpatory. At best, the excluded evidence could have shown that Petitioner's mistake at the intersection was relatively easy to make, undermining the inference that Petitioner's wrong turn showed she was acting recklessly under circumstances manifesting extreme indifference to the value of human life. Accordingly, although the excluded evidence could have supported her argument that there were no circumstances manifesting extreme

[7] For instance, because Petitioner's excluded evidence was not hearsay, the reliability analysis in *Chambers* is not applicable in this case.

indifference to the value of human life, it could not have exonerated her.[8] *See Ayala*, 829 F.3d at 1114 (finding that although excluded evidence "supported defendant's theory of the case, it was not directly exculpatory like the confession in *Chambers*"); *see also Thiecke v. Kernan*, 695 F. App'x 209, 211 (9th Cir. 2017) ("[I]n contrast to the excluded statements in *Chambers*, the excluded hearsay testimony here was not directly exculpatory."). At worst, the excluded evidence was not exculpatory at all; other drivers who had entered the off-ramp going the wrong direction had, unlike Petitioner, immediately corrected their mistakes without causing a crash. Indeed, when addressing Petitioner's wrong-way driving as evidence of her recklessness under circumstances manifesting extreme indifference to the value of human life, the prosecutor consistently focused not Petitioner's initial wrong-way entry onto the freeway, but on her failure to pull over despite her admitted awareness that she was going the wrong direction,. Tr. 888–89, 1281–82.

Second, the excluded evidence in Petitioner's case, unlike the excluded evidence in *Chambers*, was not critical to the defense. Petitioner was able to introduce expert evidence that the intersection was confusing and poorly signed. Although Petitioner argues that the admitted theoretical evidence from experts would have been more compelling if corroborated with practical evidence from other drivers, dissatisfaction with the admitted evidence does not mean the excluded evidence was "critical." *See Santifer v. Evans*, 312 F. App'x 857, 858 (9th Cir. 2009) (reasoning that "unlike *Chambers*, the excluded testimony here was not 'critical' to the defense" where it would merely have corroborated other admitted evidence); *see also Crane*, 476 U.S. at 690

[8] Because Petitioner's wrong turn at the intersection has little bearing on her admission that she was aware of the risks involved in her conduct – drinking and driving – evidence about the intersection does not even directly support the argument that she was merely criminally negligent.

(recognizing that states' evidentiary rules may constitutionally exclude evidence "even if the defendant would prefer to see that evidence admitted"). Because Petitioner's case is distinguishable from *Chambers* in key respects, the state court's decision was not an unreasonable application of *Chambers* even if *Chambers* provided the relevant Supreme Court precedent for purposes of Section 2254(d).

Finally, even if the state court's ruling were contrary to or involved an unreasonable application of Supreme Court precedent, habeas relief would not be warranted in Petitioner's case. In federal habeas corpus proceedings, a harmless error analysis "requires federal courts to determine 'whether the error had substantial and injurious effect or influence in determining the jury's verdict.'" *Cudjo*, 698 F.3d at 768 (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993)). Here, the evidence from other drivers, if admitted, would have had a minor impact. First, the exclusion had only a small impact on the defense Petitioner was able to present. Petitioner presented evidence that the intersection was confusing and poorly signed; the experience of other drivers would merely have provided a practical complement to that evidence.[9] Second, the State's case regarding Petitioner's recklessness under circumstances manifesting extreme indifference to the value of human life was strong regardless of her incorrect navigation of the intersection: Petitioner had a very high blood alcohol content, a fact she never contested. Also, she acknowledged she previously had completed a course on the dangers of drinking and driving, yet after consuming three or four beers, she still decided to drive on the freeway and then realized she was going the wrong way but failed to pull-over. Instead, she sped-up and moved into the

[9] As noted above, it is unclear whether this evidence would have helped Plaintiff's case or harmed it; other drivers who made a similar mistake immediately corrected it.

median lane. Thus, these other circumstances allowed the jury to find her conduct manifested extreme indifference to the value of human life, and the exclusion of the evidence regarding other drivers' experiences at the intersection did not have a substantial and injurious effect or influence in determining the jury's verdict.

The trial judge's exclusion of evidence of other drivers' incorrect navigation of the intersection where Petitioner entered the highway going the wrong way was not contrary to or an unreasonable application of clearly established federal law. Even if it was, however, any error in excluding the testimony was harmless. Accordingly, Petitioner is not entitled to habeas corpus relief on the claim alleged in Ground One.

V. Procedurally Defaulted Claim – Ground Two

A. Legal Standards

A habeas petitioner must exhaust his claims by fairly presenting them to the state's highest court, either through a direct appeal or collateral proceedings, before a federal court will consider the merits of those claims. *Rose v. Lundy*, 455 U.S. 509, 519 (1982). "As a general rule, a petitioner satisfies the exhaustion requirement by fairly presenting the federal claim to the appropriate state courts . . . in the manner required by the state courts, thereby 'affording the state courts a meaningful opportunity to consider allegations of legal error.'" *Casey v. Moore*, 386 F.3d 896, 915-916 (9th Cir. 2004) (quoting *Vasquez v. Hillery*, 474 U.S. 254, 257 (1986)). If a habeas litigant failed to present his claims to the state courts in a procedural context in which the merits of the claims were actually considered, the claims have not been fairly presented to the state courts and therefore are not eligible for federal habeas corpus review. *Edwards v. Carpenter*, 529 U.S. 446, 453 (2000); *Castille v. Peoples*, 489 U.S. 346, 351 (1989).

A petitioner is deemed to have "procedurally defaulted" his claim if he failed to comply with a state procedural rule or failed to raise the claim at the state level. *Carpenter*, 529 U.S. 446, 451 (2000); *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). If a petitioner has procedurally defaulted a claim in state court, a federal court will not review the claim unless the petitioner shows "cause and prejudice" for failure to present the constitutional issue to the state court or makes a colorable showing of actual innocence. *Gray v. Netherland*, 518 U.S. 152,162 (1996); *Sawyer v. Whitley*, 505 U.S. 333, 337 (1992); *Murray v. Carrier*, 477 U.S. 478, 485 (1986).

B. Analysis

In Ground Two, Petitioner alleges that trial counsel provided ineffective assistance of counsel in violation of her Sixth Amendment rights. Petitioner raised similar claims against trial counsel in her PCR petition.[10] Resp. Exh. 108, pp. 3–6. However, Petitioner did not raise these claims on her appeal of the PCR judgment; instead, she argued that the PCR court's judgment did not comply with state law requirements. Resp. Exh. 127, p. 14. Accordingly, Petitioner did not fairly present her claims regarding trial counsel's ineffective assistance to the Oregon Court of Appeals or Oregon Supreme Court, and she no longer has an opportunity to do so. OR. REV. STAT. § 138.650(1) (2019) (notice of appeal in PCR proceeding must be filed no later than 30 days after the judgment or order appealed from was entered). Because Petitioner has not fairly presented and cannot now fairly present her ineffective assistance claims to the highest Oregon court, her claim on Ground Two is procedurally defaulted.

Petitioner does not provide any legal argument on Ground Two in her Petition for Writ of

[10] Of the nine subclaims in Petitioner's Petition for Writ of Habeas Corpus, eight were argued in her PCR petition. Resp. Exh. 108, pp. 3–6.

Habeas Corpus, brief, or sur-reply. Thus, Petitioner has not sustained her burden to demonstrate why she is entitled to relief on this claim. *See Lampert v. Blodgett*, 393 F.3d 943, 970 n.16 (9th Cir. 2004). Moreover, Petitioner makes no attempt to excuse the procedural default; thus, habeas review is precluded. Accordingly, habeas relief as to Ground Two should be denied.

Recommendation

For these reasons, the Petition for Writ of Habeas Corpus (ECF No. 2) should be DENIED, and a judgment of dismissal should be entered. A certificate of appealability should be denied as Petitioner has not made a substantial showing of the denial of a constitutional right. See 28 U.S.C. § 2253(c)(2).

Scheduling Order

The above Findings and Recommendation are referred to a United States District Court Judge for review. Objections, if any, are due 17 days after entry of this Findings and Recommendation. If no objections are filed, review of the Findings and Recommendation will go under advisement that date.

A party may respond to another party's objections within 14 days after the objections are filed. If objections are filed, review of the Findings and Recommendation will go under advisement upon receipt of the response, or on the latest date for filing a response.

DATED this 27th day of April, 2020.

JOHN V. ACOSTA
United States Magistrate Judge