APPENDIX A

Memorandum Decision

Filed March 1, 2024

NOT FOR PUBLICATION

FILED

MAR 1 2024

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HSIU YING TSENG, Petitioner-Appellant, v. MONA D. HOUSTON, Warden, Respondent-Appellee.	No. 22-55401 D.C. No. 2:20-cv-09036-AB-KES MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Andre Birotte, Jr., District Judge, Presiding

Argued and Submitted February 7, 2024
Pasadena, California

Before: WARDLAW, FRIEDLAND, and SUNG, Circuit Judges.

Dr. Hsiu Ying Tseng appeals the district court's denial of her petition for a writ of habeas corpus. The parties agree that the last reasoned state court decision on the merits is the California Court of Appeal's ruling on Tseng's direct appeal of her conviction, which is published in part at *People v. Tseng*, 241 Cal. Rptr. 3d 194 (Ct. App. 2018). We review de novo the district court's denial of Tseng's habeas

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

petition. *Poyson v. Ryan*, 879 F.3d 875, 887 (9th Cir. 2018). For the reasons stated below, we affirm the denial of habeas relief.

1. The California Court of Appeal's conclusion that there was sufficient evidence from which a rational jury could convict Tseng of the second-degree murder of Vu Nguyen, Steven Ogle, and Joseph Rovero was not objectively unreasonable. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Boyer v. Belleque*, 659 F.3d 957, 964–65 (9th Cir. 2011) ("[T]o grant relief, we must conclude that the state court's determination that a rational jury could have found that there was sufficient evidence of guilt, i.e., that each required element was proven beyond a reasonable doubt, was objectively unreasonable.").

The California Court of Appeal reasonably concluded that there was sufficient evidence that Tseng's acts, i.e., the prescription of drugs to Nguyen, Ogle, and Rovero, proximately caused their deaths. Tseng argues that the presence of methadone in Nguyen's body and alcohol in Rovero's body at the time of death were unforeseeable, independent intervening events that interrupted proximate causation. But expert testimony indicated that the amount of methadone in Nguyen's body and alcohol in Rovero's body at the time of death would not have been lethal absent the presence of drugs prescribed by Tseng. And despite Tseng's incorrect assertion to the contrary, expert testimony plainly indicated that the amount of methadone prescribed by Tseng in Ogle's body at the time of death

would have killed him even absent the other drugs found in his body. Under California law, "it has long been recognized that there may be multiple proximate causes of a homicide, even where there is only one known actual or direct cause of death." *People v. Sanchez*, 29 P.3d 209, 216 (Cal. 2001). Accordingly, the California Court of Appeal did not unreasonably conclude that a rational jury could have found proximate causation on this record.

The California Court of Appeal reasonably concluded that there was sufficient evidence that Tseng acted with conscious disregard for the lives of Nguyen, Ogle, and Rovero. The evidence relied on by the state court includes: (1) Tseng's occupation as a licensed physician with "expert knowledge of the life-threatening risk posed by her drug prescribing practices;" (2) Tseng's admission to undercover DEA agents that she understood that the drugs she was prescribing should only be used to treat severe pain from broken bones or cancer; (3) Tseng's referral of patients to smaller pharmacies after larger pharmacies refused to continue filling her prescriptions; (4) Tseng's awareness that Nguyen, Ogle, and Rovero were already taking extremely high doses of opioids when they first visited her clinic; (5) Tseng's knowledge of three recent patient deaths possibly connected to her prescriptions during the period she was treating Nguyen, four during the period she was treating Ogle, and eight by the time she treated Rovero; and (6) Tseng's repeated writing of refill prescriptions for Nguyen and Ogle when they

used up large prescriptions in a short amount of time.

Tseng argues that when she was contacted by the coroners' offices regarding other patient deaths, "[s]he was never told that anything she had done was the cause of or contributed to that death." But even if Tseng were correct that no one explicitly informed her that her prescription practices were endangering the lives of her patients, that does not mean that Tseng lacked awareness that her patients were dying of drugs that she prescribed. A reasonable jury could find that Tseng, as a licensed medical doctor, could make that connection on her own.

2. The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") bars Tseng's legal claim that the admission of "other act" evidence violated her due process rights. *See* 28 U.S.C. § 2254(d)(1). As Tseng concedes, there is no clearly established Supreme Court precedent on whether allowing "other act" evidence violates due process. Dkt. No. 15 at 86; Petition for Writ of Certiorari at 11, *Tseng v. California*, 140 S. Ct. 208 (2019) (No. 18-9774) ("This Court has thus far not held that the admission of propensity evidence in violation of state law rules is a matter of federal due process. The issue was left open in *Estelle v. McGuire*, 502 U.S. 62 (1991)."); *see also Larson v. Palmateer*, 515 F.3d 1057, 1066 (9th Cir. 2008). AEDPA therefore bars Tseng's due process claim.

We also disagree with Tseng's alternative argument that the state trial court's decision to admit evidence of uncharged deaths rested on an unreasonable

determination of the facts under 28 U.S.C. § 2254(d)(2). Tseng argues that "Ryan Latham was found to have committed suicide," "Joshua Chambers and Joseph Gomez overdosed on heroin and Michael Katsnelson died of a pre-existing heart condition." Thus, Tseng claims that her "prescribing practices had nothing to do with" the deaths of Latham, Chambers, Gomez, and Katsnelson. The California Court of Appeal reasonably concluded otherwise.

Ryan Latham's manner of death was listed as suicide, but the cause of death was "acute polydrug intoxication, combined effects of hydrocodone/ dihydrocodeine, carisoprodol/meprobamate, diazepam, and alprazolam." Tseng does not dispute that she prescribed hydrocodone, alprazolam, and carisoprodol to Latham six days before his death. Accordingly, there is evidence that belies Tseng's claim that Latham's death "had nothing to do with Tseng's prescribing practices."

As to Chambers and Gomez, Tseng emphasizes her own selective characterization of the testimony of a toxicology expert over the official coroners' documentation. But the officially documented causes of death for Chambers and Gomez were "combined effects of morphine, codeine, hydrocodone/ dihydrocodeine," (Chambers) and "[c]ombined intoxication of alprazolam, codeine, morphine, oxycodone, and oxymorphone," (Gomez). Tseng had prescribed hydrocodone and alprazolam to Chambers four days before his death

and had prescribed oxycodone, alprazolam, and carisoprodol to Gomez two days before his death. The California Court of Appeal could therefore also reasonably reject Tseng's argument that Chambers' and Gomez's deaths "had nothing to do with Tseng's prescribing practices."

As to Michael Katsnelson, Tseng is correct that the California Court of Appeal mistakenly characterized Katsnelson's death as an overdose, when the coroner's report listed the official cause of death as "cardiac hypertrophy, bilateral pulmonary congestion" and the manner of death as "natural death." The state trial court, however, did not err when it allowed the prosecution to admit Katsnelson's death to show that Tseng had, or should have had, notice, as well as to show Tseng's "intent (implied malice), knowledge, and/or absence of mistake"—all permissible purposes under California Evidence Code § 1101(b). The coroner had not yet determined Katsnelson's cause of death when the coroner called Tseng about Katsnelson, Tseng then entered an alert in Katsnelson's file noting that the coroner called her to inform her of Katsnelson's death, and later, Tseng altered Katsnelson's medical records as she had done with other patients who she was informed had died from suspected overdoses.[1]

[1] Even if the state trial court erred in admitting evidence of Katsnelson's death to show notice, Tseng fails to establish "actual prejudice" under *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993). The only alleged murder for which Katsnelson's death was relevant was Joseph Rovero's, the only charged death

3. The California Court of Appeal reasonably concluded that two incidents of prosecutorial misconduct did not "so infect[] the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (cleaned up). The prosecutors immediately admitted the mistakes; they did not attempt to connect Tseng to the improperly elicited testimony; the state trial court provided curative jury instructions; and the other evidence against Tseng was weighty. *See Tak Sun Tan v. Runnels*, 413 F.3d 1101, 1115 (9th Cir. 2005).

4. AEDPA bars Tseng's claim that the state trial court's allowance of supplemental closing arguments violated her due process rights, because there is no clearly established Supreme Court precedent on this issue. *See* 28 U.S.C. § 2254(d)(1).

5. The California Court of Appeal reasonably concluded that Tseng's cumulative error claim fails because the state trial court did not constitutionally err.

AFFIRMED.

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following Katsnelson's death. By that point, even excluding Katsnelson's death, Tseng was aware that seven of her patients had died from overdoses connected to her prescriptions. Therefore, even if the state trial court erred in admitting evidence of Katsnelson's death, the error did not cause "a 'substantial and injurious effect or influence' on the verdict." *Brown v. Davenport*, 596 U.S. 118, 133 (2022) (quoting *Brecht*, 507 U.S. at 637).

APPENDIX B

Order Denying Rehearing

Filed May 6, 2024

FILED

MAY 6 2024

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HSIU YING TSENG, Petitioner-Appellant, v. MONA D. HOUSTON, Warden, Respondent-Appellee.	No. 22-55401 D.C. No. 2:20-cv-09036-AB-KES Central District of California, Los Angeles ORDER

Before: WARDLAW, FRIEDLAND, and SUNG, Circuit Judges.

The petition for panel rehearing is DENIED.

APPENDIX C

Order Granting Certificate of Appealability

Judgment

Order Accepting Findings of United States Magistrate Judge

Filed March 23, 2022

Report and Recommendation of United States Magistrate Judge

Filed November 17, 2021

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HSIU YING LISA TSENG, Petitioner, vs. MONA D. HOUSTON, Warden, Respondent.	Case No. 2:20-CV-09036 AB (KES) ORDER GRANTING A CERTIFICATE OF APPEALABILITY

Effective December 1, 2009, Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts was amended to read as follows:

(a) **Certificate of Appealability.** The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. Before entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue. If the court issues a certificate, the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2). If the court denies a certificate, the parties may not appeal the denial but may seek a

certificate from the court of appeals under Federal Rule of Appellate Procedure 22. A motion to reconsider a denial does not extend the time to appeal.

(b) **Time to Appeal.** Federal Rule of Appellate Procedure 4(a) governs the time to appeal an order entered under these rules. A timely notice of appeal must be filed even if the district court issues a certificate of appealability.

Under 28 U.S.C. § 2253(c)(2), a Certificate of Appealability ("COA") may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." In Slack v. McDaniel, 529 U.S. 473, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000), the Supreme Court held that, to obtain a COA under § 2253(c), a habeas prisoner must show that "reasonable jurists could debate whether (or, for that matter, 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." See Slack, 529 U.S. at 483-84 (internal quotation marks omitted); see also Miller-El v. Cockrell, 537 U.S. 322, 123 S. Ct. 1029, 1039, 154 L. Ed. 2d 931 (2003).

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The Court finds that Petitioner has made the foregoing showing with respect to the grounds for relief alleged in the Petition. Petitioner, a medical doctor, sustained three murder convictions based on a lengthy and detailed record after three patients died of drug overdoses. The jury heard evidence of other patients' deaths, including evidence the trial court had earlier ordered excluded, and evidence in support of charges for over-prescribing opiates. The evidence of Petitioner's mental state was indirect and circumstantial. Reasonable jurists could debate whether Petitioner has shown constitutional error, and if so, whether that error was prejudicial.

Accordingly, a COA is GRANTED in this case.

DATED: March 23, 2022

ANDRÉ BIROTTE JR.
UNITED STATES DISTRICT JUDGE

Presented by:

Karen. E. Scott
United States Magistrate Judge

JS-6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HSIU YING LISA TSENG,
Petitioner,
vs.
MONA D. HOUSTON, Warden,
Respondent.

Case No. 2:20-CV-09036 AB (KES)

JUDGMENT

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

IT IS ADJUDGED that the Petition is denied with prejudice.

DATED: March 23, 2022

ANDRÉ BIROTTE JR.
UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

HSIU YING LISA TSENG,

Petitioner,

vs.

MONA D. HOUSTON, Warden,

Respondent.

Case No. 2:20-CV-09036 AB (KES)

ORDER ACCEPTING FINDINGS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition, the other records on file herein, and the Report and Recommendation of the United States Magistrate Judge. Further, the Court has engaged in a de novo review of those portions of the Report and Recommendation to which objections have been made. The Court accepts the findings and recommendations of the Magistrate Judge.

IT THEREFORE IS ORDERED that Judgment be entered denying the Petition with prejudice.

DATED: March 23, 2022

ANDRÉ BIROTTE JR.,
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

HSIU YING LISA TSENG,

Petitioner,

v.

MONA D. HOUSTON, Warden,[1]

Respondent.

Case No. 2:20-CV-09036 AB (KES)

REPORT AND RECOMMENDATION OF UNITED STATESMAGISTRATE JUDGE

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

I.

INTRODUCTION

Hsiu Ying Lisa Tseng ("Petitioner"), who is represented by counsel, filed a Petition for Writ of Habeas Corpus by a person in state custody pursuant to 28

[1] Mona D. Houston, Warden at the California Institution for Women, where Petitioner is currently incarcerated, is substituted for her predecessor. Fed. R. Civ. P. 25(d).

U.S.C. § 2254, and a supporting memorandum, challenging her 2015 convictions for three counts of second degree murder, nineteen counts of unlawfully prescribing opiates, and one count of obtaining a controlled substance by fraud. (Dkt. 1 ["Pet."] at 2; Dkt. 1-1 ["Pet. Mem."] at 10.[2]) On April 23, 2021, Respondent answered the Petition (Dkt. 19) and lodged documents ("LD") from Petitioner's state proceedings (Dkt. 20). On August 31, 2021, Petitioner replied. (Dkt. 26.) For the reasons discussed below, Petitioner's claims fail on the merits, and the Petition should be denied.

II.

FACTUAL BACKGROUND

The underlying italicized facts are taken from the partially published California Court of Appeal decision on Petitioner's direct appeal. (LD 6); see People v. Tseng, 30 Cal. App. 5th 117 (2018) (certified for partial publication). Unless rebutted by clear and convincing evidence, these facts may be presumed correct. Tilcock v. Budge, 538 F.3d 1138, 1141 (9th Cir. 2008); 28 U.S.C. § 2254(e)(1).

A. [Petitioner]'s Medical Clinic and Practice

In approximately 2007, [Petitioner], a licensed physician practicing internal medicine and osteopathy, joined Advance Care AAA Medical Clinic (the clinic) in Rowland Heights, a general medical practice operated by her husband. When [Petitioner] first joined the clinic, the patients were from the local Hispanic and Asian communities, the wait time for each patient was 15 to 30 minutes and 90 percent of the patients paid for treatment through their insurance.

By 2008, the practice and the clientele of the clinic had changed. Most of [Petitioner]'s patients were now white males in their 20's and 30's who came from

[2] Except for citations to the Reporter's Transcript ("RT") and Clerk's Transcript ("CT"), page citations refer to pagination imposed by the Court's electronic filing system.

outside Los Angeles County seeking pain and anxiety management medications. By 2010, the clinic had developed a reputation as a place where patients could easily obtain prescriptions for controlled substances, including opioids, sedatives, muscle relaxants, and drugs used to treat drug addiction. In addition, fees had doubled, and nearly all patients paid in cash.[FN3] The clinic's income increased from $600 a day in cash to $2,000 to $3,000 per day.[FN4]

[FN3] [Petitioner] also charged $5 to "split" a prescription. "Splitting" is a practice of writing a prescription on two different prescription forms so that a patient could fill the prescription on different dates or at different pharmacies.

[FN4] It appears that the clinic's earnings grew during this time because of the increase in fees charged for services and in the number of patients treated on a daily basis.

According to one visitor, the clinic looked "like a parole office" with "drug dealing." The wait time for [Petitioner]'s patients also increased to about six hours with 20–30 patients inside the waiting room or outside the clinic at any one time. Some patients appeared to be under the influence of drugs or suffering from drug withdrawals, and one patient overdosed in the waiting room. When G.R., the clinic's receptionist, expressed concern about the number of patients waiting and the level of anxiety and agitation they expressed in the waiting room, [Petitioner] told her that they were "druggies" and could wait.

B. [Petitioner]'s Treatment and Prescribing Methods Beginning in 2008

[Petitioner] spent about 10 to 15 minutes with new patients and five minutes with them on return visits. Often she would see two or three unrelated patients in the same examination room at the same time. [Petitioner] would often undertake no (or only a cursory) medical examination of her patients; patients for whom she would prescribe pain medications often expressed nonspecific complaints about anxiety and pain from old injuries. Many times, she did not obtain an adequate

medical history or prior medical records before prescribing medications. For example, she did not do drug testing or review the California's Controlled Substance Utilization Review and Evaluation System (CURES) database[FN5] to determine whether patients had current or prior prescriptions for controlled substances from other doctors. [Petitioner] routinely wrote prescriptions for opioids (such as oxycodone, oxymorphone, fentanyl, and hydrocodone),[FN6] sedatives (such as promethazine and benzodiazepine),[FN7] muscle relaxants (such as carisoprodol, which is sold under the brand name Soma), and amphetamines, as well as controlled substances used to treat drug and opioid addictions (such as methadone and buprenorphine/naloxone).[FN8] [Petitioner] sometimes allowed patients to pick up prescriptions for other patients who were not at the clinic. The evidence presented at trial showed that on at least one occasion [Petitioner] prescribed a patient's relative, who had never been [Petitioner]'s patient, a controlled substance. [Petitioner] acknowledged that some patients, who presented symptoms suggesting opioid and drug addiction and withdrawal, were merely seeking drugs.

[FN5] CURES collects prescription dispensation information for all controlled substance prescriptions written in the State of California for individual patients. By referring to the CURES database, a doctor may determine when and from whom a particular patient has obtained a prescription for a controlled substance. This can reveal whether the patient may be abusing controlled substances by obtaining prescriptions for the same drug from multiple doctors.

[FN6] Branded formulations of oxycodone are sold under the brand names OxyContin or Roxicodone; branded formulations of oxymorphone are sold under the brand names Opana or Opana ER; and branded formulations of the drug hydrocodone are sold under the brand names Norco, Vicodin, or Lortab.

FN7 [Petitioner] prescribed a benzodiazepine drug sold under the names alprazolam and Xanax.

FN8 The United States Drug Enforcement Agency (DEA) had not licensed [Petitioner] to prescribe drugs to treat addiction.

C. Investigations of [Petitioner]'s Practice

Beginning in 2008, pharmacists began to refuse to fill prescriptions written by [Petitioner] because the prescriptions raised "red flags"; the patients' profiles, conduct, and the combination of substances and quantities [Petitioner] prescribed indicated no legitimate medical purpose for writing the prescriptions. When [Petitioner] learned of this, she referred her patients to "mom and pop" pharmacies, which continued to fill her prescriptions. That same year, law enforcement investigators, including investigators from the coroner's office, began calling [Petitioner] to discuss the deaths of several of her patients and to apprise her that the patients had died of suspected drug overdoses shortly after obtaining prescriptions from her. Once she became aware of the deaths, she entered "alerts" in some of the patients' records indicating that they had died from a possible drug overdose. She also altered [FN9] patient records but continued her prescribing practices until she was arrested in 2012.

FN9 During this period, the clinic began using digital patient records that allowed [Petitioner] to enter medical information, including "alerts" in a patient file to convey information to a receptionist about a patient. According to G.R., until authorities began investigating the clinic and requesting information about [Petitioner]'s patients, many patient records were incomplete or blank. In fact, the digital copies of medical records obtained in 2010 by law enforcement from [Petitioner]'s office computers contained few exam notes for patients who had died from drug overdoses; however, the same records seized by authorities in 2012 for the same office visits revealed

extensive exam notes, indicating that [Petitioner] had altered the records while she was under investigation.

In 2010, the DEA and California Department of Justice (DOJ) investigated [Petitioner] for diversion of drugs. DEA agents executed a search warrant at [Petitioner]'s medical group. Agents seized computers and created digital copies of her computer files. In 2012, the Medical Board of California (the Medical Board) also executed a search warrant on [Petitioner]'s medical group, seizing patient records. Evidence produced during the investigation revealed that from 2007 through 2010, the clinic's gross receipts were approximately $5,000,000.

D. [Petitioner]'s Patients' Overdose Deaths

In July 2012, [Petitioner] was arrested and charged with three counts of second degree murder (§ 187 (count 1, Vu Nguyen; count 2, Steven Ogle; and count 4, Joseph Rovero)), 20 counts of unlawfully prescribing controlled substances to patients (Health & Saf. Code, § 11153, subd. (a) (count 3 & counts 5–23)), and one count of obtaining a controlled substance by fraud (Health & Saf. Code, § 11173, subd. (a) (count 24)).

At trial, the prosecution presented evidence that from September 2007 to December 2009, nine of [Petitioner]'s patients—ranging from 21 to 34 years of age—died shortly after filling the prescriptions [Petitioner] wrote them for controlled substances.

1. Murder charges

a. Death of Vu Nguyen (count 1—second degree murder) in 2009

In early February 2009, [Petitioner] prescribed 28-year-old Nguyen the sedative Xanax, and the opioids Norco and Opana.[FN10] *Nguyen died several days later of a drug overdose. Nguyen's family did not believe he suffered from any medical condition that required him to take painkillers. The Orange County Coroner's Division conducted Nguyen's autopsy and determined the cause of his*

death was the combined effects of Opana and Xanax, although he had methadone in his system as well.[FN11]

[FN10] *On February 7, 2009, [Petitioner] prescribed Nguyen: Xanax (2 mg, 90 tablets); Norco (10 mg, 90 tablets); and Opana (10 mg, 90 tablets).*

[FN11] *[Petitioner] never prescribed Nguyen methadone.*

On March 9, 2009, the coroner's investigator contacted [Petitioner] to discuss Nguyen's death. [Petitioner] told the investigator she started treating Nguyen on August 9, 2008, for back and neck pain. She prescribed the opioid Norco and sedative Xanax.[FN12] *Two weeks later, Nguyen returned and said he had taken all of the medication because the pain was "too much." [Petitioner] wrote him a refill prescription. Although [Petitioner] claimed she told Nguyen she would not write refill prescriptions for his medications "early" again, she failed to discuss with him the potential health risks of Norco and Xanax. Nguyen returned to [Petitioner] at the beginning of November 2008 and said the medications were not working. [Petitioner] prescribed the opioid Opana, which is three times stronger than Norco, and wrote him a refill prescription for Xanax. During that visit, Nguyen also told [Petitioner] that he had Attention Deficit Disorder and reported he was having trouble concentrating. [Petitioner] did not attempt to corroborate the diagnosis of Attention Deficit Disorder; nonetheless, [Petitioner] prescribed him Adderall.*[FN13] *Nguyen returned on December 1, and [Petitioner] prescribed Vicodin,*[FN14] *Opana, and Xanax for him. Nguyen returned on January 5, 2009, and reported that the Vicodin was not strong enough. [Petitioner] prescribed Nguyen a higher dose of the opioid Norco (10 mg, 90 tablets), and gave him refill prescriptions for the opioid Opana (10 mg, 90 tablets) and the sedative Xanax (2 mg, 90 tablets). A month later, at Nguyen's last visit, [Petitioner] wrote those refill prescriptions for the same dose and number of pills. [Petitioner] told the coroner's investigator that Nguyen was always seeking more medication and stronger doses.*

FN12 The record does not contain evidence of the doses or number of pills of Norco or Xanax that [Petitioner] initially prescribed Nguyen.

FN13 Adderall is the brand name of an amphetamine drug commonly prescribed to treat the symptoms of Attention Deficit Disorder.

FN14 The opioid Vicodin is a hydrocodone opioid of the same degree of strength as the hydrocodone opioid Norco.

The prosecution also presented evidence that [Petitioner] did not obtain information from Nguyen to corroborate his complaints of pain and anxiety or complete an adequate physical examination to determine whether a legitimate medical reason existed to prescribe the controlled substances. In addition, although Nguyen reported to [Petitioner] that he was taking "high doses of opioids" prescribed by other doctors, [Petitioner] did not contact Nguyen's other doctors. [Petitioner] did not obtain medical records relating to Nguyen's prior treatment or a complete medical and mental health history of Nguyen.

[Petitioner]'s medical records pertaining to Nguyen showed that [Petitioner] had not provided a treatment plan for Nguyen, nor had she educated him about alternative treatments for his symptoms or the potential risks of the substances she prescribed. In addition, the prosecution presented evidence that [Petitioner] had altered Nguyen's patient records between 2010 and 2012 by filling in information in his records that she had left incomplete while she was treating Nguyen.

The prosecution's medical expert testified that [Petitioner]'s treatment of Nguyen represented an extreme departure from the standard of medical care.

b. Death of Steven Ogle (count 2—second degree murder; count 3—unlawful prescription) in 2009

Steven Ogle, who lived in Palm Springs, sought treatment from [Petitioner] in early March 2009, complaining of pain caused by a car accident that had occurred several years before. According to [Petitioner]'s patient records for Ogle, during his first visit to [Petitioner]'s clinic on March 2, 2009, he told [Petitioner]

he was taking six to eight OxyContin tablets (80 mg) per day,[FN15] *using heroin, and that he wanted to take methadone. [Petitioner] did not ask who had prescribed Ogle the OxyContin. Even though [Petitioner] was not an addiction specialist licensed to prescribe and monitor the use of methadone, she wrote Ogle prescriptions for methadone (10 mg, 100 tablets) and Xanax (2 mg, 100 tablets).*[FN16] *Ogle returned to the clinic two weeks later on March 17, 2009, having used all of the medication and suffering from symptoms of withdrawal. [Petitioner] wrote refill prescriptions for Ogle. On April 7, again having used all the medications prescribed on March 17 and suffering from withdrawal symptoms, Ogle returned to the clinic for more prescriptions. [Petitioner] again prescribed Xanax (2 mg, 100 tablets) and methadone (10 mg, 100 tablets). Ogle died two days later. Investigators found three bottles of prescription medication near Ogle's body. [Petitioner] had written prescriptions for two of these only two days earlier: methadone, 100 tablets (7 remaining) and Xanax, 100 tablets (15.5 remaining). The third bottle, containing OxyContin, had been prescribed in January 2009 by another doctor. The coroner opined that Ogle died of "methadone intoxication."*

FN15 According to expert testimony presented at trial, an 80 milligram dose of OxyContin is an amount typically prescribed to a terminal cancer patient. There was no evidence Ogle was suffering from cancer.

FN16 Ogle's sister-in-law accompanied him on visits to the clinic. She testified it was her belief that at Ogle's first visit on March 2, 2009, [Petitioner] prescribed Ogle: OxyContin, Xanax, and the sedative promethazine. She also testified that at Ogle's second visit in mid-March, she believed that [Petitioner] wrote refill prescriptions and also prescribed methadone. [Petitioner]'s patient records for Ogle do not indicate that she prescribed him OxyContin or promethazine. Likewise, when [Petitioner] spoke to the coroner's investigator in May 2009, after Ogle's death, [Petitioner] did not mention prescribing Ogle OxyContin or promethazine.

In early May 2009, a coroner's investigator called [Petitioner] regarding Ogle. [Petitioner] confirmed that Ogle's first visit was in March 2009, about a month before his death. She said that Ogle reported he was abusing OxyContin and wanted her help to stop, and therefore she prescribed methadone and Xanax. [Petitioner] said she saw Ogle again two weeks later and wrote him refill prescriptions. [Petitioner] confirmed he returned in early April and she wrote Ogle refill prescriptions again. She claimed that she told Ogle not to take methadone with other opioids.

The prosecution presented expert medical testimony that [Petitioner]'s method of treatment of Ogle represented an extreme departure from the standard of care in various ways, including that [Petitioner] was not a licensed addiction specialist and did not have the training to monitor Ogle's use of methadone.

c. Death of Joseph Rovero (count 4—second degree murder; count 5—unlawful prescription) in 2009

In 2009, Rovero was a 21-year-old student at Arizona State University, who traveled from Arizona seeking treatment at [Petitioner]'s clinic. [Petitioner] saw Rovero only once, on December 9, 2009, to treat his complaints of back pain, wrist pain, and anxiety. Rovero informed [Petitioner] he had been using high doses—six pills (150 mg to 200 mg) of OxyContin and Xanax and the muscle relaxant Soma—every day and requested the same prescriptions. [Petitioner] prescribed him the opioid Roxicodone (30 mg, 90 tablets), Soma (350 mg, 90 tablets), and Xanax (2 mg, 30 tablets). Nine days later, when Rovero died of a drug overdose, empty bottles of medications prescribed by [Petitioner] were found near his body. The coroner in Arizona investigating Rovero's death found the cause of death was combined drug toxicity, including alcohol,[FN17] prescription opioids, muscle relaxants (Soma), and a sedative (Xanax).

[FN17] The amount of alcohol in Rovero's blood at the time of his death was a non-lethal amount.

When investigators questioned [Petitioner] about Rovero's death, she admitted treating Rovero and knowing that he had been using opioids, sedatives, and muscle relaxants prescribed by other doctors. She told investigators that she believed Rovero was taking an inappropriate amount of OxyContin. Consequently, she prescribed Roxicodone instead, as well as Xanax and Soma. Her stated goal was to wean Rovero from opioids. [Petitioner] did not, however, verify the doses or the types of medications that Rovero claimed other doctors had previously prescribed him. [Petitioner] reduced the doses of all three drugs Rovero reported taking by 80 percent, which, according to the evidence presented at trial, guaranteed he would suffer from withdrawals. The prosecution's expert explained that when an individual has been abusing pain medications by taking high doses of the medications—as Rovero was—any efforts to "wean" the person from those drugs require a gradual reduction in dosing; otherwise, the individual might experience symptoms of drug withdrawal that place the individual at risk of overdose or death. The prosecution also presented evidence that the prescriptions [Petitioner] wrote for Rovero likely increased his potential for overdose and death because [Petitioner] failed to verify the doses of the drugs he had been previously prescribed.

2. Uncharged deaths of [Petitioner]'s patients

During the trial, in addition to the deaths of Nguyen, Ogle, and Rovero, the prosecution presented evidence of the following six uncharged deaths of [Petitioner]'s patients from prescription drug overdoses between late 2007 and 2009: Matthew Stavron, Ryan Latham, Nathan Keeney [sic], *Joshua Chambers, Joseph Gomez, and Michael Katnelson* [sic].[3]

[3] The California Court of Appeal consistently misspelled the names of Nathan "Kenney" and Michael "Katsnelson." (See, e.g., 5 RT 1298, 1300 [admitting into evidence the CURES database entries for Kenney and Katsnelson].)

Specifically, with respect to patient Stavron, who died in 2007, [Petitioner] prescribed to him, among other drugs, OxyContin (80 mg). During the DEA's investigation of [Petitioner]'s practice, she told an undercover DEA agent that an 80 milligram prescription of OxyContin is "super high." She was also aware that OxyContin is primarily prescribed only to treat pain from broken bones or cancer, and that Stavron did not suffer pain from broken bones or cancer. Two days after [Petitioner] wrote Stavron a prescription for OxyContin, he died from an overdose of that medication. When the coroner's investigator called [Petitioner] to discuss Stavron's death, she told the investigator that Stavron was drug-seeking.

[Petitioner]'s patients Latham and Keeney died in 2008. [Petitioner] had prescribed Latham Norco (10 mg, 150 tablets), in addition to other drugs. As [Petitioner] told an undercover DEA agent, Norco is addictive and "evil." Two days after [Petitioner] wrote Latham the prescription, he died from a Norco overdose. During a call with the coroner's investigator, [Petitioner] described the number of Norco pills Latham took per day and characterized him as a "drug-seeker."

[Petitioner] prescribed Keeney OxyContin (80 mg, 60 tablets). There was no indication that Keeney had broken bones or cancer. [Petitioner] also prescribed to him methadone (10 mg, 100 tablets). Four days after filling the prescriptions from [Petitioner], Keeney died from a methadone and OxyContin overdose. [Petitioner] told the coroner's investigator that Keeney had "somewhat drug-seeking behavior."

[Petitioner] was aware of Stavron's and Latham's overdose deaths ***before*** *she started treating murder victim Nguyen, and learned of Keeney's death while she was treating Nguyen. In addition, by the time that murder victim Ogle died in April 2009, [Petitioner] had also learned of Nguyen's death.*

In 2009, [Petitioner]'s patients Chambers, Gomez, and Katnelson [FN18] *also succumbed to drug overdoses. Specifically, concerning Katnelson, [Petitioner]*

prescribed him fentanyl (10 of the 75 mcg-per-hour patches). Fentanyl is an opioid 100 times more potent than morphine. Katnelson died the day after he filled the prescription from [Petitioner]. [Petitioner] told the coroner's investigator that she did not know Katnelson well enough to know whether he was abusing the medication.

FN18 [Petitioner] was charged with issuing unlawful prescriptions with respect to Chambers (count 8), Gomez (count 10), and Katnelson (count 13).

[Petitioner] prescribed Chambers, among other drugs, Norco (10 mg, 100 tablets); Chambers died three days later. The coroner determined Chamber's cause of death was a combination of drugs, including Norco. [Petitioner] told the coroner's investigator that Chambers appeared to be drug-seeking because he finished his drugs early and because his insurance company apprised her that Chambers was seeking medication from other doctors. She also reported that she suspected Chambers was abusing alcohol.

[Petitioner] prescribed Gomez, among other drugs, the opioid Roxicodone (30 mg, 90 tablets) and Xanax (2 mg, 100 tablets); two days later, Gomez died. The coroner determined he died of a combined intoxication, including Roxicodone and Xanax. [Petitioner] told the coroner's investigator that Gomez attempted to get medication from other doctors.

[Petitioner] learned of the drug overdose deaths of Chambers, Gomez, Katnelson, and Ogle ***before*** *she began treating murder victim Rovero in December 2009.*

Similar to the deaths of the patients in the charged murder counts—Nguyen, Ogle, and Rovero—the six uncharged patient deaths of Stavron, Latham, Keeney, Chambers, Gomez, and Katnelson all occurred within days after [Petitioner] wrote them prescriptions for high doses of opioids, sedatives, or other drugs. These patients—Stavron, Latham, Keeney, Chambers, Gomez, and Katnelson—also fit the same patient profile as Nguyen, Ogle, and Rovero. They were in their 20's or early

30's, and [Petitioner] knew they were drug-seeking and drug-abusing. [Petitioner] treated some of these patients only once while others returned several times; each time, [Petitioner] prescribed high doses of controlled substances. Moreover, after the coroner's investigators contacted [Petitioner] to inform her when each patient had died from a drug overdose, [Petitioner] entered an "alert" in the clinic's computer records for some of those patients, indicating the patient had died from a possible drug overdose. A comparison of the patient records seized in 2010 and 2012 also showed that [Petitioner] had altered patient records, while she was under investigation, by completing records that had been previously left blank or incomplete.

Even after [Petitioner] learned of these deaths, she continued to prescribe high doses of controlled substances, including opioids, sedatives, and in some cases, methadone to other patients.

(LD 6 at 2–15) (registered trademark symbols omitted).

III.

PROCEDURAL HISTORY

On October 30, 2015, a Los Angeles County Superior Court jury in case number BA394495 found Petitioner guilty of three counts of second degree murder (Cal. Penal Code ["P.C."] § 187(a)), nineteen counts of unlawfully prescribing controlled substances (Cal. Health & Safety Code § 11153(a)),[4] and one count of obtaining a controlled substance by fraud (Cal. Health & Safety Code § 11173(a)). (19 CT 3576–99.) On February 9, 2016, the trial court sentenced Petitioner to 30 years to life in state prison. (19 CT 3758–75.)

Petitioner appealed, raising the same issues as she raised in her § 2254 Petition, plus additional issues. (LD 3–5.) On December 14, 2018, the California Court of Appeal affirmed the judgment in a partially published opinion. (LD 6.)

[4] The jury found Petitioner not guilty of one of the twenty counts of unlawfully prescribing controlled substances. (19 CT 3597.)

On January 11, 2019, the California Court of Appeal summarily denied Petitioner's petition for rehearing. (LD 7–8.) On March 20, 2019, the California Supreme Court summarily denied Petitioner's petition for review. (LD 9–10.) On October 7, 2019, the United States Supreme Court summarily denied Petitioner's petition for writ of certiorari. (LD 11–12.)

Petitioner did not file any state habeas petitions. (Pet. at 3.)

IV.

PETITIONER'S CLAIMS

Petitioner raises the following claims for federal habeas relief:

Ground One: The evidence that Petitioner was guilty of second degree murder as to Vu Nguyen (count one) was insufficient (Pet. at 5; Pet. Mem. at 46–59.)

Ground Two: The evidence that Petitioner was guilty of second degree murder as to Steven Ogle (count two) was insufficient (Pet. at 5–6; Pet. Mem. at 59–60.)

Ground Three: The evidence that Petitioner was guilty of second degree murder as to Joseph Rovero (count rour) was insufficient (Pet. at 6; Pet. Mem. at 61–63.)

Ground Four: The admission of six uncharged deaths (Matthew Stavron, Ryan Latham, Nathan Kenney, Joshua Chambers, Joseph Gomez, and Michael Katsnelson) under Evidence Code § 1101(b) violated Petitioner's right to due process because it was merely propensity evidence. (Pet. at 6; Pet. Mem. at 63–73.)

Ground Five: The failure to strike John Mata's testimony and dismiss count fourteen after the prosecutor committed misconduct deprived Petitioner of due process and a fair trial under the Sixth and Fourteenth Amendments. (Pet. at 6–7; Pet. Mem. at 74–81.)

Ground Six: The court's failure to grant a mistrial when the prosecutor again committed misconduct, by eliciting that Michael Huggard (count eleven) died, violated Petitioner's right to due process and a fair trial under the Sixth and Fourteenth Amendments. (Pet. at 20; Pet. Mem. at 81–83.)

Ground Seven: The Court's reopening of closing arguments over defense objection when the jury stated it could not reach a unanimous verdict on second degree murder coerced a unanimous verdict in violation of Petitioner's due process rights. (Pet. at 21; Pet. Mem. at 84–91.)

Ground Eight: Petitioner's rights under the Sixth and Fourteenth Amendments to a fair trial and due process were violated by cumulative error. (Pet. at 24; Pet. Mem. at 91–92.)

V.

STANDARD OF REVIEW

Under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), Petitioner is entitled to habeas relief only if the state court's decision on the merits "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1)–(2); Cullen v. Pinholster, 563 U.S. 170, 181 (2011).

When applying § 2254(d)(1), the relevant "clearly established Federal law" consists of only Supreme Court holdings (not dicta), applied in the same context to which the petitioner seeks to apply it, existing at the time of the relevant state court decision. See Premo v. Moore, 562 U.S. 115, 127 (2011). A state court acts "contrary to" clearly established Federal law if it applies a rule contradicting the relevant holdings or reaches a different conclusion on materially indistinguishable facts. Price v. Vincent, 538 U.S. 634, 640 (2003). A state court "unreasonably

appli[es]" clearly established federal law if it engages in an "objectively unreasonable" application to the facts of the correct governing legal rule. White v. Woodall, 572 U.S. 415, 425 (2014) (rejecting previous construction of section 2254(d) that a state court decision involves an unreasonable application of clearly established Supreme Court law if the state court "unreasonably refuses to extend a legal principle to a new context where it should apply"). Habeas relief may not issue unless "there is no possibility fair-minded jurists could disagree that the state court's decision conflicts with [the United States Supreme Court's] precedents." Harrington v. Richter, 562 U.S. 86, 103 (2011). "[T]his standard is 'difficult to meet,'" Metrish v. Lancaster, 569 U.S. 351, 358 (2013), as even a "strong case for relief does not mean the state court's contrary conclusion was unreasonable," Richter, 562 U.S. at 102.

When applying § 2254(d)(2), a state court's decision is based on an unreasonable determination of the facts when the federal court is "convinced that an appellate panel, applying the normal standards of appellate review, could not reasonably conclude that the finding is supported by the record before the state court." Hurles v. Ryan, 752 F.3d 768, 778 (9th Cir. 2014) (citation omitted). So long as "reasonable minds reviewing the record might disagree," the state court's determination of the facts is not unreasonable. Brumfield v. Cain, 576 U.S. 305, 314 (2015) (citation omitted). The petitioner carries the burden of proof. See Pinholster, 563 U.S. at 181.

Under both § 2254(d)(1) and (2), the relevant state court decision is the last reasoned decision. Ylst v. Nunnemaker, 501 U.S. 797, 806 (1991). The federal court "looks through" subsequent unexplained decisions, presuming that those decisions denied relief on the same factual and legal grounds as the last reasoned decision. Id. at 804; see also Shackleford v. Hubbard, 234 F.3d 1072, 1079 n.2 (9th Cir. 2000) ("The California Supreme Court denied review of Shackleford's direct appeal and habeas petition without comment. In these circumstances, we 'look

through' the unexplained California Supreme Court decisions to the last reasoned decision, the state appellate court's decision, as the basis for the state court's judgment.").

Here, Petitioner presented all her claims on direct appeal, and the California Court of Appeal issued a reasoned decision. (LD 6.) The California Supreme Court summarily denied review. (LD 10.) As a result, the California Court of Appeal's decision is the relevant state court decision for purposes of applying AEDPA deference.[5]

VI.

DISCUSSION

A. GROUND FOUR: Admission of Propensity Evidence.

In Ground Four, Petitioner asserts that the trial court abused its discretion in permitting the prosecution to introduce evidence of six uncharged deaths. (Pet. Mem. at 72.) She argues that the evidence of uncharged deaths failed to demonstrate notice of dangerous consequences from her prescribing practices. (Id. at 71.) Petitioner also argues that the evidence was more prejudicial than probative. (Id. at 72–73.) She contends that if "the six charged deaths been properly excluded there is a reasonable probability that [she] would not have been convicted of second degree murder in counts 1, 2, and 4." (Id. at 73.)

1. Relevant Trial Court Proceedings.

In January 2015, Petitioner filed a motion in limine to exclude evidence of uncharged patient deaths. (16 CT 3039–40.) She argued that there was "insufficient evidence to support any expert testimony on the exact cause of death

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[5] Petitioner contends that the California Court of Appeal's decision is not entitled to AEDPA deference because it misstated or failed to consider the full record before it. (Pet. Mem. at 12, 42–45; Reply at 7–10.) However, as discussed below, the California Court of Appeal's opinion is a reasonable interpretation of the evidentiary record. See infra §§ VI.A.4, VI.B.1.

of these patients." (16 CT 3039). She further argued that even if the evidence was relevant, any probative value was outweighed by its danger of unfair prejudice. (16 CT 3039–40.)

The prosecution opposed the motion, contending the uncharged deaths would demonstrate that "[Petitioner's] patients died as a result of the prescriptions issued by [Petitioner]." (16 CT 3053.) The prosecution asserted that the evidence was "relevant to demonstrate that [Petitioner] had actual knowledge that her prescriptions could, and in fact did, kill her patients, and that there was a lack of 'mistake' or an 'accident' on her part when the charged homicides occurred." (16 CT 3053–54) (footnote omitted). The prosecution noted that the uncharged deaths were probative of implied malice. (16 CT 3056–58.) Thus, the prosecution argued that as a trained physician, Petitioner was subjectively aware of the risks with her prescribing practices after being notified of the deaths of Stavron, Latham, and Kenney. (16 CT 3061.)

In February 2015, after hearing oral argument from the parties, the trial court denied the motion. (2 RT F-12–17.) While the trial court was not inclined to exclude the evidence, its ultimate ruling would depend on the prosecution establishing the requisite foundation or offer of proof. (2 RT F-12–14.) The trial court found that under California Evidence Code § 1101, the evidence of uncharged deaths was relevant to demonstrate that Petitioner had actual knowledge her prescriptions could and did, in fact, kill her patients.[6] (2 RT F-15.) The evidence of uncharged deaths of Petitioner's patients "goes directly to the element of implied

[6] Specifically, a trial court is not precluded from admitting "evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act." Cal. Evid. Code § 1101(b).

malice for purpose of the homicide charges." (2 RT F-16.) The trial court also considered the prejudicial consequences balancing test under California Evidence Code § 352 and found that the probative value of the evidence of the uncharged deaths was not "substantially outweighed by its undue prejudice."[7] (2 RT F-16–17.)

In August 2015, Petitioner filed another motion in limine, seeking to require the prosecution to specify and make an offer of proof as to the alleged conduct it would offer under § 1101(b). (17 CT 3262–65.) In its response, the prosecution asserted that it had already "proven up" the § 1101(b) evidence at the preliminary hearing. (17 CT 3276.) At the hearing on the motion, the trial court "stood by" its earlier ruling. (2 RT 601.) The court reiterated that the evidence of uncharged deaths goes to "intent, lack of mistake, [and] continuing plan or scheme. … It goes to deaths. [¶] An overdose goes to implied malice, that aspect of the charges, of the [murders] showing a reckless disregard for human life." (2 RT 601–02.)

2. The California Court of Appeal's Decision.

The California Court of Appeal found that admitting evidence of the six uncharged deaths of Petitioner's patients did not violate due process, reasoning as follows:

[Petitioner] contends the trial court erred in permitting the prosecution to present evidence of the uncharged deaths of Stavron, Latham, Keeney, Chambers, Gomez, and Katnelson. She argues that the trial court should have excluded this evidence under Evidence Code section 1101, subdivision (a), because the six patient deaths were not relevant for any purpose authorized by Evidence Code

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[7] Under California Evidence Code § 352, the "court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

section 1101, subdivision (b). [Petitioner] further asserts that the trial court should have excluded the evidence under Evidence Code section 352 because the undue prejudice from this evidence substantially outweighed its probative value and its admission also violated her due process rights. We disagree.

Under Evidence Code section 1101, subdivision (b), evidence that a defendant has committed a crime, civil wrong, or some other act is admissible to prove a material fact "such as motive, opportunity, intent, preparation, plan, knowledge, identity, [the] absence of mistake or accident." (Evid. Code, § 1101, subd. (b); see People v. Ewoldt (1994) 7 Cal.4th 380, 402–403.) The admissibility of prior acts evidence "turns largely on the question whether the uncharged acts are sufficiently similar to the charged offenses to support a reasonable inference of the material fact they are offered to prove." (People v. Erving (1998) 63 Cal.App.4th 652, 659–660.) "The least degree of similarity (between the uncharged act and the charged offense) is required in order to prove intent." (People v. Ewoldt, supra, 7 Cal.4th at p. 402.) "On appeal, the trial court's determination of this issue, being essentially a determination of relevance, is reviewed for abuse of discretion." (People v. Kipp (1998) 18 Cal.4th 349, 369.)

The trial court did not abuse its discretion in admitting evidence of the six uncharged deaths to prove [Petitioner]'s intent. This evidence was relevant to the issue of [Petitioner]'s subjective awareness of the dangerous consequences of overprescribing opioids and other controlled substances to patients whom she knew to be "drug-seeking" or suffering the symptoms of addiction.

The evidence showed that, over the course of a few years, [Petitioner] was repeatedly made aware of the potentially lethal risks posed by her prescribing practices, yet she ignored those warnings. Prior to the charged deaths, [Petitioner] had learned of the uncharged deaths of her patients—Stavron, Lathan, Keeney, Chambers, and Katnelson—from overdoses of the same or similar drugs she prescribed Nguyen, Ogle, and Rovero. Despite this knowledge, [Petitioner]

continued to prescribe Nguyen, Ogle, Rovero, and others these drugs in sometimes even higher doses without any medical justification for doing so. Her prescribing practices thus tended to show a conscious disregard for the lives of her patients, including the murder victims. Even if the investigators did not expressly inform [Petitioner] that her treatment and prescription practices caused the deaths of the uncharged patients, her knowledge of the uncharged patients' deaths after she prescribed powerful drugs with no medical justification for those prescriptions was circumstantial evidence of her subjective knowledge of risk to support an implied malice mental state. In short, evidence of her knowledge of the uncharged murders helped the jury assess [Petitioner]'s level of awareness of the risk in determining whether, at the time of the murders, she acted with conscious disregard for life. The evidence was therefore admissible under Evidence Code section 1101, subdivision (b).

Further, the trial court did not abuse its discretion under Evidence Code section 352 in admitting the uncharged crimes. Evidence of the uncharged deaths was highly probative on the key issue in the case—whether [Petitioner] harbored implied malice— and was not substantially outweighed by its prejudicial effect. (See Evid. Code, § 352 ["The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will ... [create substantial danger of undue prejudice."].)

Finally, admission of uncharged crimes under Evidence Code sections 352 and 1101 did not violate [Petitioner]'s constitutional rights to due process, a fair trial, and a reliable adjudication. (People v. Lewis (2009) 46 Cal.4th 1255, 1289 [""routine application of state evidentiary law does not implicate [a] defendant's constitutional rights""]; People v. Lindberg (2008) 45 Cal.4th 1, 26.)

(LD 6 at 26–28.)

3. No Clearly Established Federal Law Precludes Propensity Evidence.

A federal court conducting habeas review is limited to determining whether a state court decision violates the Constitution, laws or treaties of the United States. 28 U.S.C. § 2254(a); Swarthout v. Cooke, 562 U.S. 216, 219 (2011) (per curiam); Estelle v. McGuire, 502 U.S. 62, 67–68 (1991). Thus, "evidentiary rulings based on state law cannot form an independent basis for habeas relief." Rhoades v. Henry, 638 F.3d 1027, 1034 n.5 (9th Cir. 2011); see McGuire, 502 U.S. at 67–68 ("it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions"); Lewis v. Jeffers, 497 U.S. 764, 780 (1990) (federal habeas corpus relief "does not lie for errors of state law"). A federal habeas court generally is "bound to accept a state court's interpretation of state law." Butler v. Curry, 528 F.3d 624, 642 (9th Cir. 2008). Accordingly, to the extent that Ground Four can be read as challenging the California Court of Appeal's application of state law, or alleging that any state court abused its discretion, such a claim does not set forth a cognizable ground for habeas corpus relief. See Williams v. Borg, 139 F.3d 737, 740 (9th Cir. 1998) (Federal habeas relief is available "only for constitutional violation, not for abuse of discretion.").

Instead, a federal court must determine whether the admission of evidence violated a defendant's due process right to a fair trial. McGuire, 502 U.S. at 68; see Kipp v. Davis, 971 F.3d 939, 955 (9th Cir. 2020) ("The general test is whether the admission of evidence rendered the trial so fundamentally unfair as to violate due process.") (citation omitted). However, a petitioner "may not … transform a state-law issue into a federal one merely by asserting a violation of due process." Langford v. Day, 110 F.3d 1380, 1389 (9th Cir. 1997); see Spencer v. State of Tex., 385 U.S. 554, 563–64 (1967) ("Cases in this Court have long proceeded on the premise that the Due Process Clause guarantees the fundamental elements of fairness in a criminal trial. But it has never been thought that such cases establish

this Court as a rule-making organ for the promulgation of state rules of criminal procedure.") (citations omitted). Indeed, "[a] habeas petitioner bears a heavy burden in showing a due process violation based on an evidentiary decision." Boyde v. Brown, 404 F.3d 1159, 1172 (9th Cir.), as amended on reh'g, 421 F.3d 1154 (9th Cir. 2005); see Marshall v. Lonberger, 459 U.S. 422, 438 n.6 (1983) ("[T]he Due Process Clause does not permit the federal courts to engage in a finely-tuned review of the wisdom of state evidentiary rules …"). "Only if there are *no* permissible inferences the jury may draw from the evidence can its admission violate due process." Jammal v. Van de Kamp, 926 F.2d 918, 920 (9th Cir. 1991); cf. McGuire, 502 U.S. at 78–79 (O'Connor, J., concurring) ("a permissive inference is not a violation of due process because the State still has the burden of persuading the jury that the suggested conclusion should be inferred based on the predicate facts proved"); Kipp, 971 F.3d at 956 (reiterating "no due process violation where there *were* permissible inferences that the jury could draw from the challenged evidence").

4. Admission of Uncharged Deaths Not Fundamentally Unfair.

The California Court of Appeal reasonably determined that evidence of the uncharged deaths was admissible to prove Petitioner's implied malice mental state—i.e., her subjective awareness of the dangerous consequences of overprescribing opiates to patients whom she knew to be "drug-seeking" or exhibiting addiction symptoms. (LD 6 at 27–28.) Petitioner contends that the prosecution did not introduce any evidence she was on notice that her prescribing practices were responsible for the uncharged deaths. (Pet. Mem. at 71.) However, even if investigators did not explicitly inform Petitioner that she *caused* the deaths of the uncharged patients, she was *notified* that multiple patients had died from drug overdoses shortly after she prescribed opiates and other controlled subsequences. For example, the coroner's office informed Petitioner in January 2008 that her patient Matthew Stavron died in September 2007 from a possible drug overdose. (7

RT 1931; 14 RT 4814–16.) Similarly, an investigator informed Petitioner in May 2008 that patient Ryan Latham died in March 2008 from a possible drug overdose. (7 RT 1934; 13 RT 4589–91.) And, in December 2009, an investigator informed Petitioner that he was investigating the August 2009 death of patient Joseph Gomez. (13 RT 4606–08; 15 RT 5112; see also 19 RT 6343 [investigator testifying that it is normal practice to advise physician "of all the circumstances" surrounding patient's death). From this circumstantial evidence, the jury could draw a permissible inference that Petitioner was subjectively aware of the potentially lethal consequences from her prescribing practices and that at the time she prescribed opioids and other controlled medications to Nguyen, Ogle, and Rovero, she acted with implied malice. See People v. Erving, 63 Cal. App. 4th 652, 659–60 (1998), as modified on denial of reh'g (May 15, 1998) ("The admissibility of such evidence turns largely on the question whether the uncharged acts are sufficiently similar to the charged offenses to support a reasonable inference of the material fact they are offered to prove.").

Petitioner argues that the California Court of Appeal's opinion is not entitled to § 2254(d)(2) deference because the opinion "failed to acknowledge that Chambers and Gomez died from heroin overdoses, which had nothing to do with Petitioner." (Pet. Mem. at 73.) To the contrary, Petitioner prescribed Norco (hydrocodone) to Chambers, who died from the combined effects of morphine, codeine, and hydrocodone. (12 RT 3975–76.) Petitioner prescribed Roxicodone (oxycodone) and Xanax (alprazolam) to Gomez, who died from the combined effects of multiple drugs, including oxycodone and alprazolam. (12 RT 3981–88.) While the California Court of Appeal's opinion indicated that Nathan Kenney "died from a methadone and OxyContin overdose" (LD 6 at 13), Petitioner contends that she prescribed only OxyContin, Xanax, Adderall, and Soma. (Pet. Mem. at 44–45.) To the contrary, Petitioner also prescribed methadone shortly before Kenney died. (13 RT 4595, 4599.)

Petitioner also contends that "Latham died by suicide" and "Katsnelson died from a heart condition," neither of which had anything to do with Petitioner. (Pet. Mem. at 73.). But an expert witness testified that the cause of Latham's death was "acute polydrug intoxication" and that the Norco in his system alone—which Petitioner had prescribed—would have killed him. (12 RT 3952–58.) A day after Petitioner prescribed Fentanyl— a very powerful opiate—Katsnelson died from a heart attack, and the expert witness could not eliminate Fentanyl as a contributing factor. (6 RT 1544–45; 12 RT 3988–90.)

Because the jury could draw a permissible inference from the evidence of the uncharged deaths, admission of that evidence did not violate due process.

B. GROUNDS ONE, TWO, AND THREE: Insufficiency of the Evidence.

In Grounds One, Two, and Three, Petitioner contends that the evidence she was guilty of second degree murder as to Nguyen, Ogle, and Rovero was insufficient. (Pet. Mem. at 46–63.) She argues that there was insufficient evidence of implied malice. (Id. at 53–57, 60, 62.) Petitioner also contends that for Nguyen and Rovero, the evidence was insufficient to prove that her conduct was the proximate cause of their deaths. (Id. at 53, 62.)

1. Relevant Trial Evidence.

The Court first considers Petitioner's contention that the California Court of Appeal's decision was based on an unreasonable determination of the facts. (Pet. Mem. at 12.) The Ninth Circuit has identified "different 'flavors' of challenges to state-court findings under section 2254(d)(2)'s unreasonableness standard." Kipp, 971 F.3d at 953.

> [First,] the state court might have neglected to make a finding of fact when it should have done so. Second, the state court might make factual findings under a misapprehension as to the correct legal standard. … Third, the fact-finding process itself might be defective. For instance, the state court might have made evidentiary findings

> without holding a hearing to give the petitioner an opportunity to present evidence. Alternatively, the state court might plainly misapprehend or misstate the record in making its findings. Lastly, the state-court fact-finding process may be undermined where the state court has before it, yet apparently ignores, evidence that supports petitioner's claim. In other words, failure to consider key aspects of the record is a defect in the fact-finding process.

Id. at 953–54 (citations omitted).

Here, Petitioner contends that the California Court of Appeal misstated or failed to consider the full record before it. (Pet. Mem. at 42–45; see also Reply at 7–10.) Specifically, Petitioner argues that the California Court of Appeal's treatment of the second degree murder convictions is not entitled to § 2254(d)(2) deference because it "overlooked and/or made numerous material misstatements of fact." (Pet. Mem. at 42; Reply at 10–12.) After careful review of the whole evidentiary record, the Court finds otherwise.

a. Pharmacists Refused to Fill Prescriptions Written by Petitioner.

The California Court of Appeal noted that beginning in 2008, pharmacists refused to fill prescriptions written by Petitioner because they raised "red flags" indicating "no legitimate medical purpose for writing the prescriptions." (LD 6 at 5.) In response, "[Petitioner] referred her patients to 'mom and pop' pharmacies, which continued to fill her prescriptions." (Id.)

Petitioner contends that this is not accurate. She asserts there was "no evidence that she referred them to any such pharamcies [sic]." (Pet. Mem. at 43.) To the contrary, patient Casey Yoder testified that after some pharmacies stopped filling Petitioner's prescriptions, Petitioner referred him to "small," neighborhood pharmacies, "like a mom-and-pop kind of type deal." (21 RT 6919–20.)

b. Investigators Notified Petitioner of Patient Overdose Deaths.

The California Court of Appeal found that beginning in 2008, law enforcement investigators called Petitioner to discuss the deaths of several of her patients and apprised her that "the patients had died of suspected drug overdoses shortly after obtaining prescriptions from her." (LD 6 at 5.) Petitioner contends there was "no evidence presented that they told her the patients had died of drug overdoses." (Pet. Mem. at 43.) But the record contains explicit evidence indicating otherwise.

Patient Matthew Stavron's medical record included a note that "Victoria from coroner's office called on 1/16/08 to inform [Petitioner] that patient passed away on 9/16/07 possibly from drug overdose." (7 RT 1931; see 14 RT 4814–16 [investigator testified that he called Petitioner on January 16, 2008, "to speak with her about the overdose death of Matthew Stavron"].) Similarly, patient Ryan Latham's medical record included a note indicating that "Deputy Kelly Ralph called on 5/19/08 and informed [Petitioner] that patient passed away on 3/30/08 from possible drug overdose." (7 RT 1934; see 13 RT 4589–91 [investigator confirming that he spoke with Petitioner on May 19, 2008, concerning Latham's death].) Further, one investigator testified that while he could not remember specifically informing Petitioner that her patient had died from a possible drug overdose, it was his "normal practice to advise the physician of all the circumstances" surrounding her patient's death. (19 RT 6343.)

Petitioner also asserts there was no evidence that the investigators explicitly notified her "that it was her prescriptions which caused the deaths." (Pet. Mem. at 43.) But the California Court of Appeal explicitly acknowledged Petitioner's argument on this issue and based its opinion on other evidence. (LD 6 at 16, 24 ["Finally, even accepting [Petitioner's] claim that investigators did not expressly inform her that she was directly responsible for the deaths of Nguyen, Ogle,

Rovero, or other patients, her conduct, after learning of these deaths, demonstrated she was aware of the lethal consequences of her prescribing practices."].)

c. Patient Records Were "Altered."

The California Court of Appeal concluded that after Petitioner became aware of her patients' overdose deaths, "she entered 'alerts' in some of the patients' records … [and] also altered patient records but continued her prescribing practices until she was arrested." (LD 6 at 5–6 [footnote omitted].) Petitioner contends that "[w]hile some of the records have 'alerts' as to possible drug overdose, the evidence presented showed that at most there was additional information added to a medical record years later and never that the record had been changed or altered." (Pet. Mem. at 43.) The California Court of Appeal's opinion is a reasonable interpretation of the evidence. A "material alteration" includes a "significant change in something." Black's Law Dictionary 85 (8th ed. 2004). Thus, "additional information" added to a previously blank patient file could reasonably be considered an "alteration." The trial record indicates that after Petitioner learned that she was being investigated, "alerts" were added to medical files months or years after the deaths occurred. (See, e.g., 7 RT 1893, 1987, 1901–02, 1907–08, 1910, 1915, 1929–34; 14 RT 4947–48, 4953; 15 RT 5112, 5125, 5141–53.)

Petitioner also asserts that when she was "put on notice that patients were merely drug seeking, she immediately terminated any contact with them." (Pet. Mem. at 43–44.) However, while Petitioner identifies a couple instances when she did terminate contact with drug-seeking patients (id. at 44), there are multiple instances when she did not. (E.g., 13 RT 4593–95; 14 RT 4814–16; 22 RT 7269–76; 20 RT 6670.)

2. The California Court of Appeal's Decision.

The California Court of Appeal found that substantial evidence supported Petitioner's second degree murder convictions, reasoning as follows:

[Petitioner] contends that substantial evidence does not support her convictions of second degree murder of Nguyen, Ogle, and Rovero because there was no evidence that she acted with implied malice, and, in the case of Nguyen and Rovero, no evidence that her conduct was the proximate cause of their deaths. She argues that although she acted with negligence sufficient to support convictions for involuntary manslaughter, there was no evidence that she acted with conscious disregard for her patients' lives. Specifically, she asserts that because coroner and police investigators never informed her that she was responsible for the victims' deaths or the deaths of other patients, her continued practice of prescribing high doses and large quantities of opioids and other controlled substances did not show the necessary reckless mindset to support a finding of implied malice.

We review the evidence in the light most favorable to the verdicts, presuming the existence of every fact the trier could have reasonably deduced from the evidence. (People v. Johnson (1993) 6 Cal.4th 1, 38, overruled on other grounds by People v. Rogers (2006) 39 Cal.4th 826.) We apply the same standard to our review of circumstantial evidence. (People v. Ceja (1993) 4 Cal.4th 1134, 1138.) As set forth below, we conclude that substantial evidence supports the jury's verdict.

A. Evidence of Implied Malice

Implied malice exists when an intentional act naturally dangerous to human life is committed "'by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life.'" (People v. Lasko (2000) 23 Cal.4th 101, 107, quoting Pen. Code, § 188.) "It is the "'conscious disregard for human life'" that sets implied malice apart from gross negligence."[FN19] *(People v. Contreras (1994) 26 Cal.App.4th 944, 954.) "Implied malice is determined by examining the defendant's subjective mental state to see if ... she actually appreciated the risk of ... her actions." (People v. Superior Court (Costa) (2010) 183 Cal.App.4th 690, 697 (Costa); see People v. Olivas (1985) 172 Cal.App.3d 984, 988 ["[T]he state of mind of a person who acts with conscious*

disregard for life is, 'I know my conduct is dangerous to others, but I don't care if someone is hurt or killed.'"].) "Implied malice may be proven by circumstantial evidence." (Costa, supra, 183 Cal.App.4th at p. 697; see People v. Nieto Benitez (1992) 4 Cal.4th 91, 110 ["Even if the act results in a death that is accidental ... the circumstances surrounding the act may evince implied malice."].)

FN19 Second degree murder (based on implied malice) and involuntary manslaughter both involve a disregard for life. For murder, however, the disregard is judged by a subjective standard, whereas for involuntary manslaughter, the standard is an objective one. (People v. Watson (1981) 30 Cal.3d 290, 296–297.) Implied malice murder requires a defendant's conscious disregard for life, meaning that the defendant subjectively appreciated the risk involved. (Ibid.) In contrast, involuntary manslaughter merely requires a showing that "a reasonable person would have been aware of the risk." (Id. at p. 297.)

The record discloses overwhelming evidence that [Petitioner]'s treatment of Nguyen, Ogle, Rovero, and other patients was well below the standard of care in the practice of medicine and prescribing opioid medications. We recognize that, although probative of [Petitioner]'s subjective appreciation of risk, a departure from the medical standard of care alone would not be sufficient to support an implied malice finding. (See People v. Klvana (1992) 11 Cal.App.4th 1679, 1703–1705 [even though the evidence showed that doctor's treatment of patients fell below the standard of care, his second degree implied malice murder convictions were affirmed not based on the evidence of the doctor's negligence but, instead, because sufficient evidence demonstrated doctor's actual awareness and conscious disregard of the life-threatening dangers of his treatment of patients].) As noted above, to sustain an implied malice murder conviction, there must be substantial evidence that [Petitioner] subjectively appreciated the risk to her patients of her opioid prescription practices. Here, substantial evidence supports the jury's finding

that [Petitioner] acted with a subjective appreciation of the risks involved in her medical treatment of Nguyen, Ogle, and Rovero.

As a licensed physician, [Petitioner] had expert knowledge of the life-threatening risk posed by her drug prescribing practices. She knew that the drugs she prescribed were dangerous and that the combination of the prescribed drugs, often with increasing doses, posed a significant risk of death. [Petitioner]'s experience and medical training regarding opioids and other controlled substances endowed her with special knowledge of those dangers. During the investigation of her practice, [Petitioner] admitted to undercover DEA agents that she understood that the drugs she was prescribing were addictive and typically would only be prescribed to treat pain from cancer and broken bones. She knew that she was prescribing those drugs in high doses and in dangerous combinations to patients who did not suffer from those conditions.

[Petitioner] also took other actions that showed her awareness of the danger of her prescribing practices. After larger pharmacies, such as CVS and Walgreens, contacted [Petitioner] to raise questions about the lack of medical justification for her prescriptions, and ultimately refused to fill those prescriptions, [Petitioner] sent her patients to small "mom and pop" pharmacies which she knew would continue to fill her prescriptions. Moreover, although she knew some patients were also obtaining similar prescriptions from other doctors and were taking drugs in lethal combinations, [Petitioner] did not contact those other doctors to determine which drugs other doctors had prescribed or in what doses and when; nor did she check the CURES database for that information. Rather, [Petitioner] told patients—some of whom she knew were addicted to prescription pain medication—not to mix the drugs.

There is substantial evidence of [Petitioner]'s subjective awareness of the risk of death her prescribing practices posed to the three charged murder victims. Concerning Nguyen, the evidence showed that from his initial visit, [Petitioner]

knew that Nguyen was drug-seeking and that he was taking high doses of opioids prescribed by other doctors. Nonetheless, she failed to corroborate his complaints of pain and anxiety, contact his other doctors, or do the kind of physical examination required to determine whether a legitimate medical reason existed for prescribing the drugs he requested. Instead, [Petitioner] prescribed to Nguyen opioids and sedatives, and when he returned two weeks later having used up all the medications, she simply wrote him refill prescriptions. According to [Petitioner], during the second visit, she told Nguyen that she would not write him a prescription for his medications "early" again. She failed, however, to discuss with him the severe health risks of those combined medications. After that, Nguyen returned almost every month until his death in February 2009 seeking more medication in higher doses. [Petitioner] wrote him refill prescriptions without further inquiry into the need for those refills, let alone in higher doses. A reasonable jury could infer from this evidence that [Petitioner] was aware Nguyen was abusing the opioids and sedatives she had prescribed, and that by continuing to prescribe the drugs in greater amounts and stronger doses, [Petitioner] acted in conscious disregard for his life.

In addition, even while [Petitioner] was treating Nguyen, she learned of the deaths of other patients—Stavron, Latham, and Keeney—who had similar patient profiles. They, like Nguyen, were otherwise healthy, young men seeking prescriptions for controlled substances and willing to pay cash, who died of drug overdoses shortly after [Petitioner] treated them. They also expressed vague complaints about pain and reported taking prescription opioids and sedatives. [Petitioner] admitted she knew that many of these patients were drug-seeking and had presented with symptoms of drug addiction when she prescribed controlled substances to them. She told her receptionist that her patients were "druggies." She, nonetheless, continued to prescribe high doses of opioids, sedatives, and muscles relaxants without performing adequate physical examinations of these

patients and without corroborating their claims of pain and prior injuries. When these patients returned for subsequent visits and sought to refill the prescriptions, [Petitioner] complied and sometimes wrote them prescriptions for stronger medications, again with no medical justification.

Substantial evidence further supports that [Petitioner] acted with implied malice when treating Ogle. At his first visit in March 2009, Ogle told [Petitioner] that he was taking extremely high doses of OxyContin—in amounts used to treat terminal cancer patients—and using heroin daily. Rather than investigate this report of Ogle's drug use and prior treatment, [Petitioner] prescribed him 100 tablets each of Xanax as well as methadone—a drug she knew she was not licensed or trained to prescribe. Ogle then returned twice in the next month having used all the medications [Petitioner] had prescribed. During those visits, he informed [Petitioner] that he had taken all the medications and wanted refill prescriptions, and [Petitioner] observed that Ogle was suffering from symptoms of withdrawal from drugs. [Petitioner] did not, however, refer him to an addiction specialist. Instead, [Petitioner] just wrote him refill prescriptions. From this evidence, and from the evidence that at the time [Petitioner] was treating Ogle she was aware of the deaths of her patients Stavron, Latham, Keeney, and Nguyen, the jury could reasonably have found that [Petitioner] acted with implied malice in treating Ogle.

Substantial evidence also supports that [Petitioner] acted with implied malice in treating Rovero. By the time she prescribed drugs for Rovero in December 2009, [Petitioner] knew that eight of her patients (Stavron, Latham, Keeney, Chambers, Gomez, Katnelson, Nguyen, and Ogle) had died shortly after she had prescribed the types of drugs Rovero sought. Even armed with this knowledge, she continued to prescribe dangerous drugs in conscious disregard for Rovero's life. Specifically, Rovero presented to [Petitioner] as using extremely high doses of OxyContin, Xanax, and the muscle relaxant Soma every day. [Petitioner] did not, however, verify the doses or the types of medications that other doctors had

previously prescribed to Rovero. Instead, [Petitioner] substituted one brand of opioid (OxyContin) for another (Roxicodone) and prescribed Xanax and Soma in reduced doses, which, according to the evidence presented at trial, guaranteed Rovero would suffer from withdrawals and raised his potential for overdose and death.

Our conclusion that substantial evidence supports a finding of implied malice with respect to each of the charged murders is not unprecedented. Our research has uncovered three cases—a federal case applying New York law and cases from California and Michigan—in which appellate courts addressed the sufficiency of evidence to support convictions of second degree murder or similar charges, requiring evidence of recklessness or conscious disregard of life, stemming from a licensed physician's treatment of a patient.

Thus, in Einaugler v. Supreme Court of State of N.Y. (2d Cir. 1997) 109 F.3d 836, a medical doctor was charged under the New York Penal Code with reckless endangerment and willful patient neglect in connection with the death of his patient. The prosecution presented evidence that he endangered his patient, who was in a nursing home, when he prescribed that she be fed through her dialysis catheter instead of her feeding tube, and then engaged in willful neglect by delaying the patient's hospitalization, despite being told by other doctors that prompt treatment of the patient in a hospital was necessary. (Id. at pp. 840–841.) Although the doctor was not charged with second degree implied malice murder, the reckless endangerment charge against him required proof, as in [Petitioner]'s case, of the doctor's subjective awareness of the danger of his treatment. (Id. at p. 840.)

After the state appellate court affirmed the doctor's conviction, the doctor filed a petition for a writ of habeas corpus in the federal district court challenging the sufficiency of the evidence supporting his conviction. In denying the petition, the district court observed "[t]he reckless endangerment charge required proof that [the doctor] had recklessly engaged in conduct that created a substantial risk of

serious physical injury. [New York] Penal Law [section] 120.20. For [the doctor's] act to be reckless, he must have grossly deviated from a reasonable person's standard of conduct and consciously disregarded a substantial and unjustifiable risk. See [New York] Penal Law [section] 15.05." (Einaugler v. Supreme Court of State of N.Y., supra, 109 F.3d at p. 840, italics omitted.) The district court concluded that the doctor's convictions were supported by "sufficient" evidence. The court observed that the doctor knew of the dire health condition in which his directions had placed his patient, had been directed to hospitalize his patient immediately once she showed signs of distress, and was aware of the serious health risk if she was not transferred promptly. He nevertheless waited 10 hours before transferring her to a hospital. (Ibid.)

Our opinion in People v. Klvana, supra, 11 Cal.App.4th 1679 also supports our conclusion that substantial evidence supports the jury's finding of [Petitioner]'s implied malice. In that case, we affirmed a medical doctor's convictions of second degree murder for the deaths of nine infants. We concluded that a reasonable jury could have found implied malice to support the murder convictions based on the following evidence: The defendant repeatedly ignored obvious signs of medical distress in his patients during delivery; he advised parents not to take their children to the hospital despite clear indications of the need to do so; he induced vaginal births in inappropriate circumstances, after having been warned on numerous occasions that his treatment was dangerously substandard; and he continued to deliver babies despite the fact that his hospital privileges had been suspended because of substandard performance. (Id. at pp. 1704–1705.) Further paralleling the facts here, in Klvana, the prosecution presented evidence of an uncharged baby's death resulting from the doctor's treatment to support the doctor's subjective knowledge of the grave risks of his treatment practices. (Ibid.)

People v. Stiller (2000) 242 Mich.App. 38, 43 (Stiller), is also instructive. In Stiller, the Michigan appellate court affirmed the implied malice second degree

murder conviction of a doctor who, for a four-month period, prescribed his patient high doses of hydrocodone unrelated to any rational medical treatment. (Id. at p. 43.) The patient then died from an overdose of drugs, including hydrocodone. (Id. at p 41.)

In challenging his murder conviction, the doctor argued that "there was no evidence that he actually instructed [his patient] to take a fatal dose of drugs." (Stiller, supra, 242 Mich.App. at p. 47.) The Stiller court rejected the doctor's argument: "[B]y prescribing huge quantities of medicine unrelated to any rational medical treatment and that had a possibility of interacting with other drugs he prescribed, defendant should have known that an overdose was likely to occur, and he therefore exhibited a wanton and wil[l]ful disregard of the likelihood that the natural tendency of his behavior was to cause death or great bodily harm." (Ibid.) The court also supported its decision with evidence that pharmacies had warned the doctor about his dangerous prescribing practices, the doctor had prescribed very high doses of powerful drugs, and he had knowledge that there was no legitimate medical reason for his drug prescription for the murder victim. (Id. at pp. 43–45.) The same is true here.

Finally, even accepting [Petitioner]'s claim that investigators did not expressly inform her that she was directly responsible for the deaths of Nguyen, Ogle, Rovero, or other patients, her conduct, after learning of these deaths, demonstrated she was aware of the lethal consequences of her prescribing practices. For example, [Petitioner] placed "alerts" in the patient files indicating that they died of suspected drug overdoses. She also altered patient records after she learned she was under investigation. From this evidence and other circumstantial evidence in the record, a jury could have reasonably found [Petitioner] knew the cause of Nguyen's, Ogle's, and Rovero's deaths and of her role in their demise. In sum, substantial evidence supports the jury's findings of implied malice.

B. Evidence of Causation

[Petitioner] argues substantial evidence did not support the finding that she caused Nguyen's and Rovero's deaths.[FN20] *We disagree.*

[FN20] *On appeal, [Petitioner] does not contest that there was substantial evidence of causation with respect to Ogle's death.*

Concerning Nguyen, the coroner determined that the cause of his death was the combined effects of Opana and Xanax, both prescribed by [Petitioner]. Nguyen also had small amounts of methadone in his system when he died. [Petitioner] argues that the presence of methadone was an "unforeseeable intervening" cause that demonstrates she did not cause his death. [Petitioner]'s argument is unavailing because it asks us to reweigh the evidence, which we cannot do. (See People v. Protopappas (1988) 201 Cal.App.3d 152, 168 [appellate court will not reweigh the evidence and draw inferences which the jury rejected].)

Although "an 'independent' intervening cause will absolve a defendant of criminal liability[,] [citation] ... the intervening cause must be 'unforeseeable ... an extraordinary and abnormal occurrence, which rises to the level of an exonerating, superseding cause.' [Citation.] On the other hand, a 'dependent' intervening cause will not relieve the defendant of criminal liability. 'A defendant may be criminally liable for a result directly caused by his act even if there is another contributing cause. If an intervening cause is ... normal and reasonably foreseeable ... the intervening act is "dependent" and not a superseding cause, and will not relieve defendant of liability.'" (People v. Funes (1994) 23 Cal.App.4th 1506, 1523.)

Here, [Petitioner]'s medical expert opined that the amount of methadone in Nguyen's system was "pretty small" and alone would not have killed Nguyen. [Petitioner]'s expert and the coroner's investigator agreed that the medications [Petitioner] prescribed to Nguyen were contributing causes of his death. Thus, even if methadone played a role in Nguyen's death, the jury could have reasonably

concluded that the presence of methadone was not an unforeseen, independent intervening event that would relieve [Petitioner] of liability for Nguyen's death.

Likewise, there was substantial evidence that [Petitioner]'s actions were a proximate cause of Rovero's death. [Petitioner] prescribed Rovero Roxicodone, Soma, and Xanax. The coroner found that the cause of Rovero's death was the combined drug toxicity from alcohol and the drugs [Petitioner] had prescribed. Evidence was also presented that the amount of alcohol in his system could not have been lethal. The jury could have reasonably inferred from this evidence that alcohol was not an independent intervening cause of Rovero's death.

(LD 6 at 16–26.)

3. Clearly Established Federal Law.

The Due Process Clause of the Fourteenth Amendment "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. 358, 364 (1970). To review the sufficiency of the evidence in a habeas corpus proceeding, the federal court must determine "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979); accord Parker v. Matthews, 567 U.S. 37, 43 (2012) (per curiam); see also Coleman v. Johnson, 566 U.S. 650, 656 (2012) (per curiam) ("[T]he only question under Jackson is whether [the jury's] finding was so insupportable as to fall below the threshold of bare rationality."). "[A] reviewing court must consider all of the evidence admitted by the trial court, regardless whether that evidence was admitted erroneously." McDaniel v. Brown, 558 U.S. 120, 131 (2010) (per curiam) (citation omitted). All evidence must be considered in the light most favorable to the prosecution. Jeffers, 497 U.S. at 782; Jackson, 443 U.S. at 319. If the facts support conflicting inferences, reviewing courts "must presume—even if it does not affirmatively appear in the record—that the trier of

fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution." Jackson, 443 U.S. at 326; accord Cavazos v. Smith, 565 U.S. 1, 7 (2011) (per curiam). Thus, "[a] due process claim based on insufficiency of the evidence can only succeed when, viewing all the evidence in the light most favorable to the prosecution, no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Emery v. Clark, 643 F.3d 1210, 1213 (9th Cir. 2011).

Furthermore, under AEDPA, federal courts "owe a double dose of deference to state courts." Long v. Johnson, 736 F.3d 891, 896 (9th Cir. 2013) (citation omitted). The federal courts "ask only whether the state court's decision was contrary to or reflected an unreasonable application of Jackson to the facts of a particular case." Emery, 643 F.3d at 1213–14. "[I]t is not enough if [a federal court] conclude[s] that [it] would have found the evidence insufficient or that [it] thinks the state court made a mistake." Boyer v. Belleque, 659 F.3d 957, 964–65 (9th Cir. 2011). Instead, a federal court "must conclude that the state court's determination that a rational jury could have found that there was sufficient evidence of guilt, i.e., that each required element was proven beyond a reasonable doubt, was objectively unreasonable." Id. at 965. These standards are applied to the substantive elements of the criminal offense under state law. Jackson, 443 U.S. at 324 n.16; Boyer, 659 F.3d at 964; see also Johnson, 566 U.S. at 655 ("Under Jackson, federal courts must look to state law for the substantive elements of the criminal offense, but the minimum amount of evidence that the Due Process Clause requires to prove the offense is purely a matter of federal law.") (citation omitted).

4. Petitioner Is Not Entitled to Habeas Relief.

a. Implied Malice.

Murder is the unlawful killing of a human being with malice aforethought. P.C. §§ 187(a), 188. "Second degree murder is the unlawful killing of a human being with malice aforethought but without the additional elements, such as

willfulness, premeditation, and deliberation, that would support a conviction of first degree murder." People v. Knoller, 41 Cal. 4th 139, 151 (2007). Malice may be either express or implied. Express malice is manifested by "a deliberate intention unlawfully to take away the life of a fellow creature." P.C. § 188(a)(1). Malice is implied "when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart." P.C. § 188(a)(2). Thus, under California law, "to find a defendant guilty of second-degree murder based on implied malice, the jury must find that at the time of the killing the defendant intended to do an act that is dangerous to human life, with the knowledge that the act threatens life, and with a 'conscious disregard' of that threat." Ho v. Carey, 332 F.3d 587, 592 (9th Cir. 2003); see People v. Nieto Benitez, 4 Cal. 4th 91, 102–03 (1992) (defining second degree, implied malice murder); P.C. § 187 (defining murder); P.C. § 188 (defining express and implied malice); P.C. § 189 (defining second degree murder based on implied malice).

Implied malice includes both a physical and a mental component. The physical component requires "the performance of an act, the natural consequences of which are dangerous to life." People v. Cravens, 53 Cal. 4th 500, 508 (2012), as modified (Mar. 14, 2012) (citation omitted). The mental component requires "that the defendant knows that his conduct endangers the life of another and acts with a conscious disregard for life." Id. (citation omitted). "Implied malice, like all other elements of a crime, may be proven by circumstantial evidence." People v. James, 62 Cal. App. 4th 244, 277 (1998), as modified (Mar. 30, 1998) (citation omitted); see Nieto Benitez, 4 Cal. 4th at 110 ("Even if the act results in a death that is accidental, … the circumstances surrounding the act may evince implied malice.")

i. Evidence Common to All Three Murder Victims.

Abundant evidence supported a rational jury's conclusion that Petitioner acted in conscious disregard that her practice of prescribing large quantities of opiates and other dangerous drugs to Nguyen, Ogle, and Rovero were potentially

fatal. First, as a physician, Petitioner knew that her primary duty to her patients was not to "expos[e] them to unnecessary risks associated with [a] drug that they may not need." (6 RT 1529.) She also had a duty when prescribing controlled substances for the treatment of pain to conduct an appropriate examination; understand when the pain started, where it is located, its severity, and how it is aggravated; obtain prior medical records and investigate what other remedies have been explored; determine whether there is a family history of drug or alcohol abuse; thoroughly explain treatment options; run diagnostic tests; and keep adequate patient records. (6 RT 1596–606.) Regarding the prescribing of controlled substances, Petitioner had a duty to monitor her patients and schedule regular follow-up office visits to ensure that the patient is using the medication appropriately and benefiting from it. (6 RT 1603–05.) Expert testimony indicated that Petitioner made no effort to determine that the drugs she was prescribing to Nguyen, Ogle, and Rovero were medically appropriate. She failed to perform adequate medical examinations, verify their complaints, keep adequate medical records, or determine what other medications they were taking even though she was informed that they were taking illegal drugs or had other prescriptions. (15 RT 5179–95; 23 RT 7512–41.) Petitioner knew she was not certified by the DEA to prescribe Suboxone or methadone but did so anyways. (4 RT 998; 11 RT 3630, 3635–36, 3640). While a departure from the medical standard of care would not alone be sufficient to support an implied malice determination, it is probative of Petitioner's subjective appreciation of the risk inherent in prescribing opiates and other controlled substances. See People v. Klvana, 11 Cal. App. 4th 1679, 1703–05 (1992).

Second, Petitioner was aware that multiple pharmacists from well-known pharmacies were calling to verify prescriptions, questioning their medical appropriateness, and ultimately refusing to fill her prescriptions. For example, Alfonso Vercueil was a pharmacist at CVS Pharmacy in Aliso Viejo. (5 RT 1235–

36). From 2008–2010, he received multiple prescriptions from Petitioner that raised red flags—e.g., patients paying cash for large quantities of OxyContin. (5 RT 1254–67.) He initially contacted Petitioner's office to verify that the prescriptions were not forged and were medically necessary. (5 RT 1254, 1256–57, 1265.) Vercueil ultimately contacted the DEA, stopped filling Petitioner's prescriptions, and referred the patients back to Petitioner. (5 RT 1265–68.)

Lydia Bray was the pharmacist in charge at Longs Drug Store in Mission Viejo. (5 RT 1359–61.) From 2007–2008, she noticed eight to nine suspicious prescriptions from Petitioner *every week*. (5 RT 1364; 7 RT 1814, 1829.) She testified that in 38 years, she had had never seen prescriptions with the strengths, quantities, and drug combinations as prescribed by Petitioner. When Bray called Petitioner's clinic to verify the prescriptions, she received a vague or no diagnosis. The behavior of Petitioner's patients also raised red flags—e.g., young white men from out of the area with identical prescriptions; paying cash; requesting brand names; pacing in front of the pharmacy until their prescription was filled; slurring speech; having pinpoint or dilated pupils; and attempting to fill prescriptions the day they were written. (5RT 1365–70; 7RT 1804, 1813–16, 1830, 1847–48.) Finally, in mid-2008, Bray stopped filling Petitioner's prescriptions, turned away Petitioner's patients, and contacted the DEA. (7RT 1816–1819, 1821, 1848–49.)

Angela Li was the pharmacist in charge at Walgreens in Rowland Heights. (5 RT 1311, 1314.) In 2009–2010, she noticed an increase in Petitioner's prescriptions for controlled substances—up to twenty prescriptions per day—by patients whose behavior raised red flags—e.g., young men from out of the area who asked for brand names, paid cash, paced in front of the pharmacy until their prescriptions were filled, and were visibly intoxicated. (5 RT 1326–40.) She initially contacted Petitioner's office to confirm the prescriptions and secure supportive documents. (5 RT 1321–22.) Ultimately, Li refused to fill Petitioner's

prescriptions, turned away Petitioner's patients, and contacted the DEA. (5 RT 1336–37, 1343–48, 1351–53.)

Petitioner's response to these pharmacists who refused to fill her prescriptions was to refer her patients to small "mom-and-pop" pharmacies. (21 RT 6919–20.)

Third, Petitioner was aware that her patients were dying. While Petitioner was not explicitly informed that her prescribing practices *caused* her patients' deaths, she was *notified* that multiple patients died from drug overdoses shortly after she prescribed opiates and other controlled subsequences. For example, the coroner's office informed Petitioner that Stavron died from an acute intoxication of oxycodone and Xanax, just two days after Petitioner prescribed him OxyContin (oxycodone). (7 RT 1931; 12 RT 3943–50; 14 RT 4814–16; 17 RT 3367–80.) After the investigator's call, Petitioner entered an "alert" in his patient file and altered his medical records. (7 RT 1929–31; 15 RT 5152.)

An investigator informed Petitioner in May 2008 that Latham died in March 2008 six days after Petitioner prescribed him Norco. (7 RT 1934; 13 RT 4589–91.) The cause of Latham's death was "acute polydrug intoxication," and an expert testified that the Norco in his system alone would have killed him. (12 RT 3952–58.) After the investigator's call, Petitioner entered an "alert" in Latham's file and altered his medical records. (7 RT 1933–34; 13 RT 4588; 15 RT 5151.)

Kenney died four days after Petitioner prescribed him OxyContin and methadone. (13 RT 4595–99.) The cause of his death was the effect of multiple drugs, including those prescribed by Petitioner. The toxicology expert testified that the methadone or OxyContin alone could have killed Kenney. (12 RT 3960–73; 13 RT 4592–99.)

Finally, as discussed below, additional evidence specific to each murder victim indicated that Petitioner acted in conscious disregard that her practice of

prescribing large quantities of opiates and other dangerous drugs was potentially fatal.

ii. Nguyen (Ground One).

Substantial evidence further supports that Petitioner acted with implied malice when treating Nguyen. Despite knowing that Nguyen was drug-seeking and taking opioids prescribed by other physicians, Petitioner failed to contact them or otherwise determine with the CURES database what other drugs he was taking. (22 RT 7273–76.) Petitioner also failed to corroborate Nguyen's claimed symptoms, conduct a physical examination, or otherwise confirm whether legitimate medical reasons existed for prescribing the drugs he requested. (23 RT 7512–24.) When Nguyen prematurely used up his prescriptions, Petitioner wrote early prescriptions and unjustifiably increased his dosages until he died from a drug overdose. (23 RT 7520–23.) While treating Nguyen, Petitioner was aware that *three* of her other patients—Stavron, Latham, and Kenney—had died after she had prescribed them similar drugs. (13 RT 4589–94; 14 RT 4814–16, 4589–90.) After Nguyen died, Petitioner altered his medical records. (15 RT 5152–53.)

iii. Ogle (Ground Two).

Substantial evidence further supports that Petitioner acted with implied malice when treating Ogle. She knew Ogle was taking high dosages of OxyContin—doses usually given only to terminal cancer patients—and using heroin daily. (15 RT 5180–86, 5207.) Without confirming Ogle's medical needs or drug use, Petitioner prescribed methadone, which she was not certified to do, along with Xanax. (4 RT 998; 15 RT 5181–89.) Like Nguyen, Ogle prematurely used up his prescriptions and exhibited withdrawal symptoms, but Petitioner merely prescribed more drugs. (15 RT 5180–93.) Two days after Petitioner's final prescription, Ogle died of a drug overdose. (15 RT 3930–31.) At the time, Petitioner knew that *four* of her patients—Stavron, Latham, Kenney, and Nguyen—

had died from drug overdoses. (13 RT 4589–94; 14 RT 4814–16, 4589–90; 22 RT 7270–76.)

iv. Rovero (Ground Three).

Substantial evidence further supports that Petitioner acted with implied malice when treating Rovero. Petitioner knew that Rovero was taking very large doses of OxyContin, Xanax, and Soma daily. (14 RT 4855–56.) Nevertheless, she failed to confirm what doses of which drugs other doctors were prescribing. Instead, during Rovero's sole visit, Petitioner merely substituted one opioid (Roxicodone) for another (OxyContin) and drastically reduced his Xanax and Soma doses. (14 RT 4856–57; 23 RT 7532–37.) An expert testified that by "dramatically" reducing Rovero's dosages by more than 80 percent, "it would have guaranteed that he would experience a substantial withdrawal reaction from the opioid." (23 RT 7537–38.) A week later, Rovero died of a drug overdose. 12 RT 3935–36.) The coroner determined that the death was caused by combined drug toxicity, including prescription opioids, muscle relaxants (Soma), and a sedative (Xanax). (12 RT 3936–41; 13 RT 4536–41.) At the time of Rovero's death, Petitioner knew that *eight* of her patients—Stavron, Latham, Kenney, Chambers, Gomez, Katsnelson, Nguyen, and Ogle—had died shortly after she had prescribed them with the types of drugs sought by Rovero. (6 RT 1544–45; 12 RT 3975–76, 3981–90; 13 RT 4589–94; 14 RT 4814–16, 4589–90; 22 RT 7270–76.)

v. Summary.

In sum, the record is replete with substantial circumstantial evidence that at the time of the deaths of Nguyen, Ogle, and Rovero, Petitioner knew that her prescription practices were potentially fatal and that she acted with a conscious disregard of that threat. She knew that Nguyen, Ogle, and Rovero were abusing drugs yet prescribed dangerous opioids without performing adequate medical examinations, confirming their prescription and drug use, obtaining medical histories or records, or ensuring a medical justification for her prescriptions. At the

time of the deaths of Nguyen, Ogle, and Rovero, Petitioner knew of the mounting deaths of her patients and pharmacies refusing to fill her prescriptions. After the deaths, Petitioner entered "alerts" in the medical files and altered the medical records.

Petitioner argues that the prosecution's implied malice theory relied on patient-death notifications, which was insufficient because investigators did not expressly inform her that she caused her patients' deaths. (Pet. Mem. at 53–54; Reply at 8–9.) However, while Petitioner was not informed that she *caused* her patients' deaths, she was *notified* that multiple patients had died of drug overdoses shortly after she had prescribed high dosages of opioids and other controlled substances. Thus, the California Court of Appeal reasonably found the evidence sufficient to support a rational jury's conclusion that Petitioner was aware of the lethal consequences of her prescribing practices. Further, the prosecution did not rely *only* on the patient-death notifications. The prosecution also emphasized other extensive evidence, including (a) increased calls from pharmacists seeking medical justifications for Petitioner's prescriptions, (b) increased calls from parents asking Petitioner to stop prescribing to their children, (c) controlled substances left unattended around the clinic which were being stolen, (d) dismissing her patients as mere "druggies," (e) allowing unrelated patients in a single examination room, (f) failing to keep adequate medical records, and (g) acknowledging that her patients were "drug-seeking." (26 RT 8502–05, 8511, 8519–23, 8528.)

Petitioner identified evidence she contends indicates she "did not deliberately engage in conduct that endangered another with a conscious disregard for life." (Pet. Mem. at 56.) She cited three instances that she claims disproves implied malice: calling 911 when Michael Cook overdosed inside her clinic and two occasions where she declined to write prescriptions for undercover DEA agents. (Id.) But Petitioner's rational decision to call 911 when a patient *publicly overdosed* in her clinic does not negate her culpable state of mind in connection

with her lethal prescription practices. And while Petitioner may have been cautious with two older DEA agents who did not fit the "profile" of young drug abusers who frequented her clinic, on other occasions she did write medically unsupported prescriptions for undercover DEA agents. (E.g., 8 RT 2423, 2452–53, 2495; 9 RT 2775–76.) In any event, these isolated instances of "normal" behavior do not negate the substantial evidence demonstrating conscious disregard for her patients' lives. On habeas review, the federal court must presume that the jury resolved the conflicting evidence in the prosecution's favor. Brown, 558 U.S. at 133 ("a reviewing court faced with a record of historical facts that supports conflicting inferences must presume—even if it does not affirmatively appear in the record—that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution") (citation omitted).

Finally, Petitioner contends that the three cases relied on by the California Court of Appeal were inapposite. (Pet. Mem. at 57–59.) In concluding that substantial evidence supported a finding of implied malice as to each of the charged murders, the California Court of Appeal noted three cases "in which appellate courts addressed the sufficiency of evidence to support convictions of second degree murder or similar charges, requiring evidence of recklessness or conscious disregard of life, stemming from a licensed physician's treatment of a patient." (LD 6 at 21–22.)

In Einaugler v. Supreme Ct. of State of N.Y., 109 F.3d 836, 838 (2d Cir. 1997), a medical doctor was convicted under the New York Penal Code with reckless endangerment and willful patient neglect in connection with the death of his patient. After the state appellate court affirmed the conviction, the Second Circuit affirmed the federal district court's denial of the doctor's habeas petition. Id. Petitioner contends this case is inapposite because "reckless endangerment is not comparable with second degree implied malice murder." (Pet. Mem. at 58). To the contrary, under New York law, "[t]he reckless endangerment charge required

proof that Einaugler had recklessly engaged in conduct that created a substantial risk of serious physical injury. For Einaugler's act to be reckless, he must have grossly deviated from a reasonable person's standard of conduct and consciously disregarded a substantial and unjustifiable risk." Einaugler, 109 F.3d at 840 (citation omitted). This standard of proof is similar to the California implied malice standard. See Ho, 332 F.3d at 592 ("[T]o find a defendant guilty of second-degree murder based on implied malice, the jury must find that at the time of the killing the defendant intended to do an act that is dangerous to human life, with the knowledge that the act threatens life, and with a 'conscious disregard' of that threat.").

In Klvana, the California Court of Appeal affirmed a medical doctor's second degree murder convictions for the deaths of nine infants. 11 Cal. App. 4th at 1684–85. The court found sufficient evidence to support implied malice, including the defendant repeatedly ignoring obvious signs of medical distress in his patients; advising parents not to take their children to the hospital, despite clear indications of the need to do so; inducing vaginal births in inappropriate circumstances, after having been warned that his treatment was substandard; continuing to deliver babies despite that his hospital privileges had been suspended; and evidence of an uncharged baby's death resulting from the doctor's treatment. Id. at 1704–05. Petitioner argues that while "Dr. Klvana was told number times by others at hospitals where he worked that his performance was substandard and he was a danger to his patients, … Petitioner was never told by anyone prior to the deaths of Messrs. Nguyen, Ogle, and Rovero, that her medical practices were substandard or endangering her patients." (Pet. Mem. at 58.) But the record here included substantial evidence of implied malice that was comparable to the evidence in Klvana. Like Dr. Klvana, Petitioner ignored obvious signs that her practices were endangering her patients, including (a) increased calls from pharmacists seeking medical justifications for Petitioner's prescriptions, (b) increased calls from parents asking Petitioner to stop prescribing to their children, (c) controlled substances left

unattended around the clinic which were being stolen, (d) dismissing her patients as mere "druggies," (e) allowing unrelated patients in a single examination room, (f) failing to keep adequate medical records, and (g) acknowledging that her patients were "drug-seeking."

In People v. Stiller, 242 Mich. App. 38, 41 (2000), the Michigan appellate court affirmed the implied malice second degree murder conviction of a physician, who during a four-month period, prescribed his patient high doses of hydrocodone unrelated to any rational medical treatment. Petitioner contends that Stiller is inapposite because in that case "the doctor had been treating this patient for many years and he was present at the patient's apartment on the day of her death for much of the day." (Pet. Mem. at 58.) However, while the Michigan appellate court cited this fact as *one* piece of evidence indicating implied malice, the court emphasized that the "*totality* of the evidence … was sufficient that defendant had a wanton and wilful disregard of the likelihood that the natural tendency of his behavior was to cause death or great bodily harm." Stiller, 242 Mich. App. at 46 (emphasis added). In describing the substantial evidence supporting implied malice, the court emphasized that "by prescribing huge quantities of medicine unrelated to any rational medical treatment and that had a possibility of interacting with other drugs he prescribed, defendant should have known that an overdose was likely to occur, and he therefore exhibited a wanton and wilful disregard of the likelihood that the natural tendency of his behavior was to cause death or great bodily harm." Id. at 47. The court also highlighted evidence that pharmacies had warned the physician about his dangerous prescribing practices, including prescribing very high doses of controlled substances, and the physician knew there was no legitimate medical reason for his prescriptions for the murder victim. Id. at 43–45. Thus, the totality

of the evidence supporting implied malice second degree murder in Stiller was comparable to the evidence in this case.[8]

b. Causation.

"In homicide cases, a cause of the death … is an act or omission that sets in motion a chain of events that produces as a direct, natural and probable consequence of the act or omission the death of the decedent and without which the death would not occur." People v. Cervantes, 26 Cal. 4th 860, 866 (2001). Thus, to prove murder, the prosecution must show that the defendant's actions were "the 'proximate cause' of the death of the victim, even though he did not administer the fatal wound." People v. Hansen, 59 Cal. App. 4th 473, 479 (1997) (citation omitted). "[I]t is proximate causation, not direct or actual causation, which, together with the requisite culpable mens rea (malice), determines defendant's liability for murder." People v. Sanchez, 26 Cal. 4th 834, 845 (2001).

Proximate cause is "clearly established where the act is directly connected with the resulting injury, with no intervening force operating." Cervantes, 26 Cal. 4th at 866. "In general, an 'independent' intervening cause will absolve a defendant of criminal liability. However, in order to be 'independent' the intervening cause must be unforeseeable[,] an extraordinary and abnormal occurrence, which rises to the level of an exonerating, superseding cause." Id. at 871 (citations omitted).

> On the other hand, a "dependent" intervening cause will not relieve the defendant of criminal liability. A defendant may be criminally liable for a result directly caused by his act even if there is another

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[8] Petitioner does not identify any case where a doctor's conviction of implied malice murder was overturned for insufficient evidence. See generally United States v. Ilayayev, 800 F. Supp. 2d 417, 434 (E.D.N.Y. 2011) ("if a patient dies from an overdose of [an opioid prescription painkiller], the prescribing physician could face charges of manslaughter or even murder").

> contributing cause. If an intervening cause is a normal and reasonably foreseeable result of defendant's original act the intervening act is "dependent" and not a superseding cause, and will not relieve defendant of liability. The consequence need not have been a strong probability; a possible consequence which might reasonably have been contemplated is enough. The precise consequence need not have been foreseen; it is enough that the defendant should have foreseen the possibility of some harm of the kind which might result from his act.

Id. (citations omitted).

Proximate cause, however, does not mean primary cause. "[I]t has long been recognized that there may be multiple proximate causes of a homicide, even where there is only one known actual or direct cause of death." Sanchez, 26 Cal. 4th at 846. Thus, "[t]o be considered the proximate cause of the victim's death, the defendant's act must have been a substantial factor contributing to the result, rather than insignificant or merely theoretical." People v. Jennings, 50 Cal. 4th 616, 643 (2010) (citation omitted). In other words, when there are multiple concurrent causes of death, the jury need not decide whether the defendant's conduct was the primary cause of death but need only decide whether the defendant's conduct was a substantial factor in causing the death. Id. at 634, 642–44.

i. Nguyen.

Nguyen died of a drug overdose in February 2009, several days after Petitioner prescribed him the sedative Xanax and the opioids Norco and Opana. (12 RT 3920–23; see 10 RT 3039–42, 3047–52.) The coroner conducted an autopsy and concluded that Nguyen's death was caused by the combined effects of Opana and Xanax, both prescribed by Petitioner. (12 RT 3920–27.) Both the coroner and Petitioner's toxicology expert testified that the methadone in Nguyen's system—which Petitioner did not prescribe—was "pretty small" and alone would not have killed him. (13 RT 4246–47; accord 12 RT 3493.)

Petitioner argues there was "no evidence for which a rational juror would find beyond a reasonable doubt that Petitioner's prescriptions were a substantial factor in the cause of death." (Pet. Mem. at 53.) She contends the "methadone on top of these other drugs was an unforeseen intervening event." (Id.) However, even if the methadone played a role in Nguyen's death, the jury could have reasonably determined that the drugs Petitioner prescribed played a substantial role—i.e., proximately caused—Nguyen's death. On habeas review, the federal court must presume that the jury resolved the conflicting evidence in the prosecution's favor. Brown, 558 U.S. at 133.

ii. Rovero.

Rovero died of a drug overdose in December 2009, nine days after Petitioner prescribed him the opioid Roxicodone (oxycodone), along with Soma (carisoprodol), a muscle relaxer, and Xanax (alprazolam), a sedative. (12 RT 3935–37.) The Arizona coroner concluded that the cause of death was combined drug toxicity, including alcohol, oxycodone, and alprazolam. (12 RT 3936–41; 13 RT 4536.) Rovero's blood alcohol level was 0.10, not enough to kill him. (13 RT 4557; 14 RT 4883–85.) The amount of oxycodone in Rovero's system was "toxic but not in a lethal range." (13 RT 4558.) Both the coroner and the toxicologist testified that the drugs prescribed by Petitioner—Roxicodone and Xanax—contributed to Rovero's death. (12 RT 3937–41; 13 RT 4536–41.)

Petitioner argues that because "Rovero died [after] mixing drugs with alcohol, something he did routinely, the prosecution failed to prove that Petitioner's treatment of him proximately caused his death." (Pet. Mem. at 62.) Petitioner contends that the alcohol was an unforeseeable, intervening event, thus absolving her of Rovero's murder. (Id.) But even if the jury found that the alcohol consumption was unforeseeable, it was not an independent cause of death. The coroner testified that Rovero's blood alcohol level of 0.10 was not lethal. (13 RT 4557.) Because both the coroner and toxicologist testified that the drugs prescribed

by Petitioner contributed to Rovero's death, the jury could reasonably find that Petitioner played a substantial role—i.e., proximately caused—his death. On habeas review, the federal court must presume that the jury resolved the conflicting evidence in the prosecution's favor. Brown, 558 U.S. at 133.

c. Summary.

In sum, there was sufficient evidence that Petitioner was guilty of the second degree murders of Nguyen, Ogle, and Rovero. Therefore, the California Court of Appeal's determination that a rational jury could have found beyond a reasonable doubt that the prosecution proved Petitioner acted with implied malice and caused the deaths of Nguyen, Ogle, and Rovero was not objectively unreasonable.

C. GROUNDS FIVE AND SIX: Prosecutorial Misconduct.

In Ground Five, Petitioner asserts that the trial court's failure to strike John Mata's testimony and dismiss count fourteen after the prosecutor committed misconduct deprived Petitioner of due process and a fair trial under the Sixth and Fourteenth Amendments. (Pet. Mem. at 74–81.) Despite the trial court ordering the prosecution not to mention the death of any individual named in the overprescribing counts or any individual who passed away after Rovero's death, Petitioner contends the prosecution impermissibly solicited testimony from John Mata that his son had died in May 2010. (Id.) Petitioner contends that "the trial court's failure to strike John Mata's testimony and dismiss count 14, so infected the trial with unfairness as to make the resulting convictions on all counts, a denial of due process." (Id. at 79.) She argues that the "highly emotional yet completely irrelevant testimony that Nicholas Mata had died—all elicited in violation of a court order—made it impossible for Petitioner to get a fair trial." (Id. at 80.)

In Ground Six, Petitioner contends that the trial court's failure to grant a mistrial after the prosecutor elicited testimony that Michael Huggard (count eleven) died violated Petitioner's rights to due process and a fair trial under the Sixth and Fourteenth Amendments. (Id. at 81–83.)

1. Relevant Trail Court Proceedings.

As discussed above, the trial court allowed the prosecution to admit evidence of six uncharged deaths, including three deaths prior to the first murder, to demonstrate malice. See supra § VI.A.1. The trial court, however, excluded evidence of deaths that had occurred after the last murder (Rovero's death in December 2009). (3 RT 642.)

a. Nicholas Mata.

Petitioner was charged in count fourteen with unlawfully issuing a prescription for a controlled substance (hydrocodone) to Nicholas Mata. (14 CT 2647; see 19 CT 3589.) During the testimony of John Mata (Nicholas's father), the prosecutor asked the date of his son's death. (11 RT 3347.) Mata responded that his son had died on May 14, 2010. (11 RT 3347.) At a sidebar conference, defense counsel reminded the court of its ruling excluding that evidence because the death occurred *after* the last charged death. (11 RT 3347.) The prosecutor conceded his mistake. (11 RT 3349.) The trial court noted that it could exclude the evidence but that doing so would just highlight the issue for the jury. (11 RT 3348.) Questioning resumed. At the conclusion of direct examination, defense counsel requested the trial court to strike all of Mata's testimony and to dismiss count fourteen. (11 RT 3359–60.) The trial court denied the request, finding the evidence was not prejudicial and did not warrant dismissing the charge. (11 RT 3360.)

At the end of Mata's testimony, defense counsel again requested the trial court to strike Mata's entire testimony and dismiss count fourteen. (11 RT 3365–66.) The court declined but agreed to admonish the jury that Petitioner was not charged with Nicolas Mata's overdose or death and that John Mata's testimony could be considered only for the unlawful prescription count.[9] (11 RT 3366, 3369–72.)

[9] Specifically, the jury was admonished that Nicholas Mata's "death has nothing to do with [the controlled substance] charge, [Petitioner] is not being

b. Michael Huggard.

Petitioner was charged in count eleven with unlawfully issuing a prescription for a controlled substance (Opana) to Michael Huggard. (14 CT 2646; see 19 CT 3586.) During questioning of the doctor who performed the autopsies of Latham and Kenney—whose deaths preceded Rovero's—the prosecutor also asked about Huggard's autopsy. (17 RT 5760–61, 5785.) At a sidebar, defense counsel argued that "this is evidence of another instance of prosecutorial misconduct. Michael Huggard … passed away after the other three counts [Nguyen, Ogle, and Rovero] and his death was not to be mentioned. They were only limited to the overdose." (17 RT 5785–86.) The prosecutor asserted that Huggard's death was "in the window" because he had died in 2009. (17 RT 5786.) However, both the witness and defense counsel noted that Huggard had died in 2010. (17 RT 5786.) Defense counsel moved for a mistrial. (17 RT 5786.)

After a break, the prosecutor conceded that Huggard had died in 2010. (17 RT 5788.) Nevertheless, the court denied the mistrial motion, finding "some confusion" by the prosecution regarding the date of Huggard's death but "no bad faith." (17 RT 5790.) The court also reasoned that because the charges against Petitioner included three murder counts, the evidence of Huggard's death was "not more prejudicial than what has already come in with respect to [the] murder charges." (17 RT 5790.) Thereafter, the court admonished the jury "not to consider anything about [Huggard's] death. It has nothing to do with this case, and [it] was a mistake. … So you're not to consider the fact that he died for any purpose. … Disregard it."[10] (17 RT 5797–98.)

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charged with that, so please do not consider that evidence for any purpose. [¶] What you're to consider is whether or not that charge of unlawfully prescribing a substance has been committed …." (11 RT 3372.)

[10] At the close of the case, the trial court again admonished the jury not to "consider for any purpose any offer of evidence that was rejected or any evidence

2. The California Court of Appeal's Decision.

The California Court of Appeal found that while the prosecutor committed misconduct, the actions did not violate Petitioner's due process rights and the trial court did not abuse its discretion in denying the motion for mistrial, reasoning as follows:

[Petitioner] complains that the prosecution committed prejudicial misconduct on two separate occasions during the trial by eliciting, in violation of a court order, information about the deaths of two victims of the unlawful prescription charges. She contends that this prosecutorial misconduct denied her due process.

* * *

The Attorney General concedes, and we agree, that the prosecution's questions referencing Mata's and Huggard's deaths constituted prosecutorial misconduct because the trial court had previously ordered that this evidence not be presented to the jury. (See People v. Bell (1989) 49 Cal.3d 502, 532 [holding that the deliberate asking of questions and calling for inadmissible and prejudicial answers is misconduct].)

We conclude, however, that the prosecution's actions did not violate [Petitioner]'s due process rights and did not warrant reversal. The prosecution's misconduct was not so pervasive as to infect the trial with such "'unfairness as to make the resulting conviction a denial of due process.'" (Darden v. Wainwright (1986) 477 U.S. 168, 181.) Furthermore, given the evidence of the other overdose deaths that was properly admitted, "it is not reasonably probable that a result more favorable to defendant would have been reached in the absence of any alleged misconduct." (People v. Turner (1994) 8 Cal.4th 137, 194, abrogated on another ground by People v. Griffin (2004) 33 Cal.4th 536, 555, fn. 5.) We assume the jury

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that was stricken by the court; treat it as though you had never heard it." (26 RT 8463–64.)

*followed the trial court's admonitions, which further obviated any prejudice. (*People v. Jones *(1997) 15 Cal.4th 119, 168, overruled on other grounds by People v. Hill (1998) 17 Cal.4th 800.)*

In addition, the trial court did not abuse its discretion in denying the motion for a mistrial. "A mistrial should be granted if the court is apprised of prejudice that it judges incurable by admonition or instruction. [Citation.] Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions." (People v. Haskett (1982) 30 Cal.3d 841, 854.) We conclude that the trial court did not abuse its discretion here, particularly given that the jury had already heard evidence about the nine uncharged deaths of [Petitioner]'s patients.

(LD 6 at 37, 39–40.)

3. Clearly Established Federal Law.

A habeas petition alleging prosecutorial misconduct will be granted only where the prosecutor's improper comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Darden v. Wainwright, 477 U.S. 168, 181 (1986); accord Matthews, 567 U.S. at 45. "In essence, what Darden requires reviewing courts to consider appears to be equivalent to evaluating whether there was a 'reasonable probability' of a different result." Ford v. Peery, 999 F.3d 1214, 1225 (9th Cir. 2021) (citation omitted). Alleged instances of misconduct must be reviewed "in the context of the entire trial." Donnelly v. DeChristoforo, 416 U.S. 637, 639 (1974). This is because "the touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor." Smith v. Phillips, 455 U.S. 209, 219 (1982). Thus, in analyzing a claim of prosecutorial misconduct, a habeas court asks (1) "whether the prosecutor's remarks were improper" and if so, (2) "whether they infected the trial with unfairness." Tan v. Runnels, 413 F.3d 1101, 1112 (9th Cir. 2005) (citing Darden, 477 U.S. at 181). In making this determination, the federal

habeas court may consider "(1) whether the prosecutor's comments manipulated or misstated the evidence; (2) whether the trial court gave a curative instruction; and (3) the weight of the evidence against the accused." Id. at 1115 (citing Darden, 477 U.S. at 181–82). Finally, a "constitutional violation arising from prosecutorial misconduct does not warrant habeas relief if the error is harmless." Towery v. Schriro, 641 F.3d 300, 307 (9th Cir. 2010); see Fields v. Woodford, 309 F.3d 1095, 1109 (9th Cir.), amended, 315 F.3d 1062 (9th Cir. 2002) ("If prosecutorial misconduct is established, and it was constitutional error, we then apply the Brecht harmless error test."). Thus, Petitioner is entitled to habeas relief on Grounds Five or Six only if, considering the whole record, the prosecutorial misconduct "had substantial and injurious effect or influence in determining the jury's verdict." Brecht v. Abrahamson, 507 U.S. 619, 638 n.9 (1993); see Rowland v. Chappell, 876 F.3d 1174, 1189 (9th Cir. 2017) (applying Brecht harmless error test to claim of prosecutorial misconduct); Spector v. Diaz, 115 F. Supp. 3d 1121, 1141–42 (C.D. Cal. 2015) (same).

4. Petitioner Is Not Entitled to Habeas Relief.

The trial court and the California Court of Appeal found that the prosecution committed misconduct, and the prosecutors conceded their mistakes in allowing the deaths of Mata and Haggard into the record. Nevertheless, Petitioner has not demonstrated a due process violation.[11] The two brief mentions of Mata's and Haggard's deaths did not result in an unfair trial. The prosecutors "did not manipulate or misstate the evidence, nor did [they] implicate other specific rights of the accused such as the right to counsel or the right to remain silent." Darden, 477 U.S. at 182. The witnesses' testimony did not link Petitioner to the deaths of Mata

[11] Petitioner also contends that the trial court abused its discretion in refusing to grant a mistrial. (Pet. Mem. at 82–83.) But federal habeas relief is available "only for constitutional violation, not for abuse of discretion." Williams, 139 F.3d at 740.

and Haggard. The trial court gave curative instructions immediately following the two instances of misconduct and again at the close of the case. (11 RT 3372; 17 RT 5797–98; 26 RT 8463–64.) See Tan, 413 F.3d at 1115 (finding no due process violation for prosecutorial misconduct where "the court gave multiple and timely protective instructions to the juries on these issues"). Absent extraordinary facts to the contrary—which are not present here—a federal habeas court presumes that jurors follow the trial court's instructions. Francis v. Franklin, 471 U.S. 307, 324 n.9 (1985), holding modified on other grounds by Boyde v. California, 494 U.S. 370 (1990). Moreover, as the California Court of Appeal emphasized (LD 6 at 39), the jurors already knew of *nine* other patient deaths—the three murder charges and the six uncharged deaths—that were properly admitted (see supra § VI.A.4)—and it was not reasonably probable that the jurors' knowledge of two additional deaths would have improperly swayed their decision to convict Petitioner of second degree murder instead of manslaughter or on *any* of the twenty improperly prescribing counts.[12] See Tan, 413 F.3d at 1115 (finding no due process violation for prosecutorial misconduct where "as weighed and assessed by the Court of Appeals, the evidence against the petitioners was 'not close'").

Finally, even if the prosecution's misconduct rose to the level of a due process violation, the error was harmless. See Shaw v. Terhune, 380 F.3d 473, 478 (9th Cir. 2004) ("Prosecutorial misconduct which rises to the level of a due process violation may provide the grounds for granting a habeas petition only if that misconduct is deemed prejudicial under the [Brecht] "harmless error" test ...."). Any error did not have a "substantial and injurious effect or influence in determining the jury's verdict." Brecht, 507 U.S. at 637. As discussed above, there was substantial evidence supporting the three second degree murder convictions,

[12] As noted above, the jury found Petitioner not guilty on one of the twenty improperly prescribing counts. (19 RT 3597.)

including the properly admitted evidence of the uncharged deaths. See supra §§ VI.A.4, VI.B.4.

Accordingly, even though the prosecutors committed misconduct, the California Court of Appeal reasonably found that Petitioner was not prejudiced by the evidence indicating that Mata and Huggard had died, and Petitioner is not entitled to habeas relief on Grounds Five or Six.

D. GROUND SEVEN: Supplemental Closing Arguments.

In Ground Seven, Petitioner contends that the reopening of closing arguments over her objection coerced a unanimous jury verdict in violation of her due process rights. (Pet. Mem. at 84–91.) She argues that "the suggestion to the jury that it could hear additional argument on top of the two supplemental instructions [already given] was coercive."[13] (Id. at 90.)

1. Relevant Trial Court Proceedings.

On the eighth day of deliberations, the jury sent the trial judge a note with two questions regarding the second degree murder counts: "Do we have to be unanimous in not guilty of second degree to deliberate on manslaughter? What if

[13] Petitioner asserts that AEDPA deference does not apply to Ground Seven because the California Court of Appeal "failed to consider the issue under federal due process standards." (Pet. Mem. at 91.) To the contrary, the California Court of Appeal explicitly acknowledged Petitioner's contention that the reopening of closing arguments "violated her due process rights." (LD 6 at 40.) By addressing the merits of Petitioner's coercion argument, the California Court of Appeal necessarily found no due process violation. See Johnson v. Williams, 568 U.S. 289, 301 (2013) ("When a state court rejects a federal claim without expressly addressing that claim, a federal habeas court must presume that the federal claim was adjudicated on the merits …."); Ibarra v. Montgomery, 835 F. App'x 247, 249 (9th Cir. 2020), cert. denied, No. 20-7700, 2021 WL 2044627, 2021 U.S. LEXIS 2694 (U.S. May 24, 2021) ("Although Ibarra's principal brief in that court squarely raised the federal complete-defense issue, it was not explicitly mentioned in the state court's decision. Nonetheless, there is a 'strong but rebuttable presumption' that 'the federal claim was adjudicated on the merits,' and that presumption is not rebutted here.") (quoting Williams, 568 U.S. at 301).

we are split on second degree?" (29 RT 11402; see 18 CT 3483, 3500–01, 3505.) After consulting with counsel, the trial court read CALJIC No. 17.49 (Use of Multiple Verdict Forms) to the jury:

> In this case, the defendant has been charged with second-degree murder in counts 1, 2, and 4, all felonies. The aforegoing charged crimes include the lesser offenses of involuntary manslaughter. [¶] You will be given guilty and not guilty verdict forms encompassing both the charged crimes and the lesser included offenses. [¶] Since the lesser offenses are included in the greater, you are instructed that if you find the defendant guilty of the greater offenses, you should not complete the verdicts on the corresponding lesser offenses, and those verdicts should be returned to the court unsigned by the foreperson. [¶] If you unanimously find the defendant not guilty of the felonies charged, you then need to complete the verdicts on the lesser included offenses by determining whether the defendant is guilty or not guilty of the lesser included crimes, and the corresponding verdict forms should be completed and returned to the court signed by your foreperson.

(29 RT 11407–08; see 18 CT 3507). The trial judge also reminded the jurors to consider each count separately and to carefully review all the evidence. (29 RT 11408.)

The next day—pursuant to defense counsel's request (18 CT 3508–13)—the trial court notified the parties that it intended to further instruct the jury on lesser included offenses and allow each party ten minutes of argument on the "specific issue of greater versus lesser." (29 RT 11702.) When the bailiff informed the jury that the court was going to read them an additional instruction and hear additional argument, the jury responded that was "fine, that they were … pretty much in agreement with that; however, they said that they had resolved the issue that was in

their question that they propounded to this court." (29 RT 11702.) Defense counsel then objected, noting that the law allowed reopening argument only if the jury was deadlocked. (29 RT 11703.) The court overruled counsel's objections, finding that the jury was "deadlocked based on their questions yesterday, or at least they were divided, and so the court can allow [additional argument] under those circumstances."[14] (29 RT 11704.)

The court then read CALJIC No. 17.10 (Conviction of Lesser Included or Lesser Related Offense) to the jury:[15]

> If you are not satisfied beyond a reasonable doubt that the defendant is guilty of the crime charged, you may nevertheless convict her of any lesser crime if you are convinced beyond a reasonable doubt that the defendant is guilty of the lesser crime. [¶] Obviously, as you know, the crime of involuntary manslaughter is lesser to that of second-degree murder, as charged in count 1; [¶] The crime of involuntary manslaughter is lesser to that of second-degree murder, as charged in count 2; [¶] The crime of involuntary manslaughter is lesser to that of second-degree murder, as charged in count 4. [¶] Thus, you are to determine whether the defendant is guilty or not guilty of the crimes charged in counts 1, 2, and 4, or any lesser crimes thereto. [¶] In doing so, you have discretion to choose the order in which you evaluate each crime and consider the evidence pertaining to it. You may find it productive to consider and reach a tentative conclusion on all charges and lesser crimes before reaching any final verdicts. [¶]

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[14] Under California law, "If the trial judge determines that further action might assist the jury in reaching a verdict, the judge may … [p]ermit attorneys to make additional closing arguments." Cal. Ct. R. 2.1036(b)(3).

[15] Neither CALJIC No. 17.10 nor No. 17.49 was included in the original jury instructions. (26 RT 8461–94.)

> However, the court cannot accept a guilty verdict on a lesser crime unless you have unanimously found the defendant not guilty of the charged greater crime.

(29 RT 11705–06.)

The court then returned the jury to the deliberation room to determine if ten minutes of additional argument from each party on "the lesser versus the greater issue of the charge, would be of assistance" in their deliberations on the three murder counts. (29 RT 11706–07.) Soon thereafter, the jury returned a notice indicating: "We would like to listen to the additional argument!" (29 RT 11707–08; 18 CT 3514.) The jury heard a ten-minute argument from each party and then resumed deliberations. (29 RT 11708–21; 18 CT 3516.) By the end of the next day, the tenth day of deliberating, the jury reached its verdicts. (19 CT 3600–01.)

2. The California Court of Appeal's Decision.

The California Court of Appeal found no coercion in the trial court's decision allowing supplemental arguments, reasoning as follows:

[Petitioner] argues that the trial court's decision to reopen the argument during deliberations coerced the jury to return a guilty verdict on the murder charges and thus violated her due process rights. We disagree.

* * *

When faced with questions from a jury, including a question referencing an impasse, "a court must do more than figuratively throw up its hands and tell the jury it cannot help. It must at least consider how it can best aid the jury." (People v. Beardslee (1991) 53 Cal.3d 68, 97 (Beardslee), italics omitted.) A further argument is permissible where a jury reports it has reached an impasse in deliberations. (People v. Young (2007) 156 Cal.App.4th 1165, 1170; see Cal. Rules of Court, rule 2.1036(b)(3).)

Here, the jury initially indicated that it was "split on second degree." The jury's subsequent communications indicated it had resolved one of the questions

coupled with its desire to hear additional argument. Taken together, the jury's inquiries demonstrated that it was struggling with its deliberations and had reached an impasse. Under these circumstances, we conclude that the trial court's decision to allow the parties to reopen argument to assist the jury in its deliberative process was not an abuse of discretion. (People v. Ardoin (2011) 196 Cal.App.4th 102, 129, fn. 10 [further argument is permissible "when a jury expresses confusion and an impasse in its deliberations related to the governing law and instructions, particularly in light of the trial court's broad discretion to alter the sequence of trial proceedings"].)

By asking if additional argument might be helpful, the trial court did no more than ascertain the reasonable probability of resolving the impasse and a means by which that might be accomplished. Further, the procedure was neutral, giving each side a brief opportunity to argue. The trial court did not make any coercive remarks or give any coercive instructions. It did not urge the jurors to reach an agreement. We see no abuse in the court's exercise of its discretion. Furthermore, even if the trial court erred in allowing further argument, there was no reasonable probability that [Petitioner] suffered prejudice as a result of that decision. (See Beardslee, supra, 53 Cal.3d at pp. 97–98 [a court's error in resolving concerns or questions from the jury during the deliberation reviewed for harmless error under state law prejudice standard].)

(LD 6 at 40, 42–43.)

3. No Clearly Established Federal Law Precludes Supplemental Closing Arguments.

A federal court conducting habeas review is limited to determining whether a state court decision violates the Constitution, laws or treaties of the United States. 28 U.S.C. § 2254(a); Cooke, 562 U.S. at 219; McGuire, 502 U.S. at 67–68. There is no Supreme Court authority precluding or setting the parameters for supplemental closing arguments. See Yslas v. Adams, No. 1:16 CV 00020, 2017

WL 1837108, at *11, 2017 U.S. Dist. LEXIS 70044, at *34 (E.D. Cal. May 8, 2017) ("The Supreme Court has never considered whether supplemental arguments in a criminal trial violate a defendant's constitutional rights."). While the Ninth Circuit in United States v. Evanston, 651 F.3d 1080 (9th Cir. 2011), found that the federal district court abused its discretion in permitting supplemental argument on issues dividing the jury, the Evanston court based its decision on its supervisory powers, not on constitutional principles. Id. at 1082–83, 1093 n.15; see Taylor v. Sullivan, No. CV 12-3550-BRO JPR, 2013 WL 4502077, at *18 n.13, 2013 U.S. Dist. LEXIS 119905, at *55 n.13 (C.D. Cal. Aug. 22, 2013) ("Evanston relied on the court's supervisory powers rather than on any constitutional provision and therefore has no relevance in § 2254(d) analysis") (citation omitted); see also Early v. Packer, 537 U.S. 3, 9–11 (2002) (holding that Ninth Circuit erred in a § 2254 case by relying on "nonconstitutional" Supreme Court authority based solely on court's supervisory powers).

4. Supplemental Closing Arguments Not Fundamentally Unfair.

If the trial court "fails to discharge a jury which is unable to reach a verdict after protracted and exhausting deliberations, there exists a significant risk that a verdict may result from pressures inherent in the situation rather than the considered judgment of all the jurors." Arizona v. Washington, 434 U.S. 497, 509 (1978). When a trial court coerces a deadlocked jury into reaching a unanimous verdict, the defendant's due process rights are violated. Lowenfield v. Phelps, 484 U.S. 231, 237 (1988). To determine whether a trial court's actions were impermissibly coercive, the reviewing court must evaluate them "in [their] context and under all the circumstances." Id.; see Jiminez v. Myers, 40 F.3d 976, 979 (9th Cir. 1993) ("Whether the comments and conduct of the state trial judge infringed defendant's due process right to an impartial jury and fair trial turns upon whether the trial judge's inquiry would be likely to coerce certain jurors into relinquishing their views in favor of reaching a unanimous decision.") (citation omitted). Thus,

on federal habeas review, the court determines whether the trial court's decision to allow supplemental closing arguments "rendered the proceeding so fundamentally unfair as to violate federal due process under the United States Constitution." Duckett v. Godinez, 67 F.3d 734, 740 (9th Cir. 1995).

Evaluating the totality of the circumstances, the California Court of Appeal reasonably concluded that the trial court's actions were not coercive. The trial court was responding to multiple inquiries from the jury seeking clarification on second degree murder versus the lesser included charge of manslaughter. In response, the court gave two additional standard instructions: CALJIC No. 17.49 (Use of Multiple Verdict Forms) and CALJIC No. 17.10 (Conviction of Lesser Included or Lesser Related Offense). The trial court also inquired of the jury whether additional argument would be helpful in their deliberations, and they responded affirmatively. The approach was neutral: each side had an opportunity to make a ten-minute argument regarding the narrow issue of greater versus lesser offenses. The trial court did not make any coercive statements to the jury or urge them to reach an agreement.

Petitioner's arguments to the contrary are without merit. She suggests that hearing additional argument after the trial court gave the two additional instructions "was coercive." (Pet. Mem. at 90; Reply at 17.) But Petitioner provides no authority for the proposition that supplemental argument becomes coercive if it accompanies additional instructions, especially here where the additional instructions were requested by defense counsel. Petitioner also contends that the additional argument was coercive because the trial court did not remind the jury that it was required to reach a unanimous verdict and did not have to surrender their conscientiously held beliefs. (Pet. Mem. at 90.) But there is no authority requiring a trial court to *sua sponte* remind the jury of previously-given instructions, especially here where the jury was inquiring only whether it could render a verdict on voluntary manslaughter if it was split on second degree murder, *not* whether

unanimity was necessary. Finally, Petitioner argues that the supplemental argument was coercive because the jury had not explicitly requested it. (Pet. Mem. at 90.) However, there is no federal law or Supreme Court authority precluding the trial court from using its own sound discretion in determining how to respond to jury inquiries.

Accordingly, the Court cannot conclude that the California Court of Appeal acted contrary to or unreasonably applied clearly established Supreme Court law. Thus, habeas relief is not merited.

E. GROUND EIGHT: Cumulative Error.

In Ground Eight, Petitioner contends that her right to a fair trial and to due process were violated by cumulative error. (Pet. Mem. at 91–92.)

The California Court of Appeal found the cumulative error doctrine nonapplicable, reasoning as follows:

[Petitioner] contends even if the alleged individual errors addressed above were harmless when viewed in isolation, the cumulative effect of the errors warrants reversal of her convictions. "Under the cumulative error doctrine, the reviewing court must 'review each allegation and assess the cumulative effect of any errors to see if it is reasonably probable the jury would have reached a result more favorable to defendant in their absence.' [Citation.] When the cumulative effect of errors deprives the defendant of a fair trial and due process, reversal is required." (People v. Williams (2009) 170 Cal.App.4th 587, 646.) Because [Petitioner] has not demonstrated that the trial court committed any error, the "cumulative" error doctrine does not apply.

(LD 6 at 44–45.)

In Chambers v. Mississippi, 410 U.S. 284, 302 (1973), the Supreme Court found that the combined effect of individual errors "denied [Chambers] a trial in accord with traditional and fundamental standards of due process." Citing Chambers, the Ninth Circuit held in Parle v. Runnels, 505 F.3d 922, 928 (9th Cir.

2007), that "[t]he Supreme Court has clearly established that the combined effect of multiple trial errors may give rise to a due process violation if it renders a trial fundamentally unfair, even where each error considered individually would not require reversal." The cumulative error doctrine, however, applies only where multiple trial errors of constitutional magnitude have been established. Hooks v. Workman, 689 F.3d 1148, 1194–95 (10th Cir. 2012) ("[A]s the term 'cumulative' suggests, [c]umulative-error analysis applies where there are two or more actual errors." (citation omitted)). Habeas relief is warranted on a cumulative error claim only when the errors had a substantial and injurious effect or influence on the jury's verdict under Brecht. Parle, 505 F.3d at 927.

Here, Petitioner's trial was not rendered fundamentally unfair by multiple errors. As discussed above, the prosecutor's two incidents of misconduct did not result in an unfair trial and were not prejudicial given the other strong evidence of Petitioner's guilt. See supra § VI.C.4. Accordingly, Petitioner is not entitled to relief on Ground Eight.

VII.

RECOMMENDATION

IT IS THEREFORE RECOMMENDED that the District Court issue an Order: (1) approving and accepting this Report and Recommendation; and (2) directing that judgment be entered denying the Petition on the merits.

DATED: November 17, 2021

Karen E. Scott

KAREN E. SCOTT
UNITED STATES MAGISTRATE JUDGE

APPENDIX D

Opinion of the California Court of Appeal

Filed December 14, 2018

Filed 12/14/18

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

HSIU YING LISA TSENG,

Defendant and Appellant.

B270877

(Los Angeles County
Super. Ct. No. BA394495)

APPEAL from a judgment of the Superior Court of Los Angeles County, George G. Lomeli, Judge. Affirmed.

Verna Wefald, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Victoria B. Wilson, and David Glassman, Deputy Attorneys General, for Plaintiff and Respondent.

* Pursuant to California Rules of Court, rules 8.1100 and 8.1110, this opinion is certified for publication with the exception of the Discussion *post*, parts II-VII.

Defendant and appellant Hsiu Ying Lisa Tseng, a physician, appeals from the judgment entered upon her convictions of three counts of second degree murder, 19 counts of unlawfully prescribing controlled substances, and one count of obtaining a controlled substance by fraud. She contends that substantial evidence did not support the murder convictions and that the trial court erred in (1) admitting evidence of six uncharged patient deaths; (2) failing to unseal and quash a search warrant of her financial records; (3) failing to grant a mistrial based on prosecutorial misconduct; (4) reopening closing argument; and (5) failing to apply Penal Code[1] section 654 to the murder conviction sentences. None of her arguments are meritorious. We therefore affirm.

FACTUAL AND PROCEDURAL BACKGROUND[2]

A. *Tseng's Medical Clinic and Practice*

In approximately 2007, Tseng, a licensed physician practicing internal medicine and osteopathy, joined Advance Care AAA Medical Clinic (the clinic) in Rowland Heights, a general medical practice operated by her husband. When Tseng first joined the clinic, the patients came from the local Hispanic and Asian communities, the wait time for each patient was 15 to 30 minutes and 90 percent of the patients paid for treatment through their insurance.

By 2008, the practice and the clientele of the clinic had changed. Most of Tseng's patients were now white males in their

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[1] All statutory references are to the California Penal Code unless otherwise indicated.

[2] This case involved a six-week trial on two dozen criminal charges relating to Tseng's medical practice and prescriptions of controlled substances. We include only the facts and evidence relevant to the issues on appeal.

20's and 30's who came from outside Los Angeles County seeking pain and anxiety management medications. By 2010, the clinic had developed a reputation as a place where patients could easily obtain prescriptions for controlled substances, including opioids, sedatives, muscle relaxants, and drugs used to treat drug addiction. In addition, fees had doubled, and nearly all patients paid in cash.[3] The clinic's income increased from $600 a day in cash to $2,000 to $3,000 per day.[4]

According to one visitor, the clinic looked "like a parole office" with "drug dealing." The wait time for Tseng's patients also increased to about six hours with 20-30 patients inside the waiting room or outside the clinic at any one time. Some patients appeared to be under the influence of drugs or suffering from drug withdrawals, and one patient overdosed in the waiting room. When G.R., the clinic's receptionist, expressed concern about the number of patients waiting and the level of anxiety and agitation they expressed in the waiting room, Tseng told her that they were "druggies" and could wait.

B. *Tseng's Treatment and Prescribing Methods Beginning in 2008*

Tseng spent about 10 to 15 minutes with new patients and five minutes with them on return visits. Often she would see two or three unrelated patients in the same examination room at the same

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[3] Tseng also charged $5 to "split" a prescription. "Splitting" is a practice of writing a prescription on two different prescription forms so that a patient could fill the prescription on different dates or at different pharmacies.

[4] It appears that the clinic's earnings grew during this time because of the increase in fees charged for services and in the number of patients treated on a daily basis.

time. Tseng would often undertake no (or only a cursory) medical examination of her patients; patients for whom she would prescribe pain medications often expressed nonspecific complaints about anxiety and pain from old injuries. Many times, she did not obtain an adequate medical history or prior medical records before prescribing medications. For example, she did not do drug testing or review the California's Controlled Substance Utilization Review and Evaluation System (CURES) database[5] to determine whether patients had current or prior prescriptions for controlled substances from other doctors. Tseng routinely wrote prescriptions for opioids (such as oxycodone, oxymorphone, fentanyl, and hydrocodone),[6] sedatives (such as promethazine and benzodiazepine),[7] muscle relaxants (such as carisoprodol, which is sold under the brand name Soma®), and amphetamines, as well as controlled substances used to treat drug and opioid addictions (such as methadone and

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[5] CURES collects prescription dispensation information for all controlled substance prescriptions written in the State of California for individual patients. By referring to the CURES database, a doctor may determine when and from whom a particular patient has obtained a prescription for a controlled substance. This can reveal whether the patient may be abusing controlled substances by obtaining prescriptions for the same drug from multiple doctors.

[6] Branded formulations of oxycodone are sold under the brand names OxyContin® or Roxicodone®; branded formulations of oxymorphone are sold under the brand names Opana® or Opana ER®; and branded formulations of the drug hydrocodone are sold under the brand names Norco®, Vicodin®, or Lortab®.

[7] Tseng prescribed a benzodiazepine drug sold under the names alprazolam and Xanax®.

buprenorphine/naloxone).[8] Tseng sometimes allowed patients to pick up prescriptions for other patients who were not at the clinic. The evidence presented at trial showed that on at least one occasion Tseng prescribed a patient's relative, who had never been Tseng's patient, a controlled substance. Tseng acknowledged that some patients, who presented symptoms suggesting opioid and drug addiction and withdrawal, were merely seeking drugs.

C. *Investigations of Tseng's Practice*

Beginning in 2008, pharmacists began to refuse to fill prescriptions written by Tseng because the prescriptions raised "red flags"; the patients' profiles, conduct, and the combination of substances and quantities Tseng prescribed indicated no legitimate medical purpose for writing the prescriptions. When Tseng learned of this, she referred her patients to "mom and pop" pharmacies, which continued to fill her prescriptions. That same year, law enforcement investigators, including investigators from the coroner's office, began calling Tseng to discuss the deaths of several of her patients and to apprise her that the patients had died of suspected drug overdoses shortly after obtaining prescriptions from her. Once she became aware of the deaths, she entered "alerts" in some of the patients' records indicating that they had died from a possible drug overdose. She also altered[9] patient

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[8] The United States Drug Enforcement Agency (DEA) had not licensed Tseng to prescribe drugs to treat addiction.

[9] During this period, the clinic began using digital patient records that allowed Tseng to enter medical information, including "alerts" in a patient file to convey information to a receptionist about a patient. According to G.R., until authorities began investigating the clinic and requesting information about Tseng's patients, many patient records were incomplete or blank. In fact, the digital copies of medical records obtained in 2010 by

records but continued her prescribing practices until she was arrested in 2012.

In 2010, the DEA and California Department of Justice (DOJ) investigated Tseng for diversion of drugs. DEA agents executed a search warrant at Tseng's medical group. Agents seized computers and created digital copies of her computer files. In 2012, the Medical Board of California (the Medical Board) also executed a search warrant on Tseng's medical group, seizing patient records. Evidence produced during the investigation revealed that from 2007 through 2010, the clinic's gross receipts were approximately $5,000,000.

D. *Tseng's Patients' Overdose Deaths*

In July 2012, Tseng was arrested and charged with three counts of second degree murder (§ 187 (count 1, Vu Nguyen; count 2, Steven Ogle; and count 4, Joseph Rovero)), 20 counts of unlawfully prescribing controlled substances to patients (Health & Saf. Code, § 11153, subd. (a) (count 3 & counts 5-23)), and one count of obtaining a controlled substance by fraud (Health & Saf. Code, § 11173, subd. (a) (count 24)).

At trial, the prosecution presented evidence that from September 2007 to December 2009, nine of Tseng's patients—ranging from 21 to 34 years of age—died shortly after filling the prescriptions Tseng wrote them for controlled substances.

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law enforcement from Tseng's office computers contained few exam notes for patients who had died from drug overdoses; however, the same records seized by authorities in 2012 for the same office visits revealed extensive exam notes, indicating that Tseng had altered the records while she was under investigation.

1. *Murder charges*

a. *Death of Vu Nguyen (count 1—second degree murder) in 2009*

In early February 2009, Tseng prescribed 28-year-old Nguyen the sedative Xanax®, and the opioids Norco® and Opana®.[10] Nguyen died several days later of a drug overdose. Nguyen's family did not believe he suffered from any medical condition that required him to take painkillers. The Orange County Coroner's Division conducted Nguyen's autopsy and determined the cause of his death was the combined effects of Opana® and Xanax®, although he had methadone in his system as well.[11]

On March 9, 2009, the coroner's investigator contacted Tseng to discuss Nguyen's death. Tseng told the investigator she started treating Nguyen on August 9, 2008, for back and neck pain. She prescribed the opioid Norco® and sedative Xanax®.[12] Two weeks later, Nguyen returned and said he had taken all of the medication because the pain was "too much." Tseng wrote him a refill prescription. Although Tseng claimed she told Nguyen she would not write refill prescriptions for his medications "early" again, she failed to discuss with him the potential health risks of Norco® and Xanax®. Nguyen returned to Tseng at the beginning of

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[10] On February 7, 2009, Tseng prescribed Nguyen: Xanax® (2 mg, 90 tablets); Norco® (10 mg, 90 tablets); and Opana® (10 mg, 90 tablets).

[11] Tseng never prescribed Nguyen methadone.

[12] The record does not contain evidence of the doses or number of pills of Norco® or Xanax® that Tseng initially prescribed Nguyen.

November 2008 and said the medications were not working. Tseng prescribed the opioid Opana®, which is three times stronger than Norco®, and wrote him a refill prescription for Xanax®. During that visit, Nguyen also told Tseng that he had Attention Deficit Disorder and reported he was having trouble concentrating. Tseng did not attempt to corroborate the diagnosis of Attention Deficit Disorder; nonetheless, Tseng prescribed him Adderall®.[13] Nguyen returned on December 1, and Tseng prescribed Vicodin®,[14] Opana®, and Xanax® for him. Nguyen returned on January 5, 2009, and reported that the Vicodin® was not strong enough. Tseng prescribed Nguyen a higher dose of the opioid Norco® (10 mg, 90 tablets), and gave him refill prescriptions for the opioid Opana® (10 mg, 90 tablets) and the sedative Xanax® (2 mg, 90 tablets). A month later, at Nguyen's last visit, Tseng wrote those refill prescriptions for the same dose and number of pills. Tseng told the coroner's investigator that Nguyen was always seeking more medication and stronger doses.

The prosecution also presented evidence that Tseng did not obtain information from Nguyen to corroborate his complaints of pain and anxiety or complete an adequate physical examination to determine whether a legitimate medical reason existed to prescribe the controlled substances. In addition, although Nguyen reported to Tseng that he was taking "high doses of opioids" prescribed by other doctors, Tseng did not contact Nguyen's other doctors. Tseng did not obtain medical records relating to Nguyen's prior treatment or a complete medical and mental health history of Nguyen.

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[13] Adderall® is the brand name of an amphetamine drug commonly prescribed to treat the symptoms of Attention Deficit Disorder.

[14] The opioid Vicodin® is a hydrocodone opioid of the same degree of strength as the hydrocodone opioid Norco®.

Tseng's medical records pertaining to Nguyen showed that Tseng had not provided a treatment plan for Nguyen, nor had she educated him about alternative treatments for his symptoms or the potential risks of the substances she prescribed. In addition, the prosecution presented evidence that Tseng had altered Nguyen's patient records between 2010 and 2012 by filling in information in his records that she had left incomplete while she was treating Nguyen.

The prosecution's medical expert testified that Tseng's treatment of Nguyen represented an extreme departure from the standard of medical care.

b. *Death of Steven Ogle (count 2—second degree murder; count 3—unlawful prescription) in 2009*

Steven Ogle, who lived in Palm Springs, sought treatment from Tseng in early March 2009, complaining of pain caused by a car accident that had occurred several years before. According to Tseng's patient records for Ogle, during his first visit to Tseng's clinic on March 2, 2009, he told Tseng he was taking six to eight OxyContin® tablets (80 mg) per day,[15] using heroin, and that he wanted to take methadone. Tseng did not ask who had prescribed Ogle the OxyContin®. Even though Tseng was not an addiction specialist licensed to prescribe and monitor the use of methadone, she wrote Ogle prescriptions for methadone (10 mg, 100 tablets)

[15] According to expert testimony presented at trial, an 80 milligram dose of OxyContin® is an amount typically prescribed to a terminal cancer patient. There was no evidence Ogle was suffering from cancer.

and Xanax® (2 mg, 100 tablets).[16] Ogle returned to the clinic two weeks later on March 17, 2009, having used all of the medication and suffering from symptoms of withdrawal. Tseng wrote refill prescriptions for Ogle. On April 7, again having used all the medications prescribed on March 17 and suffering from withdrawal symptoms, Ogle returned to the clinic for more prescriptions. Tseng again prescribed Xanax® (2 mg, 100 tablets) and methadone (10 mg, 100 tablets). Ogle died two days later. Investigators found three bottles of prescription medication near Ogle's body. Tseng had written prescriptions for two of these only two days earlier: methadone, 100 tablets (7 remaining) and Xanax®, 100 tablets (15.5 remaining). The third bottle, containing OxyContin®, had been prescribed in January 2009 by another doctor. The coroner opined that Ogle died of "methadone intoxication."

In early May 2009, a coroner's investigator called Tseng regarding Ogle. Tseng confirmed that Ogle's first visit was in March 2009, about a month before his death. She said that Ogle reported he was abusing OxyContin® and wanted her help to stop, and therefore she prescribed methadone and Xanax®. Tseng said she saw Ogle again two weeks later and wrote him refill prescriptions. Tseng confirmed he returned in early April and she

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[16] Ogle's sister-in-law accompanied him on visits to the clinic. She testified it was her belief that at Ogle's first visit on March 2, 2009, Tseng prescribed Ogle: OxyContin®, Xanax®, and the sedative promethazine. She also testified that at Ogle's second visit in mid-March, she believed that Tseng wrote refill prescriptions and also prescribed methadone. Tseng's patient records for Ogle do not indicate that she prescribed him OxyContin® or promethazine. Likewise, when Tseng spoke to the coroner's investigator in May 2009, after Ogle's death, Tseng did not mention prescribing Ogle OxyContin® or promethazine.

wrote Ogle refill prescriptions again. She claimed that she told Ogle not to take methadone with other opioids.

The prosecution presented expert medical testimony that Tseng's method of treatment of Ogle represented an extreme departure from the standard of care in various ways, including that Tseng was not a licensed addiction specialist and did not have the training to monitor Ogle's use of methadone.

c. *Death of Joseph Rovero (count 4—second degree murder; count 5—unlawful prescription) in 2009*

In 2009, Rovero was a 21-year-old student at Arizona State University, who traveled from Arizona seeking treatment at Tseng's clinic. Tseng saw Rovero only once, on December 9, 2009, to treat his complaints of back pain, wrist pain, and anxiety. Rovero informed Tseng he had been using high doses—six pills (150 mg to 200 mg) of OxyContin® and Xanax® and the muscle relaxant Soma®—every day and requested the same prescriptions. Tseng prescribed him the opioid Roxicodone® (30 mg, 90 tablets), Soma® (350 mg, 90 tablets), and Xanax® (2 mg, 30 tablets). Nine days later, when Rovero died of a drug overdose, empty bottles of medications prescribed by Tseng were found near his body. The coroner in Arizona investigating Rovero's death found the cause of death was combined drug toxicity, including alcohol,[17] prescription opioids, muscle relaxants (Soma®), and a sedative (Xanax®).

When investigators questioned Tseng about Rovero's death, she admitted treating Rovero and knowing that he had been using opioids, sedatives, and muscle relaxants prescribed by other

[17] The amount of alcohol in Rovero's blood at the time of his death was a non-lethal amount.

doctors. She told investigators that she believed Rovero was taking an inappropriate amount of OxyContin®. Consequently, she prescribed Roxicodone® instead, as well as Xanax® and Soma®. Her stated goal was to wean Rovero from opioids. Tseng did not, however, verify the doses or the types of medications that Rovero claimed other doctors had previously prescribed him. Tseng reduced the doses of all three drugs Rovero reported taking by 80 percent, which, according to the evidence presented at trial, guaranteed he would suffer from withdrawals. The prosecution's expert explained that when an individual has been abusing pain medications by taking high doses of the medications—as Rovero was—any efforts to "wean" the person from those drugs require a gradual reduction in dosing; otherwise, the individual might experience symptoms of drug withdrawal that place the individual at risk of overdose or death. The prosecution also presented evidence that the prescriptions Tseng wrote for Rovero likely increased his potential for overdose and death because Tseng failed to verify the doses of the drugs he had been previously prescribed.

2. *Uncharged deaths of Tseng's patients*

During the trial, in addition to the deaths of Nguyen, Ogle, and Rovero, the prosecution presented evidence of the following six uncharged deaths of Tseng's patients from prescription drug overdoses between late 2007 and 2009: Matthew Stavron, Ryan Latham, Nathan Keeney, Joshua Chambers, Joseph Gomez, and Michael Katnelson.

Specifically, with respect to patient Stavron, who died in 2007, Tseng prescribed to him, among other drugs, OxyContin® (80 mg). During the DEA's investigation of Tseng's practice, she told an undercover DEA agent that an 80 milligram prescription of OxyContin® is "super high." She was also aware that OxyContin®

is primarily prescribed only to treat pain from broken bones or cancer, and that Stavron did not suffer pain from broken bones or cancer. Two days after Tseng wrote Stavron a prescription for OxyContin®, he died from an overdose of that medication. When the coroner's investigator called Tseng to discuss Stavron's death, she told the investigator that Stavron was drug-seeking.

Tseng's patients Latham and Keeney died in 2008. Tseng had prescribed Latham Norco® (10 mg, 150 tablets), in addition to other drugs. As Tseng told an undercover DEA agent, Norco® is addictive and "evil." Two days after Tseng wrote Latham the prescription, he died from a Norco® overdose. During a call with the coroner's investigator, Tseng described the number of Norco® pills Latham took per day and characterized him as a "drug-seeker."

Tseng prescribed Keeney OxyContin® (80 mg, 60 tablets). There was no indication that Keeney had broken bones or cancer. Tseng also prescribed to him methadone (10 mg, 100 tablets). Four days after filling the prescriptions from Tseng, Keeney died from a methadone and OxyContin® overdose. Tseng told the coroner's investigator that Keeney had "somewhat drug-seeking behavior."

Tseng was aware of Stavron's and Latham's overdose deaths *before* she started treating murder victim Nguyen, and learned of Keeney's death while she was treating Nguyen. In addition, by the time that murder victim Ogle died in April 2009, Tseng had also learned of Nguyen's death.

In 2009, Tseng's patients Chambers, Gomez, and Katnelson[18] also succumbed to drug overdoses. Specifically, concerning Katnelson, Tseng prescribed him fentanyl (10 of the 75 mcg-

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[18] Tseng was charged with issuing unlawful prescriptions with respect to Chambers (count 8), Gomez (count 10), and Katnelson (count 13).

per-hour patches). Fentanyl is an opioid 100 times more potent than morphine. Katnelson died the day after he filled the prescription from Tseng. Tseng told the coroner's investigator that she did not know Katnelson well enough to know whether he was abusing the medication.

Tseng prescribed Chambers, among other drugs, Norco® (10 mg, 100 tablets); Chambers died three days later. The coroner determined Chamber's cause of death was a combination of drugs, including Norco®. Tseng told the coroner's investigator that Chambers appeared to be drug-seeking because he finished his drugs early and because his insurance company apprised her that Chambers was seeking medication from other doctors. She also reported that she suspected Chambers was abusing alcohol.

Tseng prescribed Gomez, among other drugs, the opioid Roxicodone® (30 mg, 90 tablets) and Xanax® (2 mg, 100 tablets); two days later, Gomez died. The coroner determined he died of a combined intoxication, including Roxicodone® and Xanax®. Tseng told the coroner's investigator that Gomez attempted to get medication from other doctors.

Tseng learned of the drug overdose deaths of Chambers, Gomez, Katnelson, and Ogle *before* she began treating murder victim Rovero in December 2009.

Similar to the deaths of the patients in the charged murder counts—Nguyen, Ogle, and Rovero—the six uncharged patient deaths of Stavron, Latham, Keeney, Chambers, Gomez, and Katnelson all occurred within days after Tseng wrote them prescriptions for high doses of opioids, sedatives, or other drugs. These patients—Stavron, Latham, Keeney, Chambers, Gomez, and Katnelson—also fit the same patient profile as Nguyen, Ogle, and Rovero. They were in their 20's or early 30's, and Tseng knew they were drug-seeking and drug-abusing. Tseng treated some of

these patients only once while others returned several times; each time, Tseng prescribed high doses of controlled substances. Moreover, after the coroner's investigators contacted Tseng to inform her when each patient had died from a drug overdose, Tseng entered an "alert" in the clinic's computer records for some of those patients, indicating the patient had died from a possible drug overdose. A comparison of the patient records seized in 2010 and 2012 also showed that Tseng had altered patient records, while she was under investigation, by completing records that had been previously left blank or incomplete.

Even after Tseng learned of these deaths, she continued to prescribe high doses of controlled substances, including opioids, sedatives, and in some cases, methadone to other patients.

A jury found Tseng guilty of three counts of second degree murder, 19 counts of unlawfully prescribing controlled substances, and one count of obtaining a controlled substance by fraud. The trial court sentenced her to 30 years to life in state prison. Tseng filed a timely notice of appeal.

DISCUSSION

I. Substantial Evidence Supports Tseng's Second Degree Murder Convictions

Tseng contends that substantial evidence does not support her convictions of second degree murder of Nguyen, Ogle, and Rovero because there was no evidence that she acted with implied malice, and, in the case of Nguyen and Rovero, no evidence that her conduct was the proximate cause of their deaths. She argues that although she acted with negligence sufficient to support convictions for involuntary manslaughter, there was no evidence that she acted with conscious disregard for her patients' lives. Specifically, she asserts that because coroner and police investigators never informed her that she was responsible for the victims' deaths or the deaths of other patients, her continued practice of prescribing high doses and large quantities of opioids and other controlled substances did not show the necessary reckless mindset to support a finding of implied malice.

We review the evidence in the light most favorable to the verdicts, presuming the existence of every fact the trier could have reasonably deduced from the evidence. (*People v. Johnson* (1993) 6 Cal.4th 1, 38, overruled on other grounds by *People v. Rogers* (2006) 39 Cal.4th 826.) We apply the same standard to our review of circumstantial evidence. (*People v. Ceja* (1993) 4 Cal.4th 1134, 1138.) As set forth below, we conclude that substantial evidence supports the jury's verdict.

A. *Evidence of Implied Malice*

Implied malice exists when an intentional act naturally dangerous to human life is committed " 'by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life.' " (*People v. Lasko* (2000) 23 Cal.4th

101, 107, quoting Pen. Code, § 188.) "It is the ' " 'conscious disregard for human life' " ' that sets implied malice apart from gross negligence."[19] (*People v. Contreras* (1994) 26 Cal.App.4th 944, 954.) "Implied malice is determined by examining the defendant's subjective mental state to see if . . . she actually appreciated the risk of . . . her actions." (*People v. Superior Court (Costa)* (2010) 183 Cal.App.4th 690, 697 (*Costa*); see *People v. Olivas* (1985) 172 Cal.App.3d 984, 988 ["[T]he state of mind of a person who acts with conscious disregard for life is, 'I know my conduct is dangerous to others, but I don't care if someone is hurt or killed.' "].) "Implied malice may be proven by circumstantial evidence." (*Costa*, *supra*, 183 Cal.App.4th at p. 697; see *People v. Nieto Benitez* (1992) 4 Cal.4th 91, 110 ["Even if the act results in a death that is accidental . . . the circumstances surrounding the act may evince implied malice."].)

The record discloses overwhelming evidence that Tseng's treatment of Nguyen, Ogle, Rovero, and other patients was well below the standard of care in the practice of medicine and prescribing opioid medications. We recognize that, although probative of Tseng's subjective appreciation of risk, a departure from the medical standard of care alone would not be sufficient to support an implied malice finding. (See *People v. Klvana* (1992)

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[19] Second degree murder (based on implied malice) and involuntary manslaughter both involve a disregard for life. For murder, however, the disregard is judged by a subjective standard, whereas for involuntary manslaughter, the standard is an objective one. (*People v. Watson* (1981) 30 Cal.3d 290, 296–297.) Implied malice murder requires a defendant's conscious disregard for life, meaning that the defendant subjectively appreciated the risk involved. (*Ibid.*) In contrast, involuntary manslaughter merely requires a showing that "a reasonable person would have been aware of the risk." (*Id.* at p. 297.)

11 Cal.App.4th 1679, 1703-1705 [even though the evidence showed that doctor's treatment of patients fell below the standard of care, his second degree implied malice murder convictions were affirmed not based on the evidence of the doctor's negligence but, instead, because sufficient evidence demonstrated doctor's actual awareness and conscious disregard of the life-threatening dangers of his treatment of patients].) As noted above, to sustain an implied malice murder conviction, there must be substantial evidence that Tseng subjectively appreciated the risk to her patients of her opioid prescription practices. Here, substantial evidence supports the jury's finding that Tseng acted with a subjective appreciation of the risks involved in her medical treatment of Nguyen, Ogle, and Rovero.

As a licensed physician, Tseng had expert knowledge of the life-threatening risk posed by her drug prescribing practices. She knew that the drugs she prescribed were dangerous and that the combination of the prescribed drugs, often with increasing doses, posed a significant risk of death. Tseng's experience and medical training regarding opioids and other controlled substances endowed her with special knowledge of those dangers. During the investigation of her practice, Tseng admitted to undercover DEA agents that she understood that the drugs she was prescribing were addictive and typically would only be prescribed to treat pain from cancer and broken bones. She knew that she was prescribing those drugs in high doses and in dangerous combinations to patients who did not suffer from those conditions.

Tseng also took other actions that showed her awareness of the danger of her prescribing practices. After larger pharmacies, such as CVS and Walgreens, contacted Tseng to raise questions about the lack of medical justification for her prescriptions, and ultimately refused to fill those prescriptions, Tseng sent her

patients to small "mom and pop" pharmacies which she knew would continue to fill her prescriptions. Moreover, although she knew some patients were also obtaining similar prescriptions from other doctors and were taking drugs in lethal combinations, Tseng did not contact those other doctors to determine which drugs other doctors had prescribed or in what doses and when; nor did she check the CURES database for that information. Rather, Tseng told patients—some of whom she knew were addicted to prescription pain medication—not to mix the drugs.

There is substantial evidence of Tseng's subjective awareness of the risk of death her prescribing practices posed to the three charged murder victims. Concerning Nguyen, the evidence showed that from his initial visit, Tseng knew that Nguyen was drug-seeking and that he was taking high doses of opioids prescribed by other doctors. Nonetheless, she failed to corroborate his complaints of pain and anxiety, contact his other doctors, or do the kind of physical examination required to determine whether a legitimate medical reason existed for prescribing the drugs he requested. Instead, Tseng prescribed to Nguyen opioids and sedatives, and when he returned two weeks later having used up all the medications, she simply wrote him refill prescriptions. According to Tseng, during the second visit, she told Nguyen that she would not write him a prescription for his medications "early" again. She failed, however, to discuss with him the severe health risks of those combined medications. After that, Nguyen returned almost every month until his death in February 2009 seeking more medication in higher doses. Tseng wrote him refill prescriptions without further inquiry into the need for those refills, let alone in higher doses. A reasonable jury could infer from this evidence that Tseng was aware Nguyen was abusing the opioids and sedatives she had prescribed, and that by continuing

to prescribe the drugs in greater amounts and stronger doses, Tseng acted in conscious disregard for his life.

In addition, even while Tseng was treating Nguyen, she learned of the deaths of other patients—Stavron, Latham, and Keeney—who had similar patient profiles. They, like Nguyen, were otherwise healthy, young men seeking prescriptions for controlled substances and willing to pay cash, who died of drug overdoses shortly after Tseng treated them. They also expressed vague complaints about pain and reported taking prescription opioids and sedatives. Tseng admitted she knew that many of these patients were drug-seeking and had presented with symptoms of drug addiction when she prescribed controlled substances to them. She told her receptionist that her patients were "druggies." She, nonetheless, continued to prescribe high doses of opioids, sedatives, and muscles relaxants without performing adequate physical examinations of these patients and without corroborating their claims of pain and prior injuries. When these patients returned for subsequent visits and sought to refill the prescriptions, Tseng complied and sometimes wrote them prescriptions for stronger medications, again with no medical justification.

Substantial evidence further supports that Tseng acted with implied malice when treating Ogle. At his first visit in March 2009, Ogle told Tseng that he was taking extremely high doses of OxyContin®—in amounts used to treat terminal cancer patients—and using heroin daily. Rather than investigate this report of Ogle's drug use and prior treatment, Tseng prescribed him 100 tablets each of Xanax® as well as methadone—a drug she knew she was not licensed or trained to prescribe. Ogle then returned twice in the next month having used all the medications Tseng had prescribed. During those visits, he informed Tseng that he had taken all the medications and wanted refill prescriptions, and

Tseng observed that Ogle was suffering from symptoms of withdrawal from drugs. Tseng did not, however, refer him to an addiction specialist. Instead, Tseng just wrote him refill prescriptions. From this evidence, and from the evidence that at the time Tseng was treating Ogle she was aware of the deaths of her patients Stavron, Latham, Keeney, and Nguyen, the jury could reasonably have found that Tseng acted with implied malice in treating Ogle.

Substantial evidence also supports that Tseng acted with implied malice in treating Rovero. By the time she prescribed drugs for Rovero in December 2009, Tseng knew that eight of her patients (Stavron, Latham, Keeney, Chambers, Gomez, Katnelson, Nguyen, and Ogle) had died shortly after she had prescribed the types of drugs Rovero sought. Even armed with this knowledge, she continued to prescribe dangerous drugs in conscious disregard for Rovero's life. Specifically, Rovero presented to Tseng as using extremely high doses of OxyContin®, Xanax®, and the muscle relaxant Soma® every day. Tseng did not, however, verify the doses or the types of medications that other doctors had previously prescribed to Rovero. Instead, Tseng substituted one brand of opioid (OxyContin®) for another (Roxicodone®) and prescribed Xanax® and Soma® in reduced doses, which, according to the evidence presented at trial, guaranteed Rovero would suffer from withdrawals and raised his potential for overdose and death.

Our conclusion that substantial evidence supports a finding of implied malice with respect to each of the charged murders is not unprecedented. Our research has uncovered three cases—a federal case applying New York law and cases from California and Michigan—in which appellate courts addressed the sufficiency of evidence to support convictions of second degree murder or similar

charges, requiring evidence of recklessness or conscious disregard of life, stemming from a licensed physician's treatment of a patient.

Thus, in *Einaugler v. Supreme Court of State of N.Y.* (2d Cir. 1997) 109 F.3d 836, a medical doctor was charged under the New York Penal Code with reckless endangerment and willful patient neglect in connection with the death of his patient. The prosecution presented evidence that he endangered his patient, who was in a nursing home, when he prescribed that she be fed through her dialysis catheter instead of her feeding tube, and then engaged in willful neglect by delaying the patient's hospitalization, despite being told by other doctors that prompt treatment of the patient in a hospital was necessary. (*Id*. at pp. 840-841.) Although the doctor was not charged with second degree implied malice murder, the reckless endangerment charge against him required proof, as in Tseng's case, of the doctor's subjective awareness of the danger of his treatment. (*Id*. at p. 840.)

After the state appellate court affirmed the doctor's conviction, the doctor filed a petition for a writ of habeas corpus in the federal district court challenging the sufficiency of the evidence supporting his conviction. In denying the petition, the district court observed "[t]he reckless endangerment charge required proof that [the doctor] had recklessly engaged in conduct that created a substantial risk of serious physical injury. [New York] Penal Law [section] 120.20. For [the doctor's] act to be reckless, he must have grossly deviated from a reasonable person's standard of conduct and consciously disregarded a substantial and unjustifiable risk. See [New York] Penal Law [section] 15.05." (*Einaugler v. Supreme Court of State of N.Y.*, *supra*, 109 F.3d at p. 840, italics omitted.) The district court concluded that the doctor's convictions were supported by "sufficient" evidence. The court observed that the doctor knew of the dire health condition in which

his directions had placed his patient, had been directed to hospitalize his patient immediately once she showed signs of distress, and was aware of the serious health risk if she was not transferred promptly. He nevertheless waited 10 hours before transferring her to a hospital. (*Ibid*.)

Our opinion in *People v. Klvana*, *supra*, 11 Cal.App.4th 1679 also supports our conclusion that substantial evidence supports the jury's finding of Tseng's implied malice. In that case, we affirmed a medical doctor's convictions of second degree murder for the deaths of nine infants. We concluded that a reasonable jury could have found implied malice to support the murder convictions based on the following evidence: The defendant repeatedly ignored obvious signs of medical distress in his patients during delivery; he advised parents not to take their children to the hospital despite clear indications of the need to do so; he induced vaginal births in inappropriate circumstances, after having been warned on numerous occasions that his treatment was dangerously substandard; and he continued to deliver babies despite the fact that his hospital privileges had been suspended because of substandard performance. (*Id.* at pp. 1704-1705.) Further paralleling the facts here, in *Klvana,* the prosecution presented evidence of an uncharged baby's death resulting from the doctor's treatment to support the doctor's subjective knowledge of the grave risks of his treatment practices. (*Ibid*.)

People v. Stiller (2000) 242 Mich.App. 38, 43 (*Stiller*), is also instructive. In *Stiller*, the Michigan appellate court affirmed the implied malice second degree murder conviction of a doctor who, for a four-month period, prescribed his patient high doses of hydrocodone unrelated to any rational medical treatment. (*Id*. at p. 43.) The patient then died from an overdose of drugs, including hydrocodone. (*Id*. at p 41.)

In challenging his murder conviction, the doctor argued that "there was no evidence that he actually instructed [his patient] to take a fatal dose of drugs." (*Stiller*, *supra*, 242 Mich.App. at p. 47.) The *Stiller* court rejected the doctor's argument: "[B]y prescribing huge quantities of medicine unrelated to any rational medical treatment and that had a possibility of interacting with other drugs he prescribed, defendant should have known that an overdose was likely to occur, and he therefore exhibited a wanton and willful disregard of the likelihood that the natural tendency of his behavior was to cause death or great bodily harm." (*Ibid.*) The court also supported its decision with evidence that pharmacies had warned the doctor about his dangerous prescribing practices, the doctor had prescribed very high doses of powerful drugs, and he had knowledge that there was no legitimate medical reason for his drug prescription for the murder victim. (*Id.* at pp. 43-45.) The same is true here.

Finally, even accepting Tseng's claim that investigators did not expressly inform her that she was directly responsible for the deaths of Nguyen, Ogle, Rovero, or other patients, her conduct, after learning of these deaths, demonstrated she was aware of the lethal consequences of her prescribing practices. For example, Tseng placed "alerts" in the patient files indicating that they died of suspected drug overdoses. She also altered patient records after she learned she was under investigation. From this evidence and other circumstantial evidence in the record, a jury could have reasonably found Tseng knew the cause of Nguyen's, Ogle's, and Rovero's deaths and of her role in their demise. In sum, substantial evidence supports the jury's findings of implied malice.

B. *Evidence of Causation*

Tseng argues substantial evidence did not support the finding that she caused Nguyen's and Rovero's deaths.[20] We disagree.

Concerning Nguyen, the coroner determined that the cause of his death was the combined effects of Opana® and Xanax®, both prescribed by Tseng. Nguyen also had small amounts of methadone in his system when he died. Tseng argues that the presence of methadone was an "unforeseeable intervening" cause that demonstrates she did not cause his death. Tseng's argument is unavailing because it asks us to reweigh the evidence, which we cannot do. (See *People v. Protopappas* (1988) 201 Cal.App.3d 152, 168 [appellate court will not reweigh the evidence and draw inferences which the jury rejected].)

Although "an 'independent' intervening cause will absolve a defendant of criminal liability[,] . . . the intervening cause must be 'unforeseeable . . . an extraordinary and abnormal occurrence, which rises to the level of an exonerating, superseding cause.' [Citation.] On the other hand, a 'dependent' intervening cause will not relieve the defendant of criminal liability. 'A defendant may be criminally liable for a result directly caused by his act even if there is another contributing cause. If an intervening cause is . . . normal and reasonably foreseeable . . . the intervening act is "dependent" and not a superseding cause, and will not relieve defendant of liability.' " (*People v. Funes* (1994) 23 Cal.App.4th 1506, 1523.)

Here, Tseng's medical expert opined that the amount of methadone in Nguyen's system was "pretty small" and alone would not have killed Nguyen. Tseng's expert and the coroner's

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[20] On appeal, Tseng does not contest that there was substantial evidence of causation with respect to Ogle's death.

investigator agreed that the medications Tseng prescribed to Nguyen were contributing causes of his death. Thus, even if methadone played a role in Nguyen's death, the jury could have reasonably concluded that the presence of methadone was not an unforeseen, independent intervening event that would relieve Tseng of liability for Nguyen's death.

Likewise, there was substantial evidence that Tseng's actions were a proximate cause of Rovero's death. Tseng prescribed Rovero Roxicodone®, Soma®, and Xanax®. The coroner found that the cause of Rovero's death was the combined drug toxicity from alcohol and the drugs Tseng had prescribed**.** Evidence was also presented that the amount of alcohol in his system could not have been lethal. The jury could have reasonably inferred from this evidence that alcohol was not an independent intervening cause of Rovero's death.

II. The Court Did Not Err in Admitting Evidence of the Six Uncharged Deaths of Tseng's Patients

Tseng contends the trial court erred in permitting the prosecution to present evidence of the uncharged deaths of Stavron, Latham, Keeney, Chambers, Gomez, and Katnelson. She argues that the trial court should have excluded this evidence under Evidence Code section 1101, subdivision (a), because the six patient deaths were not relevant for any purpose authorized by Evidence Code section 1101, subdivision (b). Tseng further asserts that the trial court should have excluded the evidence under Evidence Code section 352 because the undue prejudice from this evidence substantially outweighed its probative value and its admission also violated her due process rights. We disagree.

Under Evidence Code section 1101, subdivision (b), evidence that a defendant has committed a crime, civil wrong, or some other act is admissible to prove a material fact "such as motive, opportunity, intent, preparation, plan, knowledge, identity, [the]

absence of mistake or accident." (Evid. Code, § 1101, subd. (b); see *People v. Ewoldt* (1994) 7 Cal.4th 380, 402-403.) The admissibility of prior acts evidence "turns largely on the question whether the uncharged acts are sufficiently similar to the charged offenses to support a reasonable inference of the material fact they are offered to prove." (*People v. Erving* (1998) 63 Cal.App.4th 652, 659-660.) "The least degree of similarity (between the uncharged act and the charged offense) is required in order to prove intent." (*People v. Ewoldt, supra,* 7 Cal.4th at p. 402.) "On appeal, the trial court's determination of this issue, being essentially a determination of relevance, is reviewed for abuse of discretion." (*People v. Kipp* (1998) 18 Cal.4th 349, 369.)

The trial court did not abuse its discretion in admitting evidence of the six uncharged deaths to prove Tseng's intent. This evidence was relevant to the issue of Tseng's subjective awareness of the dangerous consequences of overprescribing opioids and other controlled substances to patients whom she knew to be "drug-seeking" or suffering the symptoms of addiction.

The evidence showed that, over the course of a few years, Tseng was repeatedly made aware of the potentially lethal risks posed by her prescribing practices, yet she ignored those warnings. Prior to the charged deaths, Tseng had learned of the uncharged deaths of her patients—Stavron, Lathan, Keeney, Chambers, and Katnelson—from overdoses of the same or similar drugs she prescribed Nguyen, Ogle, and Rovero. Despite this knowledge, Tseng continued to prescribe Nguyen, Ogle, Rovero, and others these drugs in sometimes even higher doses without any medical justification for doing so. Her prescribing practices thus tended to show a conscious disregard for the lives of her patients, including the murder victims. Even if the investigators did not expressly inform Tseng that her treatment and prescription practices

caused the deaths of the uncharged patients, her knowledge of the uncharged patients' deaths after she prescribed powerful drugs with no medical justification for those prescriptions was circumstantial evidence of her subjective knowledge of risk to support an implied malice mental state. In short, evidence of her knowledge of the uncharged murders helped the jury assess Tseng's level of awareness of the risk in determining whether, at the time of the murders, she acted with conscious disregard for life. The evidence was therefore admissible under Evidence Code section 1101, subdivision (b).

Further, the trial court did not abuse its discretion under Evidence Code section 352 in admitting the uncharged crimes. Evidence of the uncharged deaths was highly probative on the key issue in the case—whether Tseng harbored implied malice—and was not substantially outweighed by its prejudicial effect. (See Evid. Code, § 352 ["The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice."].)

Finally, admission of uncharged crimes under Evidence Code sections 352 and 1101 did not violate Tseng's constitutional rights to due process, a fair trial, and a reliable adjudication. (*People v. Lewis* (2009) 46 Cal.4th 1255, 1289 [" ' "routine application of state evidentiary law does not implicate [a] defendant's constitutional rights" ' "]; *People v. Lindberg* (2008) 45 Cal.4th 1, 26.)

III. Tseng Has Not Demonstrated Prejudicial Error in the Trial Court's Denial of Her Motion to Unseal the Affidavit in Support of the Warrant to Search Her Bank Accounts, or in Finding that the Warrant Was Supported by Probable Cause, Nor Has She Demonstrated any Miscarriage of Justice from Introduction at Trial of the Financial Information Obtained Through the Warrant

Tseng argues that the trial court erred in failing to unseal the entire affidavit submitted in support of the warrant to search her financial records, and in failing to quash or traverse the warrant because it was not supported by probable cause. Tseng further asserts that these errors violated her constitutional rights.

A. *Background*

When the forensic examiners imaged Tseng's computers, they discovered that the vast majority of Tseng's patients paid in cash and that Tseng deposited the cash into multiple accounts at more than a dozen banks. In addition, the clinic's receptionist, G.R., confirmed that Tseng required patients to pay for services in cash and that the clinic's cash revenue and the number of patients had increased dramatically since 2007. Investigators suspected that Tseng's motivation in issuing medical prescriptions was financial. They also suspected that Tseng might have engaged in other crimes, such as money laundering, although Tseng ultimately was never charged with any such crime.

Based on this information, on April 16, 2013, Sergeant Thomas Greep, an investigator for the Los Angeles County District Attorney's Office, prepared a search warrant for approximately 13 banks, requesting account information from multiple accounts held by Tseng and her husband. Sergeant Greep's affidavit supporting the search warrant was submitted under seal pursuant

to *People v. Hobbs* (1994) 7 Cal.4th 948 (*Hobbs*), because, according to the affidavit, if the information in the affidavit and attachments were made public, they would have compromised the investigation. The search warrant was issued, and the financial records were seized.

Thereafter, on April 29, 2013, Tseng filed motions to unseal the affidavit and to quash and traverse the search warrant. The trial court conducted an in camera, ex parte hearing under the procedures outlined in *Hobbs*. At the hearing, the trial court questioned Sergeant Greep about the basis of probable cause for the warrant and the representations he made in the affidavit. The court further examined him as to the justification for sealing the affidavit and the supporting documents. (*Hobbs*, *supra*, 7 Cal.4th at p. 976.)

The trial court observed that although sealing the affidavit may have been initially justified to protect the confidentiality and integrity of the investigation, much of the information in the affidavit, including the identity of the clinic's receptionist, G.R., had already been disclosed to the defense.[21] The prosecutor agreed, but also stated that some of the information—including the identity of some of the banks and the account information subject to seizure—had not been disclosed to the defense. The prosecutor also asserted that the investigation was not complete because some banks were

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[21] We have reviewed the sealed documents and the transcript of the above-described in camera hearing. We observe that in addition to G.R.'s identity, it appears that the identity of three of the banks identified in the affidavit were no longer confidential by the time of the hearing. An employee of one of the banks had tipped off Tseng to the existence of the subpoena in the warrant and the DEA had already learned of the identity of two other banks from its earlier seizure of Tseng's and her medical corporation's records.

still producing records. The prosecutor told the trial court that depending on what the investigation revealed, an asset forfeiture procedure might be brought and, therefore, he argued that the identity of the banks and accounts subject to the warrant should remain under seal to protect the integrity of the assets in the accounts. Investigators feared that if Tseng became aware of the identity of all of the accounts subject to search, she might remove her funds from those accounts.

The trial court concurred that the information about the banks should remain under seal, but ordered unsealing the first seven pages of the affidavit that contained information already known to Tseng (except for part of the conclusion on the seventh page which remained sealed).[22] The trial court also

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[22] The trial court ordered disclosed the following information: The DEA and the Medical Board had investigated Tseng's medical practice; the DEA warrant had revealed that Tseng and her husband had numerous bank accounts; Tseng and her husband purchased real property; G.R.'s statement that the clinic accepted cash; and Sergeant Greep's belief that probable cause existed that Tseng had violated Health and Safety Code section 11153, subdivision (a) (prescriptions written for no legitimate medical purpose).

The following information at the bottom of page seven of the affidavit remained sealed: Tseng and her husband had 51 bank accounts and had purchased multiple real properties; and given the number of transactions and accounts, Sergeant Greep believed that Tseng and her husband were laundering their money in violation of section 186.10.

In September 2017, Tseng filed a motion in this court to unseal the warrant, the portions of the affidavit that remained sealed, and the transcript from the June 2013 in camera hearing in which the trial court held pursuant to *Hobbs* to consider Tseng's motion to quash and traverse. In November 2017, this

denied the motion to quash, finding that the warrant was supported by probable cause, and denied the traverse, finding no basis to conclude that the warrant was based on falsities, misrepresentations, or omissions. After the trial court unsealed part of the affidavit, Tseng never renewed her motions or sought to suppress the evidence discovered pursuant to the warrant.

Tseng argues on appeal that the trial court should have ordered the entire affidavit unsealed because there was no justification for sealing the search warrant and the entire supporting affidavit in the first place. She argues that under *Hobbs*, the only legal basis for sealing a warrant is to protect the identity of a confidential informant. Tseng elaborates that the only witness identified in the warrant, G.R., was not a confidential informant and was already known to Tseng. In addition, noting that she was never charged with money laundering, Tseng maintains that the sealed information did not disclose a basis of probable cause to issue a warrant.

B. *Analysis*

Pursuant to Evidence Code sections 1040 (privilege to refuse to disclose official information acquired in confidence), 1041 (the privilege to refuse to disclose the identity of a confidential informant), and 1042, subdivision (b) (protecting confidential information and an informant's identity in a warrant from disclosure) and *Hobbs, supra,* 7 Cal.4th at page 971, all or part of a search warrant may be sealed or redacted to protect official confidential information or the identity of a confidential informant. (*Ibid.*; *People v. Galland* (2008) 45 Cal.4th 354, 363-364 (*Galland*);

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court ordered the unsealing of the entire affidavit, but denied the request to unseal the warrant; in December 2017, we ordered that the transcript from the June 2013 *Hobbs* hearing be unsealed.

People v. Heslington (2011) 195 Cal.App.4th 947, 955-956 (*Heslington*).) To preserve a defendant's right to reasonable access to information that might form the basis for a challenge to the validity of a warrant, and to strike a fair balance between the privileges in Evidence Code sections 1040 and 1041, a trial court must follow certain procedures when a defendant moves to unseal, quash, or traverse a sealed warrant.[23] (*Hobbs, supra,* 7 Cal.4th at pp. 962, 971–975; *Galland, supra*, 45 Cal.4th at p. 364; *Heslington, supra,* 195 Cal.App.4th at pp. 955–958.)

On appeal, we review Tseng's claims de novo. (See *Hobbs, supra,* 7 Cal.4th at pp. 975, 977.) We review *Hobbs* error under the state law harmless error standard. (See *Heslington, supra,* 195 Cal.App.4th at pp. 960-961 [applying a state law standard of prejudice to a claim of error under *Hobbs*].)

The trial court acknowledged that Tseng was aware of G.R.'s identity and thus protecting the identity of a confidential informant did not justify denying Tseng's request to unseal the

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[23] The trial court must first conduct an in camera hearing to determine whether there are sufficient grounds for maintaining the confidentiality of the informant's identity or the information sought to remain sealed. (*Galland*, *supra,* 45 Cal.4th at p. 364; *Hobbs, supra,* 7 Cal.4th at p. 972; *People v. Martinez* (2005) 132 Cal.App.4th 233, 240–241.) Once the affidavit is found to have been properly sealed, the court must determine whether there was " ' "a fair probability" that contraband or evidence of a crime would be found in the place searched pursuant to the warrant' (if the defendant has moved to quash the warrant) or 'whether the defendant's general allegations of material misrepresentations or omissions are supported by the public and sealed portions of the search warrant affidavit . . .' (if the defendant has moved to traverse the warrant)." (*Galland, supra,* 45 Cal.4th at p. 364; *Hobbs, supra,* 7 Cal.4th at pp. 974–975; *Heslington, supra,* 195 Cal.App.4th at p. 957.)

entire affidavit. In addition, other information in the sealed affidavit was no longer confidential, i.e., the government's awareness of at least three of the banks that were the subject of the search warrant. Moreover, presumably Tseng was aware of her bank account information, such as her bank account numbers.

The prosecutor informed the trial court that the People were seeking to keep a portion of the affidavit sealed to shield that the People were exploring potential additional charges related to how Tseng used her bank accounts to hide the cash she received from her medical practice. The prosecutor sought to keep this information sealed to prevent Tseng from removing the funds from those accounts while the People were considering whether to bring any such additional charges against Tseng. Acknowledging the prosecutor's concerns, the trial court ordered that those sections of the affidavit relating to the ongoing confidential investigation remain sealed.

Tseng argues that the *Hobbs* sealing procedures apply *only* to protect the identity of confidential informants. We note that the Evidence Code states that an informant's identity and other *confidential official information* may remain under sealed. (See Evid. Code, § 1042, subd. (b) [providing that when a search warrant is valid on its face, a public entity bringing a criminal proceeding may establish the search's legality without revealing to the defendant any official information or an informant's identity], italics added.) Similarly, in dicta, the *Heslington* court observed that "[b]y statutory privilege, public entities may refuse to disclose *official information* and an informant's identity when disclosure is against the public interest." (*Heslington, supra,* 195 Cal.App.4th at pp. 955-956, italics added.) Arguably, the fact of the People's confidential investigation into potential money laundering and similar charges against Tseng could constitute such official

information. (See *People v. Jackson* (2003) 110 Cal.App.4th 280, 287 [holding that "[o]ngoing investigations fall under the privilege for official information," and affirming the prosecution's refusal to disclose information about an ongoing police investigation based on Evidence Code section 1040]; see also *People v. Otte* (1989) 214 Cal.App.3d 1522, 1531, fn. 4 [observing that the definition of "official information" subject to the privilege includes "more sources of information and the different methods of its acquisition than that furnished by the informants"].)

We need not, however, resolve this issue. Even assuming arguendo that the court erred in failing to unseal the entire affidavit, any such error was not prejudicial as to the *Hobbs* proceedings or the trial itself.

First, Tseng suffered no prejudice from the court's order sealing the information about the government's investigation of the three banks (and Tseng's accounts) because he had already learned the information from other sources.

Second, as to the other information in the affidavit, upon our review of the sealed portions of the affidavit, we have concluded there was no reasonable probability that Tseng would have prevailed on her motion to quash or traverse had the entire affidavit been unsealed. Concerning the motion to traverse, the sealed portion of the affidavit contained no inconsistencies or insufficiencies indicating that the affiant included a false statement made "knowingly and intentionally, or with reckless disregard for the truth" that was "necessary to the finding of probable cause." (*Franks v. Delaware* (1978) 438 U.S. 154, 155-156.) Thus, the sealed information would not have supported Tseng's motion to traverse.

With regard to the motion to quash, we also agree with the trial court's finding that the affidavit detailed probable cause for

issuance of the warrant. Tseng's claim to the contrary is based solely on the sealed portion of the affidavit. Aside from the fact that the sealed affidavit contained additional evidence of probable cause, the information in the first seven pages of the affidavit, which was unsealed and disclosed to Tseng the factual basis for the warrant—including that Tseng's practice was under investigation for its prescribing practices by state and federal authorities, that Tseng had numerous bank accounts, and Tseng accepted cash payments for service—was sufficient by itself to make the requisite showing of probable cause. Tseng's argument downplays this information and ignores the reasonable inferences of guilt of the violation of Health and Safety Code section 11153, subdivision (a) (prescriptions written for no legitimate medical purpose) that was being investigated.

Finally, Tseng claims that the failure to unseal the entire affidavit violated her constitutional rights to due process and the effective assistance of counsel. Tseng's motion to unseal the affidavit was a discovery motion. (See *People v. Navarro* (2006) 138 Cal.App.4th 146, 169-170 [characterizing motions to disclose information in sealed affidavits supporting search warrants pursuant to *Hobbs* as "discovery" procedures].) "It is settled that an accused must demonstrate that prejudice resulted from a trial court's error in denying discovery." (*People v. Memro* (1985) 38 Cal.3d 658, 684, overruled on other grounds by *People v. Gaines* (2009) 46 Cal.4th 172; accord, *People v. Clark* (1992) 3 Cal.4th 41, 133, overruled on other grounds in *People v. Pearson* (2013) 56 Cal.4th 393, 462.) Tseng has not done so. She does not explain how the part of the affidavit that remained sealed could have assisted her in challenging the warrant and she never moved to suppress the evidence obtained in the search even after the trial court unsealed portions of the affidavit and warrant.

Tseng has not shown she suffered a miscarriage of justice under the state law standard of prejudice. Evidence of Tseng's finances may have suggested a possible motive for the crimes underlying her convictions. But motive was not an element of those crimes. Furthermore, even absent this financial evidence, there was overwhelming evidence of Tseng's knowledge of risk and reckless indifference to her patients' lives in her prescribing practices to support her convictions, as we have detailed above. Thus, viewed from any vantage point in the proceedings, any error in applying *Hobbs* was harmless.[24]

IV. Tseng Has Not Demonstrated that the Prosecution Committed Prejudicial Misconduct Warranting Reversal

Tseng complains that the prosecution committed prejudicial misconduct on two separate occasions during the trial by eliciting, in violation of a court order, information about the deaths of two victims of the unlawful prescription charges. She contends that this prosecutorial misconduct denied her due process.

A. *Background*

1. *Nicholas Mata*

During the trial, John Mata testified that his son was one of Tseng's patients, Nicholas Mata, the victim in count 14, an unlawful prescription charge. The prosecutor asked John Mata

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[24] Also unavailing is Tseng's general attack on the constitutionality of the *Hobbs* procedure. Our Supreme Court has rejected such an attack. (*Hobbs*, *supra*, 7 Cal.4th at pp. 971-975 [authorizing procedures the trial court followed here and rejecting that those procedures violate due process].) We are bound by *Hobbs*. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

the date of his son's death; he responded that his son died on May 14, 2010. Tseng's counsel objected, reminding the trial court that under a prior order, the prosecution was prohibited from eliciting evidence of Nicholas Mata's death because the death had occurred *after* the last charged death. The prosecution conceded the error. The trial court informed counsel that it could instruct the jury to disregard the evidence of the death, but was concerned that any instruction might highlight the death. The trial court asked the prosecution to remind the witness not to mention his son's death. Thereafter, at the conclusion of the direct examination, Tseng's counsel requested that the trial court strike the testimony of John Mata and dismiss count 14. The trial court denied the request, finding the misconduct was not prejudicial and did not warrant dismissal of the charge. The trial court, however, admonished the jury that Tseng was not being charged with Nicholas Mata's death and that John Mata's testimony was relevant only to the unlawful prescribing count.

2. *Michael Huggard*

The prosecution elicited testimony from the doctor who conducted the autopsy of Huggard, the victim in count 11 (an unlawful prescription charge), that Huggard had died. Tseng's counsel complained that "this is evidence of another instance of prosecutorial misconduct. . . . Huggard . . . passed away after the other three counts [Nguyen, Ogle, and Rovero], and his death was not to be mentioned. They were only limited to the overdose." The prosecutor responded that Huggard was "in the window" because he had died in 2009. Tseng's counsel moved for a mistrial. The court instructed the prosecution to determine Huggard's date of death.

After the lunch break, the prosecution stated that Huggard had died in 2010 and that they had been mistakenly operating

under the assumption that Huggard had died in 2009. Thereafter, the trial court denied the mistrial motion and subsequently admonished the jury to disregard the testimony of Huggard's death and to consider only the evidence about the unlawful prescription allegation. At the close of the case, the trial court also instructed the jury not to "consider for any purpose any offer of evidence that was rejected or any evidence that was stricken by the court; treat it as though you had never heard it."

Before this court, Tseng argues the trial court's instructions were insufficient to cure the harm and that the trial court should have stricken John Mata's testimony, dismissed count 14 after the first instance of misconduct, and granted Tseng's mistrial motion after the reference to Huggard's death.

B. *Analysis*

The Attorney General concedes, and we agree, that the prosecution's questions referencing Mata's and Huggard's deaths constituted prosecutorial misconduct because the trial court had previously ordered that this evidence not be presented to the jury. (See *People v. Bell* (1989) 49 Cal.3d 502, 532 [holding that the deliberate asking of questions and calling for inadmissible and prejudicial answers is misconduct].)

We conclude, however, that the prosecution's actions did not violate Tseng's due process rights and did not warrant reversal. The prosecution's misconduct was not so pervasive as to infect the trial with such " 'unfairness as to make the resulting conviction a denial of due process.' " (*Darden v. Wainwright* (1986) 477 U.S. 168, 181.) Furthermore, given the evidence of the other overdose deaths that was properly admitted, "it is not reasonably probable that a result more favorable to defendant would have been reached in the absence of any alleged misconduct." (*People v. Turner* (1994)

8 Cal.4th 137, 194, abrogated on another ground by *People v. Griffin* (2004) 33 Cal.4th 536, 555, fn. 5.) We assume the jury followed the trial court 's admonitions, which further obviated any prejudice. (*People v. Jones* (1997) 15 Cal.4th 119, 168, overruled on other grounds by *People v. Hill* (1998) 17 Cal.4th 800.)

In addition, the trial court did not abuse its discretion in denying the motion for a mistrial. "A mistrial should be granted if the court is apprised of prejudice that it judges incurable by admonition or instruction. [Citation.] Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions." (*People v. Haskett* (1982) 30 Cal.3d 841, 854.) We conclude that the trial court did not abuse its discretion here, particularly given that the jury had already heard evidence about the nine uncharged deaths of Tseng's patients.

V. The Trial Court Did Not Err in Reopening Closing Arguments

Tseng argues that the trial court's decision to reopen the argument during deliberations coerced the jury to return a guilty verdict on the murder charges and thus violated her due process rights. We disagree.

A. *Background*

On the eighth day of deliberations, the jury submitted two questions to the trial court: "Do we have to be unanimous in not guilty of second degree to deliberate on manslaughter? [And] [w]hat if we are split on second degree?" After consulting with, and obtaining the agreement of the parties, the court instructed the jury with CALJIC No. 17.49 [Use of Multiple Verdict Forms—Implied Acquittal—First], which informed the jury in pertinent part: "Since the lesser offenses are included in the greater, you

are instructed that if you find the defendant guilty of the greater offenses, you should not complete the verdicts on the corresponding lesser offenses, and those verdicts should be returned to the court unsigned by your foreperson. If you unanimously find the defendant not guilty of the felonies charged, you then need to complete the verdicts on the lesser included offenses by determining whether the defendant is guilty or not guilty of the lesser included crimes, and the corresponding verdicts should be completed and returned to the court signed by your foreperson." The court also reminded the jurors to consider the evidence about each murder count separately and carefully review all of the evidence. The jury resumed deliberations.

The next day, outside the jury's presence, the trial court indicated it had planned to instruct the jurors (pursuant to defense counsel's request) with CALJIC No. 17.10 [Conviction of Lesser Included or Lesser Related Offense—Implied Acquittal— First] to augment the instruction it had given the previous day. The trial court explained it had also decided to grant the parties' requests to argue for 10 additional minutes "regarding that specific issue of greater versus lesser" offense. The trial court also acknowledged that the bailiff had informed the court that jurors stated they "had resolved the issue that was in their question." The trial court said it was inclined to proceed as it had previously planned.

Tseng's counsel objected, pointing out that the trial court was permitted to reopen argument only if the jury is "deadlocked." The trial court responded: "It appears that they're deadlocked based on their questions yesterday, or at least they were divided, and so the court can allow it under those circumstances, as well."

The jurors entered the courtroom, and the trial court instructed in accordance with CALJIC No. 17.10, which informed them that "the court cannot accept a guilty verdict on a lesser crime

unless you have unanimously found the defendant not guilty of the charged greater crime," and then returned the jurors to the jury room to decide whether further argument would be helpful. Shortly thereafter, the jury sent the trial court the following request: "We would like to listen to the additional argument!" The jury returned to the courtroom and heard 10 minutes of argument from each side, focusing on the issue previously identified by the jury. The jury continued deliberations for the remainder of that day, and at the end of the following day—the 10th day of deliberations—the jury reached its verdicts.

B. *Analysis*

When faced with questions from a jury, including a question referencing an impasse, "a court must do more than figuratively throw up its hands and tell the jury it cannot help. It must at least consider how it can best aid the jury." (*People v. Beardslee* (1991) 53 Cal.3d 68, 97 (*Beardslee*), italics omitted.) A further argument is permissible where a jury reports it has reached an impasse in deliberations. (*People v. Young* (2007) 156 Cal.App.4th 1165, 1170; see Cal. Rules of Court, rule 2.1036(b)(3).)

Here, the jury initially indicated that it was "split on second degree." The jury's subsequent communications indicated it had resolved one of the questions coupled with its desire to hear additional argument. Taken together, the jury's inquiries demonstrated that it was struggling with its deliberations and had reached an impasse. Under these circumstances, we conclude that the trial court's decision to allow the parties to reopen argument to assist the jury in its deliberative process was not an abuse of discretion. (*People v. Ardoin* (2011) 196 Cal.App.4th 102, 129, fn. 10 [further argument is permissible "when a jury expresses confusion and an impasse in its deliberations related to the governing law and

instructions, particularly in light of the trial court's broad discretion to alter the sequence of trial proceedings"].)

By asking if additional argument might be helpful, the trial court did no more than ascertain the reasonable probability of resolving the impasse and a means by which that might be accomplished. Further, the procedure was neutral, giving each side a brief opportunity to argue. The trial court did not make any coercive remarks or give any coercive instructions. It did not urge the jurors to reach an agreement. We see no abuse in the court's exercise of its discretion. Furthermore, even if the trial court erred in allowing further argument, there was no reasonable probability that Tseng suffered prejudice as a result of that decision. (See *Beardslee, supra,* 53 Cal.3d at pp. 97-98 [a court's error in resolving concerns or questions from the jury during the deliberation reviewed for harmless error under state law prejudice standard].)

VI. The Imposition of Consecutive Sentences on Counts 1 and 4 Did Not Violate Section 654

Tseng argues that the consecutive sentences imposed on her second degree murder convictions for count 1 (murder of Nguyen) and count 4 (murder of Rovero) violated section 654. She maintains that the trial court should have run those sentences concurrently with the sentence on her second degree murder conviction for count 2 (murder of Ogle).

Pursuant to section 654, subdivision (a): "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." (*Ibid*.) Section 654 precludes multiple punishments not only for a single act but also for an indivisible course of conduct. (*People v. Hester* (2000) 22 Cal.4th 290, 294.)

Tseng contends that because the prosecution's theory at trial was that Tseng committed the charged crimes pursuant to a common pattern of criminal conduct of overprescribing drugs to her patients, and pursuant to a single intent and objective of enriching herself, separate sentencing for the murder convictions was impermissible under section 654. Even if we were to consider that all of the murders were committed with a single generalized intent and objective, separate sentencing would still be permissible under section 654.

Here, the crimes involved separate murder victims, Nguyen, Ogle, and Rovero and occurred months apart. Acts of violence against separate victims at different times may be separately punished. (See, e.g., *People v. Price* (1991) 1 Cal.4th 324, 492 [section 654 does not preclude separate punishments for crimes of violence committed against separate victims]; *People v. Kwok (*1998) 63 Cal.App.4th 1236, 1255-1256 [where the offenses are temporally separated in such a way as to afford the defendant an opportunity to reflect and to renew his or her intent before committing the next one, section 654 does not apply].) Accordingly, the second degree murder convictions of Nguyen, charged in count 1, and Rovero charged in count 4, were not subject to section 654.

VII. The Cumulative Error Doctrine Does Not Apply

Tseng contends even if the alleged individual errors addressed above were harmless when viewed in isolation, the cumulative effect of the errors warrants reversal of her convictions. "Under the cumulative error doctrine, the reviewing court must 'review each allegation and assess the cumulative effect of any errors to see if it is reasonably probable the jury would have reached a result more favorable to defendant in their absence.' [Citation.] When the cumulative effect of errors deprives the

defendant of a fair trial and due process, reversal is required." (*People v. Williams* (2009) 170 Cal.App.4th 587, 646.) Because Tseng has not demonstrated that the trial court committed any error, the "cumulative" error doctrine does not apply.

DISPOSITION

The judgment is affirmed.

CERTIFIED FOR PARTIAL PUBLICATION.

ROTHSCHILD, P. J.

We concur.

CHANEY, J.

BENDIX, J.